OECD Reviews of Regulatory Reform

Regulatory Reform in Brazil

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Foreword

Appropriately designed and implemented regulations are powerful tools for enhancing economic performance and societal well-being. A strong and sound regulatory framework can mitigate threats to health, safety, and the environment and address market imperfections. Its benefits extend throughout the economy, fostering economic growth. A regulatory framework that facilitates competition, for example, can stimulate productivity by encouraging the efficient allocation of resources and promoting innovation. In turn, these measures can reduce prices for consumers, stimulate the creation of jobs and deliver improvements in living standards.

The *Review of Regulatory Reform of Brazil* identifies areas for reform to bring the country's regulations and institutional arrangements more in line with international best practices. The analysis is carried out through two "lenses": the OECD Product Market Regulation (PMR) indicators and the OECD's instruments on regulatory reform and management, including the 2012 *Recommendation of the OECD Council on Regulatory Policy and Governance*.

The *Review* examines a range of product markets, services and network industries, relying on the results of the PMR indicator, and focuses on reform areas that are most critical for Brazil. These include the governance of state-owned enterprises, interaction between policy makers and interest groups, network sectors, and professional services. In the area of regulatory governance, the *Review* assesses Brazil's efforts to improve regulatory quality, not least by establishing oversight institutions, as well as by developing and adopting effective regulatory management tools, such as regulatory impact assessment, stakeholder engagement, and *ex post* assessment of regulations.

The *Review* provides policy insights and recommendations to help Brazil strengthen its policies and institutions for better regulation and enhance the use of regulatory management tools. The *Review* also takes account of Brazil's federal structure and the challenges it creates for the adoption of regulatory policy by the states and municipalities.

By focusing on both the "what" and the "how" of regulations, the analysis and evidence reported in the *Review* can inform discussions among Brazilian policy makers and society more broadly about how regulatory reform can enhance economic performance and societal well-being.

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Chapter 1 relies on the information collected during the 2018 PMR update, as well as on additional information on reforms in relevant areas provided by Brazilian government agencies. It also draws on the 2020 OECD Economic Survey of Brazil, as well as on many other OECD reports on specific regulatory areas, which include assessments of Brazil.

Chapters 2 to 6 and Chapter 8 draw on information available from the following main sources: desk research conducted by the OECD Secretariat, a questionnaire answered by key stakeholders, a virtual fact-finding mission during August 2021 with Brazilian government agencies, NGOs, academics and industry associations, and a virtual policy workshop on December 2021. Statistics and figures gathered as part of the desk research came predominantly from official sources and from international organisations.

The analysis of regulatory policy governance in Brazil was carried out under the auspices of the OECD Regulatory Policy Committee, whose mandate is to assist both members and non-members in building and strengthening capacity for regulatory quality and regulatory reform. The report was shared for comments with a wide range of stakeholders in Brazil and internationally, including authorities, experts and private representatives.

The section of regulatory policy and governance of the report was approved and declassified by the OECD Regulatory Policy Committee on 2 May 2022 and prepared for publication by the Secretariat.

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Abbreviations and acronyms

ANA	National Water and Public Sanitation Agency (*Agência Nacional de Águas e Saneamento Básico*)
ANAC	National Civil Aviation Agency (*Agência Nacional de Aviação Civil*)
ANATEL	National Telecommunications Agency (*Agência Nacional de Telecomunicações*)
ANCINE	National Cinema Agency (*Agência Nacional do Cinema*)
ANEEL	National Electricity Agency(*Agência Nacional de Energia Elétrica*)
ANM	National Mining Agency (*Agência Nacional de Mineração*)
ANP	National Oil, Natural Gas and Biofuels Agency (*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis*)
ANS	National Supplemental Health Care Agency (*Agência Nacional de Saúde Suplementar*)
ANTAQ	National Water Transportation Agency (*Agência Nacional de Transportes Aquaviários*)
ANTT	National Terrestrial Transportation Agency (*Agência Nacional de Transportes Terrestres*)
ANVISA	National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária*)
APEC	Asia-Pacific Economic Co-operation
ARCE	Regulatory Agency of Ceará (*Agência Reguladora do Estado do Ceará*)
ARR	Evaluation of the Regulatory Result (*Avaliação do Resultado Regulatório*)
ARSAE-MG	Regulatory Agency of Water Services and Public Sanitation of Minas Gerais (*Agência Reguladora de Serviços de Abastecimento de Água e de Esgotamento Sanitário do Estado de Minas Gerais*)
ARSEPS	Public Services Regulatory Agency of São Paulo State (*Agência Reguladora de Serviços Públicos do Estado de São Paulo*)
BNDES	National Development Bank (*Banco Nacional do Desenvolvimento*)
BNDESPar	BNDES Partnerships, Subsidary of BNDES
BPP	Best Practice Principles
BRL	Brazilian Real

CADE	Administrative Council of Economic Defense (*Conselho Administrativo de Defensa Econômica*)
CEO	Chief executive officer
CFA	CFA Institute
CGPAR	Inter-ministerial Commission on Corporate Governance and Management of Equity Interests of the Union (*Comissão Interministerial de Governança Corporativa e de Administração de Participações Societárias da União*)
CGSIM	Committee for the Management of the National Network for the Simplicidation of the Registry and Formalisation of Businesses (*Comitê para Gestão da Rede Nacional para a Simplificação do Registro e da Legalização de Empresas e Negócios*)
CGU	Office of the Comptroller General (*Controladoria-Geral da União*)
CIG	Inter ministerial Council of Governanace (*Comitê Interministerial de Governança*)
CISB	Inter-ministerial Committee for Basic Sanitation (*Comitê Interministerial de Saneamento Básico*)
CIT-Digital	Interministerial Committee for Digital Transformation (*Comitê Interministerial para a Transformação Digital*)
CMAP	Council for the Monitoring and Evaluation of Public Policies (*Conselho de Monitoramento e Avaliação de Políticas Públicas*)
CMGN	Monitoring Committee for the Opening of the Natural Gas Market (*Comitê de Monitoramento da Abertura do Mercado de Gás Natural*)
CNPE	National Council for Energy Policy (*Conselho Nacional de Política Energética*)
CNPJ	National Register of Legal Entities (*Cadastro Nacional de Pessoas Jurídicas*)
CONAMER	National Commission for Better Regulation (*Comisión Nacional de Mejora Regulatoria*)
CT-GN	Committee for the Development of the Natural Gas Industry (*Comitê Técnico para o Desenvolvimento da Indústria do Gás Natural no Brasil*)
CVM	Securities Commission (*Comissão de Valores Mobiliários*)
DSP	Digitisation of Public Services Programme
E-Digital	Brazilian Strategy for Digital Transformation (*Estratégia Brasileira para a Transformação Digital*)
ENAP	National School of Public Administration (*Escola Nacional de Administração Pública*)
EPE	Energy Research Office (*Empresa de Pesquisa Energética*)
ETP	Preliminary Technical Study (*Estudo técnico preliminar*)
EU	European Union
FDI	Foreign direct investment
G20	Group of 20
Gasmar	Companhia Maranhense de Gás

Gaspetro	Petrobras Gás
GDP	Gross Domestic Product
ICT	Information and Communication Technologies (*Instituto Nacional de Metrologia, Qualidade e Tecnologia*)
IEA	International Energy Agency
INMETRO	National Institute of Metrology, Quality and Technology (*Instituto Nacional de Metrologia, Qualidade e Tecnologia*)
iREG	Indicators of Regulatory Policy and Governance
IT	Information technologies
JMP	Joint Monitoring Programme
LAC	Latin America and the Caribbean
LDC	Local distribution company
LEF	Economic Freedom Act (*Lei da Liberdade Econômica*)
LLC	Limited liability company
LNG	Liquefied Natural Gas
LPG	Liquefied Petroleum Gas
LRA	Regulatory Agencies Act (*Lei das Agências Reguladoras*)
M&ARR	Monitoring and Evaluation of the Regulatory Result (*Monitoramento e Avaliação do Resultado Regulatório*)
MERCOSUR	Southern Common Market (*Mercado Comum do Sul*)
MINFRA	Ministry of Infrastructure (*Ministério da Infraestrutura*)
MLPC	Minas Free to Grow (*Minas Livre para Crescer*)
MME	Ministry of Mines and Energy (*Ministério de Energia e Minas*)
MP	Provisional measure (*Medida provisória*)
NAFTA	North American Free Trade Agreement
NSS	National Secretariat of Sanitation (*Secretaria Nacional de Saneamento*)
NTS	Nova Transportadora do Sudeste
OBPR	Office of Best Practice Regulation
OECD	Organisation for Economic Co-operation and Development
PL	Law proposal (*Projeto de Lei*)
PLANSAB	National Plan for Basic Sanitation (*Plano Nacional de Saneamento Básico*)
PMR	Product Market Regulation
PNCP	Public Contracting National Portal (*Portal Nacional de Contratações Públicas*)
PPI	Investment Partnership Programme (*Programa de Parcerias de Investimentos*)
PPP	Public Private Partnerships

PRO-REG	Programme for the Strengthening of the Institutional Capacities for Regulatory Management (*Programa de Fortalecimento da Capacidade Institucional para Gestão em Regulação*)
RADAR	Network for the Articulation of Regulatory Agencies, Brazil (*Rede de Articulação das Agências Reguladoras*)
RDC	Resolution of the Collegiate Board of Directors (*Resolução de Diretoria Colegiada*)
Redesim	National Network for the Simplification of the Registry and Formalisation of Businesses (*Rede Nacional para a Simplificação do Registro e da Legalização de Empresas e Negócios*)
RIA	Regulatory Impact Assessment
ROB	Regulatory Oversight Body
SAG	Deputy Chief of Analysis and Monitoring of Government Policies (*Subchefia de Análise Governamental*)
SCM	Standard Cost Model
SDDG	Special Secretariat for De-bureaucratisation, Management and Digital Government
SEAE	Secretariat for Competition Advocacy and Competitiveness
Seinfra-MG	State Secretariat of Infrastructure and Mobility of Minas Gerais
SinDigital	National System for Digital Transformation
SINGREH	National System for the Management of Hydric Resources (*Sistema Nacional de Gerenciamento de Recursos Hídricos*)
SINIR	National Information System about the Management of Solid Waste (*Sistema Nacional de Informações sobre a Gestão dos Resíduos Sólidos*)
Siscomex	Single Foreign Rade Portal Programme (*Programa Portal Único de Comércio Exterior*)
SNIS	National Information System for Basic Sanitation (*Sistema Nacional de Informações sobre Saneamento*)
SOE	State-owned enterprise
TAG	Transportadora Associada de Gás S.A.
TBG	Transportadora Brasileira Gasoduto Bolivia-Brasil S.A.
TCC	Term of Commitment to Cease Anticompetitive Practices (*Termo de Compromisso de Cessação*)
TPA	Third-party access
TRAINS	UNCTAD Trade Analysis Information System
TSB	Transportadora Sulbrasileira de Gás
UNCTAD	United Nations Conference on Trade and Development
UNICEF	United Nations International Children's Emergency Fund
USAID	US Agency for International Development
USD	United States Dollar
WHO	World Health Organization

Executive summary

The effectiveness of a regulatory framework hinges upon both the *what* and the *how* of regulation. Policy makers and regulators must look at the *what* – the substance of regulation – to ensure that the "rules of the game" deliver desired outcomes. Equally important is that policy makers and regulators consider the *how* of regulation – how countries develop, implement, and review rules – to ensure that regulations work effectively to promote the public interest.

This review follows such a combined approach to regulatory reform in Brazil. Chapter 1 considers regulatory barriers to competition in Brazil, using Brazil's results in the OECD Product Market Regulation indicators to propose a range of policy options to make the country's regulatory frameworks more competition-friendly. Chapters 2 to 6 consider Brazil's institutional and policy arrangements for better regulation. They document the progress that the country has achieved so far, and provide recommendations to tackle the challenges ahead. Chapters 7 and 8 provides case studies of reforms in the natural gas and public sanitation sectors.

Together, the approaches show how a proportional, clear, and efficient regulatory framework can drive improvements in Brazil's economic performance and its citizens' welfare. In addition, removing unnecessary barriers to competition through targeted reform can foster productivity and economic growth.

The *what* of regulation: An assessment of regulatory barriers to competition

State involvement in the economy

The assessment of Brazil's regulatory stance against the OECD Product Market Regulation indicators shows that, despite recent reforms, more could be done to improve Brazil's regulatory set-up and foster a more competitive business environment. Public ownership is not a concern *per se*, provided the rules ensuring the governance of state-owned enterprises (SOEs) engaged in commercial activities limit undue political interference and promote a level playing field between state-owned and private companies. However, public ownership is an area for attention in Brazil, given both a significant level of state ownership across a number of economic sectors and governance arrangements for SOEs that lag behind OECD best practices. Similarly, absence of rules on the legitimate interaction between public officials and interest groups in the policy-making process raises a risk of private interests being advanced in an opaque and non-transparent fashion and unduly distorting market competition. In addition, the public procurement of goods, services and public works, which represents an important share of the economy, could deliver better value for money for the country.

Key policy options:

- Clearly establish the rationale for state ownership of firms and consider privatising those firms where such a rationale is weak.

- Align the governance of SOEs with the *OECD 2015 Guidelines on Corporate Governance of State-Owned Enterprises*.
- Build on current efforts to introduce comprehensive legislation regulating lobbying activities.
- Continue taking steps to make federal procurement processes more open and competitive.

Barriers to the entry of firms

There is still scope to reduce barriers to the entry and expansion of firms, in particular foreign ones. Recent reforms have addressed some of these regulatory weaknesses, but additional efforts are necessary to fully bridge the gap with OECD countries.

Key policy options:

- Continue the country's efforts to reduce regulatory burdens imposed on firms by pursuing the roll-out of the one-stop shop for setting up new firms and wider application of the "silence is consent" rule for licenses.
- Take steps to permanently reduce tariff and non-tariff barriers and to further automatise and streamline trade formalities.
- Consider whether less discriminatory alternatives are available with respect to existing requirements that still limit foreign investments in some sectors.

Barriers to competition in professional services and network sectors

Brazil's regulatory framework in the area of retail trade is more competition-friendly than in many OECD economies. In contrast, the provision of services by accountants, architects, engineers, lawyers, notaries, and estate agents is still subject to a range of regulatory constraints that limit competition and risk hampering innovation and productivity.

Results in the OECD Product Market Regulation indicators on network industries are quite diverse across sectors. The regulatory framework in the e-communications and air transport sectors is rather competition-friendly, especially as a result of recent reforms, while in the road transport sector is still far from OECD best practices. In the gas sector, recent and planned regulatory changes promise to narrow the gap between Brazil and OECD countries, as the detailed case study on the gas sector shows; while more efforts are necessary to foster competition in the electricity sector.

Key policy options:

- Consider performing a competition assessment to determine whether the regulatory constraints imposed on professionals are effectively necessary.
- Contemplate privatising those firms in the energy industry where the rationale for state ownership is weak.
- Foster entry in competitive segments by ensuring vertical separation between monopolist and competitive segments.
- Consider easing requirements to operate road freight and long-distance coach services and removing all forms of retail price regulation.

The *how* of regulation: Institutional and policy arrangements for better regulation

Policies and institutions for regulatory policy

Brazil has made strides in the adoption and implementation of better regulation practices and tools, particularly by the federal administration. So far, the country's strategy has favoured the introduction of specific regulatory management tools before establishing a complete and comprehensive legal and institutional set-up for regulatory policy. Several regulatory oversight functions are dispersed across various administrative areas and entities, leading to co-ordination gaps and difficulties in defining a long-term strategy for the rollout of better regulatory policy.

Key recommendations:

- Define and consolidate most, if not all, regulatory oversight functions to a single body with the highest political support and adequate governance arrangements.
- Promote a holistic approach to better regulation by bringing together good regulatory practices in a single high-level document.
- Develop an implementation strategy of the policy objectives on regulatory quality with clear milestones and defined co-ordination mechanisms.

Ex ante *assessment of regulation and stakeholder engagement in rule making*

Most of Brazil's better regulation efforts have focused on the introduction and development of a regulatory impact assessment (RIA) system. The gradual introduction of obligatory RIA has allowed the country to develop capabilities and roll out the tool in the federal government. Nonetheless, the governance of the system and its adoption by policy makers throughout the administration could be strengthened. Furthermore, stakeholder engagement remains voluntary for ministries. A successful rollout of RIA and public consultation processes go beyond a legal obligation and require adequate institutional arrangements and clear communication across, and outside, the government.

Key recommendations:

- In the short term, consider strengthening the role of the Secretariat for Competition Advocacy and Competitiveness (SEAE) for stronger oversight of RIA and stakeholder engagement activities.
- Develop a roadmap for the country's policy on RIA. Build on the lessons learned by regulatory agencies to enhance the roadmap with explicit goals for the rest of the administration.
- Harness communication and engagement practices within the administration as a tool to embed RIA in the rule-making culture.
- Embed the requirement for public consultation in the RIA process.
- Build on the potential of existing platforms by centralising public consultations in the *Participa + Brasil* portal and encourage the participation of stakeholders.

Revision of the regulatory stock

Brazil's efforts to review the stock of regulation are going in the right direction; however they are not yet co-ordinated. By bringing the different initiatives under a single umbrella policy, Brazil could improve benefits for citizens and businesses. The country has tackled red tape by streamlining licensing and permitting procedures for businesses and by deploying a programme to digitalise public services, with over 4 000 procedures available online. On the other hand, the implementation of a systematic *ex post* evaluation system is still at an early stage.

Key recommendations:

- Define a whole-of-government strategy for administrative simplification, within the scope of the country's regulatory policy.
- Measure the administrative burdens created by key government processes and formalities and target the administration's resources on simplifying these procedures.
- Establish clear and explicit governance arrangements that underpin the implementation of systematic *ex post* evaluations by the federal administration.

Regulatory policy at the subnational level

Brazil has improved regulatory coherence and co-ordination across the three levels of government. Nonetheless, these efforts are not systematic and participation by states and municipalities tends to be voluntary. The initiative by the federal government to document and disseminate the progress achieved by states and municipalities in the adoption of good regulatory practices is a step in the right direction.

Key recommendations:

- Embed regulatory coherence as a key pillar of the country's regulatory policy.
- Take a gradual approach to promoting better regulation practices in states and municipalities.
- Encourage the involvement of subnational administrations by developing notification mechanisms when draft regulations have relevant impacts on states and/or municipalities.
- Foster the exchange of lessons learned and good practices between the federal government and subnational governments and among subnational entities.

Part I Product Market Regulation in Brazil

1 Product Market Regulation in Brazil: An international comparison

This chapter presents an in-depth analysis of Brazil's results on the OECD Product Market Regulation indicators, which measure regulatory barriers to competition. The economy-wide indicators capture these barriers across the economy, while a set of sector indicators reflect the country's regulatory stance at the sector level, focusing on network industries, professional services, and retail distribution. Complemented by other OECD work in the areas covered by the indicators and information about recent reforms, the analysis gives rise to a range of policy insights for the improvement of Brazil's regulatory framework.

Policy insights for ensuring that Brazil's product market regulation fosters competition and productivity

The OECD Product Market Regulation (PMR) indicators are a unique and globally-recognised set of policy indicators that measure regulatory barriers to firm entry and competition in a broad range of key economic sectors and policy areas. The wealth of information underpinning these indicators helps policymakers to identify specific aspects of product market regulation that could hinder competition and create unnecessary barriers to the entry and the growth of firms, thus being an impediment to growth, and suggest meaningful reforms, as a way of improving economic performance.

Brazil's scores in the 2018 PMR indicators suggest that the regulatory framework currently in place would have to be reformed in many domains and sectors in order to bring it closer to international best practices. Since the indicators were produced in 2018, Brazil has already made some progress, but more is still necessary if the country wishes to align its regulatory framework to those of OECD economies in the areas covered by the PMR indicators.

Key policy insights to improve product market regulation in different regulatory areas

- **Scope of SOEs**: Brazil's level of state ownership across the economy has declined in recent years and further privatisations are ongoing. Nevertheless, Brazilian authorities should consider **clearly setting out the rationale for state ownership** of the firms over which they have control and consider **privatising those firms where such rationale is weak** to better align themselves with international best practices in this area.
- **Governance of SOEs:** State ownership of firms is not necessarily a concern *per se*, provided the rules ensuring the governance of SOEs engaged in commercial activities limit undue political interference in the management of these firms and promote a level playing field between state-owned and private companies. The Brazilian authorities have taken some steps to improve the corporate governance of their SOEs, but the country is still far from having aligned with international best practices. To address these regulatory weaknesses the country could better conform to the OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015[1]) and, to this end, **could consider implementing the recommendations put forward in the 2020 *OECD Review of the Corporate Governance of State-Owned Enterprises in Brazil*** (OECD, 2020[2]). For example, Brazil could:
  - Reduce the dispersion of decision-making power among many different ownership public entities, and develop a single formal public ownership policy for SOEs.
  - Guarantee clear separation between public officials responsible for ownership functions and others responsible for sectorial public policies.
  - Ensure that the President of the Republic and his ministers refrain from intervening in the management of SOEs and that they define the SOEs' objectives in a transparent manner.
  - Strengthen boards of directors in SOEs by improving appointment procedures, and empowering boards to appoint their CEO.
  - Apply the same set of laws and regulations to private companies and to SOEs engaged in commercial activities, including those regulating the procedures to be followed in case of insolvency.
- **Direct Control over Enterprises:** Constraints on privatisations of SOEs still exist in some sectors, such as rail freight transport, airport and port operations, urban/suburban passenger transport, energy, finance, motion picture production and distribution, building and repairing of ships and boats, manufacturing of chemicals and computer products. Brazil could **consider removing constraints to the sale of shares in SOEs in non-strategic sectors**.

- **Retail Price Controls and Regulation:** Retail price controls are still more widespread in Brazil than in the average OECD country. Brazil could consider reducing price regulation, in particular, by **liberalising the fees charged by certain regulated professionals and by abolishing minimum fees in road freight transport services**.
- **Public Procurement of goods, services and public works**: Significant developments have been taking place in how the government procures goods, services and public works since 2018. However, further efforts to make procurement processes more open and competitive are of the essence. To this end the country **could implement the recommendations put forward in the 2021 OECD report *Fighting bid rigging in Brazil: A review of federal public procurement*** (OECD, 2021[3]). In particular, it could:
  - Mandate procurement agencies to perform a market survey as part of the preliminary technical study undertaken before designing procurement exercises (possibly with the exception of low-value repetitive tenders for which market research has recently been conducted).
  - Maximise participation of genuine competing bidders by tightening the conditions under which direct awards can be used, developing standard mandatory templates for all types of procurement and all stages of the procurement process, making participation requirements clearer and more predictable for bidders and ensuring that entry requirements and deadlines for submitting bids are proportional to the value or complexity of the tender.
  - Increase participation by foreign bidders by relaxing the rules that limit the ability of international companies to participate in tenders, in particular by removing the requirement to obtain an authorisation order from the Ministry of the Economy when foreign companies want to bid in a tender without being part of a consortium with local firms.
  - Require procurement bodies to systematically publish all tender documents and receive bids online at all levels of government, and limit the exceptions to those cases where submission of physical samples are necessary.
  - Abandon the current practice of providing a reference price in tender documentation.
  - Recognise the essential role of public procurement officials in the fight against bid rigging and provide adequate training and capacity building.
  - Streamline and strengthen the rules addressing conflicts of interests, incompatibilities and impartiality in public procurement.
- **Command and Control Regulation:** Most of the regulatory barriers to competition in this area relate to professional services. The relevant policy insights that arise from the analysis of the PMR indicators are provided below where professional services are discussed.
- **Complexity of Regulatory Procedures:** Numerous positive changes are ongoing and may improve the country's performance in this area. To further ensure regulatory transparency, Brazil could **complete the rolling out of an online database of all subordinate legal instruments**. In addition, to reduce the regulatory burden on citizens and firms, Brazil could **continue recent efforts to review existing pieces of legislation**. More detailed policy suggestions related to the *ex post* review of regulations to reduce administrative burdens are presented in Chapter 5.
- **Assessment of Impact on Competition**: Brazil has made improvements in the use of regulatory impact assessment (RIA) for assessing new policy proposals since 2018. However, more could be done to align its processes with international best practices. Chapter 4 provides detailed policy suggestions in this area.
- **Interaction with Interest Groups**: Brazil has been enhancing its arrangements to engage stakeholders in the policy making process, but more could be done to ensure their effective involvement. Chapter 4 provides more detailed policy recommendations in this area. As for the interactions between interest groups and public officials, Brazil still lacks a comprehensive legal

framework regulating them. A draft law on lobbying activities may fill this gap and ensure a more balanced regulatory process.

- **Administrative Requirements for Start-ups:** Even after recent reforms, the process for opening up a new business in Brazil remains burdensome. To further simplify this process, Brazilian authorities could **ensure that the recently-introduced one-stop shop providing information on how to start a business includes all the necessary administrative steps and foster its roll-out across the whole country**. Additional reforms that ease the process for obtaining licenses have also been adopted. More efforts could be made to ensure that these reforms are effectively implemented across the country, and at all relevant levels of government. An additional step to increase speed and certainty in the licensing process could be to **continue efforts to increase the effective application of the "silence is consent" principle for licences and permits**.
- **Barriers in Network Sectors and Barriers in Service Sectors**: Most of the restrictions in this area relate to the regulation of professional services, transport and energy, while the country has a relatively competition-friendly regulatory set-up in retail trade. Detailed policy insights in these sectors are provided in the next sub-section.
- **Tariff Barriers*:*** Applied tariffs in Brazil are very high, with a negative impact on the prices for final, intermediate and capital goods as well as on productivity, given the reduced exposure of local firms to external competition. Brazil is taking some steps to reduce tariffs, though some of these measures are temporary and, hence, will soon end, and many key sectors have not seen any long-term measures at all. As already suggested in the OECD Economic Survey of Brazil (OECD, 2020[4]) Brazil could take steps to **permanently reduce tariff barriers, starting with capital goods and intermediate inputs**.
- **Barriers to Trade Facilitation:** Import licensing requirements have been eased in recent years and the introduction of a National Single Window Project (*Portal Único Siscomex*) has started reduced processing delays for both imports and exports. Additional steps in this direction would facilitate Brazil's external trade, thereby helping Brazil better integrate in the world's economy. In particular, Brazil can implement measures to alleviate non-tariff barriers by **further automating, harmonising and streamlining administrative processes at the border**. This may include:
  - accelerating the full implementation of *Siscomex*;
  - improving the availability of information on trade-related regulations;
  - improving the capacity of border agencies to exchange related data electronically;
  - simplifying trade documents;
  - streamlining border procedures, and
  - enhancing co-operation between agencies.
- **Regulatory barriers to Foreign Direct Investment (FDI):** Brazil has recently adopted a number of measures that have led to an improvement in the treatment of FDI, and a horizontal restriction related to the access by foreign-owned companies to the national financial system is slated for removal in December 2022. However, a number of restrictions still remain in place, which limit the ability of foreign firms to invest in the country. Brazil could consider **whether less discriminatory alternatives to these restrictions are available, in particular** with respect to local incorporation requirements in various sectors, foreign ownership restriction in media and ownership of rural land.
- **Differential Treatment of Foreign Suppliers:** Brazil imposes rules that limit access by foreign firms to public tenders, as well restrictions on cabotage in some transport sectors. In addition, accountants and lawyers with foreign qualifications are required to pass an exam to practice in the country. Brazil could **consider relaxing these rules** to foster entry by foreign providers and promote competition in these sectors. More detailed suggestions were included above under the heading Public Procurement and in the key policy insights applying to sectors below.

Key policy insights to improve product market regulation in specific sectors

- **Professional services:** Accountants, architects, engineers, lawyers, notaries, and estate agents are heavily regulated in Brazil. Precise policy options for reducing unnecessary barriers to competition in this area would require a detailed assessment of the specific features of the regulatory environment, not only of these professions but also of the sectors in which they are active. Hence, the first suggestion for the Brazilian authorities is to **consider performing a competition assessment to determine which of the existing regulatory constraints are effectively necessary and whether they strike the right balance between fostering competition and innovation, and protecting consumers**. However, some general policy insights can already be derived from the PMR sector indicators for professional services, which suggest that Brazil could:
    - **Reassess the activities over which exclusive rights should be granted to these six professions**, considering whether exclusivities are effectively necessary, and if these rights could be entirely removed, or shared with other professionals.
    - Consider **introducing alternative pathways to access these six professions** to foster entry, as well as to offer additional career development options for mature workers with relevant experience.
    - Re-assess the **rationale for imposing on accountants and lawyers with foreign qualifications the requirement to pass an exam** in order to practice in the country and **for notaries the obligation to have Brazilian nationality**.
    - If passing a professional examination remains an important element for some or all pathways to become an accountant, lawyer, or notary, **consider replacing exams run by professional associations with exams run by public authorities**.
    - Consider **relaxing the territorial constraints imposed on the ability of lawyers, notaries and real estate agents** to provide services across the country.
    - Reconsider the need for **quantitative constraints on the number of notaries**.
    - **Re-evaluate whether being member of a professional association should be mandatory** for a qualified accountant, architect, engineer, lawyer, notary, or real estate agent to be allowed to practice.
    - **Introduce competition in the tariffs for the services provided by lawyers, notaries, architects and engineers** by removing any form of regulation, approval and even recommendation by professional association.
    - **Lift the restriction, imposed on accountants and lawyers, to set up a business with other professionals**, to allow innovative business models to arise.
    - Remove unnecessary **constraints on the ability of lawyers, notaries, accountants to advertise and market their services.**
- **Electricity:** Public authorities hold stakes in electricity companies at all levels of the supply, and control in those companies under state ownership can only be divested following legislative authorisation. Brazil should **clearly assess the rationale for state ownership** across the whole industry and consider **selling their stakes where such rationale is weak**. To foster entry and competition, the country should also **consider imposing ownership or legal separation between companies involved in electricity distribution and transmission, and those operating at other levels of the supply chain.**
- **Gas:** Brazil has made headways in opening this industry to competition in the last few years. Chapter 7 provides detailed policy insights to bring this process to successful completion.
- **Road Transport:** Road transport is important for Brazil's economy, given its geography. In the road transport sector, Brazilian authorities may consider easing requirements to operate road

freight and long-distance coach services by **replacing the current cumbersome licensing requirements with a leaner notification system** and **allowing providers of passenger transport services by coach to decide the routes they wish to serve**. In addition, competition could be fostered by **removing all forms of retail price regulation in the sector where competition is possible** and by **relaxing constraints on cabotage services by foreign companies**.

- **Water Transport**: Regulatory constraints to competition in this sector will be assessed in considerable details and which a much wider scope than the one of the PMR indicators in the forthcoming *OECD Competition Assessment Reviews: Brazil*. Brazilian authorities should refer to the policy recommendations that will be put forward in this review.

Brazil's results for the PMR Indicators

Brazil asked the OECD to analyse its results in the OECD PMR indicators in order to identify areas where its regulatory framework may pose unnecessary constraints on competition and suggest meaningful reforms, as a way of improving economic performance.

In this analysis, the OECD benchmarks Brazil against the latest vintage of the PMR indicators, which reflect the laws and regulation in force in the countries assessed on 1 January 2018. As agreed with Brazilian authorities, the values of the PMR indicators have not been calculated again to reflect changes and reforms that took place since 2018. This choice was made to ensure consistency with the PMR dataset used in the analysis and because of the resource-intensive nature of such an exercise. The only exception is Chapter 7 which provides a detail case study of the gas industry, where an ad hoc update of the relevant PMR sector indicator has been undertaken. However, in the analysis herein presented all policy developments that have taken place over the past four years are taken into account.

Brazil's PMR scores are assessed with reference to the average of OECD members to provide a reference point. Since OECD countries have generally been undertaking pro-competition reforms for longer, these countries tend to be closer to international best practice. Brazil's PMR scores are also presented alongside the Latin American countries included in the PMR database (i.e. Argentina, Chile, Colombia, Costa Rica and Mexico), the average of the OECD Latin America economies (i.e. Chile, Colombia, Costa Rica and Mexico), and the average of the G20 emerging economies included in the PMR database (i.e. Argentina, China, Indonesia, Mexico, Russia, South Africa ,Turkey and Brazil itself).

The OECD Product Market Regulation Indicators

In order to understand this exercise and how Brazil can use it to identify areas and priorities for reform, one must first understand how the OECD PMR indicators work, and how they are structured.

The OECD PMR indicators measure a country's regulatory barriers to competition. The economy-wide PMR indicator provides an overall measure of the extent to which product market regulation across a variety of sectors and regulatory domains fosters competition, while the PMR sector indicators quantify regulatory barriers to firm entry and competition at the level of specific network and service sectors.

While governments use regulations to address market imperfections and mitigate dangers to health, safety or the environment, ill-designed regulations can create unnecessary barriers to the entry and growth of firms and impede the effective development of competition, thereby limiting the economy's growth potential. Evidence from a wide range of firm, industry and macro-level studies shows that a regulatory framework that creates unnecessary obstacles to competition induces significant negative effects on productivity and growth by reducing investment and weakening multi-factor productivity performance (Égert and Wanner, 2016[5]) (Égert, 2017[6]) (Égert, 2018[7]).

Reforming product market regulation to yield a regulatory framework that fosters competition can spur productivity growth by encouraging the efficient allocation of resources across the economy, encouraging experimentation, innovation and the diffusion of existing innovations (Andrews and Cingano, 2014[8]) (OECD, 2015[9]) (Andrews, Criscuolo and Gal, 2016[10]). Lower barriers to entry supported by measures allowing new firms to compete effectively can reduce consumer prices and facilitate greater job creation, especially in services where there is pent-up demand, and can deliver long-term gains in living standards (Bouis et al., 2012[11]); (Égert and Gal, 2016[12]).

The PMR indicators were first calculated in 1998, and they have been updated every five years since then. Over time, the PMR indicators have become an essential element of the OECD's policy analysis toolkit. These indicators and their underlying database are also widely employed by national governments and other international organisations to determine areas for regulatory change. Academics and research institutions also use the PMR indicators in their research. The uses of the PMR indicators are detailed in Box 1.1.

Box 1.1. How the OECD's Product Market Regulation indicators are used

The PMR indicators are one of the most extensively used measures of barriers to competition in the analysis of market regulations. Examples of their use include:

- **Country surveillance and assessments performed by the OECD**: The PMR indicators are the basis for recommendations in the **OECD's Economic Surveys** and **Going for Growth**, identifying areas where regulatory reforms could be undertaken so that these markets could work more effectively. Moreover, the PMR indicators have constituted key inputs into OECD deliverables to the G20, such as the **G20 Enhanced Structural Reform Agenda** and the **International Monetary Fund-led Strong Sustainable and Balanced Growth** reports.
- **Reviews of barriers to competition performed by the OECD**: the OECD performs detailed reviews of regulations to help governments identify and remove unnecessary barriers to competition, using its **Competition Assessment Toolkit**. The PMR indicators are usually employed to perform a first screening of the country's sectors and identify those where such barriers are more extensive. This helps to target the assessment to those economic areas where the most benefits could be obtained.
- **National reform initiatives**: Individual countries have used the PMR indicators when determining their agenda for reforms. The exercise can also serve as an instrument to take stock of existing regulations in a country and evaluate their performance with respect to the stated goals or international experiences. The French administration referred to the OECD PMR indicators to perform a selection of areas to focus on when starting their agenda of reforms. Similarly, the 2015 Italian draft law to increase competition in product markets, referred extensively to the PMR. The areas for regulatory reform where identified using the PMR indicators. In 2017, the government of Kazakhstan started with the OECD a comprehensive evaluation of its product market regulations using the PMR indicators to help their ministries identify areas for improving their market regulations.
- **Quantification of reforms:** The PMR indicators are used regularly in **OECD Economic Surveys** to quantify the potential effects of product market reforms on the labour market and economy across countries. The PMR indicators are also widely used by academics and other national and international institutions to measure the impact of reforms on macro variables.
- **Key tools in the work of other international organisations**: The **European Commission** has been a key user of OECD PMR indicators in identifying priorities for reforms in EU countries and has collaborated in extending these indicators to non-OECD EU members. Since 2013, the **World Bank** has also been cooperating with the OECD in broadening the coverage of the PMR

indicators outside the OECD area. The PMR indicators are also one of the indicators chosen by the **Asia-Pacific Economic Cooperation (APEC) secretariat** to evaluate progress on structural reforms in their member countries.

Structure of the OECD Product Market Regulation Indicators

The PMR indicators are based on an extensive database that relies on the answers provided by national authorities to a detailed questionnaire.[1] The information included in the database is used to build two sets of indicators: an economy-wide indicator, which provides a general quantitative measure of a country's regulatory stance, and a group of sector indicators that focus on regulation at the level of specific network and service sectors.

The PMR places a strong emphasis on network sectors because energy, transport, and e-communications constitute important inputs in most other sectors of the economy (OECD, 2014[13]). Empirical research has shown that upstream regulations in network and services sectors curb productivity growth in the manufacturing sector and the economy more broadly (Barone and Cingano, 2011[14]) (Bourlès et al., 2013[15]) (Arnold et al., 2016[16]) (Égert and Wanner, 2016[5]).

A key feature of the PMR database is that it captures the "de jure" policy settings. This means that the answers are not based on "subjective" assessments by market participants, but on the laws in force in the country. It also implies that the answers do not reflect the level of enforcement of these laws. These two aspects of the data improve the comparability across countries by insulating them from context-specific assessments and by allowing the OECD to verify the accuracy of information provided.

The Economy-wide indicator

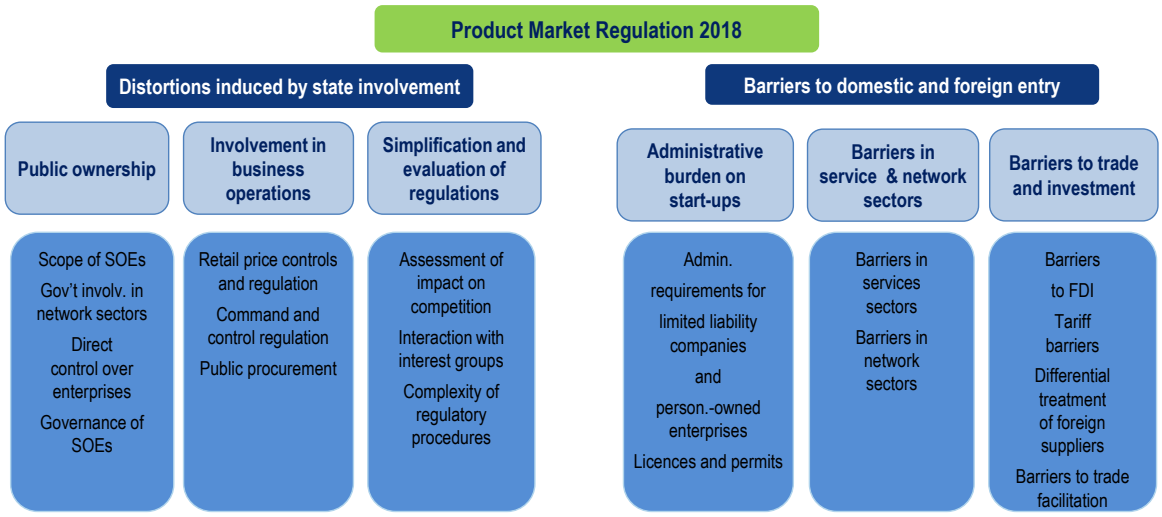
The economy-wide PMR indicator is constructed from two high-level indicators capturing two potential sources of barriers to competition in the economy:

i) those that may arise from state involvement in the economy, and

ii) those that may arise from regulations on the entry and expansion of domestic and foreign firms.

Each of these two high-level indicators is composed of three sub-indicators, which are in turn composed of a number of low-level indicators that refer to specific regulatory domains (Figure 1.1).

Figure 1.1. The structure and content of the 2018 economy-wide PMR indicator



Source: (Vitale et al., 2020[17]).

a. Indicators of distortions induced by state involvement in the economy

This high-level indicator captures distortions that can be caused by the state's involvement in the economy through the activity of state-owned enterprises (SOEs) and other forms of controls and obligations imposed by the state on private firms. It covers three key regulatory domains, represented by the three medium level indicators (the light blue left hand side in Figure 1.1). Ten low-level indicators (i.e. the dark blue boxes in the left hand side of Figure 1.1) focus on specific and detailed regulatory areas. These indicators are:

1. Presence of state-owned enterprises in the economy and their governance (*Public Ownership*)
   a) *Scope of SOEs*: measures whether the government controls at least one firm in a number of business sectors, with a higher weight given to the key network sectors on which the PMR exercise focuses.
   b) *Direct Control over Enterprises*: measures the existence of special voting rights by the government in privately owned firms, and constraints to the sale of government stakes in publicly controlled firms (based on same sectors and weights as the indicator above).
   c) *Government Involvement in Network Sectors*: measures the size of the government's stake in the largest firm in key network sectors.
   d) *Governance of State-owned Enterprises*: measures the degree of insulation of state-owned enterprises from market discipline and the degree of political interference in the management these firms. This sub-indicator is based on some of the principles underlying the *2015 OECD Guidelines on Corporate Governance of State Owned Enterprises* (from hereon the *2015 OECD Corporate Governance Guidelines*) (OECD, 2015[1]).
2. Controls and obligations imposed on private firms, including the rules regulating public procurement (*Involvement in Business Operations*):
   a) *Retail Price Controls*: measures the extent and type of retail price controls in key network and service sectors.
   b) *Command and Control Regulation*: measures the extent to which the government uses this type of regulations, as opposed to incentive-based ones, across key network and service sectors.
   c) *Public Procurement*: measures the degree to which procurement rules ensure a level playing field in access to public contracts for the provision of goods, services and public works.
3. Rules in place to evaluate new and existing regulations and efforts to simplify the administrative burden businesses face when interacting with the government (*Simplification and Evaluation of Regulations*).
   a) *Assessment of Impact on Competition*: measures the level of assessment of the impact of new and existing regulations on competition to minimise distortions to competition.[2]
   b) *Interaction with Interest Groups:* measures the existence of rules for engaging stakeholders in the design of new regulation with the goal of reducing unnecessary restrictions to competition and for ensuring transparency of lobbying activities.[3]
   c) *Complexity of regulatory procedures*: measures the government's efforts in reducing and simplifying the administrative burden of interacting with the government.

b. Indicators of barriers to domestic and foreign entry

This high-level indicator captures barriers to firms' entry and expansion across various sectors of the economy. It covers three key regulatory domains represented by the three medium level indicators (the light blue boxes in the right hand side of Figure 1.1). Eight low-level indicators (i.e. the dark blue boxes on the right hand side of Figure 1.1) focus on specific regulatory areas:

1. The administrative burden that new firms have to face when starting their business (*Administrative Burden on Start-ups*)
   a) *Administrative Requirements for Limited Liability Companies and Personally-Owned Enterprises*: measures the extent of the administrative requirements necessary to set up new enterprises, with a focus on two specific legal forms: limited liability companies and personally owned enterprises.
   b) *Licences and Permits*: measures the existence of initiatives to simplify licensing procedures, such as 'one-stop-shops' for licences and notifications, "silence is consent" rule, and programs to review and reduce number of licences.
2. The qualitative and quantitative barriers firms face to enter and operate in specific key economic sectors (*Barriers in Service and Network Sectors*),
   a) *Barriers in Services Sectors*: measures the extent of the qualitative and quantitative barriers to competition arising from existing incentive-based regulation in key service sectors.[4]
   b) *Barriers in Network Sectors*: measures the extent of the qualitative and quantitative barriers to competition arising from existing incentive-based regulation in network sectors.[5]
3. The barriers that could limit access to domestic markets by foreign firms and foreign investors (*Barriers to Trade and Investment*)
   a) *Differential Treatment of Foreign Suppliers*: measures the level of discrimination that foreign firms may experience when participating in public procurement processes, and the barriers to entry that foreign firms may experience relative to domestic firms in key network and service sectors.
   b) *Barriers to Foreign Direct Investment (FDI):* measures the restrictiveness of a country's FDI rules, which shape cross-border investment in which a foreign investor establishes a lasting interest with significant influence in an enterprise of a different economy (OECD, n.d.[18]), in 22 sectors. It gauges the restrictiveness of rules in terms of foreign equity limitations, screening or approval mechanisms, restrictions on the employment of foreigners as key personnel, and operational restrictions. This indicator reflects the value of the FDI Regulatory Restrictiveness Index developed by the OECD Directorate for Financial and Enterprise Affairs.[6]
   c) *Tariff Barriers:* reflects the value of a cross-product average of effectively applied tariffs. The source of the relevant information is the UNCTAD Trade Analysis Information System database.[7]
   d) *Barriers to Trade Facilitation:* measures the level of complexity of the technical and legal procedures for international trade, ranging from border procedures to the simplification and harmonisation of trade documents. This indicator reflects the value of the average of a subset of the Trade Facilitation Indicators developed by the OECD Trade and Agricultural Department.[8]

Sector PMR indicators

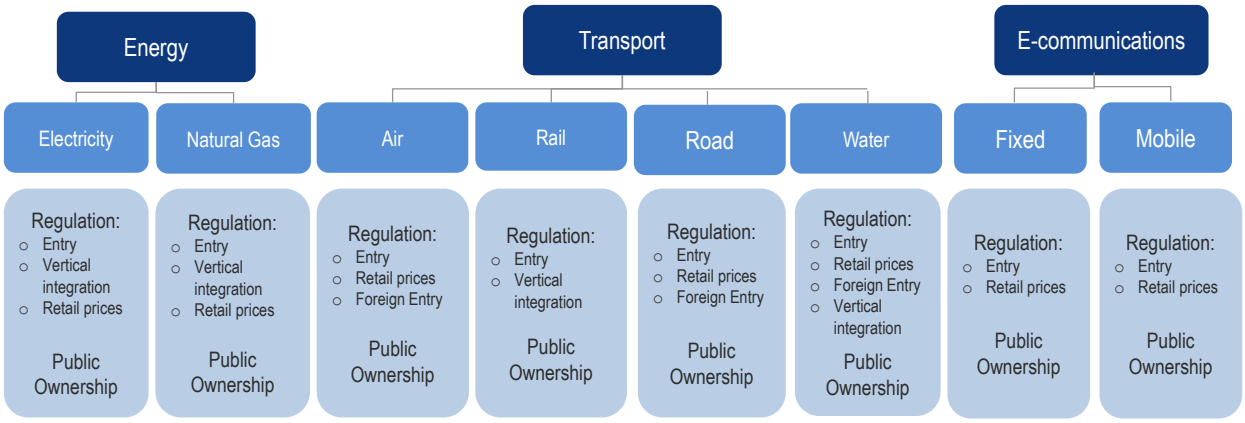
The sector PMR indicators summarise information by sector, and not by regulatory domain as in the economy-wide indicator. These indicators cover three broad sectors: network industries, professional services and retail distribution.

a. Network sectors

The indicators for network sectors assess eight sectors: electricity, natural gas, air transport, rail transport, road transport, water transport, as well as fixed and mobile e-communications.[9] Each of these indicators include information on how entry and conduct in the relevant sector is regulated, and on the level of public ownership.

These eight indicators are then aggregated into three indicators, one for each industry (energy, transport and e-communications), and into one single overall indicator covering all network sectors (Figure 1.2).

Figure 1.2. Structure of the 2018 PMR indicators for network sectors



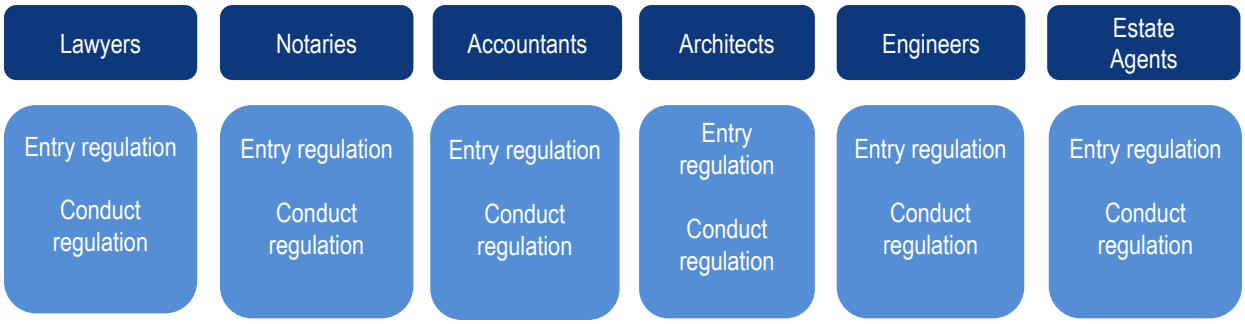
Source: (Vitale et al., 2020[17]).

b. Professional services and retail

The service sector indicators cover six professions (accountants, architects, civil engineers, real estate agents, lawyers, and notaries), as well as general retail distribution and retail sales of medicines. The indicators for professional services include information on entry requirements and conduct constraints (Figure 1.3), whereas the retail trade indicators cover a broad set of regulatory issues, ranging from shop opening hours to licensing and retail price regulation (Figure 1.4).

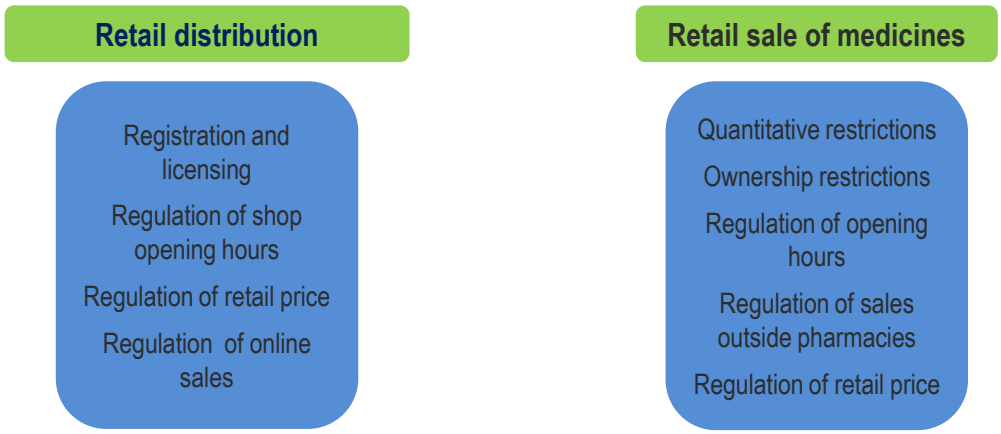
There is no aggregate indicator covering these eight sectors because of their very different nature. In addition, there is no single indicator on the regulation of all professional services because some professions do not exist in all countries; hence, a single average would distort comparisons.

Figure 1.3. Structure of the 2018 PMR indicators for professional services



Source: (Vitale et al., 2020[17]).

Figure 1.4. Structure of the 2018 PMR indicators for retail trade



Source: (Vitale et al., 2020[17]).

Collection and calculation of the data for Brazil

In 2019, the OECD published the results of the latest vintage of the OECD PMR indicators based on a new methodology. Brazil was among the countries included in this analysis.[10] The results of this vintage were based on information relative to laws and regulations in force in the country on 1 January 2018.

The information used to construct the OECD PMR indicators was collected through the 2018 PMR questionnaire sent to national authorities. The questionnaire included over 1 000 questions on economy-wide or industry-specific regulatory provisions. After the OECD received the countries' responses, an internal team of experts reviewed them. This verification process helped to ensure that the questions were correctly interpreted. The team used the legal references and other supporting information provided by the Brazilian authorities to verify the responses. When doubts about specific answers arose, the team requested clarifications from the respondents.

Subsequently, the PMR team coded the questionnaire responses so that all quantitative and qualitative responses were transformed into a value ranging from 0 to 6, with zero representing international best practice. Because the qualitative questions are closed questions where respondents have to select an answer from a pre-defined menu, responses can be coded easily. The PMR team then aggregated the coded responses to calculate the indicators. The scoring methodologies, the specific weights used to calculate all the indicators, together with the underlying dataset of information, are available on the OECD PMR website.[11]

To prepare this chapter, the OECD has complemented the information used to build the 2018 PMR indicators with details on the reforms undertaken in the following 3 years. Even though this latter information could not be used to directly update the values of the PMR indicators, this exercise has allowed the OECD to identify areas where the PMR indicators may no longer accurately reflect the actual regulatory framework and to adapt any policy suggestions that may arise from an examination of just the 2018 PMR results.

Results for the economy-wide PMR indicator

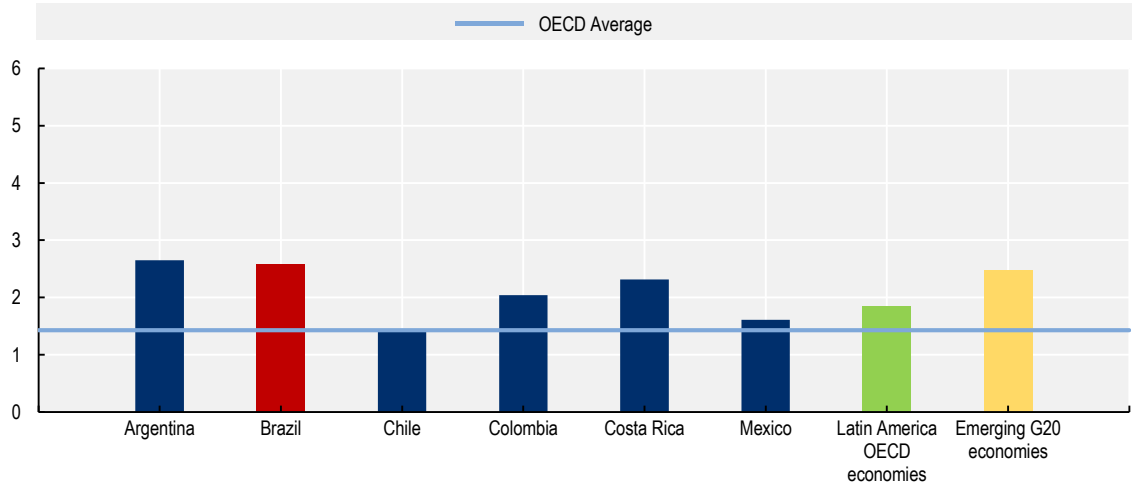
Brazil's regulatory framework is changing rapidly, and recent developments in the areas covered by the economy-wide PMR indicator reflect some of these changes. Privatisations have reduced public ownership in key sectors. At the same time, Brazil has seen the introduction of new measures to assess the impact of proposed new regulations, lessen the administrative burdens on start-ups, reduce barriers in service

and network sectors, and relax barriers to trade and investments. These changes have occurred since the 2018 PMR indicators were calculated, hence these values provide a partial picture of the regulatory environment. To provide a more complete snapshot of the country's regulatory framework, the next pages provide an analysis of the 2018 results integrated with information on more recent reforms.

The values of the 2018 economy-wide PMR indicator suggest that the regulatory framework currently in place in Brazil is considerably less competition friendly than those reflecting international best practice in many domains and sectors. Indeed, Brazil's PMR indicator values often compare unfavourably with the OECD average, and at times markedly so. They also compare unfavourably with the average PMR values for Latin American OECD economies – some of which have values for their PMR indicators close to or, in some cases, even better than the OECD average (Vitale et al., 2020[17]). By contrast, Brazil's economy-wide PMR indicators are broadly in line with those of G20 emerging economies (Figure 1.5). Recent reforms are likely to improve Brazil's results, but not in a substantial manner. However, these reforms may be paving the way for more substantial changes that could bring Brazil in line with OECD economies.

Figure 1.5. Results for the economy-wide PMR indicator, 2018

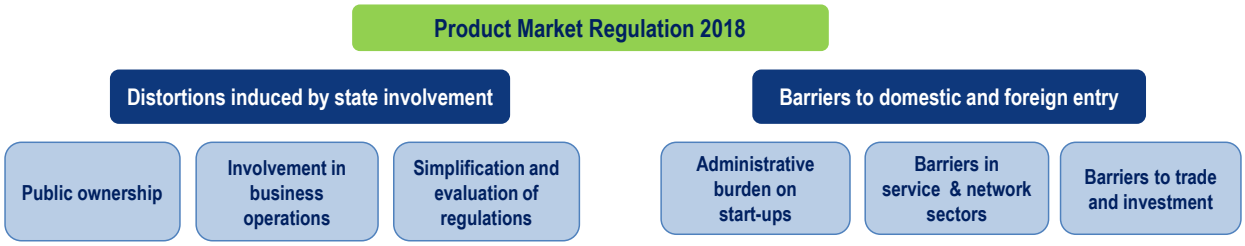
Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

The result for the economy-wide PMR indicator is the average of the values of the high-level indicator of *Distortions Induced by State Involvement*, and the high-level indicator on *Barriers to Domestic and Foreign Entry* (Figure 1.6). Sections Results for the economy-wide PMR indicator and Results for barriers to domestic and foreign entry below discuss the results of these two high level indicators separately.

Figure 1.6. High-level indicators within the economy-wide PMR



Source: (Vitale et al., 2020[17]).

Results for distortions induced by state involvement

This high-level indicator capturing potential sources of barriers to competition that may arise from state involvement in the economy.

In 2018 Brazil's result for this high-level indicator was relatively high when compared with the OECD average. It also compared unfavourably with the average of OECD Latin American economies, even if it was broadly in line with those of the average of G20 emerging economies. Recent reforms are likely to improve Brazil's performance in this indicator to a limited extent.

These include:

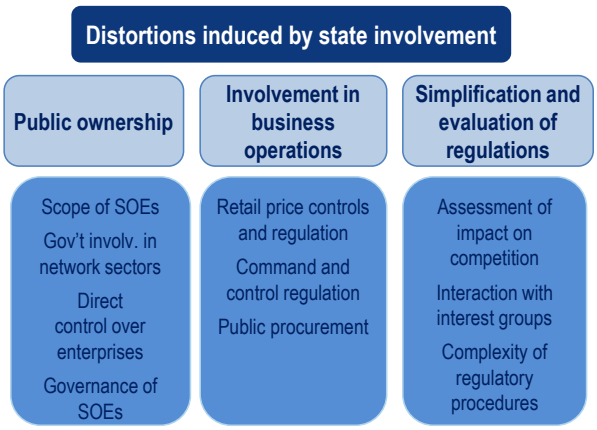
- Recent and ongoing privatisation in some sectors, including notably the electricity and gas sectors.
- A recent law reducing the scope for political appointments to SOEs.
- A public procurement law, which is currently being rolled out, that should improve the design of public tenders and facilitate participation by domestic and foreign bidders.
- Ongoing efforts to reduce the complexity of regulatory procedures.
- Steps towards a systematic requirement for *ex ante* regulatory impact assessment when new laws and regulations have to be introduced.

Reforms, however, address only partially the weaknesses the country shows in the areas of public ownership and involvement in business operations. Despite privatisation efforts, Brazil still reflects significant state ownership, and the corporate governance of SOEs lags behind international best practice. The country has made some inroads towards alleviating retail price controls and regulation, but high level of retail price controls relative to the OECD persists in the economy. Public procurement remains an area of attention despite a new public procurement law, with room for further improvements to, for example, increase the use of e-procurement. In addition, Brazil can go further to reduce compliance costs and administrative burdens on enterprises and to ensure clear communication of laws and regulation.

Similarly, efforts to simplify and better evaluate regulations have thus far remained limited. Discussed in greater detail in Chapter 4, requirements to assess of the impact of new laws and regulations remain limited to subordinate regulations issued by a subset of regulators. In addition, Brazil has limited requirements for authorities to engage stakeholders in the development of new laws and regulations. Finally, the country lacks a comprehensive framework on the interaction between public officials and interest groups in the regulatory and legislative process, and very little guidance on how to deal with conflict of interests concerning public officials.

The next sub-sections discuss Brazil's result in each of the 10 low-level indicators included in *Distortions Induced by State Involvement* (Figure 1.7), highlighting the improvements made since 2018, but also the remaining weaknesses.

Figure 1.7. Low-level indicators under the high-level distortions induced by state involvement indicator



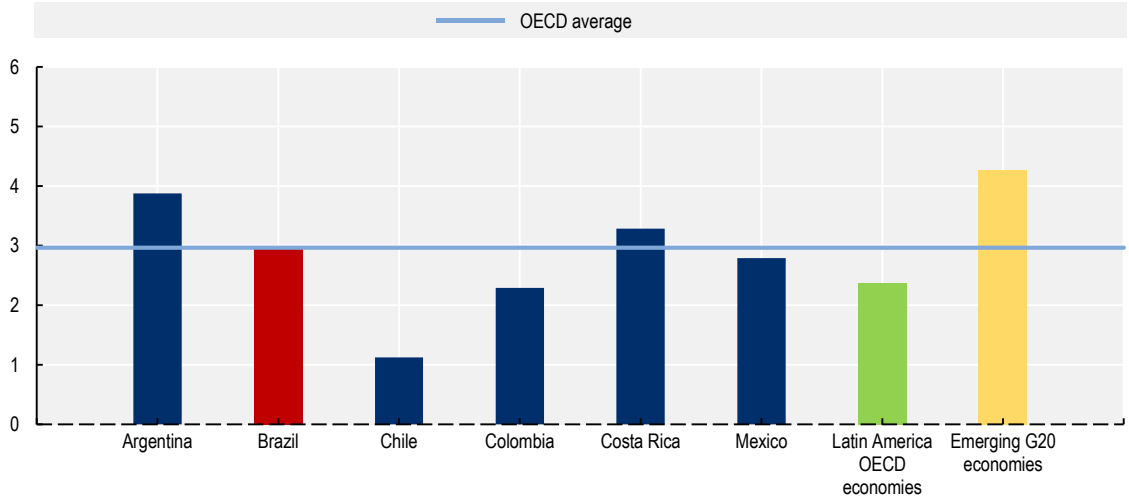
Source: (Vitale et al., 2020[17]).

Scope of SOEs

According to data collected through the 2018 PMR questionnaire, the value of the sub-indicator ***Scope of SOEs*** reflects extensive state presence across many sectors of the economy. However, it is not much higher than the OECD average and compares favourably with its G20 peers (Figure 1.8).

Figure 1.8. PMR low-level indicator: Scope of SOEs, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

Recent ongoing privatisation in some sectors may slightly improve Brazil's performance in this area, but Brazil still has 155 directly and indirectly owned SOEs across a wide range of economic activities (Federal Government of Brazil, 2022[19]). While it might be justified for a country to retain a certain level of participation in specific, more strategic, sectors, this indicator shows that there may be room for further reducing the presence of SOEs in others.

As discussed below, reforms that took place since 2018 mean that Brazil's state ownership has declined to some extent compared to what is measured in the 2018 PMR indicators portrayed above. Following the announcement of a privatisation package, some subsidiaries of SOEs were sold to private investors during 2019 and BNDESPar, the private equity arm of the national development bank BNDES, reduced its participation in several companies. Privatisation of Eletrobras will likely continue to reduce state presence in the electricity segments, as will Petrobras divestments in the transmission and distribution segments of the gas sector. Further privatisations of smaller SOEs are planned, but the political consensus for privatising key public enterprises, such as large public banks, which would require congressional approval, appears limited (OECD, 2020, p. 71[4]).

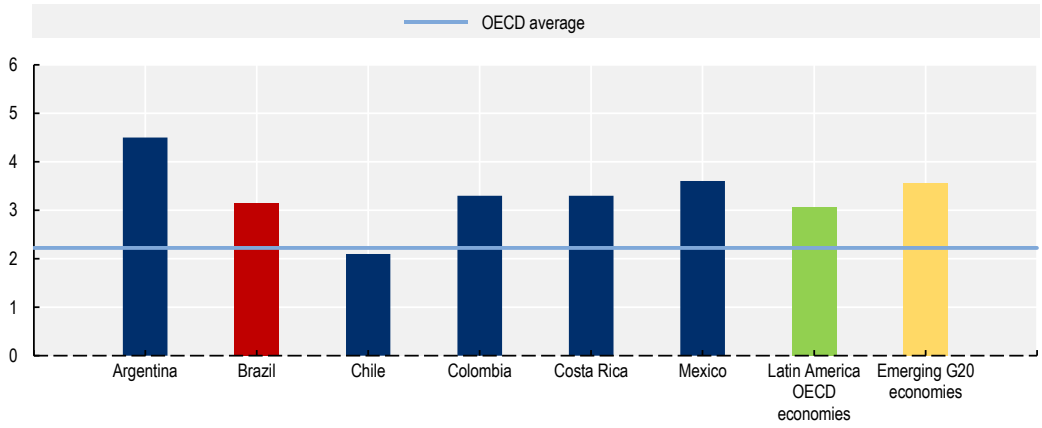
Governance of SOEs

State ownership of firms is not necessarily a concern *per se*. However, Brazil's public enterprises are bound by stringent budget rules and lack the flexibility to adapt to changing market conditions that private companies could have. Moreover, while the 2016 SOE law[12] reduced the scope for political appointments, the context has not otherwise changed. At the subnational level, political parties have maintained strong influence over local SOEs (OECD, 2020, p. 71[4]). Further, competition could be distorted and allocative efficiency weakened because SOEs are exempt from some of the rules that apply to private companies, e.g. SOEs are exempt from insolvency procedures. Hence, it is crucial that the framework governing SOEs guarantees that these firms compete on a level playing field with privately owned firms, i.e. that it ensures competitive neutrality among SOEs and privately owned firms.

Indeed, in the low-level indicator that measures the quality of the ***Governance of SOEs***, Brazil scores compare very unfavourably with the OECD average; as well with the OECD Latin American average. However, Brazil fares better than the average of G20 emerging economies (Figure 1.9).

Figure 1.9. PMR low-level indicator: Governance of SOEs, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

This comparison shows there is room to improve the SOEs' governance rules and to align them and their implementation to OECD best practices, as presented in the *2015 OECD Corporate Governance Guidelines* (OECD, 2015[1]).

In Brazil, the ownership rights of the federal government over SOEs are exercised concurrently by the Ministry of the Economy and the line ministries responsible for individual SOEs.[13] Both are represented on SOE boards of directors. In cases where the Ministry of the Economy exercises sole ownership rights (the case in financial SOEs), it typically has the authority to nominate individuals to all board and fiscal council seats that the Federal Government has the right to fill. Where ownership is shared with a line ministry, the Ministry of Economy typically appoints one member of the board of directors and one member of the fiscal council, and the line ministry nominates all the other members of the board of directors that the federal government has the right to elect (OECD, 2020, p. 39[2]). This means that even in the cases where boards of SOEs select their CEOs, public authorities are heavily involved given their heavy presence in the boards.[14]

In addition, ownership rights over SOEs are often exercised by the same body that regulates the sector in which the SOE operates – since the line ministries overseeing SOEs play a role in both policy formulation and ownership. While some ministries have departments or teams dedicated to exercising ownership on behalf of the state, there is no clear separation between public officials responsible for ownership functions and others responsible for sectorial public policies (OECD, 2020, p. 104[2]). Further, in Brazil, the government does not set clear financial and public policy targets for SOEs. There is only a statutory requirement for SOEs to report *ex post* the costs implementing public policies.

Other weaknesses in the governance of SOEs, in Brazil, include the fact SOEs are subject to different sets of rules when compared to private enterprises. First, as already mentioned above, Ministers responsible for the supervision of a SOE can directly appoint senior executives, including the CEO. Likewise, in the specific case of Banco do Brasil, Law No. 4.595/1964 (article 21) states that the CEO of the bank should be appointed by the President of the Republic. Second, SOEs are excluded from procedures of insolvency or bankruptcy of private companies (Law No. 11.101/2005). Instead, SOEs that are not financially sustainable can face three scenarios: becoming dependent on the public purse, being privatised or being liquidated.

Brazil could seek to adopt policies that promote a level playing field between state-owned and private companies, and limit political interference in the management of SOEs. In so doing, Brazil could draw inspiration from recent OECD work on the corporate governance of SOEs in Brazil (Box 1.2).

Box 1.2. OECD Review of the Corporate Governance of State-Owned Enterprises in Brazil and its recommendations

The Brazilian authorities have taken some steps to improve the corporate governance in the SOE sector, including the establishment of the Inter-ministerial Commission on Corporate Governance and Management of Equity Interests of the Union (CGPAR), the introduction of the Corporate Governance Code in 2015 and, notably, the issuance of the 'SOE Statute' (Law No. 13.303/2016) and its implementing regulation.[1] Despite these improvements, concerns remain about the potential use of SOEs for political purposes. This is especially relevant considering the role of political influence over such companies. Board members and CEOs are appointed to SOEs by the Executive Branch without a structured process to select nominees, leading to suspicions of political patronage even after the SOE Statute introduced appointment criteria to reduce such risks.

The 2020 *OECD Review of the Corporate Governance of State-Owned Enterprises in Brazil* provides a number of recommendations, including:

- Reduce the dispersion of decision-making power among many different ownership public entities, and develop a single formal public ownership policy for SOEs.
- The President of the Republic and his ministers should refrain from intervening in the management of SOEs and define their objectives in a transparent manner.
- Strengthen boards of directors in SOEs by preventing conflicts of interest in all committees to the board and to the fiscal council, improving appointment procedures for board directors, and empowering boards to appoint their CEO.
- All relevant Brazilian public authorities and SOEs' senior leadership should ensure the implementation of the SOE Statute by correcting rules and practices that are not compliant with it and its regulatory decree.
- Enhance the professionalisation and independence of corporate officers.

These recommendations, if implemented, would improve the corporate governance of these firms and ensure fairer competition between state-owned and privately owned firms.

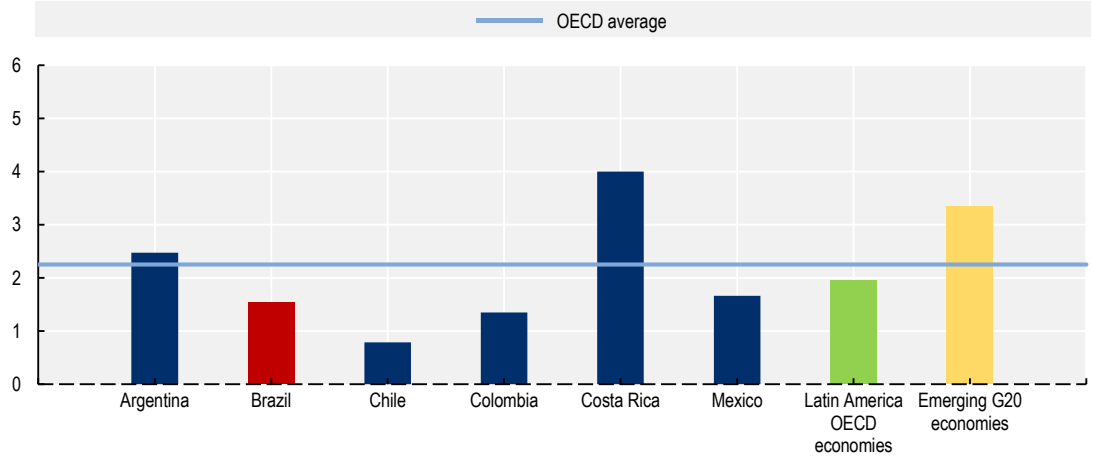
1. It should be noted that these reforms, while very positive, would not affect Brazil's performance in the PMR low-level indicator on the Governance of SOEs.
Source: (OECD, 2020[2]).

Government involvement in network sectors

Brazil fares better than both the OECD and OECD Latin American average in the indicator on ***Government Involvement in Network Sectors*** (Figure 1.10), which measures the size of the government's stake in the largest firm in key network sectors. This score is the result of the largest players in some network sectors being privately owned, and of the government having smaller equity stakes in incumbents than in many of those countries. Recent divestments of Petrobras' assets in the gas sector further enhance Brazil's performance in this indicator, and additional progress is expected as a result of the ongoing privatisation of Eletrobras in the electricity sector.

Figure 1.10. PMR low-level indicator: Government Involvement in Network Sectors, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



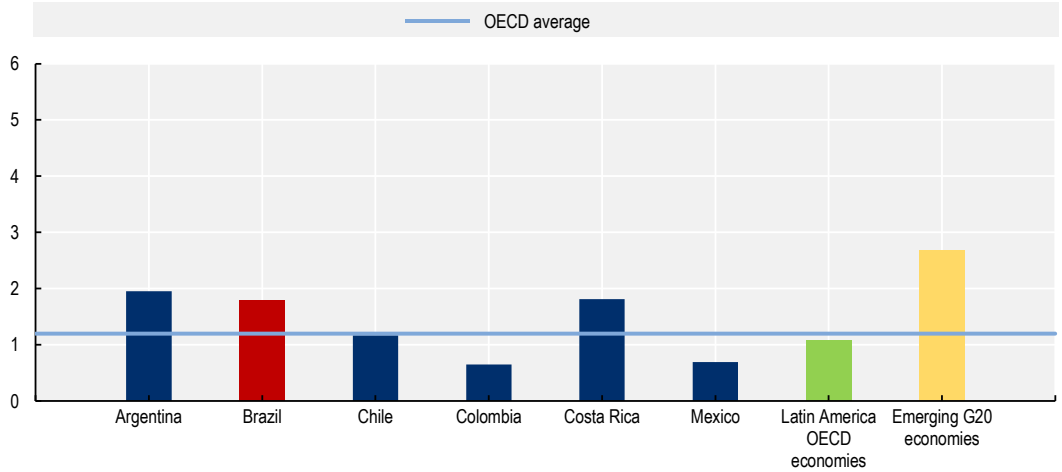
Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

Direct control over enterprises

The indicator of ***Direct Control over Enterprises*** measures the existence of special voting rights held by the government and of constraints to privatisation of its shares. In this indicator (Figure 1.11), Brazil's PMR indicator compares unfavourably with the OECD average and the OECD Latin American average, reflecting a higher level of government clout over SOEs. However, Brazil scores better than the average of G20 emerging economies.

Figure 1.11. PMR low-level indicator: Direct Control over Enterprises, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

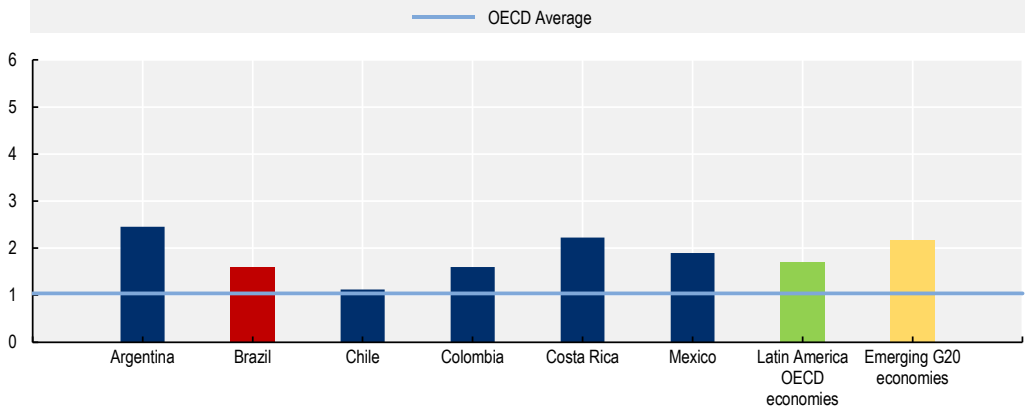
This score is mainly driven by the presence of constraints on privatisations in networks sectors, such as energy and transport (e.g. rail freight transport, airport and port operations, urban/suburban passenger transport, etc.), and in other sectors such as finance, motion picture production and distribution, building and repairing of ships and boats, the manufacture of chemicals and computer products. According to the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, constraints on the sale of SOEs should be kept only in strategic sectors, while for all other SOEs the decision should be left to the board (OECD, 2015[1]). Recent decisions to privatise many SOEs have made this issue less pressing.

Retail price controls and regulation

The indicator of ***Retail Price Controls and Regulation*** captures the extent and type of controls and regulations imposed on retail prices in key network and services sectors. While retail price controls are more widespread in Brazil than in the average OECD country, they are less common than in other Latin American countries and G20 peers (Figure 1.12). Despite this, prices are still regulated in several sectors, including for the services provided by notaries, architects, and engineers, for some non-prescription medicines and in a number of network sectors. This is a matter addressed in more details in section Barriers to entry and competition in the service sectors and in the network sectors below. Addressing these practices would avoid market distortions and ensure that consumers enjoy the benefits of price competition.

Figure 1.12. PMR low-level indicator: retail price controls and regulation, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



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Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

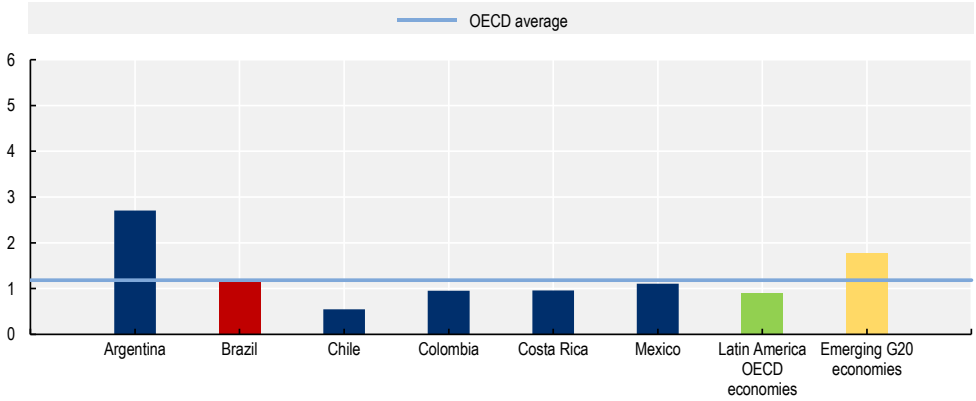
It should be noted that Brazil has made some advances in this area since 2018. Notably, retail fares for long-distance domestic passenger transport services by coach are no longer regulated or approved by the government. In addition, regulation of prices for lawyers' services has been replaced with non-binding prices recommended by the professional association (discussed in greater detail in a. Insights from PMR sector indicators: services sectors).

Command and control regulation

Brazil's score in the indicator on ***Command and Control Regulation***, which measures the use of coercive rather than incentive-based regulation in both network sectors and service sectors, is close to the OECD average, and a little better than the OECD Latin American average and the average of G20s emerging economies (Figure 1.13). Brazil could score better if the regulation of some professions was more competition–friendly, a matter addressed in more detail in a. Insights from PMR sector indicators: services sectors.

Figure 1.13. PMR low-level indicator: Command and Control Regulation, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



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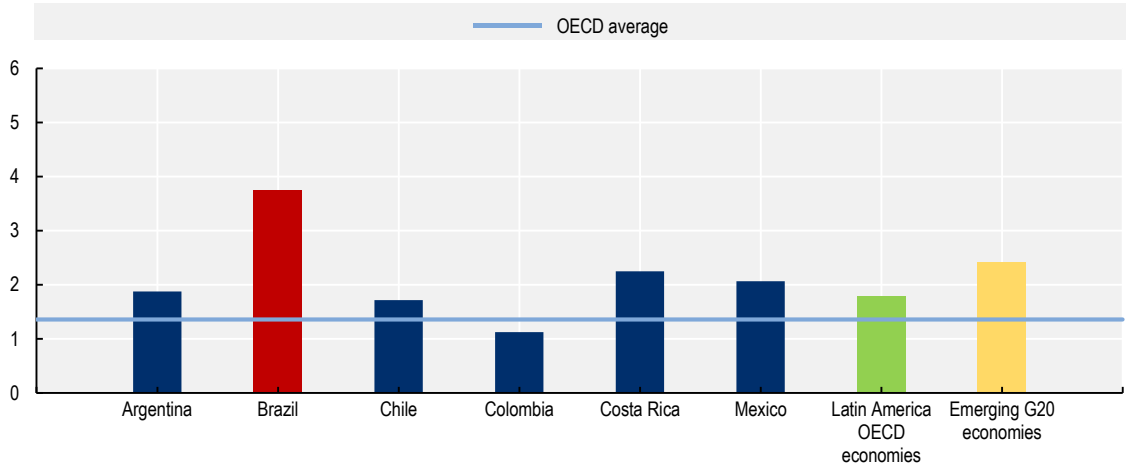
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

Public procurement

The 2018 result for the indicator on the ***public procurement*** of goods, services and public works suggests that the rules in this area are not designed in a way that tries to guarantee that all firms compete on a level playing field. Brazil has a noticeably less competition-friendly public procurement framework than the average OECD economy.[15] Brazil's score also compares unfavourably with the OECD Latin American average and the average of the G20 emerging economies (Figure 1.14). Improvements could include, for example, measures to ensure that Brazil's regulatory framework for public procurement – both for the procurement of goods and services and for public works – further facilitate participation by bidders and foster competition. It currently it does not stipulate that entry requirements should be proportional to the size or value of the tender, and it does not require that deadlines for submitting bids are proportionate to the size or complexity of the tender. Furthermore, there is no requirement for tender documents to be published online, nor to set up systems so that bids can be submitted online.

Figure 1.14. PMR low-level indicator: public procurement, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



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Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

However, significant developments have been taking place since 2018. Most notably, a new federal procurement law was adopted in April 2021, which consolidates the fragmented legal framework in Brazil, but will not be fully applicable until 1 April 2023.[16] Since July 2020, all federal authorities must prepare a preliminary technical study (*estudo técnico preliminar, ETP*) when planning procurement of goods, services and works. An electronic repository of public procurement purchases was created in 2018 that can serve for price comparisons at present,[17] but it could be converted into a more comprehensive, centralised e-procurement for public purchases in the future (OECD, 2021, p. 69[3]). This will not only allow for bidders in many public tenders to register online, but it will also assist in the standardisation of public procurement procedures. In addition, the requirement for foreign bidders to have a legal representative in Brazil, and the need for certified translations of foreign language documents, have both been abolished.[18] Brazil is also in the process of joining the World Trade Organization Government Procurement Agreement (OECD, 2020, p. 70[4]).

These efforts were recognised in the OECD's 2020 Economic Survey of Brazil, which acknowledged that public procurement procedures for the acquisition of goods and contracting of common services – and particularly electronic auctions, which have increased from 22% to 45% of all federal level procurement from 2017 to 2019 – improved in the last couple of years (OECD, 2020, p. 49[4]). However, further efforts to make federal procurement more competitive are of the essence (OECD, 2021[3]). Recent OECD work has highlighted a number of ways through which this could be achieved (Box 1.3).

Box 1.3. OECD recommendations to strengthen public procurement in Brazil

The 2021 OECD report *Fighting bid rigging in Brazil: A review of federal public procurement* made a number of recommendations to Brazil on how to better prevent and detect bid rigging in public procurement in line with the OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement. The recommendations, which take into account the changes introduced by the new law, include:

- *Designing procurement procedures based upon appropriate information.* While ETPs (preliminary technical studies) are now mandatory for all federal entities, "market surveys" are merely one possible element of an ETP and are not mandatory. It is particularly important to develop such market investigation practices prior to designing procurement exercises. This could be achieved by mandating a market survey in preliminary technical studies for all procurement processes (possibly with the exception of low-value repetitive tenders for which market research has recently been conducted).[1]
- *Maximising participation of genuine competing bidders*. Currently direct awards are used far too often – even if their use has decreased from 75% of all bids in 2017 to 54% in 2019. The circumstances where such procedures can be relied upon should be tightened, since they can represent a way to favour specific firms and thwart competition. In addition, Brazil should take practical steps to facilitate the participation of more players in public bids. This would involve, for example, developing standard mandatory templates for all types of procurement and all stages of the process (planning, tender phase and execution of the contract) to make participation requirements clearer and more predictable for bidders. All entities involved in overviewing procurement should co-operate in this. The provisions of the new law partially address this, as they require the establishment of certain template documents, like terms of reference and standardised contracts
- *Increasing participation by foreign bidders.* Brazil could study options to relax rules on tendering by international companies and allow independent participation of foreign companies – rather than as part of a consortium.
- *Increasing the use of e-procurement*. Brazil should require procurement bodies to systematically publish all tender documents and receiving bids online at all levels of government, and limit the exceptions to the use of e-procurement to those cases where submission of physical samples are necessary. The new law establishes that e-procurement should be privileged over in-person proceedings and creates a Public Contracting National Portal (*Portal Nacional de Contratações Públicas*, PNCP), though it stops short of imposing an obligation to always rely on e-procurement.
- *Avoiding practices that reduce competition on prices*. Brazil should abandon the current practice of providing a reference price in the tender documentation for goods and services or for public works. Improvements in this area are not only relevant for strengthening competition, but also for reducing the scope for corruption and collusion in public procurement.

- *Recognising and enhancing the essential role of public-procurement officials in the fight against bid rigging*. Hence, the public procurement workforce's employment conditions and level of professionalisation should be improved, including through training and capacity building. The new law introduces new measures to lessen excessive exposure to penalties for public procurement officials mis-applying public procurement rules, including for "non-intentional acts that do not involve private gain".
- *Paying attention to transparency, disclosure and integrity*. Rules pertaining to conflicts of interests, incompatibilities and impartiality in public procurement could be streamlined and strengthened. Building on recent progress with unified electronic procurement platforms can enhance transparency and reduce the scope for economic crimes.
- *Detecting and punishing collusive agreements.* Brazil should be vigilant about the competitive or anti-competitive nature of joint bidding and some sub-contracting practices that might hide collusive agreements. Brazil should also encourage public-procurement officials to report any suspicion of bid rigging to the relevant authorities before annulling the procurement process or starting an inquiry on the tender.

These recommendations, if implemented, would improve how public procurement exercises are run and support authorities in obtaining better value from money.

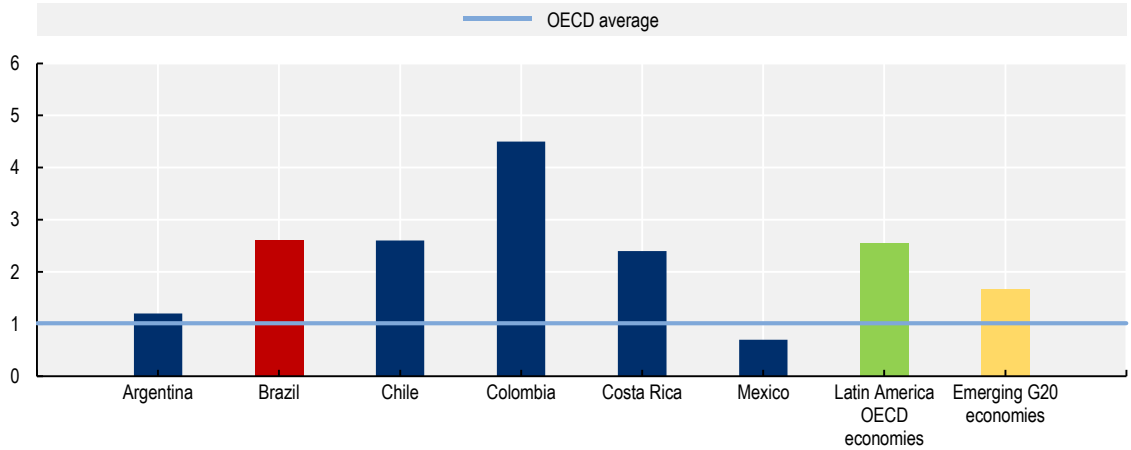
1. Such as Regulatory Instruction No. 5/2014 on price research and Regulatory Instruction No. 40/2020 on market surveys.
Source: (OECD, 2021[3]).

Complexity of regulatory procedures

Brazil has a fairly high score in the indicator that measures the ***complexity of regulatory procedures*** (Figure 1.15), as a result Brazil's score compares very unfavourably with the OECD average, that of its G20 peers, as well as with some OECD Latin American economies. However, numerous positive changes are ongoing and may improve the country's performance in this area.

Figure 1.15. PMR low-level indicator: complexity of regulatory procedures, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.

Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

While there is a database of primary regulations in place, Brazil is still rolling out a database of subordinate instruments, as of the time of writing, under the auspices of the "Codex Project," introduced by Ordinance of the General Secretariat of the Presidency of the Republic No. 48/2020. Also, when the data were collected in 2018 Brazil's government did not publish online lists of primary laws or subordinate regulation that are to be prepared, modified, reformed or repealed in the next six months or more. However, a reform introduced in 2019[19] partially addresses this gap and requires regulatory agencies to make public their regulatory agenda. Further, while Brazil has a program to reduce the compliance costs and administrative burdens imposed by the national government on enterprises, this program is limited by the fact that it does not involve costs assessments of existing regulations, or the systematic *ex post* review of such instruments.

Since 2018, Brazil has continued rolling out new technologies for regulatory administration (e-government). Over 1 000 government services across all areas can now be delivered online (OECD, 2020, p. 67[4]). This builds on measures to reduce notarization and certified copy requirements in the relations between citizens and the public administration.[20] Recently, measures to digitise signatures and company documents when opening a company have been adopted (OECD, 2020, p. 68[4]).

Despite there being no systematic *ex post* requirement to review existing regulation,[21] recent efforts to take stock of the complexity of current regulations have led to a review of over 3 700 pieces of legislation, of which 3,300 were revoked in February 2020. Brazil should continue to build on these efforts with a view towards identifying further scope for easing and simplification of the administrative burden on firms. (OECD, 2020, p. 68[4]). One such option is conducting competition assessments of specific sectors to identify and remove unnecessary regulations in order to foster a more competitive environment (see the discussion in b. Insights from PMR sector indicators: network sectors below).

Assessment of impact on competition

In 2018, there was considerable scope for improving the regulatory regime for assessing the impact of new and existing regulations on competition. However, Brazil has made improvements in this area.

A main reason for the poor performance in 2018 was the absence of requirements for public authorities to pursue regulatory impact assessments (RIAs) systematically, but this is beginning to change. In 2019, RIAs became mandatory for eleven regulatory agencies[22] under the Law of Regulatory Agencies (Law 13 484/2019) and for the rest of the federal administration with the approval of the Law of Economic Freedom (Law 13 874/2019). It is worth highlighting that these requirements concern subordinate regulations and do not apply to primary laws. In addition, the publication of new written guidance to support the preparation of RIAs has also helped Brazil to support the use of this regulatory tool in line with international best practices. A detailed assessment of Brazil's performance in this area is presented in Chapter 4.

A bright area, which was reflected already in the 2018 results, concerns competition advocacy. The competition authority (*CADE*) is an independent body with powers to advocate for competition, and it can perform market studies, which can be a powerful tool to foster competition.[23] However, the government is not required to publicly respond to the recommendations emerging from these studies, neither by stating if and how it will implement them nor, if it decides not accept them, by justifying such a decision. This can reduce the impact that these recommendations can have in terms of removing barriers to competition that fall outside the traditional scope of antitrust law and weaken the competition advocacy role of CADE.

Interaction with interest groups

This indicator also shows margin for improvement, as in 2018 Brazil's indicator value pointed to a large gap with OECD countries' practices and to a smaller gap with G20 emerging economies.

This indicator looks at two related, yet distinct topics. The first concerns the involvement of stakeholders in the design of new policy interventions. In this area, Brazil lacks good-practice arrangements to involve stakeholders in policy processes. Notably, Brazil lacks requirements for stakeholder engagement in developing primary laws and subordinate regulations, it does not provide written guidance on how to conduct stakeholder engagement, and it does not require that regulators formally consider comments received during stakeholder consultation. Finally, there are no mechanisms in place in the country for the public to provide input or dispute existing laws and regulations on an ongoing basis. Progress since 2018 has affected eleven regulatory agencies;[24] in 2019 Brazil adopted a law that provides for the participation of stakeholders in the design of new regulations by these agencies.[25] Stakeholder engagement is discussed in greater detail in Chapter 4.

The second area concerns the regulation of the interaction between interest groups and public officials involved in the elaboration, modification, or repeal of laws, regulations, and other policies, plans and programmes, to ensure that the process is transparent. In this latter area Brazil has made some small improvements, as a 2021 decree requires the proactive publication of the agenda of certain officials in the executive branch.[26] However, Brazil still lacks a comprehensive legal framework regulating the legitimate interaction between public officials and interest groups. This regulatory gap raises the risk of private interests being advanced in an opaque and non-transparent fashion (for more information about transparency and integrity in interactions with lobbyists, see Box 1.4). A draft law[27] may fill this gap.

Brazil should also consider extending the rules concerning conflict of interests and cooling-off periods after leaving office to all public official, including members of legislative bodies. The movement of individuals between the public and private sectors – known as the revolving door – may lead to conflict of interest situations, increasing the risks of corruption. Given their decision-making power, access to key information and influence, former ministers and members of the government can be an important asset for private companies. It is considered good practice to have measures in place to avoid former public officials misusing the information and power they hold to the benefit of private interests.

Box 1.4. Transparency and integrity in lobbying in Brazil

The *OECD Recommendation on Principles for Transparency and Integrity in Lobbying* were the first international guidelines for governments to address transparency and integrity risks related to lobbying practices. The principles for transparency and integrity in lobbying set out in the OECD Recommendations are organised around four pillars: i) building an effective and fair framework for openness and access; ii) enhancing transparency; iii) fostering a culture of integrity; and iv) adopting mechanisms for effective implementation, compliance and review.[1]

In 2021, the OECD Council released a report on the implementation of this Recommendation across a number of countries including Brazil, despite the country not having adhered to the Recommendation. This report noted that:

- Brazil does not have any transparency requirements – i.e. no type of decision-maker (ministers and/or members of their cabinet, members of legislative bodies, appointed public officials (e.g. political advisors), or any type of civil servant) is under a duty to disclose any contacts it may have concerning any type of public decision (primary legislation, government regulation, policy, programme or decision, and contract, grant, funding or any other type of award). Following the introduction of Decree 10.889/2021, some categories of officials are now required to publish their agenda.
- Brazil has no regulation covering any type of lobbying, not even non-binding rules such as codes of conduct. Brazil also has no disclosure requirements for lobbying activities.

- Infractions related to the financing of political parties and election campaigns are sanctioned with fines, loss of funding, and loss of official and party offices, but not with prison.
- Regulation in other LAC countries is referred to in order to provide examples Brazil could consider when assessing possible reforms:
- **Chile** has an act regulating lobbying and representations of private interests to authorities and civil servants. Lobbyists are subject to a Code of Good Practice for Lobbyists, which requires them to abide by the principles of honesty and integrity, transparency, professionalism, and compatibility of private and public interests. The country subjects all senior decision-makers to transparency requirements regarding all types of public decisions mentioned above. In particular, members of the Executive, the Legislature, regional and local authorities, judicature, senior members of the policy and army and various senior civil servants such as Central Bank Members and the Comptroller General, are subject to disclosure in their contacts with stakeholders that may have an interest regarding the elaboration, enactment, modification, repeal or rejection of laws, administrative acts, public contracts and other policies, plans and programmes. Lobbied public officials and administrations have a duty to register, in a public registry, hearings and meetings with lobbyists, as well as donations and trips. Public administrations also have a duty to maintain a public register of lobbyists and interest representatives. Political finance infractions are sanctioned with prison and fine, and deregistration from political parties.
- **Colombia** has rules concerning conflicts of interest and imposes cooling-off periods for public officials. It sanctions political financing infractions with prison, fines, loss of public funding, forfeiture, party deregistration and loss of office.
- **Costa Rica** sanctions political financing infractions solely with prison and fines, and has rules concerning conflicts of interest. However, it does not have any rules governing the interaction with public officials in the regulatory process of interest groups, nor does it have cooling-off periods. Further, while it has requirements to conduct stakeholder engagement, Costa Rica does not regulate how this is to take place.
- **Mexico** subjects the members of its legislative bodies (in particular management bodies and committees of the Senate or the Chamber of Deputies, or senators or deputies contacted individually or jointly) to transparency requirements, and regulates lobbying of the legislature. In particular, all lobbyist must be registered together with their interests. Mexico also has conflict of interest rules in place for all types of senior public decision-makers, including cooling-off periods. Finance party infractions are sanctioned with fines, deregistration from political parties and loss of ability to run for office.
- **Peru** subjects all "Officials with public decision-making capacity" (i.e. members of the Executive, legislature, judicature, local authorities, members of SOE boards and certain civil servants with decision-making powers) to act transparently regarding any contact that may influence public decision that has an economic, social or political significance of an individual or collective nature, or that affects interests in the various sectors of society. Peru also has an act regulating lobbying. Public officials must only meet lobbyists in their institutional headquarters and must register all their visits. Political financing infractions can lead to prison, fines, loss of public funding and loss of possibility to run for office.

1. OECD Principles for Transparency and Integrity in Lobbying OECD/LEGAL/0379.
Source: (OECD, 2010[20]); (OECD, 2021[21]).

Results for barriers to domestic and foreign entry

This high-level indicator captures potential regulatory barriers to the entry and expansion of domestic and foreign firms.

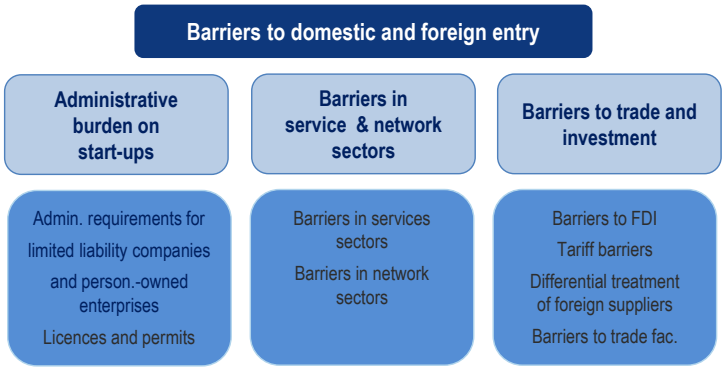
In 2018, Brazil's PMR score in this high-level indicator showed that its regulatory framework in this area was less competition friendly than the OECD average and the OECD Latin American average, though Brazil's score was broadly in line with that of G20 emerging economies. However, recent reforms are likely to improve Brazil's performance in this indicator.

These include:

- Some reductions in administrative burdens on start-ups, such as the removal of a requirement to certificate documents necessary to start limited liability companies and personally-owned enterprises, wider application of the "silence is consent" rule, and the establishment of an online one-stop shop for starting new businesses;
- The easing of barriers to entry in some network sectors. This includes, first, the creation of a secondary market for spectrum. Second, recent reforms have introduced the requirement to vertically separate monopolistic and competitive activities in the gas sector (specifically introducing full ownership separation between the gas transmission operator and all other companies active in other segments of the gas market, a process already well underway, and operational separation between gas generation and import companies from gas distribution companies – see Chapter 7);
- The reduction of barriers to foreign direct investments in air transport, in the insurance sector and in financial institutions;
- The lowering of tariffs on the import of some goods, including a temporary horizontal reduction on a wide swath of products ending in December 2023 and a reduction on many compounds in the chemicals sector through MERCOSUR;
- Some steps to level the playing ground between foreign and domestic firms, namely relaxing the rules limiting the provision of water transport cabotage services and changing the requirement for foreign firms to have legal representatives in-country to bid in public tenders.

Nevertheless, these efforts are not yet sufficient to bring Brazil's regulatory framework in line with that of the average OECD country. In particular, barriers to trade concerning tariffs and trade facilitation remain high. In addition to some of the highest effectively applied import tariffs[28] in terms of value and coverage in the region, various forms of non-tariff barriers, including local content requirements, limit competition by foreign companies (OECD, 2020[4]). Furthermore, some discriminatory restrictions to FDI remain in place. While for barriers to foreign entry in services sectors and in network sectors in some areas, particularly in regulated professions, there is still substantial scope for pro-competition reforms.

Figure 1.16. Low-level indicators under the high-level barriers to domestic and foreign entry indicator



Source: (Vitale et al., 2020[17]).

The next sub-sections discuss Brazil's result in each of the 10 low-level indicators included in *Barriers to domestic and foreign entry* (Figure 1.16), highlighting the improvements made since 2018 but also the remaining weaknesses.

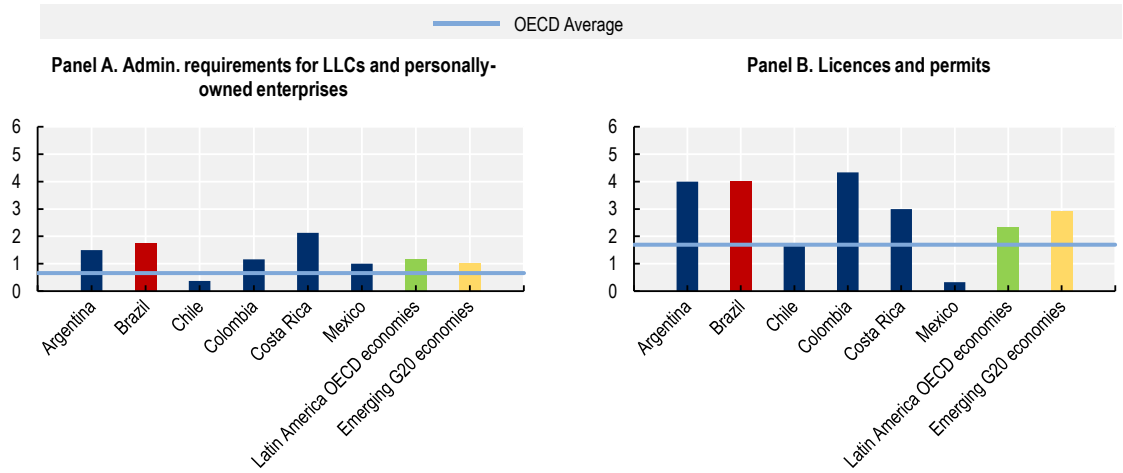
Administrative burden on start-ups

In 2018 Brazil did not score well in the two low-level indicators that measure the administrative burden that new firms must face to start their business (Figure 1.17).

The low-level indicator on ***Administrative requirements for limited liability and personally-owned enterprises*** (Figure 1.17, Panel A) captures the steps a business must take to set up a new enterprise, including the number of bodies to be contacted and the associated compliance costs. On this indicator, Brazil's score indicates that the regulatory settings have to change substantially to align with the OECD average. Brazil's result is also higher than that of the average of OECD Latin American economies and of its G20 peers. Recent reforms aimed at cutting red tape would not improve this result, as they do not reduce substantially neither the number of procedures necessary to set up a new firm, nor the number of bodies that need to be contacted.

Figure 1.17. PMR low-level indicators on measuring the administrative burden on start-ups, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

When it comes to the low-level indicator ***licences and permits***, which measures initiatives aimed at simplifying licensing procedures, recent policy interventions are likely to considerably improve Brazil's performance, which was quite negative in 2018 (as shown in Figure 1.17, Panel B).

Brazil has relaxed some of the administrative requirements to set up a business. In particular it has removed the obligation to notarise or certify documents necessary to start an LLC or a personally-owned enterprise. The naming of a new business has also been made simpler since number of the National Register of Legal Entities (CNPJ) can be used as business name, thereby eliminating the need for the companies and registry authorities to assess whether a firm's proposed name conflicts with those of pre-existing entities. In addition, Brazil has continued to develop e-government tools, discussed further in Complexity of Regulatory Procedures under Section Results for distortions induced by state involvement, some of which make starting a business easier. Despite these small reforms Brazil still lags behind the

OECD average, as well as the average of Latin American OECD economies and the one for G20 emerging economies (see Figure 1.17, Panel A)

Advances in the area of licensing and permitting, instead, have narrowed the gap between Brazil and OECD countries significantly, which was quite high in 2018 (see Figure 1.17, Panel B). The first advance comes in the form of a one-stop shop for information and submission procedures relating to starting a business. Brazil has set up a single portal for collecting the information needed to start a business, under the management of Receita Federal do Brasil, the Brazilian federal revenue service agency and a secretariat of the Ministry of Economy of Brazil. Local authorities must adjust their own rules to comply with these simplifications and implementing regulations to ensure that this happens.[29] The second advance enhanced the scope of application of the silence-is-consent rules.[30] Efforts are underway to apply silence-is-consent rules wherever possible and to add the remaining requirements for starting a business to the one-stop shop.

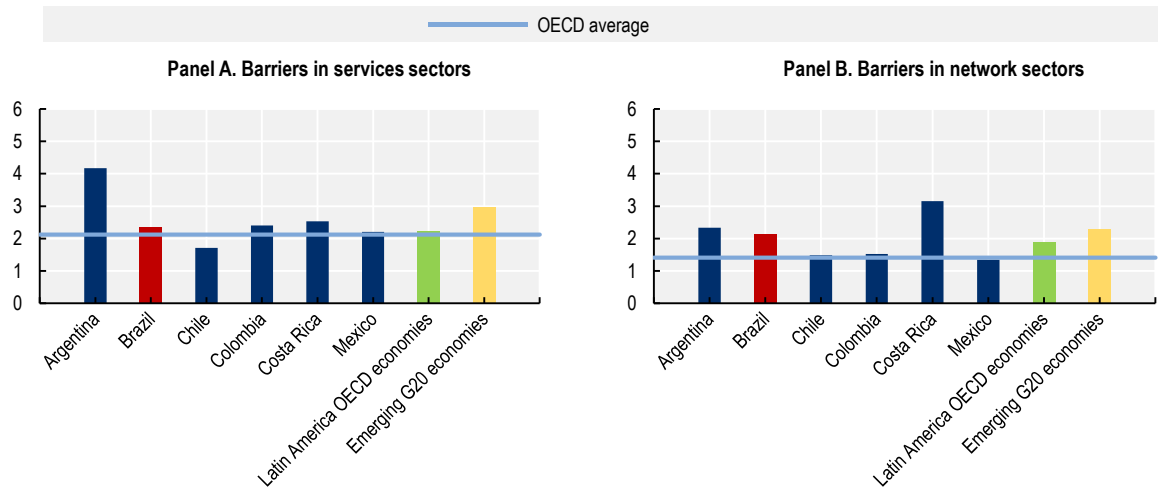
However, there are still opportunities for improvement. For example, Brazil's federal government does not keep a complete count of the number of permits and licences required. This makes it hard to control excessive burdens imposed by lower-level governments, and the lack of a proper assessment of the status quo makes it difficult to implement reforms to reduce such burdens.

Barriers to entry and competition in the service sectors and in the network sectors

In 2018 Brazil's score in the indicator on ***Barriers in services sectors*** was slightly worse than the OECD average, but similar to peer countries (Figure 1.18, Panel A). However, when Brazil is compared with the five best performing OECD countries, it is clear that are still considerable margins for improvement. No reforms have been introduced that could affect these results. Regulatory ***Barriers in networks sectors*** in 2018 were lower compared to those in the services sectors, but higher than in the average OECD country, and higher than in peer G20 economies (Figure 1.18, Panel B). Recent reforms, however, are going in the right direction.

Figure 1.18. PMR low-level indicators: Barriers in service sectors and barriers in network sectors, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

The following sub-sections use the PMR sector indicators to better understand the nature of these barriers to competition.

a. Insights from PMR sector indicators: services sectors

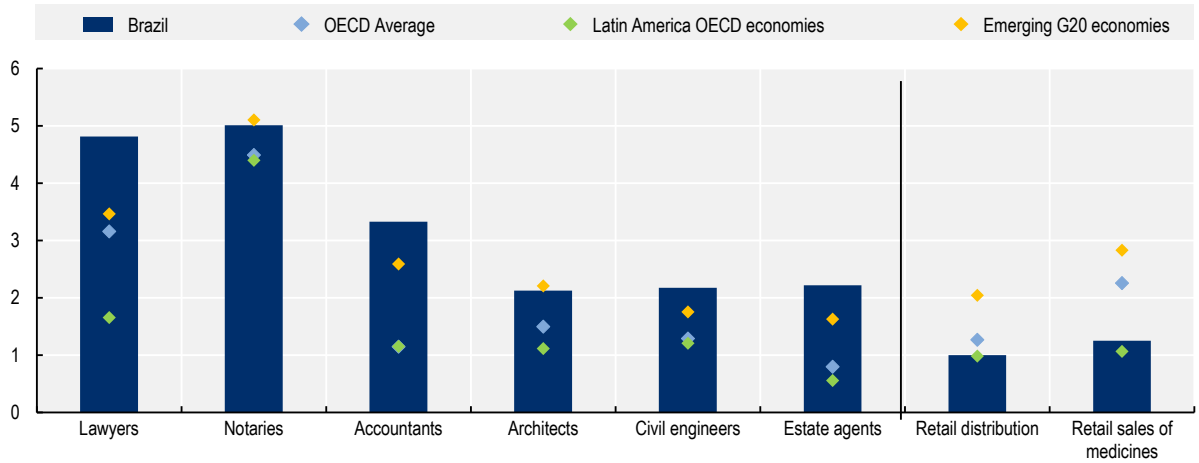
The service sector indicators cover general retail distribution and retail sales of medicines, as well as six professions (accountants, architects, civil engineers, real estate agents, lawyers, and notaries).

Regulatory constraints to retail distribution and the retail sale of medicines in Brazil are lighter than in many OECD countries. As regards the former, owners of retail outlets can decide on shop-opening hours, only registration in a specific register is required, and, in general, there are few constraints to competition, even with respect to online sales. Concerning the retail sale of medicines, there are no restrictions on the number, location and ownership of pharmacies, which are more common in OECD countries. Reforms since 2018 have further liberalised these sectors, e.g. most non-prescription medicines are now exempt from government-mandate price adjustments and prices are freely set in the market.[31]

However, the PMR sector indicators measuring regulatory barriers to competition in the six regulated professions included in the PMR database show rather high scores (Figure 1.19). It should be highlighted that this is an area where also OECD countries could perform better, but the regulatory framework in Brazil appears to be even less competition-friendly than in the average OECD economy, as well as than in the average OECD Latin American economy and, to a lesser extent, than the average of G20 emerging ones.

Figure 1.19. PMR sector indicators: Professional Services and Retail trade, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. The average for Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

These results are due to the presence of constraints on the legal form that professional firms can take and of territorial restrictions to the movement of professionals within the country. In addition, professional associations can restrict the scope for new entry and limit competition by setting minimum or fixed fees for legal, notarial, architectural and engineering services (binding or recommended). Brazil still reserves exclusive rights for certain ancillary tasks to legal, accounting or architectural professionals, although these tasks could also be performed by other professionals (OECD, 2020, p. 68[4]). All six professions can be

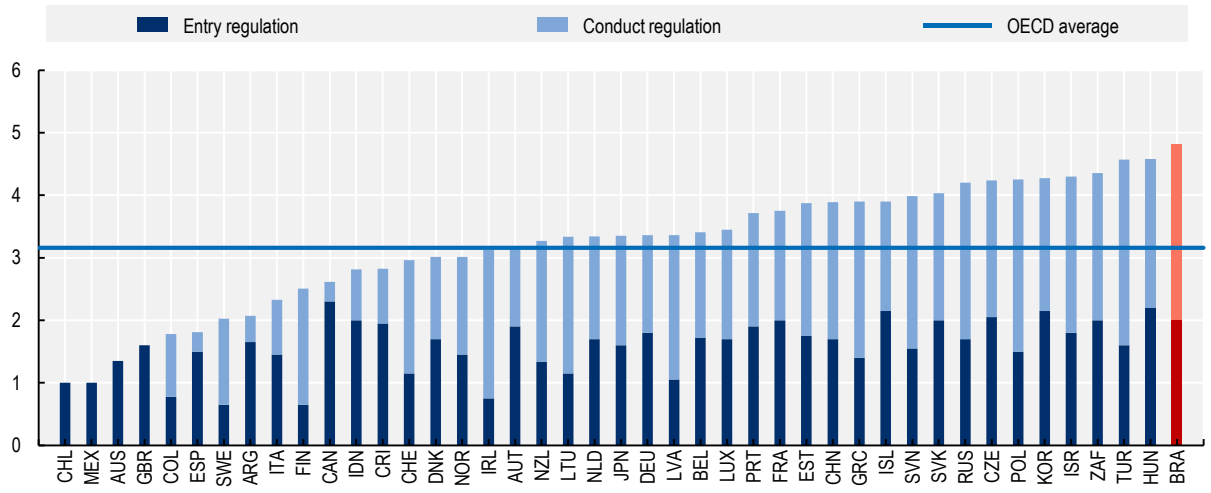
accessed through a single pathway, which for some includes passing an examination run by the professional association. Finally, engineers, lawyers, accountants, architects and real estate agents have to be member of the respective professional associations to be allowed to practice.

Below we discuss more in depth the results for each of the six professions.

Lawyers

A comparison of PMR indicators across individual countries makes it apparent that regulations in Brazil pose higher barriers to entry and conduct into this profession than is observed in OECD countries (Figure 1.20).

Figure 1.20. PMR sector indicator for professional services: Lawyers, 2018



Note: For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica and Estonia, this information refers to 1 January 2019 and for Indonesia and China to 1 January 2020, as these countries provided their answer to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database.

The existence of a single pathway that requires the cumulative requirements to have a university degree, pass an entrance exam and to become a member of the professional association, limits access to the profession.

In addition, Brazil reserves a larger number of services exclusively to lawyers than other countries – including representation before courts, drawing up of legal instruments, and providing advice on international and foreign law (which prevents foreign lawyers from providing services in Brazil). Lawyers also have reserved, though shared, rights to provide advice on a number of matters. These rules are more restrictive than in many other countries.

Brazil also imposes stricter rules on lawyers' conduct including, *inter alia*, restrictions on advertising and marketing and restrictions on business co-operation between lawyers and other professionals. However, the recent liberalisation of lawyers' fees is a positive development.

Until 2018 the fees for lawyers' services were strictly regulated, but soon after the Superior Court of Justice stipulated that the fees for lawyers' services could not be fixed by the professional association, the latter could only issue recommendations on their level. This decision has introduced some competition on prices. However, recommended fees still provide a reference point and could foster tacit collusion. In addition, there is no evidence that consumers are sufficiently well informed about the possibility to negotiate what

they are asked to pay. Hence, this intervention is still not sufficient to introduce real competitive pressures on these fees.

Notaries

The provision of notarial services is very strictly regulated in many countries around the world, where notaries exercise administrative and judicial tasks by virtue of power delegated by the state. The special role notaries play in the legal services market justifies some of these regulatory constraints. However, Brazil has rules that are even less competition friendly than the average OECD and OECD Latin American country – though Brazil fares better than the average G20 peer.

The number of notaries is limited, and notaries are only able to practice in the state where they undertook the professional examination, and cannot move to other states. In addition entry into the profession is also subject to candidates being Brazilian nationals. Fees are strictly regulated and notaries cannot advertise their services.

A few countries have started deregulating the profession, showing that there are margins for introducing greater competition without harming consumers or endangering the proper functioning of the legal system (Vitale et al., 2020[17]). For example, fees have been liberalised in the Netherlands and Italy, geographic restrictions on where to practice have been removed in France, and quantitative restrictions on the number of notaries have been eased or eliminated in France (partially) and in the Netherlands.

Accountants

The value of the PMR sector indicator for this profession compares very poorly with both the OECD average and OECD Latin American average.

Most uncommonly, accountants in Brazil have exclusive rights to provide an extensive number of accounting services. Many OECD countries do not restrict the provision of these services to regulated professions.

Access to the profession is possible only through one single pathway, which involves obtaining a higher education degree followed by a professional certification and passing an examination that is administered by the professional body. Across the OECD, it is unusual for accountants to have access to the profession through a single pathway. Further, it is necessary to be member of a professional organisation to be able to provide accounting services while many OECD countries do not impose such a requirement. In addition, accountants can set up limited liability partnership, but no incorporation is possible and they face limits on their freedom to advertise their services.

Architects and civil engineers

The regulations imposed on both architects and civil engineers are more competition-friendly than those imposed on the other regulated professions in Brazil, but they are significantly more stringent than in the average OECD country.

Access to these professions is possible only through a single pathway, which requires an earlier higher education degree followed by a professional certification. A large number of countries offer alternative paths for entering into each of these professions, thus facilitating entry. In addition, architectural and engineering services can only be provided by members of the relevant professional organisation. Many countries do not require architects and civil engineers to belong to a professional organisations, including Argentina, Chile, Colombia and Mexico in the Americas, the Scandinavian and Baltic countries in Europe, and Japan in Asia.

Architects and civil engineers share with other professionals the exclusive rights to provide a number of services, e.g. preparing and submitting studies to the authorities, design and planning, representation for obtaining permits and submit tenders, construction management, and even interior design. Brazil is unusually restrictive in requiring that so many activities can only be provided by regulated professionals,

while a number of countries, including many European countries[32] and New Zealand, do not restrict access to the provision of these activities.

In addition the fees these professionals can charge for their services are regulated, and only civil engineers/architects can have the majority of ownership and voting rights in engineering/architectural firms.

Real estate agents

Real estate agents face regulation that raises barriers to entry and creates limits on the conduct of professionals that are higher than the OECD average, the average of OECD Latin American countries and, to a lesser extent, the average of G20 emerging economies.

Real estate agents have the exclusive right to perform activities that are not restricted to regulated professionals in many countries, including Chile, Colombia and Costa Rica, such as facilitating contacts between buyers and sellers, showing properties to interested parties and setting up arrangements between them and even drawing up lease agreements. In addition, only one pathway gives access to the profession, which requires attending an eight-month course, undertaking a period of compulsory practice, and becoming member of the professional organisation.

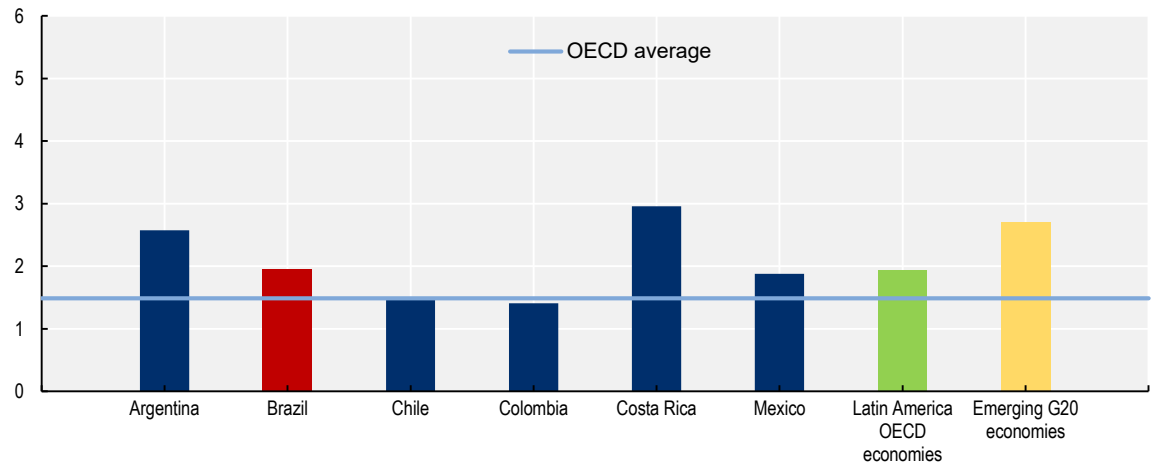
b. Insights from PMR sector indicators: network sectors

These indicators provide an assessment of how competition-friendly the regulatory framework is in three industries: ***energy, transport*** and ***e-communications***.

Brazil's 2018 score in the PMR sector indicator for all network industries suggests that the country's regulatory settings are more restrictive than in the average OECD country, but close to the average of OECD Latin American countries and of G20 emerging economies (Figure 1.21). However, in the last few years Brazil has undertaken reforms, most notably in the energy sector, which have addressed some of the regulatory weaknesses highlighted in the 2018 PMR results.

Figure 1.21. PMR sector indicators: Average of all network sectors, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies are the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

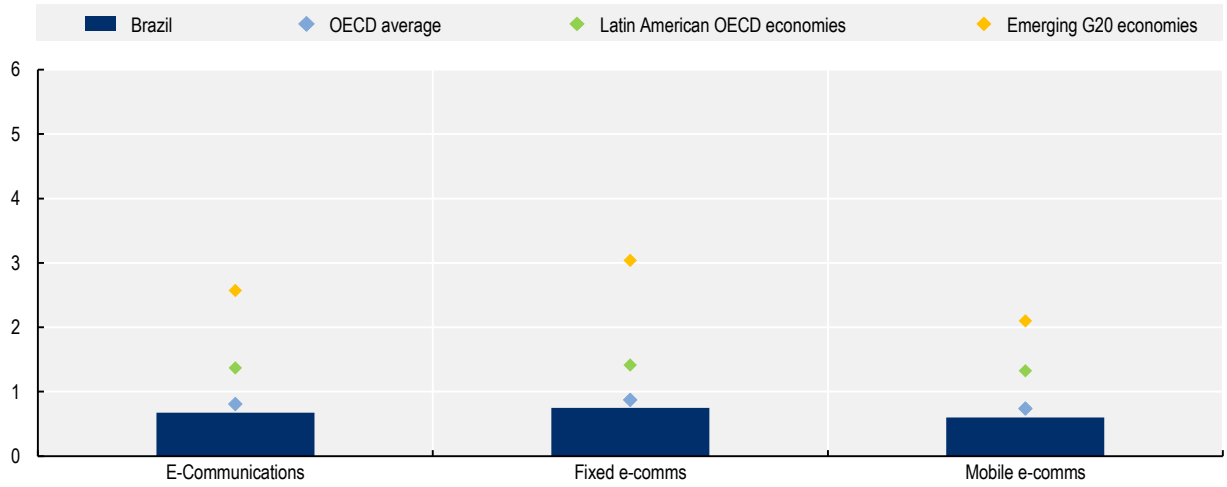
The importance of network sectors for economic activity, investment, and welfare suggests there could be sizeable benefits from exploring all margins for introducing more competition in these sectors. OECD research drawing on the PMR sector indicators has shown that the effects of competition-friendly regulation in upstream sectors cascade through the economy improving productivity (Bourlès et al., 2013[15]), (Égert and Wanner, 2016[5]), and may have a larger effect when countries are further from the technology frontier (Nicoletti et al., 2003[22]).

E-communications

Looking at individual network sectors, Brazil has very good results in the e-communications PMR sector indicators. The indicators suggest that regulatory settings in both **fixed** and **mobile e- communications** are conducive to competition, with values in line with the OECD average (Figure 1.22).

Figure 1.22. PMR sector indicator: E-communications, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

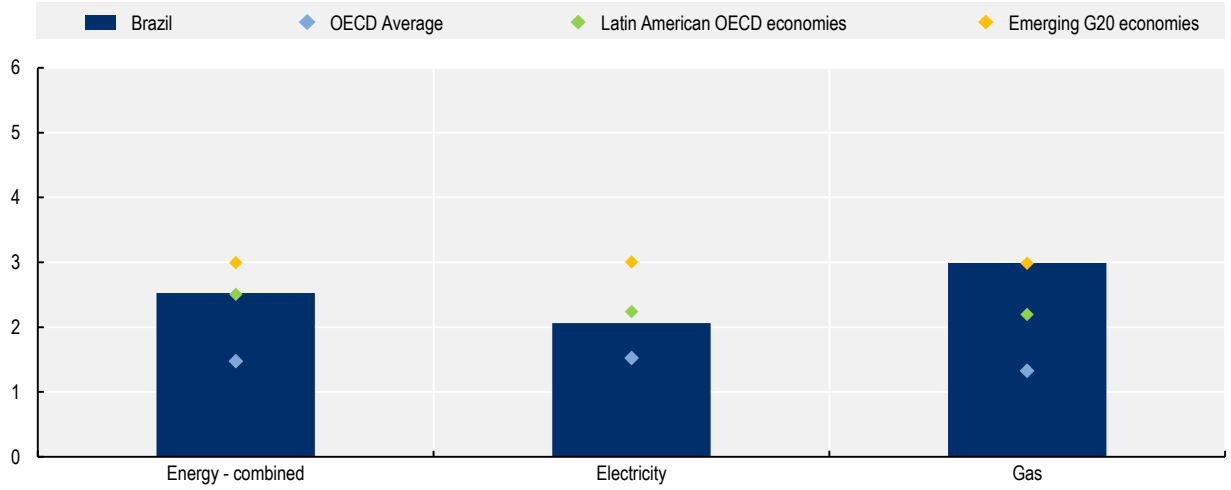
It should be noted that in 2018 these indicators reflected the fact that secondary trading of spectrum was not permitted. However, this was amended by Law Nº 13.879, of 3 October 2019, which created a secondary radio frequency market, and Decree Nº 10.402 of 17 June 2020, which authorises telecommunication services and the extension and transfer of radio frequency permits, thereby enabling private investments in the sector. Additional reforms introduced since 2018 are expected to lead to improved investment in this sector, but are unlikely to improve the country's performance in the PMR sector indicators.[33]

Energy

As regards the energy sector, the 2018 indicators show that both electricity and natural gas have more barriers to competition than the average OECD country (Figure 1.23).

Figure 1.23. PMR sector indicator: Energy, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

However, some recent reforms in the ***gas*** sector have improved Brazil's performance in this sector. Chapter 7 provides a more detailed assessment of these changes and their impact on Brazil's performance in the relevant PMR indicator.

As for the ***electricity*** sector, the value of the 2018 PMR sector indicator compares unfavourably with the OECD average – though not with respect to the average of OECD Latin American economies or of the average of its G20 peers. This is due to the fact that public authorities hold stakes in electricity companies at all levels of the supply, and control in those companies under state ownership can only be divested following legislative authorisation. In addition, Brazil's electricity sector is a highly vertically integrated. Companies involved in both electricity generation and transmission, and in electricity distribution and transmission, are only required to ensure accounting separation, and no separation is required between companies active in both electricity distribution and retail supply.

In the last couple of years this has started to change, however. Consider, for example, Elétricas Brasileiras S.A. – Eletrobras. Eletrobras is Latin America's largest electricity company – operating in energy generation, transmission and commercialisation. It controls eight subsidiaries, a holding company (Eletropar), a research centre that is a private association (Cepel) and 50% of Itaipu Binacional. It holds approximately 30.2% of Brazil's installed generation capacity, has a market value of 8,728 million USD and employs 14,641 people. The state owns 63.08% of Eletrobras and exercises this ownership jointly through the Ministry of Economy and the Ministry of Mines and Energy (OECD, 2020, p. 60[2]). However, Eletrobras is slated for privatisation[34] and the passage of law 14.182/2021 that provides for the privatisation of Eletrobras marks significant step towards achieving this objective (Presidency of the Republic, 2021[23]). The government intends to privatise Eletrobras in 2022, and has initiated preparatory actions (BNAmericas, 2022[24]).

In addition, Eletrobras has divested some of its assets in recent years. The company held direct and indirect interests in 137 special purpose entities in 2020, down from 160 in 2016. At present, Eletrobras has no more distribution companies and is completely focused on the generation and transmission of electricity. In addition, Brazil has created new possibilities for contracting with concessionaires, in the context of wider efforts to introduce competition into the electricity generation sector. In 2018, a legal instrument was adopted regulating the granting of a concession contract in the electricity sector associated with the privatization of the holder of a public service concession for electricity generation, thereby establishing new contract conditions (possibilities) and facilitating the privatization process[35]

In short, Brazil is making progress in fostering competition the electricity network, even though avenues for improvement remain, most obviously as regards further divestments of public stakes in some market players, and the unbundling of vertically integrated electricity companies.

Transport

Concerning the ***transport sector***, regulatory barriers to competition are highest in rail transport, though this is also the case for most OECD and non-OECD countries. The 2018 PMR result was driven by the fact that rail infrastructure was owned by public companies that are vertically integrated with rail freight service providers, and which limits access to the rail infrastructure to non-integrated operators. However, the situation may have improved since 2018 as a result of recent changes in the rules applicable to freight rail service provided by independent rail operators, which facilitate the use by third parties of rail infrastructure, and may lead to improved intra-sector competition on different rail lines.[36]

In 2018 there was also no competition in rail passenger transport services and this has not changed since.

Regulations in air transport, on the other hand, are very competition-friendly, and recent reforms have fully opened the market to foreign investors.[37]

The relative strengths and weaknesses of these PMR indicators are understandable given Brazil's geography and transport structure, and the respective roles that trains and air travel play in it – with the first being quite marginal, while the second one plays an important role.[38]

Road and water transport are also important for Brazil's economy, given its geography, and their regulatory framework is less competition-friendly than the air transport one. However, a recent change in federal legislation for water transport, which broadens permissions for the use of foreign vessels and labour force, represents a positive development.

Historically, the domestic supply of shipping services has been highly concentrated among those (national) companies that obtained the requisite licence. The low quality of port infrastructure and high bureaucratic requirements to provide shipping services add to these challenges (OECD, 2020, p. 75[4]). Further, regulatory barriers have been put in place for providers of container storage and movement services in Brazilian Ports since 2018,[39] despite other improvements to Brazil's regulatory framework in this area.

In the road transport sector,[40] non-transferable licences are required to operate both freight transport and passenger coach transport services. In addition, each new route for passenger transport has to be approved before service provision can start. A 2022 law[41] may further restrict competition, as it introduces the possibility for the economic regulator of terrestrial transport (*Agência Nacional de Transportes Terrestres*) to limit the number of competitors based on economic feasibility of new entry. The implications of this new law rest upon the criteria of feasibility to be defined by the executive as well as its implementing regulations.

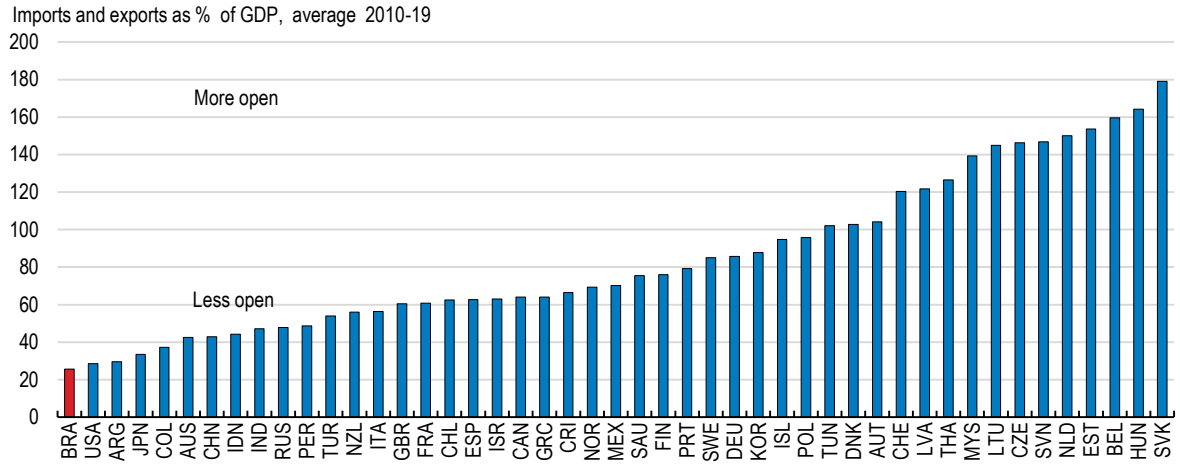
Furthermore, until 2019, prices for passenger coach transport services were regulated, but recent provisions have liberalised them.[42] However, in 2018 price floors were established for road freight services following a transport strike (OECD, 2020, p. 69[4]).

Specific aspects of competition in transport sectors – specifically civil aviation and ports – will be the subject of an OECD competition assessment review, expected publication 2022. The review (provisional title *OECD Competition Assessment Reviews: Brazil*) will apply the OECD Competition Assessment Toolkit to the regulation of the civil aviation and ports sectors, in co-operation with CADE (OECD, 2021[25]).

Barriers to trade and investment

Strengthening competitive pressures from foreign firms provides a powerful way to raise competition. With exports and imports below 30% of GDP, Brazil's economy is significantly less integrated into international trade than other emerging market economies of similar size. Brazilian companies have also shown only scant participation in global value chains, in a context where other Latin American countries exemplify how trade and the integration in global value chains can contribute to economic growth (OECD, 2020, p. 72[4]). Figure 1.24 shows Brazil's imports and exports as a percentage of its GDP.

Figure 1.24. Brazil's exposure to international trade, 2010-2019



Source: OECD Economic Outlook database (2020).

Scores of the low-level PMR indicators in the area of barriers to trade and investment are low relative to its scores in other PMR indicators, but high relative to those of other countries.

Tariff barriers to trade

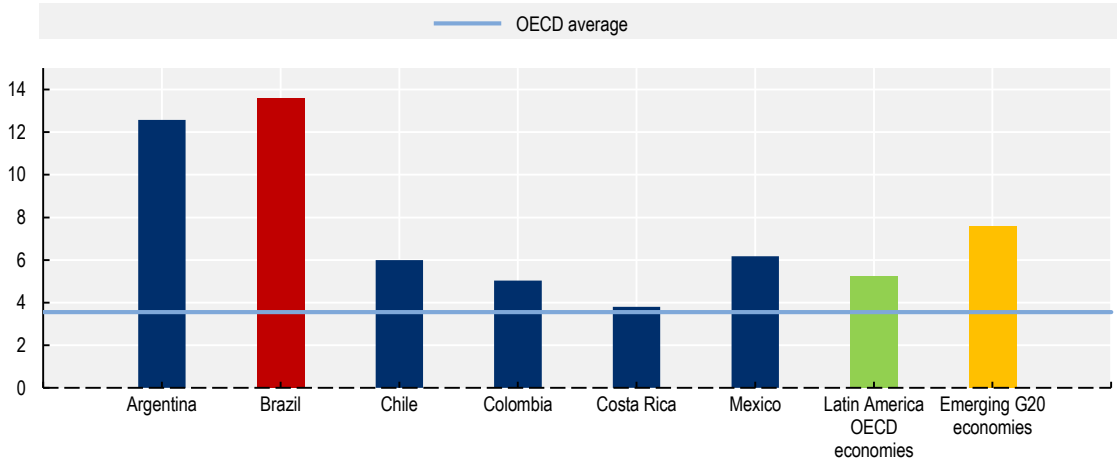
Brazil has taken some steps in recent years to reduce ***tariff barriers to trade***. A 2019 MERCOSUR resolution reduced tariffs affecting many compounds in the chemicals sector (MERCOSUR, 2018[26]). More recently, a resolution reduced import taxes on a wide range of products, although the measure is temporary and will stop at the end of 2023 (Comitê-Executivo de Gestão, 2021[27]; LegisWeb, 2022[28]).The scope of tariff exemptions for capital goods has been extended by applying a narrower definition of the availability of domestic equivalents, which rules out these tariff exemptions. In addition, import licensing requirements have been eased in recent years. The imposition of import licensing requirements will be subject to review based on Law nº 14.195/2021 (Article 10, § 3º). The requirement to conduct such a review would not affect the PMR indicator in this area, but represents a positive signal. A National Single Window Project – *Portal Único Siscomex* for both export and import processes has reduced processing delays, and its implementation has continued to progress in recent years (OECD, 2020, p. 75[4]). Additional steps in this direction would facilitate Brazil's external trade, thereby helping Brazil better integrate in the world's economy.

Even after recent reductions, tariff barriers, as measured by effectively applied tariffs on imports, remain high both in absolute terms, and in comparison to other countries. As discussed in the most recent OECD Economic Survey of Brazil (OECD, 2020, p. 71[4]) average tariff levels weighted by imports are significantly higher than its Latin American peers, and Brazil's most frequently applied tariff rate is around 13/14%, while around 450 tariff lines are at 35%, including textiles, apparel and leather and motor vehicles. In addition to tariffs, various forms of non-tariff barriers, including local content requirements, add to the protection of domestic producers. The Economic Survey suggests that they are at the root of significant reductions in imports and exports (OECD, 2020, p. 71[4]).

Figure 1.25 shows the average value of the effectively applied import tariffs at the time when the 2018 PMR valued where published. These data refer to 2016.[43] In the case of Brazil more recent values do not show any major improvements.[44]

Figure 1.25. Effectively applied import tariffs, 2016

Effectively applied tariffs, simple average (%)



Note: The PMR gauges tariff trade barriers using the effectively applied tariff data from the UNCTAD Trade Analysis Information System database, which can be accessed at https://wits.worldbank.org/. This data refers to the lowest available tariff, which may be a preferential tariff or the Most-Favoured Nation Tariff (World Bank, n.d.[29]). The data refers to 2016, which was the most recent data available when the 2018 PMR indicators were calculated. More recent data is not available for all the countries in the figure.
Source: The United Nations Conference on Trade and Development (UNCTAD) Trade Analysis Information System (TRAINS) database.

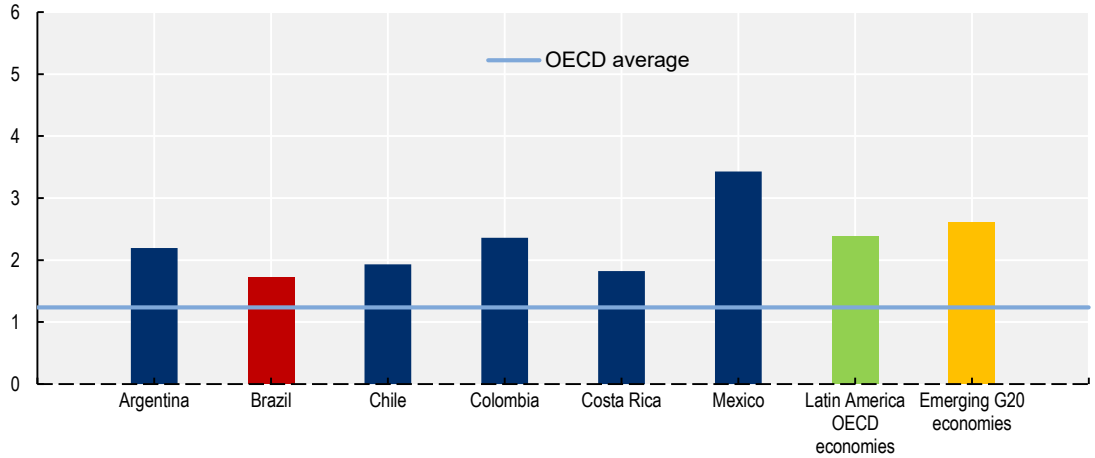
Continuing to lower trade barriers may offer a range of benefits for Brazil's economy. The most evident and immediate effects of lowering trade barriers would be a fall in import prices for consumers and firms in downstream sectors, which is particularly important for micro-, small- and medium-sized enterprises, and further participation in global value chains. Partial equilibrium estimates suggest that Brazilian consumers could see their purchasing power increase by 8% if tariff barriers were eliminated (OECD, 2020, p. 73[4]). Moreover, these benefits are highly progressive, as lower income households spend larger shares of their incomes on tradable goods, such as food, home appliances, furniture and clothing. Lowering tariffs would not result in significant tax losses, and the productivity effects of better integration are likely to lead to an expansion of economic activity and to additional tax revenues. Firms would simultaneously gain improved access to intermediate and capital inputs, and they would be more exposed to external competition. This would induce them to upgrade products and processes, reduce slack and cut economic rents. Just like in the case of stronger domestic competition, it would also allow high-performing firms to grow at the expense of less productive ones (OECD, 2020, p. 73[4]).

Differential treatment of foreign suppliers

Regulations also create relatively high barriers for foreign firms that wish to participate in public procurement processes, or that try to operate in key network and service sectors, as shown by the value of the low-level indicator on ***differential treatment of foreign suppliers***, which compares unfavourably with the OECD average (Figure 1.26). However, in this low-level indicator Brazil fares better than the average of its G20 peers and the average of the OECD Latin American countries.

Figure 1.26. PMR low-level indicator: differential treatment of foreign suppliers, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

The high value in 2018 is partially explained by the rules that limit access by foreign firms to public tenders. However, the country has started addressing these constraints by recently abolishing the requirement for foreign bidders to have a legal representative in Brazil and the obligation to provide certified translations of foreign documents. Nevertheless, more is necessary to ensure that foreign bidders are not at a disadvantage compared to domestic ones. For example, foreign bidders can participate in all procurement processes, provided they meet all the legal and technical requirements. In practice, however, a foreign company wishing to participate in a tender needs to obtain an authorisation order from the Ministry of the Economy to operate in the country. This authorisation is not required only if the foreign firm is participating as part of a consortium including domestic firms, so the majority of foreign companies prefer to bid jointly with a local company, which reduces the number of participants in tenders (OECD, 2021, p. 59[3]).

The 2018 results are also due to are restrictive cabotage regimes in transport. A 2022 law making chartering of foreign vessels more flexible for Brazilian maritime cabotage is a positive development in this area (see also the subsection on transport under Sector PMR indicators). However, foreign planes and road vehicles are still prevented from operating on internal routes.

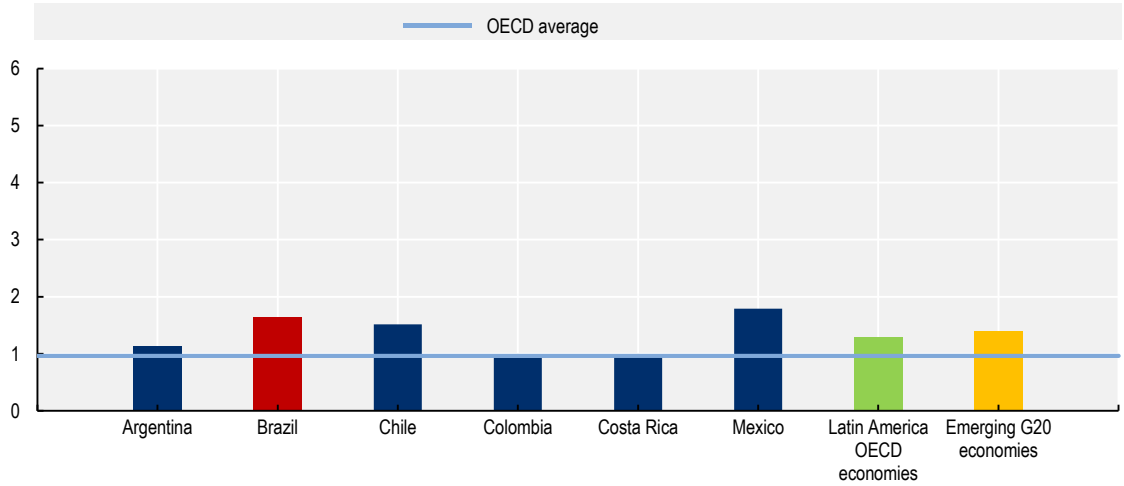
In addition, despite mutual recognition agreements with some countries, accountants and lawyers are protected from competition from foreign professionals, since the latter are required to take a local exam in order to be able to practice.

Barriers to trade facilitation

The indicator of ***Barriers to trade facilitation*** reflects the degree of complexity of the technical and legal procedures relating to international trade transactions.[45] The indicator for Brazil is close to the value of other large economies, such as Mexico and Indonesia. However, it is above the OECD, the G20 emerging economies and the OECD Latin American countries averages (Figure 1.27).

Figure 1.27. PMR low-level indicator: Barriers to Trade Facilitation, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey. For most countries, the indicators are based on laws and regulation in force on 1 January 2018. For Costa Rica, Estonia and the US, the information refers to 1 January 2019 and, for Indonesia and China, to 1 January 2020, as these countries provided their answers to the 2018 PMR questionnaire at a later date.
Source: OECD 2018 PMR database; and OECD-World Bank Group 2018 PMR Database.

Brazil has made strides towards improving trade facilitation as it continues implementation of the Single Foreign Trade Portal Programme (*Siscomex*), a single window for the trade community, launched in 2014 and further elaborated in law in 2021 (Presidency of the Republic, 2021[30]). The programme has resulted in a new process for exports, and the module for imports is now being made operational as well. Implementation of this programme continues in 2022 (Siscomex, 2021[31]).

Brazil can build upon these efforts by targeting areas of greatest impact for trade facilitation: streamlining trade formalities, governance and impartiality, information availability, involvement of trade community, advance rulings and fees and charges, simplification and harmonisation of documents, automation of border processes, and cross-border agency co-operation, as noted in the OECD Trade Facilitation Indicators cross-country comparison tool.

The following are suggested as areas for further improvement (OECD, 2019[32]):

- Reduce the average issuance time for advance rulings, which are prior statements from authorities regarding the treatment the country will provide to an imported good.
- Limit the number and diversity of fees and charges collected during appeals of administrative decisions by border agencies.

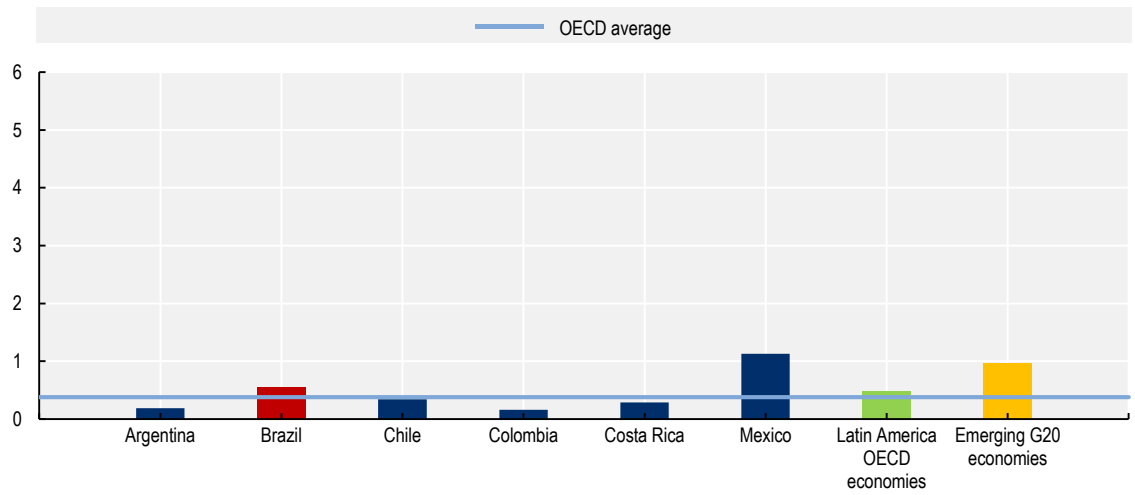
- Enhance the capacity of border agencies' IT systems to exchange data electronically, complete the development of electronic pre-arrival processing, and improve the quality of telecommunications and IT supporting the automation of border processes.
- Expand the use of pre-arrival processing of import documentation, expand the use of Authorised Operator programmes for operators meeting certain criteria related to compliance, and further simplify procedures in terms of associated time and cost.
- Increase co-operation on the ground between various administrations present at the border by, inter alia, holding regular meetings at the national level in order to improve co-operation.

Barriers to FDI

In 2018, these barriers, as measured in the OECD FDI Regulatory Restrictiveness Index that feeds directly into this PMR low-level indicator,[46] are relatively low in absolute terms and by comparison to the average of G20 emerging economies. However, they are still higher than the OECD average and the average of OECD Latin American countries (Figure 1.28).

Figure 1.28. PMR low-level indicator: Barriers to FDI, 2018

Index scale 0 to 6 from most to least competition-friendly regulatory framework



Note: Their vertical axis is on a 0-3 scale to better highlight the differences between the values. The OECD average includes all OECD member countries. Latin America OECD economies is the average of Chile, Colombia, Costa Rica and Mexico. Emerging G20 economies is the average of eight countries: Argentina, Brazil, China, Indonesia, Mexico, Russia, South Africa and Turkey.
Source: 2018 FDI Regulatory Restrictiveness dataset.

Since 2018, Brazil adopted a number of measures that have led to lower regulatory barriers to FDI. The country repealed the previous 20% limit on foreign investment in air transport and the requirement that directors be exclusively Brazilian nationals.[47] Brazil also repealed reciprocity requirements for foreign insurance companies that wish to invest in the country.[48] Finally, the Central Bank no longer has to authorise foreign investment in financial institutions, and applies to them the principle of national treatment.[49]

These measures have slightly narrowed the gap with the OECD average. Table 1.1 below shows the changes in the values, calculated using the most recent values for the OECD FDI Restrictiveness Index. In addition, a horizontal restriction related to the access to the national financial system by foreign companies, which currently may be restricted by the Central Bank in case of balance of payment crises, is slated to be removed in December 2022 with the entry into force of Law No. 14.286. Despite these

improvements, a number of discriminatory restrictions remain, such as local incorporation requirements in various sectors, and foreign ownership restriction in media and for purchases of rural property. Brazil could consider whether less discriminatory alternatives could be implemented.

Table 1.1. Low-level indicator on Barriers to FDI, 2018 and 2020

Year	Brazil	OECD average
2018	0.55	0.38
2020*	0.49	0.38

* The values for 2020 are estimated on the basis of the values of the FDI Restrictiveness Index.
Source: OECD FDI Restrictiveness dataset.

Notes

[1] This questionnaire is available on the PMR webpage at http://oe.cd/pmr.

[2] For OECD countries, half of the information used in calculating this indicator comes from the OECD Indicators of Regulatory Policy and Governance (iREG) database, which presents in-depth evidence on countries' regulatory policy and governance practices: www.oecd.org/gov/regulatory-policy/indicators-regulatory-policy-and-governance.htm. Since Brazil is not included in this database, even though the iREG for Latin America 2016 covered Brazil, the information was collected directly from the Brazilian authorities.

[3] As above.

[4] This indicator captures the barriers to competition that can exist in service sectors that are related to incentive-based regulation. The sub-indicator Command and Control Regulation measures the barriers created by the government's use of coercive regulations in the same sectors.

[5] As above, but with reference to network sectors.

[6] More information on the FDI restrictiveness index can be found at https://www.oecd.org/investment/fdiindex.htm.

[7] The UNCTAD Trade Analysis Information System database can be accessed at https://wits.worldbank.org/.

[8] More information on the OECD Trade Facilitation Indicators can be found at http://www.oecd.org/trade/topics/trade-facilitation/.

[9] E-communications are traditionally referred to as telecommunications, but to highlight the relevance of data transmission in the PMR questionnaire this indicator is referred to as e-communications.

[10] Brazil was first included in the PMR exercise in 2008.

[11] See www.oecd.org/economy/reform/indicators-of-product-market-regulation.

[12] Law 13.303 of 30 June 2016.

[13] Since 1 January 2019, several line ministries merged into the Ministry of Economy, which continues to play a central co-ordination role.

[14] The Brazilian Corporations Act (art. 142) establishes that shareholders elect the board members who, in turn, appoint senior executives. In the case of national SOEs, this general rule does not apply, according to the Ministry of the Economy's interpretation, because art. 26 of Decree-Law 200/1967 would allow line ministers to appoint the CEO and other senior executives of the SOE. The board of directors still has formally to appoint the senior executives nominated by the ministers or the President, but there is no known case where the board has denied appointing an executive nominated by a minister or the President. See (OECD, 2020, p. 40[2]).

[15] It should be noted that public procurement is an area where *de jure* and *de facto* realities are often quite different, making comparisons across countries difficult (Vitale et al., 2020[17]).

[16] Law 14.133 of 1 April 2021.

[17] The information shared in this platform – Comprasnet– only covers part of the public procurement carried out at national level. Many municipalities and states use other e-procurement platforms only covers part of the public procurement carried out at national level; many municipalities and states use other e-procurement platforms. See (OECD, 2021, p. 68[3]).

[18] Certified translations are still required if the foreign bidder wins the tender.

[19] http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/l13848.htm.

[20] Law 13.726 of 8 October 2018.

[21] Ongoing efforts to introduce systematic *ex post* evaluations of existing laws and regulations are discussed in more detail in Chapter 5.

[22] These include the National Electric Energy Agency (*Agência Nacional de Energia Elétrica*, Aneel), the National Agency of Petroleum, Natural Gas and Biofuels (*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis*, ANP); the National Telecommunications Agency (*Agência Nacional de Telecomunicações*, Anatel); the National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária*, Anvisa); the National Supplementary Health Agency (*Agência Nacional de Saúde Suplementar*, ANS); the National Water Agency (*Agência Nacional de Águas*, ANA); the National Waterway Transport Agency (*Agência Nacional de Transportes Aquaviários*, Antaq); the National Land Transport Agency (*Agência Nacional de Transportes Terrestres*, ANTT); the National Cinema Agency (*Agência Nacional do Cinema*, Ancine); the National Civil Aviation Agency (*Agência Nacional de Aviação Civil*, Anac); and the National Mining Agency (*Agência Nacional de Mineração*, ANM).

[23] The Secretariat of Competition Advocacy and Competitiveness (*Secretaria de Advocacia da Concorrência e Competitividade*, SEAE) also performs advocacy activities and market studies (OECD Competition Committee, 2019[33]), but since SEAE is part of the Ministry of Economics, it is not considered in the PMR indicators. These only focuses on market studies run by independent bodies.

[24] These include the National Electric Energy Agency (*Agência Nacional de Energia Elétrica*, Aneel), the National Agency of Petroleum, Natural Gas and Biofuels (*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis*, ANP); the National Telecommunications Agency (*Agência Nacional de Telecomunicações*, Anatel); the National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária*, Anvisa); the National Supplementary Health Agency (*Agência Nacional de Saúde Suplementar*, ANS); the National Water Agency (*Agência Nacional de Águas*, ANA); the National Waterway Transport

Agency (*Agência Nacional de Transportes Aquaviários*, Antaq); the National Land Transport Agency (*Agência Nacional de Transportes Terrestres*, ANTT); the National Cinema Agency (*Agência Nacional do Cinema*, Ancine); the National Civil Aviation Agency (*Agência Nacional de Aviação Civil*, Anac); and the National Mining Agency (*Agência Nacional de Mineração*, ANM).

[25] Law 13.848 of 26 June 2019.

[26] Decree 10.889, of 9 December 2021.

[27] Law Proposal 4391/2021. This draft law includes, *inter alia*, provisions for lobbyists to register on a dedicated registry, to refrain from undertaking certain activities, and to report annually on expenses and payments to public officials above a certain amount.

[28] The PMR gauges tariff trade barriers using the effectively applied tariff data from the UNCTAD Trade Analysis Information System database, which can be accessed at https://wits.worldbank.org/. This data refers to the lowest available tariff, which may be a preferential tariff or the Most-Favoured Nation Tariff (World Bank, n.d.[29]).

[29] Resolution CGSIM nº 61/2020 of 12 August 2020. São Paulo has already implemented an online one-stop shop, but other municipalities are still in the implementation phase.

[30] Law No. 13.874 of 20 September 2019.

[31] Communication CMED No. 2 of 5 March 2020.

[32] E.g. the Scandinavian and Baltic countries, France, the Netherlands, Switzerland and the United Kingdom.

[33] Law 14.109, of 16 December 2020, restructures the Telecommunications Universalization Fund and allows its use to invest in telecommunication networks. Finally, Law 14.173, of 15 June 2021 rationalises existing sectorial taxes on the provision of internet services via satellite, with a view to incentivising the provision of such services.

[34] Provisional Measure No. 1.031 of 23 February 2021.

[35] Decree 9.271 of 25 January 2018.

[36] Resolution ANTT 5.920 of 15 December 2020.

[37] Law 13.842 of 17 June 2019 permanently eliminated the previous requirement for management and at least 80% of the voting shares of air transport companies to be in the hands of Brazilian nationals. The new regime requires local incorporation only.

[38] However, the PMR indicators do not consider the relative importance of different sectors.

[39] Resolution Antaq 34, of 19 August 2019.

[40] Taxis are not discussed since their regulation is limited to the State level.

[41] Law 14.298 of 5 January 2022.

[42] Decree 10.157 of 4 December 2019.

[43] The PMR low-level indicator on Tariff Barriers to Trade is based on the UNCTAD Trade Analysis Information System (TRAINS) is a computerised database that collects data on trade control measures in 150 countries. The OECD takes from this database the average value of the tariff rates effectively applied in a country for all trade available when the PMR indicators are calculated, which means that the data refers to an older date (in 2018 the data referred to 2016). This average value is broken down in classes to which the 0 to 6 PMR scale is applied.

[44] In 2016 the average value of the effectively applied import tariffs for Brazil was 13.56, the most recent available value, which refers to 2019, is 13.43.

[45] This low-level indicator is based on the OECD Trade Facilitation indicators, which assess the implementation of key provisions of the World Trade Organisation's Trade Facilitation Agreement. The data refers to the 2017 update for these indicators. For more information, see https://www.oecd.org/trade/topics/trade-facilitation/.

[46] The FDI Index is used to calculate the low-level indicator Barriers to FDI. The value of this low-level indicator is set equal to the value of the FDI index, adjusted to a 0 to 6 scale. For more detail refer to www.oecd.org/economy/reform/a%20detailed%20explanation%20of%20the%20methodology%20used%20to%20build%20the%20oecd%20pmr%20indicators_final.pdf.

[47] Law 13.842 of 17 June 2019.

[48] Law 13.874 of 20 September 2019.

[49] Circular No. 3.977/2020 of the Brazilian Central Bank (Banco Central do Brazil).

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Part II Regulatory Policy and governance in Brazil

2 Assessment and recommendations to enhance regulatory policy in Brazil

This chapter presents the assessment and recommendations for the development of a successful better regulation policy in Brazil. The findings derive from interviews with stakeholders from the Brazilian administration, civil society and private sector; desk research and information provided by the main actors. The issues described in this section focus on aspects related to regulatory policy, namely: policies and institutions, regulatory impact assessment and stakeholder engagement; revision of the regulatory stock; and regulatory coherence and regulatory policy at the sub-national level.

Policies and institutions

Assessment

> *Brazil has taken steps to institutionalise the use of regulatory policy tools such as regulatory impact assessment; however, the country has yet to develop a single, high-level policy statement that integrates and supports all of Brazil's better regulation policies, tools, and institutions.*

The current legal framework in Brazil mandates the implementation of some regulatory policy tools (e.g. RIA) and encourages the adoption of others (e.g. public consultations) as part of a broader strategy to increase the country's competitiveness and improve the business environment. However, the introduction of these legal instruments is not underpinned by a single, high-level policy statement, such as a law that covers all of the regulatory policy's tools, institutions, and instruments. This means that Brazil lacks an integrated comprehensive policy framework that supports the design and adoption of a whole-of-government programme on better regulation.

Recently, Brazil overhauled its better regulation efforts with the introduction of the Regulatory Agencies Act (Act No. 13.848/2019) and the Economic Freedom Act (Act No. 13.874/2019). These enactments set the foundations for the adoption of tools such as the regulatory impact assessment (RIA) in the regulatory agencies and ministries and define the obligation for public consultation of regulatory proposals in the regulatory agencies.[1] The principles promoted by the Economic Freedom Act (LEF) – protection of economic freedom, good faith and observance of contracts, investments and private property – influence the rationale behind Brazil's better regulation efforts. This means that a strong emphasis is placed on tools such as administrative simplification of certain procedures and regulations, digitisation of services, and adoption of the RIA. Nonetheless, this approach does not consider the entire regulatory cycle in a holistic way, from the identification of a public policy problem, to the selection of the policy instrument, its implementation, monitoring and *ex post* evaluation; all of this underpinned by stakeholder engagement activities, and co-ordination and collaboration efforts.

While the Regulatory Agencies Act covers a wider range of regulatory policy tools, such as the obligation to carry out stakeholder engagement activities and to prepare a regulatory agenda, it applies only to 11 regulatory agencies[2] in Brazil. However, it is not clear when these tools will be deployed in all the other entities with regulatory attributions in the country. Furthermore, elements such as enforcement and inspection activities and *ex post* evaluations of regulations remain somewhat relegated across the administration, with individual efforts in certain ministries or agencies.

> *The Secretariat for Competition Advocacy and Competitiveness is leading the regulatory oversight activities in Brazil. However, safeguards such as a law or decree to ensure an adequate and permanent supervision of the regulatory policy has yet to be developed.*

SEAE's roles and responsibilities are established in Article 119 of the decree that defines the structure of the Ministry of Economy (Decree No. 9.745/2019). This legal instrument, however, does not include an explicit mandate that ensures that the Secretariat can define the strategy to promote and oversee a whole-of-government approach to regulatory quality. In fact, SEAE's role and objectives as regulatory oversight body are not contained in a single, high-level document such as a decree or law that guarantees the continuation of the regulatory reform agenda should the political or institutional set up change.

While various regulatory oversight attributions are scattered across several institutions, there is no single mandate that allows each institution to define a long-term strategy for the implementation of the regulatory policy in the country. In particular, SEAE's role as regulatory oversight body focuses on the assessment of RIAs, which is mandatory for assessments prepared by regulatory agencies and mostly on an *ad hoc* basis for the ministries. Additional tasks carried out by SEAE include the improvement of the regulatory framework to foster a better business environment and the reduction of the cost of doing business.

On the other hand, much of the administrative simplification and digitisation efforts are under the Special Secretariat of De-bureaucratisation, Management and Digital Government in the Ministry of Economy. The Council for the Monitoring and Evaluation of Public Policies (*Conselho de Monitoramento e Avaliação de Políticas Públicas*, CMAP) is leading the work in terms of *ex post* evaluations of public policies financed either by direct spending or by government subsidies, whereas the evaluation of regulatory outcomes will become mandatory in 2022. Furthermore, Casa Civil also has the ability to request and review RIAs of laws and decrees. The review team could perceive the focus and effort of each of these bodies; however, the existence of a gap in co-ordination efforts was evident. In this context, systematic co-ordination and collaboration actions play a key role to ensure that all oversight functions are covered to prevent overlapping responsibilities and foster transparency.[3]

> *Brazil has introduced several initiatives to foster the development of high quality regulations; nonetheless, these efforts are not part of a long-term strategy with explicitly defined goals.*

In addition to the absence of a single, high-level policy statement, such as a law that covers all the regulatory policy's tools, institutions, and instruments, Brazil also lacks a single, overarching strategy. In particular, the priorities of the administration for the introduction of other regulatory management tools beyond the use of RIA, *ex post* evaluation and administrative simplification are not explicitly stated. For instance, stakeholder engagement is mandatory for the regulatory agencies covered under Act No. 13.848/2019, but it is not clear when it will be an obligation for all the other institutions that have regulatory powers. In fact, during the fact-finding mission, several stakeholders mentioned that the obligation for carrying out public consultation will derive from the Brazil's commitments set out in the new annex on good regulatory practices to the Agreement on Trade and Economic Cooperation Between the Government of the Federative Republic of Brazil and the Government of the United States of America Related to Trade Rules and Transparency. External factors, such as an international commitment can be a strong instrument to make use of better regulation tools in the country; as part of a central strategy on the topic.

The lack of an overarching strategy means that it is hard to assess the progress of the regulatory reform efforts. Although SEAE has to prepare a yearly report on its activities (Decree No. 9.745/2019, Art. 119), it focuses mainly on the actions taken to promote economic competition. This means that it is difficult to monitor the performance of the regulatory policy in the country and reduces the accountability of those responsible for the adoption and implementation of the tools. This prevents the identification of low hanging fruit, limits the amount of evidence available to set long-term priorities and reduces the possibility of adjusting the policy strategy when the results are not in line with the targets previously defined.

Recommendations

Brazil could consider allocating most, if not all, oversight functions for better regulation policy to a single body. This would contribute to assure an adequate and permanent supervision of the policy.

The precise location and configuration of this body will depend on many factors, including legal arrangements and administrative traditions; although evidence from OECD countries suggests that a body within a ministry or other area close to the centre of government is very common.

Regardless of the location of this body in the administration, it is paramount that Brazil considers the following elements for the institutional design:

- The body should have a clear and explicit mandate regarding its functions in terms of regulatory policy. Clear roles and responsibilities should be defined explicitly, which should include the organisation of communication channels. This will contribute to creating an overall strategy and ensure consistency of the better regulation policy.

- It is important that the administrative area with these responsibilities have the support of the highest political level to promote a comprehensive policy on better regulation.
- The body should also co-ordinate across agencies and ministries at all levels of government to seek regulatory coherence, as well as to promote better regulation policy at lower levels of government. The body should have an overall perspective that allows it to develop procedures that prevent overlapping or conflicting regulations from coming into force.
- Should core responsibilities of regulatory oversight be located in several entities or administrative areas, Brazil should aim at avoiding overlapping functions and define co-ordination mechanisms clearly.
- The institutional arrangement should provide the development of a consistent and knowledgeable oversight to regulatory policy. The location of the oversight should remain close to the centre of government, shielded from political swings, and should focus on its technical nature.
- When strengthening the oversight function, consideration for digitisation and use of digital platforms and other similar tools may help facilitate the co-ordination functions.
- Ensure that officials in the oversight body(ies) have adequate institutional and technical knowledge and capacities. It is important to ensure that the staff do not frequently change within administrations.

Brazil would benefit from developing a single, high-level document that defines and supports the country's better regulation policy. Brazil could ensure that the regulatory policy follows a holistic approach, meaning that the policy document considers the entire regulatory cycle. It is important to bear in mind that there is not necessarily a trade-off between the development of more formal policy documents and the actual implementation of the policy.

This policy statement should promote a whole-of-government approach to regulatory policy that considers institutions, tools and public policy objectives. The document should provide a framework with the attributions, co-ordination mechanisms, and objectives of the relevant institutions for better regulation in the country.

Brazil already has in place administrative decrees and legislation mandating better regulation policies and tools for sectoral regulators (Regulatory Agencies Act, 2019) and for the federal government (Economic Freedom Act, 2019). Therefore, if it were to follow a path of progressive development, it would be ideal to pass a general law mandating better regulation policies. While the optimal scenario is to have the high-level statement and policy in a binding document of the highest level such as a law, in the short term and following a gradual approach, it might be relevant to consider other instruments such as a presidential decree, a sectoral planning document, or something similar.

The high-level document on better regulation should be accompanied by a gradual implementation plan with clear prioritisation of goals. The plan could articulate the use of the existing regulatory management tools in a coherent strategy, and introduce those that have yet to be developed widely. The plan could also comprise milestones and policy goals for the short and medium term, which could help assess progress and help rectify the path when necessary. A clear definition and prioritisation of the goals contained in the implementation plan would help agencies and bodies from the direct administration focus their resources more efficiently and ensure that the foundations for the regulatory policy in the country are solid. The plan should also include a strong communication strategy, including channels for monitoring.

In this endeavour, Brazil could benefit from building on the experience of the regulatory agencies to deploy regulatory management tools across the federal government. This could help identify lessons learnt as well as harness support of other regulatory entities in the adoption of regulatory management tools.

Considering the complexity of the federal administration of Brazil, the gradual approach should be underpinned by explicit objectives, in order to hold institutions accountable for their progress in the adoption

and implementation of the elements considered in the plan. The oversight body or bodies will play a key role in this supervisory function.

Finally, the role of international commercial treaties in the development of national better regulation policies should be emphasised. An international treaty with a valued trade and investment partner can help stimulate the consolidation of better regulation practices. Therefore, the US-Brazil protocol can be useful to help the implementation of better regulation in Brazil.

Regulatory impact assessment and stakeholder engagement

Assessment

> *Brazil effectively introduced a gradual implementation of RIA in the federal administration. Brazil has not defined concrete and achievable goals for the adoption of this tool and a plan to communicate these expectations clearly is still missing.*

The mandate to conduct RIA for all central ministries came into force in October 2021. In anticipation of this event, the Ministry of Economy prepared a plan to adopt this obligation within the ministry itself, taking into consideration that this model could help other ministries and bodies implement the RIA. This included issuing draft technical guidelines and the setting up capacity building activities before the obligation was fully in place. The Ministry of Economy also offered advice and help to other ministries and bodies in the federal administration who wish to take advantage of these activities to implement the RIA. However, there is room to improve the implementation plan right from the start of the obligation.

Brazil does not have a roadmap that defines the steps needed to increase the scope of RIA to include the primary laws and decrees drafted by the central government submitted to congress, and to ensure a fully-fledged gate keeping system to ensure that RIA is carried out effectively. Another key aspect is the assessment of whether the threshold to conduct RIA is effective. Currently the threshold is flexible, which is welcome in the very early stages of RIA. However, there is a risk that ministries will impose most regulatory proposals without a regulatory impact assessment. Therefore, SEAE will have the challenge of studying this aspect very carefully and developing a more concrete threshold if necessary (such as a calculator based on impacts).

Conducting an evaluation of the RIA system is key to understanding its progress and shortcomings. While SEAE has developed a multifaceted implementation plan, it has not anticipated how it will evaluate the RIA system. SEAE has not defined the necessary indicators to evaluate the effectiveness of RIA during the first years of implementation. The central question is whether RIA is improving the quality of regulations. Examples of aspects that SEAE can evaluate include the percentage of regulatory proposals subjected to RIA, the volume of participation in public consultation, the extent to which comments during consultation positively improving the regulatory proposals and sophistication in the assessment of costs and benefits. Beyond the specific indicators, the government of Brazil needs to discuss what the general expectations of RIA are.

In addition, the government of Brazil has not clearly defined the allocation of responsibilities when it comes to RIA implementation. Act No. 13.848/2019 on Regulatory Agencies provides the Ministry of Economy, and particularly the SEAE, with attributions regarding the supervision of RIA. Nonetheless, according to SEAE,[4] the Secretariat is not in charge of implementing RIA (which is prepared by line ministries). SEAE's role focuses on providing opinions on the RIAs submitted and on the dissemination of good practices. Thus, there is scope for improvement to ensure that entities have a clear mandate regarding each given function (i.e. supervision of RIAs, implementation and co-ordination of the RIA system) and clearly understand the processes and requirements to minimise friction and maximise compliance.

> *Stakeholder engagement activities have improved and become a widespread practice; however, public consultation and practices to foster transparency have not yet become a central part of RIA.*

Brazil has increased the scope of its stakeholder engagement practices, notably through the implementation of *Participa + Brazil.*[5] The latter is a digital platform with open access for public consultation. The introduction of this tool has allowed ministries to expand their own efforts, by increasing the reach of their public consultations through the website, while holding informal consultation with specific stakeholders. While all this is a step in the right direction, the RIA system still has yet not adopted consultation as a core element for the whole federal government.

According to the RIA decree (Decree No. 10.411/2020), ministries are encouraged to conduct a public consultation, but not legally forced to do so. On the other hand, only regulatory agencies have the explicit obligation to do so, as the mandate comes from the Regulatory Agencies Act.[6] Consultations carried out by regulatory agencies should last for a minimum period of 45 days, except for matters of urgency and relevance,[7] which have to be duly motivated. These consultations must be published on the regulator's website and all comments received must be published after the consultation period ends. Following the consultation period, the regulator has to publish a position on the comments received but does not have to respond to all individual comments given that the law authorises a reply to several similar points in a consolidated answer. Civil society participants pointed out that it is not always clear how comments are analysed and that regulatory proposals under consultation are not easily retrievable.

Ministries have made progress on increasing the scope of stakeholder engagement activities. For instance, the Ministry of Agriculture stated that the number of regulatory proposals subjected to public consultation has increased from 1% to 20%. In the case of this ministry, the decision of whether or not subjecting RIA to consultation relates to the extent of the impact of the regulatory proposal. The Ministry of Infrastructure also has around 20% of policies published on *Participa + Brazil,* and it mentioned that this portion is one of the highest among ministries and regulators. One of the initial challenges is to increase the percentage of regulatory proposals subject to consultation and to develop the capacities to analyse all comments when consultations have a high volume of participation.

Additionally, with regard to transparency, although Decree No. 10.411/2020 requires keeping the RIA reports available on the entities' website,[8] the practice of publishing the final RIA is still limited. The publication of the final RIA, along with an explanation of how stakeholders' comments were taken into consideration or the reasons for rejecting them, can lead to substantial benefits in the quality and integrity of the decision making process for regulatory policy, policy design and stakeholder support. The latter practice is commonplace amongst regulatory agencies under the purview of the Regulatory Agencies Act.

The limited number of regulations and RIAs subjected to public consultation creates a problem of quality and standardisation. More often than not, the materials for consultations are prepared by each ministry and published on their own website. Another problem is that the language tends to be complex and technical, not citizen-friendly, despite the instruction to use simple and accessible language in specific parts of the assessment (e.g. RIA's executive summary[9]). More broadly, the quality of public hearings (as a subset of public consultations) varies among and within Ministries. Finally, the wider public does not know RIA, and civil society has not been trained on the subject. If the stakeholders do not understand and follow the RIA, this tool will have limited success.

The objectives of public consultation go beyond receiving comments from stakeholders. This tool helps increase transparency and sheds light on the decisions that governments make. In this sense, consultations are not only useful during the commenting period, but also to have a permanent record of the rationale for selecting a given regulatory decision. This could motivate the introduction of the legal requirement to expand the obligation of subjecting all regulatory proposals to public consultation, even from the initial stage of the regulatory implementation of the RIA system.

Beyond the limited scope of regulatory proposals subject to public consultation, Brazil has not anticipated the introduction of a formalised early consultation mechanism.

> *Brazil has deployed technical resources to foster the uptake of RIA including capacity building; the main challenge ahead is the cultural change required to adopt RIA effectively.*

ENAP, the public administration school within the Ministry of Economy, leads the capacity building efforts. ENAP has conducted multiple courses on RIA for different ministries of the central government.[10] It also provides advice for the elaboration of RIAs when public officials make a specific request. While currently ENAP has been able to accommodate all requests, this might be more challenging in the near future when RIA is fully implemented. According to the Government, ENAP's external advisors are often selected from among public servants with strong expertise and usually come from regulatory agencies.

In 2021, SEAE published an updated version of the technical guidelines to conduct RIA.[11] This guide is very complete, and its scope goes beyond the technical explanation of the RIA elements. The document also sheds light on a variety of subjects including the statement of what a good regulation is, common problems related to the RIA elaboration, sources of data, among others.

The challenge most often quoted during the fact-finding mission is the need to change the culture of most public officials. In practical terms, this means that officials need to adopt the mentality that the RIA process has to start from a very early stage when a policy problem is detected (or even before), and that it is not box-ticking exercise to be done once a draft regulation is ready. RIA is not only about assessing the effects of a regulatory proposal, but it implies having an actual deliberation process on what the problem is and what available regulatory (or otherwise) tools exist to solve the problem. A good practice from the Ministry of Infrastructure is the *Governance Manual for Regulatory Impact Assessment*,[12] which, in turn, is based on a series of guiding documents prepared by the Ministry of Economy. The manual of the Ministry of Infrastructure includes the workflow to elaborate RIA divided into the responsibilities of the regulatory unit, managers and the board of directors.

Brazil could take more advantage of the lessons learned by regulatory agencies and other institutions to make RIA better known. For instance, the federal government could share the experiences of CVM, the financial regulator, which has worked on RIA for over a decade. Another example is ANEEL, who was an early adopter of RIA amongst regulatory agencies. Specialised task forces on RIA can also be helpful. In fact, INMETRO has already set up a team dedicated to the elaboration of RIA, which participated in the training conducted by ENAP. SEAE could draw on this experience and systemise the information. One possible way to introduce a RIA system is by looking at the agencies in which the most advanced skills and the most concentrated external stakeholders are located, and expand to other ministries taking advantage of this experience (OECD, 2015[1]).

> *Brazil will face the challenge of adopting a proportional approach to RIA, including decisions on quantitative versus qualitative assessments, and the availability of data.*

RIA should be in proportion to the significance of the regulation. Policy makers should target RIA towards regulatory proposals that are expected to have the greatest effects on society. The depth of the analysis should depend on the significance of the regulation being assessed. RIA, if carried out properly, takes time and resources. To ensure the right focus of the RIA framework, it is advisable to concentrate on the regulatory measures that are the most important and have the greatest impact.

Current RIA arrangements in Brazil do not determine cases where ministries or regulators have to carry out a deeper assessment based on the expected impact of the draft regulation. At the early stages of the introduction of RIA, this flexible arrangement may bring benefits. Moving forward, the need to define proportionality criteria will become pressing, as scarce public resources will have to be targeted properly.

Once a RIA system becomes more mature, performing a quantitative assessment of potential benefits and costs of the alternatives considered in the RIA analysis is always desirable. In this case, quantitative

information should be preferred and used in RIA whenever this is practical, and data is available, as quantitative assessments are always superior for the purpose of identifying the option with the highest net benefit. However, there are often limitations for this, such as availability of data and lack of technical skills. Whenever possible (e.g. data is available), one option is to focus the efforts of a quantitative cost-benefit analysis on draft regulations with the greatest expected effect, that is, those above a determined threshold. SEAE will have to carefully supervise the possibility that ministries will avoid quantifying effects when required, and to provide detailed guidance on how to carry out a qualitative assessment in the event that it is the only option.

Having adequate information is essential to quantity effects. However, data collection, management, and analysis is also one of the most quoted challenges when conducting RIA. Anticipating the importance of this matter, Decree No. 10.411/2020 dictates *"that bodies and entities will implement specific strategies for collecting and processing data, so as to enable the preparation of a quantitative analysis and, when applicable, a cost-benefit analysis"*.[13] Individual efforts are already in place, but the challenge is to ensure the effective implementation throughout ministries of systems to collect and share data for impact assessment.

Recommendations

Building on the lessons learned from the gradual introduction of RIA, Brazil would benefit from defining a roadmap with explicit goals for the deployment and adoption of RIA in the public administration as a whole. This roadmap should be a part of the high-level document on better regulation and its plan described above.

Even if the implementation of RIA has been gradual, it is important that the entities in charge of the RIA system and those that will need to adopt this tool are aware of the expectations, requirements and next steps to come. In this sense, the body given the task to co-ordinate the RIA system should clearly communicate the objectives and goals to be attained at each step of the implementation plan. One way to share information with stakeholders in the administration is the information cards developed by the Ministry of Economy, which synthesised key information in a way that is both simple and easy to understand.

The roadmap could include:

- How Brazil plans to include in the RIA discipline all types of regulations emanating from entities belonging to the executive power
- Objectives, milestones and goals to be achieved in the adoption of RIA
- Monitoring and evaluation mechanisms to evaluate the RIA system against the goals defined in the roadmap. For this, it will be necessary to define the data that will be required to assess these goals and ensure that the relevant parties systematically collect the information.
- Clearly defined co-ordination and collaboration mechanisms within, and throughout agencies and ministries.

As part of the designation of one or several bodies as oversight entities for better regulation, Brazil could consider granting powers to this body to help ensure effective implementation of the RIA tool. OECD country experience shows that these attributions could include requiring ministerial approval of RIAs, blocking the publication of regulations that do not prepare a RIA or receive authorisation for exemption, or a "naming and shaming" mechanism in which ministries and agencies that do not prepare RIAs are identified publicly. In this situation, agencies subject to Regulatory Agencies Act No. 13.848/2019 should be exempted in order to avoid undermining their independence.

In the short term, Brazil could consider further strengthening SEAE's role as an oversight body for RIA and stakeholder engagement. By providing the Secretariat with the possibility of requesting improvements and modifications to the RIAs submitted by the ministries and agencies, impact assessments becomes a tool

for evidence-based decision-making rather than an administrative requirement. It is important to incorporate in SEAE's mandate the legal authority to scrutinise the regulatory analyses and give the entity the possibility of returning RIAs that do not include an adequate analysis. Adequate gatekeeping functions are key to building credibility in RIA. Brazil is at the early stages of its RIA journey, meaning that it has to place particular attention to the development of the foundations that will encourage the adoption and sustainability of the tool.

Brazil should foster the engagement of stakeholders in the regulatory process by embedding the requirements for public consultation in the RIA process. Brazil should give consideration to making consultation of draft regulation mandatory as part of the RIA process, such as in the case of regulatory agencies. Bringing stakeholders closer to the rule-making process leads to better quality regulations, achieves wider acceptance of the norms and increases trust in the administration.

As part of the measures to strengthen transparency in rule making through public consultation, Brazil could consider adopting the following practices:

- Centralise public consultation and publication of RIAs on a single website, for which the portal *Participa + Brazil* is the leading option.
- Promote the use of citizen-friendly language throughout the contents of the RIA. Consider providing training on the matter as part of the capacity building activities around better regulation. The engagement of knowledge brokers could also be considered.
- Ensure that stakeholders have all the relevant information to engage meaningfully in the consultation process. Make easily available the RIA, the policy proposal, studies, and other useful documents that can help inform the feedback from the stakeholders.
- Encourage the participation of stakeholders in the consultation process.
- Ensure that the oversight body is given the task of supervising or made responsible for undertaking these activities.

Brazil would benefit from securing greater buy-in from ministries and regulatory entities by increasing communication and engagement practices within the administration. Brazil could build on the experience by the regulatory agencies and other institutions with more advanced expertise on RIA, including its own Ministry of Economy, to advocate a change of culture within line ministries. This change in culture should be considered as a necessary condition for RIA to develop and improve over time. As such, the roadmap described above should include explicit actions to ensure that all the relevant parties adopt the mentality and have the adequate skills to use evidence to inform public policies. Moreover, ENAP and public policy schools can play a key role in promoting a change in the culture of public officials by utilising the RIA study and training activities already in place.

Through the creation of a community of practitioners, public officials could learn from their peers and realise the benefits that the RIA discipline brings to the sponsoring office. Another option is a system for exchanging officials, in which employees to work directly with another regulator or line ministry for a specific period to learn the RIA system from within. The latter could take place with Brazilian agencies as well as foreign entities, through the development of exchange programmes and partnerships.

Enhance the use of proportionality criteria and threshold tests for RIA starting with a high threshold for a small number of RIAs.

Continue efforts to build a robust data collection to provide information for the regulatory assessments. The Executive Secretariat of the Ministry of Economy can lead co-ordination and collaboration among SEAE, ENAP, and the Digital Government Secretariat to assist in the production, collection and access to data for RIA. Brazil would benefit from building or consolidating data catalogues within ministries and expanding the exchange of information across institutions.

Revision of the regulatory stock

Assessment

> *Brazil has strategies in place to make public services more efficient by reducing the administrative burdens on citizens and firms. The strategies, as well as the actions devised to undertake them, are not part of a well-defined, integrated and co-ordinated policy on administrative simplification.*

The Federal government of Brazil has several inter-institutional strategies to simplify regulations and reduce the administrative burdens created by public agencies. The strategies are crucial to make the regulatory framework user-friendly. However, they are not part of a national and integrated policy on administrative simplification. While these initiatives are relevant, they are individual efforts with uneven levels of implementation and with differing integration of administrative simplification tools. Expected outcomes from these strategies are ambitious and their implementation is still in progress. These strategies are:

- The Path to the Top 50 Most Competitive Countries' strategy (Top 50). This strategy was designed to improve specific formalities and administrative processes that affect the business environment and the attraction of foreign investments.
- The Digitisation of Public Services programme (DSP); which aims at digitising all public services in Brazil at federal level.
- The National Network for the Simplification of the Registry and Formalisation of Businesses (*Rede Nacional para a Simplificação do Registro e da Legalização de Empresas e Negócios,* Redesim). Redesim's objective is to reduce and simplify formalities to open businesses, as well as to decrease to the minimum the time and cost to register and formalise firms.
- Publication of Presidential Decree No. 10.139 in November 2019. It stated the obligation to review and consolidate normative acts lower than a decree in the federal administration.

Brazil has published several instruments and guidelines that are under the scope administrative simplification activities; however, they are not part of a well-defined, integrated and co-ordinated policy on administrative simplification, covering action lines, use of tools on administrative simplification (and regulatory policy), actors (oversight bodies and institutions with responsibilities on administrative simplification) and their roles.

The governance of the administrative simplification policy is another element with opportunity areas in the midterm. The Ministry of Economy through SEAE and the Special Secretariat for De-bureaucratisation, Management and Digital Government (SEDG) have the responsibility to manage and oversee several projects on administrative simplification. Currently, however, these efforts are not co-ordinated and lack a federal-wide focus. Effective co-ordination requires an oversight body with general and specific objectives, as well as defined goals. Such a body would help to undertake challenging strategies such as Redesim, where different levels of governments are involved.

> *Despite the introduction of several strategies to reduce administrative burdens and improve formalities, there is a lack of a whole-of-government policy to reduce burdens.*

Brazil uses several administrative simplification tools through projects that aim at reducing administrative burdens. However, there is no evidence of an integrated administrative simplification policy following a whole-of-government approach. For instance, there is no evidence of the systematic use of simplification measures before digitisation efforts in the DSP strategy. In Redesim, the focus is only on formalities for starting up businesses, thus other processes for business and individuals are relegated.

Furthermore, public entities have different levels of implementation of administrative simplification tools. In particular, regulatory agencies are among the most advanced institutions in the adoption of such practices

with significant efforts. An illustrative example in the adoption of administrative simplification practices with a long-term approach can be observed in ANVISA, the National Health Surveillance Agency. In 2018, ANVISA launched the *Guia para a mensuração da carga administrativa da regulamentação em Vigilância Sanitária*. This document constitutes a guideline to measure administrative burdens from regulation. Some pilot programmes to tackle administrative burdens followed the introduction of the guidelines, which led to relevant savings for citizens.

At national level, in 2020, the Ministry of Economy published the *Guia de Desregulamentação*: Cutting the red tape. This document is a relevant example to promote the importance of a simplification strategy in Brazil. However, it requires a policy declaration or a high-level document indicating specific plans and goals for the government to achieve good results.

> *Brazil has moved forward with the adoption of the ex post evaluation of regulations by publishing Decree No. 10.411/2020 and with the establishment of CMAP. However, implementation is at an early stage and the efforts are only beginning.*

Decree No. 10.411/2020 dictates that public entities of the federal government conduct an evaluation of regulatory outcomes (ARR) to assess the original objectives of regulations and other effects observed. The Decree provides general criteria to select the potential regulations that will be subject to evaluation. These criteria include regulations with significant effects on the economy, the existence of issues derived from the implementation of the regulation, significant effects on specific groups, analysis of relevant information for the institution, and regulation that reach the 5-year maturity mark.

The formal requirement to perform an *ex post* evaluation of regulations is relevant progress for the management of the regulatory policy cycle. The challenge is an effective implementation of the practice where a set of priority regulations are assessed to identify potential reforms. As the decree was published in 2020, the current administration will begin to implement it in 2022.

The establishment of the Council for the Monitoring and Evaluation of Public Policies (CMAP) is also a step forward in the *ex post* evaluation of public interventions. CMAP is a collegiate body comprised by the Ministry of Economy, Casa Civil of the Presidency and the Office of the Comptroller General (CGU). CMAP is in charge of selecting a list of public policies subject to evaluation, according to specific criteria. The scope of the CMAP includes public policies financed by public spending and subsidies. The work of the CMAP is important for *ex post* evaluation practices, as it constitutes a relevant experience for the assessment of broader public policy instruments (such as regulations). Brazil should make progress in both schemes, the work of the CMAP and the development of the ARR; however, the ARR has a broader scope and it is important to start the practice with quality standards.

> *Brazil has provisions in place by which public entities must plan an ex post evaluation of their regulations. These provisions offer general guidelines to select potential regulations to be assessed.*

According to Decree No. 10.411/2020, during the first year of each presidential mandate all public entities within the federal administration must select and publish at least one regulation that will incorporate the ARR agenda on their respective websites. Such a regulation must be in the general interest of the economic agents or users of the services provided by the entity. The regulation assessment must be published before the end of each mandate. For the current administration, the ARR agenda must be published by 14 October 2022 and the assessment must be carried out by 31 December 2022. It is not clear, though, what the intensification process will look like for *ex post* evaluations in the country.

The decree provides instructions to plan the *ex post* evaluation. The requirement is to plan for the review of at least one regulation per public entity.[14] This is a positive development in the right direction. However, there is a risk that ministries and agencies may decide to assess regulations that are not necessarily the most relevant ones, such as the ones with the most significant effects, in favour of easy targets.

Recommendations

Building on the progress and results so far, Brazil would benefit by stepping up the efforts to simplify formalities and reduce administrative burdens, including, but not limited to business licences and permits. The strategy should be part of a whole-of-government articulated strategy on administrative simplification, which in turn, should be a fundamental element of the policy on better regulation, and linked to the use of other regulatory management tools.

The whole-of-government articulated strategy on administrative simplification should help in addressing the challenges identified by the OECD in the indicator of Product Market Regulation (PMR), specifically on the sub-indicators on complexity in regulatory procedures and administrative burdens on start-ups. These sub-indicators try to capture, among other things, the efforts by the Brazilian processes for simplifying and evaluating regulations that are not competition friendly, and the administrative burdens that new companies must face when starting their business. While Brazil has made some progress in these areas, such as increasing the availability of e-government services, the country's 2018 scores in these sub-indicators are significantly higher than the OECD average, and higher than the Latin American average.[15]

A whole of government approach means that the strategy on administrative simplification should go beyond licences and permits tor business start-up and encompasses formalities and government procedures that affect citizens and all other stages of the business cycle of enterprises, such as formalities needed for operation, import and export, amongst others.

The oversight body with the task of supervising the better regulation policy should be in charge of managing and following up the whole-of-government articulated strategy on administrative simplification, assessing progress against well-defined targets and reporting to the public. If there is more than one oversight body appointed on better regulation, proper co-ordination mechanisms should be set up.

While each current or new policy initiative as part of the strategy on administrative simplification has specific goals and objectives, all these elements should contribute to high-level objectives on better regulation. In this sense, provisions should be set to ensure that each initiative contains clear criteria on better regulation that apply horizontally to all of them, such as simplification measures before the digitisation of government processes and services, among others. Similarly, clear links with other regulatory management tools should be established, for instance with RIA, in which potential new formalities could be identified and simplified during the RIA scrutiny, before the legal instrument comes into being.

Brazil could consider undertaking measurements and reduction of administrative burdens on groups with regard to key government processes and formalities as part of the whole-of-government articulated strategy on administrative simplification, which will help prioritise efforts and increase accountability when reporting results to the public and other government authorities.

The methodology employed more widely by many OECD countries to measure administrative burdens is the Standard Cost Model (SCM), or variations of it. The SCM allows for the monetisation of burdens created by formalities, government procedures, and information obligations that must be prepared by citizens and businesses and submitted to the government. The monetisation of burdens facilitates the definition of reduction targets, while enabling policymakers to focus on the most onerous groups of formalities. Moreover, once simplification has been achieved, the monetisation of burdens relieved the assessment of reduction targets, and facilitates communications with the public at large.

Another approach for identifying the most onerous regulations is to engage directly with the regulated parties. By setting up a process that allows citizens and businesses to suggest regulations, processes, and formalities that could be simplified or eliminated, the administration would have an initial indication into where to focus resources to reduce administrative burdens. As in the case of public consultations, it is important to provide feedback to stakeholders on how and why their suggestions were or were not taken into consideration.

Use could be made of current experience on burden measurement and reduction in the digitisation of formalities and by entities such as ANVISA to define and carry out the plan for the rest of the government, as part of the whole-of-government articulated strategy on administrative simplification.

Brazil should work towards establishing the governance arrangements to enable a successful implementation of Decrees No. 10.139/2019 and No. 10.411/2020, so the *ex post* regulatory assessment tool is used systematically, as part of the broader policy on better regulation. The report *Reviewing the Stock of Regulation, OECD Best Practice Principles for Regulatory Policy* (OECD, 2020) establishes that the governance of *ex post* reviews is key to their effectiveness and provides advice in areas within regulatory systems for the *ex post* review of regulation.

Regulatory coherence and regulatory policy at sub-national level

Assessment

> *While some co-ordination efforts have been made to seek regulatory coherence throughout the three levels of government, these efforts are isolated.*

The national government should ensure that there are mechanisms in place to ensure regulatory coherence to avoid gaps, overlaps or conflicts in both the contents of the regulatory instruments and the enforcement approaches throughout levels of government. Sub-national governments have a key role in delivering public policy objectives through regulations. They may have the legal capacity to issue and enforce regulation within their own domains, as in federal-type jurisdictions such as Brazil. Alternatively, they may be given the task to implement and enforce regulations issued by upper levels of government, through bye-laws, manuals or guidelines, combined with actions to ensure the enforcement and compliance of the regulations. For that, the government must ensure regulatory coherence.

Brazil has taken some steps to improve co-ordination and regulatory consistency across government levels; however, the country lacks a systematic approach to regulatory coherence. Anecdotic evidence shows that while developing new national regulations, states and municipalities are not formally consulted, generating problems in the implementation. Thus, in some cases, states and municipalities do not have the financial or human resources to implement regulations that are developed at the national level.

Brazil has implemented tools for reducing the administrative burdens on citizens and businesses. These efforts are mainly focused on enhancing the business environment with the involvement of sub-national governments and seek to promote regulatory coherence by ensuring that licences and permits are consistent across the different levels of government. One of these initiatives is Redesim, which focuses on simplifying the process for opening a low-risk business. Redesim is a network formed by states and municipalities all over the country.

> *Some sub-national governments have taken steps to implement better regulation tools; however, these efforts are not underpinned by a national programme or active policy co-ordinated by the federal administration.*

Even though some states and municipalities in Brazil use better regulation tools such as RIA and apply administrative simplification to their formalities and services, these are not systemised practices within states and municipalities. Moreover, the federal administration has not yet taken action to actively promote the adoption of regulatory policy tools in the sub-national governments.

Each state and municipality may design and implement its own better regulation practices, based on its objectives. For example, Minas Gerais issued the State Programme of De-bureaucratisation under Decree No. 47.776/2019. The Programme seeks to reduce the administrative burdens for businesses by eliminating formalities, to make inspections more efficient by focusing on identifying and correcting malpractices, and to train economic agents to make the Federal Economic Freedom Act effective.

Additionally, as a result of the alignment with the national government, it seeks to make the use of RIA for all state regulation mandatory. Even though this programme is a good initiative, it does not cover all the different stages of the regulatory governance cycle.

Finally, governance of the regulatory policy at sub-national level still lacks a clear policy statement and oversight body that fosters their development.

> *There are good regulatory practices at the sub-national level; however, these practices have not been mapped and there is no mechanism whereby relevant practices on better regulation can be shared.*

One way to foster the development of regulatory management capacity and performance at sub-national levels of government is the promotion of best practice across these government authorities and between sub-national and national levels. The sharing of lessons learned, successful cases, and the "dos and don'ts" in the design, implementation and evaluation of regulatory policy and its tools can effectively promote their adoption.

Sub-national governments could also champion policies and programmes on better regulation on behalf of the federation. It should include recruiting the participation of specific ministries or agencies at lower levels of government responsible for ensuring the national level message is shared throughout and to co-ordinate the communication exchanges. In these arrangements, each level of government needs to have clear communication mechanisms and consistent ways of sharing the messaging.

Some states and municipalities in Brazil have adopted better regulation tools, such as administrative simplification and impact assessment. Currently, however, there is no mechanism to share relevant practices and exchange lessons learnt among sub-national governments.[16] The gap in implementing regulatory management tools and policies can lead to diverse state or municipal regulatory frameworks, ultimately affecting citizens and businesses.

The national government has not devoted resources to identifying and mapping good practices on better regulation among sub-national governments. As a result, the federal government is not aware of all the relevant practices that exist across the country and cannot focus on their promotion. The identification and promotion of relevant practices among states and municipalities are important because it helps to close the gap between the ones that have advanced in implementing better regulation tools and the ones that have not. It allows states and municipalities to jump ahead to avoid mistakes and ease the adoption of regulatory policy tools and policies.

> *There is progress in the use of better regulation tools in some states and municipalities; neither the federal administration nor sub-national governments assess these efforts.*

Sub-national governments are part of the public administration machinery, and as such, they should be able to follow principles and apply the appropriate tools to ensure that the regulations they issue are of high quality. In addition, they should ensure that they are effective in enforcing and implementing the regulatory framework. To achieve this, the federal level should step in to help generate the necessary capacities in sub-national governments.

Some states and municipalities in Brazil have started to use better regulation tools, the most common ones being administrative simplification and RIA. However, their implementation is not always optimal, as their main drivers are either political mandates or individual efforts by individual ministries and agencies. Moreover, neither the federal nor the sub-national administrations consider the effectiveness of the efforts and practices implemented at the states and municipalities. This means that it is difficult for administrations to focus their resources on those actions that enhance the quality of regulations.

Additionally, the federal government has not yet focused on developing capacity-building activities for public servants at sub-national level.

Recommendations

In the high-level document that defines and supports the country's better regulation policy, and its gradual implementation plan, Brazil could consider incorporating a section to seek regulatory coherence across the three levels of government, and promote the adoption of better regulation policy and its tools by lower levels of government. In this undertaking, the federal nature of Brazil, which establishes clear limits on the regulatory powers of each level of government and ensures each one's autonomy, should be fully considered.

The initial objective should be to quickly start the promotion of better regulation policy in regional and local governments, in which the federal government could play a leadership role. The gradual approach, together with the provisions set by the federal nature of Brazil, necessarily calls for a model based on promotion and voluntary approaches at the beginning. Once progress is achieved, different governance arrangements could be considered to strengthen the implementation of better regulation at sub-national level, which may include reforms to the regulatory framework.

Existing simplification initiatives such as Top 50 and Redesim, already follow the model in which the involvement of sub-national government is voluntary. The sub-national section of Brazil's better regulation policy could build on these experiences and offer an overall and articulated strategy that may cover:

- Provisions to seek regulatory consistency: this implies creating a mechanism to notify sub-national governments of key draft regulations and creating spaces for engagement for those interested. Given the size of the country, proportionality approaches and prioritisation criteria should be employed. By setting up co-ordination mechanisms that ensure that regulations do not overlap, Brazil can reduce administrative burdens and promote legal certainty.
- Mechanisms to exchange good practices and lessons learned between the federal government and sub-national governments and among different sub-national governments. This will provide the federal government with information and data from which guides, manuals, toolkits, templates, model laws or tools, and a compendium of good practices can be drawn up and shared widely. The voluntary nature of this necessary mechanism implies that sub-national governments have the final decision on adopting these instruments.
- Mechanisms whereby sub-national governments can voluntarily request the support of the federal government to implement, develop or assess their better regulation policy. Initially, the support could be based on "soft" approaches such as advice, supervision, reviews, and capacity building exercises. Contingent on progress and other policy considerations, the mechanism could evolve to encompass more sophisticated incentives to boost adoption, such as transfers of resources.

Notes

[1] The Regulatory Agencies Act (National Act 13.384/2019, Art. 6 and Art. 9) defines the obligation to carry out regulatory impact assessments and public consultations of regulatory proposals by the following regulatory agencies: the Electricity Agency (ANEEL), National Oil, Natural Gas and Biofuels Agency (ANP), National Telecommunications Agency (ANATEL), National Health Surveillance Agency (ANVISA), National Water and Public Sanitation Agency (ANA), National Mining Agency (ANM), National Water Transportation Agency (ANTAQ), National Terrestrial Transportation Agency (ANTT), National Cinema Agency (ANCINE), National Civil Aviation Agency (ANAC), National Supplemental Health Care Agency (ANS).

[2] National Electricity Agency (ANEEL), National Oil, Natural Gas and Biofuels Agency (ANP), National Telecommunications Agency (ANATEL), National Health Surveillance Agency (ANVISA), National Water and Public Sanitation Agency (ANA), National Mining Agency (ANM), National Water Transportation Agency (ANTAQ), National Terrestrial Transportation Agency (ANTT), National Cinema Agency (ANCINE), National Civil Aviation Agency (ANAC), National Supplemental Health Care Agency (ANS).

[3] According to the OECD Recommendation of the Council on Regulatory Policy and Governance, the regulatory oversight body has five key responsibilities: quality control (scrutiny process), identifying areas of policy where regulation can be made more effective (scrutiny of substance), systemic improvement of regulatory policy (scrutiny of the system), co-ordination (coherence of the approach in the administration), and guidance, advice and support (capacity building in the administration).

[4] OECD Review Regulatory Reform of Brazil Virtual Policy Workshop, 9-10 December 2021.

[5] https://www.gov.br/participamaisbrasil/.

[6] Article 9, Act 13.848/2019; Regulatory Agencies Act.

[7] Relevance is not defined in the law.

[8] Article 18 of Decree No. 10.411/2020.

[9] Article 6.I of Decree No. 10.411/2020.

[10] ENAP has conducted the following courses: 1) Applied course in RIA, 2) RIA – basic concepts, 3) RIA – problem definition, 4) RIA – technical methods, 5) RIA – fundamental concepts, 6) *Ex ante* analytics of public policies, 7) Actor mapping and agenda tracking for ex ante assessment of public policies, 8) *ex post* evaluation, 9) RIA for social programs, 10) indicators and monitoring of public policies.

[11] https://www.gov.br/economia/pt-br/assuntos/noticias/2021/abril/arquivo/af_min_guia_tecnico_plano_plurianual_alta.pdf.

[12] https://www.gov.br/infraestrutura/pt-br/acesso-a-informacao/air/airmodelodegovernana20210921_english.pdf.

[13] Art 17, RIA Decree No. 10.411.

[14] To support the adoption of this regulatory management tool, in 2022, Brazil published guidelines on *ex post* evaluation. The document provides guidance to facilitate the introduction of this tool in the Brazilian federal administration. Please refer to Chapter 4.

[15] It includes Argentina, Brazil, Chile, Colombia, Costa Rica, and Mexico.

[16] In 2021, SEAE began the development of the Municipal Competition Index (*Índice de Concorrência dos Municípios*), which aims at encouraging competition among municipalities by disseminating good practices in administrative simplification and regulatory quality. For more details on the Index, please refer to Chapter 5.

Reference

OECD (2015), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264238770-en. [1]

Annex 2.A. Policy options to implement the recommendations of the Review of Regulatory Reform of Brazil

Introduction

This note include a proposal of policy options, which can help Brazilian authorities implement the recommendations of the Review of Regulatory Reform of Brazil. The options described below should be regarded as indicative, with the only intention of providing general guidance. They should be considered along with other options that Brazilian authorities might decide to develop.

Identification of recommendations

To facilitate the identification of recommendations, Annex Table 2.A.1 proposes a system of classification, which allocates a number and a short label to each recommendation. In order to appreciate the detailed content of the recommendations, the reader should refer to the corresponding section of the Review of Regulatory Reform of Brazil.

Annex Table 2.A.1. Identification of recommendations

Recommendation	Identification number	Label
1. Policies and Institutions		
Brazil could consider allocating most, if not all, oversight function for better regulation policy to a single body	1.1.	Oversight body on better regulation
Brazil would benefit from developing a single, high-level document that defines and supports the country's better regulation policy	1.2.	High-level policy document on better regulation
The high-level document on better regulation should be accompanied by a gradual implementation plan	1.3.	Gradual implementation plan
2. Ex ante assessment of regulation and stakeholder engagement in rulemaking		
Building on the lessons learned from the gradual introduction of RIA, Brazil would benefit from defining a roadmap with explicit goals for the deployment and adoption of RIA in the public administration as a whole	2.1.	Roadmap for RIA
As part of the definition of one or several bodies as oversight entities for better regulation, Brazil could consider granting powers to this body to help ensure effective implementation of the RIA tool.	2.2.	Oversight of RIA to supervision body
In the short term, Brazil could consider strengthening further SEAE's role as oversight body for RIA and stakeholder engagement.	2.3.	Strengthen SEAS´s role in RIA
Brazil should foster the engagement of stakeholders in the regulatory process by embedding the requirements for public consultation in the RIA process	2.4.	Embed consultation in RIA
As part of the measures to strengthen transparency in rule making through public consultation, Brazil could consider adopting the following practices[1]	2.5.	Practices to strengthen transparency in consultation
Brazil would benefit from securing greater buy-in from ministries and regulatory entities by stepping up the communication and engagement practices inside the administration	2.6.	Secure greater buy-in for RIA

Recommendation	Identification number	Label
Enhance the use of proportionality criteria and threshold tests for RIA starting with a high threshold for a small number of RIAs.	2.7.	Enhance the use of proportionality criteria in RIA
Continue efforts to build a robust data collection to inform the regulatory analyses	2.8.	Continue efforts to build a robust data collection for RIA
3. Revision of the regulatory stock		
Building on the progress and results so far, Brazil would benefit by stepping up the efforts to simplify formalities and reduce administrative burdens, including, but not limited to business licenses and permits. The strategy should be part of a whole-of-government articulated strategy on administrative simplification	3.1.	Strategy to simplify formalities and reduce administrative burdens
Brazil could consider undertaking measurements and reduction of administrative burdens on groups on key government processes and formalities as part of the whole-of-government articulated strategy on administrative simplification	3.2.	Burden reduction on key government processes
Brazil should work towards establishing the governance arrangements to enable a successful implementation of decrees 10.139/2019 and 10.411/2020, so the tool ex post assessment of regulation is carried out systematically	3.3.	Implementation of ex post assessment of regulation
4. Regulatory coherence and regulatory policy at the sub-national level		
In the high-level document that defines and supports the country's better regulation policy, and its gradual implementation plan, Brazil could consider incorporating a section to seek regulatory coherence across the three levels of government, and promote the adoption of better regulation policy and its tools by lower levels of government. a. Provisions to seek regulatory coherence b. Mechanisms to exchange good practices and lessons learned c. Mechanisms whereby sub-national government can request voluntarily the support of the federal government	4.1	Policy and implementation plan for better regulation with sub-national governments

1. See corresponding section for more details.

Policy option 1: implementation of recommendations on policies and institutions

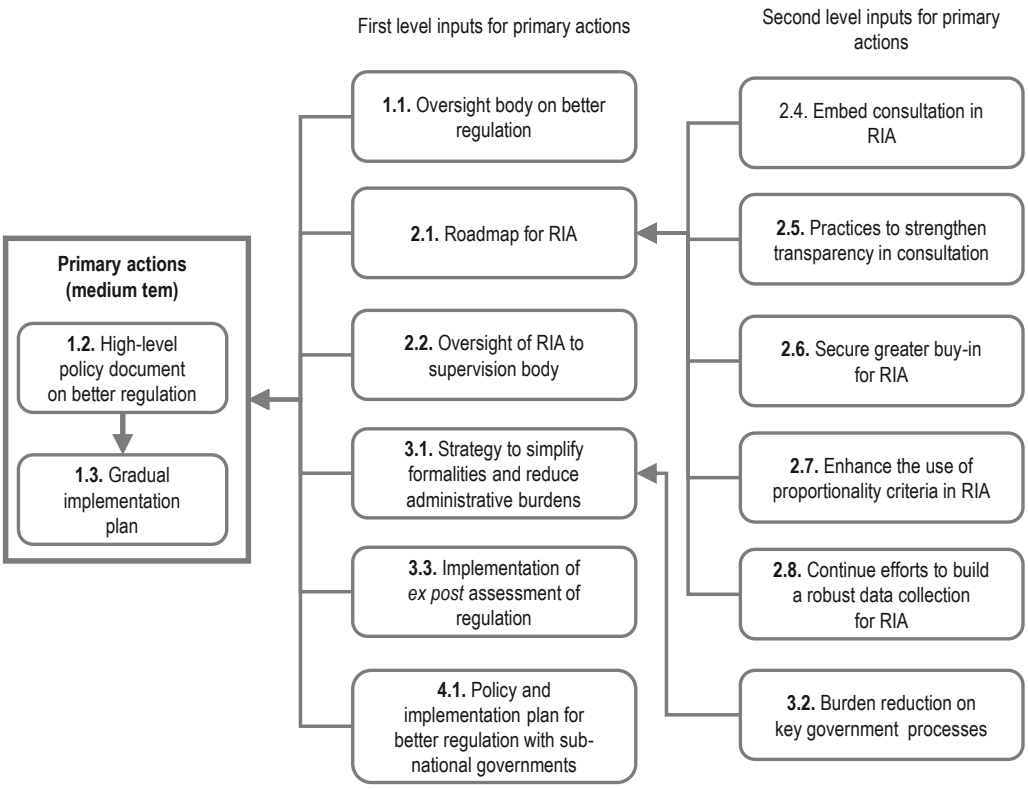
Annex Figure 2.A.1 contains a graphic description of policy option 1. In this scenario, recommendations 1.2 and 1.3 can be considered as the primary actions to implement. The development and eventual publication of a high-level policy on better regulation could be followed by the preparation and publication of its gradual implementation plan.

Annex Figure 2.A.1 also identifies the recommendations that could be considered as inputs for the primary actions. These inputs are identified as first and second level inputs. The first level inputs comprises the recommendations that can help to develop and implement the primary actions directly. They include recommendations for the oversight of the system as a whole, and for the oversight or RIA (recommendations 1.1 and 2.2). They also comprise the recommendation to continue developing the RIA system (recommendation 2.1), to develop the strategy to simplify formalities and reduce administrative burdens (recommendation 3.1), as well recommendations to implement the tool of *ex post* assessment (recommendation 3.3), and to develop the policy and implementation plan to promote the policy on better regulation with sub-national governments (recommendation 4.1).

Finally, Annex Figure 2.A.1 distinguishes the recommendations that could be considered as second level inputs, because they provide with more details suggestions. These recommendations can help to develop and implement the roadmap for RIA (recommendations 2.4, 2.5, 2.6, 2.7 and 2.8), and to develop and implement the strategy to simplify formalities and reduce administrative burdens, through the reduction of burdens on key government processes (recommendation 3.2).

It can be anticipated that the resources needed to undertake the tasks included in policy option 1 may include demands on time and political will, amongst many others. Given these demands, Brazil could aspire to implement these recommendations in the medium term (2 to 4 years).

Annex Figure 2.A.1. Policy option 1: policies and institutions



Policy option 2: Implementation of recommendations on *ex ante* assessment of regulation and stakeholder engagement in rule making

Annex Figure 2.A.2 displays policy option 2, which focuses on recommendations on ex ante assessment of regulation and stakeholder engagement in rulemaking. In this scenario. Recommendation 2.1 “Roadmap for RIA” and recommendation 2.3 “Strengthen SEAE´s role in RIA” are considered the primary actions.

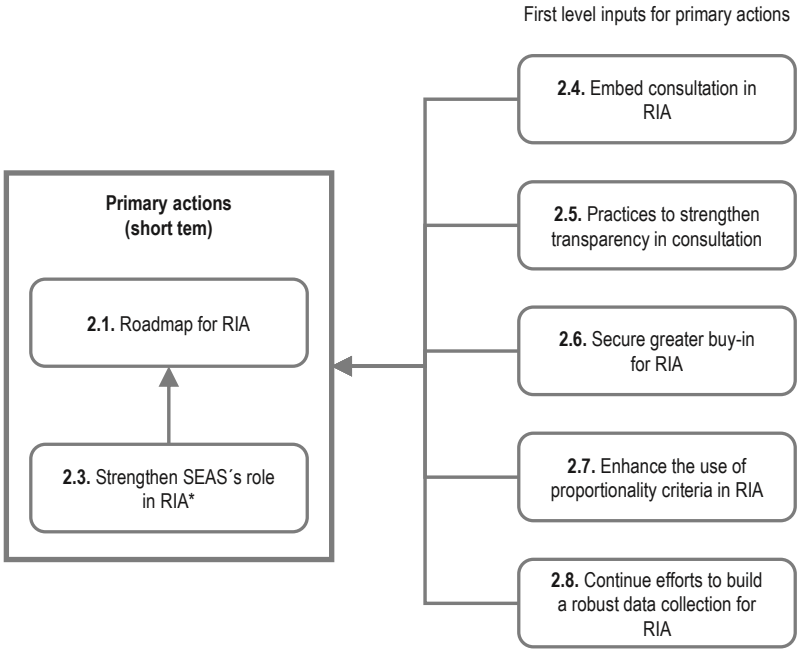
In Annex Figure 2.A.2, the first level inputs covers the recommendations which can help develop and implement the primary actions. For instance, when considering the actions to strengthen the role of SEAE in the RIA process (recommendation 2.3), provisions should be sought to ensure that SEAE can apply proportionality criteria when scrutinising the RIAs (recommendation 2.7).

The inclusion of recommendation 2.3 “Strengthen SEAE´s role in RIA” as one of the primary tasks in policy option 2 should not be regarded as implying that SEAE should become in the longer term the oversight body. Recommendations 1.1 and 2.1 establish that Brazil could consider different institutional arrangements before taking such decision.

Compared to policy option 1, which is very comprehensive and covers practically all recommendations of the Review, the implementation of recommendations included in policy option 2 can demand fewer resources. Therefore, Brazilian authorities might consider undertaking the implementation of these actions in the short term (within the next two years).

Moreover, the undertaking of policy option 2 could provide with inputs in the forms of lessons learned, generation of capacities and expertise, and good practices, which can feed into the development of policy option 1. In this sense, the implementation of policy option 2 should also be carried out keeping in mind the broader objectives contained in policy option 1, in order to ensure consistency and continuity.

Annex Figure 2.A.2. Policy option 2: *ex ante* assessment of regulation and stakeholder engagement in rulemaking



Note: * The inclusion of this recommendation into the broader policy option 1 will depend on the decisions on recommendations 1.1. and 2.1.

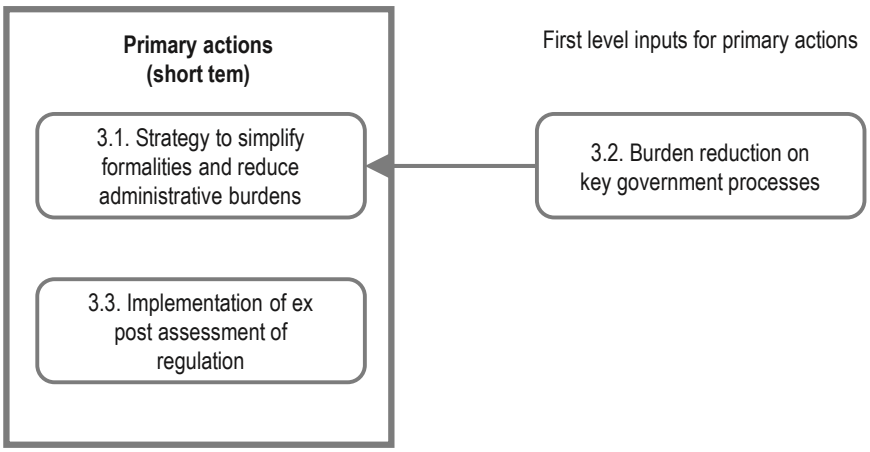
Policy option 3: implementation of recommendations for the revision of the regulatory stock

Annex Figure 2.A.3 shows policy option 3. It includes the recommendations on revision of the regulatory stock. Annex Figure 2.A.3 identifies recommendation 3.1 “Strategy to simplify formalities and reduce administrative burdens”, and 3.3. “Implementation of ex post assessment of regulation” as primary actions. While these recommendations are both aimed at revising and improving the stock of regulation, they can be seen as two separate approaches.

Recommendation 3.2. “Burden reduction on key government processes” can be regarded as providing inputs to develop recommendation 3.1 “Strategy to simplify the formalities and reduce administrative burdens”.

Brazilian authorities could consider taking steps to implement these actions in the short term, as the resources needed are expected to be fewer compared to policy option 1. Furthermore, in this way the implementation of policy option 3 can also provide with important contributions towards the development of policy option 1.

Annex Figure 2.A.3. Policy option 3: revision of the regulatory stock

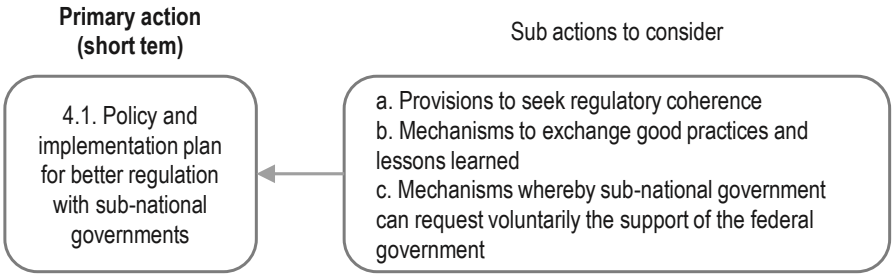


Policy option 4: implementation of recommendations for regulatory coherence and regulatory policy at the sub-national level

Finally, the recommendation for regulatory coherence and regulatory policy at the sub-national level are shown in Annex Figure 2.A.4. Annex Figure 2.A.4 also contains the sub actions to consider to implement this recommendation. They include the establishment of provisions to seek regulatory coherence, of mechanism to exchange good practices across a between levels of governments, and processes to foster support between the federal and subnational governments.

Brazil could start taking measures to implement recommendation 4.1 in the short term. Similar to previous policy options, this can allow Brazil to generate with expertise, which can be leveraged towards the pursuit of policy option 1.

Annex Figure 2.A.4. Policy option 4: regulatory coherence and regulatory policy at the sub-national level



3 Policies and institutions for regulatory governance in Brazil

This chapter provides an overview of the institutional and legal setup for regulatory policy in Brazil. It describes the instruments that underpin the better regulation efforts in the country and offers a glimpse into the aspects that are part of a whole-of-government approach to regulatory quality. Additionally, the chapter focuses on the organisation and status of the regulatory oversight functions using as reference the four core functions of oversight bodies. The last part of the chapter centres on other elements that are important for the development of a fully-fledged regulatory policy.

Regulatory policy in Brazil: an overview

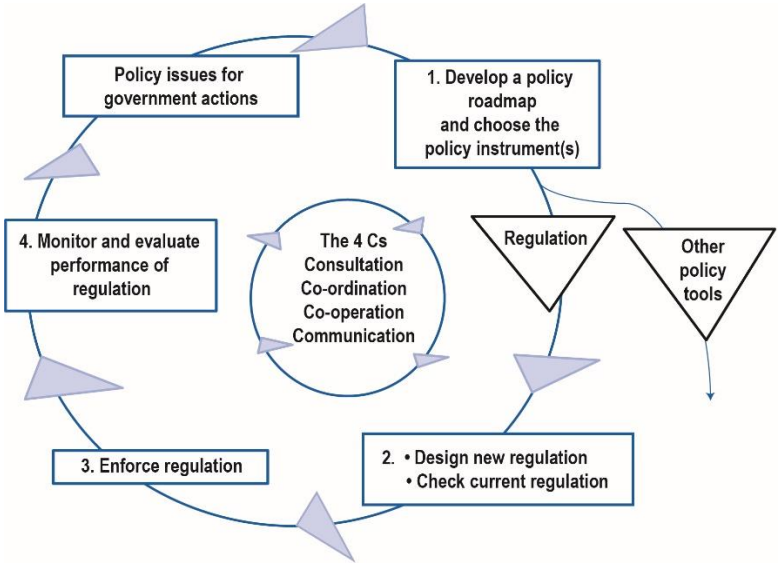
In Brazil, the better regulation agenda dates back to 2007 with the creation of the PRO-REG programme. This coincided with the 2008 OECD Review of Regulatory Reform of Brazil (OECD, 2008[1]), which provided recommendations that boosted the policy on better regulation in the country. The main objective of PRO-REG was to improve the quality of regulations issued by the federal administration. In its first phase (until 2013), the programme focused on the diagnosis of the regulatory environment and on the development of capacities for improving the normative framework in the country. After 2013, the main emphasis of the initiative was the dissemination of good regulatory practices and tools. Since 2016, better regulation initiatives have gained momentum.

In 2016-18 Casa Civil emphasised co-ordination efforts aiming at promoting cultural change towards the best regulatory practices and accelerating the implementation of better regulatory tools at federal level. The national government has enacted several legal instruments to reduce red tape in the federal administration, promote the assessment of existing regulations and introduce a more systematic use of regulatory policy tools.

Legal framework for regulatory policy in Brazil

While regulation is not the only avenue to achieve public policy objectives, a high-quality regulatory framework can help administrations attain their goals in an effective manner. Governments have endorsed the regulatory policy cycle as a process that considers the emission, implementation and evaluation of norms to guarantee the development of a regulatory framework that benefits the society, environment, and economy among others. In this cycle, rules are part of a comprehensive process that begins with the identification of a public policy problem (see Figure 3.1). The selection of the instrument to address this problem is considered during the preparation of a regulatory impact assessment (RIA). Ideally, RIAs take into account several options to achieve a public policy objective, regulation being one of the alternatives. If regulation is the selected option, tools such as regulatory enforcement, monitoring, and *ex post* evaluations become even more relevant.

Figure 3.1. Regulatory policy cycle



Source: OECD (2011[2]), Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264116573-en.

The Brazilian strategy for the roll-out of a better regulation agenda is in the process of considering each of the blocks as an interconnected system that form the regulatory policy cycle, underpinned by horizontal activities, i.e. public consultation, co-ordination, co-operation and communication, instead of independent self-contained elements. Thus, the legal framework for regulatory policy in Brazil is contained across several instruments. This setup, however, is not exhaustive in the regulatory management tools that it covers nor on the requirement for their implementation across the government.

The Regulatory Agencies Act (Act No. 13.848/2019) and the Economic Freedom Act (Act No. 13.874/2019) are the two main legal documents that underpin the implementation of specific regulatory policy tools in the Brazilian federal administration. The former mandates the adoption of better regulation tools for only 11 regulatory agencies,[1] while the latter has a strong focus on economic competition even though it is relevant for most of the federal administration entities.

Several decrees and by-laws have derived from the Economic Freedom Act. These instruments introduce a broader scope for regulatory management and delivery elements namely licensing, regulatory impact assessment, and review of the stock of regulation (see Box 3.1 with more details of these decrees). As in the case of the regulation that supports their development, these decrees apply to a subset of regulations, activities and procedures. For instance, the Decree for the revision of the stock of regulations (Decree No. 10.139/2019) is relevant only for those legal instruments that are lower than a decree. In addition, the Regulatory Agencies Act (Act No. 13.848/2019) makes the public consultation of impact assessment and draft regulation compulsory only for the 11 regulatory agencies and optional for the rest of the federal public administration.

In terms of administrative simplification and reduction of regulatory sludge,[2] Brazil is taking steps to improve the business environment. Namely, Act No. 11.598/2007 that creates the Registry and Legalisation of Companies and Businesses (Redesim) and the measures taken as part of the commitment by the current administration to increase the country's competitiveness and digitisation are the drivers for these efforts. In line with the aspects linked to the Economic Freedom Act, the emphasis of the regulatory burden reduction activities is to improve the business environment by focusing on a defined set of formalities and government procedures.

Box 3.1. Decrees and legal documents derived from the Economic Freedom Act

- **Decree on Regulatory Impact Assessment**: Decree No. 10.411/2020 regulates the obligation to carry out the RIAs introduced in the Economic Freedom Act and the Regulatory Agencies Act. It describes the circumstances under which RIAs and *ex post* regulatory assessments should be carried out, as well as the content requirements and publication processes. Additionally, the Decree dictates the elaboration of an agenda of *ex post* evaluations, which should include at least one normative act and must be published on the institution's website. The agenda is expected to comprise an entire presidential term (four years). Finally, regulatory impact assessment shall be made publicly available on each institution's website.
- **Decree on licensing**: Decree No. 10.178/2019 defines the criteria and procedures that the administration must follow to assign the risk levels of the different economic activities. Based on the risk level, institutions set a deadline before applying the silence-is-consent rule. In contrast to the other norms that derive from the Economic Freedom Act, this decree is relevant for the federal administration, states, and municipalities.
- **Decree on the revision and consolidation of regulations**: Decree No. 10.139/2019 mandates ministries, regulators and other rule-issuing entities the revision and consolidation of regulations at a lower level than decree. It provides a description of the steps to take to comply with the decree as well as the deadlines for each wave of revisions.

Source: Decree 10.178/2019; Decree No. 10.139/2019; Decree No. 10.411/2020.

Moving towards a whole-of-government regulatory policy in Brazil

Brazil has put in place some of the building blocks for the development of a successful regulatory policy. For instance, the country has made RIA mandatory for entities of the federal administration and has introduced the obligation for regulatory agencies to perform public consultations. The implementation of these efforts has yet to be determined as part of a government-wide strategy in better regulation. The approach followed so far builds on the political and economic context to introduce better regulation. Taking advantage of existing opportunities and f the current environment is a good way to introduce regulatory management tools without going through more formal and slower processes. However, it is important that these activities be further integrated to represent an explicit and comprehensive policy on better regulation. Moreover, by incorporating the country's regulatory policy in a single, high-level document it protects the efforts made so far, as well as future ones, from changes in the political landscape or priorities and ensures their sustainability over time (see Box 3.2 for a snapshot of Canada's regulatory policy).

Box 3.2. Making better regulation a whole-of-government policy

The case of Canada

In Canada, the Cabinet Directive on Regulation defines the Government's regulatory policy framework. It sets the expectations, requirements and guiding principles for the development, management, and review of federal regulations. Moreover, it specifies the main responsibilities that each department or agency have for the better regulation agenda. The Directive encourages departments and agencies to assess regulations through a regulatory life cycle approach. This means that the analysis of regulations should consider three periods: the development of the norms, the management of the regulations already in place, and the assessment of the existing regulations. Table 3.1 lists the main elements and regulatory delivery tools for each of the three periods of the regulatory policy cycle. Additionally, stakeholder engagement activities, regulatory co-operation and alignment, and co-ordination across levels of government underpin the entire rulemaking process in the country.

Table 3.1. Regulatory lifecycle approach

Key aspects

Stage of the regulatory lifecycle	Key elements and tools
During the development of norms	Selection of the regulatory approach
	Regulatory Impact Analysis
	Requirements of the Regulatory Impact Analysis Statement
Management of regulations	Compliance and enforcement
	Inspections and licensing
	Compliance promotion activities and outreach
	Data gathering
	Measuring performance
	Providing clear and transparent information and service
Revision and results of the measures taken	Reviews of regulatory programs
	Reviews of the regulatory stock

Source: (Government of Canada, 2018[3]).

It is important to point out that the Directive provides the general framework for the better regulation agenda in Canada and it is not prescriptive in the methodologies or characteristics that each of the points mentioned above should include.

Source: (Government of Canada, 2018[3]).

As mentioned above, some developments have provided a window of opportunity to introduce elements of regulatory policy. For example, the current administration's objective to encourage competitiveness and economic competition led to the approval of the Economic Freedom Act. Another example is the use of international obligations to introduce regulatory management tools in the domestic rule-making process. This aspect was particularly salient during the discussions within the framework of the fact-finding mission for this report. In 2020, Brazil signed the Agreement on Trade and Economic Cooperation between the Government of the Federative Republic of Brazil and the Government of the United States of America Related to Trade Rules and Transparency, which has an annex on good regulatory practices. Some stakeholders pointed out the possibility of using the requirement for public consultation established in the Agreement to legitimise its implementation throughout the federal administration.[3] Mexico's experience after the approval of the North American Free Trade Agreement (NAFTA) in 1994 shows that the treaty was an important element to stimulate the adoption of some practices in the country.

Building on international requirements to dictate the adoption of regulatory management tools is a way to start the implementation of certain tools. Nonetheless, it does not consider the lack of a single policy document that sees the regulatory policy cycle as a holistic process with clear responsibilities and leadership. A whole-of-government approach to regulatory policy goes hand in hand with the development of an umbrella document that promotes regulatory quality throughout the administration. This policy statement helps to provide consistency in the actions and responsibilities of the parties concerned. It also helps define objectives and goals and provides a framework against which efforts can be evaluated.

While the publication of an overall statement with explicit objectives and attributions does not represent a necessary condition for the deployment of regulatory management tools in the public administration, one of the main recommendations of the OECD is to aspire to a high-quality regulatory framework (OECD, 2012[4]). With a whole-of-government policy, administrations can establish co-operation mechanisms that take institutions, stakeholders, and policy communities into consideration. Thus, using the resources more efficiently and reaping the benefits of better regulations. Box 3.3 lists the main elements that a whole-of-government policy on better regulation should include.

Even if countries may take different approaches to incorporating regulatory policy in their administrations, it is crucial that an all-encompassing document or statement supporting the policy is issued. In fact, the OECD Recommendation of the Regulatory Policy and Governance encourages countries to "issue a formal and binding policy statement underpinning regulatory reform, including guidelines for the use of regulatory policy tools and procedures" (2012[4]). This recommendation has been widely adopted by OECD member countries. As shown in data from the OECD Indicators of Regulatory Policy and Governance (iREG), in 2018 most OECD member countries already had an explicit whole-of-government policy for regulatory quality (OECD, 2018[5]).

Box 3.3. Key elements to be included in the policy for better regulation

Recommendation of the Council on Regulatory Policy and Governance

The OECD Recommendation of the Council on Regulatory Policy and Governance encourages governments to put in place a regulatory policy that encompasses the following elements:

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality.
2. Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by legitimate needs of those interested in and affected by regulation.
3. Establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and foster regulatory quality.

4. Integrate Regulatory Impact Assessment (RIA) into the early stages of the policy process for the formulation of new regulatory proposals.
5. Conduct systematic programme reviews of the stock of significant regulations against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.
6. Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the regulations.
7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.
8. Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions.
9. As appropriate, apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective.
10. Where appropriate, promote regulatory coherence through co-ordination mechanisms between the supranational, the national and sub-national levels of government.
11. Foster the development of regulatory management capacity and performance at sub-national levels of government.
12. In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

Source: OECD (2012[4]), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264209022-en.

Finally, the policy statement should identify the responsibilities of the different institutions and administrative areas with a role in developing, managing and adopting the regulatory policy in the country. It is also important to include clear and explicit co-ordination arrangements to facilitate the implementation of the regulatory management tools and to promote accountability. The next subsection will offer an overview of Brazil's institutional arrangement for regulatory policy.

Key institutions for regulatory policy in Brazil

The institutional landscape for regulatory policy in Brazil comprises several bodies with a role in the implementation of regulatory management tools. Given this range of institutions and the way the better regulation efforts have been implemented in the country, some key functions of regulatory oversight have not yet been clearly defined nor allocated. Furthermore, it seems that even in one and the same ministry, administrative areas that make efforts on better regulation work in silos. Box 3.4 describes the main responsibilities of the entities that deal with aspects of the regulatory policy cycle in the federal administration.

Box 3.4. Key actors at the centre of the regulatory policy in Brazil

- The **Executive Secretariat of the Ministry of Economy** supervises the organisational and administrative modernisation linked to the Ministry of Economy. It co-ordinates the studies and analyses related to regulatory proposals and manages the preparation of legal proposals that affect the Ministry.

- **Secretariat for Competition Advocacy and Competitiveness (SEAE)** is the administrative area in the Ministry of Economy responsible for some of the regulatory policy tools in Brazil, mainly RIA (Decree 9.475/2019, Art.119). It promotes the dissemination of good regulatory practices, mainly through issuing guidelines, capacity-building activities and providing tools and support. SEAE can issue opinions (not binding) on the quality of the regulatory impact analyses prepared for draft regulation. Finally, SEAE can suggest the assessment of existing regulatory instruments that can affect economic competition in the country and propose measures to improve the business environment.
- **Casa Civil** is at the centre of the federal administration and is directly linked to the Presidency of the Republic. In particular, the Deputy Chief of Analysis and Monitoring of Government Policies (SAG) is in charge of assessing the merit and coherence of the government's programmes and policies. If SAG deems it necessary, it can request a RIA for a regulatory proposal (law or decree).
- The **Special Secretariat for De-bureaucratisation, Management and Digital Government**, an administrative unit inside the Ministry of Economy, leads the efforts digitisation of government formalities and services in the country. Additionally, it is responsible for measuring the reduction of the administrative burdens resulting from the implementation of digital solutions.
- The **Inter Ministerial Council of Governance (CIG)** advises the President of the Republic in governance matters regarding the federal administration. The CIG approves guidelines, manuals, and practices to foster the implementation of good governance practices. The Ministry of Economy, the Ministry of the Presidency (Casa Civil), and the Office of the Comptroller General (CGU) are the members of the Council.
- The **Council for Monitoring and Evaluation of Public Policies (CMAP)** evaluates selected public policies that were financed through public expenditure. In addition, it is given the task to monitor the modifications that it suggests as a result of the evaluations.

Table 3.2 lists some of the most salient regulatory management tools and the administrative area or entity in charge of it. While most of the tools are present in Brazil's current normative framework, there is still room for their improvement and development.

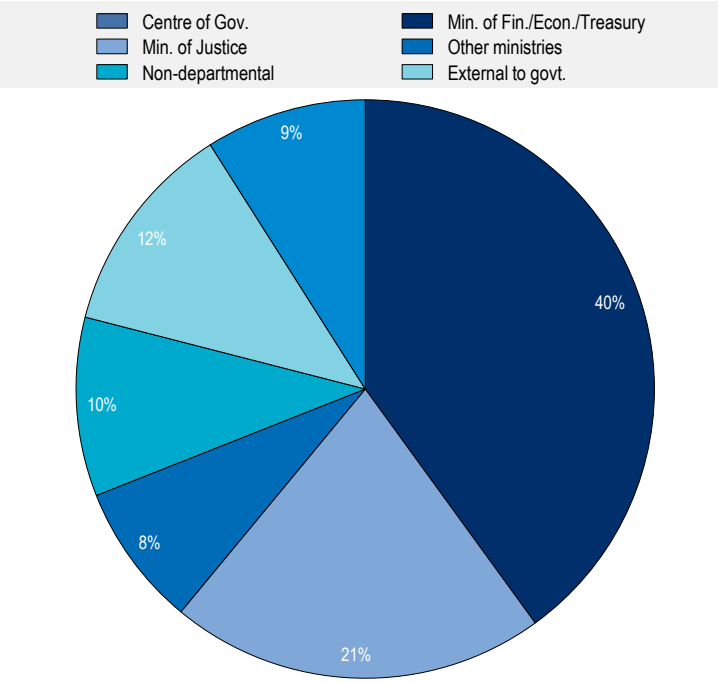
Table 3.2. Regulatory policy management tools and entity responsible of their supervision

	Quality of RIAs	Quality of Stakeholder Engagement	Quality of *ex post* evaluations	Administrative simplification and burden reduction	Compliance and enforcement activities	Communications of regulatory policy
SEAE	Only for a sub-set of regulations					
Special Secretariat for De-bureaucratisation, Management and Digital Government				Mainly through digitising formalities and procedures		
Council for Monitoring and Evaluation of Public Policies			The CMAP performs the evaluation, but only for a sub-set of policies			
Casa Civil	Only for a sub-set of regulations					
Executive Secretariat, Ministry of Economy						Publishes information campaigns and supporting materials

Source: Decree No. 9.203/2017, Decree No. 9.745/2019.

It is fundamental that the department leading the design and implementation of the country's regulatory policy has adequate technical competencies. This ensures that the tools are adopted and implemented in the correctly way throughout the administration and ensures that the oversight and quality control functions are based on expertise. At the same time, it is important for the oversight body to have the political power and support to ensure that the better regulation efforts follow a whole-of-government approach (see Figure 3.2 for a snapshot of the location of ROBs throughout the OECD).

Figure 3.2. Location of ROBs (in % of total)



Note: Data is based on 38 OECD member countries and the European Union.
Source: Indicators of Regulatory Policy and Governance Survey 2021.

In Brazil, Casa Civil was previously the institution leading the efforts on the implementation of the regulatory policy in Brazil, namely RIA. With the creation of the new Ministry of Economy, the oversight of RIA was transferred to the Secretariat for Competition Advocacy and Competitiveness (SEAE).

Core regulatory oversight functions in Brazil

The attributions, responsibilities and institutional arrangements of the regulatory oversight system vary among OECD countries. In some jurisdictions, the regulatory oversight functions are concentrated in one body (i.e. National Commission for Better Regulation in Mexico, CONAMER); while in others, they are allocated to several different administrative areas or institutions. Regardless of the configuration, Renda and Castro identify four core functions for regulatory oversight bodies (Forthcoming[6]). The following subsections will describe the Brazilian regulatory oversight ecosystem through the lens of these core functions.

Quality control of regulatory management tools

The function of quality control of regulatory management tools focuses on three main elements: regulatory impact assessments, stakeholder engagement and *ex post* evaluations, being the first one the most broadly developed in OECD member countries. The regulatory oversight body (ROB) responsible for

quality control plays a key role in ensuring that regulations are developed using a thorough analysis and following methodologies that assess the potential costs and benefits of the alternatives considered. Additionally, by guaranteeing adequate stakeholder engagement processes, the ROB promotes more inclusive and accepted regulations.

In Brazil, the scrutiny of regulatory management tools is in its early stages and is restricted to the assessment of RIAs. SEAE is the body responsible for scrutinising the RIAs of subordinate regulations (Decree 10.411/2020). Nonetheless, SEAE does not perform a systematic evaluation of the RIAs and its opinions are non-binding. The opinions should be publicly available, which eventually may a encourage higher quality of the assessment by working as a *name and shame* mechanism. It is important to emphasise that for *naming and shaming* mechanisms to work, SEAE's oversight authority should be protected from political interference. When this report was being prepared, the OECD team could not identify evidence to assess the effectiveness of this mechanism nor its potential effect on the quality of the RIAs. Furthermore, the Secretariat is not in a position to return the assessment to the agency submitting it. Finally, Decree No. 10.411/2020 defines the basis for the *ex post* evaluation of regulations or evaluation of the regulatory result (*avaliação de resultado regulatório,* ARR); however, it does not define a supervisory body for these assessments.

Perhaps the need to set up adequate resources to perform this function is as important as giving the ROB a clear and explicit mandate for quality control. The regulatory oversight body's protective role must be supported by staff with the adequate level of expertise and with the right financial resources. As the ROB provides a switchboard function, where it brings together the relevant parties in the administration, officials should have the tools to identify how the potential effects of a regulatory proposal might affect other agencies and stakeholders. When this report was being prepared, SEAE had a team of 22 officials to scrutinise the regulatory impact assessments of the entire federal administration, as well as other tasks. It is too early to say if the Secretariat has the necessary resources available to discharge this function correctly. However, representatives from the centre of government stressed that, given the tight fiscal conditions in the country, they do not plan to allocate more resources to regulatory policy but to change the culture and make better use of the resources available.

Issue or provision of relevant guidance on the use of regulatory management tools

The availability of adequate guidance and support is crucial for the implementation of a sound regulatory policy. Regulators, ministries and other institutions should not see better regulation efforts as additional burdens, but rather as tools that encourage the achievement of public policy objectives. Having a regulatory oversight body that is a provider of capacity building activities can help reduce the resistance that ministries or other entities might have towards regulatory policy and can develop their confidence in using regulatory management tools.

In Brazil, the Ministry of Economy spearheaded the efforts to provide guidance and advice for the implementation of regulatory management tools. In fact, several ministries and institutions emphasised the availability of the team from the Ministry of Economy to help deal with questions and doubts in the implementation of RIA. Additionally, to prepare for the new requirement to carry out RIA, the Ministry published a series of manuals and guidelines to help the regulatory impact assessment to be implemented. These documents focus on the executive federal administration, and in some cases special emphasis is place in the Ministry of Economy, but they are publicly available and are a reference for other ministries or institutions. The most relevant guidance documents are:

- Guidelines for the Elaboration of Regulatory Impact Assessments (Ministério da Economia, 2021[7])
- Regulatory Impact Assessment, Frequently Asked Questions (Ministério da Economia, 2021[8])
- Stakeholder engagement in the framework of the Decree on Regulatory Impact Assessment (Ministério da Economia, 2021[9])

- Collection and treatment of data in the framework of the Decree on Regulatory Impact Assessment (Ministério da Economia, 2021[10])
- Governance Model of the Regulatory Impact Assessment in the Ministry of Economy (Ministério da Economia, 2021[11])
- Guidelines for the Evaluation of the Regulatory Outcomes (Ministério da Economia, 2022[12])

Brazilian regulatory agencies have implemented RIA and other regulatory management tools for some years now. This has allowed them to develop expertise and good practices that can be shared throughout the administration. The exchange of lessons learnt can help alleviate the concerns that other agencies might have and could help incorporate regulatory policy into the culture of the ministries and other institutions.

Finally, the National School of Public Administration (ENAP) is also an important player in the provision of training and capacity-building activities. The School conducts courses on impact assessment and other regulatory studies that are available virtually and may be available to a wide range of public officials.. Box 3.5 provides a brief description of the training activities to build expertise in RIA in Australia.

Box 3.5. Capacity building for RIA in Australia

The Office of Best Practice Regulation

Australia's Office of Best Practice Regulation (OBPR) offers capacity building on the impact analysis of regulatory proposals put forward by ministries or other entities. The Office provides different kinds of trainings and resources free of charge to public officials. The contents, scope and purpose of the coaching activities are based on the audience and their needs. OBPR has five streams of capacity development:

- General policy maker training or "RIA 101": It is a full day working session where participants learn Australia's RIA framework and OBPR's role. It focuses on the seven RIA questions* in an interactive way, with several OBPR staff involved.
- Ministry specific training: It provides an overview of the RIA framework, while keeping into consideration the specific characteristics of the relevant ministry. The contact point(s) of the ministry within OBPR lead the training to foster a more fluid relationship with the ministry's policy makers.
- First-year cohort training: It is targeted to public servants who join the administration after their university studies. It focuses on the underlying objective of RIA, which is that evidence informs policymaking.
- *Ad hoc* "needs based" training: It centres on the request by the ministry to address specific elements of the RIA. For example, a session can focus on the definition of the problem and alternatives.
- International and interstate training: Training for national administrations and sub-national governments in Australia that aim at familiarising and learning more about Australia's RIA framework.

Note: The Australian RIA framework includes 7 RIA Questions: 1. What is the problem you are trying to solve? 2. Why is government action needed? 3. What policy options would solve that problem? 4. What is the likely benefit of each option? 5. Who will you consult and how will you consult them? 6. What is the best option from those you have considered? 7. How will you implement and evaluate your chosen option?
Source: OBPR (2022[13]), Learning from Australia's experience of capacity building for Regulatory Impact Analysis (RIA).

Co-ordination on regulatory policy

In Brazil, no administrative area or areas are explicitly in charge of co-ordinating the regulatory policy agenda. For instance, both the Ministry of Economy and Casa Civil play a role in assessing the potential effects of regulations. The Ministry of Economy, particularly SEAE, is involved in the quality assurance of RIAs for subordinate regulations (Decree No. 10.411/2020), while Casa Civil can also require an impact assessment for certain decrees and laws. However, there is no working link between both institutions, even if the two entities have a role in the issue of regulations. The lack of a clear mandate makes it hard to assign a leading agency to ensure the quality of RIA, let alone of the entire regulatory cycle.

Previously, Casa Civil led the steering of the regulatory policy in Brazil. The technical resources available in the Ministry of Economy and the political context in the country directed the reallocation of the RIA agenda to the Ministry of Economy. Moving forward, it is important that, once a department or entity is granted the leadership of the better regulation efforts, it embraces a holistic view of the regulatory cycle and it is allocated adequate support. The approval of the better regulation agenda by the country's political leadership helps reinforce the validity of the institution or administrative area in charge of the policy. Leadership and governance arrangements are critical to ensure the implementation of a successful regulatory policy system (OECD, 2012[4]). Co-ordination and collaboration among the regulatory oversight body (or bodies), ministries and agencies are key to ensuring the adoption of the regulatory management tools and practices.

As in the case of RIA, administrative simplification efforts could benefit from closer co-ordination among the relevant players in the administration. The federal government has set up programmes aimed at tackling the substantial administrative burdens on citizens and businesses in Brazil. The three main initiatives are: i) The Path to the Top 50 Most Competitive Countries, ii) The Digitisation of Public Services Programme, and iii) The National Network for the Simplification of the Registry and Formalisation of Businesses (Redesim) (please refer to Chapter 4 for more details). While the three strategies have generated (and continue to generate) benefits and improved efficiency, these are individual efforts. Each initiative is under the management of a different administrative area of the Ministry of Economy. However, no underlying policy or central co-ordinator encompasses all three programmes. A body that co-ordinates administrative simplification and incorporates it into the regulatory policy in the country can guarantee that the synergies are exploited and that regulations generate the lightest burden for Brazilians. For an example of co-ordinaion among institutions on better regulation, please refer to Box 3.6.

Box 3.6. United Kingdom's regulatory policy ecosystem

In the country, the core functions of regulatory oversight bodies are not centralised in a single institution, but are rather allocated to several administrative areas. Three key actors compose the United Kingdom's regulatory policy ecosystem: the Better Regulation Units, the Better Regulation Executive, and the Regulatory Policy Committee.

- The Better Regulation Unit (BRU) is a departmental administrative area responsible for ensuring that the department complies with the better regulation requirements. Besides, the BRU offers guidance and advises on the methodology that the regulators follow to assess the impacts of draft proposals. Finally, the Unit helps policymakers navigate the approval process for regulators, which could include the sign-off by the Regulatory Policy Committee.
- The Better Regulation Executive (BRE) is responsible for the country's regulatory policy, including its promotion and delivery. Located in the Department for Business, Energy and Industrial Strategy, it also develops guidelines and provides support to the BRUs.

- The Regulatory Policy Committee (RPC) is a body at arm's length of the Department for Business, Energy and Industrial Strategy. It assesses the quality of the analysis used to develop the regulatory proposals (RIAs) and emits an opinion that informs the decisions of ministers on whether to adopt the proposal or not. The RPC's formal opinions are available on line.

Source: (Government of the United Kingdom, 2022[14]); (Department for Business, 2020[15]); (OECD, 2021[16]).

Another aspect in which the ROB plays a key co-ordination role is in regulatory consistency among levels of government. In Brazil, this aspect has been only marginally considered as the strong federal nature of the country has been seen as a disadvantage to the actual development of co-ordination mechanisms. In fact, collaboration on better regulation among the federation, states, and municipalities was perceived as a rather sensitive topic during preparation of this report. While Chapter 5 describes in detail the governance arrangements with sub-national governments, it is important that the regulatory oversight body responsible for co-ordinating the better regulation policy at federal level plays a leadership role in promoting this policy among lower levels of government.

In practical terms, one way to promote collaboration among agencies is by creating networks of policy makers. Currently, two networks exist where regulators and ministries can contact each other to exchange experiences and good practices. The Network for the Articulation of Regulatory Agencies (*Rede de Articulação das Agências Reguladoras,* RADAR), created in 2018, brings together the 11 regulatory agencies within the scope of the Regulatory Agencies Act. The Network offers an area to discuss topics such as risk-based regulation, inspections and regulatory enforcement, and administrative burdens, among others. On the other hand, ministries and regulatory agencies meet every two or three months to share good regulatory practices at the Meeting of Federal Regulators (*Encontro de Reguladores Federais*). This is an initiative in the right direction, even if participation in the activities is voluntary and rather informal. It is worth pointing out that there is a specific working group within the scope of these meetings that focuses on trade regulations.

Systematic evaluation of regulatory policy

The fourth core function of regulatory oversight bodies refers to the systemic evaluation of regulatory policy. As in the case of other government policies, it is important to define goals and objectives, but also to be able to assess the impact of the efforts and resources devoted to achieving these goals. As Brazil is still in the process of developing a whole-of-government policy on better regulation, now is the right time to define a monitoring and evaluation system. Having a global perspective on the efforts on regulatory policy allows system-wide improvements and leads to the development of feedback loops.

Regulatory policy in Brazil: Beyond the building blocks

When talking about regulatory policy, usually the focus tends to be on RIA, stakeholder engagement, and *ex post* evaluation of regulations. High-quality regulation goes well beyond these three building blocks and includes elements such as forward planning, monitoring and assessment of RIA systems, and inspections and regulatory enforcement, among others. In Brazil, several of these tools are already among the tasks performed by some entities; nonetheless, ensuring that these mechanisms are part of the country's regulatory cycle is important to achieve a thorough policy. The following sub-sections describe the achievements and opportunity areas of the Brazilian administration in terms of regulatory planning and inspection and enforcement activities.

Forward planning

Regulators and regulated parties benefit from the development of agendas that describe the anticipated normative changes. Planning encourages transparency and accountability, as it can improve co-ordination in government institutions and provides stakeholders with a roadmap of the regulator's work. In Brazil, the publication of a forward plan or regulatory agenda is only mandatory for regulatory agencies within the scope of the Regulatory Agencies Act. The agenda should be in line with the agency's strategic planning and be publicly available at the entity's headquarters and internet site (Act No. 13.848/2019, Art. 21). Other institutions might have an internal requirement to publish a regulatory agenda; such is the case of the Securities Commission (*Comissão de Valores Mobiliários*, CVM). The CVM's internal regulations state that the Commission should develop a regulatory agenda for the coming year (Ordinance CVM/PTE 190/19). As in the case of the regulatory agencies, the proposed agenda is approved by the Board of Directors/Commissioners and includes a prioritisation of the projects and whether the proposals would be subject to RIA.

In the case of ministries, forward regulatory planning is more institutionalised for primary legislation. As of 2022, Casa Civil is required to publish the government's priority agenda (Decree No. 10.907/2021). This document includes a compilation of the legislative proposals (primary laws) that ministries deem as a priority for the next year. In 2022, the ministries put forward 531 proposals, which were assessed and refined by Casa Civil. The final agenda included 45 proposals grouped into ten major topics[4] (Casa Civil, 2022[17]). The publication of the government's priority agenda is an effort to increase the administration's transparency and predictability vis-à-vis the Congress and relevant stakeholders.

While the obligation to set up a regulatory agenda does not apply to ministries, some administrative areas and entities are incorporating forward planning in their normative process. For instance, the Ministry of Infrastructure (MINFRA), in 2020 published its Transit Regulatory Agenda for the period 2021-2022 (*Agenda Regulatória de Trânsito*, Ordinance No. 2.663/2020). In the same vein, the Ministry of Agriculture made its regulatory agenda for 2021-2022 (Ordinance No. 277/2020) available to the public.

Although this tool has not been systematically adopted throughout the federal administration, the provisions in the recently signed agreement between the United States and Brazil[5] should help deploy the use of regulatory agendas in the federal administration. It is not clear, however, when this obligation will come into force. The regulatory agendas of the regulatory agencies as well as those of a subgroup of ministries are available on the Ministry of Economy's website.

Inspection and regulatory enforcement activities

A relevant point in the regulatory policy cycle refers to efforts that administrations make to inspect regulated parties and enforce compliance of the norms. Governments can incorporate key elements for a high-quality enforcement and inspections system in the country's policy on better regulation. Brazil has taken some steps to encourage better inspections by introducing risk considerations in the Economic Freedom Act and in Decree No. 10 178/2019. The focus of these legislations has been the classification of economic activities based on their risk level and the after-market inspection of those activities considered of low risk. These are steps in the right direction, and could help develop a more articulate strategy for enforcement and inspections with a better regulation viewpoint (please see Box 3.7 for more details on the principles of good inspections and enforcement ecosystems).

Box 3.7. High-quality inspection and enforcement systems

OECD Regulatory Enforcement and Inspections Toolkit

Regulatory enforcement and inspection activities are a necessary component of an efficient and high-quality regulatory system. The 12 principles covered in the Toolkit provide a tool for assessing the way an institution is promoting and ensuring compliance with regulations.

1. **Evidence-based enforcement:** deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly.
2. **Selectivity:** inspections and enforcement cannot be everywhere and address everything, and there are many other ways to achieve regulations' objectives.
3. **Risk focus and proportionality:** the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aiming at reducing the actual risk posed by infractions.
4. **Responsive regulation:** inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses.
5. **Long-term vision:** clear objectives should be set and institutional mechanisms set up with clear objectives and a long-term road map.
6. **Co-ordination and consolidation:** less duplication and overlaps will ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness.
7. **Transparent governance:** Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management. Execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded.
8. **Information integration:** Information and communication technologies should be used to maximise risk-focus, co-ordination and information-sharing – as well as optimal use of resources.
9. **Clear and fair process:** coherent legislation to organise inspections and enforcement needs to be adopted and published, and clearly articulate rights and obligations of officials and of businesses.
10. **Compliance promotion:** Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists.
11. **Professionalism:** Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency.
12. **Reality check:** Institutions in charge of inspection and enforcement should deliver the performance that is expected from them – in terms of stakeholder satisfaction, of efficiency (benefits/costs), and of total effectiveness (safety, health, environmental protection etc.).

Source: OECD (2018[18]), *OECD Regulatory Enforcement and Inspections Toolkit*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264303959-en.

Regulatory agencies have taken some steps to strengthen their inspection and enforcement systems. Nevertheless, these efforts are neither systematised nor widespread throughout the administration. Evidence collected by the review team shows that there are deep underlying issues to be tackled to guarantee that regulatory compliance activities are adequate, efficient and evidence-based. Among the key opportunities areas are:

- The different interpretation of the laws and rules
- Little standardisation of procedures and co-ordination across institutions and levels of government involved in the inspection process
- Resourcing structures of inspection entities.

Notes

[1] National Electricity Agency (ANEEL), National Oil, Natural Gas and Biofuels Agency (ANP), National Telecommunications Agency (ANATEL), National of Health Surveillance Agency (ANVISA), National Water and Public Sanitation Agency (ANA), National Mining Agency (ANM), National Water Transportation Agency (ANTAQ), National Terrestrial Transportation Agency (ANTT), National Cinema Agency (ANCINE), National Civil Aviation Agency (ANAC), National Complementary Health Care Agency (ANS).

[2] Regulatory sludge: "excessive or unjustified frictions, such as paperwork burdens, that cost time or money; that may make life difficult; that may be frustrating, stigmatising, or humiliating; and that might end up depriving people of access to important goods, opportunities, and services." (see Sunstein, Cass R. (2019), Sludge Audits, 27 April). Harvard Public Law Working Paper No. 19-21, Forthcoming, Behavioural Public Policy, http://dx.doi.org/10.2139/ssrn.3379367.

[3] The regulatory agencies covered under the Regulatory Agencies Act already have an obligation to hold public consultations. Please refer to Chapter 3 for more details on stakeholder engagement activities in the Brazilian federal administration.

[4] Economic, Brazilian Cost (*Custo Brasil*), Social, Environmental, Security and Defence, Agriculture, Mining, Education, Infrastructure, and Health.

[5] Agreement on Trade and Economic Cooperation between the Government of the Federative Republic of Brazil and the Government of the United States of America Related to Trade Rules and Transparency.

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4 *Ex ante* assessment of regulation and stakeholder engagement in rulemaking in Brazil

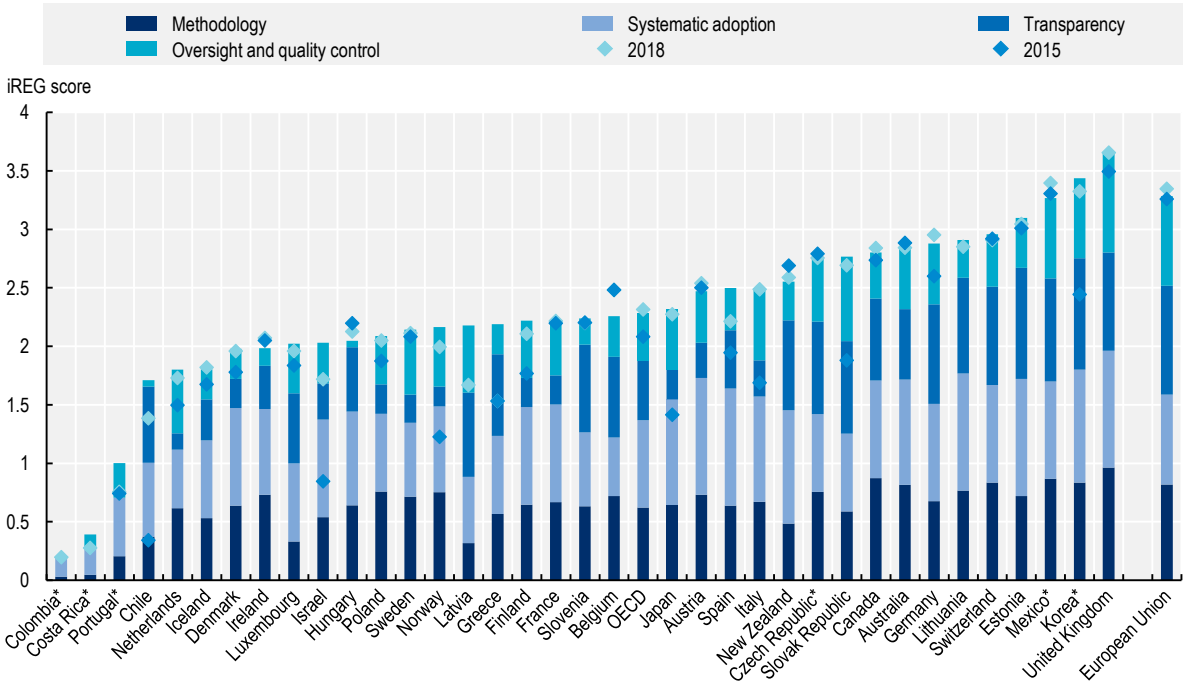
Brazil has introduced a regulatory impact assessment system to assess the effects of regulatory emission and modification. The RIA system was planned as a gradual implementation, with some ministries and institutions adopting the tool first, followed by the rest of ministries six months later including a pilot phase for selected ministries. This chapter outlines the main aspects of the system, including the governance arrangements and practical aspects of the early stages. The chapter also presents the state of public consultation for regulatory production.

Background: RIA in OECD and Best Practice Principles

To ensure that all regulations are of the highest quality and are up to date, regulators must put in place regulatory management tools to analyse the new flow and the stock of existing regulations. This chapter focuses on the *ex ante* assessment of new regulations, mainly by the introduction of a regulatory impact assessment (RIA) and the scope of stakeholder engagement used during the process of designing regulation. RIA has the general goal of subjecting regulatory proposals to a thorough analysis, which includes contrasting the cost and benefits of different alternatives to achieve a given policy objective.

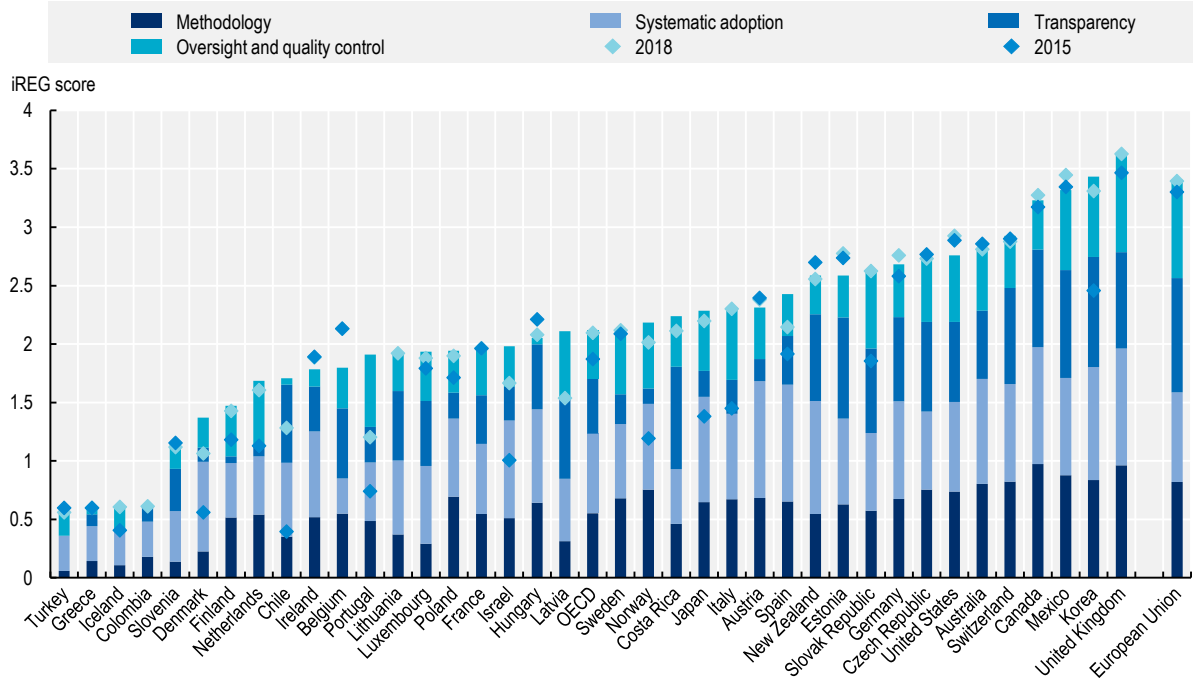
RIA is a practice widely used among OECD member countries, in fact, all OECD member countries have a RIA system in place with varying degrees of development (OECD, 2021[1]). The four pillars that the OECD evaluates to assess the maturity of RIA are: methodology, systemic adoption, transparency, and oversight and quality control. Figure 4.1 and Figure 4.2 present the latest assessment included in the Regulatory Policy Outlook 2021 for primary laws and subordinate regulation. The countries with the highest-ranking for RIA in primary laws includes the United Kingdom, Korea, Mexico, Estonia, as well as the European Union. The countries with the most sophisticated RIA systems for subordinate regulations are the United Kingdom, Korea, and Mexico.

Figure 4.1. Regulatory impact assessment adoption in OECD countries for developing primary laws, 2021



Note: Data for 2014 are based on the 34 countries that were OECD members in 2014 and the European Union. Data for 2017 and 2021 include Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score. The indicator only covers practices in the executive. This therefore excludes the United States where all primary laws are initiated by Congress. * In the majority of OECD countries, most primary laws are initiated by the executive, except for Colombia, Costa Rica, Czech Republic, Korea, Mexico, and Portugal, where a higher share of primary laws are initiated by the legislature. Due to a change in the political system during the survey period affecting the processes for developing laws, composite indicators for Turkey are not available for stakeholder engagement in developing regulations and RIA for primary laws.
Source: (OECD, 2021[1]).

Figure 4.2. Regulatory impact assessment adoption in OECD countries for developing subordinate laws, 2021



Note: Data for 2014 are based on the 34 countries that were OECD members in 2014 and the European Union. Data for 2017 and 2021 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.
Source: (OECD, 2021[1]).

The governance arrangements for RIA vary from one country to another, which respond to differences in the legal and political systems. While they differ in practice, there are common key elements for establishing a sound RIA system. All countries have a body with oversight responsibilities to ensure that all *ex ante* assessments of regulation have a high-quality standard. These bodies may be located within a line ministry (Canada, Mexico, United Kingdom), or within the office of the Presidency or Prime Minister (United States, Australia).

Each country must define its own pathway to establish the design for its *ex ante* assessment system. To help point the countries in the right direction, the OECD identified the Best Practice Principles (BPPs) on RIA (OECD, 2020[2]). These principles relate both to the governance arrangements of RIA, but also to specific methodological content. These principles are summarised in Box 4.1. As shown in these principles, RIA is not only about a technical assessment of effects, but also a greater effort for transparency, stakeholder engagement, and communication. By adopting RIA, countries can increase trust among citizens, as it opens a window into how decisions are made.

Box 4.1. OECD's Best Practice Principles for regulatory impact assessment

A well-functioning RIA system can help policy makers identify the potential outcomes of proposed regulations and determine whether regulations will achieve the intended objectives. RIA should reflect the following critical elements:

- Regulatory impact assessment should be part of the policy implementation process/cycle

- It should start at the beginning of the regulation-making process
- It should clearly and systematically identify the problem and the related regulatory objectives
- Alternative solutions, their costs and benefits are identified and assessed
- It is developed transparently in co-operation with relevant stakeholders
- Its results are clearly and objectively communicated.

The best practice principles relate to the following aspects:

- The role of governments to ensure quality, transparency and stakeholder involvement in the process
- Full integration of RIA in the regulatory governance cycle respecting administrative and cultural specifics of the country
- Strengthened accountability and capacity over RIA implementation
- Using appropriate and well targeted methodology
- Appropriate communication and availability of RIA results to the public
- Continuous monitoring, evaluation and improvement of RIA.

Source: OECD (2020[2]), as presented in the OECD Regulatory Policy Outlook 2021 (OECD, 2021[1]).

Legal and institutional framework in Brazil

In Brazil, the practice of regulatory impact assessment (RIA) in regulatory agencies dates back to the early 2010, and more recently Brazil started efforts to introduce the tool in a systematic way. In 2019, Brazil approved a legal framework to implement an RIA system for subordinate regulations. The obligation contained in the Economic Freedom Act (Article 5) and in the Decree No. 10.411/2020, covers all ministries in the federal government.

> *Article 5. Proposals for editing and amending normative acts of general interest to economic agents or users of the services provided, modified by an agency or entity of the federal public administration, including autarchies and public foundations, will be preceded by a regulatory impact analysis, which will contain information and data on the possible effects of the normative act to verify the rationality of its economic impact.*

Similarly, building on the existing practices in many regulatory agencies, the Regulatory Agencies Act (LRA)[1] systematised the obligation for economic regulators.

> *The adoption of proposals for the amendment of normative acts of general interest to economic agents, consumers or users of the services provided will, under the terms of the regulation, be preceded by the performance of a Regulatory Impact Assessment (RIA), which will contain information and data on the possible effects of the normative act.*

There are a few differences between the LRA and LEF. The LRA sets out that the regulatory proposal together with the RIA should be subjected to public consultation. Additionally, it specifies that the board of directors of each regulator should indicate *whether the estimated effects recommend its adoption, and, when applicable, what additions are needed.* In this sense, the LRA gives the board of directors supervisory responsibilities to ensure the quality of the assessment in the RIA.

Main governance arrangements

Other than the two additional clauses contained in the LRA, all the governance arrangements are common to the federal government and the regulators. These arrangements are specified in Decree No. 10.411, approved in June 2020. The Decree states the following three general conditions that determine whether

a regulatory proposal should or should not be subjected to RIA: 1) should be carried out by bodies and entities of the federal, autonomous, and public administration, 2) be a normative act formulated by collegiate bodes, or by an entity in charge of producing administrative support, 3) RIA does not apply to decrees or normative acts submitted to Congress. From the third condition, primary laws proposed by the executive are not subjected to RIA. It is important to point out that Casa Civil, specifically the Deputy Chief of Assessment and Monitoring of Government Policies (SAG), can request an impact assessment of a regulatory proposal when it deems it appropriate (Decree No. 9.191/2017, Art. 24).

Administrative acts exempted from RIA

The Decree also presents specific conditions that exclude normative acts from being subjected to a regulatory impact assessment:

- Regulations that directly concern taxes directly (the creation administrative obligations regarding taxes must comply with the RIA)
- The administrative act only has internal effects on a specific public body or entity.
- Administrative acts whose effects have individual recipients.
- Which provide budgetary and financial execution.
- Which strictly regulate currency exchanges and monetary policy.
- Aimed at consolidating other rules without changing their merits (Casa Civil, 2018[3]).

The exemptions outlined above concern two broad subjects: regulations on financial policy and internal organisation. Financial policy, broadly speaking, refers to the design of taxes and spending, as well as monetary policy. It is common for OECD countries to exempt this from RIA. This is reasonable, since usually budget approval follows specific supervision controls and approval from the legislative body.

Conditions that may waive certain administrative acts from conducting RIA

Additionally, the RIA may be waived under the following conditions:

- Urgency.
- Normative act intended to discipline rights or obligations defined in a hierarchically superior norm that does not allow, technically or legally, different regulatory alternatives.
- Normative act considered to have a low impact.
- Normative act aimed at updating or revoking norms considered obsolete, without changing their merits.
- Normative act aimed at preserving national financial system liquidity, solvency or soundness.
- Normative act aimed at maintaining convergence to international standards.
- Normative act that reduces requirements, obligations, restrictions, requirements or specifications in order to reduce regulatory costs.
- Normative act that reviews outdated standards to adapt them to internationally consolidated technological development.

It is a common practice among OECD countries to include provisions that waive RIA under certain conditions. By paying closer attention to the clause that states that a waiver can be requested for regulatory proposals considered of low impact, the Decree defines three conditions shown in Box 4.2. These conditions are not particularly specific. In other words, the clause states that the regulatory proposal does not cause a *significant* increase in costs. This is a key aspect of the whole governance on the RIA, since through legal loopholes, many regulations could be exempted when they merit a RIA.

Box 4.2. Definition of a low-impact normative act

If a normative act meets one of the following three criteria it is considered low-impact and do not requires a RIA for its approval.

- Does not cause a significant increase in costs for economic agents or users of the services provided.
- Does not cause a significant increase in budgetary or financial expenses
- Does not have substantial repercussions on public health, safety, environmental, economic or social policies.

Source: Decree No. 10.411/2020.

Roles and responsibilities

SEAE

Brazil has not set up an oversight body with extensive co-ordination tasks. The most salient agency in the process of a RIA is the Secretary of Advocacy for Competition and Competitiveness (SEAE), within the Ministry of Economy. According to the LAR, SEAE "*is obliged [..] to give an opinion, when it deems it relevant, on the regulatory effects of drafts and proposals for amending normative acts of general interest to economic agents, consumers or users of the services provided, submitted for public consultation by the regulatory agency".* While SEAE's role includes that of promoting quality for the RIA system, it does not have the attributions and responsibilities of a traditional gatekeeper for regulatory proposals. Line ministries do not have the obligation of submitting the RIA to SEAE, and even when SEAE does provide comments; ministries do not have an obligation to answer the comments. SEAE does not have the authority to prevent a regulatory proposal from moving forward, even when its impact assessment does not meet an acceptable level of quality. Finally, while SEAE does have a role of providing non-binding comments, it does not have the platform to establish a public naming and shaming mechanism.

According to the Decree on the Ministry of Economy Structure, SEAE also has the task of facilitating regulatory improvement by conducting studies, courses, guides, training, events, etc.[2] An example of this is SEAE's co-ordination with ENAP to provide capacity-building workshops (see section below). Box 4.3 presents the case of Australia's RIA oversight, the Office of Best Practice Regulation (OBPR). As SEAE, OBPR plays a key role in the country's RIA environment, where following a hollistic approach helps ensure the sustainability of the system.

Box 4.3. Australia's Office of Best Practice Regulation: a holistic and responsive approach to oversight

To maximise RIA's ability to identify the pathway to policy solutions with robust analysis of trade-offs, costs and benefits (and thus its influence), OBPR focuses on two areas: scanning efforts to identify upcoming proposals that require RIA, as well as proactive engagement with Ministries on the benefits of RIA. It uses information flows, decision-making processes of government, and its central position in the Department of the Prime Minister and Cabinet to assess if RIA is required for over 1 500 unique new proposals each year. However, much more effort is dedicated to the OBPR's capacity-building focus. In 2019-20, it delivered over 2 250 structured training hours to public servants on how to conduct

robust impact analysis and evidence-based decision making - in addition to emails, calls and meetings to provide agencies with the support and skills to produce high-quality impact analysis.

This support often involves the OBPR working with Ministries to identify the broad range of economic, social and distributional impacts of proposals before preferred options are settled. Using RIA early as a practical policy framework tool enables Ministries to consider the cumulative impacts of proposals. It also enables Ministries to consider how different policy levers interact with each other, well before a policy nears a decision point. This enables more interrogation of innovative options and discourages a siloed or narrow approach to solving policy problems: rather, it helps to focus on policy options that deliver net benefits to the community.

While it is a non-negotiable requirement that RIA is undertaken for all major decisions of the Government, the OBPR's lived experience shows that Ministries who see value in using the RIA framework will generate higher quality impact analysis compared to Ministries who aim for minimum RIA expectations. From the earliest stages of policy development, the OBPR works with Ministries to identify the costs and benefits of options to solve policy problems, often with rapid response times. Where proposals have major impacts on business, individuals, or community organisations, it actively supports Ministries to develop in-depth analysis to inform decision-makers and adopts an agile approach to suit the support required. Assistance can take the form of interactive workshops, drafting advice on early analysis, or short-term secondments. As a result, Ministries are not only encouraged to adopt RIA, but are supported by the OBPR in practice. The OBPR also often works post-RIA, to partner with Ministries to showcase their analysis internally with their colleagues, and share lessons learnt and RIA tips.

Source: Exchanges with Australia's Office of Best Practice Regulation (OBPR); (OECD, 2021[4])

Ministries and regulators

According to the RIA guidelines, each ministry is in charge of the putting RIA into operation. This activity may include defining its workflow, assigning responsibilities, and identifying capacity-building needs. Each ministry is responsible for the elaboration of RIA, with the potential assistance of ENAP (see section below), and subject to feedback from SEAE if ministry in question deems it necessary.In addition to the Ministry of Economy, and on its advice, the Ministry of Infrastructure (MINFRA) has already set up its internal governance arrangements to ensure the introduction of RIA. Through an internal resolution, MINFRA defined the entire workflow, including the possibilities of having a waiver, conducting public consultation, or not needing RIA at all. The workflow divides responsibilities among three levels: Board of Directors, Managers, and Regulatory Units, and generally consists of three broad processes: authorisation to develop RIA (or approval of a waiver), development of RIA (and possible public consultation), and final decision by the authority.[3]

RIA in practice

Decree No. 10.411 lays down the obligation for federal Brazilian authorities to conduct RIA, starting on 14 October 2021. However, the Decree established an earlier date for the Ministry of Economy, the regulatory agencies, and the National Institute of Metrology, Quality and Technology (INMETRO). These bodies had to start conducting RIA 6 months earlier, by 15 April 2021 (Casa Civil, 2020[5]). The rationale was to follow a phased approach that would guarantee a gradual implementation of the RIA system. This helped the key practicalities of the tool to be understood and allowed for the development of guidelines by the Ministry of Economy. The manuals and guidance prepared aimed at supporting RIA in the Ministry of Economy as well as in other ministries and entities.

The Brazilian government made several efforts to ensure a smooth introduction by the full deadline in October 2021. This included updating technical guidelines for RIA, the implementing capacity building workshops for public officials, and communication efforts to start developing a RIA culture when developing new regulations.

Guidelines

Brazil published the first set of guidelines for regulatory impact assessment in 2018 (Casa Civil, 2018[3]), and issued and updated version in 2020 (SEAE, 2020[6]). The guidelines were made available in an effort to support the implementation of RIA for the regulators and ministries of the federal government. The scope goes beyond the technical explanation of the sections that make up the RIA. According to the OECD Best Practice Principles on RIA, *"governments should spell out what [they] consider as good regulations"* (OECD, 2020[2]). The updated guidelines start by precisely defining what is considered a good regulation in Brazil:

> *Regulation is the instrument through which the public administration acts, with a view to ensuring market efficiency, improvement in security, economic growth and gains in social well-being (SEAE, 2020[7]).*

Data and sources of information

The guidelines consider the importance of having reliable information sources and evidence. Having sound data, and the technical and methodological knowledge to process and analyse it will be key to conducting quantitative cost-benefit analysis for the regulations with the greatest effects. As quoted in the guidelines, ENAP reached the conclusion that, in fact, there is a large volume of data available, but the challenge is to process and interpret the information. The guidelines from 2018 also deal with this subject, and indicate that the RIA report *must be transparent on the methods, data, and sources of information used, with the exception of those having a confidential nature* (Casa Civil, 2018[3]). Additionally, it states that it is desirable that public officials use data with the following characteristics:

- Accessibility to the public;
- Accuracy and impartiality: data that allows its validation through other sources or empirical evidence and does not reflect particular values and interests;
- Reputation of the source. (Casa Civil, 2018[3]).

According to the RIA Decree, *the bodies and entities will implement specific strategies for collecting and processing data, so as to enable the preparation of a quantitative analysis and, when applicable, a cost-benefit analysis* (Casa Civil, 2020[5]). During the interviews with the Brazilian authorities, the challenge of conducting data analysis was often raised. One of the greatest difficulties is to co-ordinate data collection and management within different units of a Ministry, as well as among different Ministries.

Risk proportionality

It is a common practice among OECD member countries to adjust the scope and depth of the assessment according to the potential impact of the forthcoming regulation. Countries have a different way, and they usually change, of determining the threshold that would require a normative act to be subjected to a high-impact RIA. There are countries, such as the United States, that specify a specific numeric threshold. If a normative act has a potential effects greater than the given threshold, then a *high-impact* RIA should accompany the proposal. In contrast, Australia does not have rigid criteria and allows for public officials to assess the need for a high or low impact RIA on a case by case basis.[4] While there is no size fits all when it comes to the use of proportionality principles for RIA, the OECD has identified key principles that countries can follow when setting their threshold and proportionality rules (Box 4.4).

Box 4.4. Annex to the OECD Best Practice Principles on Regulatory Impact Assessment: A closer look at proportionality and threshold tests for RIA

OECD countries follow different methodologies to determine the level of scrutiny and analysis of regulatory proposals. While there are varying approaches to the definition of threshold tests, the OECD has identified key principles that countries should follow when developing proportionality rules:

1. Determining the scope of RIA should start at an early stage when policy makers are evaluating the problem – potentially even before considering the need for intervention – and identifying regulatory and non-regulatory alternatives. Preferably, this process should start already in the phase of legislative planning.
2. An oversight body should assess whether the regulator has characterised the problem correctly, including its magnitude, when the regulator still has the flexibility in formulating a regulation or policy. The earlier policy makers understand the magnitude of the problem, the better the government may target resources to developing solutions.
3. During the early stage of RIA, policy makers should begin to introduce an economic rationale and data to determine the scope of the issue. This does not mean an in-depth analysis at an early stage (e.g. a well-developed cost-benefit analysis). Policy makers should be broadly scanning an issue, before undertaking an in-depth analysis.
4. The time and resources devoted to the development of regulation and its analysis should relate to the size of the impacts, the size and structure of the economy, the impacts per capita, the flexibility of the policy, and the relative resources of the government.
5. If a country chooses to use quantified thresholds for RIA, they should be inclusive and base the thresholds on the size of impacts across society, rather than focusing on any specific sector or stakeholder group. There may also be a risk in using one single value threshold that captures impacts across society. One stakeholder group may be disproportionately affected but the total impacts are below the threshold, so countries may wish to consider a threshold that also incorporates a per capita or stakeholder threshold.
6. Regulations should only be exempt from completing the RIA process in genuinely unforeseen emergencies, when a significant delay could objectively put the wellbeing of citizens at risk. Oversight bodies should be very critical of ministries that overuse such exemptions. Ministries should also be required to conduct an ex post evaluation to ensure that the regulation was effective after a defined period of time.
7. Regulations with limited policy options or flexibility (e.g. transposition of EU directives or supranational laws) might have a less rigorous process. When fewer policy options or instruments are available, even if the impacts may be quite significant, policy makers have less flexibility to improve a policy at this stage. Despite this, governments should be mindful that EU directives or other supranational instruments might still have a degree of flexibility in their implementation.
8. The time and resources for regulation development and analysis should also scale with the capacities of the government. It is important that governments continuously build the expertise of policy makers in RIA and stakeholder engagement to make analysis more effective. Governments must build capacities in ministries before they can require significant levels of analysis.

Source: (OECD, 2020[8]).

Brazil has approached this matter with flexibility. Although the RIA Decree does not specify different types of RIA, the 2018 guidelines introduce RIA Level I and RIA Level II.[5] There is no specific threshold to conduct a Level II RIA, as the guidelines indicate: *Practice and experience will reveal, during preparation of the RIA, the cases that require a more in-depth analysis. In more complex cases, the simplest level of assessment will not be capable of satisfactorily identifying and investigating all factors relevant to decision making* (Casa Civil, 2018[3]). The main difference is that Level II RIA should conduct a fully-fledged quantitative assessment, and include a consideration of international practices, and risk-based criteria. With the introduction of Decree No. 10.411/2020, a single-level RIA was preferred over the two levels described in the 2018 Guidelines.

Capacity building

Beginning in 2021, the National School of Public Administration (ENAP) revamped its offer of courses to different Ministries, with the objective of ensuring that public officials were ready when the RIA obligation started. ENAP is linked to the Ministry of Economy and, in co-ordination with the Ministry's Executive Secretariat, works in the development of technical capabilities to carry out RIAs. Ministries can request specific training for their officials, after assessing what the specific needs are. For instance, the Ministry of Infrastructure defined a roadmap, aiming to have 50% of its staff with a basic understanding of RIA and 25% with an intermediate understanding by 2020, and increasing the target in 2021 to 75% basic, 50% intermediate, and 25% advanced understanding.

ENAP also offers advice to individual teams of public officials conducting RIA in the case where public officials request support. ENAP provides the AIR Advisory System (*Serviço de assessoria em* AIR) that helps ministries and entities cope with the challenges they face. The programme follows training through using methods to aid in the adoption of the RIA. Anticipating the fact that the full implementation of the RIA obligation will increase the demand for training and specific advice, ENAP will certify external advisors capable of supporting public officials in carrying out the cost-benefit analysis.

Table 4.1. Courses offered on RIA by ENAP

Course	Access link
Applied Course in Regulatory Impact Analysis (AIR)	https://suap.enap.gov.br/portaldoaluno/curso/1086/
Regulatory Impact Analysis - Basic Concepts	https://suap.enap.gov.br/portaldoaluno/curso/907/
Regulatory Impact Analysis: problem definition	https://suap.enap.gov.br/portaldoaluno/curso/401/
Regulatory Impact Analysis Methods	https://suap.enap.gov.br/portaldoaluno/curso/1004/
Regulatory Impact Analysis: Fundamental Concepts	https://www.escolavirtual.gov.br/curso/357
Ex ante Analysis of Public Policies	https://www.escolavirtual.gov.br/curso/142
Ex ante analysis of public policies: a practical approach	https://suap.enap.gov.br/portaldoaluno/curso/911/
Actor Mapping and Agenda Tracking for the Ex Ante Analysis of Public Policies	https://suap.enap.gov.br/portaldoaluno/curso/847/
Ex Post Evaluation for Public Policies: executive evaluation	https://suap.enap.gov.br/portaldoaluno/curso/916/
Impact Assessment of Social Programs and Policies	https://www.escolavirtual.gov.br/curso/98
Indicators and Monitoring of Public Policies	https://suap.enap.gov.br/portaldoaluno/curso/1196/ and https://www.escolavirtual.gov.br/curso/98

Source: Information provided by Brazilian authorities.

Stakeholder engagement for *ex ante* assessment of regulation

Brazil has introduced provisions and recommendations regarding public consultation in different legal instruments and technical guidelines. The Regulatory Agencies Act explicitly instructs regulators[6] to subject regulatory proposals to public consultations. The RIA and other technical documents developed to

support the regulatory proposal should be available as well, although they are not subject to consultation. Meanwhile, the Economic Freedom Act does not instruct the Ministries of the central government to conduct public consultation. The Decree on RIA stipulates that each Ministry can choose to conduct public consultation on each RIA (Decree No. 10.411/2020 Art. 8). While not systematic, Brazil has increasingly adopted stakeholder engagement practices in the process of issuing or modifying regulations.

The Decree on RIA gives consideration to important arrangements for public consultation. For instance, it instructs that public consultations *should guarantee a period for public manifestation in proportion to the complexity of the subject.*[7] This is in line with the OECD Best Practice Principles on RIA to consider risk-proportionality when preparing an RIA (OECD, 2020[9]). When facing a complex regulation with a significant potential effects, a longer period of consultation will ensure that all stakeholders have enough time to analyse the proposal and produce useful comments. A common practice however, is to establish a minimum length time for the consultation, and allow agencies to increase it when necessary. Box 4.5 presents a list of the main characteristics that public consultations should have in Australia, where stakeholder engagement activities are embedded in the RIA process.

Box 4.5. Stakeholder engagement as a fundamental part of the regulatory cycle

The case of Australia

In Australia, ministries and regulators are required to engage with relevant actors as part of the rulemaking process. Stakeholder engagement is at the core of the Regulatory Impact Statement (RIS). The Office of Best Practice Regulation provides guidance on the stakeholder engagement process and assesses it as part of the Final Assessment of the RIS. According to the Australian government, consultations should be planned and should have the following characteristics:

- Continuous: It should be part of all the regulatory policy cycle
- Broad-based: Consultations should take into account the diversity of stakeholders impacted by the regulatory proposal. It should also consider the impacts on other government departments, agencies, and sub-national administrations.
- Accessible: Regulators should put in place information and tools that allow stakeholders to contribute effectively to the consultation. This means that the information should be written in plain language, supporting documents and material should be easily available, and communication channels have to be adequate.
- Not burdensome: Regulators should provide sufficient time for stakeholders to offer their feedback and be realistic about the requests placed on the consulted groups.
- Transparent: Engage stakeholders since the beginning and be clear about the objectives of the consultation and the management of comments and inputs.
- Consistent and flexible: Regulators should adjust their consultation process given the nature of the regulatory proposal.
- Subject to evaluation and review: Agencies should assess the effectiveness of their consultation practices and use the results from the evaluation as input for improvements.
- Not rushed: Provide stakeholders with enough time to provide feedback. The length of the consultation should be in line with the potential impacts of the proposal (usually, the consultation period should take between 30 and 60 days).
- A means rather and an end: Consultations should inform decision-making.

Source: (OBPR, 2020[10]).

The Regulatory Agencies Act (Act No. 13.848/2019) instructs regulators under its scope to carry out public consultations of their regulatory proposals (Art. 9). The regulatory draft must be publicly available for at least 45 days (except in the case of emergencies). The agencies should post the comments received on their website and headquarters within 10 working days after the consultation period has ended (Art. 9). Finally, regulatory agencies are required to consider the comments and make their answers available to the public.

The ministries also have to publish their RIA on their own website after public consultations, together with an analysis of information and comments. Regarding the comments, the decree states that bodies are not obliged to comment or individually consider the information and may group them or eliminate those that are repetitive or irrelevant. While ministries have less rigorous requirements than regulatory agencies in terms of stakeholder engagement activities, some ministries have adopted this practice and integrate public consultations as part of their regulatory activities. The Ministry of Agriculture and the Ministry of Infrastructure are two examples of this. In the case of the Ministry of Agriculture, approximately 20% of regulatory proposals go through public consultations. In the same vein, the Ministry of Infrastructure also publishes around 20% of its proposals on the website *Participa + Brasil*.

As stated in the previous paragraph, all ministries have to publish the regulatory proposals and RIA on their own websites,[8] following their own quality controls. To increase the ease of finding public consultations, Brazil created a digital platform called *Participa + Brazil*, managed by the office of the Presidency of the Republic. This platform centralises public consultations sent by the ministries and regulators, and sends back the comments to the originator of a regulatory proposal. The interactive platform allows for detailed queries, and to search for consultations by subject or authority and gives the dates of the consultation.

The 2018 RIA guidelines consider the subject of stakeholder engagement and present a set of recommendations to improve their efficiency and experience. Box 4.6 summarises the recommendations in the guidelines. The general idea is that all citizens should be able to access public consultations easily. This covers language, availability, advertising and timing. According to the guidelines, consultations should avoid public holidays, or other dates that might hinder participation by stakeholders. They also consider the fact that consultations should not be a burden on participants. Often, consultations are about asking for information that will improve the decision-making process of regulators. In this sense, information requests should be efficient, avoid being repetitive, and have a clear objective that will improve regulatory design.

Box 4.6. Brazil recommendations for public consultation

- Clearly define the purpose of the consultation.
- Define the target group for the consultation.
- Organise the demand for information, avoiding requesting data or asking unnecessary questions, which can reduce the incentive to participate or distract from the relevant information.
- Define the best form of consultation to reach the public, using channels that facilitate participation.
- Use language appropriate to the target audience of the consultation.
- Use appropriate means of communication or advertising.
- Ensure adequate time for the consultation process, according to the complexity of the topic under analysis.
- Carry out the consultation during a favourable period.

- Ensure the confidentiality of sensitive information.

Note: This is a summarised version of the recommendations for public consultation.
Source: Casa Civil (2018[3]), Diretrizes gerais e guia orientativo para elaboração de análise de impacto regulatório, https://www.gov.br/casacivil/pt-br/centrais-de-conteudo/downloads/diretrizes-gerais-e-guia-orientativo_final_27-09-2018.pdf/view (accessed on 3 February 2022).

Similarly to putting RIA into operation, each ministry must incorporate consultation considerations into the regulatory proposal process. As described in the workflow implemented by the Ministry of Infrastructure, there is a description of what steps to follow when a public consultation is held. The same document emphasises that the consultation should be conducted in accordance with the Ministry's handbook for stakeholder engagement.

Notes

[1] This law covers the following regulators: National Electric Energy Agency (ANEEL), National Petroleum, Natural Gas and Biofuels Agency (ANP), National Telecommunications Agency (ANATEL), National Health Surveillance Agency (ANVISAR), National Supplementary Health Agency (ANS), National Water and Public Sanitation Agency (ANA), National Waterway Transport Agency (Antaq), National Land Transport Agency (ANTT), National Cinema Agency (Ancine), National Civil Aviation Agency (Anac), and the National Mining Agency (ANM).

[2] Art 121. http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9745.htm.

[3] To see the complete workflow, refer to Resolution CEG No. 5 of 2021, MINFRA.

[4] This is however a recent reform in the Australian system, which used to include specific criteria similar to Mexico. After decades of maturity, and once the RIA was conducted systematically throughout the government, Australia introduced flexible criteria.

[5] This, however, is not dealt with in the 2020 guidelines.

[6] Those governed by Regulatory Agencies Act No. 13.848.

[7] Art. 9.

[8] Art 15, § 4.

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OBPR (2020), *Best Practice Consultation*, http://www.consultation.business.gov.au (accessed on 9 May 2022). [10]

OECD (2021), *OECD Regulatory Policy Outlook 2021*, https://www.oecd-ilibrary.org/sites/38b0fdb1-en/index.html?itemId=/content/publication/38b0fdb1-en. [1]

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OECD (2020), *OECD Best Practice Principles for Regulatory Policy: Regulatory Impact Assessment*. [9]

OECD (2020), "Regulatory Impact Assessment", *OECD Best Practice Principles for Regulatory Policy*, https://doi.org/10.1787/7a9638cb-en. [2]

SEAE (2020), *Guia para elaboração de análise de impacto regulatório (AIR)*, https://www.gov.br/economia/pt-br/assuntos/noticias/2021/abril/arquivo/af_min_guia_tecnico_plano_plurianual_alta.pdf (accessed on 3 February 2022). [7]

SEAE (2020), *GUIA PARA ELABORAÇÃO DE ANÁLISE DE IMPACTO REGULATÓRIO (AIR)*, https://www.gov.br/economia/pt-br/assuntos/noticias/2021/abril/arquivo/af_min_guia_tecnico_plano_plurianual_alta.pdf (accessed on 3 February 2022). [6]

5 Revision of the regulatory stock in Brazil

This section reviews the regulatory framework surrounding the revision of the regulatory stock and the implementation of practices in Brazil at federal level. The revision of the regulatory stock is divided in two branches; the administrative simplification policy and the *ex post* evaluation of regulations. First, this chapter presents the regulatory framework associated with administrative simplification and *ex post* evaluation; then a summary of the practices in Brazil is given. Finally, a summary of relevant international practices and an extract of the OECD principles associated to the revision of the regulatory stock are presented.

Regulatory frameworks shaping Brazil's review of the stock of regulation

In recent years, Brazil has updated its regulatory framework for the purpose of achieving objectives on administrative simplification, digitisation and the review of the regulatory stock through *ex post* evaluation. The section will present a summary of the regulatory framework in Brazil supporting the national simplification policy. To see a quantitative assessment of the measures taken by Brazil to tackle administrative burdens on start-ups and of the simplification and evaluation of regulation activities, please refer to Chapter 1.

Economic Freedom Act

The Economic Freedom Act (Act No. 13.874/2019), published in September 2019, protects the economic activity in Brazil and defines the role of the State as a regulatory agent. This law constitutes the foundation for the regulatory policy in the country, including the administrative simplification strategy and the *ex ante* assessment of regulations. Article 5 of the law introduces the obligation to perform a regulatory impact assessment (RIA) for potential reforms and regulatory proposals drafted by ministries and agencies of the federal public administration. Act No. 13.874/2019 also indicates that its bylaw will describe the methodology and requirements to implement RIA. This bylaw, published by Decree No. 10.411 in June 2020, regulates the implementation of RIA in Brazil. Furthermore, Article 13 establishes that all public entities will implement an evaluation of regulatory outcomes (ARR) in order to verify the effects of regulations in place, taking into account the objectives originally defined, as well as any other impact observed in markets and society. The scope of the ARR includes all entities in the federal public administration and autonomous bodies with authority to draft normative acts subject to RIA.

The Act (Article 3) also establishes the rights to economic freedom and requests that the federal government classify and publish low risk economic activities. This classification should be used when sub-national governments do not have specific regulation with the classification of risks associated to economic activities. Similarly, the law also establishes that in the event that the Federal Government has not yet published the classification of risks, sub-national governments instead must apply the resolution of the Committee of the National Network for the Simplification of the Registration and Legalisation of Companies and Businesses (Redesim).

Article 10 of the Economic Freedom Act also amends Act No. 12.682 of July 2012, enabling the storage and use of electronic means to manage public and private documents when citizens or companies interact with public entities. According to the reform, electronic documents will have the same effects and legal validity as paper documents. Consequently, the Secretariat of Digital Government in the Special Secretariat for De-bureaucratisation, Management and Digital Government (SDDG) should draw up the documents which require a verifiable code for reproduction.

The Economic Freedom Act also amends Act No. 8.934 of 1994. The Act states that the National Department for the Registry and Integration of Companies from the SDDG will constitute an archive that collects information from state registries. Moreover, the National Network for the Simplification of the Registry and Legalisation of Companies and Businesses (Redesim) will inform public entities regarding the registration of acts, their modifications and revocations.

The National Network for the Simplification of the Registry and Legalisation of Companies and Businesses

Act No. 11.598 of November 2007 established guidelines and procedures for the simplification and integration of the registry and legalisation of business persons and legal entities. Similarly, it created the National Network for the Simplification of the Registry and Legalisation of Firms and Businesses

(Redesim). The law established the rules for participation in the network, responsibilities and general operating guidelines or principles.

Redesim is a network with the aim of proposing actions to integrate the business creation registry and its process, as well as the legalisation of companies and legal entities. According to the law, the purpose of Redesim is to co-ordinate efforts among different levels of government, avoiding overlaps and duplications in the information and documents required by public entities. The law setting up Redesim indicates that a Management Committee will run the network and the President will be a representative from the Ministry of Economy.

Act No. 11.598 is still in force but some amendments have been made since its publication in 2007. Act No. 14.195 of August 2021 changed some elements in the Redesim law. It focuses on facilities for starting a business, protection for minority shareholders and facilities for foreign trade. For example:

- It requests a regulation detailing the configuration, structure and operation of the Management Committee.
- It incorporates food, handcraft products and civil construction into the network.
- The law indicates that all public entities involved in the process of registering and legalising companies will provide a form (in paper or digital format) with information on the companies and details of their processes in the registration.
- The ability of the committee to develop initiatives within the union, the federal district, states and municipalities to improve the business environment.
- The involvement of the committee on the classification of risks in economic activities.

In order to promote efficiency in the licensing process, in December 2019, Brazil published Decree No. 10.178, which established criteria and procedures by which public entities and bodies in the federal public administration, as well as autonomous and foundational bodies will classify the level of risks associated with economic activities and periods to approve public actions. This decree is complementary to Act No. 11.598 in in that Article 19 provides a framework when a public entity does not have a risk classification. In particular, this law indicates that such an entity can use the risk classification made by the Redesim Committee.

Digitisation of the Public Services Programme

Digitisation of the Public Services Programme (DSP) is an initiative taken by the federal government of Brazil to reduce administrative burdens by using digital resources. One of the highpoints of this programme was the publication of Act No. 12.682 in June 2012, regarding the Electromagnetic Preparation and Storage of Documents. This law regulates digitisation, electronic storage, as well as the reproduction of public and private documents. A key element of the law is that requires an index system to be used for the public and private entities involved in the storage of electronic documents, allowing their precise location and subsequent verification. This law allows digital interaction among public institutions, citizens and companies, ensuring that use of public and private electronic documents is absolutely legal. In particular, this law provides the basic elements for Brazil to develop a digital environment.

Afterwards, the Economic Freedom Act of 2019 updated some of the most relevant articles in Act No. 12.682/2012 to ensure that digital documents are legal. In particular, Article 10 of the Economic Freedom Act refers to the use of digital documents in communications with public bodies. A relevant step is that digital documents and their reproduction have the same validity as printed documents if the former complies with the authenticity and integrity verification mechanisms in accordance with the law.

Managing the regulatory stock in Brazil

Strategies reducing administrative burdens in Brazil

National Network for the Simplification of the Registry and Legalisation of Firms and Businesses

Redesim is the Brazilian national strategy to standardise procedures to set up businesses and track their legal constitution. General information and statistics on the programme's performance can be found on its official website (Government of Brazil, n.d.[1]) (see Box 5.1 with a summary of statistics provided by the programme). Redesim is the one of the most important initiatives of the Brazilian government to improve regulations and simplify business creation as it involves federal and sub-national governments. In practice, Redesim co-ordinates federal and sub-national institutions simplifying all the formalities involved in opening a business, identifying and promoting an efficient pathway.

Box 5.1. Achievements of Redesim at national level

Average time to open a business in Brazil

Redesim publishes on its official website the average time to set up companies and legal entities in Brazil and its states. Similarly, the website publishes the number of requests to start businesses. Since 2019, this information has been provided by the federal entity on a monthly basis. Table 5.1 provides the statistics as for December 2021. As noticed, Sergipe is the state with the least time with 23 hours, followed by Espírito Santo with 1 day and 2 hours. In contrast, the poorest performers are Bahia with 4 days and 22 hours and Amapá with 3 days and 6 hours.

Table 5.1. Average time to set up a business in Brazil's states, December 2021

Federal entity	Average time in days and hours	Number of requests
Brazil	2 days, 4 hours	50 248
Acre	2 days, 17 hours	130
Alagoas	1 day, 23 hours	506
Amazonas	1 day, 14 hours	594
Amapá	3 days, 6 hours	159
Bahia	4 days, 22 hours	1 447
Ceará	2 days, 18 hours	1 683
Distrito Federal	1 day, 13 hours	1 625
Espírito Santo	1 day, 2 hours	1 138
Goiás	1 day, 7 hours	1 769
Maranhão	1 day, 8 hours	657
Minas Gerais	2 days, 10 hours	4 867
MatoGrosso do Sul	1 day, 21 hours	706
MatoGrosso	1 day, 17 hours	1 153
Pará	1 day, 14 hours	329
Paraíba	1 day, 19 hours	464
Pernambuco	2 days, 10 hours	1 039
Piauí	1 day, 22 hours	387
Paraná	1 day, 9 hours	4 084
Rio de Janeiro	2 days, 9 hours	2 002
Rio Grande do Norte	1 day, 9 hours	538

Rondônia	1 day, 10 hours	475
Roraima	1 day, 23 hours	125
Rio Grande do Sul	2 days, 20 hours	3 667
Santa Catarina	2 days, 7 hours	2 221
Sergipe	0 days, 23 hours	283
São Paulo	2 days, 6 hours	17 884
Tocantins	1 day, 22 hours	316

As observed in Table 5.2, in December 2021, the average time to set up a company in Brazil was 2 days and 4 hours. This outcome is the effect of work conducted by the National Department of Business Registry and Integration over the years. Table 5.2 shows a snapshot of the progress that Brazil has made to reduce the time it takes to set up a business. Since January 2019, Brazil has cut by 3 days and 9 hours the time taken to register a company.

Table 5.2. Progress in reducing the time to open a business

Year/Month	Average time in days and hours
2019/January	5 days, 13 hours
2019/December	4 days, 13 hours
2020/December	2 days, 15 hours
2021/December	2 days 4 hours

Note: Please refer to Chapter 1, sub-section on administrative burdens on start-ups, to see an analysis of the impact of Redesim on the OECD's Product Market Regulation indicator.
Source: Government of Brazil (n.d.[1]), Redesim, https://www.gov.br/empresas-e-negocios/pt-br/redesim (accessed on 26 January 2022).

In this context, co-ordinating national and sub-national authorities is the starting point, as Redesim is a network of local and federal institutions. Involvement of national institutions is compulsory and, as mentioned before, it is ruled by the Redesim law (Act No. 11.598/2007). In contrast, participation of sub-national governments and local institutions is voluntary, but formalisation is through an agreement (participation of local entities depends on whether their attributions are in line with the objectives of Redesim). (Government of Brazil, n.d.[2])

Once a sub-national government joins the network, Redesim encourages participating institutions to publish a form, free of charge with all the information, guidelines and instruments related to the process for registering and setting up a company. So that the licencing and registration process is clear and certain, the form should be available in both paper and digital formats.

On the other hand, in standardising and simplifying the process to start businesses, the Redesim Management Committee encourages the classification of low risk activities. Moreover, the law facilitates low-risk activities. In addition, for medium levels of risk, according to the law, licences will be issued automatically, and without human intervention. Similarly, health and safety, environmental control and fire prevention must be simplified, rationalised and standardised by entities and agencies integrating Redesim, and in accordance with their own competencies. The Redesim law also indicates that any relevant inspection required to issue licences and permits could be conducted after the business has started. The only exemption to this provision is when federal law requires prior consent from the tax authority for specific activities.

The Ministry of Economy is the entity in charge of Redesim, in particular, the National Department of Business Registry and Integration in the Secretariat of Digital Government (SGD). The National Department is the advocate and oversight body of Redesim, however, powers to promote and incentivise sub-national governments to join the programme may be limited.

The review learned from some sub-national governments that financial constraints can limit their participation in Redesim. This is because sub-national administrations have to bear the costs as national resources are not available.

Moreover, SEAE has declared that Redesim does not have specific goals to track progress of the programme due to challenges in the implementation of the project at sub-national level. It is a fact that federalism increases challenges to promote public policies, as sub-national governments are autonomous.

In summary, the Redesim law provides guidelines to facilitate licensing, the registration, modification and closure of companies by devising standards to simplify the business environment. These objectives are appropriate and have provided significant gains, but there is a need to integrate this strategy into a whole-of-government policy on better regulation, in which the definition of specific goals for the short, medium and long term will be paramount.

Digitisation of the public services programme

Digitalisation of Public Services (DSP) is an initiative of the Federal Government to evolve public services Digitisation of Public Services (DSP) is an initiative by the Federal Government to develop public services using digital means. DSP is part of the 2020-2022 Digital Government Strategy launched by Decree No. 10.332 of 2020. The Special Secretariat for De-bureaucratisation, Management and Digital Government (SDDG) is in charge of the programme. It is an administrative unit in the Ministry of Economy that conducts the efforts to digitalise public services. Similarly, SDDG measures the reduction of administrative burdens derived from the implementation of digital solutions.

The DSP initiative combines contact points in government agencies into one single website, enabling citizens to communicate with all public entities at federal level by means of a single access point: https://www.gov.br (Government of Brazil, n.d.[2]). In 2021, the Government of Brazil indicated that there were 88 million users registered on the website. In comparison, in January 2019, there were 1.7 million users. This growth shows the success of the DSP program and the benefits perceived by citizens.

Currently, the Government of Brazil provides 4,137 public services from 193 public entities. According to SEAE, in 2021, the DSP programme completed the digitisation of 2,670 of such services (64.5%) and the partial digitisation of 640 (15.5%). The latter still have some steps or elements that have to be done in person, such as submitting documents. It implies that 827 (20%) public services are not yet digitised (these processes can be started on the web page to check information and requirements but they need a physical presence in public offices). The government goal is to completely digitise public services at federal level by 2022.

According to SEAE, digitisation of public services accounts for BRL 2,000 million in savings per year by eliminating administrative tasks; out of this, BRL 1,500 million are savings for citizens and BRL 500 million for the government. Benefits for the citizens and the government are appreciated; however, the review team could not identify evidence of the systematic use of simplification measures before the digitisation of public services.

Simplification in the provision of public services as part of a digitisation strategy can lead to greater savings for citizens and businesses. The elimination of data requirements, the re-engineering of the process, the elimination of steps in the front and back offices, the application of the proportionality principle, the use of citizen language, and an analysis of the improvement in groups of services and formalities from a life event approach[1] (OECD, 2020[3]), are actions on administrative simplification that can further add to the reduction of burdens for citizens and businesses, in addition to digitisation.

The fact that the review team could not find any evidence of the application of simplification measures before digitisation, does not imply that some entities did not follow this path. However, this gap certainly shows the need to have an articulated whole-of-government strategy on better regulation that brings

together all relevant initiatives, with the objective to ensure the systematic application of horizontal criteria for the pursuit of regulatory quality.

Path to the Top 50 Most Competitive Countries Strategy

In 2019, President Jair Bolsonaro undertook to work within a strategy to increase Brazil's competitiveness significantly. The strategy encompasses several initiatives to modernise the business environment and attract foreign direct investment as a means of rebuilding the economy after the health crisis. One of the elements that triggered this strategy was the performance of Brazil in the Doing Business Report by the World Bank. As a result, Brazil started to work on policy interventions, including several reforms to regulations that were identified as onerous (see Box 5.2). These initiatives have brought benefits for citizens, including time and money savings in the opening and operation of businesses.

Box 5.2. Initiatives to improve competitiveness in Brazil

Brazil undertook several initiatives to improve the business environment. Reforms focused on the opening and operation of business activities, aiming at reducing bureaucracy and eliminating barriers to business. Some of the achievements attained so far include:

- Integrating the three levels of government for tax registration. With this measure, a business can start operations in one day, in comparison to the previous situation which took anything from 3 to 10 days (depending on sub-national governments)
- Eliminating the companies' address analysis. It was a compulsory formality for Brazilian companies, now it is a provisional measure conducted by the company.
- Automating the business naming procedure. Now, the company can check the viability of the intended name by consulting the Internet.
- Implementing a nation-wide medium risk classification for companies to improve registration. Now, states and municipalities without their own classification can use the national criteria to grant licences automatically.
- Providing legal certainty in contracts establishing prescriptive deadlines. Previously, complex prescriptive deadlines generated uncertainty and opportunistic situations.
- Speed up electricity connections for low complexity projects. Previously, there was no deadline for electricity connections. Now, there is a provisional measure, in which the silent-is-consent rule applies after five days.
- Speed up electricity connections for new companies. In the past, medium-sized companies waited about 123 days in Rio de Janeiro and 132 days in Sao Paulo for an electricity connection. Now, a company should be connected within 45 to 60 days.
- Reforms of import licensing. According to the new system, the requirement for imports is reduced and, for some products, this document is no longer necessary.
- Strengthen the foreign trade one-stop-shop. Previously, there were entities participating on the website but which carried out formalities in person. Now the transactions are digitised.

These initiatives are a subset from 20 key policy interventions intended to improve the competitiveness of Brazil and follow international standards.

Source: Government of Brazil. Path to the Top 50 Most Competitive Countries: the Provisional Measure Of Business Environment.

Presidential Decree No. 10.139

Decree No. 10.139 provides guidance for the review and consolidation of normative acts lower than decrees issued by entities of the direct and autonomous federal public administration. For the current stock of regulations, acts under the scope of this decree include ordinances, resolutions, normative instructions, letters, notices, normative guidelines, guidelines, recommendations, and approval orders, among others. For future regulations, normative acts will be classified as ordinances, resolutions or normative instructions. These "efforts to take stock of the complexity of current regulations have led to a review of over 45,700 pieces of legislation, of which 22,500 were revoked by September 2021"[2].

Decree No. 10.139 does not apply to normative acts recipients of which (natural persons or legal entities) can be identified by name or recommendations or directives whose non-compliance does not imply legal consequences (real or potential) for recipients.

Use of administrative simplification tools

Public entities in Brazil take advantage of several administrative simplification tools in order to make administrative formalities less onerous. The Ministry of Economy is the main promoter of these tools and several institutions follow regulatory practices with different levels of implementation, however, there is no evidence of an integrated administrative simplification policy following a whole-of-government approach. Simplification tools include:

- Measurement of administrative burdens
- Elimination of obsolete regulations and requirements
- Use of *life events* websites.
- Digitisation of formalities

In March 2018, Brazil published Decree No. 9.319 containing the Brazilian Strategy for Digital Transformation (Government of Brazil, 2008[4]). The strategy, its themes and the governance structure, make up the National System for Digital Transformation (SinDigital). The objective of e-Digital is to take advantage of digital technologies to promote sustainable and inclusive economic and social development. One of its main objectives is digital transformation, making the federal government more accessible to the population and more efficient in providing services to citizens (see Box 5.3Box 5.3). The DSP strategy presented above is incorporated into this objective.

Box 5.3. Brazilian Strategy for Digital Transformation (E-Digital)

The National System for Digital Transformation (SinDigital) is devised by the Brazilian Strategy for Digital Transformation (E-Digital), its thematic branches and its governance structure. SinDigital is co-ordinated by the Casa Civil of the Presidency of the Republic and comprises the following bodies:

- The Inter-ministerial Committee for Digital Transformation (CIT-Digital), composed of representatives from the Federal Government.
- The Advisory Board for Digital Transformation, composed of experts and representatives from the scientific community, civil society and the private sector
- Other bodies and entities linked to digital transformation policies.

e-Digital is structured into the following elements:

Enabling elements:

- Infrastructure and access to information and communication technologies: it aims to promote the expansion of the population's access to the internet and digital technologies.
- Research, development and innovation: it aims at stimulating the development of new technologies, as well as scientific and technological production.
- Trust in the digital environment: it aims at ensuring that the digital environment is safe, reliable, conducive to services and consumption and respects citizen's rights
- Education and professional training: it aims at transforming society for the digital world, new technologies and prepare it for the work of the future.
- International dimension: aims at strengthening Brazilian leadership in global forums related to digital issues, stimulate competitiveness of Brazilian companies overseas, and promote regional integration in the digital economy.

Digital transformation elements:

- Digital transformation of the economy: it aims at stimulating computerisation, the dynamism, productivity and competitiveness of the Brazilian economy.
- Digital transformation: making the federal government more accessible to the population and more efficient in providing services to citizens.

Source: Government of Brazil (2008[4]), *Estratégia Brasileira para a Transformação Digital. E-Digital*, https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/ArquivosEstrategiaDigital/estrategiadigital.pdf (accessed on 31 January 2022)

In December 2020, Brazil published *The Guia de Desregulamentação: "Cutting Red Tape"*, which is a guideline with concepts, description of principles, and policy practices on simplification and deregulation. It presents a series of concepts covering barriers to business, as well as insights on deregulation, including simplification. Like e-Digital, this document is a policy document demonstrating the interest of the Brazilian Government in simplifying formalities. While this guide is a positive development, the review team could not find evidence that other simplification initiatives took advantage of it, in order to boost their results, such as in the case of Redesim and the digitisation of formalities.

The Brazilian government promotes other simplification tools and practices, which are relevant in reducing the administrative burdens for citizens and companies. The website www.gov.br collects most of the stock of formalities at federal level and several elements of the *life event* methodology are there, such as the use of a citizen language and the organisation of formalities into sensible categories.

The adoption of simplification practices varies from one public entity to another. However, individual evidence suggests that regulatory agencies are among the most advanced institutions in the adoption of such practices. An example of this is the work by the *Agência Nacional de Vigilância Sanitária* (ANVISA), the National Health Surveillance Agency. In 2018, ANVISA launched the *Guia para a mensuração da carga administrativa da regulamentação em Vigilância Sanitária* (ANVISA, 2019[5]). This document constitutes a guideline to measure administrative burdens from regulation. This guide supported a pilot programme to tackle administrative burdens, which led to appropriate savings for companies selling products subject to the administrative resolution of the Collegiate Board of Directors (RDC) No. 185 of October 2006 (see Box 5.4). The first exercise to measure the administrative burdens led to the administrative simplification by BRL 750 000 per year. The methodology employed by ANVISA to measure the administrative burdens was the Standard Cost Model.

Box 5.4. Measurement of administrative burdens in Brazil

Agência Nacional de Vigilância Sanitária (ANVISA)

In 2018, ANVISA published the Exercise to measure the administrative burden of RDC No. 185/2006: a pilot study. The Directorate of Economic Studies and Regulatory Intelligence of ANVISA conducted the study and its objective was to measure the burdens created by the administrative resolution of the Collegiate Board of Directors (RDC) No. 185, of 13 October 2006. This rule regulates the economic information (such as prices) sent to ANVISA by registered companies marketing specific health products; for instance, devices used in cardiovascular procedures, clinical analysis, orthopaedics, replacement kidney therapy, among others.

The methodology used to measure administrative burdens was the Standard Cost Model (SCM), which calls for direct interviews with companies within the scope of the regulation. Those firms selected for interviews met the following criteria:

- Five companies participated voluntarily after a letter was sent to different business associations.
- One company selected by convenience due to the large number of reports sent to ANVISA between 2014 and 2017. The reports issued by this company accounted for 14% of the total number.
- Three companies selected randomly according to their size, following the classification published by the Brazilian Micro and Small Enterprises' Support Service (Sebrae).

In this exercise, the implementation of the SCM took advantage of the 11 standard activities that a company undertakes to meet information obligations. Furthermore, an additional analysis of the pilot study was on the relationship of the results with the size of the establishments (according to the number of employees published by Sebrae in 2013). Finally, the study conducted some statistical tests in order to verify whether the sample data had a normal distribution (Shapiro-Wilk test) and the presence of outliers (Grubbs test).

The sample included 13% of the country's companies from 2014 to 2017. According to the tests, the sample used a normal distribution without the presence of outliers. A summary of the results is presented in Table 5.3. According to the report, the administrative burdens of RDC No. 185/2006 may have been influenced by the heterogeneity of the sample that included very different companies in terms of size, quantity of products subject to the regulation and participation in international markets, although the Grubb tests did not suggest the presence of outliers.

Table 5.3. Estimated administrative burden by reporting requirement, ANVISA

Information obligation	Total value without the lower and higher extremes (BRL)	% of the value
Understanding the rules	4,300	12.1
Company data	140	0.4
Basic product information	465	1.5
Detailed technical description of the product	976	3.2
Price intended to be charged on the domestic market with breakdown of tax burden and contribution margin	2,176	6.3
Pricing in other countries	3,706	11.8
List of substitute products accompanied by their respective prices	2,698	9.0
Expected annual expenditure on the product sales effort aimed at healthcare professionals	2,276	7.5
Expected annual expenditure on advertising and product advertising	2,024	6.9
Potential number of patients the product is intended for per year	2,206	7.6

Lifetime and maximum number of sessions	817	2.1
Maximum number of tests per kit	25	0.2
File a document with ANVISA and send a spreadsheet by email containing all the requested information	872	3.7
(Acquisitions to EXCLUSIVELY comply with the regulation)	0	0.0
(costs external additional for to EXCLUSIVELY comply with the regulation)	0	0.6
Subtotal	**22 685**	**72.9**
Operating costs (37%)	**8 393**	**27**
Total	**31 079**	**100**
Average	**6 215**	

Source: ANVISA (2020[6]), Monitoramento e Avaliação de Resultado Regulatório (M&ARR) Diretrizes para a implementação de M&ARR na Anvisa, ANVISA, https://www.gov.br/anvisa/pt-br/assuntos/regulamentacao/monitoramento-e-avaliacao-de-resultado-regulatorio/diretrizes-para-implementacao-de-m-arr-na-anvisa-com-logo.pdf (accessed on 3 February 2022).

In another initiative, in 2017, the Securities Commission (*Comissão de Valores Mobiliários*, CVM) launched a project to reduce administrative burdens with a focus on:

- Increasing regulatory efficiency while considering potential risks to investors.
- Increasing economic welfare, boosted by competition in the marketplace.

The project had two phases. The first one, *Redundancy Elimination Pilot Project*, focused on assessing low complexity regulatory reforms in order to solve redundancies and overlaps. CVM invited 24 institutions to collaborate, including self-regulatory industry associations, the B3 Exchange, the National Development Bank (BNDES), Moody's rating agency, CFA, among others. As a result, 16 instruments were reformed and five were revoked. In December 2018, this phase ended.

The second phase, *Project Portfolio and Prioritisation of Actions,* took advantage of the information collected in the first phase and covered elements that did not meet the eligibility criteria set in the first phase. By 2019, the project drafted a regulatory agenda and opened digital communication channels with market participants and the public, in order to receive suggestions aimed to reduce the cost of regulatory compliance.

Another achievement of CVM on administrative simplification was the application of Presidential Decree No. 10.139 published in November 2019. It stated the obligation to review and consolidate normative acts lower than a decree. CVM performed a major revision and consolidation its regulations including:

- Merger of repetitive devices or of identical normative value.
- Updating outdated terms and language.
- Elimination of ambiguities
- Standardisation of texts
- Suppression of outdated provisions

As a result, in 2020, the CVM revoked 210 regulatory instruments, including 60 Instructions (*Instruções*), 87 Board of Commissioners Decisions (*Deliberações*) and 63 Guidelines (*Notas Explicativas*).

The initiatives by ANVISA and CVM are in the right direction and could be adopted more systematically by Brazil. However, it is clear that these activities could be resource-intensive or difficult to scale-up. In the short term, Brazil could tap into the knowledge and experiences of citizens, businesses, and stakeholders to identify those regulations or procedures that could be streamlined, simplified, or eliminated. Box 5.5 showcases the experience of the European Union, which engages actively with stakeholders to reduce administrative burdens.

Box 5.5. Cutting red tape in the European Union

For over a decade, the European Commission has taken steps to reduce red tape and cut unnecessary regulatory costs. The Regulatory Fitness and Performance Programme (REFIT) was introduced in 2015 and focused on cutting red tape and simplifying existing regulations. The Commission developed a scoreboard to monitor the progress of the proposals for simplification across 18 policy areas. Over the four years of the programme, it yielded cost savings in areas such as energy and financial matters, the digital sector, and tax burden for SMEs.

The Fit for Future Platform (F4F) builds on the experience of the REFIT Programme and, as its predecessor; it aims at simplifying the EU legislation and reducing administrative burdens. The Platform publishes an annual programme of work with the list of topics to address during the next year. For each topic, the Platform collects evidence, feedback, and information on how EU laws could be simplified without undermining their performance.

The Platform is composed of two groups, the Government group, which sits representatives from the national, regional, and local authorities of all member states; and the Stakeholder group. The latter includes experts on better regulation—both from the private sector and from civil society. Citizens and business representatives can propose ideas for streamlining and improving procedures, potential for digitalisation, overlaps with other regulations, among others.

Source: (European Commission, 2020[7]); (European Commission, 2022[8])

Ex post evaluation of regulations

The 2012 OECD Recommendation on Regulatory Policy and Governance invites countries to "conduct systematic programme reviews of the stock of significant regulations against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives". Furthermore, the OECD Best Practice Principles on Reviewing the Regulatory Stock (OECD, 2020[9]), builds upon the 2012 Recommendation (OECD, 2012[10]) and helps elucidate key aspects of ex post evaluation (see Box 5.6).

Box 5.6. OECD Best Practice Principles for Reviewing the Stock of Regulation

The all-embracing principles for ex post evaluations are that:

- Regulatory policy frameworks should explicitly incorporate *ex post* reviews as an integral and permanent part of the regulatory cycle.
- A sound system for the *ex post* review of regulation would ensure comprehensive coverage of the regulatory stock over time, while "quality controlling" key reviews and monitoring the operations of the system as a whole.
- Reviews should include an evidence-based assessment of the actual outcomes from regulations against their rationales and objectives, note any lessons and make recommendations to address any performance deficiencies.

Specific principles relate to the following:

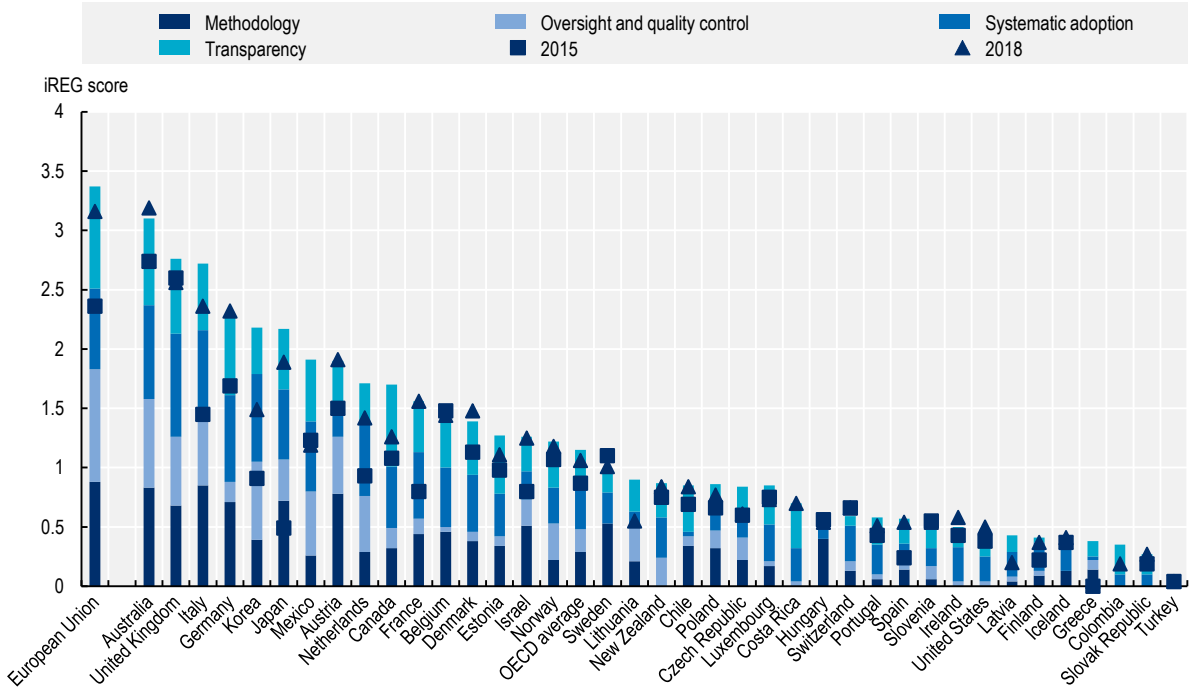
- System governance.

- Broad approaches to reviews: programmed reviews; ad hoc reviews; and ongoing stock management.
- Governance of individual reviews.
- Key questions to be answered in reviews: appropriateness; effectiveness; efficiency; and alternatives.
- Methodologies.
- Public consultation.
- Prioritisation and sequencing.
- Capacity building.
- Committed leadership.

Source: OECD (2020[9]), *Reviewing the Stock of Regulation*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, https://dx.doi.org/10.1787/1a8f33bc-en.

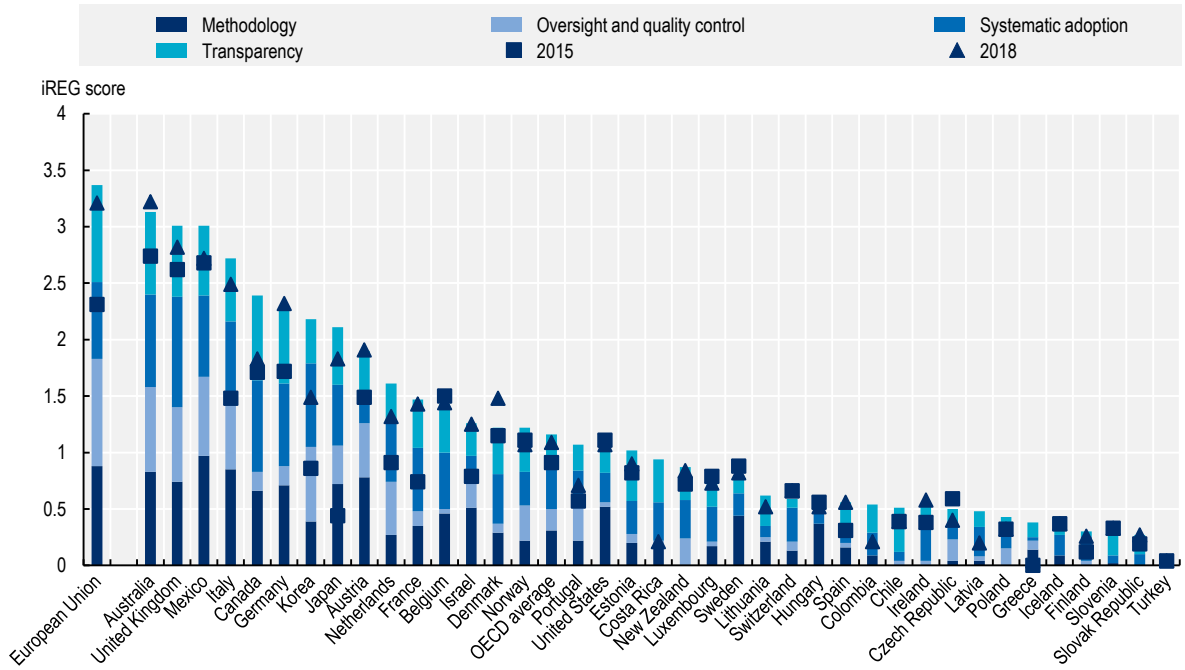
The implementation of the *ex post* evaluation of regulations differs from one member country to another at the OECD (see Figure 5.1 and Figure 5.2). The requirement to review laws and regulations has been formalised by some OECD members by using review or sunset clauses (both are important to ensure that the flow of regulations is under the scope of some sort of review and to determine that they remain appropriate over time). However, only one-quarter of OECD members have systematic requirements in place to conduct *ex post* evaluations, and for a number of countries *ex post* evaluations are close to a new area of regulatory management (OECD, 2021[11]). Relevant examples in ensuring the *ex post* assessment of regulation can be seen in the Box 5.7.

Figure 5.1. Composite indicators: *Ex post* evaluation for primary laws, 2021



Note: Data for 2014 is based on the 34 countries that were OECD members in 2014 and the European Union. Data for 2017 and 2021 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.
Source: Indicators of Regulatory Policy and Governance Surveys 2014, 2017 and 2021.

Figure 5.2. Composite indicators: *Ex post* evaluation for subordinate regulations, 2021



Notes: Data for 2014 is based on the 34 countries that were OECD members in 2014 and the European Union. Data for 2017 and 2021 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.
Source: Indicators of Regulatory Policy and Governance Surveys 2014, 2017 and 2021.

Box 5.7. Selected approaches to ensure that ex post evaluations are considered at earlier stages in the regulatory policy cycle

New Zealand

In New Zealand, the Public Service Act stipulates five public service principles. One of them is "stewardship", which explicitly includes within its scope the stewardship of all legislation administered within the public service. This "regulatory stewardship" responsibility views regulation (regulatory systems) as a set of national assets that require proactive monitoring, care and maintenance to deliver effectively over time.

Good regulatory stewardship practice includes:

- Monitoring the performance and the state of the regulatory systems and of the regulatory environment, assessing the regulatory system and evaluating whether it is suitable for the regulatory objective and reporting on regulatory systems.
- Systematic assessment of risks and effects of the regulations prior to any changes and enabling interested parties to contribute to the design of regulations.
- Providing information and support to regulated parties
- Providing training to regulatory personnel.

European Commission

The European Commission's "evaluate first" principle is a key aspect of its regulatory framework. The "evaluate first" principle calls for the review of regulations before any new proposal is made in an area concerned by the foreseen regulation and that timely and relevant recommendations are given to regulators to support their decision-making. In addition, the evaluation of regulations aids the decision-making process by contributing to the design of future policies.

Source: OECD (2021[11]), OECD Regulatory Policy Outlook 2021, https://www.oecd-ilibrary.org/sites/38b0fdb1-en/index.html?itemId=/content/publication/38b0fdb1-en.

In 2020, around 60% of OECD members provided guidance on conducting *ex post* evaluations to the teams carrying out the assessment. Moreover, the Regulatory Policy Outlook 2021 underscores the importance of having methodologies in place to ensure that observed the effects on the regulations can be assessed against those originally planned. Similarly, the document highlights the relevance of the data collection processes for the purposes of monitoring and evaluation. In particular, Australia has introduced post-implementation reviews (PIR) as one of its tools to evaluate the effectiveness, validity and relevance of existing regulations (Box 5.8). These reviews follow an approach similar to that of the country's *ex ante* assessments, where guiding questions provide a framework for the analysis of the contents of the regulation.

Box 5.8. Preventing the continuity of obsolete regulations in Australia

Post-implementation Reviews

Australia's Post-implementation Reviews (PIR) aim at assessing the effectiveness, validity, and relevance of an existing regulation. The results of the assessment should inform decision-making as to whether keep, modify, or eliminate a regulatory disposition. It is important to point out, that regulators need to follow a holistic approach to rulemaking. This means that agencies and government institutions should consider the data and information that they will need to carry out the PIR, even before they implement the regulation. Please refer to Table 5.4 for a list of the regulations that are subject to a PIR:

Table 5.4. Completion timeframes for post-implementation reviews

Reason for PIR	PIR required to be completed within
Substantial or widespread impact on the Australian economy	5 years of implementation
RIS not prepared for a final decision on a regulatory change	2 years of implementation
RIS not assessed by the OBPR prior to a final decision	2 years of implementation
RIS assessed by the OBPR as insufficient	2 years of implementation
Prime Minister's exemption from the need to prepare a RIS	2 years of implementation

Source: (OBPR, 2020[12])

Just as Regulatory Impact Statements, regulators must answer a set of pre-defined questions when they submit their PIR to the OBPR. The scope and length of the answers to each one of the points below depend on the regulation and its impacts. The questions that should be included in the PIR include:

1. What problem was the regulation meant to solve?

2. Why was government action needed?
3. What policy options were considered?
4. What where the impacts of the regulation?
5. Which stakeholders have been consulted?
6. Has the regulation delivered a net benefit?
7. How was the regulation implemented and evaluated?

Source: (OBPR, 2020[12])

In Brazil in 2018, the Casa Civil of the Presidency of the Republic published the Practical Guide to *Ex Post* Evaluation. This document followed the guidelines established in Decree No. 9,203/2017, which provided for the governance policy of the federal administration, and in particular "monitoring the performance and evaluating the design, implementation and results of policies and priority actions to ensure that strategic guidelines are observed" (Casa Civil da Presidência da República, 2018[13]). The document provides directions on:

- The role of the assessment of public policies within the federal government
- The impact of evaluations on budget
- Executive and specific evaluations
- Design, implementation, governance, outcome and impact evaluations
- Economic assessments, and social and economic payback
- Efficiency analysis

The guidelines offered a general framework on policy assessments and by 2020, Brazil advanced a step forward in the *ex post* evaluation of regulations publishing Decree No. 10.411/2020. This decree indicates that all public entities under the scope of the federal government will conduct an evaluation of regulatory outcomes (ARR) to assess the original objectives of regulations and other effects observed.

Instruments subject to an *ex post* evaluation include, but is not limited to, those regulations:

- With significant effects on the economy.
- With potential issues derived from the implementation of the regulation.
- With significant effects on specific groups
- With five years' maturity.

Implementation of Decree No. 10.411/2020 will start in 2022. The decree indicates that, during the first year of each presidential mandate, all public entities within the scope of the federal administration will select and publish on their respective websites at least one regulation that will integrate the ARR agenda. The regulation proposed in the agenda must be of interest to economic agents or users of services provided by the entity. Finally, the institutions must publish the assessment before the end of each presidential term. For the current administration, the agenda will be integrated by 14th October 2022 and the assessment must be carried out by 31 December 2022.

To support the adoption of the evaluation of regulatory outcomes, in 2022, Brazil published the Guidelines for the Preparation of Evaluation of Regulatory Outcomes (*Guia Orientativo para Elaboração de Avaliação de Resultado Regulatório*-ARR). The development of the document benefited from contributions from stakeholders, as it was subject to public consultation for 45 days on the portal *Participa + Brasil*. The Guidelines provide an overview of key elements such as monitoring, planning of ARR, the ARR report. Furthermore, the document briefly describes appropriate actions that ministries and entities can implement to help incorporate the ARR in the rule-making process (Ministério da Economia, 2022[14]).

The adoption of *ex post* assessments of regulations is at an early stage in Brazil. For this reason, the implementation throughout entities is not standardised. Individual evidence suggests that some regulators are among the most advanced entities in the implementation of this practice. For example, within the scope of ANVISA, Ordinance No. 162/2021 establishes the rules for the application of ARR, according to the provisions of Decree No. 10.411/2020. Moreover, at the end of 2020, in order to structure and implement the Impact Evaluation and Monitoring of Regulation (M&ARR) process, ANVISA published the Guidelines for the implementation of Monitoring and Evaluation of the Regulatory Result (M&ARR) (ANVISA, 2020[6]). These guidelines provide a general framework for ARR within ANVISA, Brazil and other countries. Furthermore, it offers concepts and useful information for ARR implementation as part of the regulatory policy cycle. Taking advantage of this document, ANVISA drafted a series of support material for carrying out the M&ARR. For instance, 10 Guideline Notes adapted as modules for a virtual course on M&ARR were developed (ANVISA, 2020[6]).

A second element in the assessment of Brazilian regulations is the establishment of the Council for Monitoring and Evaluation of Public Policies (CMAP). CMAP is a collegiate body comprised of the Ministry of Economy, Casa Civil of the Presidency and the Office of the Comptroller General (CGU). CMAP is in charge of selecting a list of public policies subject to evaluation, according to specific criteria. The scope of the CMAP includes public policies financed by public spending and subsidies. The work of CMAP is important for *ex post* evaluation practices, as it constitutes a relevant experience for the assessment of broader public policy instruments (as regulations).

Notes

[1] *Life event* is an integrated service model when providing public services. The provision of services tend be based on a single life event (e.g. “having a child”, “starting a business”, etc.), so that a single official can resolve all the transactions with the citizen or the business in a holistic manner. In this way, one-stop shops should aim to provide an end-to-end experience across various transaction channels. Common life event one-stop shops are: the creation, expansion, and closure of businesses; permitting and licensing information from multiple levels of government for one specific geographic area; births, deaths, and marriages; and purchasing property.

[2] https://www-gov-br.translate.goog/secretariageral/pt-br/moderniza-brasil/revisao-de-atos-normativos-inferiores-a-decreto?_x_tr_sl=pt&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp, last accessed 16 March 2022.

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6 Regulatory policy at sub-national level in Brazil

This chapter describes the elements in place in Brazil consistent with the pursuit and application of regulatory coherence and better regulation policy at sub-national level. It first outlines the competence of each level of government to regulate. Then, it presents the context and practices on regulatory coherence at the three levels of government, and the application of a better regulation policy and regulatory management tools at regional level. Finally, the chapter presents practical examples of better regulation practices in two states: Ceará and Minas Gerais.

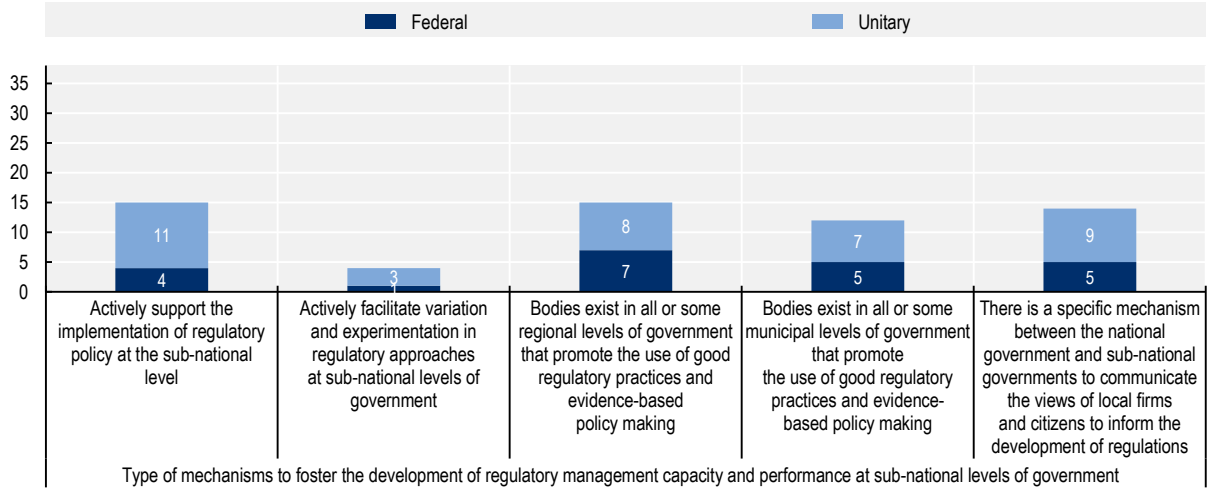
The case for the promotion and implementation of regulatory policy at sub-national level

The 2012 Recommendation of the Council on Regulatory Policy and Governance of the OECD focuses on better regulation in sub-national administrations through two key aspects: regulatory coherence throughout government levels and the development of capacities in states and municipalities. A way to encourage coherence is by identifying cross-cutting regulatory issues, resulting in similar regulatory approaches and avoiding duplication of or conflicting regulations. In addition, the Recommendation invites countries to work on developing regulatory management capacities and performance in sub-national governments (OECD, 2012[1]).

Sub-national governments have a key role in delivering public policy objectives through regulations. States and Municipalities may have the legal authority to issue and enforce regulations within their own domains. On the other hand, they may have to implement and enforce regulations issued by higher levels of government, through secondary regulation, such as bye-laws, manuals or guidelines, combined with actions to ensure the enforcement and compliance of the regulations (OECD, 2021[2]).

The 2021 OECD Indicators of Regulatory Policy and Governance (iREG) emphasise that some countries have made progress on regulatory improvement at sub-national level. Some OECD countries have established a body at sub-national levels of government with the task of overseeing regulatory policy. The indicators also show that governments promote the use of mechanisms to collect feedback from stakeholders at local level to help strengthen regulatory policy at sub-national and federal level. Figure 6.1 shows the most common mechanisms that OECD countries have to encourage the development of management capacities and performance in their sub-national governments.

Figure 6.1. Mechanisms to encourage the development of management capacity and performance at sub-national level



Note: Data are based on 38 OECD member countries. The countries considered as federal type are: Australia, Austria, Belgium, Canada, Germany, Mexico, Switzerland, and the United States of America. The EU is not included in the data.
Source: Indicators of Regulatory Policy and Governance Survey 2021.

The division of regulatory powers in Brazil

Constitutional provisions

Brazil is a Federal Republic. The Constitution of the Federative Republic of Brazil —Articles 22, 23, 24 and 30 — establishes the competence and limitations of the federal, state and municipal levels of government to issue regulations. Each state and municipality has the authority to issue regulations on matters that are not covered by the general rules of the Federal Constitution and the Federal Laws. The common competence of the Federal, State and Municipal governments relates to collective issues, such as guarding the Constitution, health, environment and promoting culture, among others.

Article 22 of the Constitution lists the subjects on which only the Federal Government is competent to legislate. However, it also establishes that complementary laws may authorise the states to legislate on specific issues on these matters. Among them are: civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labour law; social security; public registries; general bidding and contracting norms for public administration, independent agencies and foundations of the Federation, states, Federal District and municipalities; and commercial advertising (Presidency of the Republic of Brazil, 1988[3]).[1]

Article 23 states the competences common to the three levels of government. The complementary law shall establish norms for co-operation among the Union and the States, the Federal District and the Municipalities, aiming at a balanced development and welfare at national level. Some common competences are: public health and assistance; protecting the environment and fighting pollution; promoting the improvement of housing conditions and basic sanitation; fighting the causes of poverty and factors leading to marginalisation; and registering, monitoring and overseeing the granting of rights to research and exploit water and mineral resources within its territories.

The states are responsible for matters of regional interest. In the Constitution there is no express provision defining each of their competences, making them *residual*. Article 24 of the Constitution consolidates the list of subjects for which the Federal government and the states have concurrent legislative competence. In these cases, it falls to the Union to establish general rules, while the states may establish specific rules. However, the competence of the Union to legislate on general rules does not exclude the states' supplementary competence and, in the absence of federal law on general rules, the states will exercise full legislative competence to meet their needs. Among the topics subject to state competence are commercial registries; tax, financial and economic laws; protection of the environment; social security, health protection and defence; the protection of the historical, cultural, artistic, tourist and landscape heritage. On these topics, the competence of the Federal government should be limited to establishing general rules. The supervening federal law on general rules suspends the effectiveness of the state law insofar as it is contrary to it.

Finally, Article 30 of the Constitution states that it is the duty of municipalities to legislate on matters of local interest and to supplement federal and state legislation where appropriate. Municipalities are responsible for matters of local interest, such as urban transport, land apportioning, land use planning, providing local health services and promoting the protection of local cultural and historic heritage. Moreover, municipalities can institute and collect taxes within their own competence, as well as apply their revenue.

The Economic Freedom Act and sub-national governments

The Economic Freedom Act applies to states and municipalities only when the federal ordinary legislation delegates the public act generating economic activity. Some provisions of the Economic Freedom Act, such as the Federal Licensing Decree (Decree No. 10.178 of December 18, 2019), apply to sub-national entities if the public acts of economic activity authorisation are derived or delegated by ordinary federal

legislation. As sub-national governments in Brazil are autonomous, the national decree for RIA (Decree No. 10.411/2020), does not apply to them. Each sub-national government has to generate the regulatory framework for the implementation of better regulation tools (Executive Power of Brazil, 2020[4]).

Regulatory coherence through the three levels of government

The 2012 OECD Recommendation of the Council on Regulatory Policy and Governance states that governments, where appropriate, should promote regulatory coherence through the use of co-ordination mechanisms among the supranational, the national and sub-national levels of government. Furthermore, governments should identify cross-cutting regulatory issues at all levels of government, to promote coherence among regulatory approaches and avoid duplication or conflict of regulations (OECD, 2012[1]).

On this subject, national levels of government should guarantee that there are mechanisms in place to ensure that there is regulatory coherence to avoid gaps, overlaps or conflicts in both the contents of the regulatory instruments and the enforcement approaches throughout the levels of government. Sub-national governments are part of the public administration machinery. As such, they should be able to follow principles and apply the appropriate tools to ensure that the regulations they issue are of a high quality. Additionally, they should ensure that they are effective in enforcing and implementing the regulatory framework.

However, this can only be achieved effectively if the guidelines and procedures issued by state and municipal governments are fully consistent with national law. The preparation and publication of secondary regulations would benefit from applying tools on regulatory management to promote regulatory quality such as RIA and stakeholder engagement. This will only be possible if sub-national governments have the capacity to implement and use these tools. The same reasoning applies to states and municipalities responsible for the enforcement and inspections of the regulatory framework (see Box 6.1 for an example of effective co-ordination and collaboration across institutions to ensure effective regulatory delivery).

Box 6.1. The Primary Authority scheme in the United Kingdom: a mechanism to boost regulatory delivery at the sub-national level

The Primary Authority as a statutory scheme in which a local authority takes on responsibility for providing advice and guidance to businesses on how they can comply with local regulations. In particular, Primary Authority covers regulation regarding environmental health, trading standards and fire safety. The authority that acts as Primary Authority is the key contact point for the business or business association in the partnership.

Primary Authority is conducted through a partnership between businesses and a chosen local authority. However, if a Primary Authority is not able to cover all the regulatory areas required by businesses, they can find an additional partner to meet their needs. Moreover, if the businesses trade in both England and Wales, they can have a primary authority in both nations for areas of legislation that are delegated to the Welsh Government. Regulators operating as primary authorities include county, district and unitary councils, and fire and rescue authorities.

At the national level, the Office for Product Safety & Standards (OPSS) from the Department for Business, Energy and Industrial Strategy (BEIS) is responsible for Primary Authority and manages the Primary Authority Register. National regulators can be a source of expertise for primary authorities, while the latter support national regulators to better understand and engage with local businesses.

Benefits for businesses include:

- Access to relevant and authoritative advice from Primary Authorities
- Recognition of robust compliance arrangements
- Effective means to meet business regulations and on suitability of business control systems
- Confidence that they are protecting themselves and their customers.

Benefits for regulators include:

- Clarity over where responsibility lies
- Support local economic growth through stronger business relationships
- Improve coherence of local regulation and target resources on high-risk areas
- Develop their staff expertise via partnerships
- Protect front line services through cost recovery, as local authorities are allowed to charge a cost recovery fee for primary authority services supplied.

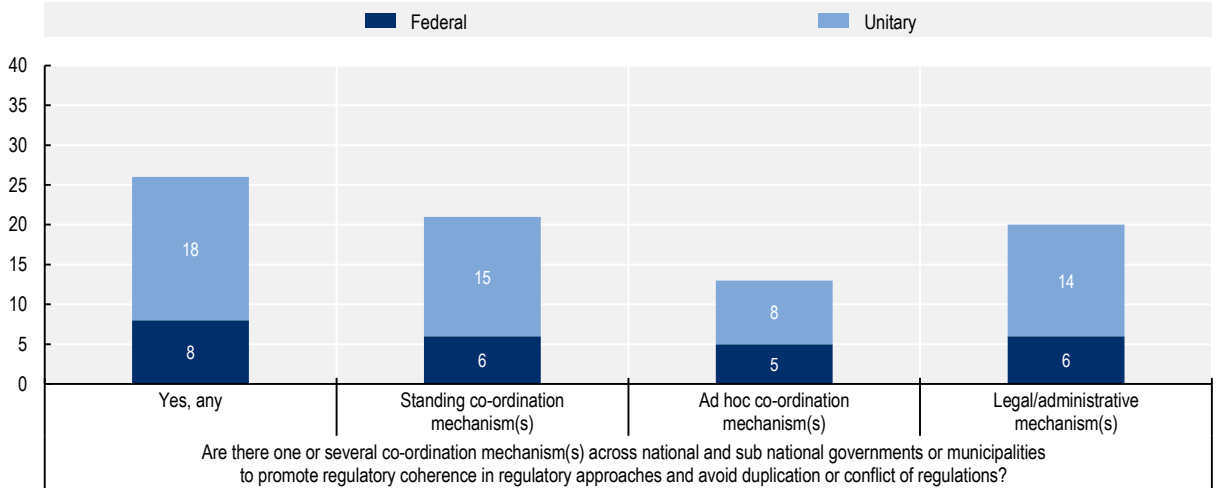
Benefits for citizens include:

- Effective protection, as businesses comply with legislation more effectively.
- Risk reduction due to a better understanding of businesses and focus on high-risk areas.

Source: (OECD, 2021[2])

National governments should focus on designing and establishing appropriate co-ordination mechanisms to develop regulatory policies and practices for all levels of government. This could be done using measures to achieve harmonisation, or by mutual recognition agreements. Such agreements help to harmonise regulation in regional governments and it reduces administrative burdens on citizens and businesses. Figure 6.2 shows the most common mechanisms that OECD countries use to promote regulatory coherence throughout all levels of government. OECD countries have many opportunities to engage in actions with sub-national governments that will benefit the overall effectiveness of the regulatory framework in delivering policy objectives.

Figure 6.2. Mechanisms to promote regulatory coherence with sub-national governments



Note: Data are based on 38 OECD member countries. The countries considered as federal type are: Australia, Austria, Belgium, Canada, Germany, Mexico, Switzerland, and the United States of America. The EU is not included in the data.
Source: Indicators of Regulatory Policy and Governance Survey 2021.

Brazil has a similar situation as OECD countries in the implementation of mechanisms to engage with sub-national governments. The Economic Freedom Act focuses on reducing administrative burdens and it covers sub-national governments if regulation is imposing unnecessary costs. However, it does not consider the creation or application of strategies to seek harmonisation of regulation. Redesim is a good national example of a strategy to seek harmonisation in the opening of businesses. As it is described in the Chapter on the Revision of the stock of regulation, Redesim is a network that aims to integrate the business creation registry, process, and legalisation of the three levels of government. The networks encourage co-ordination efforts among different levels of government, with the objective of avoiding overlaps and duplications of documents and information requirements.

Sub-national governments create licences and permits for businesses to start up and operate. Usually, the process to obtain these licences and permits is onerous, as businesses are required to provide a large number of documents and visit several government offices. The tendency of departments to work in isolation results in administrative burdens and inefficiencies, as businesses have to submit the same documents to different government departments. All these elements may result in businesses deciding not to start up at all or to open in a different location. In this sense, Redesim becomes appropriate as a tool to reduce the requirements for obtaining permits and licences. This initiative plays a key role in the vertical (among different levels of government) and horizontal (across sub-national governments) government co-ordination and consistency.

As a way to tackle the burdens arising from licensing, in 2019, Brazil issued the Decree on Licensing 4.0 (Decree No. 10.178/2019). This regulation seeks to define the criteria and procedures for the classification of risk levels according to economic activity. The decree applies to the three levels of government, particularly for cases where a state or municipality do not have specific legislation to define the risk of economic activities.

A frequent problem in countries is the existence of overlapping regulations between levels of government. Co-ordination between national and sub-national governments to ensure that regulations among levels of government do not contradict each other or establish similar layers of legal obligations is challenging. Therefore, it is necessary for national governments to develop tools to diagnose regulatory issues that throughout levels of government to identify and reform overlapping regulations. Box 6.2 shows the example of how Yucatan, a State of Mexico, co-ordinates with the national government to seek regulatory coherence.

Box 6.2. Regulatory coherence in the State of Yucatan, Mexico

The State Law for the Comprehensive Management of Waste

The Better Regulation Law of the State of Yucatan promotes, as a fundamental principle, the coherence and harmonisation of the provisions that integrate the regulatory framework with at municipal, state and national levels. It also establishes as an objective the performance of RIA to guarantee that regulatory proposals comply with different objectives, while ensuring regulatory coherence.

Since 2019, the Government of the State of Yucatan has worked with the OECD on the implementation of better regulation recommendations. Derived from the recommendations, Yucatan made amendments to its regulatory framework, specifically in seven laws. One of these reforms was to the Act on the Comprehensive Management of Waste of the State of Yucatan.

The law's explanatory memorandum establishes that the regulation complies with international decrees and agreements on environmental matters, as well as with the Political Constitution of the United Mexican States and the Official Mexican Standards on environmental matters.

In addition, this legal ordinance is based on the powers that the General Act for the Prevention and Integral Management of Waste establishes, which clearly states the powers that sub-national entities must have in terms of waste management, so that the three levels of government do not oppose each other in the compliance and surveillance of environmental regulation.

Source: Congreso del Estado de Yucatán (2019[5]), Decreto 134-2019 por el que se emite la Ley de Mejora Regulatoria para el Estado de Yucatán [Decree No. 134-2019 issuing the Act on Better Regulation for the State of Yucatan], Official Gazette of the State of Yucatan, Mexico.

Even though Brazil has worked on improving its regulatory coherence and co-ordination, these efforts have not been carried out systematically to achieve regulatory coherence. Individual evidence shows that sub-national governments are not formally involved in the process of developing new national regulation. The lack of involvement of sub-national governments in the creation of national regulation generates issues in the implementation as in some cases they do not have the necessary financial or human resources for implementing these regulations.

Development of regulatory management capacity and performance at sub-national levels of government

The 2012 OECD Recommendation by the Council on Regulatory Policy and Governance states that central governments should promote the development of regulatory management capacity and performance at sub-national levels of government. The national government should participate actively in the generation of the necessary capacities at sub-national level to advance the adoption and implementation of regulatory policy tools. By incorporating better regulation tools in the state and municipal rule-making processes, sub-national administrations can develop high-quality rules and reduce administrative burdens on citizens and businesses. Mexico provides a relevant example of how the federal government can engage with sub-national administrations to embed good regulatory practices in states and municipalities. The country has leveraged specific collaboration projects and the local context to introduce practices and tools in states and municipalities. Box 6.3 provides a short summary of Mexico's experience embedding regulatory policy at the sub-national level.

Box 6.3. Embedding regulatory policy at the sub-national level

The Mexican experience

Mexico has followed a gradual approach to the introduction of regulatory policy tools at the sub-national level. The collaboration between the federation and the local administrations began over 30 years ago with the development the System for Rapid Business Licensing (*Sistema de Apertura Rápida de Empresas*, SARE). The SARE aimed at improving the local licensing procedures and led to a strong collaboration between the federal administration and the municipalities for its rollout. Given Mexico's federal nature, the central administration focused on promoting and facilitating access to better regulation policies, tools, and institutions. Following the SARE, Mexico's regulatory oversight body (COFEMER), co-operated with state and municipal governments to measure the administrative burdens related to local licensing and other important procedures. Mexico's strategy of promotion and facilitation, rather than imposition, paved the way for the adoption of other regulatory policy tools by local administrations.

The Constitutional amendment of 2017 incorporated a better regulation mandate for all institutions in the three levels of government in the country. This lead to the publication of the General Law on Better Regulation (Ley General de Mejora Regulatoria, 2018) that changed the role of the regulatory oversight body in relation to the sub-national administrations. The new law required states and municipalities to harmonise their better regulations legislations to the federal law as well as to put in place institutional and policy arrangements for better regulation. By 2022, the 31 Mexican states and Mexico City had in place local better regulation laws in line with the General Law on Better Regulation.

Source: Information provided by Cesar Hernandez, international expert on better regulation from Mexico

Governments should support the implementation of regulatory policy and programmes at sub-national level to reduce regulatory costs and barriers at local or regional level, which limit competition and impede investment, business growth and job creation. Regulatory management capacities and the assessment of the performance of sub-national governments contribute to the implementation of regulatory policy tools, such as RIA and stakeholder engagement in the development of regulation, which leads to better quality of regulation and helps in the reduction of administrative burdens.

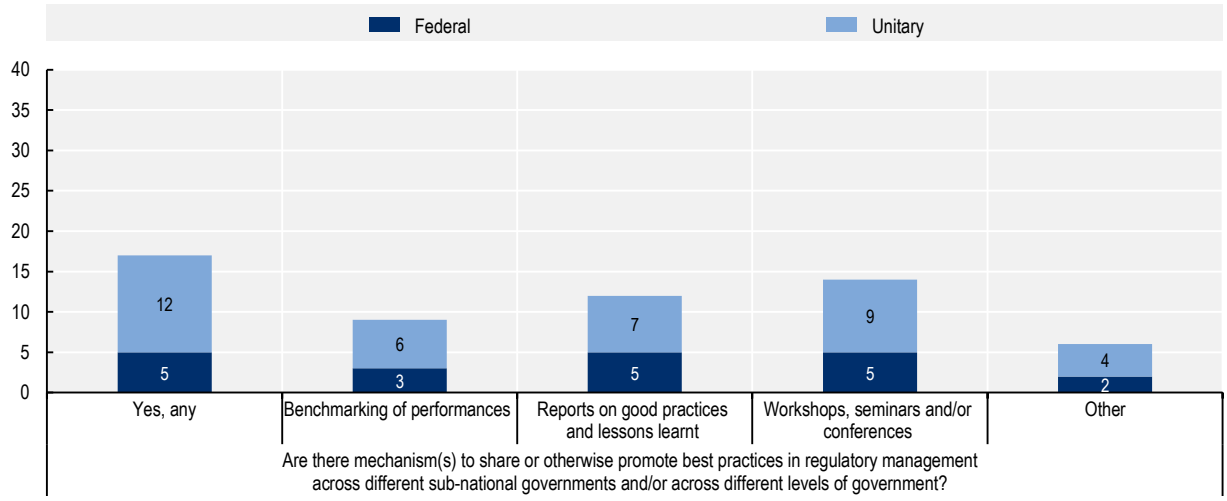
The fact that Brazil has such a large number of sub-national administrations, over 20 states and more than 5,000 municipalities, inevitably leads to the lack of uniformity in the knowledge and adoption of regulatory policy tools. Stakeholders highlighted this issue during the development of this report, which calls for a systematic approach to encourage the use of regulatory management tools at sub-national level in Brazil.

One of the ways to promote the development of regulatory management capacity and performance at sub-national levels of government is by promoting best practices throughout these governments, and between sub-national and federal levels. The sharing of lessons learned, successful cases, and the “dos and don’ts” in the design, implementation and evaluation of regulatory policy and its tools can be an effective way of promoting their adoption.

National governments have the task of promoting the exchange of information and transparency mechanisms from one level of government to another, to overcome irregularities in information and encourage complementarities within regulations. It is common that the level of development in state and municipal governments varies; some states have a very developed regulatory system and experience, while others lack practice and knowledge. The creation of mechanisms for transparency and sharing of information is crucial for levelling the development of the regions and identifying good regulatory practices. The use of benchmarking practices among jurisdictions also helps the less developed regions to make progress. These mechanisms provide a space for identifying innovative regulation. Figure 6.3 shows the OECD mechanisms to share best practices throughout sub-national governments.

Among the main mechanisms being used by OECD countries for sharing best practices among sub-national governments are the benchmarking of performances, the use of national reports on good practices and lessons learned, as well as workshops, seminars and conferences. These mechanisms, used separately or in some combination, help national governments to keep track of the practices being implemented in the states and municipalities. This facilitates the role of the federal better regulation agency as an entity that promotes the dissemination of good practices and encourages maintaining a standard in sub-national governments. By encouraging the synthesis and dissemination of information, the federal administration can build support and active participation by states and municipalities. Additionally, the exchange of experiences among peers and communities of practitioners can go a long way to increase the awareness of tools such as RIA and administrative simplification, among others.

Figure 6.3. Mechanisms to share best practices throughout sub-national governments



Note: Data are based on 38 OECD member countries. The countries considered as federal type are: Australia, Austria, Belgium, Canada, Germany, Mexico, Switzerland, and the United States of America. The EU is not included in the data.
Source: Indicators of Regulatory Policy and Governance Survey 2021.

Mexico has a relevant example of a mechanism in place for sharing good practices among sub-national governments. Box 6.4 describes Mexico's National System and National Observatory on Better Regulation, which comprises the three levels of government in the country.

Box 6.4. The National System and the National Observatory on Better Regulation of Mexico

In 2018, Mexico issued the General Law for Better Regulation, which, among other things, aims to harmonise the regulation among the three levels of government: federal, state and municipal. For that, the Law created the National System for Better Regulation. The purpose of the National System is to co-ordinate the authorities of all orders of government through the National Strategy on Better Regulation, regulation, principles, objectives, plans, guidelines, bodies, instances, formalities and the national policy on better regulation. The National System for Better Regulation is formed by:

- The National Council on Better Regulation;
- the National Strategy on Better Regulation;
- the National Commission on Better Regulation (CONAMER);
- the Better Regulation Systems at sub-national levels; and
- the National Observatory on Better Regulation.

The National Council on Better Regulation

The National Council on Better Regulation is responsible for co-ordinating the national policy. It includes the co-ordination with the Better Regulation Unit of every state of the country. Each state has issued a law on better regulation to implement the better regulation policy that the National Strategy mandates.

This National Council meets at least twice a year. From its ordinary sessions, the National Council agreed to create specialised working groups. Up-to-date, the National Council has created two groups: the group for administrative simplification of the regulation of gasoline, L.P. gas and natural gas service stations and the group on regulatory reforms at the sub-national level. CONAMER has a specific

website for the information related to the sessions and functioning of the National Council on Better Regulation: https://conamer.gob.mx/cnmr/Home.

The National Observatory on Better Regulation

The National Observatory on Better Regulation is an instance of citizen participation in charge of monitoring and evaluating the performance of the better regulation policy at sub-national level. It assesses three categories: Policy, Institutions and Tools. To date, the National Observatory on Better Regulation has published two reports available in http://onmr.org.mx/. The Policy indicator analyses the regulatory framework that underpins the regulatory reform policy in the state and municipality, e.g. the State Laws on Better Regulation. The Institutions indicator analyses the strength and operation of the bodies of the state or municipality to apply and promote regulatory reform, such as the State Councils on Better Regulation. The Tools indicator analyses the implementation of better regulation instruments in the state or municipality, e.g. the Rapid Business Start-up Systems. Currently, the Mexican Business Co-ordinating Council and the US Agency for International Development (USAID) operate the National Observatory.

Source: (OECD, 2021[2]), OECD Regulatory Policy Outlook 2021, OECD Publishing, Paris, https://doi.org/10.1787/38b0fdb1-en.

Currently, the adoption and implementation of better regulation tools at sub-national governments in Brazil are voluntary. Moreover, there is room to introduce mechanisms to share appropriate practices and exchange lessons learned among levels of government. For instance, mapping and sharing good practices identified at the sub-national level can help bring the better regulation agenda closer to states and municipalities. Bridging the gap in the adoption of better regulation tools can benefit citizens and businesses significantly. Brazil has not yet set up yet a system to identify and map good practices on better regulation among sub-national governments. As a result, the federal government's capacity as an information broker is somewhat limited when it comes to disseminating and promoting relevant practices that exist throughout the country. This kind of mechanism could allow states and municipalities to pull ahead to ease the adoption of regulatory policy tools and policies.

In 2021, SEAE took the lead in the development of a tool to promote the adoption of good regulatory practices and administrative simplification measures by Brazilian municipalities. The Municipal Competition Index (*Índice de Concorrência dos Municípios*) gives an outline of the municipalities' practices and will allow the design of studies and programmes intended to improve the performance of sub-national governments and close the gap among municipalities in the adoption of good practices. The Index is composed of three pillars: Access to the local market, Competition with agents already established, and Acting within a framework of integrity and fairness. Table 6.1 lists the main components of the Index by pillar (SEAE, 2021[6]).

The indicator builds on the findings of the pilot phase that comprised 15 municipalities and from the views of stakeholders that engaged with SEAE during the public consultation process. These two activities helped improve the questionnaire, which will be gradually distributed. This means that municipalities with greater populations will be in the first wave of data collection. In the first phase, SEAE expects to include municipalities with over 500 000 inhabitants, representing approximately 34% of the Brazilian population (SEAE, 2021[7]).

Table 6.1. Municipal Competition Index

Key components

Pillar	Chapters
Access to the local market	Entrepreneurship in the municipality
	Competitiveness in the municipality
	Construction in the municipality
Competition with agents already established	Quality of the urban regulation
	Economic freedom
	Competition in the provision of public services
Acting within a framework of integrity and fairness	Legal certainty
	Public procurement
	Taxation

Source: SEAE (2021[6]), *Índice de Concorrência dos Municípios, Guía de Preenchimento*, https://www.gov.br/economia/pt-br/acesso-a-informacao/reg/indice-de-concorrencia-dos-municipios-brasileiros-icm/sobre/20210920-manual-de-preenchimento-v05.pdf (accessed on 17 March 2022).

Experiences of regulatory policy and use of regulatory management tools at sub-national level

Some states and municipalities in Brazil have started to use better regulation tools, the most common one being administrative simplification, through the clearing out of the regulatory stock and the use of information and communication technology (ICT) tools. The adoption of RIA is in the early stage; however, some sub-national governments are taking actions to encourage the use of evidence in decision-making. In particular, the review team focused on the use of regulatory management tools by the states of Ceará and Minas Gerais.

Ceará

In Ceará, regulatory policy powers are allocated to several institutions. The Casa Civil supports the development of state regulations and policies and promotes the collaboration and articulation with other sub-national and federal entities. The Regulatory Agency of Ceará (ARCE) is an autarchic institution connected the state's Attorney General's Office. ARCE regulates the public services of electricity, piped gas, basic sanitation and urban public transport. Finally, the Secretariat of Economic Development, in collaboration with the Secretariat of Modernisation, is in charge of issues related to improving the business environment in the state.

Ceará is in the early stages of adopting better regulation tools. While the state does not have a formal requirement for RIA, stakeholder engagement or administrative simplification, it has an informal system of public consultation. The latter is activated whenever a regulation has a direct impact on users. The invitations to participate are published in the official gazette and social networks, and the entire process is open to the public. Stakeholders can submit documents, comments, studies or requests.

Minas Gerais

Minas Gerais has introduced several regulatory management initiatives aimed at improving the regulatory framework in the state. While most of the efforts focus on the reduction of administrative burdens and barriers to business development, Minas Gerais is laying down the foundations for the use of RIA and public consultation for the development of regulations.

Minas Free to Grow

The Programme Minas Free to Grow (*Minas Livre Para Crescer*, MLPC) is a state initiative to reduce bureaucracy, business promotion, and competitiveness (Decree No. 47.776/2019). Additionally, the Programme builds on the provisions set forth in the Economic Freedom Act (Act No. 13.874/2019) and regulates it at state level (Decree No. 48.036/2020). The issue of Decree No. 48 036/2020 led to a series of measures aimed at copying and going beyond the elements introduced at federal level. In particular, Minas Gerais has taken steps to (Minas Gerais, 2021[8]):

- **Use risk-based criteria to classify economic activities in the state**. In 2021, Minas Gerais had classified more than 700 economic activities as low risk operations, which facilitates the licensing process and eliminates the need for pre-market inspections.
- **Introduce the silence-is-consent rule.**
- **Mandatory use of Regulatory Impact Assessment.** Starting in January 2021, the entities of the state Executive are required to carry out a RIA for the drafting and modification of regulations.
- **Reduction in bureaucracy and administrative simplification**. The MLPC Programme encourages citizens and businesses to suggest formalities, procedures and regulations that are obsolete or that could be improved. By 2021, the state had revoked 561 normative acts.
- **Support municipalities to align their regulations to the provisions of the Economic Freedom Act**. The relationship between the state and the municipalities is supported by the initiative Municipality Free to Grow (*Município Livre para Crescer*) and the Municipal Guidelines for Economic Freedom (Minas Gerais, 2021[9]). At the time that this report was being prepared, more than 200 municipalities (out of 853) in Minas Gerais had issued a decree to regulate the state's Economic Freedom Act at municipal level.

The Secretariat of Economic Development of Minas Gerais has set up a dashboard where progress of the programme can be followed.

State Policy on Simplification and Digital Government

In 2018, the state of Minas Gerais introduced the State Policy on Simplification and Digital Government (Decree No. 47.441/2018). The initiative aimed at overhauling the way the state provides services to its citizens and businesses; and encouraged improved efficiency in the manner that the administration manages formalities and procedures. To attain these objectives, the policy stated that services had to be user-oriented and the back office had to improve by increasing the exchange of information and data throughout administrative areas, mainly by using ICT tools. The policy is co-ordinated by the Secretariat of Planning and Management, which also provides capacity building and guidance to other entities in the state and municipal governments.

The Simplification Network (*Rede de Simplificação*) plays a key role in the implementation of the elements of the Policy. Approximately 300 officials from various institutions and administrative areas of the state administration compose the Network. Around half of the members of the Network are Simplification Agents (*Agentes de Simplificação*), who are responsible for the simplification and improvement efforts in their institution. The other half of the members are content editors (*Editores de conteúdo*), who are in charge of posting the information onto the government's website. The site www.mg.gov.br offers information on the services that businesses and citizens can request. The information available in the website is presented in a standardised format based on the specifications included in the Guidelines that the Secretariat of Planning has defined and that content editors use as reference.

Moreover, in 2021 Minas Gerais reviewed the decree that set the foundations for the Policy on Simplification to include specifications regarding the use of simple and clear language for the drafting of regulations and on communication between the citizens and the administration. The Secretariat of Planning published guidelines to support this new requirement (Minas Gerais, 2021[10]).

As in the case of the Minas Free to Grow Programme, a dashboard called Map of Digital Transformation of Services (*Mapa de Transformação Digital de Serviços*), enables *progress* to be tracked on the implementation of some aspects of the Policy on Simplification and Digital Government. This tool is publicly available on the website of the *Minas Atende* Programme (https://www.mg.gov.br/pagina/minas-atende).

Next steps for the Policy on Simplification and Digital Government

The Secretariat of Planning has identified the following actions as the next steps to advance the administrative simplification strategy in Minas Gerais:

- Eliminate the requirement to present documents issued by the State when requesting public services.
- Hold workshops and capacity building activities with the simplification agents, the content editors, and other officials on the use of simple and clear language (*Linguagem Simples*).
- Use the information available in the Map of Digital Transformation of Services to monitor the elimination of unnecessary requirements and support the institutions in charge of the services and formalities.
- Continue with and strengthen the capacity-building programme for Simplification Agents (*Programa de Desenvolvimento dos Agentes de Simplificação*).

Revision of the regulatory stock

Apart from actions taken as part of the programmes mentioned above, Minas Gerais has passed specific legislation to eliminate obsolete regulations. In 2019, the State Decree No. 47.732/2019 revoked 137 decrees that were inconsistent with the existing regulatory framework or that were outdated. On the other hand, the State Secretariat of Infrastructure and Mobility has opened communication channels to receive the views of stakeholders on the norms that regulate the transport of passengers. The objective is to receive information on regulations that should be reviewed or simplified.

Regulatory planning

Although the publication of a regulatory agenda is not mandatory for state government entities in Minas Gerais, some institutions are taking the lead in this regard. For instance, the State Secretariat of Infrastructure and Mobility (Seinfra-MG) issued its Regulatory Agenda for 2021-2022. In addition to the topics that would be regulated during the two-year period, the document emphasised the importance of an adequate institutional structure and the technical capabilities of the public officials to achieve better outcomes in terms of the safety and quality of the decisions (Seinfra-MG, 2021[11]).

Another example of regulatory planning in the state is the case of the Regulatory Agency of Water Services and Public Sanitation of Minas Gerais (ARSAE-MG). In 2021, the Agency defined six topics to be covered during the year and provided a list of the points that would be considererd under each topic. For instance, on matters regarding tariffs, one aspect to discuss as part of the regulatory process are the methodologies and estimation of operational costs (ARSAE-MG, 2021[12]).

Note

[1] Other matters considered in Article 22 of the Constitution: Water, energy, information technology, telecommunications and broadcasting; monetary system and measures, securities and metal guarantees; credit policy, currency exchange, insurance and transfer of values; ports and navigation; transit and

transport; deposits, mines, other mineral resources and metallurgy; indigenous populations; organisation of the national employment system; national statistical, cartographic and geological systems.

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Part III Case studies on regulatory reform in Brazil

7 Case study on natural gas

This chapter describes and analyses the reforms in the natural gas market in Brazil. It provides an overview of recent modifications to the regulatory framework in the sector, then analyses these changes through regulatory policy and competition lenses. The chapter includes policies options to further improve the regulatory framework in the sector and reap the full range of benefits of the reforms.

The natural gas sector in Brazil has been subject to substantial recent modifications, conceived as part of the New Gas Market Programme (*Novo Mercado de Gás*) and culminating in the passage of the New Gas Law (*Nova Lei do Gás,* Law 14.134/2021) in 2021. These advances have laid the foundations for a significant reform of the market. The modifications, passed in law and supplemented by enacting regulations, are aimed at fostering a more open, competitive, efficient and flexible gas sector.

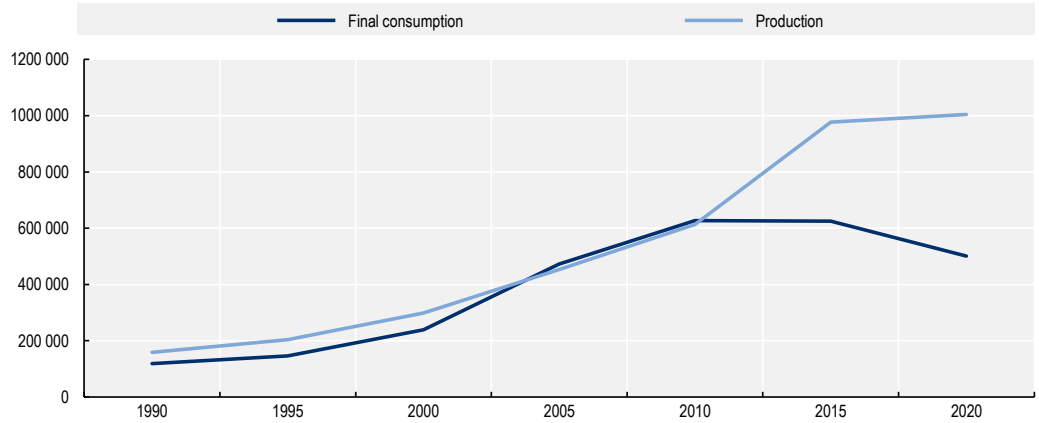
The following sections will review the changes in the legal framework using two lenses: the reform process seen through a regulatory policy lens and, the second one, evaluating the regulatory framework in the market and recent reforms using the OECD Product Market Regulation (PMR) indicator. The chapter is structured in three thematic parts. The first section describes the context of the recent reforms in the natural gas sector (section Regulatory framework and recent reforms in the natural gas sector). The second section focuses on the use of regulatory management tools in the development of reforms, taking into account elements such as stakeholder engagement and evidence-based decision-making, and summarises policy options to strengthen regulatory management and delivery in the sector (section Use of regulatory management tools in the reform process). The third section assesses the impact of the reform on the OECD- PMR sector indicator for the gas industry to understand to what extent recent changes in the regulatory framework are creating a more competition-friendly regulatory environment, and suggests policy options arising from the analysis based on the PMR indicator (section The reform of the natural gas sector in Brazil and its impact on economic competition).

Regulatory framework and recent reforms in the natural gas sector

The legal framework of the natural gas sector in Brazil has gone through a series of adjustments since 1997. While the production and consumption of natural gas in the country have increased steadily since 1990 (Figure 7.1), the previous reforms failed to create a competitive gas market, limiting the benefits for the country, its citizens and businesses. The most recent wave of reforms – the New Gas Market (*Novo Mercado de Gás*) – aims at fostering a competitive market structure. The New Gas Market reform is underpinned by four key principles: unbundling, third-party access, exit-entry transport system, and transparency (IEA, 2021[1]).

Figure 7.1. Brazil's natural gas final consumption and gross production

In Terajoules



Note: This chart plots the gross production and final consumption of natural gas in Brazil. The final consumption figures exclude deliveries for transformation and use of natural gas by the energy-producing industries. A significant amount of the gas produced in the country gas is used for reinjection and consumption in production facilities before final consumption, and Brazil is a net importer of natural gas.
Source: (IEA, 2021[2]).

Overview of the natural gas regulatory and institutional setup

The regulatory framework that underpins the natural gas sector in Brazil has evolved since the introduction of the Petroleum Law (Law 9.478/1997), which opened the oil and gas state monopoly and allowed the participation of other market participants besides the state company Petrobras. In 2009, Brazil approved the Gas Law (Law 11.909/2009), which was issued as a result of the very limited increase in the number of participants in the natural gas market when Petrobras' monopoly was ended. The Gas Law introduced a concession regime for the transportation of natural gas and regulated the access to the pipeline transportation system.

In 2016, Brazil launched the Gas to Grow Initiative (*Gás para Crescer*). The initiative aimed at reforming the legal framework of the natural gas sector to encourage competition by unbundling transportation activities, opening the natural gas market and introducing negotiated access to essential infrastructure, among others. The reform process was characterised by a strong engagement with relevant stakeholders to develop a new law based on international experiences, particularly that of the European Union. While a law proposal was elaborated, it was not until 2021 that a new legal framework was approved.

In 2021, the New Gas Law (*Nova Lei do Gás,* Law 14.134/2021) came into force as part of the New Gas Market Programme (*Novo Mercado de Gás*) introduced in 2019. Among the key aspects of this reform is the Cease and Desist agreement between Petrobras and the Brazilian competition authority (the Administrative Council for Economic Defence, CADE) to reduce its market participation by divesting assets in the transportation and distribution segments. The main objective of the New Gas Market programme is to boost competition, following four key principles: unbundling, non-discriminatory third-party access, entry-exit transportation system, and transparency. Fostering harmonization between federal and state level regulations is also a key element of the Programme, since the distribution segment of the industry is regulated by the states.

The process of evaluation of the previous regulatory framework, as well as the definition of the new norms and laws, has been a co-ordinated effort that involved several stakeholders from the Brazilian administration. The following sub-section lists the main actors and their main attributions regarding the natural gas sector.

Key stakeholders in the natural gas sector

Ministry of Mines and Energy (MME)

The Ministry of Mines and Energy was established in 1960 and it is the institution responsible for the design of the national policy on natural gas. Decree 9.675/2019 states the attributions of the Ministry, which include the definition of the policy on exploration and production of energy resources, the establishment of guidelines on planning and on setting tariffs. Moreover, the MME, in collaboration with the regulatory agencies and other institutions, the following:

- Monitors and evaluates the conditions and evolution of natural gas supply
- Suggest measures that minimise the risk of shortages in exceptional situations
- Co-ordinate and promote programmes to attract investments and businesses.

The Secretariat for Oil, Natural Gas and Biofuel is the administrative unit inside the MME that proposes the guidelines for the execution of bids for areas aimed at the exploration and production of natural gas. It monitors the performance of the sector and, in collaboration with the National Agency of Petroleum, Natural Gas and Biofuels (ANP), it tracks the rational use of the reserves of hydrocarbons.

Casa Civil (Presidency of the Republic)

The Casa Civil is at the centre of the federal administration and it is directly linked to the Presidency of the Republic. Casa Civil co-ordinates and integrates the government policies and actions and provides support in the monitoring and evaluation of policies and of the management of entities of the federal administration. In particular, the Deputy Chief of Analysis and Monitoring of Government Policies (SAG) is in charge of assessing the merit and coherence of the government's programmes and policies. In case SAG deems it necessary, it can request a regulatory impact assessment (RIA) for a regulatory proposal (law or decree).

Ministry of Economy

The Ministry of Economy is responsible for the national economic policy, national strategic planning, financial administration and public accounting, reduction of bureaucracy, social security, economic and financial negotiations with governments, multilateral organizations and government agencies and for the elaboration of materials and information for the development of long-term public policies. The Ministry is also responsible for competition advocacy in the natural gas sector.

National Agency of Petroleum, Natural Gas and Biofuels

The National Agency of Petroleum, Natural Gas and Biofuels (ANP) was instituted by Law 9.478/1997 and regulated by Decree 2.455/1998. Its main responsibilities concern the regulation, contracting and inspections of the economic activities related to the energy sector. The creation of a regulatory agency for the oil, natural gas and biofuels sectors is one of the results from the opening of the monopoly that Petrobras used to hold. The ANP regulates the extraction, transportation, treatment, processing, storage, liquefaction, commercialisation, among others, of natural gas in Brazil.

Energy Research Office (Empresa de Pesquisa Energética, EPE)

The Office carries out research activities and produces studies that the Ministry of Energy and Mines uses to support the strategic planning of the energy sector, which includes the natural gas sector. The EPE was created with the objective of ensuring that the government has the adequate information and analyses for the development of the infrastructure, policies and guidelines for the energy sector in the country.

Administrative Council of Economic Defense (Conselho Administrativo de Defesa Econômica, CADE)

CADE is Brazil's competition authority. It is an autonomous agency (linked to the Ministry of Justice and Public Security) and has three broad objectives: review and decide on mergers, acquisitions, and other transactions that may affect economic competition; investigate, and if necessary, sanction abuses of competition law; and perform competition advocacy activities.

In particular, Petrobras signed a Term of Commitment to Cease Anticompetitive Practices (TCC) with CADE. This means that CADE's investigation of Petrobras' potential anticompetitive practices is suspended as long as Petrobras complies with the dispositions in the TCC.

National Economic and Social Development Bank (Banco Nacional de Desenvolvimento Econômico e Social, BNDES)

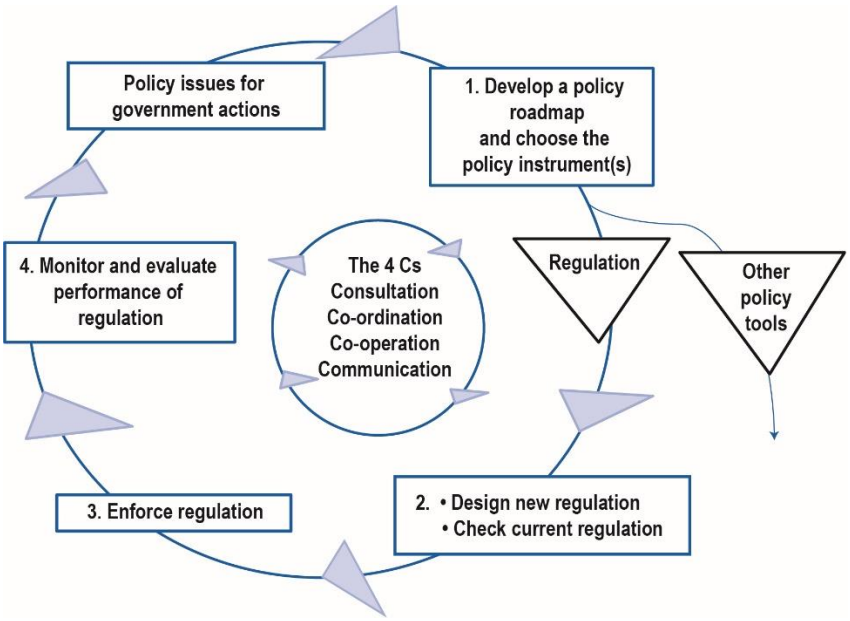
BNDES is the main entity providing long-term financing for projects contributing to the expansion of industry and infrastructure in Brazil. To support the development of Brazilian natural gas industry, BNDES has carried out studies of opportunities for investments and has proposed measures to foster investments.

Use of regulatory management tools in the reform process

Regulation is one of the levers that governments have to pursue public policy objectives. A high-quality regulatory framework can help countries move closer towards their environmental, social, and economic goals. Reaching and maintaining a regulatory framework that has the public interest at its core is not necessarily an easy task. More often than not, regulations generate unintended consequences, have impacts on citizens and businesses, and need to keep up in a constantly-changing world.

The OECD proposes that administrations see the rule-making process as a cycle that encompasses several steps, starting with the identification of the public policy problem and concluding with the evaluation of the regulatory alternative after its implementation (see Figure 7.2). This aids administrations to develop norms that generate greater benefits than costs and that remain relevant in light of the underlying policy goals.

Figure 7.2. Regulatory policy cycle



Source: (OECD, 2011[3]).

The modification of the regulatory framework for the natural gas sector in Brazil could be analysed through the lens of the regulatory policy cycle. As there was already in place a set of regulations that underpinned the sector, the natural place to begin the analysis is the evaluation of the stock of norms and rules. The OECD recommends that *ex post* evaluations have three characteristics (OECD, 2020[4]):

- Be integral and permanent part of the regulatory cycle
- Be comprehensive
- Include an evidence-based assessment of the actual outcomes from regulatory action, and contain recommendations to address any deficiencies.

The following sections will provide a description of the process for the evaluation of the previous laws and decrees and the development of the new regulatory framework for the natural gas sector in Brazil. Both the assessment of the New Gas Law (and to a certain extent the Gas to Grow Initiative) and the elaboration of the New Gas Market were underpinned by stakeholder engagement activities. These efforts are also considered in the following sections.

Evaluation of the previous regulatory framework

The approval of the New Gas Law (Law No. 14.134/2021) is the culmination of over four years of work focused on improving the regulatory framework for natural gas in Brazil. The previous law for the sector, the Gas Law (2009), had not increased the number of participants in the market. In fact, Petrobras remained the dominant agent years after the opening of the market and the formal end of the state monopoly. The Gas to Grow Initiative was introduced with the main objective of reviewing the regulatory framework to boost the participation of more companies in the market. There was already widespread agreement that the previous framework had failed to foster competition in the natural gas value chain. As such, Brazil did not carry out an *ex post* assessment as to why the Gas Law had failed to deliver some of its objectives.

In 2016, the National Council for Energy Policy emitted a set of strategic directives that defined the basis for the development of the Gas to Grow Initiative (Resolution 10/2016, CNPE). The elaboration of the Gas to Grow Initiative included the conformation of nine work fronts with the objective of stimulating the participation and dialogue between representatives of the public administration and the industry. Furthermore, eight sub-committees carried out an in-depth analysis of key topics and engaged with a wide range of stakeholders of the sector to create proposals for reform (please refer to Table 7.1 for a list of the sub-committees). In these groups, specific articles or regulations that referred to the topic covered by each sub-committee were assessed. The former was done taking as reference the objectives of the strategic directives as well as international experiences. The scope of the analyses performed by the sub-committees varied across the board. While in most cases the assessment was exhaustive, it did not include a thorough evaluation of the potential costs and benefits of the new regulatory framework. In some sub-committees, the expected benefits and risks were described qualitatively. In addition to the eight sub-committees, there was also a working group that analysed the need of a supplier of last resort for the Brazilian market.

Table 7.1. Sub-committees of the Technical Committee for the Development of the Natural Gas Industry

Sub-committees
Upstream pipelines, Processing and Liquefied Natural Gas (LNG) (*Escoamento, Processamento e GNL*)
Transportation and storage (*transporte e estocagem*)
Distribution (*Distribuição*)
Commercialisation (*Comercialização*)
Improvement of tax rules (*Aperfeiçoamento das regras tributárias*)
Natural gas as raw material (*Gás Natural Matéria Prima*)
Use of the Gas of the Union (*Aproveitamento do Gás da União*)
Integration of the Electric and Natural Gas Sectors (*Integração Setores Elétrico e Gás Natural*)

Source: (Ministério de Minas e Energia, 2021[5]).

In several of the sub-committees, stakeholders agreed on potential solutions and suggested adjustments to the legal text. The proposals presented by the sub-committees became part of the Law Proposal (*Projeto de lei, PL*) 6.407/2013 (later re-numbered PL 4.476/2020), which was not approved by the Congress during the period of that legislative term. For more details on the reforms proposed, please refer to Table 7.2.

Nevertheless, those proposals that did not require to go through Congress for their approval or that represented adjustments in the regulation of the legal framework were implemented (namely, those related to the entry and exit model, Decree 9.616/2018).

Table 7.2. Reforms proposed in the Gas to Grow Initiative

Segment	Gas Law (2009)	Gas to Grow
Transmission pipelines	Capacity hired point-to-point on long-term contracts	Formation of entry-exit systems
	Legal unbundling	Ownership Unbundling (OU) for new transmission system operators (TSOs). Existing ones must apply for an Independent Certification (according to ANP regulation)
	Operation co-ordinated by Petrobras	Operation co-ordinated by Independent Market Area Manager
	Auctions for new pipelines and expansions (concessions)	Authorisation regime for new pipelines and expansions
	Ten years planning published by MME based on EPE studies	1. Indicative planning by EPE 2. Investment planning submitted by TSOs and approved by ANP after public consultation
		Capacity release
		ANP can start a gas release programme after hearing the competition authority
Commercialisation		Open market regulated by the Federal government together with the states
Distribution	Open market ("free consumer") regulated by the states	Open market regulated by the Federal government together with the states
Upstream infrastructure and LNG terminals	No third party access (TPA)	Negotiated non-discriminatory TPA, based on good practices code
Storage	Concession after auction process	Authorisation (permit)

Source: (Ministério de Minas e Energia, 2018[6]).

Engagement with stakeholders to review existing regulations and define reforms

The participation of a broad range of stakeholders was key to reform the Gas Law. The identification of the aspects that could be improved from the previous regulatory framework was supported with the inputs of stakeholders from the public administration, the industry, international experts, academia, and civil society. In October 2016, and in the framework of the Gas to Grow Initiative, the Ministry of Mines and Energy submitted to public consultation the draft Strategic Guidelines for the design of the new natural gas market in Brazil (*Diretrizes Estratégicas para o desenho de novo mercado de gás natural no Brasil*). The document was available for public consultation for a month. The Operational Core[1] (*Núcleo Operacional*) that was leading the programme provided technical information and additional documents to support the draft proposal.

After the consultation process was completed, the contributions and feedback of over 50 participants were summarised. The report of the participation in the public consultation included an analysis of the comments received as well as feedback from the Operational Core describing what aspects were taken into consideration. Finally, the document contained the final version of the legal texts to reflect the comments that were considered as relevant.

In December 2016, the National Council for Energy Policy (*Conselho Nacional de Política Energética*, CNPE) approved the Strategic Guidelines for the design of the new natural gas market in Brazil (Resolution 10/2016, CNPE). Besides the 19 strategic guidelines that should underpin the gas market in Brazil, it mandated the creation of the Technical Committee for the Development of the Natural Gas Industry (CT-GN), which was responsible for proposing the specific modifications to the regulatory framework of the sector. The Committee was composed by representatives from the Presidency, relevant ministries, regulatory agency, the Energy Research Office, the National Forum of State Secretaries of Mines and Energy, and the Brazilian Association of Regulatory Agencies. The Committee, and the sub-committees

mentioned in Table 7.1, were also encouraged to engage with representatives from other public or private associations and institutions.

The new regulatory framework for the natural gas sector: its development

The second attempt of reform of the natural gas sector was the New Gas Market (2019). This programme continues the work of the Gas to Grow Initiative and defines guidelines for the energy policies, especially for the natural gas sector (Resolution 16/2019 of the National Council for Energy Policy). Given the previous attempts to modify the legal framework of the sector, the New Gas Market's objectives looked into increasing consensus among stakeholders to ensure a better reception of the dispositions and an easier adoption of the new law.

While the process for the modification of the gas law built heavily on the inputs and expertise of stakeholders from the public, private and international arena, other aspects also played a key role. In particular, the establishment of the Committee of the Promotion of the Competition in the Natural Gas Market in Brazil and the measures taken by the antitrust watchdog, CADE. The Committee for the Promotion of the Competition in the Natural Gas Market in Brazil (created by Resolution 4/2019, CNPE) was responsible for proposing actions aimed at increasing competition in the sector, fostering the adoption of good regulatory practices, and making recommendations to the National Council for Energy Policy. For that, this Committee, through the Ministry of Mines and Energy, carried out an analysis of the market concentration and performed a multi-criteria analysis to inform decision making and to estimate the potential impacts of the reforms in the market and on competition (Comitê de Promoção da Concorrência no Mercado de Gás Natural do Brasil, 2019[7]). This resulted in the Resolution 16/2019, CNPE, that establishes guidelines and improvements to energy policies aimed at promoting free competition in the natural gas market. In parallel, CADE, that also integrated the Committee, took actions to reign in the market power of Petrobras. Petrobras signed an agreement with the Administrative Council of Economic Defence to reduce its participation in the natural gas market.

Moreover, Decree 9.934/2019 created the Monitoring Committee for the Opening of the Natural Gas Market (CMGN). The CMGN grouped representatives from several agencies and ministries (see Box 7.1 for more details) and introduced three working groups to deepen the understanding of specific aspects of the reform, namely the integration between the natural gas sector and the electric sector, the integration between the natural gas sector and the industry and tax and customs aspects.

Box 7.1. Monitoring Committee for the Opening of the Natural Gas Market

The Committee was established by Decree 9.934/2019 with the objective of monitoring the implementation of the measures introduced as part of the New Gas Market Programme (*Novo Mercado de Gás*). The Committee is composed by representatives from Casa Civil, the Ministry of Economy, ANP, the Energy Research Office, Administrative Council of Economic Defence, and the Ministry of Mines and Energy, which is also the co-ordinator. Every three months the Committee publishes a report with the main developments in the natural gas sector, in particular it provides information on the following items:

- Increase of economic competition
- Harmonisation of state and federal regulations
- Reduction of fiscal barriers
- Integration of the natural gas sector with the industrial and electric sectors.

The approval of the new law for the natural gas sector in Brazil was only one of the steps to achieve all the objectives considered in the New Gas Market. In fact, several bylaws, decrees and regulations have to be reviewed, modified or emitted to ensure that the legal framework is coherent and efficient. At the moment of preparation of this report, the New Gas Law[2] (Law 14.134/2021) and its bylaw[3] (Decree 10.712/2021) had been approved (Box 7.2). Moreover, the National Agency of Oil, Natural Gas and Biofuels has published a regulatory agenda for the following years, where it details the regulations to be reviewed or developed. According to the agenda, the ANP will continue with the improvement of the regulatory framework at least until 2023.

Box 7.2. The new regulatory framework for the gas sector

In Brazil, both the federation and the state governments play a role in the regulation of different segments of the natural gas sector. The federal administration is responsible for the transportation, storage, conditioning, gathering, liquefaction, regasification, treatment, and processing of natural gas. The National Agency of Petroleum, Natural Gas and Biofuels (ANP) is the federal institution in charge of granting the authorisations for the performance of the previous activities. On the other hand, state administrations regulate the distribution of natural gas.

New Gas Law (Law 14.134/2021)

The New Gas Law, approved on 8 April 2021, brought important changes to the natural gas sector, as it aims at increasing the number of market participants, improving transparency, reducing the natural gas prices, and fostering competitiveness. Among the most relevant reforms for the sector are:

- The activities of transportation and underground storage will be under an authorisation regime instead of a concession regime. This means that parties that would like to engage in these activities should request an authorisation from the ANP and are no longer required to go through a public tender for concession.
- Unbundling of the transportation segment
- Negotiated access to essential installations
- Unbundling of the distribution activities
- Promotion of multi-level regulatory coherence, by stimulating collaboration between the Ministry of Mines and Energy, ANP and the state regulators.

Decree 10.712/2021

The Decree 10.712/2021 published on 4 June 2021, regulates several of the dispositions established in the New Gas Law. This piece of legislation sheds light on key topics included in the New Gas Law and narrows down certain technical aspects, such as the classification of transportation pipelines and clarifies points of controversy with sub-national administrations. In particular, the Decree defines mechanisms for the articulation between the federal and sub-national spheres. Among these mechanisms are:

- The creation of knowledge networks, where federal and state regulators, as well as other stakeholders participate.
- The proposal by ANP of guidelines for state regulation. Their adoption is voluntary.
- The establishment of the National Pact for the Development of the Natural Gas Market (*Pacto Nacional para o Desenvolvimento do Mercado de Gás Natural*), which states can join on a voluntary basis.

Moving forward, one of the most relevant challenges for the achievement of the objectives of the New Gas Market is the harmonisation of regulations across states. Evidence collected by the OECD team showed that the multi-level regulatory governance of the natural gas sector has been a source of tensions between the sub-national administrations, particularly the states, and the federal government. Currently, the Federation has put in place mechanisms to incentivise the convergence harmonisation by creating a knowledge network for the exchange of good regulatory practices and by providing guidelines that states can adopt in a voluntary basis.

Areas for Improvement and Suggestions for Reform

The Recommendation of the Council on Regulatory Policy and Governance (OECD, 2012[8]) advises governments on the effective use of regulation to achieve better social, environmental and economic outcomes. It also provides governments with clear guidance on the principles, tools and institutions required to improve the design, enforcement and review of their regulatory framework to the highest standards. Some of these tools include *ex ante* assessment of regulation, through the regulatory Impact assessment (RIA), *ex post* analysis of the regulation, and stakeholder engagement. The underlying principle of these tools is to ensure that regulations be based on evidence.

Ex post analysis allows policy makers to take stock of the outcomes and achievements of existing laws and regulations. It helps define to what extent the underlying policy objectives have been achieved, and whether the law or regulations under scrutiny had produced other unexpected or undesirable impacts. The report *Reviewing the Stock of Regulation, OECD Best Practice Principles for Regulatory Policy* (OECD, 2020[4]) offers advice to government officials on what methods steps and practices could be followed to undertake *ex post* analysis of regulations.

RIA is a regulatory management tool that helps policy makers think critically on the policy objectives of the draft regulation ahead of its implementation. It offers a method to identify the policy problem to be solved, define different alternatives to tackle the challenge, and through an assessment of the expected benefits and costs of each alternative, choose the more efficient form of policy intervention. The report *Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy* (OECD, 2020[9]) contains guidance on how to undertake RIA using internationally recognised good practices.

One of the fundamental elements of both RIA and *ex post* analyses of regulations is to ensure that stakeholder engagement activities are carried out. The interaction with an ample range of relevant actors allows policy makers to collect evidence, contrast points of view and create ownership of the reform, which feeds positively into the assessment of both current and draft regulation. The report *OECD Best Practice Principles on Stakeholder Engagement in Regulatory Policy* (OECD, 2017[10]) aims to provide policy-makers and civil servants in both OECD member and partner countries with a practical instrument to better design their stakeholder engagement strategies.

In the case of the two last exercises of reforming the regulatory framework of gas in Brazil - the Gas to Grow Initiative and the New Gas Market Programme – there are elements to ascertain that these exercises were congruent with good practices on *ex post* analysis, RIA, and stakeholder engagement, although with varying degrees.

Stakeholder engagement practices were used intensively in both cases of reforms. Consultation with an ample range of stakeholders provided the administration with evidence, which was employed to assess the existing framework and analyse the merits of the reform in the gas sector, as well as to build consensus. The processes also came across as transparent and inclusive.

For the case of *ex post* analysis, before the introduction of the Gas to Grow Initiative, there was some consensus among relevant parties that the Gas Law was not delivering the expected results, and thus there was a need for reform of the regulatory framework. The Gas to Grow Initiative included many technical assessments of the existing framework.

Regarding RIA, it is commendable that there were efforts to assess the expected net benefits of the reforms, but these exercises were limited to qualitative techniques. A positive aspect to highlight, however, is the use of evidence to inform the reform, as the process benefited from engaging a wide range of stakeholders since the early stages and from the development of technical inputs and documents. When considering the additional steps recommended later in this report as part of the ongoing reforms in the gas sector, Brazil should aim at undertaking quantitative analysis of the anticipated benefits and costs of the regulatory changes to the extent possible.

When the New Gas Law (April of 2021) and its bylaw, Decree 10.712/2021, were published no formal process of preparing a RIA was followed. Although the Ministry of Mines and Energy had no legal obligation to do so, these documents represent the legal foundations for the New Gas Market and would have benefited of being assessed under this lens. Brazil could consider following more closely the *ex post* assessment and RIA methodology to inform reforms with an expected large economics and social impact, such as the natural gas sector.

The reform of the natural gas sector in Brazil and its impact on economic competition

Over the past decade, Brazil has sought to reform its energy sector, in line with OECD experiences. Reforming energy sectors in the OECD have mostly consisted of countries moving from vertically integrated state monopolies to an effectively competitive industry. This transition requires both reducing state control over firms in the sector, as well as introducing a regulatory framework that allows new, and more efficient firms to enter and consumers to switch towards those firms that offer the best deal.

The PMR sector indicator for the natural gas industry captures the legal barriers to entry and expansion that firms face in this sector. The PMR indicator helps to identify areas where Brazil performs less well than its OECD peers, and the steps it could take to bring its regulatory framework in line with international best practices. Given that Brazil is currently undertaking a reform process in its gas industry akin to the one undertaken by other OECD countries, an in-depth look at Brazil's gas sector PMR indicators is valuable.

The goal of this exercise is to better understand the regulatory framework in the gas sector, evaluate the state of reforms using the OECD PMR indicators as a benchmark, and suggest policy options that could further help Brazil to open its natural gas sector to competition.

The natural gas sector and its evolution around the world

The gas sector is a network industry

The gas sector is a network industry, as it requires a network to connect producers and consumers. Such a network can entail fixed installation costs that are so high, and economies of scale that are so significant, as to make it efficient only for one firm to run the network over a certain geographic area. This means that some segments of this industry present the characteristics of a natural monopoly.

These characteristics, coupled with concerns related to the public interest in ensuring widespread consumer access to energy, security of supply, in the past led to the gas sector being a vertically integrated monopoly across all segments and under state ownership.

Starting in the 1990s, the role that the government could usefully play in the business sector was subject to a thorough reassessment. A consensus emerged that the scope for public enterprises was narrower than previously thought, even in network industries, such as the gas one. On the one hand, it was felt that managerial incentives would be enhanced by privatisation, including by severing the link between managers and politicians, thereby lowering the deadweight costs associated with influence-seeking activities (OECD, 2000, p. 154[11]). On the other, it was found to be desirable to facilitate competition in industry segments that could sustain it, as a tool for controlling costs and promoting investments and innovation, to the ultimate benefit of final users and consumers (OECD, 2001[12]).

A consequence of this reassessment is that gas sectors across the world have been reformed in recent decades, mostly by moving from a vertically integrated state monopoly towards a competitive industry, with the exception of some segments that still present features of natural monopolies. In line with this, regulatory reform in natural gas industry involves promoting competition in the competitive segments of the industry, the development of a robust regime for access to the monopolistic elements, and structural separation between the competitive and non-competitive segments (OECD, 2000[13]). As we shall see below, these are all dimensions measured by the PMR indicator.

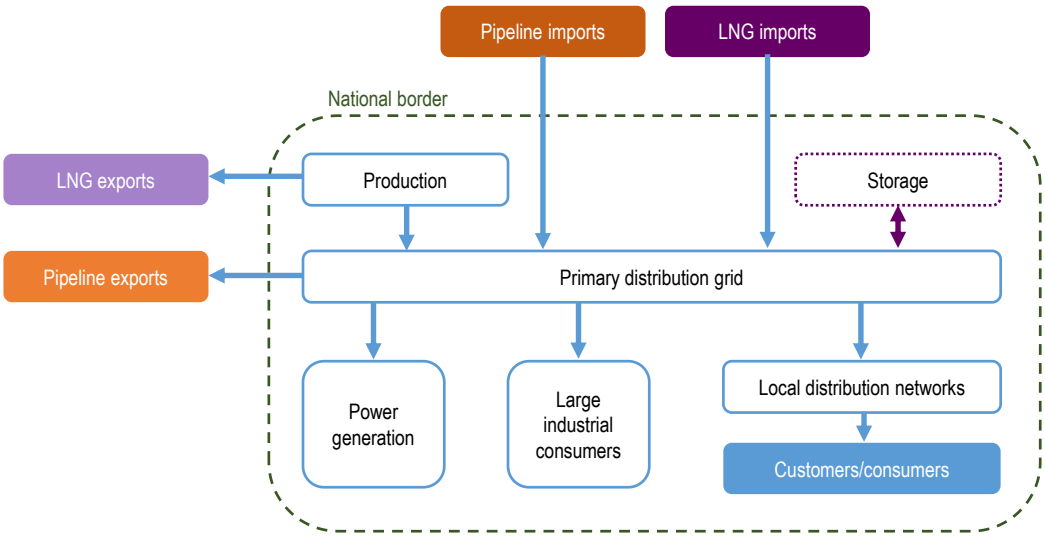
Empirical evidence on the effects of such regulatory reforms in public utilities and other sectors suggests that liberalisation has been, on the whole, beneficial for efficiency and consumer welfare, leading to better productive efficiency, increased quality of service and lower prices after reform (Gönenç, Maher and Nicoletti, 2001[14]). However, these beneficial effects have been sometimes bedevilled by regulatory flaws in the access regime to the monopolistic elements, the failure to curb the use of market power by incumbents in the competitive segments of the industries, and difficulties in addressing the complex technical issues that arise after basic entry liberalisation has been implemented (OECD, 2000, p. 155[11]).

In practice, liberalisation of the gas sector is a difficult process that often takes years. As restrictions to entry in competitive segments are lifted, rules must be set to make access to the non-competitive segments by a plurality of service providers possible, non-discriminatory and efficient. Consumers' ability to switch to new entrants must be fostered by easing the process and ensure transparent information on retail prices and other contractual terms and conditions are easily available. Where liberalisation is matched by the separation of vertically-integrated monopolies into several independent entities (so-called "unbundling"), markets have to be created *ex novo* to replace transactions that were previously taking place exclusively within a single firm. Where (non-economic) public interest objectives were pursued within a regulated non-competitive environment, ways have to be found to make these objectives consistent with competition. Finally, where firms are privatised or activities contracted out, regulation through public ownership must be replaced by effective arm's length regulation (OECD, 2000, p. 156[11]).

The liberalisation of the natural gas industry

The gas industry is composed by a number of segments, most notably, production, storage, transmission, distribution, and retailing (OECD, 2000, pp. 7-9, 22-26[13]).

Figure 7.3. A stylised depiction of the gas sector



Source: IEA, 2014.

This chapter focuses only on natural gas and does not consider liquefied petroleum gas (LPG), as the PMR indicators focus only on the former.

- Natural gas is usually transported from the wellhead – or, if relevant, the place where gas is imported over sea or the storage facility – to the point of consumption through high-pressure transmission and low-pressure distribution pipelines.
  - There are significant economies of scale in transmission pipelines. As a result, the opportunities for competition between transmission pipelines depend on the geographic location of producers and consumers, and on the level of gas demand – and are typically limited. As a result, gas transmission is normally taken to have characteristics of a natural monopoly (and is treated as such in the PMR indicators[4]) (OECD, 2000, p. 8[13]).
  - The local (low pressure) gas distribution network to smaller consumers exhibits economies of scale and density. The scope for competition is strictly limited, hence local distribution networks are considered to have the characteristics of natural monopolies (and are treated as such in the PMR indicators[5]) (OECD, 2000, p. 8[13]).
- Natural gas can be temporarily stored, enabling flows over the pipeline network to be held relatively constant despite daily and seasonal fluctuations in gas demand. There is scope for competition in this segment, though the opportunities for effective de facto competition will depend on the number of suitable sites for storing large quantities of gas, which varies from country to country (OECD, 2000, p. 8[13]).
- Companies active in retailing provide various services, such as negotiating with producers for supplies and with transmission and distribution operators for transport services. These companies may also develop new contractual products and services which meet the demands of downstream users; and they may also provide a brokerage service, matching the supply and demand of gas customers in gas markets. The scope for competition can be substantial (OECD, 2000, p. 8[13]).

In short, promoting competition in the natural gas industry hinges on the development of competition in the gas production, storage, and gas retail supply markets. Since the transmission and distribution segments are “natural monopoly” activities, these two activities need to be regulated to promote competition in the other segments, by ensuring non-discriminatory access by third parties at cost oriented prices, and by providing them with incentives towards cost and productive efficiency (OECD, 2000, p. 8[13]) (IEA, 2018, p. 7[15]).

Hence competition in the gas sector can be enhanced primarily by: a) allowing final gas customers to choose their gas producer, and b) ensuring that the incumbent transmission and distribution networks do not discriminate between gas producers in setting prices and other terms and conditions of access to their pipelines. (OECD, 2000, pp. 33-34[13]).

The vertical separation or unbundling of those market segments with the characteristics of a natural monopoly (i.e. gas transmission and distribution) from those market segments where competition is possible (i.e. gas production, storage and retail supply) is essential for the realisation of an efficient and, competitive gas market. A transmission operator that is integrated upstream into gas production or downstream into gas retailing has a strong incentive to offer transportation services of a higher price or lower quality to rival producers or rival retailers, and to resist regulatory attempts that force it to offer non-discriminatory access.

Several models of unbundling are possible.

- Full ownership unbundling, involving the complete ownership separation of the relevant companies.
- Legal or operational unbundling imply that the activities of the overall group of affiliated companies are and remain separated. This type of unbundling typically requires stronger regulatory oversight than full ownership unbundling.

- Finally, accounting separation means that a vertically integrated company must keep separate accounts for regulated and competitive market activities. This is the least stringent form of unbundling.

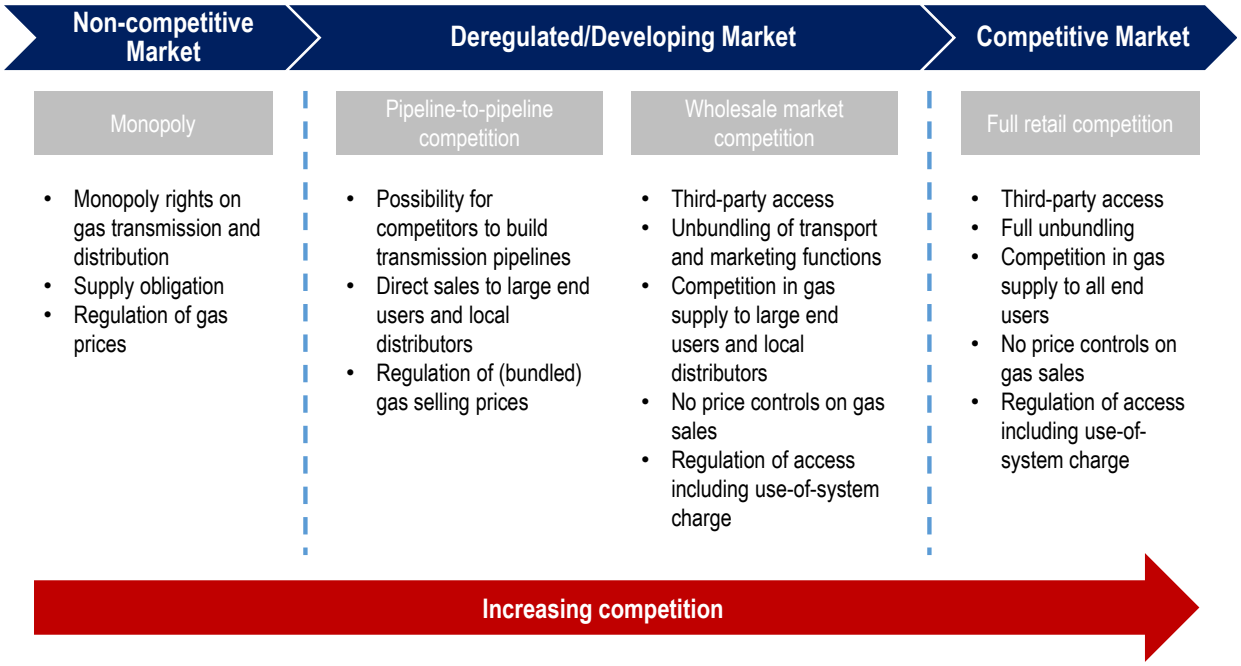
As described below, the scoring in the PMR indicator gives different scores depending on the levels of separation between transmission/distribution networks and companies active upstream and downstream. In particular, the more effective and transparent the unbundling model adopted the better the PMR indicator score, reflecting the smaller risks posed to competition in upstream and downstream markets.

Unbundling vertically integrated firms is a necessary condition to guarantee effective and non-discriminatory third-party access (TPA) to gas transmission and distribution networks (IEA, 2018, p. 21[15]). (IEA, 2018, pp. 3,21[15]).

As already noted above, transitioning from a vertically integrated, publicly owned gas supply chain to a competitive natural gas market is a complex process that must run through various stages (OECD, 2000, p. 156[11]).

This reform process is the route that Brazil is taking. When deciding which steps to take next, Brazil can rely on the PMR indicator, which is designed to measure where on this route a country finds itself by reference to the main elements of network sector reform discussed above.

Figure 7.4. Transition from an integrated monopoly to a competitive market



Source: (IEA, 1998[16]).

The PMR and the gas sector

Liberalisation of the natural gas sector involves promoting competition in the competitive segments of the industry. Entry and prices in the generation and retail markets are liberalised. The role of the state as an owner of enterprises operating in the sector is reduced. Companies operating in both competitive and non-competitive industry segments are unbundled. Regulations are introduced to foster entry and ensure competition on a level-playing field and to ensure that traditional public interest goals can be met within an increasingly competitive framework (OECD, 2000, p. 151[11]).

The PMR indicators reflect these insights. As outlined in Chapter 1 in greater detail, the PMR indicators are based on an extensive database, which is compiled by the OECD relying on the answers to a questionnaire that is sent to national authorities on economy-wide and industry-specific regulatory provisions. The information included in the database is used to build two sets of indicators: an economy-wide indicator, which provides a general quantitative measure of a country's regulatory stance, and a group of sector indicators that measure the quality of regulation at the level of specific network and service sectors. The present chapter focuses on the PMR network sector indicator for the natural gas indicator.[6] As with all network sector indicators, the PMR gas sector indicator measures how entry and conduct in the gas sector is regulated (with a focus on legal barriers to entry, vertical integration and retail price regulation) and on the level of public ownership.

Reflecting the description of the gas sector above, the PMR indicator assess how the following segments are regulated:

- Gas production: Production and onward sale of gas.
- Gas storage: Ownership or operation of gas storage facilities when these are not integrated with production.
- Gas transmission: Transport of gases over long distances from production or storage facilities to the distribution network(s).
- Gas distribution: Transport of gas from the transmission grid to the customers' premises.
- Gas import: Import of gas from abroad.
- Gas export: Export of gas abroad.
- Gas retail supply: Sale of gas to final consumers.

Brazil's PMR gas sector indicator

Brazil is seeking to promote a competitive market by reducing the dominant position of the state- controlled company Petrobras, and by introducing market-oriented arrangements that are reviewed in the section The evolution of Brazil's gas sector, immediately below.

Brazil asked the OECD to evaluate these reform efforts, and identify policy options for further reform, in light of their results in the PMR indicators. The information used to build the PMR indicators refers to laws and regulations in force in the countries surveyed at a specific point in time. For most countries, including Brazil, the date for the last PMR indicators' exercise is 1 January 2018.

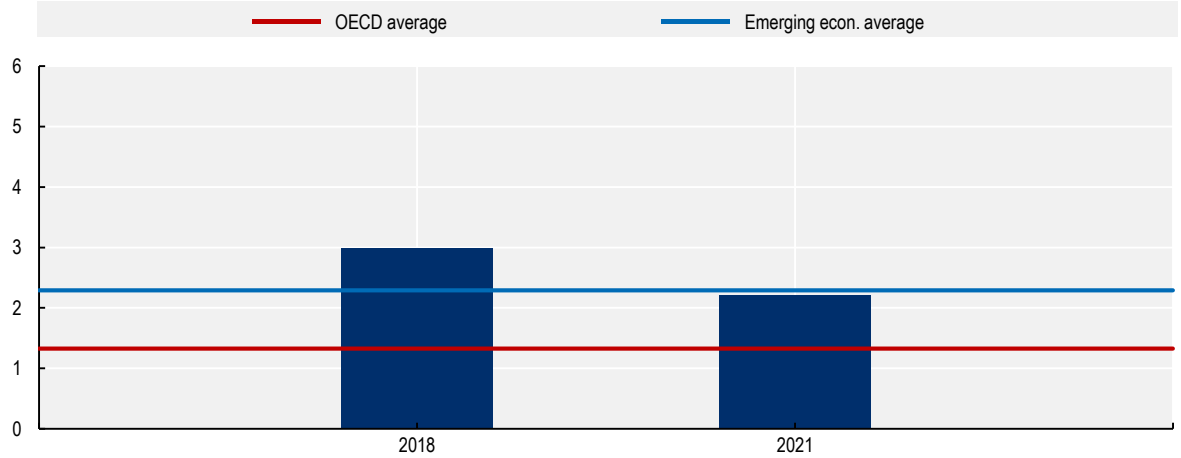
However, for the present case study the OECD recalculated Brazil's PMR sector indicator for the natural gas sector using information on the laws and regulation in force in the sector up to April 2021, including the New Gas Law.

It should also be noted that in Brazil, gas distribution and retail supply are under state jurisdiction, unlike upstream sectors which fall under the competence of the federal government.[7] When elements of a network sector are regulated at state level rather than by the federal government, the PMR indicators refer to the legislation in force in a single state: for Brazil, this is the state of São Paulo.

Figure 7.5 shows the results of the 2018 PMR sector indicator for the gas industry and the 2021 revised value, which reflects the impact of a number of reforms undertaken in the intervening years.

Figure 7.5. Brazil's PMR Sector indicator for Natural Gas before and after recent reforms

Scale 0 to 6 from most to least competition friendly regulatory framework



Note: The OECD average include all OECD member countries. Emerging G20 economies is the average of eight countries: Argentina, China, Indonesia, Mexico, Russia, South Africa, Turkey and Brazil itself. For most countries the indicators are based on laws and regulation in force on 1 January 2018, but for Costa Rica, Estonia and the U.S. the information refers to 1 January 2019, and for Indonesia and China to 1 January 2020 as these 5 countries provided the data at a later date.
Source: OECD 2018 PMR database and data provided by Brazilian authorities for 2021 update.

The figure shows that with the reforms it has undertaken thus far, Brazil's PMR sector indicator for the natural gas industry has improved substantially. Brazil's score is still higher than the OECD average, but the gap has reduced and the country performs now better than the Emerging G20 economies average in 2018. However, further reforms are needed for Brazil's PMR indicator to converge towards the OECD average, as we will see in more detail in sections The evolution of Brazil's gas sector to Retail price regulation below.

The evolution of Brazil's gas sector

As noted above, opening gas markets to competition is a long and complex process that typically takes many years. While this chapter focuses only on PMR indicators from 2018 and 2021, Brazil's efforts to promote a competitive market started earlier.

Regulatory framework

The natural gas market in Brazil has historically been controlled by the national oil company Petrobras. Until 1995, Petrobras enjoyed a constitutionally enshrined legal monopoly for the exploration, production and transportation of hydrocarbons. The design of Brazil's gas sector was therefore in line with the traditional approach to gas markets, characterised by a vertically integrated structure under state ownership.

Reflecting the evolution described in the section The natural gas sector and its evolution around the world above in the role of the state in network sectors across the world in past decades, Brazil has long been moving away from a vertically integrated state monopoly and promoting the development of an effectively competitive industry. Following a constitutional reform,[8] the 1997 Petroleum Law – applicable to both oil and gas – sought to separate transportation activities from other market segments.[9] The law stopped short of introducing cross-ownership limitations, and Petrobras complied with the new legal requirements by setting up wholly-owned subsidiaries to own and operate transmission pipelines[10] (IEA, 2018, p. 15[15]). The absence of developments in Brazil's natural gas market following the 1997 reform led to the adoption

of the 2009 Gas Law, which aimed, among other things, to create a concession regime for the transport of natural gas and to establish regulated access to the pipeline transport system.[11] Despite these reforms, Petrobras retained a *de facto* monopoly across the gas value chain (IEA, 2018, pp. 16, 18[15]).[12]

Another attempt at opening up the gas market was undertaken by means of the Gas to Grow Initiative in 2016 (please see Table 7.2 for a summary of the changes proposed by the Initiative). As presented above, involving detailed studies and the development of strategic guidelines by the National Council for Energy Policy,[13] the Gas to Grow initiative developed a general framework for market integration of the gas sector in Brazil (IEA, 2018, pp. 23-25[15]). While some of the proposed measures were adopted,[14] those that required an act of Congress were not.[15]

As a result, a second attempt of reform was launched in 2019. As presented in the section The new regulatory framework for the natural gas sector: its development, the *Novo Mercado de Gas* (New Gas Market) Programme culminated in April 2021 with the adoption of a New Gas Law, which included the significant reforms outlined in Table 7.3.[16] See also Box 7.2 for more information.

Table 7.3. 7 Main Reforms of the New Gas Law (2021)

	Before the New Gas Law	After the New Gas Law
Gas Transport	Concession regime, subject to bidding process	Authorisation Procedure
Gas Transit Unbundling	Ownership separation only for new pipelines	Full Ownership Unbundling
Gas Transport System Expansion	Centralised decision-making by Government Ministry	Transmission system operators responsible for planning, subject to no-discrimination requirements and regulator's approval
Gas Storage	Concession regime, subject to bidding process	Authorisation Procedure
Access to Essential Infrastructures	No obligation to allow third-party access to pipelines, natural gas treatment, storage and processing facilities, or LNG terminals	Mandatory non-discriminatory negotiated access to pipelines, natural gas treatment, storage and processing facilities, or LNG terminals
Gas Distribution	No unbundling requirements	Gas companies subject to federal regulation must unbundle gas distribution companies subject to state-level regulation
Market Concentration	No mechanisms in place	The National Agency of Petroleum, Natural Gas and Biofuels (Agência Nacional do Petróleo, Gás Natural e Biocombustíveis – ANP)[17] should adopt mechanisms to encourage efficiency and competitiveness, and reduce concentration in the supply of natural gas, including the possibility of carrying out gas release programs and compulsory transfer of transport capacity

Source: Government of Brazil.

In short, the New Gas Law provides the legal framework for the transition from a vertically integrated to a liberalised and competitive market structure, based on four key principles:

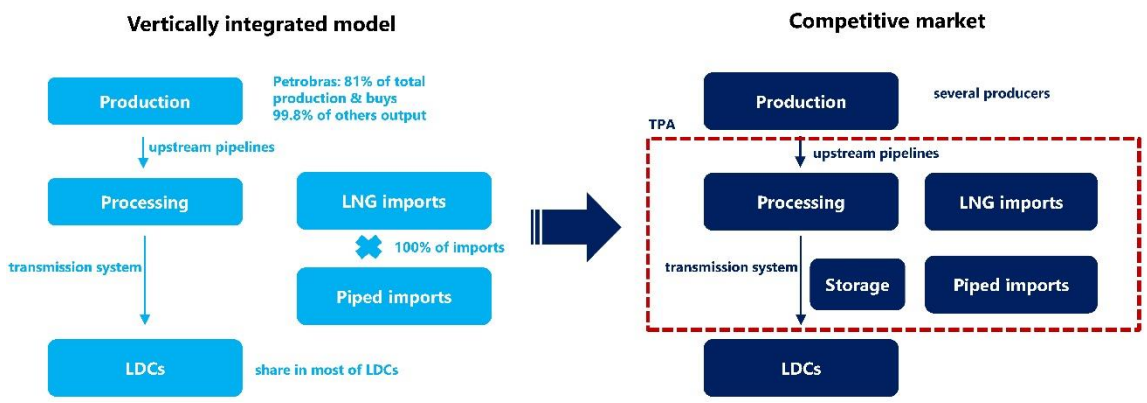
- Unbundling: Gas network operators cannot be directly or indirectly controlled by companies involved in other activities along the gas value chain, including exploration, production, import or retail commercialisation.
- Third-party access: Market participants should be granted access on a non-discriminatory basis to transport pipelines under a regulated regime, and to gathering pipelines, processing plants and liquefied natural gas (LNG) terminals under a negotiated regime.
- Entry–exit transport system: Network users will be able to book entry and exit capacities independently from each other, enhancing the flexibility of the gas system. This entails a departure

from the more rigid point-to-point system, wherein users reserve capacity at specific points along the contractual transportation route.

- Transparency: Network operators must provide market participants with operational transparency on available transport capacity and tariffs related to transport services (IEA, 2021[17]).

This reform is a major step in moving towards a competitive gas market in Brazil, and contributed to the improvement of Brazil's PMR gas sector indicator (as described below).

Figure 7.6. The impact of the new gas market programme on the natural gas sector



Source: IEA, Gergely Molnar (2020), Towards a New Gas Market in Brazil: Insights from European experience.

State ownership

To be effective, these regulatory efforts must be coupled with efforts to reduce the presence and role of Petrobras in Brazil's gas market to foster entry by private firms in the competitive segments of the value chain. And, in effect, Petrobras' corporate group has been the subject of reforms leading to the privatisation and spinning-off of certain of its gas businesses, assets and subsidiaries.

This began in the 1990s, when Brazil went through a series of market reforms that promoted privatisation and affected Petrobras group's corporate structure. More recently, Petrobras has tried to reduce its indebtedness and cost of capital by divesting non-core businesses. To settle investigations into alleged anticompetitive conduct, Petrobras has further accepted to divest important gas interests among other commitments. Among these divested businesses one can find on-shore and shallow waters assets in the oil and gas sector, gas production assets, refineries, thermoelectric generation assets, and subsidiaries involved in gas transportation and distribution[18] (OECD, 2020, p. 76[18]).

Taken together, the divestments carried out by Petrobras, and the establishment of new system operators who have been able to acquire parts of Brazil's gas transportation and distribution systems, are valuable contributions to the unbundling of the system (IEA, 2018, p. 5[15]), with positive implications for Brazil's PMR gas sector indicator score.

Despite all these efforts, Petrobras remains the main player across Brazil's gas sector. As of February 2018, 77% of Brazil's gas production came from fields operated by Petrobras (IEA, 2018, p. 83[15]). While almost 25% of all gas in Brazil is produced by companies other than Petrobras, those companies must still sell their gas to Petrobras, which is the sole company to sell gas into Brazil's wholesale market. In effect, around 97% of all gas volumes in the wholesale market were traded in 2021 on the basis of long-term contracts with Petrobras, although several producers have begun to supply LDCs directly in 2022 (ANP, 2022[19]). The existence of long term bilateral contracts by Petrobras with all distributors and large industrial consumers means that Petrobras has maintained a dominant influence in retail price formation across the

country. Furthermore, Petrobras also held indirect stakes in 19 of the 27 local distribution companies in 202 through its natural gas distribution subsidiary Gaspetro, (IEA, 2018, pp. 4-5[15]). In 2022, Petrobras and Gaspetro completed the sale of Gasmar to another company, reducing the number of local distribution companies in which Petrobras has a stake from 19 to 18 (Petrobras, 2021[20]). The landscape of ownership may change further in the future; Petrobras agreed to sell its shares in its natural gas distribution subsidiary Gaspetro, a sale which was under analysis by CADE at time of writing (Competition Policy International, 2022[21]).

In short, reforms over time, and in particular those adopted since 2018, have led Brazil's PMR gas sector indicator to improve. However, even with these initiatives the PMR indicator still shows that further reforms are needed.

The rest of this chapter looks at each constituent element of the PMR gas sector indicator in turn to highlight where reforms are still needed:

1. the level of public ownership;
2. the type and content of sectoral regulation, in particular:
   - Entry regulation, including information on third-party access;
   - Vertically unbundling of upstream and downstream markets from those market segments with natural monopoly characteristics – i.e. the gas transmission and distribution networks;
   - The existence of a liberalised wholesale market; and
   - Retail price regulation.

Analysing the status and progress of these categories provides insight to the current state of Brazil's gas sector reform, investigate how ongoing reforms influenced Brazil's PMR gas sector indicator, and identify additional opportunities for pro-competitive reforms.

Public ownership and control

The PMR explores whether public authorities are able to directly influence market competition in each gas sector segment through their ownership and control of the conduct of companies in that segment.

In particular, for each gas sector segment - gas production, import, transport, distribution and retail supply –[19] the PMR questionnaire explores whether the state holds equity stakes in the largest firm, and whether it controls or has special voting rights (e.g. golden shares) in at least one company in the relevant gas segment. In addition, the questionnaire explores whether that are constraints to privatising public companies in the relevant market segments.

Concerning the percentage of shares held by the federal or state governments in the largest firm in each segment, these are significant in all relevant segments with the exception of gas transmission and distribution. Public authorities hold a 50.5% stake of Petrobras, which is the largest company in gas production, gas import, and gas retail supply.

In recent years, Petrobras has made significant divestments in the transmission sector. In the gas transmission sector, the largest operator is Transportadora Associada de Gás SA (TAG). Up until 2019, this company, which owns about 4.500 km of transmission pipelines (about 47% of Brazilian transmission network), was part of Petrobras' corporate group. However, in 2019 Petrobras concluded the divestment of 90% of the equity it held in TAG, before selling its outstanding equity in June 2020. The result is that TAG is now fully private.[20] In 2021, Petrobras also concluded the divestment of its remaining 10% equity it held in Nova Transportadora do Sudeste S.A (NTS), after concluding the sale of 90% of its shares in 2017 (NTS, 2021[22]). NTS operates more than 2.000 km of pipelines, located in the states of Rio de Janeiro, Minas Gerais and São Paulo (responsible for 50% of natural gas consumption in Brazil). It connects to the Brazil-Bolivia gas pipeline, to the TAG transport network, to the LNG regasification

operations of the Guanabara Bay and the processing plants for natural gas produced in the Campos Basin and in the pre-salt of the Santos Basin (NTS, 2021[22]).

Concerning gas distribution, the situation is more varied since there are 27 distribution companies in different areas of the country. However, the largest gas distributor is Comgás, which is a privately-owned distributor operating in São Paulo.

In addition, federal and state governments still control at least one company in each relevant gas sector segment. This is not only the case in those segments where Petrobras is the largest company, but also in gas transmission and gas distribution.

In the transmission segment, Petrobras still holds a 51% stake in TBG – Transportadora Brasileira Bolivia-Brasil S.A., which owns and operates the 2,593 km Brazilian section of the Bolívia-Brazil gas pipeline. This may change shortly, however, as Petrobras is currently selling all its shares in transmission companies in line with commitments entered into with the Brazilian competition authority.

As regards gas distribution, state involvement is still considerable. Only nine out of the 27 distribution companies present in Brazil do not have Petrobras' corporate group as a shareholder. Of these, only two – both in São Paulo – are fully in private hands. Of the remaining six, BNDESPAR, a subsidiary of the Federal Government's Brazilian Development Bank, holds a sizable stake in one gas distributor in Rio de Janeiro; two other distributors are fully owned by state and local authorities; and state governments hold the majority stake in one gas distributor[21], and minority stakes in two gas distributors where the rest of equity is in private hands.

Through its participation in Gaspetro, Petrobras[22] fully owns one distributor, holds a majority stake in another, and has a stake below 50% – which may nonetheless be the largest equity stake – in another 16 gas distribution companies, whose ownership is in some cases shared with state governments. It should be noted that Petrobras is currently in the process of divesting Gaspetro, in accordance with commitments it entered into with Brazil's competition authority.[23] This will significantly diminish the level of state involvement in this market segment.[24]

Table 7.4. Gas Distribution Companies where Petrobras has a stake

	Federally owned investors	Petrobras equity stake	State equity stake	Private shareholders
Naturgy SP	-	-	-	99,99% - Naturgy Distribución Latinoamérica S.A 0,01% - Katia Brito Repsold
Comgas	-	-	-	99,14% - Compass Gás e Energia S.A. 0,86% - Free float
MTGás	-	-	Mato Grosso State	-
Gasmig	-	-	99,60% - Cemig (which is 50,97% owned by Minas Gerais State 0,40% - Belo Horizonte municipality	-
ESGás		-	51% - Espírito Santo State	49% - VibraEnergia (formerly BR Distribuidora)
Cigás	-	-	17% - Amazonas State	83% - Manausgás S.A.
Gas do Pará	-	-	25.5% - Pará State	74.5% - Termogás
CEG Naturgy	34,56% - BNDESPAR	-	-	54,16% - Naturgy Distribución Latinoamérica S.A. 8,84% - Fundo de Investimento em Ações Dinâmica Energia 2,26% - Pluspetrol Energy
Gasmar	-	-	25.5% - Maranhão State	74.5% - Termogás

	Federally owned investors	Petrobras equity stake	State equity stake	Private shareholders
Gas Brasiliano	-	100% - Gaspetro		-
Potigás	-	83% - Gaspetro	17% - Rio Grande do Norte State	-
MSGás	-	49 % - Gaspetro	51% - Mato Grosso do Sul State	-
Sulgás	-	49 % - Gaspetro	--	51% Compass Gás e Energia S.A.
Algás	-	41.5% - Gaspetro	17.0% - Alagoas State	41.5% - Mitsui Gas e Energia do Brasil
Bahiagás	-	41.5% - Gaspetro	17.0% - Bahia State	41.5% - Bahia Participações (Mitsui Group)
Cegás	-	41.5% - Gaspetro	17.0% - Ceará State	41.5% - Mitsui Gas e Energia do Brasil
Copergás	-	41.5% - Gaspetro	17.0% - Pernambuco State	41.5% - Mitsui Gas e Energia do Brasil
PBGás	-	41.5% - Gaspetro	17.0% - Paraíba State	41.5% - Mitsui Gas e Energia do Brasil
SCGás	-	41% - Gaspetro	17% - Celesc (a Santa Catarina State owned company	41% - Mitsui Gas e Energia do Brasil 1% - Infragás
Sergás	-	41.5% - Gaspetro	17.0% - Sergipe State	41.5% - Mitsui Gas e Energia do Brasil
Rongás	-	41.5% - Gaspetro	17.0% - Rondônia State	41.5% - Others
Gasap	-	37.25 % - Gaspetro	25.5% - Amapá State	37.25 % - Termogás
Gaspisa	-	37.25 % - Gaspetro	25.5% - Piauí State	37.25 % - Termogás
GoiasGás	-	30.5% - Gaspetro	17.0% - Goiás State	42.2% - Termogás 10.3% - free float
Compagás	-	24.5% - Gaspetro	51.0% - Copel (Paraná State owned company)	24.5% - Mitsui Gas e Energia do Brasil
CEBGás	-	32% - Gaspetro	17% - CEB – Companhia Energetica de Brasilia[25]	51% - Consórcio BrasiliaGás
CEG Rio (Naturgy)	-	37.4% - Gaspetro	-	59.6% - Grupo Gas Natural 3.0% - Pluspetrol Energy

Source: Brazil's Ministry of Economy.

The PMR indicator also evaluates whether there are obstacles to the sale of state-owned equity stakes in gas companies. As with other privatisation initiatives, the divestment of public or mixed-capital gas companies requires legislative authorisation when these companies are held by the federal government; furthermore, if the relevant company was created by law, an additional law is required before the government is able to divest its interests in it (see Chapter 1, Section 3.1.1 for more information on public ownership in Brazil). Instead, the sale of subsidiaries does not require legislative intervention.

Finally, there are no golden shares or other special voting rights held by federal or state governments in any company active in the gas sector.

The gas industry's key players at all levels of the market used to be fully state-owned. The market has witnessed some liberalisation, but the state still plays a major role across all segments of the gas sector. While this causes Brazil's PMR sector indicator to be high when it comes to state ownership (see Figure 7.5), efforts to liberalise market segments, and in particular to have Petrobras divest its operations in certain segments, have contributed, and are likely to continue to contribute to an improvement in Brazil's performance under this indicator. Given this, Brazil may want to continue its divesting Petrobras' various interests in the gas sector.

Entry regulation

The move from a vertically integrated state monopoly to an effectively competitive industry requires a regulatory framework that allows new and more efficient firms to enter, and consumers to switch towards those firms that offer better deals (i.e. lower prices, better quality, more innovative services). The PMR indicator assesses whether the key elements of such a regulatory framework are in place.

Conditions that are widely acknowledged as necessary for effective entry to occur, and which are reflected in the questionnaire, include: the absence of rules restricting the number of firms that might enter into those segments of the gas supply chain that are not natural monopolies (i.e. the transmission and distribution grids); the existence of third party access terms to the transmission and distribution grids that are set by an independent regulator; the existence of a wholesale market for gas; the ability of final consumers to switch gas suppliers; lack of retail price regulation in those segments where competition is effective; and the obligation on retailers to provide clear information to their customers on their annual consumption and on retail tariffs they are charged in their bills.

In Brazil, those segments of the market that are not natural monopolies have been opened up to competition, with the exclusion of the retail supply markets as in most states eligibility to become a "free consumer" (i.e., a consumer who can switch retail suppliers) is based on consumption volumes and, as result, small commercial and domestic users cannot choose their providers. For example, in the states of Rio de Janeiro and Bahia, free consumers are only those with a minimum average daily consumption of over 10,000 m^3 per day, and in Amazonas, those with a minimum monthly consumption over 300,000 m^3; and in São Paulo, the local distribution company's concession contracts provide the supplier with the exclusive right to provide gas to residential and commercial consumers.[26] This may be the result of long-term exclusive concession contracts entered into with gas distributors, despite the law generically providing for the possibility of retail customers choosing their supplier.[27] However, the result is that many consumers are not able to choose their supplier, and that concessionaires effectively enjoy local monopolies. Since retail supply markets are regulated at state level, a concerted effort is required to ensure that all state regulators take the steps necessary to harmonise retail regulation between states and permit the development of effective competition for all gas consumers.

On the other hand, there are no restrictions on the number of firms allowed to operate in other gas sector segments, and terms and conditions for third-party access to the gas transmission grid and to gas distribution network are regulated.

Finally, a wholesale gas market exists in Brazil. However, it should be noted that there remain practical obstacles to this market's liquidity and to third-party entry (see Box 7.3).

While Brazil has been adopting reforms to promote market entry, particularly as regards access to the gas transmission and distribution networks, obstacles remain at the state level for companies that wish to supply certain categories of final consumers. Restrictions to entry for retail suppliers should continue to be removed in order to favour competition in the retail market. Harmonising gas trade and operation of gas infrastructure, including between states, may allow gas retailers to supply gas across state borders. Ultimately, all retail consumers should be free to select their retail supplier regardless of consumption volume.

Box 7.3. The making of a wholesale market in Brazil, insights from the IEA

The wholesale gas market allows network users to trade gas bilaterally or through an exchange. Although the PMR indicator considers whether a wholesale gas market exists but does not assess its specific characteristics, the health of wholesale gas markets is important. A well-functioning wholesale market can bring about a range of benefits, including promoting competition between suppliers, enabling transparent price discovery, and improving the efficiency of resource allocation (IEA, 2020[23]).

A wholesale market exists in Brazil, but there are opportunities to make this market more liquid, transparent and competitive. Brazil's New Gas Market takes important steps in this direction, envisioning the creation of interconnected entry-exit zones with "virtual trading points" allowing free trading between and within zones (IEA, 2021[17]).

In its review of the natural gas market in Brazil (*Towards a competitive natural gas market in Brazil: A review of the opening of the natural gas transmission system in Brazil* (IEA, 2018[15])) and in the subsequent white paper (*Implementing Gas Market Reform in Brazil: Insights from European experience* (IEA, 2021[24])), the IEA provides additional insights on how to create a better-functioning wholesale market in Brazil. Their key suggestions include:

- Hub-based gas prices should replace oil indexation, currently the norm in Brazil, which better reflects supply-and-demand dynamics of the market.
- Network codes that create clear common rules should be adopted.
- Trading activity should be subject to market monitoring and supervision, allowing authorities to detect anticompetitive behaviours and build trust among participants.

A supporting factor for a more effective wholesale market is the development of well-functioning hubs, or marketplaces where market participants exchange natural gas. Hubs can be physical, a geographic point where participants trade physical volumes, or virtual, where participants can trade regardless of the location of physical volumes in the system. A "liquid" hub that is matches demand with offers from market participants in an efficient way. Drawing inspiration from the European gas market model, the IEA outlines the conditions that could ensure the development of liquid hubs in Brazil. These include a transmission system that is able to meet demand requirements, a regulatory framework that enhances midstream flexibility (including unbundling and ensuring third-party access, among other factors), and a hub design that allows for the development of trading (including non-discriminatory access, transparent licensing, and appropriate participation fees) (IEA, 2021[24]).

Sources: (IEA, 2018[15]) (IEA, 2020[23]), (IEA, 2021[17]), (IEA, 2021[24]).

Vertical integration

As noted above, the separation of gas transmission and distribution, on the one hand, from gas exploration, production and retail trade, on the other, is essential for efficient, competitive and well-functioning gas markets to develop and operate. The level of separation can differ vastly, however, which can significantly impact the operation of gas markets.

In light of this, the PMR gas sector indicator considers whether and how each gas segment is vertically unbundled from the gas transmission and distribution systems. Different unbundling models are evaluated by the PMR indicator by reference to the level of actual separation they guarantee, in line with the discussion in the section The PMR and the gas sector above.

Recent developments in Brazil have reinforced the level of vertical unbundling in the gas sector. The 2021 New Gas Law requires both full ownership separation between the gas transmission operator and all other companies active in other segments of the gas market; and operational separation between gas generation and import companies from gas distribution companies. The introduction of these requirements has improved Brazil's results in the PMR gas sector indicator.

To derive the full benefits of these reforms it is crucial that these requirements are effectively implemented over the coming years. At the moment, they have not been fully implemented, and a long transition stage is planned. In particular, the New Gas Law requires new transmission companies to be fully separated from those operating in upstream and downstream market segments, while existing transmission companies merely need to achieve legal and operational autonomy, which can be demonstrated through a certificate of independence and autonomy issued by the regulator. The latter companies have to implement full ownership unbundling only by 2039. In practice, however, the unbundling process is well underway – with much of the transmission network fully unbundled or engaged in divestment proceedings. Hence, the process may be completed earlier.[28]

Retail price regulation

In a market that is effectively competitive, firms set their own prices and consumers choose the providers that offer the best deal. Key to effective competition at the retail level is that customers are able to choose their supplier, a condition that, at present, is restricted (as discussed in section Entry regulation above).

When consumers are not free to choose their provider, retail price regulation is necessary to protect them. In Brazil, the retail supply market is regulated at state level and state regulatory authorities regulate retail prices for each category of consumers who are not eligible to switch suppliers. The methodologies used to set these prices vary across states. Some states such as Amazonas and Bahia, use a cost plus approach which passes through gas acquisition costs, while other states, such as Rio de Janeiro, São Paulo, Minas Gerais and Espírito Santo, use a price cap methodology.[29]

As discussed in the section Entry regulation above, not all consumers are yet able to switch providers, hence retail price regulation should be adapted to the relevant market conditions. This involves maintaining retail price regulation that fosters efficient entry for small commercial and domestic gas users as a stopgap measure until retail competition becomes effective, at which point retail price regulation should be removed. Disclosure requirements on consumption and rates can improve transparency and facilitate switching.

Even where customers are able to choose their supplier, competition cannot develop unless consumers have the information to be able to understand the available options and choose the best one. If consumers do not have this information, they will not exploit their ability to switch providers and suppliers will not be provided with the incentives to compete effectively, thus preventing competition from developing. Hence, consumers should be provided with sufficient information by retail gas providers. As a minimum this should include a clear indication of their annual consumption, and the retail tariffs they are charged.

The state of São Paulo, which is the one whose laws and regulations are reflected in the PMR indicator, requires that the bills issued to residential and small commercial customers provide this information[30]. This has a positive impact on the PMR indicator for the gas industry. However this is not the case across all the states in Brazil: consumers in all states could benefit from a similar degree of transparency.

Areas for improvement and insights for policy reform

The PMR indicator provides insights on measures that Brazil may want to consider as part the ongoing reform of its gas sector. In recent years, Brazil has made important strides in reducing the level of public involvement in the sector, promoting market entry and enhancing competition in numerous segments of the natural gas industry. Additional steps that Brazil could contemplate involve:

- Further divesting Petrobras' various gas interests, building on Brazil's significant early efforts to liberalise the sector and in line with Petrobras' agreement with the Brazilian competition authority to divest assets in transportation and distribution.
- Pursuing full ownership separation of gas distribution from gas generation and import companies – current requirements are limited to operational separation.
- Continue pursuing full ownership separation between existing gas transmission companies and all other companies active in the gas market, which is already well underway.
- Implementing the suggestions put forward by the IEA in its two reports on the Brazil gas market (IEA, 2018[15]; IEA, 2021[24]) to foster the development of a liquid and efficient wholesale gas market.
- Allowing all consumers in all states, regardless of their consumption volume, to choose their retail suppliers, and, when competition becomes effective, liberalising retail tariffs.

- Ensuring that all consumers are provided with the information necessary for them to understand the terms and conditions they are subject to in their annual bill, which may entail furthering common transparency requirements across states.
- Further harmonising regulatory frameworks between states,[31] to facilitate the development of effective competition across borders.

Notes

[1] The *Núcleo Operacional* refers to the group responsible for the development of a proposal of the new design of the gas market in Brazil. The group includes the Ministry of Mines and Energy, the National Agency of Oil, Natural Gas and Biofuels, and the Energy Research Office.

[2] Published on 9 April 2021.

[3] Decree 10 712/2021 was published on the Official Gazette on 4 June 2021.

[4] This means that the fact that this segment of the industry is a legal monopoly does not lead to a negative score in the PMR indicator, as it would in the case of segments that could successfully be opened to competition.

[5] See previous footnote.

[6] The PMR sector indicator only examines the markets for natural gas, and does not include liquefied petroleum gas (LPG).

[7] The Brazilian Constitution establishes that the local distribution network business and regulation are under the jurisdiction of the individual states (1988 Federal Constitution of Brazil - Art 25, paragraph 2), while upstream and mid-stream activities are subject to federal regulations (Article 177 of the Federal Constitution of Brazil).

[8] This monopoly was established in Brazil's Federal Constitution. A constitutional amendment in 1995 was therefore required to allow for the sector's liberalisation.

[9] Lei no. 9.478 de 6 de Agosto de 1997.

[10] Transportadora Associada de Gás S.A. (TAG), which owned the pipelines, and Transpetro, which operated them.

[11] Lei 11.909 de 4 de março de 2009.

[12] This could be explained by the specific design of certain key components necessary for a competitive market to develop that were set out in the 2009 Gas Law but never fully implemented. For example, the 2009 Gas Law established regulated third-party access to the transmission network but not to other facilities (such as upstream pipelines, processing facilities and LNG terminals). This made it virtually impossible for independent producers to access the gas transport infrastructure, and led them to sell their production to Petrobras.

[13] CNPE Resolution No. 10 de 14 de Dezembro de 2016.

[14] E.g. those related to Decreto nº 9.616, de 17 de dezembro de 2018, concerning the entry and exit model in the transport system.

[15] These proposals were consolidated, in 2017, into a draft bill presented before Congress in the form of a replacement for Bill (PL) No. 6.407/2013, later renumbered as PL No. 4.476/2020 (https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=593065).

[16] Law No. 14.134, de 8 de abril 2021 (http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14134.htm). In addition, the Decree regulating this Law has already been implemented – see Decreto nº 10.712, de 2 de junho de 2021.

[17] ANP is Brazil's federal regulator of the oil, gas and biofuels industry.

[18] Most notably Transportadora Associada de Gás (TAG) and Nova Transportadora do Sudeste (NTS). Further divestments are planned but incomplete: sales processes for Petrobras stakes in Transportadora Brasileira Gasoduto Bolivia-Brasil S.A. (TBG) and Transportadora Sulbrasileira de Gás (TSB) are in process, and the sale of Petrobras Gás (Gaspetro) is still under analysis by CADE at time of writing (Reuters, 2021[25]; Competition Policy International, 2022[21]).

[19] In the case of Brazil the markets for gas storage and export are not considered given their small size.

[20] https://www.engie.com.br/en/press/press-releases/engie-and-cdpq-to-acquire-remaining-10-of-tag-in-brazil.

[21] This gas distributor, ESGAS, was fully under the control of a Petrobras subsidiary called BR Distribuidora until the end of 2018. Petrobras concluded the sale of all BR Distribuidora equity in this company in June 2021. Later on, in December 2021, the state of Espirito Santo passed a new law allowing the state government to divest its stake in the distribution company (Assembleia Legislativa Espírito Santo, 2021[26]).

[22] Petrobras holds 51% of Gaspetro. The remaining 49% are held by Mitsui Gás e Energia do Brasil Ltd.

[23] https://www.gov.br/cade/en/matters/news/cade-extends-deadlines-for-petrobras-asset-sale-in-oil-refining-and-natural-gas-markets.

[24] If this process is completed by the end of 2022, it will be show in Brazil's PMR scores in the forthcoming 2023 vintage.

[25] A stake of 80.2% in this company is held by the state government. See http://www.ceb.com.br/index.php/institucional-ceb-separator/estrutura-societaria-ceb.

[26] Please note that, to the extent that as gas retail is subject to state regulation, the PMR indicators only reflect the situation in the State of Sao Paulo as this is Brazil's representative state for the purposes of the PMR indicators. The Brazilian Ministry of Economy and the Ministry of Mines and Energy provided additional information about other states.

[27] E.g. Article 28 of Deliberation 1061/2020 of 6 November 2020, of the *Agência Reguladora de Serviços Públicos do Estado de São Paulo – ARSESP* (Public Services Regulatory Agency of São Paulo State). However, this same deliberation provided (see Art. 1, § 2) that it is necessary to respect the terms of the concession contract for the supply to users in the residential and commercial segments. We understand that some of the relevant concession contracts run until 2029, and that this restriction will remain in place until then.

[28] It should be noted that since the PMR indicators assess the *de jure* regulatory framework; even if full unbundling was achieved earlier it would not affect the PMR indicator score.

[29] According to information provided by the Brazilian Ministry of Economy and the Ministry of Mines and Energy.

[30] Article 53 of the Deliberation ARSESP No. 732.

[31] Taking into account the responsibilities and competencies of the states concerning gas infrastructure, a mechanism to coordinate or harmonise access and operational security terms and conditions for federal and state level infrastructure may eventually be required. See OECD/IEA (2018, pp. 6, 8[15]).

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8 Case study on public sanitation

This chapter presents an overview of the reform of the regulatory framework of the public sanitation sector in Brazil. The modifications are assessed using as reference regulatory management tools and practices, such as *ex post* evaluation of regulations, *ex ante* regulatory impact assessment, and stakeholder engagement activities. Additionally, the chapter provides key figures to put into context the performance of the public sanitation sector. The chapter includes policies options to further improve the regulatory framework for the sectors and reap the full range of benefits of the reforms.

Recent performance of the sector

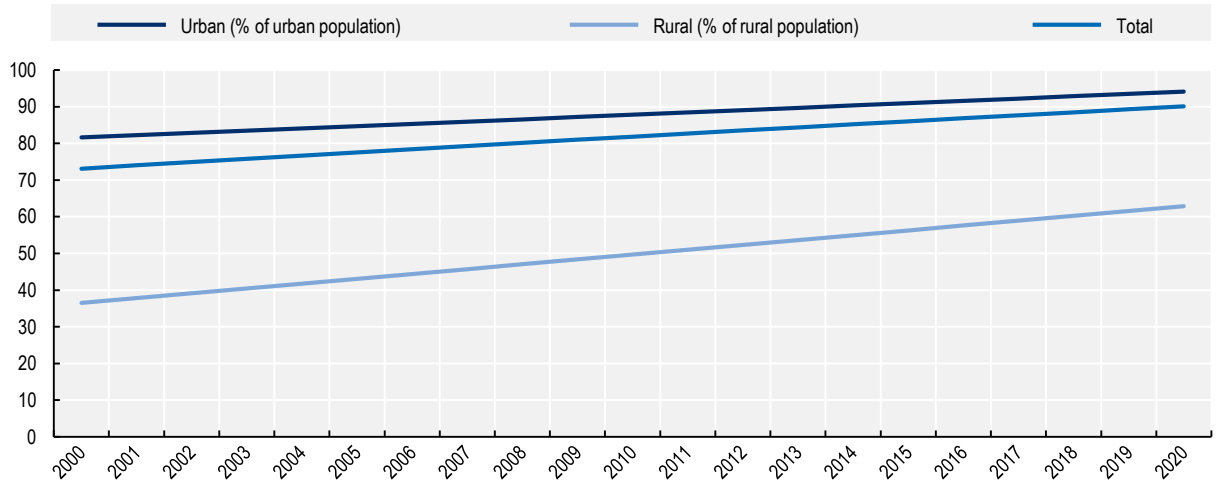
In Brazil, the General Sanitation Law (Law No. 11.445/2007) indicates that basic sanitation comprises four services:

- potable water supply
- sewage collection and treatment
- urban cleaning services and solid waste management
- urban rainwater drainage and management

According to the WHO and UNICEF's Joint Monitoring Program for Water Supply, Sanitation and Hygiene (JMP), 15 million people in Brazil lack of access to safely managed water in urban areas, while in rural areas, 25 million people only have basic services; moreover, 2.3 million access unimproved sources of water for drinking and personal hygiene (UNICEF, SIWI and The World Bank, 2020[1]).

In terms of sanitation, about 100 million people in Brazil live without safely managed sanitation services. About 21.6% of this population use an unimproved sanitation facility and 2.3% does not have access to any sanitation service. The JMP's report also indicates that the largest deficits are in the North and Northeast of the country, in particular across indigenous villages, urban peripheries and informal settlements (*favelas*) (UNICEF, SIWI and The World Bank, 2020[1]). A relevant challenge in Brazil is in rural areas, as only 62.9% of the population uses basic sanitation services; while in urban areas, 94% does (see Figure 8.1).

Figure 8.1. People using at least basic sanitation services (% of population)



Source: (The World Bank, 2020[2]).

Water and sanitation infrastructure in education facilities represents also an urgency matter in Brazil, as some states in the north of the country have less than 10% of their schools with access to sewerage systems. Furthermore, only 19% of public schools in the State of Amazonas have access to water supply (the national average is 68%). Regarding health care facilities, JPM estimates that 74.5% (excluding hospitals) had limited sanitation services by 2017. This situation exacerbates poverty and creates inequality across different sectors of population (UNICEF, SIWI and The World Bank, 2020[1]).

The Investment Partnerships Programme (*Programa de Parcerias de Investimentos*, PPI), an initiative linked to the federal executive, estimates that by 2033 Brazil would require BRL 600 billion in capital expenditure to universalize water and sanitation services. Currently, the private sector is responsible for 20% of the investment but holds 6% of the sanitation market, indicating that investments by the private sector are greater than those by the public agencies. Nonetheless, the consumer fees remain similar for both private and public investors (Programa de Parcerias de Investimentos, 2020[3]). Moreover, the *Plano Nacional de Saneamento Básico* (PLANSAB), which covers the objectives for water provisions and sanitation services, urban drainage and solid waste indicates that Brazil aims at expanding access to reach 99% water supply and 92% sewerage by the year 2033.

A new bill with a focus on sanitation aims to change the current situation and to have significant positive impacts in terms of health, education, labour productivity and preservation of the environment. According to the PPI, several projects backed by them take into consideration elements of the new sanitation law, as well as initiatives undertaken by the Brazilian Development Bank. The latter are initiatives to carry out concession projects or PPPs on water and wastewater services at municipal level (Programa de Parcerias de Investimentos, 2020[3]). The challenge is not minor, according to Sampaio and Sampaio (2020[4]), water and sanitation regulation in Brazil shall be addressed considering institutional disputes and legal uncertainty, as a complex institutional framework may play a central role in explaining the country's performance and government's inability to secure a financially self-sustainable structure of the sector.

Regulatory framework and recent reforms

The government of Brazil, recognising the state of play in sanitation services, has attempted to make reforms to increase real access to such services and improve the standard of living for the population, in particular, for people leaving with minimum resources. A first attempt to reform the regulatory framework surrounding the sanitation sector was in July and December 2018 with two Law Projects (No. 844/2018 and No. 868/2018). The reform was proposed through a provisional measure (MP); however, the proposal was never voted at the National Congress. Finally, in 2019 the Law Project No. 3.261/19 that collects most of the main arguments of the previous reform attempt, was voted and approved by the Senate. Afterwards, the draft project was delivered to the Chamber of Deputies, which undertook more than 10 public hearings. In the meantime, the Executive Power drafted the Law Project No. 4.162/2019, which was linked to the discussions of the Law Project No. 3.261/19 in the Chamber of Deputies.

By December 2019, the Chamber of Deputies approved the Law Project No. 4.162/2019 and it was sent back to the Senate, which approved the final draft. Finally, the draft project was delivered for presidential approval and the President J. Bolsonaro published the Law No. 14.026/2020.

The new law aims to provide stability and legal certainty in the sector, as well as enabling domestic and foreign private investment, in order to face the sector challenges, as the universalisation of services, the improvement concession procedures and the standardization of regulation (as sanitation services are regulated locally), see Box 8.1. According to the government, fragmentation of duties and powers led to dispersed and unbalanced rules, operational inefficiencies and regulatory risks. The municipal order of government in Brazil is characterised by high levels of fragmentation: there are more than 5 500 municipalities in the country.

The Government of Brazil promotes the new law, stressing that it provides a framework to strengthen public intervention, which is municipal in the first place, but affords state involvement when there exist: 1) common interests; 2) complementary state laws; or 3) shared infrastructure. Moreover, it provides capacities to foster the regionalisation of services for metropolitan, urban areas or micro-regions. Regionalisation of services is a key element of the new law and a strategy designed by the Federal

Government to achieve universalisation of services and prevent that potential service providers would focus only on the most populated areas or those with major expectation in revenues.

Box 8.1. Key elements of the Law No. 14.026/2020

The Law No. 14.026/2020 introduced reforms with a strong focus on the following objectives:

- Legal certainty by defining ownership of services and formalizing the sub-delegation of sanitation services through concessions or PPPs.
- Coverage goal of 99% for water service and 90% of the sanitary sewer services by 2033.
- Establishment of standard regulation for the sanitation sector by granting ANA with competences to establish national standards.
- Participation of the private sector by prohibiting exclusionary contracts between municipalities and state-owned basic sanitation companies.
- Efficiency in the implementation of sanitation projects by prioritising environmental licensing.
- Universal coverage by prohibiting the distribution of profits when providers did not comply with goals and the schedules established in contracts.

Law No. 14.026/2020 grants the Brazilian regulator, the National Agency for Water and Public Sanitation (ANA) administrative and financial autonomy, in order to establish standards that decentralised regulators could adopt. Nowadays, there are about 80 local regulators using different regulatory instruments and low capacity of standardisation. Additionally, the law provides the capacity for service providers to affiliate to a regulatory agency in a different state if the local regulator does not follow ANA's standards. In April 2021, ANA announced a regulatory agenda with a timetable for 23 regulatory standards to be published by 2023. These standards include tariff regulation, contractual instruments, regulatory accounting, system operation, quality requirements, among others.

The new regulatory framework provides the obligation to create municipal and state planning documents, which would be aligned with the National Plan for Basic Sanitation (PLANSAB) as a mean to obtain federal resources. It also allow implementing information systems for basic sanitation services linked to the National Information System for Basic Sanitation (SNIS), the National Information System about the Management of Solid Waste (SINIR) and the National System for the Management of Hydric Resources (SINGREH).

Following the publication of the Law, the Government of Brazil has published four decrees regulating aspects of inter-ministerial governance, the federal support to states and municipalities and the methodology to prove financial capacity by potential service providers.

- Decree No. 10.430 *Creation of the Inter-ministerial Committee for Basic Sanitation (CISB)*. The decree will supervise federal government's compliance in the application of resources.
- Decree No. 10.588 Regulation of technical and financial support provided by the federal government to states and municipalities, and procedures to allocate federal resources.
- Decree No. 10.710 Regulation of the methodology to prove economic and financial capacity of service providers to distribute water or provide sewage services.
- Decree No. 11.030 Regulation of the paths and conditions for the transition to the new contractual and regulatory framework

Following the publication of such instruments, the National Secretariat of Sanitation (NSS) is preparing a decree to regulate the new Law No. 14.026/2020. This decree should replace a former instrument regulating the Law of Sanitation. At this moment, the NSS indicates that, it is engaging with different stakeholders to collect information. The decree should cover elements of the new law as quality standards, maintenance of the system, tariff regulation, among other topics.

Regarding the regulatory agenda announced by ANA, the Ministry of Economy has provided technical support, including two projects in partnership with international and national stakeholders on contractual regulation and on indenisation of assets at contract termination.

Use of regulatory management tools in the reform process

The adoption of regulatory management tools, such as early and public consultation, Regulatory Impact Assessment (RIA), *ex post* evaluation and the assessment and simplification of the regulatory stock, are key elements of the strategies conducted by OECD countries and institutions to manage the quality and performance of regulation. These practices aim to improve the effectiveness in the achievement of goals of regulatory reforms. These practices have gained recognition, not only by institutions in charge to oversee quality of regulation projects but any regulator with powers to deliver public policies through regulatory instruments. This section presents a summary of practices on regulatory policy in the sector of sanitation services in Brazil.

Ex post *evaluation*

Main arguments supporting the new Sanitation Law are indicated in its motivations statement, which presents a brief analysis of the current situation according to key statistics of the sector. Performance observed in the sanitation sector in Brazil sector suggest that a change in the sanitation policy was needed. There was evidence that several debates, analyses and discussions among different actors preceded the reform in the search for a new policy. However, there is no evidence of a proper *ex post* assessment document analysing the former sanitation law, which should have led to conclude on the need for a reform with focus on specific restrictions, inefficiencies, barriers or issues generated by the former law. In contrast, the motivations statement of the new law presented a series of indicators as a proof of the weak performance of the former law, but it did not included an analysis indicating potential sources of problems, restrictions, inefficiencies or distortions – it does not imply that the latter analysis was not conducted, but there is no evidence of such work.

The need for a reform was evident, according to the diagnostic of the sector. However, the lack of a formal *ex post* analysis of the former law may open some risks to misunderstand the link between regulatory instruments and observed effects (evidence). Additionally, a formal *ex post* assessment could have brought more effectiveness in the policy design, as it may have identified more clearly specific elements to be reformed.

Regulatory impact assessment (RIA)

The regulatory impact assessment for subordinate regulation is a recent practice in Brazil. For this reason, the adoption of regulatory policy tools, such as RIA at sub-national level are not yet promoted and implemented as a consequence of an integrated strategy from the federal government.

The government of Brazil indicates that the 2020 sanitation reform was preceded by an extensive evaluation of the law conducted by the Ministry of Economy and the Ministry of Regional Development. A summary of such evaluation is expressed in the law's project motivation statement. In general, the draft

recognises that while network infrastructure for water supply covers 92.9% of the population, coverage for residual water is far from the ideal situation in Brazil. In particular, 73% of the population has access to the wastewater collection network or has septic tank. However, treatment of collected wastewater does not surpass 44.9% and the quality of the process is not guaranteed, affecting water bodies. Finally, the document indicates that deficit for water supply and sanitation accounts for 40.8 and 100.3 million of Brazilians respectively. These indicators are revealing in providing urgency in public intervention. However, there is no information on whether specific elements of the law, or the lack of some other provisions, induced or contributed to such weak performance.

The document also provides a snapshot of the composition of service providers:

- 68.9% state firms with mixed economy (composed by public and private capitals)
- 17.4% are from public administration
- 9.3% municipalities
- 2.9% are private firms
- 1.4% are public firms
- 0.1% social organisations

The draft indicates that the private industry is working in 6% of the municipalities but adds more than 20% of total investments in the sector. Moreover, estimates of the government suggest that achieving universal access to water and sanitation services requires BRL 22,000 million on yearly basis. In a context with fiscal crisis and limited public investments, the Federal Government recognises that the only way to surpass the current situation is the establishment of alliances with the private sector with the support of states and municipalities. With this information, the document concludes that the sanitation sector requires urgent attention and a change in the public intervention.

The new law was not analysed under the umbrella of a Regulatory Impact Assessment (RIA), as it was a project originated within the national Congress. According to the Government of Brazil, the quality of the regulation was assured by the extensive analysis of the project inside Congress and all public hearings conducted. The Congress indicates that any comment from different stakeholders were attender and considered.

On the other hand, part of federal subordinate regulation of the new law has been already published outside the scope of a Regulatory Impact Assessment. In particular Decrees No. 10.430/2020, No. 10.588/2020, and No. 10.710/2021 were published without a formal quality assessment. In Brazil, efforts to implement a RIA process are at early stages, but it is crucial to draft and issue subordinate regulatory instruments for the Sanitation Law after a formal scrutiny to assess their potential net benefits and increase the probability to achieve expected results. The Government of Brazil indicates that the main instrument to rule the Sanitation Law is being planned and such instrument will be assessed through a RIA. This process should be implemented for all subordinate regulations.

Another challenge is the implementation of regulatory quality instruments to oversee draft regulations at the subnational level. It is a fact that some agencies at this level of government implemented some versions of RIA but efforts and scattered. The revision of draft regulation following RIA practices should be a standard for the country.

Stakeholder engagement and Regulatory Impact Assessment (RIA)

ANA indicates that a number of public audiences within the legislative power preceded the reform. This is part of the standard legislative process followed by both chambers and it is recognised that all stakeholders from different segments of the society engaged in a democratic, open and inclusive process.

The Government of Brazil reported many meetings and other practices on stakeholder engagement with several actors during the process of issuing subordinate regulation in the sanitation sector. However, there is no evidence of formal and systematic practices of stakeholder engagement at early stages of the problem identification and the making of policy alternatives, as well as to public consultation process within a RIA.

Conclusion

During the process of reform and issuance of the new regulatory framework in the sanitation sector, the Government of Brazil followed practices that were consistent with *ex ante* and *ex post* assessment of regulation, and with stakeholder engagement.

The Government of Brazil led a comprehensive process of consultation, whereby opinions and evidence were collected to enrich the reform process of the law. This process could have been strengthened with practices on early consultation.

In contrast, the review team could not identify more profound analyses on *ex ante* and *ex post* assessments, as part of the process of reform of the law in the sanitation sector. The Government of Brazil did perform economic and legal analyses that led to conclude on the need of reform and support the merits of the new law. However, they were not carried out under the lens of regulatory quality tools, which could have allowed establishing a clear link between the public policy objectives through regulatory provisions and past or expected performance and outcomes. Moreover, secondary regulation, such as the decrees that regulate the new rule, did not follow RIA practices.

Finally, given the implications and involvement of subnational governments in the sanitation sector, it is advisable that they too follow better regulation practices when reviewing existing regulation, or issuing new legal instruments.

The section on regulatory policy and governance of this review contain a series of recommendations to the Government of Brazil to strengthen the policy, institutions and tools for better regulation. The implementation of these recommendations can help Brazil to exploit the benefits that regulatory quality practices and tools can bring to reform processes.

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OECD Reviews of Regulatory Reform

Regulatory Reform in Brazil

Removing unnecessary barriers to competition through targeted reforms can foster productivity and economic growth. This *Regulatory Reform Review of Brazil* analyses sectors that create barriers to competition, such as regulations that create obstacles to the entry of firms, inhibit the entry of firms, or restrict activities in professional and network sectors. In a complementary way, the review also identifies government efforts to develop policies and tools to improve the quality of regulations, such as *ex ante* assessment of draft regulations, stakeholder engagement in rule making, and administrative simplification. High-quality regulations can stimulate productivity by encouraging the efficient allocation of resources and promoting innovation. In turn, these measures can reduce prices for consumers, stimulate the creation of jobs, and help improve living standards. The review identifies areas for reform to bring the country's regulations and institutional arrangements more in line with international best practices. It demonstrates how a proportional, clear, and efficient regulatory framework can drive improvements in Brazil's economic performance and the welfare of its citizens.

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