Chapter 4

The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true – impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional "command and control" regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use "soft" approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

Assessment and recommendations

Trends in the production of new regulations

Regulatory production is increasing steadily and this is a cause for considerable concern. A 2009 report suggests that regulatory production has grown tenfold since the early 1980s, much of it accounted for by the Autonomous Communities, linked to the process of decentralisation. The OECD peer review team heard that constant production of regulations is complicating the legal system. Many rules are obsolete, changes are frequent, and many interviewees said it was critical to prevent unnecessary new burdens. There is a clear link with the need to establish a well functioning impact assessment process for new regulations, which the government has taken on board, as well as the reinforcement of other regulatory policies such as legislative simplification.

Recommendation 4.1. Consider establishing a monitoring mechanism within the government on regulatory production, or commission this on a regular basis from an outside source, to raise awareness of the situation.

Procedures for making new regulations

Forward planning of new regulations is a weak part of the law making process. The government's general policy programme sets out the broad lines of what can be expected, but there is little beyond this. Information is not made public. Transparency and a more efficient approach to policy and rule making would be supported by a strong forward planning mechanism. A growing number of European countries have this.

Recommendation 4.2. Establish and publish a clear annual forward planning timetable for new primary regulations as well as significant new secondary regulations.

The 1997 Government Law was a milestone in establishing important principles for the preparation of regulations. The Law embedded a number of important principles including consultation, and regulatory impact assessment. However, the OECD peer review team heard that the administrative culture remains formal and legalistic, with "internal gold-plating", and there is a need for further public administration reforms to embed good regulatory practices as well as practical support. In particular, there may be a need to back up the 1997 principles with stronger monitoring and support to ministries, to ensure that the principles are embedded in practice. A weakness of the Spanish public governance system would appear to be difficulties and delays in fleshing out laws with implementing regulations and guidelines (it took well over ten years to agree a Royal Decree implementing the 1997 Law's provisions on impact assessment) which means that useful laws are not always translated into practice.

Legal quality appears to be an issue requiring further attention. The 2000 OECD report expressed concern about this aspect of regulatory quality, and the OECD peer review team heard that it was still an issue, although it was beyond the scope of this review to go into any depth. The government set up guidelines in 2005 to standardise approaches to law drafting, but further initiatives may be needed. This is particularly the case for SMEs. Several other European countries are taking substantive steps to secure better legal quality. One aspect is to improve the readability of legal texts by non-experts, through policies to promote plain language. Complex or unclear regulations tend to increase compliance costs, because specialists are required to interpret them. Other aspects relate to legislative simplification (reviewed in Chapter 5). It is unusual that the Justice ministry does not play any role in legal quality, as its perspective is important.

Recommendation 4.3. Consider a review to assess the current situation regarding legal quality, associating this with policies to strengthen legislative simplification, and involving the Justice ministry.

Box 4.1. Comments from the 2000 OECD report on legal quality

The 1997 Government Law

The 1997 reform contains two weaknesses:

- There is little capacity to oversee compliance with its requirements. The law does not establish clear accountability or responsibility for regulatory quality assurance and compliance. In theory, the Technical General Secretary of each ministry is in charge of quality control, but his location in the ministry is not a line position, and is weaker than the Secretaries of State in charge of regulatory areas. Co-ordination and oversight are also absent from the rulemaking process established in the law. In practice, these tasks are assumed by the General Commission of General Secretaries and Sub-secretaries (CGSYS), before a final decision is made at the Council of Ministers. For some sectoral issues deemed to have a high economic impact, the draft law or regulation needs also to be discussed in the *Comisión Delegada* before going to the CGSYS. However, as the collegial CGSYS has other crucial responsibilities, its time to concentrate in providing critical and independent scrutiny of regulatory proposals is limited. Last, the CGSYS does not review ministerial orders, which often have important regulatory impacts. Best practice in other countries shows that a specific body or even a dedicated commission with a clear mandate and adequate resources are often needed to provide support in supervising the regulatory quality procedures. Such a body can also be a useful counter balance to powerful ministries in the regulatory management system.

- The law has not been reinforced by further principles, implementing regulations, definitions, or guidance to drafters that can help to prepare the reports and carry out consultation. Without clear standards or minimum parameters, regulators have few incentives to comply with the law and will tend to mechanically abide by the process and to inconsistently interpret the law's intent, especially if they are not cross-examined by an oversight body.

Training

Spain has developed training programmes on drafting techniques. The National Institute of Public Administration has trained more than 260 administrators in drafting skills. A legal think-tank (GRETEL) formed by public administrators and university professors, has also been active in improving and disseminating better legal techniques. Recently, the Council of State, ultimate guardian of legal quality, published a series of recommendations stating that what is important is that the addressees of the regulation clearly understand the rights and duties. In particular, it has advocated that regulations be clear, complete and easy to use.[1] Further, MAP has published manuals for administrators on style and accessibility. These include the Style Manual and the Manual of Administrative Documents published in the early 1990s. Currently, MAP is working on an ambitious effort to harmonise the design of all government documents, including formats based on principles of legibility and user-friendliness.

Lack of a consolidated code

A system of identification of laws and regulations according to the date of publication has been in place since 1959. However, practical and functional access to regulations in force is not as easy in Spain as in other countries, and this may have impacts on legal security. A business survey conducted in 1997 found for instance that most businesses were having important difficulties in identifying existing environmental regulation.

The most problematic issue concerns the lack of a consolidated code or registry. This creates difficulty in knowing which law, subordinate regulation, or articles can be enforced and which ones have been abrogated, totally or in part, by more recent laws and regulations. Three main reasons for the confusion are worth noting.

- First, matters are regulated by an array of laws on distinct matters. This is a more or less recent phenomenon identified by the Council of State as "legal mixture" which appeared in the 1980s,[2] and which was recently exacerbated by coalition governments. This trend is mostly

manifested by annual enactment of the *Ley de Acompañamiento*, a special law similar to the US Omnibus Law, which is voted at the same time as the budget, and which includes dozens of modifications to other laws. Because the reforms are negotiated in the Parliament, they do not follow the procedures described in the previous subsections.

- Second, regulators (including the Parliament) have complied with difficulty with the obligation to have at the end of new laws or regulations an exhaustive list of articles and laws being abrogated by the new measure.[3] By law, a table (*tabla de vigencias*) summing up which articles have been derogated should accompany each new measure (either creating or reforming a regulation). Yet, according to the *Consejo de Estado*, more and more new laws and regulations tend to use a general formula indicating that "all previous rules which are contrary to the one being enacted are henceforth repealed".

- Finally, legal security and overall transparency of the regulatory environment have decreased due to rapid shifts in the distribution of regulatory competencies across levels of government.

- European, national, and subnational.

Ex ante impact assessment of new regulations

A significant potential boost has been made to the policy on impact assessment. It is widely acknowledged that the previous system was ineffective. A new Royal Decree based on the 1997 Government Law which established impact assessment as a principle was approved in 2009, together with Guidelines issued by the Presidency ministry, aimed at encouraging a more systematic and integrated approach. This is considered by the government to be a flagship new Better Regulation initiative. A wide range of stakeholders told the OECD peer review team that they supported impact assessment and that the new proposals had potential to encourage it to be taken more seriously.

Impact assessment can be expected as a result to have a stronger shape and coherence. The new process has a number of strengths compared with the previous system. It promotes an integrated approach (at least for the mandatory impact assessments) as the new requirements consolidate existing obligations into a single report; the economic impact of regulations is emphasised, beyond financial impacts, and there is a specific link to burden reduction; the institutional centre of gravity is now at the centre of government, with the Presidency ministry; and *ex post* evaluation is covered as well. A system which was largely assessed as informal and *ad hoc* is now set up to work more effectively. The government hopes this decree will be considered as the point of no return in its commitment to Better Regulation

There is further work to anchor the new system, however, and fill gaps. For this to be a point of no return the new system needs to be strengthened further. The 2000 OECD report made a number of proposals on how to strengthen impact assessment, including public consultation, and the progressive reinforcement of analytical and quantitative skills in the administration. These issues remain valid. The previous approach was criticised for not providing explicit and standardised analytical methods, and guidance on how to develop the assessment. This remains a weakness. Not least the provisions for public consultation are not clear: there is no specific requirement for this. Yet public consultation is important to communicate with stakeholders that efforts are being made and engage in a two way dialogue for strengthening the approach to development of regulation. Parliament should also receive impact assessments on draft laws.

Recommendation 4.4. Plan to strengthen the system with more specific guidance and capacity building for analysis (including quantitative) within the administration; and with the integration of public consultation as part of the process.

In particular, institutional capacities and processes for culture change need reinforcement and incentives strengthened for the use of impact assessments. The experience of other European countries is that impact assessment requires commitment to change attitudes and overcome resistance over a long period, framed by effective institutional mechanisms and by supporting tools and guidelines. In Spain, as yet, there is no explicit or formal provision for quality control. The institutional support framework is largely based on existing, pre Royal Decree provisions. Although the centrally placed Presidency ministry is responsible for overseeing the process, it is not clear how this will be done, and resources for effective oversight appear to be limited. The Ministry of the Presidency leverage is political rather than prescriptive. Encouragement and sanctions for ministries to move away from an overly legalistic approach and to make effective assessments are not clear. Beyond some committed parts of the administration, there is no shared culture or toolbox as yet for impact assessment. Effective support for line ministry officials on what they need to do is a related issue. A further option is to set a net target for the reduction of administrative burdens which would require ministries to pay attention to production and quality.

Recommendation 4.5. Evaluate institutional capacities to support, monitor and challenge the quality of impact assessments and reinforce these. Ensure that line ministries have adequate support and guidance on the process. Aim to set a net target for the reduction of administrative burdens so that new regulations are assessed as well as the existing stock.

Evaluation of the new system will help to keep it on track to deliver real change. The plan is for the Presidency ministry to prepare an annual report on the quality of the impact assessments and to submit this to the Cabinet. This is a positive initiative, which could be complemented by giving the report a wider audience.

Recommendation 4.6. Consider a wider dissemination of the planned annual evaluation reports, for example to Parliament.

Box 4.2. Recommendation from the 2000 OECD report

Revise the evaluation questionnaire on the basis of OECD best practices, make it mandatory for all proposed regulations, including ministerial orders, and make the responses publicly available as part of public consultation procedures. As part of this, implement across the administration a step-by-step programme for improving regulatory impact assessment, based on OECD best practice recommendations, for all new and revised regulations. The analysis should begin with feasible steps such as costing of direct impacts and qualitative assessment of benefits, and move progressively over a multi-year period to more rigorous and quantitative forms of analysis as skills are built in the administration. For rapid and successful implementation, a useful step would be creation of a training programme, managed by the regulatory oversight unit discussed above, to instill the necessary skills in the public administration.

The current regulatory process, where drafts are negotiated and discussed, has advantages. The possibility of checking with all government agencies, through collegial membership of the CGSYS, can strengthen the quality of proposals, as can the legal check by the *Consejo de Estado*. The evaluation questionnaire is an important tool supporting more transparent analysis of the impacts of a proposal.

However, more effort is needed to operationalise good regulatory practices in the "culture" of the public administration. As noted, the current process lacks the explicit disciplines and uniform parameters needed to enable regulators to consistently judge if a regulation is necessary or if there are better alternatives. A key step to improve regulatory quality is to improve the analysis of social and economic impacts. Three-quarters of OECD countries now use RIA and the direction of change is universally toward refining, strengthening and extending the use of RIA disciplines. RIA can be a powerful tool, especially if integrated with notice and comment procedures, to boost regulatory quality by giving policy officials better information on the impacts of regulation on the economy. While benefit-cost analysis may be a long-term goal, interim steps feasible with current administrative skills, such as user panels and

surveys, could be implemented quickly. OECD's best practice principles should be the basis for a RIA programme, overseen by an appropriate quality control body with analytical expertise at the centre of government. To make this RIA operational as soon as possible, a training programme and support capacities should be implemented.

Alternatives to regulations

The consideration of alternatives tends to be a formality. A common view is that "most laws are necessary", despite the widespread concern over regulatory inflation. The new impact assessment Guidelines make the justification of a legislative proposal the first stage in the process. But they put less emphasis on the identification and description of the problem. This may imply (as it does in many other countries) a certain bias towards regulatory intervention as the preferred option. On the other hand, the central government notes that the consultation process and stakeholder involvement in the development of regulations can be a helpful counter to the assumption that regulation is necessary.

Recommendation 4.7. Consider how to further promote the assessment of alternatives to traditional regulation, including a scrutiny of whether regulation is needed at all.

Background

General context

The structure of regulations in Spain

The Spanish legal system is a civil law system. For historical reasons the Spanish Civil Code, not the Constitution, regulates the sources of law. The law is understood as any written rule of law created by the State or the ACs, and which is subject to judicial scrutiny. This is the pre-eminent source, while other sources such as customary rules and general principles of law are subsidiary. No applicable rule can be drawn from legal doctrine, which only provides an interpretation or clarification about the sources of law.

However, case law issued by the Supreme Court is a complementary source of interpretation and application of the law.

Box 4.3. The structure of regulations in Spain

General hierarchy

The Spanish legal system is hierarchical. Laws of lower status cannot conflict with laws of a higher status. With regard to the State legal regime, the hierarchy is as follows:

- *The Spanish Constitution (Constitucion,* SC*)* is the supreme rule of the legal system, without prejudice of the principle of supremacy of Community law. Similarly, the Constitution states that any international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision. International treaties become internal laws once they have been signed, ratified and published in the Official State Gazette (*Boletin Oficial del Estado*).

- *Organic law (ley organica).* Organic laws differ from ordinary laws as to the matter regulated. As provided for by the SC, they cover the exercise of fundamental rights and freedoms, as well as matters related to the popular initiative, the Ombudsman, the Council of State and the Constitutional Court. They also lay down the Statutes of the Autonomous Communities and the general electoral system. Organic laws also differ from ordinary laws as to the modalities of their adoption, revision and repeal. Organic laws require an absolute majority of the Congress in a final vote of the entire bill.

- Other laws:
  - Ordinary law (ley). Laws require a simple majority in both the Senate and the Congress, with the latter having the last word on their adoption.
  - *Decree law (decreto-ley).* This is a provisional legislative decision with the rank of a law that the government may issue in cases of emergency or urgency. Decree-laws may not affect basic institutions of the State; rights, duties and liberties of the citizen regulated in Title I of the SC; the system of the ACs; or the general electoral law. Within a period of 30 days they must be ratified by the Congress.
  - *Legislative decree (decreto legislativo).* Also ranking as laws, legislative decrees are dispositions of the government containing delegated legislation. Such delegation must be granted to the government in an express form, for a concrete matter and establishing a period of time for its exercise by a basic law (*ley basica*) when its objective is the formation of articled texts or by an ordinary law when is a matter of arranging several legal texts in to a single one.
- Regulation *(reglamento).*
  - These are within the sole competence of government and are of lower status than laws. They must generally be based on a law and are used to implement a law.
  - Regulations may create or modify rights and duties of the citizens or simply organise administration activities affecting only the citizen who is an special relationship with the administration. Forms of regulation include Royal decrees (*decretos*) from the Council of Ministers; orders (*ordenes*) from the Ministers or Delegate Commissions; and instructions (*Instrucciones*) and orders of regulation (*circulares*) from inferior authorities and members of public administration.

Guidelines. They are usually no more than orientation documents, but sometimes they develop and qualify as a regulation (*e.g.* the RIA guidelines).

Autonomous Community and municipality regulations

The ACs have legislative powers, and they can adopt either laws or regulations. The municipalities do not have legislative powers. They nonetheless can enact a form of regulation called *Ordenanzas* and *Bandos*, where the Mayor of the council establishes rules that are compulsory for citizens.

Source: www.llrx.com/features/spain.htm#state, and Spanish government.

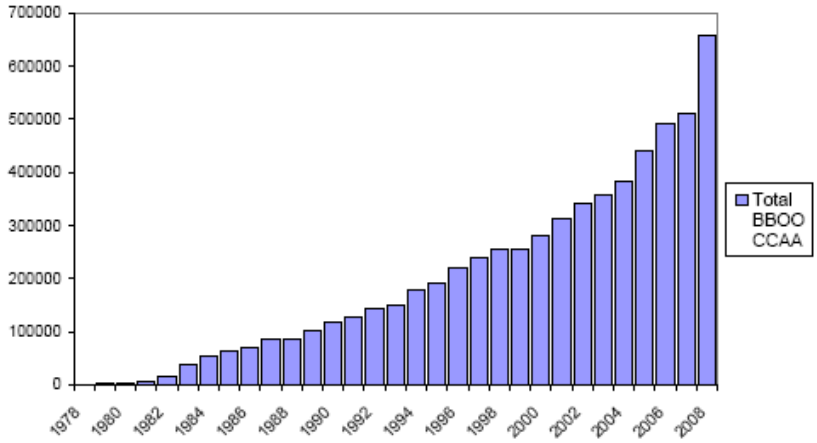
Trends in the production of new regulations

A report published in 2009 indicated that regulatory activity in Spain has steadily increased. Between 1983 and 2008, the legislation of the State cumulated with that of the ACs has multiplied by ten. The growth has nonetheless been uneven, with the ACs legislating almost 18 times more in the past 15 years, while State activity increased by "only" 1.5 times. Compared to 2007, regulatory activity in the ACs has increased by 25%, while that of the State has decreased by almost 3%. Such evidence confirms the continued decentralisation of the regulatory model in Spain, as decentralisation implies acquisition of competences and legislative activity to match. Whilst in 1978, State legislation represented some 97% of the entire regulatory activity, in 2008 the situation was reversed with almost 93% of the share related to regional activity.[4]

Figure 4.1. Number of laws in force at the start of each year

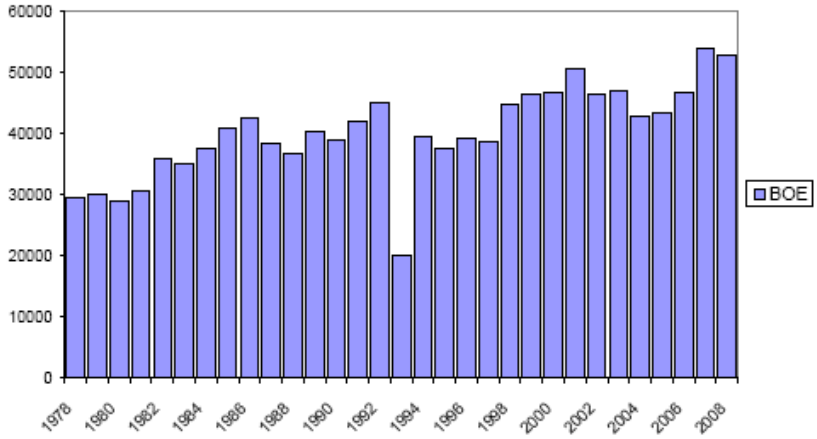
General Progress of Regulatory Activities

Progress of Regulatory Activities in the Autonomous Communities



Progress of regulatory activities in the Autonomous Communities: From 1983 (when all the Autonomous Communities already published their own Official Gazettes) to 2008 the volume of autonomous regulatory activities has multiplied by 18.

Progress of Regulatory Activities of the State



Progress of regulatory activities of the State: In the same period, State regulatory activities multiplied by 1.5.

Source: ECONLAW report, p.8.

Procedures for making new regulations at the State level

The law making process

The Constitution grants legislative initiative, or the right to initiate procedures conducive to the approval of laws, to the government, Congress (a parliamentary group), Senate (at least 25 senators), and the legislative assemblies of the ACs. It also allows the popular initiative, if the signatures of at least

500 000 citizens are collected. The legislative initiative is exercised before Congress, which as a rule is the first institution to have knowledge of bills and non-governmental proposals.

In practice, most of the legislative action is initiated by the central government (Box 4.4). Non-governmental initiatives occur very seldom.[5] When proposals originate outside the government, they must be submitted to the government with the aim of ensuring the respect of and conformity with procedural criteria, as well as assessing related budgetary impacts. If the government fails to give a reasoned response within thirty days, the non-governmental bill will be included in the regular agenda.

Box 4.4. The process for developing and enacting state legislation and regulations

Preparation in the executive

The procedure for the preparation of laws and regulations is included in the law regulating the government (*Ley del Gobierno* 50/1997).

Drafting a law

Each ministry is responsible for initiating a bill (*anteproyecto*), and develop the necessary related reports and studies, falling under their respective portfolios. The following main stages can be identified:

- *Obligatory assessments.* For each legislative proposal, the proponent directorate-general must produce at least three reports, so-called *memorias*, which are the justification of the proposal itself; an assessment of the budgetary impacts; and an opportunity (*i.e.* timeliness and appropriateness) and gender analysis. These reports have been formalised into a new RIA template in 2009 (see below).

- *Validation.* The Technical Secretariat General (*Secreteria General Technica*) of the ministry proposing the bill must validate the proposal. All Technical Secretariats General rely on the legal drafting guidelines (*Directivas de technical normativa*) of 2005. The Secretariat also takes over the responsibility for managing the subsequent stages of the proposal.

- *Internal co-ordination and consultation.* The lead ministry is responsible for seeking the opinion of the other ministries to ensure that their competences are not affected. An intranet is at the disposal of the ministerial departments for comments. It is not mandatory however for the lead ministry to include the comments received. The Council of Ministers must be informed of the proposal, so that it can determine whether additional reports are needed and what kind of consultation is adequate. In certain cases, a report from bodies such as the General Council of the Judiciary (see Box 2.2, Chapter 2) and the Economic and Social Council is necessary. The lead ministry must produce a written statement of such consultations. Draft bills may be posted on the web pages of the lead ministries for public consultation.

- *Co-ordination between the executive and the legislature.* During the preparation phase, the Directorate-General for relations with parliament, which is located in the Ministry of the Presidency, serves as a bridge between the executive and the legislature to ensure co-ordination, also in the realm of Better Regulation. The Directorate-General is tasked with channeling policy ideas between the two branches; explaining the government's draft bills so to avoid difficulties with the allocation of competences between levels of government; mediating between the State and the ACs on politically sensitive dossiers; and providing opinions in case of appeals on the ground of wrong allocation of competences.

Obligatory opinions. A number of opinions must be obtained during or further to the preparation of all draft bills. These are:

- the opinion of the Ministry of Territorial Policy, which assesses the likely impacts of the proposal on the ACs and the local level; its opinion is also necessary if the proposed act affects the distribution of competences between the State and the ACs;
- the report of the Ministry of the Presidency on compliance with Better Regulation requirements (including administrative burden reduction); on whether a new administrative procedure is

created, and whether it has effects on civil service management policy; and, finally

- the ruling of the Council of State, controlling the legality and constitutionality of the provisions of the bill.

Submission to the Council of Ministers. Once the stages above are completed, the Technical Secretariat General authorises submission to the Council of Ministers, and transmits the legislative proposal and the related memorias to the CGSYS for consideration. An Evaluation Questionnaire for Norms (*Cuestionario de Evaluacion de Proyectos Normativos*), which summarises the above reports, may be produced on a voluntary basis. If the CGSYS agrees, the proposal is submitted to the Council of Ministers for adoption and then transmitted as a bill to the Congress. In cases of urgency, the Council of Ministers may adopt a proposal without the consultation rounds described above.

Drafting a secondary regulation

The preparation and adoption of regulatory acts (*reglamentos*) unfolds along similar lines, with the exception of external consultation, which is in this case obligatory. A minimum of fifteen days (reducible to seven in case of urgency) is set to allow citizens and "associations recognised by law" directly affected to provide comments on the draft.

In case of decrees only, an opinion of the National Competition Commission (CNC) is mandatory, although it is not binding.

Debate and enactment by the parliament

Presentation of first amendments and first debate in the Congress plenary

The parliamentary procedure with regard to all legislative texts starts in the Congress. As a preliminary filter, non-governmental bills are subject to initial approval procedures (a debate and a vote on its appropriateness and principles) within Congress. Excluded from these proceedings are government bills and non-governmental bills that are received from the Senate.

Upon publication of a bill, or through its taking into consideration by Congress, parliamentary groups are allowed fifteen days to present amendments. A plenary debate takes place on amendments to the whole bill. If an amendment to the whole bill is approved, the bill is understood to be rejected. If the amendment is rejected, which is the normal case, the bill is submitted to the relevant committee to continue its procedural treatment.

Deliberation in Committees of the Congress

The responsible committee may designate a reporting sub-committee (*Ponencia*), which is a reduced body that meets behind closed doors in order to study the different amendments formulated and issues a preliminary report. This is then discussed by the committee in meetings not open to the public. Registered journalists are nonetheless allowed to attend. The outcome of the committee deliberation is a report containing the proposed legislative text to be submitted to the plenary session.

Debate and voting in the Congress plenary

The plenary debate usually begins with the introduction of the text by a member of the government (if it belongs to his initiative), and an intervention by a member of the responsible committee. The debate in plenary is often omitted and the so-called "full legislative committee authority" procedure applied. In such cases, the bill is sent directly to the Senate after its approval by the committee. This seeks to relieve the workload of the plenary, allowing it to be focused on matters considered of major political interest. The procedure is not allowed in case of constitutional reform, international affairs, the adoption of organic and basics acts, and the State budget.

Debate, amendments and vote in the Senate

The Senate can pass the legislative text sent to it by the Congress, adopt amendments, or propose a veto. The veto must be adopted by absolute majority, and the amendments by single majority. The Senate deliberates on the texts already passed by the Congress in a short period of time compared to the unlimited time allowed to Congress: normally two months, or twenty days in the case of urgency.

Congress final plenary reading

In the case of a veto of the draft bill by the Senate, the Congress may ratify its original text by absolute majority, or by single majority within two months of the veto. The Congress may accept or reject the amendments of the Senate by single majority.

Enactment

Once the law is passed, it is submitted to the monarch for royal assent and promulgation. Laws come into force twenty days after their publication in full in the Official State Gazette (BOE), unless otherwise stated in the laws themselves.

Authorisation by Congress

In addition to the adoption of legislation, Congress also ratifies and repeals Royal decree-law (*Real decreto-ley*) dictated by the government for reasons of extraordinary and urgent necessity. This must be done directly by the plenary within thirty days following the promulgation of the decree. The Permanent Deputation may nonetheless take over that function if Congress is dissolved or its term has expired.

Sources: *www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Funci/Funcion%20legislativa;* and *www.senado.es/procedimientos_i/index.html* (last accessed 11 August 2009).

Forward planning

Within the AGE, there is no systematic, structured and centrally managed forward planning. The general programme presented by the Prime Minister at the beginning of his/her mandate outlines the broad policy dossiers that are considered a priority for the government, but does not enter into any further details on expected regulatory activities.

A list of the regulations that are expected to be passed during the legislature is informally drawn up in each ministerial department. This is an internal exercise. The government does not make public the regulatory priorities of the ministries for each year, nor does it publish any other list of planned regulations.

Administrative procedures

A key document organising the legislative and administrative processes of the central government and the AGE in Spain is Law 50/1997 (see Box 4.5). The Law was an important step in efforts to modernise political and administrative processes in the central administration. It sought to clarify the powers of the central executive. The political level was redefined and separated from the administration throughout the State administration.[6] The law also regulated the role of co-ordination bodies within the government. It set general good practice requirements on ministries for the development of regulations. The law included provisions for the organisation of hearings with the ACs and municipalities, as well as stakeholders. Some of its provisions (regarding impact assessment and public consultation) are of special interest for Better Regulation. Some elements of the regulatory dossier were made mandatory under Law 50/1997 – the report on the impact of measures contained in a law or regulatory instrument (*reglamento*) on gender, and the economic memorandum containing an estimate of costs incurred.

Box 4.5. Law 50/1997 (*Ley del Gobierno*) on the organisation, jurisdiction and functioning of the state

Title 5 of the Law contains rules on the form and the competent body for legislative initiatives at the State level, as well as on the regulatory power and the control of acts of the government. It sets standards for submitting legal and subordinate regulations to the Council of Ministers (the "regulatory dossier"). Some of these standards existed already since 1991, in the form of *Directrices sobre la Forma y Estructura de los Anteproyectos de Ley.*

The Law contains two elements of special interest for Better Regulation:

- *Regulatory Impact Assessment.* A novel part of the Law was to make some of the elements of the regulatory dossier mandatory for the first time. This was the case for the report on the impact of the measures contained in a law or regulatory instrument on gender, and for the economic memorandum making an estimate of the costs incurred.

- *Public consultation.* The Law specifies that public consultation (*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. By contrast, it is up to 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.[7]

The Law covered considerable and necessary ground for the modernisation of government. However, the 2000 OECD report criticised the Law on two counts. There was little capacity to oversee compliance with its requirements, and the Law was not reinforced by further principles, implementing regulations, definitions or guidance to drafters. The Council of State was also critical.[8] Some of these criticisms appear still valid today.

The Spanish Administrative Procedure Law of 1958 is another anchor. It has been reformed twice in order to increase accountability and transparency across the administration. A first revision took place in 1992.[9] The legal regime of the procedures connecting citizens with the administration was revamped, and the response time in the delivery of public services reduced.

Legal quality

Legal quality is monitored by a combination of the Presidency ministry, Council of State, individual ministries (specialised staff in the Technical Secretariats General of each ministry) and the directorate for parliamentary affairs in the Presidency ministry. At the end of the drafting process, the Council of State reports on the legality and constitutionality of the general provisions of bills, treaties and acts subject to consultation and assessment. The Justice ministry plays no role in this regard, which is unusual in the EU.

Recommendations on accessible language and for improving the technical and linguistic quality of the rules drafted at the government's initiative, are included in the Regulatory Drafting Guidelines of the Under-Secretariat of the ministry of the Presidency. The Guidelines were approved by the Council of Ministers in July 2005.[10] The Technical General Secretariats might ensure that the guidelines are applied by drafters. These guidelines ensure the standardisation and homogenisation of the contents of government proposals (agreements, decrees, legislative decrees and draft laws). Their application relies on the collaboration of the Technical General Secretariats, which scrutinise compliance of departmental drafts with the guidelines.

In the past, some important concerns have been expressed about a deterioration in legal quality.[11] It was beyond the scope of this review to examine the issue, but it is of importance for legal security and accessibility. As the 2000 OECD report noted, it is especially important for legal security that the system should work effectively, in the context of a civil law system which is based on an exhaustive and explicit set of rules.

Ex ante impact assessment of new regulations

Policy on Impact Assessment

Early policy

The production of some forms of impact assessment has been enshrined in the legal system of the AGE for a number of years. The system covered legislative and secondary regulatory proposals.[12] Law 50/1997 (*Ley del Gobierno* – see above) regulating the government set out that the development of legislative and regulatory proposals should include so-called *memorias*:

- a report or studies on the need and appropriateness of the proposal (commonly known as "explanatory report");

- an economic report with the estimated costs (introduced in 2003); and
- a report on the gender impact of the measures. This covers every type of discrimination (not only on women) and is considered to cover an important dimension of regulation.

The *memorias* did not, however, represent a fully fledged impact assessment process. For instance, there were no explicit and standard analytical methods, such as a benefit/cost test. More generally, the legal requirement to produce the reports was just that: nothing had been added to specify what exactly the impact should include, and how it should be assessed. The Law was not fleshed out. It was left to the discretion of each ministerial department how analysis should be conducted and results presented.[13] As a result, impact assessments on national initiatives have not been produced systematically, generally not until the very last stages of the drafting process, and with a varying degree of quality and completeness. *Memorias* were not subject to public consultation and were not published. It was broadly acknowledged within the administration that RIA was not working, not least because ministries were not clear how to tackle impact assessments and needed help (there was no clear model or template, no examples, no technical or methodological support etc).

Recent reform

In 2005, the Council of Ministers agreed that the system needed a significant boost, leading to the adoption of Royal Decree 1083/2009 (*memoria del análisis de impacto normativo*) in July 2009.[14] According to its introduction, the Royal Decree is motivated by a strong Better Regulation rationale, contributing to the pursuit of sustainable development, competitiveness and job creation. The government considers it to be a sign of its commitment to an enhanced RIA system, and "a point of no return" for developing its overall Better Regulation policy. The Decree is also seen as a key lever for the Ministry of the Presidency to trigger action on RIA in line ministries.

The main objective is to make an integrated memorandum of analysis of regulatory impact mandatory for the central administration. What before were three distinctive elements of the "regulatory dossier" are now mandatory integral parts of a single document. The Decree specifies that the RIA report must be produced in parallel with the drafting of the proposal.

The new system entered into force on 11 December 2009, when the new, related operational Guidelines on RIA (*Guía metodologica para la elaboración de la memoria del análisis de impact normativo*) were officially adopted and posted on line[15] (see below).

There was some hesitation in bringing forward a revised and more comprehensive impact assessment. A number of factors have been put forward for delays in the reform, including insufficient political leadership and commitment; the predominantly legalistic culture of the AGE; and, not least, weak pressure from stakeholders. The latter are now beginning to pay more attention, albeit mainly in relation to reducing administrative burdens.[16] The change in government in 2008 helped to bring the issue back to the forefront, although the OECD peer review team heard some concerns about whether high-level political commitment is deep and sustainable.

The Royal Decree and associated guidelines represent a significant potential reinforcement of the previous regime in a number of respects:

- They promote an integrated approach, at least as regards the mandatory impact assessments.
- The economic impact of regulations is emphasised for the first time, and a specific link has been established with the Plan for the Reduction of Administrative Burdens.
- The institutional centre of gravity is now placed at the centre of government, with the Presidency Ministry co-ordinating, promoting and monitoring developments.

- The guidelines, backed up by the promise of a substantial training programme and other measures to be promoted by the Presidency Ministry at the centre of government, are an important step in the direction of more substantive monitoring and support for officials carrying out the assessments.

- They set the basis for a more systematic recourse to *ex post* evaluation.

The OECD peer review team nevertheless heard concerns that the new approach could easily fall short of delivering real and practical change within the administration in their implementation of RIAs. A particular weakness is that there is no explicit or formal provision for quality control and effective support for officials on what they need to do, a major reason why the previous system largely failed to deliver results. If monitoring and quality control prove inadequate, then major aspects which have been generally neglected in the past such as the need to start RIAs as early in the policy and rule making process as possible, and to tackle the process on the basis of a genuinely common understanding of its purpose, will not improve. Overall resources for the task are reported to have been very small in the past and it is not clear that anything has changed in this respect either. As in many other European countries, culture change across the administration is needed, and must be vigorously pursued if the new system is to meet expectations of real change.

The official opinion of the Council of State is included in a recent report.[17] It considers that simply regrouping the existing three *memorias* into a single document template does not mean creating a fully-fledged RIA process; it is a juxtaposition of individual, partial analyses which do not facilitate the identification of trade-offs and synergies. The Council also stresses the need for a more in-depth approach on cost benefit analysis, as well stronger co-ordination with AEVAL. The decree addresses mainly formal aspects of the procedure. RIA remains relatively narrow, for instance by not requiring environmental impacts or wider social and economic impacts that go beyond the gender and the competition and financial dimensions.

Institutional framework

The institutional support framework following adoption of the decree and guidelines is largely based on existing, pre decree provisions. All AGE bodies and institutions are required to apply the guidelines on every legislative and regulatory initiative, albeit in a "flexible and proportionate manner".[18] As before, and in line with practice in other countries, the lead ministry has responsibility for developing RIA and for keeping its content up to date when significant new facts and issues arise in the course of a proposal's development. As well, the competition law provides for the National Competition Commission (CNC) to contribute to the preparatory stage of RIAs by submitting reports on regulatory projects that affect competition, and presenting proposals for amending or eliminating restrictions on the market.[19] In particular, the CNC prepares opinions on proposals issued by the Ministry of Economy and Finance. This process continues to be applied. The government notes that expert support continues to be provided through the different consultative committees and bodies, and from experts across the administration. Once adopted by the Council of Ministers, a legislative proposal is transmitted to parliament together with the *memorias*.

The key development which holds some promise of real change concerns the role of the Ministry of the Presidency. Until the re-organisation of the government in April 2009, no central unit within the Spanish government oversaw the RIA system. Quality control of draft regulations was mainly legal and procedural, and was exercised through a range of processes including the Technical General Secretariats embedded in each ministry (mainly a legal check); inter ministry consultation; the CGSYS (which prepares the weekly meetings of the Council of the Ministers); and the Council of State. Since April 2009, the Ministry of the Presidency leads the oversight and promotion of RIA.

As part of the changes, the Ministry has also taken on most of the responsibilities of the government's central evaluation agency AEVAL in respect of RIA (see also Chapter 2). Prior to the reform AEVAL's mandate was, *inter alia*, to elaborate and promote methodological guidelines for impact analysis, as well as to evaluate the quality of the reports produced.[20] AEVAL produced an introductory internal report on RIA in 2008, explaining its role and benefits in changing the regulatory environment. The report also outlined key features of RIA international practice, and made a number of recommendations on how to strengthen RIA in Spain.[21] Although technically there was no issue, it seems that AEVAL did not have the necessary political power to exercise its RIA functions effectively, and its reports were not always used appropriately. The OECD peer review team heard that some parts of the administration were surprised at the development. AEVAL will, however, continue to play a role. Each year the Ministry of the Presidency in conjunction with AEVAL will prepare a report on the quality of the *memorias*. The evaluation will be submitted to the Council of Ministers.

Guidance and training

The 2009 Guidelines set out the essential content of the new integrated impact assessments (Box 4.6). The Presidency pooled current sources of expertise to draft them, seeking the highest quality input possible and at the same time trying to ensure buy in and shared ownership. Reflecting these aims, they were drafted by a working group co-ordinated by the Ministry of the Presidency and consisting of experts from the Ministry of Economy, the National Competition Commission, the Ministry of Budget, the Ministry for Equality, the Ministry for Territorial Policy, and the Ministry of Justice.

The Guidelines consolidate and upgrade existing guidance material (without wholly displacing it – see below), and constitute the reference document for the entire AGE. They broaden the spectrum of issues that must be covered.

Box 4.6. 2009 RIA Guidelines

The Guidelines specify that each integrated *memoria* should include at least:

- the rationale and opportunity of the proposal (is the proposal timely and opportune?), its motives and objectives;
- a description of the contents of the proposal;
- the alternatives considered (including the "no action" option);
- a legal analysis, which includes the detailed list of all abrogated rules as a consequence of the entry into force of the new rule;
- a summary of the procedural steps followed, including consultation and hearings, as well as the observation that were taken into account as a result;
- the analysis of the adjustment of the proposed rule to the order of the distribution of powers (*i.e.* the effect of a rule on competences across the levels of government);
- the need to consider EU law;
- the economic and budgetary impacts, including the impact on the sectors, groups or stakeholders affected by the rule, and the effect on competition as well as the detection and measurement of administrative burdens;[22] and
- the gender impact assessment.

This list is not exclusive. The memorandum should also contain any other parts which are deemed relevant by the proposing authority – with special attention to social and environmental impacts and to impacts which refer to equality of opportunities, non-discrimination and universal access of disabled persons. The proposing administration has complete discretion in deciding whether and what to include under this section.

The Decree includes the possibility of issuing a shorter report (*memoria abreviada*), when the impacts of a proposal are not deemed to be substantive. The Guidelines specify the need to justify why recourse is made to the short assessment, and indicate what essential information must in any case be presented.

The annexes provide additional guidance on specific aspects.

The Guidelines stop short of providing in depth methodological and other support for officials on the front line of drafting regulations. They are vague, for example, on methodologies to be applied and data collection. Nor do they specify responsibilities and the stages of the process. In this respect, they are of relatively little practical assistance for desk officers. The reason for this, as explained by the government, is that it is difficult to put too much detail into the guidelines, as this runs the risk of procedural challenge before the courts for infringement of the Guidelines, which would hinder the implementation of new legislation.[23] The intention is to make good this gap through the organisation of training and systematic dissemination of information and advice across the administration. The aim is to extend these processes beyond the centre to the ACs and local levels, with a view to pooling the central initiatives with the RIA projects that have already been launched by some ACs, and to encourage others.

The Guidelines do not explain who does what and when in the preparation of a RIA, and the different stages through which the RIA and the proposal have to go before reaching the Council of Ministers.

As before, three sets of more specific guidelines are also available to officials:

- an extensive tailored guide issued by the Ministry of Equality in 2005, for the evaluation of gender equality aspects;[24]
- a Ministry of Economy guide; and
- a "Guide to the preparation of Competition Assessment Reports" published by the CNC in January 2009 (Box 4.7).

The essential parts of these guidelines have been included in the 2009 Guidelines on RIA. In particular, the competition guidelines have been included as an annex. The full versions of the former guidelines will be used as orientation material and a basis for training. Recourse may also be made to international texts, for instance the RIA guidelines issued by the Committee of European Insurance and Occupational Pensions Supervisors (*3L3 Guidelines*) used by the Bank of Spain.

Box 4.7. Better understanding competition impacts: The CNC guide

Inspired by international good practices including the OECD guide, the *Guía para la elaboración de Memorias de Competencia* prepared by the National Competition Commission (CNC) aims to operationalise the principles outlined in the CNC 2008 Report on "Recommendations to Public Authorities for More Efficient and Pro-competitive Market Regulation". The Guide offers a procedure for analysing and assessing the implications of a legislative development or administrative action, from the point of view of competition policy.

The approach has been made deliberately simple and straightforward, and is organised into three steps:

- Identification of the possible negative effects on competition that may be generated by the projected law or action. This is based on applying a checklist of key questions that help the user to "think" from the competition perspective and identify potential problems. If no potential

competition problems are identified in the proposal, the reasons for this conclusion must be described in the Competition Assessment Report before the procedure can be considered completed. If, on the other hand, the proposal is found to include provisions or mechanisms capable of restricting competition, then the next steps in the analysis will have to be carried out.

- Justification of the identified restrictions on competition. This involves analysing the objective pursued by the regulation in order to evaluate how necessary those anti-competitive constraints are for achieving that purpose and their proportionality. If the proposed anti-competitive restriction cannot be justified, then the proposal will have to be modified accordingly. If, on the other hand, justification can be found for the restriction's necessity and proportionality, then it must be considered whether the measure is properly designed or if there is a regulatory alternative with less anti-competitive effects. This is an essential task and the purpose of the next step.

- Analysis of the regulatory alternatives. This involves determining whether there is an alternative mechanism that allows the same objective to be achieved but without constraining competition or, at least, restricting it to a lesser degree. If a less restrictive regulatory alternative is identified, then it should be adopted.

These steps are not binding. The CNC is nonetheless encouraging all administrations to use the guide in the preparation of their regulatory proposals, although there is no legal rule that expressly requires it to be followed. Some thousand copies of the guide have been distributed in five months, and is circulated to all new civil servant embarking on a careers in the AGE.

The CNC principles and general approach have been included in the 2009 RIA Guidelines as an specific annex on assessing competition impacts.

The role of observatories

Some ministries rely on external bodies for policy evaluation and monitoring, which also contributes to the development of impact assessment (Box 4.8).

Box 4.8. The role of observatories for evaluation: The case of the Ministry of Industry, Trade and Tourism

A number of Observatories are attached or related to the Ministry of industry, Trade and Tourism (MITYC) and are directly involved in the evaluation of sectors. These include in particular:

- since 2004, eight industrial observatories have been set up related to key industrial sectors. They are permanent platforms and aim to become an active industrial policy instrument to promote sectoral modernisation;

- since 2005, a SME Observatory facilitates the relationship of these important economic operators with MITYC;

- the Industrial Technological Prospective Observatory generates knowledge on technological trends, carries out research, and co-operates on R&D and innovation policies with the ACs; and

- the internationalisation Observatory provides guidance and analysis on international business and economic developments.

Equivalent observatories exist in the sector of tourism and telecommunications.

Before the adoption of the Royal Decree and the Guidelines on RIA, training was provided in a relatively loose way. Most of the improvements in collecting data and applying methodologies occurred through a form of "learning by doing". Officials, for example, acquired skills in producing the *memorias*

through their interaction with the CGSYS, gatekeeper to the Cabinet. The Ministry of the Presidency leads on the design and organisation of training, although there are no explicit provisions to this effect in the Royal Decree. Training seminars and courses on the new RIA system are planned throughout 2010 for all administrations. Regional and local authorities will be involved with the aim of sharing existing practices and encouraging new developments where appropriate. Specifically, a number of conferences are taking place or are planned under the aegis of the National Institute for Public Administration (NIPA) on the methodological guide for RIA. These are mainly for officials of the AGE. For the ACs, a conference took place in June 2010.

Process and methodology

The main development relates to economic impacts and administrative burdens. The analysis of the economic impact is now expected to be much broader. Law 50/1997 only required an estimate of the cost of a regulatory project. This was generally taken as an estimate of the budgetary cost. The decree makes it clear that impact analysis now also has to address the economic impacts on business and citizens.[25]

The decree also takes into account the requirement of the Plan for the Reduction of Administrative Burdens and Better Regulation of June 2008, which establishes that the administrative impacts of new regulations on companies and citizens will be measured systematically on all regulations approved after 1 January 2009. The Presidency Ministry has elaborated, together with the ACs and FEMP, a method for calculating administrative burdens, which will allow developments to be measured, on the same basis across all administrations. This is included in the RIA guidelines and is mandatory for the central administration. ACs and municipalities will use software proposed by the central administration, in order to have a common basis for the measurements.

Although the decree requires an update of the memorandum when new facts arise, the emphasis is on the final document.

Public consultation and communication

Public consultation in the framework of the RIA procedure in practice appears in the past to have been rare, on a purely voluntary basis, and on the initiative of the lead ministry. The general form, scope, and deadline for public consultations, whether or not related to RIAs, varies from case to case (see Chapter 3). The Royal Decree specifies that the final version of the RIA report must include a reference to the consultations carried out during the hearing procedure, especially with the ACs (which is internal not public consultation). It should also include other reports or position-papers, if required by the legal procedure followed. The Royal Decree states explicitly that this is to reflect the manner in which the remarks expressed have been taken into consideration by the proposing organ.[26]

There is no specific requirement, however, for public consultation in respect of RIA, either in the Royal Decree or in the related Guidelines. RIAs are not posted on line and the general public does not have access to them.[27] The OECD peer review team heard that some stakeholders were “not aware” of any RIA policy and practice by the government. Issues appear to be a lack of pro activity on the part of the administration; poor communication; and lack of interest from the stakeholders themselves.

There is no specific provision for public communication of RIA developments. The report prepared by the Ministry of the Presidency and AEVAL will go to the Cabinet only.

Alternatives to regulation

The *Ley del Gobierno* of 1997 (Box 4.5) requires that legislative and regulatory proposals include a report on the need and appropriateness of the proposal itself.[28] Although this provision does not determine the minimum obligatory contents of such a report, it is considered the legal basis for considering alternatives to regulation. In practice, this is considered as no more than an invitation to ministries to “think

outside the box", and ministerial departments approach it with differing levels of interest and commitment. There are no other formal requirements for the government to check out alternatives to regulation.

The CNC Guide for the Drafting of Regulatory proposals (Box 4.7) includes a section expressly devoted to the consideration of alternatives prior to tackling a regulatory proposal.

Experience in the AGE with alternatives to regulation

Agreements and self regulation

Since the early 1990s, State public administrations may enter into agreements, pacts or contracts with individuals in public and private law.[29] By virtue of this provision, administrations may foster certain conducts through agreements instead of having to turn to regulation. This type of instrument has been used in various sectors, in particular in environmental policy.

Box 4.9. Alternatives to regulation in the environmental domain

As in many other OECD countries, a series of voluntary agreements have been issued to protect the environment. In 2008, voluntary tools have been applied to regulate environmental risk analysis and the setting of standards.[30] Self-regulation is another form frequently used when it is proved that the private sector has the capacity of guarantee the proper functioning of the system. Examples of self-regulatory regimes are in the voluntary food-quality certification of products. Administrative processes are increasingly transformed into voluntary self-certification in this sector.

Further examples refer to the accumulated and positive experience in the management of packaging and packaging waste through *Ecoembes*.[31] This is a not-for-profit trading company operating under the legislation on packaging and packaging waste.[32] It is involved in the design of an Integrated Management System for packaging waste, aimed at its recycling and evaluation. At present, more than 12 000 companies in the packaging production sector use this system.

Beyond the environmental domain, voluntary accreditation programmes in Spain are fostered via private accreditation companies. The *Asociación Española de Normalización y Certificación* (AENOR)[33] heads the process of implementation and widespread use of ISO standards or management systems. AENOR is a company dedicated to the development of Standardisation and Certification (S+C) in all industrial sectors and services (environmental, employment, construction etc.). It aims to contribute to improving the quality and competitiveness of companies, and protecting the environment. This company also offers a valuable system of publications and training courses for companies, which undoubtedly raises standards of environmental awareness and quality, which indirectly reduces the need to have recourse to regulatory instruments.

In the audiovisual and advertising sector, self-regulation is widely used by the Association for the Self-Regulation of Commercial Communication, called *Autocontrol*.[34] Self-regulation systems are the industry's own response to society's demand for trust and credibility guarantees in advertising. They may take the form of co-regulation in certain cases. *Autocontrol*'s activity is divided into three different fields:

- processing claims presented by consumers, consumer associations and companies;
- preparing professional codes of ethics and their application by the Advertising Board; and
- providing prior consultation service or Copy Advice on the ethical and legal correction of campaigns prior to their launch.

In the audiovisual sector, the consumer benefit from self-regulation is the guarantee of responsible advertising through a free system of claims; and the rapidity and efficiency in solving disputes by a board made up of independent experts. The industry also benefits by reducing unfair competition.

Autocontrol's system of resolving controversies is the Spanish private body that has been recognised by the European Commission for fulfilling the requirements and principles of independence, transparency, contradiction, effectiveness, legality, freedom of choice and right to representation.[35] In 2000, *Autocontrol* was incorporated into the Commission's European Extra-judicial Network (EEJ Net).

Delegated regulation

A number of certification systems, notably in relation to EU norms, foresee the delegation by the government to authorised bodies. It is the case for instance of the declaration of conformity with the brand "CE", of telecommunications sets and devices, and in the automotive sector. Some examples of delegation to issue certificates and carry out inspections are the ones entrusted to AENOR, the *Asociacion Española para la Calidad* (AEC) and the *Empresa Nacional de Acreditation* (ENAC), as well as, for the telecommunications sector, the International Communication Union (ITU), the European Telecommunications Standards Institute (ETSI), and AENOR.

Risk-based approaches

Risk analysis to inform the upstream development of new regulations is not yet in the mainstream of Spanish thinking. In this respect, Spain is no different from most other countries. A few ministries and agencies emphasised the need for a more robust *ex ante* analysis of the law in this respect.[36]

Notes

1. Consejo de Estado (1993), Cuestiones de Tecnica Normativa, Memoria del Consejo de Estado, Madrid, p. 146.
2. Communication of the Consejo de Estado (1999).
3. This rule was first established in the General Tax Law of 1963.
4. All data from ECONLAW Strategic Consulting, Evaluacion de la actividad regulatoria en España 1978-2008: Descentralization y Communidades Autonomas, Madrid, January 2009, at: *www.econlaw.es/ingles/pdf/Informe%20EconLaw%20Regulación%20Autonómica%202009.pdf* (last accessed 28 September 2009).
5. Only nine popular initiatives have so far reached Parliament since 1978 and only one of them was approved (a modification of *Ley de Propiedad Horizontal*, about common property on buildings).
6. See: Law 6/1997.
7. See: OECD Review of Spain, 2000, p. 19-21.
8. Council of State, 1992, quoted in the 2000 OECD report.
9. See: Law 30/1992.
10. See: *www.boe.es/boe/dias/2005/07/29/pdfs/A26878-26890.pdf* (last accessed 20 August 2009).

11. The Council of State in 1992 noted that the complexity and quality of Spanish regulation may have worsened in the 1990s as Spain absorbed a number of changes following the adoption of the 1975 Constitution and entry into the EU. The annual number of pages of the Official Gazette grew from 2 663 pages in 1970, to 9498 pages by 1990. This was accompanied by a « degradation of laws », that is, a reduction in the rigour and overall quality of laws and regulations. This could be seen in the use of fragmented legislation and the lack of a systematic and rigorous abrogation of old rules (OECD, 2000).

12. As per Art. 22 and 24 of Law 50/1997.

13. See: Carmen Balsa Pascual, *Better Regulation*, Papeles 1/2006, Papeles de Evaluación, AEVAL, MAP, p.18, at: *www.mpt.es/publicaciones/centro_de_publicaciones_de_la_sgt/Monografias/parrafo/0112/text_es_files/file/Papeles_de_Evaluacion_nx1.pdf* (last accessed 26 August 2009).

14. The introduction to the Decree expressly quotes the Communication of the European Commission to the European Parliament of 16th March 2005 on Better Regulation.

15. See: *www.mpr.es/Documentos/guiaAIN.htm* (last accessed 16 February 2010).

16. Part of this long labour is explained also by the internal contradiction of the text of the mandate of the Council of Ministers, which specifies that the implementation of RIA will draw from the justification of the adoption of the norms. It has been argued that such contradiction well illustrates the delay of the Spanish government to understand RIA as an integral part of the decision-making process. This point was made by an internal AEVAL paper which is not available publicly.

17. Report 429 of 16 April 2009.

18. See: RIA Guidelines, p.4.

19. See: Law 15/2007.

20. See: the AEVAL statute, as per Art. 6.2.j of Royal Decree 1418/2006.

21. Rafael Pinilla, *Qué es y para qué sirve la evaluación de impacto normativo*, Papeles 8/2008, Papeles de evaluación, AEVAL, MAP, p.12, at *www.mpt.es/publicaciones/Agencia_estatal_de_evaluacion_de_las_politicas_publicas/periodicas/parrafo/07/text_es_files/file/PAPELES%208.pdf* (last accessed 26 August 2009 – no longer there). The report was never published.

22. To this end, the Guidelines include a methodology for calculating administrative costs that was agreed with the ACs and the FEMP. The common methodology, which is obligatory for the AGE, is believed to harmonise reduction programmes, and measure the progress made across all Spanish administrations.

23. Remarks from the Ministry of the Presidency.

24. See: *Guía de aplicación practica, para la elaboracion de informes de impacto de genero de las dispsiciones normativas que elabore el Gobierno, de acurdo a la Ley 30/2003*, at: *www.migualdad.es/igualdad/principios_estrategias.html#evaluacion* (last

accessed 14 August 2009). The guide is not binding but represents an effort to educate officials when they consider the impact of new provisions.

26. See: Art. 2.3 of Royal Decree 1083/2009.

27. The Spanish Constitution only refers to the publication of laws and regulations, not to the publication of the administrative file or documents accompanying them. These files are public but not publicised in most cases.

28. See: Art.s 22 and 24 of Law 50/1997.

29. See: Art. 88 of Law 30/1992 on the legal system of the public administrations and the common administrative procedure.

30. See: Royal Decree 2090 of 22 December 2008.

31. See: *www.ecoembes.com.*

32. See: Law 11/1997.

33. See: *www.aenor.com.*

34. See: *www.autocontrol.es.*

35. As established in Recommendation 98/257/EC.

36. The Labour ministry for example, in relation to fraud and risk for workers in the work place (security and health). The Medicines agency was relatively satisfied with the use of scientific evidence in the national legislative process. This might be explained by the kind of regulatory initiatives undertaken by the agency, which are technical and specific (*e.g.* implementation of European standards), and do not require political debate.