

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in chapter 9).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,¹ and the adoption of rules to promote responsiveness, such as “silence is consent”.² Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

Portugal retains a largely traditional approach to enforcement (based on inspections), although there is a wind of change through the Simplex Programme. Structures, competences and capacities at the local level remain geared to a traditional approach. However the implementation of the Simplex Programme has entailed some important strategic policy changes to encourage a more proportionate approach to enforcement. It could be time to refer to the experience of other countries to promote this approach, both in central government bodies (including at the level of local services) and in municipalities.

Recommendation 6.1. Portugal should review the practical experience of some other OECD countries in the deployment of a risk-based approach to enforcement and inspections, with a view to developing a policy adapted to its situation.

Delays in the court system are a real issue, which the Ministry of Justice is tackling to good effect through the Decongestion Action Plan. This is also another good example of a vigorous approach by parts of the institutional structure to identify and tackle problems.

Recommendation 6.2. The Ministry of Justice should be strongly supported in its ongoing efforts to deal with congested courts.

Background

Compliance and enforcement

Compliance monitoring

Portugal has no specific instrument for monitoring compliance with regulations. The only available data is the number of sanctions imposed by general inspectors and law enforcement services, but there does not seem to be specific monitoring of these data.

Responsibilities for enforcement

Enforcement of regulations is usually under the responsibility of ministries (directorate generals or institutes/agencies with administrative autonomy but attached to a ministry), which have local services in charge of inspections and verifications. For example, in the field of metrological control (gas and electricity meters, petrol pumps, etc.), the Portuguese Quality Institute (*Instituto Português da Qualidade*), which is part of the Ministry of the Economy and Innovation, is responsible for type approvals, verification and inspections of metering instruments. It carries out inspections through 5 regional directorates and 125 municipal metrology services. Another example is the Authority for Food and Economic Safety (*Autoridade de Segurança e Económica*), also under the Ministry of Economy and Innovation, which carries out inspections through five regional directorates.

Municipalities also play an important role in compliance and enforcement of regulations through their responsibility for allocating licences. In the environmental area, for example, through the licensing of civil works, they can obtain information needed to ensure that the law is being complied with.

Policy on enforcement

The approach to enforcement in Portugal has traditionally privileged numerous controls and inspection on citizens and companies. Interviews conducted by the OECD team suggest that this approach is still well entrenched, and that moving towards a risk-based approach in enforcement is still a long shot for most ministries and would require a deep change in administrative culture.

Some change is, however, taking place: with the elimination of prior licences, permits and authorisations, Portugal's administrative simplification programme has entailed a shift in strategic regulatory policy towards accepting a basic level of risk and less regulatory interference in the economy. Increased attention is now being given to the actual degree of risk of non-compliance. The *Simplex 2006* programme has opened a door to this option by

indicating that a risk-based approach can help reduce compliance costs for low-risk business. It states that an obligation, which is disproportionately burdensome to citizens or businesses when compared to the protection it delivers, should be removed. It also considers that unnecessary inspections or data requirements on less risky businesses may be disproportionate. Some measures of the *Simplex* Programme have been based on this principle (Box 6.1).

Some bodies are moving faster than others. Independent regulatory agencies seem to be the most advanced. The Bank of Portugal has implemented a methodology to assess risk (“*Modelo de Avaliação de Riscos*”), which is currently being implemented by the units responsible for the ongoing monitoring of the supervised institutions.³ The CMVM and sectoral regulators also base their regular on-site and off-site supervision, through selection in terms of risk.

Box 6.1. Risk-based approach: Examples of *Simplex* measures

Measures implemented as part of the *Simplex* Programme have entailed the adoption of a risk-based approach. For example:

- The new regime for licensing of building and construction, where compliance obligations have been reduced whenever a low-risk activity is concerned, have already been approved by the Council of Ministers, modifying Decree Law 555/99 of 16 December 1999: small low-risk building constructing are not submitted to prior licensing anymore.
- Decree Law 259/2007 of 17 July 2007, on licensing of commercial buildings, replaces a prior licensing procedure – required for the installation and modification of commercial establishments or product store – by a prior declaration.
- Decree Law 234/2007 of 19 June 2007, replaces a prior licensing procedure – required for restaurants and liquor shops installation and modification – by a mere declaration.
- The new security regulation against fire in buildings (in final phase of approval).

Appeals

Appeals against administrative decisions

Portugal has administrative courts to appeal decisions of central and local governments. The Supreme Court of Administration is the highest level. One of its sections deals with administrative disputes (with 16 courts of first instance and 2 courts of second instance below it), and another section deals with tax disputes (again with two level of courts below it). (For an overview of Portugal’s judicial system, see Annex)

Action Plan for the Decongestion of Courts

The efficiency of Portugal’s judicial system (civil courts and administrative courts) has long been seriously undermined by lengthy procedures, which amounted to 25 months in 2005 according to the Ministry of Justice. In May 2005 the government approved the Action Plan for the Decongestion of Courts (*Plano de Acção para o Descongestionamento dos Tribunais*). This plan had been designed following a co-operative work organised by the Ministry of Justice with other ministries as well as external stakeholders through the De-formalisation Commission (see also Chapter 3). The Action Plan for the Decongestion of Courts includes:

- Changes in some regulations to remove the need to go to court in a number of cases (such as setting a higher cap for resorting to injunctions);
- Introduction of the mediation system in 2006 (to be made available across all Portugal by the end of 2008);
- Creation of an arbitration centre for specific issues, such as intellectual property and domain names (to be started soon);
- Creation of “small claim courts” to address civil issues at the citizen’s level; and
- Creation of a fast-track system in 2006.

These measures have had a positive impact, and in 2008 the number of pending files in Portuguese courts diminished for the second year in a row, following 15 years of nonstop increase. There are however significant difference across issues, and payment orders, which make up 40% of litigation cases are still subject to very long procedures.

Ombudsman

The Portuguese ombudsman, called *Provedor de Justiça*, was originally created in 1975⁴ and established afterwards at constitutional level in the Portuguese constitution of 1976 (article 23) Its statute is specified in a 1991 law.⁵ The Ombudsman is nominated by the Assembly of the Republic. The institution follows, in general, the Scandinavian ombudsman model, in terms of tasks, guarantees and scope of action: control of the administrative activity, parliamentary legitimacy, independence in the performance of his duties, powers to make recommendations to the public authorities for prevention and remedy of illegalities or injustices and the corresponding duty of co-operation that public bodies and services are subject to. Additionally, the Ombudsman has important powers of initiative with respect to constitutional issues (he may request the Constitutional Court to make rulings on issues of unconstitutionality or illegality of any legal provision as well as unconstitutionality omission, whenever the adoption of the legislative measures that are necessary for purposes of the enforceability of the constitutional provisions has failed).

Any person may complain directly to the Ombudsman, including foreigners, Portuguese citizens living abroad, stateless people, legal persons such as private corporate entities, private companies, unions, etc, as well as public bodies, provided that the complaint is against an illegal behaviour of a public authority. The Ombudsman may also act on his own initiative, irrespective of the administrative and judicial remedies provided for in the constitution and in the law. The public bodies that receive a recommendation from the Ombudsman have the duty to respond within a period of 60 days, describing the implementation of the proposals referred to in the recommendation or, in case of non-compliance with the said proposals, stating the reasons why they cannot be implemented.

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. The Bank of Portugal is responsible for ensuring compliance by the regulated entities under its supervision (with regard to legislative and regulatory acts). It has specific units entrusted with the ongoing monitoring of regulated entities (“*áreas de supervisão directa*”), responsible for the off-site monitoring and on-site examinations, and with the sanctioning of those which are failing compliance (“*núcleo de processos e averiguações*”). The legal framework lays down a broad set of corrective procedures to which the Bank of Portugal may resort.
4. Decree Law 212/75 of 21 April 1975.
5. Law 9/91 of 9 April 1991, as amended by Law 30/96 of 14 August 1996 and Law 52-A/2005 of 10 October 2005.