

Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates (CCDs) can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text, for example appeals are considered in Chapter 6).¹

Assessment and recommendations

Public consultation on regulations

Public consultation has traditionally been based on legal requirements and structured processes. A general requirement to consult is enshrined in the Constitution and in the 1997 government Law, together with specific legal requirements (mainly in respect of secondary regulations). Checks are made as to whether the legal requirements have been met, and failure to do so is judicable. There is an extensive network of advisory groups, and a formal requirement to consult these. The social partners (which include consumers as well as unions and employers) also play an important role.

The processes for public consultation are quite varied, and transparency has been established as a key principle in recent years. The central government notes that the Good Government Code, approved in 2005, establishes transparency as one of the ethical principles guiding the behaviour of government members, along with integrity and responsibility. A wide range of processes has been deployed for some time, from the consultation with organised groups, to processes targeted directly at interested parties in society, notice and comment procedures, and e-consultation which opens the process to a broad public. Reduce the number of advisory bodies, as already recommended by the 2000 report. Consultation also unfolds on an informal basis.

Nevertheless, it seems that processes and overall transparency could be improved. The OECD peer review team heard from several stakeholders that there was room for improvement. It appears that

there can be problems of exclusion, quality of information received, lack of feedback, and consultation that takes place too late and does not allow adequate time for response. It was pointed out that there is no structured approach, with autonomous ministries making their own decisions. There are no guidelines, formal or otherwise, beyond the legal requirement that a consultation must take place, and ministries broadly do as they see fit. As in other countries where ministries are left to determine for themselves what processes they use, there appears to be wide variability in performance. Some ministries appear to be deeply conscious of the potential for e-consultation for example, others not. As already proposed in the 2000 OECD report, a useful improvement would be a clarification of the consultation principles established in the Government Law, and encouragement in the use of more open methods alongside the traditional processes.

Recommendation 3.1. Establish guidelines for public consultation that flesh out benchmarks of good practice on issues such as timelines and the need for feedback. Use green and white papers to promote debate and encourage feedback at an early stage in the development of policy and law making. Establish, via the Presidency ministry, an arrangement for the exchange of information and best and most appropriate practices among ministries.

Box 3.1. Recommendation from the 2000 OECD report

Improve transparency by further strengthening the public consultation process, by adopting uniform notice and comment procedures, and by launching a programme of codification to reduce legal uncertainty.

Spanish regulators typically consult affected parties, and consultation is increasing. However, the consultation does not always produce higher quality outcomes. The most frequent form of consultation is the sectoral advisory group involving social partners and other organised interest groups. Yet such interests can unduly represent “insiders” who have incentives to limit competition. A lack of clear participation rules and of carefully scrutiny by the government (independent from the promoting ministry or agency) puts the approach further at risk of a rent-seeking approach to regulation. A useful improvement would be a further clarification of the consultation rules established in the Government Law. This could be done through the development of clear guidelines and parameters. For example, the consulted parties should have direct access to the reformed evaluation questionnaire, and the promoters of the regulations should also be required to prepare written and public replies to the comments expressed by consulted parties.

Other steps to improve the efficiency and effectiveness of consultation processes may merit consideration. First, it might be useful to reduce the number of advisory groups. Second, the government should experiment with new target-oriented methods like focus groups. These groups can help to identify the costs of a proposed regulation and assist in the development of more effective and efficient alternatives. Third, the legal requirement for notice and comment, already required for technical standards, should be extended to all proposals. Other countries’ experiences show that this mechanism can complement other procedures as a safeguard against possible abuses. Adoption of a general requirement covering all substantive new laws and subordinate regulations (including ministerial order) would promote both the technical values of policy effectiveness and the democratic values of openness and accountability. The effectiveness of the notice and comment requirements would be further enhanced with the provision of better information, based on a robust evaluation questionnaire. Moreover, the adoption of notice and comment procedures would also permit a central unit, such as the recommended secretariat on regulatory management, to review new ministerial regulations against the principles of good regulation.

Discretion given to regulators in choosing the consultation strategy is too wide to ensure transparency and accessibility, to provide an independent quality control mechanism, and to protect against capture. The law requires adequate consultation, but leaves regulators with important incentives to strategically control the information provided to the public and the extent and form of participation. The fact that a spirit of open government may exist among Spanish civil servants cannot compensate the fact that for tactical reasons or by tradition, consultation may be too hasty, may not reach important groups, or may be captured by interest groups.

Although the 1997 reform increased the minimum time for sending comments during a consultation from 10 to 15 working days, this period is short for a thorough and widely-based consultation. In particular, representative organisations may experience difficulties in consulting their members and responding within this timeframe. The consultation becomes even more difficult if the 7 working days consultation period for exceptional cases is used.

Another concern relates to the extent of the review of the written consultation statement by the *Consejo de Estado* and the CGSYS. This key compliance and quality control mechanism is done too late, at the very end of the process. At this time, only very major flaws in the consultation can be detected and repaired. Important inputs and ideas that could have come from an adequate and early consultation may have been lost. Because regulators prepare the dossier, an incentive may exist to minimise the importance of negative comments. This phenomenon is even more important as no clear rules exist on making public comments or answers to them.

Public communication on regulations

Public communication on regulations has improved since the 2000 OECD report, and could be even stronger. The 2000 OECD report recommendation for a single authoritative source for regulations to enhance transparency for users and encourage a rationalisation of ministry rules has been implemented. This is a major step forward. Access to legislation remains an issue. Based on the positive experiences of other countries, further steps could be taken such as the establishment of a single portal for accessing the stock and flow of new regulations, and common commencement dates (fixed dates for the entering into force of new legislation).

Recommendation 3.2. Consider further steps to enhance access to regulations, such as the establishment of a single portal covering both existing and new regulations, and common commencement dates.

Box 3.2. Comments from the 2000 OECD report

Establish a centralised registry of all regulatory requirements with positive security

A single authoritative source for regulations would significantly enhance transparency for users in terms of the content and form of permissible regulatory actions, and force a rationalisation of ministry rules. “Positive security” means that regulations must be included in the registry to have legal effect, which ensures against any non-compliance by ministries. This central registry, based on citizens’ needs and information technology platform, should be a complement and an added value instrument to the Official Gazette.

Spain is among the few OECD countries that have adopted an indicative registry for administrative procedures. Based on this experience, the government should pursue its effort into two directions. First, it should seek to give positive security to the registry. Additionally, the government could implement a certification process consistent with good quality standards to be renewed every five years, together with a logo delivered on completion, for all formats. More ambitious, Spain could... use a “guillotine” mechanism whereby any regulations that have not been registered by a certain date are nullified.

Background

General Context

The Spanish government underlines that transparency has become a key principle for public authorities in recent years:

- The Good Government Code, approved in 2005, sets transparency as an ethical principle for the members of the government, together with integrity and responsibility.

- Article 35 of Law 30/1992 recognises citizens' rights in their relationship with the Public Administration. Among these rights (35.h) it is recognised that the "Access to records and archives of the government is provided in the Constitution and other laws". This right is developed in a further article of the same law, the article 37, but the citizen is required to have legitimate interest.
- Article 6 of Law of Citizen's Electronic Access to Public Services (Ley 11/2007) "recognises to the citizens the right to communicate with government using electronic means for the exercise of rights defined in Article 35 of Law 30/1992". As a consequence, citizens not only have access to public records and archives, but they also have the right to access to them using electronic means if they wish.
- Law 27/ 2006, that regulates the right to access to information, public participation and access to justice in the field of environment; Law 11/ 2007 (see above), on electronic access for citizens to public sector information; and Law 37/ 2007, on reuse of information in the public sector.

The government is preparing a bill about transparency and access to information for citizens. This bill establishes a general framework for the access to information for, with no exceptions. Access is considered a right for citizens. Citizens can have access to information regardless of their conditions and circumstances without having to justify their requests. The term public information is considered in a wide sense, including all information kept by public authorities. Access to information can be denied, with justification, in certain cases based on the principle of proportionality. The government notes that with this bill, Spain will be adapting its regulation on this matter to the Covenant of the Council of Europe about access to public documents. It considers that the bill will put it on the same level as the most advanced countries in the European Union in terms of access to public information.

Public consultation on regulations

Policy on public consultation by the State²

Policy is based on legal requirements (mainly in respect of secondary regulations), supported by longstanding structures and practices, as well as recent developments in the use of e-consultation. There are no guidelines or consultation code, as exist in some other EU countries.

Public consultation on laws

There is no general explicit legal requirement to consult on legislative proposals and other government programmes, although it has been done through electronic means for certain cases as the Law 11/2007. It is for the Council of Ministers to decide upon the extent of public consultation or expertise needed on laws, and what should be the appropriate timeline for this.³ In a few sectors, consultation of affected parties is explicitly required by laws. This is the case for instance of the consumer protection and telecommunication general laws.

Public consultation on secondary regulations

The obligation to consult is enshrined in the Constitution⁴ and is backed up by Law 50/1997 (*Ley del Gobierno*) which frames the functioning of the State. The Law (Article 24) specifies that a public hearing (*audiencia*) should take place on a regulatory instrument (*reglamento*), once the text is elaborated, and when it is expected to have a general impact on citizens. The lead departments must prepare a mandatory written statement summarising the consultation rounds they followed. It specifies⁵ that administrations must allow "a reasonable period and no less than fifteen working days" for stakeholders and citizens to participate in the hearing. This process may be abbreviated up to a minimum of seven working days when justified by duly motivated reasons. This process may only be omitted on serious grounds of public

interest, which must be specified. The decision on the procedure chosen for hearing the affected parties shall be duly reasoned in the record by the body that approves the opening of the hearing process. When advisable by the nature of the provision, it shall be submitted to public information during the period indicated.

The Council of State checks that these legal requirements have been met (see also chapter four). It reports on the accuracy and appropriateness of the consultation carried out. In particular, it assesses whether the consultation round was not a mere bureaucratic exercise, and whether stakeholders were provided with sufficient and adequate background documentation. Appeals can be filed if consultation was not done, as the lack of consultation is considered an essential fault in administrative justice.

Despite the formal requirements and checks, the OECD peer review team heard that processes can be applied rather irregularly. Specific arrangements for comment by stakeholders on proposals is generally left to the discretion and the culture of individual ministries. The stage at which consultation is launched, and the period allowed for responses vary considerably, depending on the administration in charge of the dossier, the type of measure consulted upon, as well as the general political climate. Consultation contributions are generally not published, unless stakeholders voluntarily do so on their websites (this is the case for instance of the social partners, the Chambers of Commerce, and some professional associations). Feedback is generally not provided to participants. Stakeholders are informed of the results only upon publication of the adopted text in the State Gazette (BOE). Stakeholders also reported a certain resistance by the public administration to engage in a true dialogue, and that the text of proposals is rarely significantly modified further to the consultation. Again, such appraisal varies from case to case, depending on ministries.

Specific processes for public consultation

A wide range of processes are used, including consultation with relevant official consultative councils (of which there are more than 450 in total); consultation with interested parties known to the relevant ministries; use of the Spanish Economic and Social Council; notice and comment; e-consultation; and informal channels.

Box 3.3. Processes for public consultation

Consultation with organised groups (*audiencia corporativa*)

This is the most structured and frequent form of consultation by the State. Two mechanisms exist that may be used separately or jointly. First, the proponent ministry consults bilaterally or multilaterally with representative groups deemed to be stakeholders in the regulated issues. In addition, and depending on the subject or if a law mandates it, a consultation is organised with some of the 473 official consultative councils. The size, influence and scope of each consultative body vary greatly. Some have permanent staff, while others are *ad hoc*. A number of them are partially or totally subsidised by the State or the ACs. It is not infrequent that a law creates a consultative council with a mandate to review future subordinate regulations. Very often, Chambers of Commerce and Industry or unions appoint members to these bodies. Increasingly, other organised interest groups, such as environmental NGOs, are involved. Unless otherwise specified, the councils are subject to internal procedures regulated by the Administrative Procedure Law.

Consultation with interested parties (*audiencia a los interesados*)

The proposed regulation is sent to selected groups or individuals believed to be affected. For instance, the Ministry of Environment organised a consultation to identify and inform lumberjacks in the north of Spain when preparing a new forestry law. The Ministry of Justice is experimenting with a new consultation procedure based on the Internet. New electronic procedures hold the promise of opening up these consultations to a wider range of interests.

The Spanish Economic and Social Council

The Spanish Economic and Social Council (ESC) is the main body for institutionalised consultation on both legislative and regulatory proposals related to economic, social, and labour matters (see also Chapter 2). Through a strict procedure, specialised committees and working bodies prepare reports on proposed regulations and laws that are discussed and approved. Minority opinions may accompany the report. The media and parliament often use these reports as a basis for debate. The Council has a permanent research staff and an annual budget of nearly EUR 6 million. In addition to its reports on regulations, the ESC studies topics of interest to its members.

Notice and comment (*informacion publica*)

This procedure is also used in Spain. For some types of rules, like land use or municipal rulings, notice and comments are mandatory, for others it is a suggested alternative to be used by the sponsor of the regulation. However, this type of procedure is less frequently used than the other consultation procedures. In part, this is due to scepticism surrounding the method and the poor results of the consultation obtained.

E-consultation

The central government makes increasing use of this method. A portal lists all the projects subject to e-consultation and offers the possibility of joining online forums on specific dossiers, with the intention of fostering citizens' involvement in public affairs. Examples of the relevance of this open approach for the preparation of recent laws are the law approving the Basic Civil Service Statute, Law of Citizens' Electronic Access to Public Services and the Competition Law. A further example of e-consultation is the initiative by the then Ministry of Public Administration in March 2009 to launch on its website a two-week public consultation on a draft Royal decree implementing partially the provisions of the law on electronic access to public services. Experience so far has been mixed, with only partially useful inputs.

Informal channels

To a great extent, consultation also unfolds on an informal basis. Personal and direct unofficial contacts are often preferred by both the public administration and the relevant associations to get their message across speedily and effectively.

Public communication on regulations

Adopted regulations are made public through a series of channels. Since February 2008, the Official State Gazette (*Boletín Oficial del Estado*, BOE) has been the official medium for the publication of laws, provisions and decrees subject to compulsory insertion, and the BOE paper-based version has been eliminated.⁶ Texts are inserted in specific sections based on the official body that issued them, and are classified within each section based on the hierarchy of the norm. For publicity purposes, the laws adopted by the ACs are also published in the BOE. Provisions issued by ACs are entered in accordance with the official publication order of their Statutes of Autonomy. Laws, royal decree-laws, and legislative royal decrees, once ratified by the King and published in Spanish in the Official State Gazette, may also be published in the official languages of the Autonomous Communities. In exceptional circumstances, the Council of Ministers may also agree to publish official reports, documents and official communications, deemed of general interest.

In addition, each ministerial department of the central government and each regional government publish new regulations that have been adopted on their websites. An online search engine allows the database to be searched.⁷

There are no arrangements to inform specific categories of stakeholder, beyond these general provisions.

Accessing legislation is not necessarily simple due to issues around the codification and consolidation of the legal stock (see Chapter 5).

Notes

1. Procedures for rule-making (Chapter 4); codification (Chapter 5); appeals (Chapter 6).
2. Public consultation by the ACs in respect of their own regulations is covered in Chapter 8.
3. See: OECD Review of Spain, 2000, p. 19-21.
4. Art. 105 SC of the Constitution.
5. Article 24c.
6. See: Royal Decree 181/2008 (*Ordenación del diario oficial "Boletín Oficial del Estado"*), further to Law 11/2007. Also: www.boe.es.
7. See: www.060.es/te_ayudamos_a/legislacion/index-ides-idweb.html (last accessed 14 August 2009).