

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

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

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

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

Assessment and recommendations

Compliance rates are not monitored and there may be a compliance issue. As in most other EU countries, Spain does not keep any systematic record of compliance rates. However, this may be particularly relevant in the Spanish context. As the 2000 OECD report had already noted, the complexity of the regulatory system may put pressure on the rate of compliance, and the Spanish government has not yet emphasised the need to design compliance friendly regulations. There are also recorded instances of mismanagement and corruption. The OECD peer review team was not able to examine this issue in any depth but it seems that compliance needs attention.

Recommendation 6.1. Consider whether to set up a system for monitoring compliance rates, starting with the records that may already be kept.

Box 6.1. Comments from the 2000 OECD report on compliance

Although some sectoral analyses have been published, no general study on regulatory compliance has been prepared. However, important signs show that a compliance problem may exist in Spain. The problem may be more acute for certain regulatory areas and for some sizes of enterprises. The 1996 Report on the State of the Environment indicated that as much as 25% of solid urban waste in Spain was dumped illegally. In the case of complying with social security contributions, some studies have shown that the size of the informal economy (*economía sumergida*) may account for more than 7% of GDP. Moreover, the complexity of the regulatory system may put pressure on the rate of compliance. Surveys from the General Council of Chambers of Commerce of Spain reveal that 90% of the new entrepreneurs ignore the formalities and other requirements when establishing their start up. Strategies to avoid compliance with onerous regulations can also be detected. The high proportion of very small enterprises and micro enterprises (with one to nine employees) may reflect an extensive use of subcontracting to circumvent tight job protection measures. Non-compliance may grow in the future. Until today, Spain has greatly relied on public investments and subsidies to achieve higher regulatory standards. The possible reduction or re-orientation of European funds that have supported these public programmes may have an indirect impact on the level of compliance in some sectors, as enterprises may find great difficulties to finance their compliance costs through their own investments.

The approach to enforcement varies significantly across the national territory, and risk-based enforcement has some way to go. Variations in approach, due in large part to delegated responsibilities, cause significant variations in quality of services provided, and there are no minimum standards. Efforts have been made to improve enforcement strategies, but these tend to focus on increasing controls (more inspectors, and databases) rather than adopting a more efficient risk-based approach as in some other EU countries (varying the rate of inspection to the risk of non compliance). The OECD peer review team also heard that the State peripheral administration often implements central regulations but has little voice in shaping it, as it is not consulted in the development of legislation.

Recommendation 6.2. Consider a review of enforcement policy, engaging all relevant actors and addressing the scope for evolving towards a more risk-based approach.

There is a comprehensive and diversified appeal system, but delays are a major issue, which the Justice ministry is addressing. The situation as recorded in the 2000 OECD report still appears to be valid. Spain's appeal mechanisms are accepted as fair, but also criticised as complex, slow and costly. The citizen is protected against possible abuses by the administration, but it is a difficult process. The main issue is delays, with a slowing up of some procedures over the last ten years. The cost of pending judicial claims has been estimated at EUR 6 billion. Litigation is rising. The Justice ministry has recently established a Modernisation Plan to address issues and update the framework.

Box 6.2. Comments from the 2000 OECD report on the appeal system

Spain's appeal mechanisms are accepted as fair, but also criticised as complex, slow, and costly compared to other OECD countries. According to the Administrative Tribunal, some claims have taken 5-6 years to reach the Tribunal, and between 12-18 more months to be settled. Slowness is due to the fact that some offices are overloaded by cases, for instance those of Madrid and Barcelona. But mostly it is due to the complexity of the procedures, which force claimants to hire lawyers and other specialists to manage cases. Moreover, the appeals procedure has a disproportionate cost for smaller firms.

Facing these challenges, the government has launched measures that focus on establishing credible dispute resolution mechanisms. For instance, reforms to the Common Administrative Procedure

Law in 1999 created a new arbitration instrument based on agreement and mediation. At the subnational level, some autonomous communities like Catalonia and Madrid have created Arbitration Councils to handle small complaints. Another approach being explored is to improve existing complaint systems so that they can be used for administrative feedback, as is done in Japan. In 1997, the Ministry of Economy and Finance established a special broad-based council, *Consejo de Defensa del Contribuyente*, to speed complaints and reduce appeals against tax laws and the revenue service. The system has already improved the internal management of the Tax Revenue Agency: 59 out of 500 complaints triggered concrete organisational and administrative changes.

Background

General context

The Ministry of Justice has recently launched a Strategic Plan for Modernising the Justice System 2009-12. The Spanish government approved this Plan on 18 September 2009. This appears to be an important and well focused initiative, but it was not possible for the OECD peer review team to evaluate it as it occurred after the team's missions to Spain earlier in 2009. The stated aim is to "achieve a flexible, efficient justice system that is comparable with the most advanced public services" (Box 6.3).

Box 6.3. The Strategic Plan for Modernising the Justice System 2009-12

On 18th September 2009, the Spanish Government approved the Strategic Plan for Modernising the Justice System 2009-12, a document that brings together the regulatory reforms, organisational changes and technological improvements that the Ministry will implement over the next three years. The aim is to achieve a flexible, efficient justice system that is comparable with the most advanced public services. Justice is a priority because of its central value for the development and well-being of our country, and for this reason a further EUR 600 million will be devoted to modernizing justice over the next three years. This commitment starts in 2010 with EU 218 million for setting the Strategic Plan in motion.

An agreed Plan

The Plan is the practical translation of the Social Agreement concerning Justice to all political forces, institutions, professional associations and organisations linked with justice. It won the support of the Congress of Deputies in plenary session, the General Council of the Judiciary and the autonomous communities. It was drawn up following consultations with practitioners and over one hundred public bodies and civil society organisations.

Source: Extract from Strategic Plan for Modernising the Justice System, 2010.

Compliance and enforcement

Compliance

In general, no track is kept centrally of compliance rates and trends, and no evaluations are systematically carried out. Sectoral information is available in certain domains, such as environmental impact or in the prevention of occupational hazards. For the securities market, the National Securities Market Commission (*Comision Nacional del Mercado de Valores*, CNMV) publishes an annual monitoring report on compliance with sectoral regulations. The report is submitted by the President of the CNMV to the Congress and made public. The number and importance of formal infringement complaints filed by market operators are sometimes used as parameters to gauge compliance rates.

The Spanish government has not yet emphasised the need to design compliance-friendly regulations from the beginning by assessing the likely effects of regulations on target populations. This approach would require the regulator to understand how the regulated population will respond to rules and enforcement strategies, and how they can be encouraged to comply with regulatory objectives.³ The OECD

peer review team heard that the State field administration is not especially well connected and informed regarding the shaping of new regulations, and are not systematically consulted. This issue is relevant to the further development of *ex ante* impact assessment and related consultation procedures (see Chapter 4).

Responsibilities for enforcement

Responsibilities for enforcement are linked to the attribution of competences between the State and the ACs:

- *State competences.* The State may enforce directly. Or it may (more commonly) delegate enforcement to the ACs, in which case the ACs either have powers only to enforce, or they may have powers to implement (*i.e.* develop secondary implementing regulations to give effect to a State law) and enforce.
- *AC competences.* The ACs enforce their own legislation and regulations.
- *Shared competences.* In some of these cases the ACs may enforce State legislation as well as their own legislation. Education, housing, health and social care policies are such cases.

Enforcement of State regulations

In the case of direct enforcement by the State, it may use its own national inspection agencies.

Where enforcement is delegated to the ACs, to oversee that it is properly done, the State relies on the so-called “peripheral administration” (*administración periférica*), which provides direction and oversight of all the central administration and its public organisms services in the respective Autonomous Communities (art. 22.1 Law 6/1997).⁴ Overall, some 100 000 officials work in the peripheral administration. They are headed by a *delegado del Gobierno* in each of the ACs, and *sub-delegados* in the provinces.

Administrative procedures and political leverage are used to ensure that enforcement is effectively carried out. Administrative procedures include State monitoring of the actions of the ACs through direct supervision (*alta inspección*). Indirect supervision is also used. The Ministry of Industry, Tourism and Commerce (MITYC), for instance, relies on accredited organisations in the sector of tourism and industry. Sectoral bodies carry out enforcement controls in the form of general supervision and specific inspection activities. This is the case of the CNE and the CMT in the energy and telecommunication sectors.

In the areas of ACs’ own competences, there is no scope for a State wide approach. The State has no powers and it can merely co-ordinate, stimulate, provide good practices and offer assistance.

Enforcement policy

The approach to enforcement varies significantly across the national territory. The situation varies with regard to the enforcement of national standards as well as standards for the ACs own legislation. The government explains that broadly speaking, mechanisms for the definition and enforcement of national standards differ from one policy to another. For each field, a board, council or system integrating all the public administrations affected, establishes standards. Nevertheless, and whilst this issue could not be examined in any depth, the OECD peer review team heard of that standards could be an issue, and could cause significant variation in the quality of the services provided by the ACs where these have delegated enforcement responsibilities. The system certainly appears to be complex.

Improving enforcement strategies has recently become more prominent on the government agenda, in particular for tax and environmental regulations. This is reflected in an increase in the number of inspectors and a more intensive use of computerised databases to obtain the information needed for control.⁵ For instance, under the 1996 pension reform agreement (the so-called “Toledo Agreement”), a Bureau of National Investigation of Tax Evasion (*Oficina Nacional de Investigación del Fraude*) was created. In the

environment area, the Ministry of Environment has set up surveillance networks for air, toxic waste and sea water quality controls to help ACs to compare their performance.⁶ In relation to the implementation of the MITYC's annual aid plan, a control table has been developed within the ministry's Under-Secretariat and it is published at the beginning of each year since 2006. The objective was to increase transparency and establish a tool to track compliance with the regulations in relation to the award of aid. This approach –setting up more sophisticated control mechanisms and key performance indicators – can be contrasted with the approach taken by some other EU countries, such as the UK and the Netherlands, to move toward risk-based enforcement (companies for example, are inspected more or less frequently depending on their performance at the last control). Risk-based strategies do exist but tend to follow an EU lead (the Health Agency has followed the EU lead, for example).

The OECD peer review team also heard that there are issues of the link between the central government and its peripheral administration. The latter often implement central regulations but have little voice in shaping it, as they are not consulted in the development of legislation.

Appeals

A comprehensive and diversified appeal system exists in Spain, which provides protection to citizens against possible abuses by the administration. It comprises a number of elements, some of which can be activated simultaneously.⁷

There have been significant developments over time to reinforce the system. The Spanish Administrative Procedure Law of 1958 was progressively reformed in order to increase accountability and transparency across the administration. A first revision occurred indirectly in 1992,⁸ when the legal regime of the procedures connecting citizens with the administration was revamped, and the response time in the delivery of public services reduced. The start, end and format of the procedures were redefined. The reforms set up minimum standards to be followed by all sub national administrations. In addition, the silence-is-consent- principle was introduced, implying that in case of non-response by an authority, the applicant can assume the request was authorised. The Law has recently been updated (Law 25/2009) to implement the Services Directive. This has brought in considerable change. The update modifies the principles of public intervention when limiting rights, requiring the adoption of the least restrictive measure and justifying it. It also modifies the “administrative silence” of administrative procedures started by citizens, and introduces explicitly the “responsible declaration” and “previous communication principles”.

Another law extended tacit authorisation to the procedures of all ministries in 2004.⁹ The Common Administrative Procedure Law of 1999 (a modification of Law 30/1992) created a new arbitration instrument based on agreement and mediation.

Following the practice of some other countries, attempts to improve existing complaint systems include the use of administrative feedback. In 1997, the Ministry of Economy and Finance established a special broad-based council (the *Consejo de Defensa del Contribuyente*), to speed up complaints and reduce appeals against tax laws and the revenue service. The system allowed the screening of some 12 000 complaints in 2008 and rejected some of them on different grounds, notably because of *desestimacion* (43%) and legal incompatibility (13%).¹⁰

Judicial review

The main element of the system is the existence of courts that deal with all complaints against actions (whether regulatory or executive) of the public administration. These so-called contentious - administrative courts are not administrative but judicial bodies, and their rulings can be appealed to the Supreme Court. Control in the contentious-administrative jurisdiction is regulated by law.¹¹ Orders, decrees and legislative-decrees are understood to be disputable, the latter only when they exceed the scope of the delegation.

Administrative appeals

Citizens can also complain against specific administrative decisions by administrative appeals addressed to the author of the decision or superior decisions. These are “appeal guarantees” and “reversal appeal”, respectively. An important novelty introduced by the reform of the Common Administrative Procedure of 1999¹² is that administrative appeals can now not only include appeals against decisions but also against underlying regulations.

The timeframe for resolving appeals in the administrative sphere varies according to the type of appeal. In the case of appeals, the deadline is three months to pronounce and notify the resolution, while one month is allowed for reversal. In the case of extraordinary review, three months are allowed from the time the appeal is lodged. In the administrative-contentious sphere, data is not available at present on the timeframes for resolution by the courts.

Administrative appeals: regulatory agencies

Agencies form part of the public administration, and are therefore ruled by the same system. In accordance with the legislative provisions,¹³ their actions may thus be subject to administrative or contentious-administrative appeal, depending on whether they refer to acts that put an end to the administrative channel or not. Both processes and resolutions may be appealed. Normally, the resolutions of the director or president of the agency bring the administrative channel to a conclusion.

The Ombudsman

The national Ombudsman (*Defensor del Pueblo*) is constitutionally independent. It is an office cited in the Constitution of 1978 as a high commissioner of the parliament guaranteeing the defense and protection of citizens’ fundamental rights.¹⁴ The Ombudsman is appointed by parliament for a five year mandate. The ombudsman office submits annual reports to the parliament. In addition, it produces “monographic reports” on particular themes and it publishes recommendations regarding the public administration’s legal duties toward citizens. The Ombudsman can also challenge a particular law before the Constitutional Court to consider its constitutionality.¹⁵ ACs tend to follow the national example, and regional ombudsmen are progressively being appointed also at the regional level.

The Office of the Attorney General

A further institution with the power to file actions for infringement of fundamental rights and freedoms is the Office of the Attorney General (*Fiscalía General del Estado*),¹⁶ which is also in charge of promotion legal actions to defend the rights of the citizens and the public interest. The Attorney General also watches over the independence of the tribunals and courts. The Attorney General is appointed by the King upon proposal of the government.

Other dispute settlement mechanisms and processes

- A regulatory practice may be reported to a specialised body, such as the National Institute for Consumers and the Service for the Protection of Competition.
- The Common Administrative Procedure Law of 1999 created a new arbitration instrument based on agreement and mediation.
- European bodies such as the European Court of Human Rights may be invoked.
- The Chambers of Commerce have established arbitration chambers on commercial law (*laudos arbitrales*).

- The order of lawyers has developed training on mediation.

Appeals at the subnational level

The national system is valid across the national territory, reflecting the unitary nature of Spain's judicial system. The system of administrative and judicial appeals that may be lodged at the level of the ACs is the same as the one established by the State legislation on administrative procedure and contentious administrative jurisdiction.

At the same time, ACs have set up some of their own structures. Some ACs like Catalonia and Madrid have created Arbitration Councils to handle minor complaints. Some ACs (*e.g.* Andalusia) have created a Suggestions and Complaints Book (*Libro de Sugerencias y Reclamaciones*) as an instrument to facilitate citizens' participation. Any individual or legal entity that believes it has been the subject of neglect, delays or any other infringement in its dealings with the regional administration as a result of a supposed poor functioning of the services, may report it in the corresponding Suggestions and Complaints Book, where any suggestions considered opportune to improve the efficiency of these Services may also be formulated. This Book is accessible via the Internet. It is also worth mentioning the possibility of reporting certain regulatory practices to specialised organisations, in areas such as competition, consumption, etc. Finally, citizens may file complaints to the Ombudsman for their Community (where one has been set up).

Performance of the system

The OECD peer review team heard that a recurrent complaint is delays of the system.¹⁷ The Judicial Statistics does not offer direct data on delays. Nonetheless, estimates of the average length of the cases ended in the various Courts of administrative jurisdiction between 2004 and 2008 are reported in Table 6.1. (the lengths are stated in months). While in some jurisdictions the length of the cases has remained relatively stable or was even reduced (*e.g.* in the Contentious Administrative Chamber of the High Court of Justice, and the Third Chamber of the High Court), procedures in the Administrative Courts have become much slower.¹⁸ The gravity of the situation was illustrated by the President of the Supreme Court who, in his opening speech of the 2009-10 judicial term, quantified the cost of judicial claims actually pending in the Second Section of the Contentious Administrative Chamber as approximately EUR 6 billion.¹⁹

Table 6.1. Average length of administrative cases (2004-08, in months)**Courts of Administrative Jurisdiction**

	2009	2008	2007	2006	2005
Administrative Courts	11,1	10,6	10,2	8,9	7,5
H.C.J. Contentious Administrative Chamber *	26,2	29,0	31,6	32,3	29,5
Central Administrative Court	14,8	11,8	9,2	7,4	5,7
National Court. Contentious Administrative Chamber	17,6	18,1	18,2	19,3	19,7
High Court 3rd Chamber	18,8	19,7	21,30	22,36	22,40

* In first instance

Administrative Courts

	2009	2008	2007	2006	2005
Land Development	16,0	15,5	14,9	13,2	11,3
Compulsory expropriation	14,7	12,4	12,1	11,8	7,7
Administrative contracting	15,3	15,0	13,5	11,6	10,1
Public ownership	13,1	13,5	13,2	11,9	9,6
Taxes	13,4	12,7	11,1	9,5	8,8
Environment	14,6	13,4	12,4	11,2	9,6
Public functions	11,7	11,1	10,2	8,7	7,9
Labor administration	12,6	12,9	12,1	11,0	9,2
Immigration	7,9	8,0	8,8	7,6	6,0
Administrative penalties	12,3	11,5	10,4	8,8	7,1
Electoral	8,9	4,9	0,6	4,9	5,8
Authorization of entries into home	2,7	2,7	2,4	1,9	1,8
Patrimonial responsibility	13,2	12,3	11,0	8,4	6,4

Source: General Council of the Judiciary (2009), The Spanish Justice System. All the Facts 2008, at: www.poderjudicial.es/eversuite/GetDoc?DBName=dPortal&UniqueKeyValue=79267&Download=false&ShowPath=false (last accessed 25 February 2010).

In recent years, litigation of administrative issues has escalated. The Justice Ministry is seeking to modernise the existing framework, by trying to limit the number of administrative appeals lodged to the highest instance, the Supreme Court (*Tribunal supremo*), which reached 15 000 cases in 2008 alone. An option under consideration might be to set a minimum threshold of EUR 300 000 for appeals considered by the Supreme Court. This would also help to focus its activity on ensuring uniformity of doctrine, as provided for by the Law.²⁰

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. OECD/PUMA (1999), *The State of Regulatory Compliance : Issues, Trends and Challenges*.
4. The General Administration of the State includes the national ministries and agencies.
5. Communication from the Spanish Government to the OECD, March 1999.
6. Ministry of the Environment (1998), *El Sistema de Inspección Ambiental en España*, p. 18-20.
7. Given the unitary nature of the judiciary, the processes described below may be triggered for all administrative actions regardless of whether they emanate from State competences or responsibilities, or from AC and local entities competences and responsibilities. See: Art. 2.1 of Law 30/1992 and Art 1.2 of Law 29/1998.
8. See: Law 30/1992. This law was not just a reform of the previous legal regime as set in 1958, s its scope was wider. Law 30/1992 helped modernise the Spanish administration, make it closer to the citizens. It reformed several laws: the 1957 Law of *Régimen Jurídico de la Administración del Estado*, the 1956 Law regulating the *jurisdicción contencioso-administrativa*; and the 1958 Administrative Procedure Act.
9. See: Law 4/1999.
10. See: the 2008 Report of the Consejo de Defensa del Contribuyente, Madrid, 2009, at: www.meh.es/Documentacion/Publico/GabSEHacienda/Memoria%20CDC%202008.pdf (1st accessed 23 February 2010).
11. See: Law 29/1998 (LJCA, esp. Art.s 25-27).
12. See: Law 6/1999.
13. See: Law 30/1992 and Law 29/1998.
14. See: Art. 54 SC, and the related Organic Law 3/1981 regulating the institution.
15. This actually happened in 2006, with the new Statute of Autonomy of Catalonia.
16. See: www.fiscal.es.
17. For complaints, see: pages 93-98 of the 2008 annual report made by the *Consejo General del Poder Judicial (CGPJ)*”.
18. See: General Council of the Judiciary (2009), *The Spanish Justice System. All the Facts 2008*, at: www.poderjudicial.es/eversuite/GetDoc?

DBName=dPortal&UniqueKeyValue=79267&Download=false&ShowPath=false (last accessed 25 February 2010).

19. See: *Discurso de Apertura de Tribunales del Presidente del Tribunal Supremo y del CGPY*, Madrid, 21 September 2009, p.7.
20. See: Art.s 96-99 of Law 29 of 13 July 1998 on the *Jurisdicción contencioso-administrativa*.