Chapter 4

Regulatory impact assessment and consultation in Mexico

This chapter describes the process by which regulations are made in Mexico and the ex ante tools to ensure their quality, including regulatory impact assessment (RIA) and public consultation. Likewise, it analyses the main issues identified in the methodologies and processes applied to these tools and proposes reforms to strengthen their implementation with the aim of improving the quality of the flow of regulations. Finally, it assesses the Mexican situation in light of the OECD's principles and best practices and the experiences of other member countries.

Introduction

This chapter discusses the processes by which new regulation is made in Mexico. It focuses on the use of *ex ante* regulatory quality assurance tools and, in particular, on the use of regulatory impact assessment (RIA) and consultation in the Mexican context.

The OECD's recent major publication on RIA (OECD, 2009a, pp. 12-13) points out that better decision-making processes should lead to better policy decisions. Public policy decisions are inherently challenging, given the need to take into account a complex range of social, economic and environmental factors to determine how to maximise the public interest. High-quality institutions, tools, and processes are needed to ensure that good policy decisions are made systematically.

RIA should function both as a tool and a policy process to inform political decision makers as to whether and how to regulate. The history of the use of RIA now extends for more than three decades and the OECD has long been an advocate of RIA as a key means by which governments can ensure that regulation achieves its objectives effectively and efficiently in a dynamic policy context. Successive publications have provided data and analyses on best practices and elucidated guiding principles for the adoption of RIA.

The key role of RIA is to ensure that regulatory decision-making is placed on a systematic and comparative footing. At its most fundamental, RIA involves clearly identifying underlying regulatory objectives, systematically seeking out policy options potentially capable of addressing them, subjecting each to rigorous and comparative analysis, ideally based on benefit/cost analysis, in order to determine how the options compare in terms of effectiveness and efficiency. RIA is closely linked to a number of other regulatory quality tools, most importantly public consultation, which provides essential inputs to the RIA analysis.

The use of RIA has spread very rapidly among OECD countries and beyond. As recently as the mid-1980's, few member countries used this tool, but, by the late 1990's, around two thirds of OECD countries had adopted RIA requirements. Currently, virtually all OECD member countries use some form of RIA. This trend represents a very rapid spread of a new policy tool—a conclusion that is further underlined by the fact that no country is known to have abandoned RIA once having adopted it.

The current chapter considers Mexico's historical and current experience with RIA within this broader context and particularly assesses the Mexican situation in light of the OECD's principles and best practices and the experiences of other member countries.

RIA in Mexico: History and recent developments

Early steps

Mexico has a relatively long history in using RIA as part of a programme to improve regulatory quality. The first step in this direction was a requirement, introduced in 1992 via amendments to the Federal Law on Metrology and Standards, for benefit/cost analysis (BCA) to be applied during the development of technical standards (*normas oficiales mexicanas* or NOMs). However, there were substantial implementation problems, with consultative committees in charge of preparing the BCAs having great difficulty producing scientific or objective data and the BCA often, in practice, amounting to little more than a list of qualitative benefits and political considerations and a description of minor transition costs (OECD, 1999a, p. 158).

A broad RIA requirement was formally adopted in 1996 via amendments to the Federal Law on Administrative Procedure (LFPA), although the OECD's 1999 review reported that the "effective establishment" of the RIA requirements came in 1998. The use of the LFPA made Mexico one of the relatively few countries at that time to have established its RIA requirements in legislation (OECD, 1999a, p. 158). Indeed, the establishment of RIA in legislation remains relatively uncommon today.

The scope of the initial RIA requirements was relatively broad, covering a wide range of draft regulations with a potential impact on business activity. A centralised quality control mechanism was also established at this time, with all RIA required to be submitted to the *Economic Deregulation Unit* (UDE) of the Ministry of Trade and Industry for assessment.

The 2000 reforms

Significant changes to the RIA system were adopted only four years later. The move to adopt a major reform to the RIA process so soon after its introduction reflected the intention to respond positively to the recommendations of the *1999 OECD Review of Regulatory Reform: Mexico* (OECD, 1999a) and a concern to better embed the process, including the new reforms, in the LFPA, in order to minimise the possibility that an incoming government administration would fail to enforce, or even seek to repeal, the requirements (Cordova-Novion, 2007, p. 233).

The 2000 reforms were adopted via thoroughgoing changes to the LFPA that were passed unanimously by Congress. These changes included the addition of an entire new section on regulatory improvement, institutionalising new rule-making procedures based on RIA and public consultation. A fundamental aspect of the 2000 reforms to RIA was a further broadening of the scope of RIA requirements, so that it was henceforth to be required in respect of a wide range of proposed regulations and formalities issued by any government ministry or agency. Of particular note is that regulations proposed by sectoral regulatory agencies were also brought within the new mandate.

Some exceptions exist to the RIA process: these relate to regulation governing taxation, the public service, "agricultural or labour justice", directives dealing with the operations of the Public Prosecutor and some regulation related to the Mexican Institute of Social Security. These exemptions are spelled out specifically in the LFPA.

The COFEMER, which was established at this time, took over the RIA quality control function previously undertaken by the UDE. A new article 69H of the LFPA required all regulatory instruments to be forwarded to the COFEMER, together with a RIA. The COFEMER was given a substantial budget to carry out its responsibilities, with a staff of 60 professionals available to it in the year 2000. In accordance with the LFPA requirements, it developed a detailed RIA format and also published a detailed manual for regulatory agencies setting out and explaining the procedures defined by the LFPA (Cordova-Novion, 2007, p. 234).

The 2010 reforms

Further, substantial reforms to the Mexican RIA process were adopted in 2010. These reforms were, in part, intended to ensure that the Mexican RIA system would be fully consistent with the OECD best practice principles. In addition, they sought to address a number of specific problems identified through accumulated experience and took account of the recommendations of the follow-up to the 1999 OECD *Reviews of Regulatory Reform: Mexico*, published in 2004 (OECD, 2004).

A key change adopted in 2010 was to distinguish formally between regulations that are expected to have moderate impacts and those expected to have high impact. An online tool—the Regulatory Impact Calculator—was developed to enable regulators to assess their proposed regulation in these terms at an early stage of the process. The importance of this distinction lies in the differential RIA requirements that are applied under the new system. According to COFEMER, RIA in relation to high impact regulation is expected to incorporate more and better quality data and a greater depth of analysis than that relating to "moderate impact" regulatory proposals. The effort to ensure proper targeting of RIA is clearly consistent with OECD best practice principles. The purpose of this distinction is to make better use of RIA resources, particularly within agencies developing regulatory proposals, by directing a greater proportion of RIA effort to those regulations likely to have the greatest impact if adopted.

The concerns of the ministries that RIA was acting as a bottleneck that impeded important regulation and even regulatory improvement were another driving force for the adoption of the 2010 reforms aiming to reduce compliance costs for ministries preparing RIA without losing essential information to appraise proposals properly.

RIA requirements for both moderate and high impact regulations were also improved in a number of other key areas. Greater attention has been paid to problem definition, thus improving the basic rationale for regulation set out in the RIA. In addition, analytical requirements in relation to alternatives to the proposed regulations have been increased, with the RIA required to include BCA of each alternative for the first time, thus expanding the number of RIAs that contain quantitative comparisons of the different identified policy options.

Additions to RIA in 2012

On November 16, 2012, the RIA Manual was modified to introduce two additional types of RIAs: high-impact RIA with competition impact analysis and moderate-impact RIA with competition impact analysis. In the same spirit of aligning RIA evaluation in Mexico, the Mexican government decided to include a specific section in the RIA requirements to assess the effects on competition of the new draft regulation.

The competition impact analysis follows closely the Competition Assessment Toolkit issued by the OECD (OECD, 2011a). The toolkit states that:

"Increased competition improves a country's economic performance, opens business opportunities to its citizens and reduces the cost of goods and services throughout the economy. Numerous laws and regulations, however, restrict competition in the marketplace further than necessary to achieve their policy objectives. Governments can reduce unnecessary restrictions by applying the OECD's Competition Assessment Toolkit. The toolkit provides a general methodology for identifying unnecessary restraints and developing alternative, less restrictive policies that still achieve government objectives." (OECD, 2011a, p. 3)

As in the case of the OECD's toolkit, the new RIA process includes a checklist that asks a series of questions which intend to determine whether the draft regulation limits the number or range of suppliers, limits the ability of suppliers to compete, limits the choices and information available to customers, or reduces the incentive of suppliers to compete. This checklist is integrated to the Regulatory Impact Calculator, and depending on the answers to the competition assessment questions, the regulator is requested to prepare either the moderate-impact RIA with competition impact analysis, or the high-impact RIA with competition impact analysis. In both cases, regulators are requested to fill a special section on the RIA template which is aimed at identifying the negative impact on competition due to the new regulation, to justify the need for such harm on competition from a public policy perspective, and to describe whether and which alternatives were considered.

The new process establishes that for these cases the COFEMER will send the RIAs to Mexico's Federal Competition Commission to receive their comments and feedback. Hence, a co-ordination mechanism between the two oversight bodies is established, which is expected to increase the quality of new regulation, and minimise its impact on competition.

Additionally, on November 28, 2012, the RIA Manual was further modified, this time to include two additional modalities of RIA: high-impact RIA with risk analysis and high-impact RIA with competition impact analysis and with risk analysis. The common thread in both new RIAs is the addition of a risk analysis, which is intended for the regulator to assess whether the proposed piece of regulation is aimed at reducing risks for human, animal of vegetal health, for public security, workplace safety, the environment, or consumer protection; and once these risks are identified, to identify and assess the actions or mechanisms that the regulation intends to apply to reach such reductions in risks.

The risk analysis introduced by Mexico has two OECD documents as source of inspiration: the 2012 *Recommendation of the OECD Council on Regulatory Policy and Governance,* which amongst its recommendations states that, "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"; and the 2010 OECD report *Risk and Regulatory Policy, Improving the Governance of Risk,* whose main purpose is to identify areas for the improvement of risk governance through an analysis of the legal, procedural and practical challenges for risk regulation, and hence, improve the efficiency and effectiveness of regulatory management arrangements for reducing risks.

The new RIAs with competition assessment and risk assessment are expected to become operational by the second half of 2013.

In a similar way, following OECD's recommendations on maintaining a regulatory management system that comprises *ex ante* and *ex post* RIA as fundamental elements of an evidence-based decision-making process, on 28 November 2012 Mexico issued an agreement that allows the COFEMER to request an *ex post* RIA to ministries and decentralised bodies who issued technical standards accompanied by high-risk RIAs. The *ex post* RIA assesses the accomplishment of the regulatory objectives, its efficiency, effectiveness, impact and permanence. The agreement, in force as of 30 March 2013, also enables the COFEMER to recommend the modification or cancellation of the technical standard, the re-statement of its objectives or the adoption of additional measures that improve its application, as a result of the review of the *ex post* RIA.

The agreement establishing the *ex post* RIA also comprises the opportunity for ministries and decentralised entities to submit their regulation (after two years of its entry in force or when they consider necessary) for an *ex post* evaluation by the COFEMER or an external evaluator on a voluntary basis.

Finally, the COFEMER created the Quality Management System of the RIA through an agreement published in the DOF on 16 November 2012. The agreement establishes the criteria under which the COFEMER will assess the quality of high-impact and moderate-impact RIAs sent by ministries and decentralised bodies. To assess the quality of the RIA, the agreement states that the COFEMER may classify RIAs as satisfactory, unsatisfactory, deficient or inapplicable (not graded). It also specifies the conditions under which a RIA may be considered as partially answered or containing unconvincing information. The system also involves a global quantity indicator for each ministry and decentralised body. This indicator is calculated through the differential between the number of satisfactory RIAs and the number of unsatisfactory and deficient RIAs, all of them in reference to the total number of RIAs analysed.

Based on these assessments, the COFEMER will issue and publish on its website, in February of each year, a report on the quality of the RIAs received during the preceding year. The report will contain: i) the period of analysis, ii) the score obtained by the ministries and decentralised bodies that issued RIAs in the previous year, iii) specific recommendations with the purpose of enabling each of them to adopt the necessary measures to improve the quality of information and analysis provided in the RIA.

Description and analysis of current RIA practice

Scope of RIA requirements

The scope of RIA requirements is a key determinant of their practical effectiveness and efficiency. In principle, RIA should be applied to all regulatory instruments that impose significant regulatory costs: applying RIA only to some types of regulatory instrument can mean that important regulatory impacts go without assessment and can lead to distortions in the regulatory process, by creating incentives to use particular instruments that may not be well-adapted to their purpose, simply in order to avoid the RIA requirement. At the same time, it is important to understand that RIA is a resource-intensive process that is demanding of often scarce expertise. This means that RIA should generally not be required in respect of relatively minor regulation, both because it has limited ability to enhance regulatory quality in such circumstances and because resources used to conduct RIA in such cases could be better employed in undertaking deeper and more sophisticated RIA analysis of farther-reaching regulatory proposals (OECD, 2009a, p. 26).

Countries that have adopted RIA have tended to broaden its application over time (OECD, 2002, p. 45). However, previous OECD research found that:

> "…despite a considerable broadening of the scope of RIA in recent years, there remains considerable divergence between OECD countries in this respect. Most countries now apply RIA to both primary and subordinate legislation. However, a very large minority applies RIA only at one or the other of these levels of legislation, with similar numbers of countries applying RIA to primary legislation only and to subordinate legislation only" (OECD, 2009a, p. 26).

Moreover, the same research found that there were often inconsistencies in relation to the coverage of subordinate legislation, with similar but legally distinct instruments being treated differently for RIA purposes.

Types of instruments subjected to RIA and threshold of application

Against this background, the Mexican system appears to have established a relatively broad scope for the application of RIA. The range of legislative instruments covered by the RIA requirement includes Acts, regulations, decrees and presidential agreements, technical standards (NOMs), handbooks, circulars, guidelines, directives, rules, and any other general regulation issued by agencies and federal decentralised bodies. This list of instruments appears to be designed to be a comprehensive recitation of all possible regulatory instruments that would have the effect of creating compliance obligations.

In addition, Mexico has established a low threshold for application of the RIA requirement, which requires RIA to be conducted whenever compliance costs are to be imposed on the private sector. RIA must also be completed where a regulatory instrument would affect the rights of individuals or modify formalities other than in ways that may reduce compliance burdens. These provisions suggest that a high proportion of regulatory instruments made in Mexico are subject to the RIA requirement. Whenever line ministries or regulators consider that their draft regulation does not create compliance costs or does not fall into any of the other criteria for RIA, they must request an exception to COFEMER. Nevertheless, COFEMER retains the power to deny the request and demand RIA analysis.

However, as discussed in the following section, the Mexican RIA requirement applies in practice to only a small proportion of primary legislation. While laws initiated by the president are subject to RIA, the much larger number that is initiated by Congress is not. This constitutes a major gap in RIA coverage. In addition, the specific exemptions from the RIA process for regulations and formalities dealing with tax matters, public servants responsibilities, agricultural and labour justice, and the attributions of the federal prosecutors that are established in the LFPA are significant in narrowing the scope of application of RIA to lower-level rules. In particular, the OECD previously highlighted the exemptions relating to tax matters and recommended that these should be removed (OECD, 2004).

Despite these factors, available comparisons suggest that Mexico has a high level of RIA activity by OECD standards, although data are available from only a limited range of countries. Table 4.1 shows that, of the four countries with which Mexico is compared, only the United Kingdom produced significantly more RIA in 2011. That said, the reported number of RIA for the United States refers only to those prepared in respect of "economically significant" regulations, which require a full BCA to be completed. Adding the number of RIA completed on regulations that fall below this threshold would yield a substantially larger number.

Table 4.1. Total RIA published in 2011

Country	Total RIA published	Note
Australia	63	July 2010-June 2011
New Zealand	106	Calendar 2011
United States[1]	118	Calendar 2011
Mexico	206	Year to May 2011
United Kingdom	320	Calendar 2011
Five country average	163	

Note 1. Total refers only to RIA on economically significant regulations, which are defined as those imposing costs exceeding 100 USD million per year. Full BCA is not required in respect of regulations that are not economically significant.

Sources: For Australia, Office of Best Practice Regulation (2011), *Best Practice Regulation Report 2010-11*, Australian Government, Canberra; for New Zealand, adapted from the website of the Treasury of New Zealand www.treasury.govt.nz/publications/informationreleases/ris, accessed 21 March 2012; for the United States, adapted from the website of the Office of Information and Regulatory Affairs, Executive Office of the President, www.reginfo.gov/public/do/eoHistReviewSearch, accessed 21 March 2012; for Mexico, Federal Commission for Regulatory Improvement of Mexico responses to OECD questionnaire, 2012; for the United Kingdom, adapted from the website of The Impact Assessment Library of the UK Government, www.ialibrary.bis.gov.uk, accessed 21 March 2012.

While Mexico has applied the RIA requirement very broadly, the above discussion of the 2010 amendments also noted that it has recently differentiated the RIA requirements applied to moderate- and high-impact regulations, in a bid to ensure that a relatively high proportion of RIA resources would be directed to the highest impact regulations.

As part of the process to introduce the new RIA system, COFEMER carried out an internal review of the regulations received in 2009. It found that 386 regulations, or approximately one third of the 1 185 reviewed, were judged as generating compliance costs on individuals. Of these 386 regulations, 92 were *reglas de operación* (operating rules for federal programmes which include granting of subsidies or other forms of public money transfers) which do not undergo the normal RIA process. Of the 294 remaining regulations, 100 were classified as high-impact and 194 as moderate- or low-impact. Thus, it was found that RIA was required for about 25% of regulations and that around one third of these would be "high-impact" RIA.

While around 75% of regulations do not require RIA to be conducted, COFEMER nonetheless conducts a basic assessment of them. It regards this scrutiny of low-impact regulations as being an important part of the overall RIA process, both because it ensures a basic consistency of approach and, importantly, because it provides a check on agencies' own assessments that proposed regulations will impose no new compliance costs: unsurprisingly, the COFEMER has on occasion reached a different conclusion in this regard and the initial assessments have led to RIA being prepared.

More recent statistics show that, while a substantial number of RIA are being completed under the new arrangements, as predicted, a smaller than anticipated proportion relate to "high-impact" regulations. According to the COFEMER, up to May 2011, a total of 206 RIA had been prepared under the new system. However, only 37, or 18%, was being judged as high-impact, with the remaining 169, or 82%, being moderate-impact. This statistic suggests that the intent of the creation of differentiated requirements—that of allowing a greater proportion of overall RIA resources to be devoted to those regulations with the highest impact—is being achieved in practice. The objective itself is clearly consistent with OECD best practice principles in this regard.

Legislation originating in Congress

As noted above, the Mexican RIA requirement formally embraces both primary and subordinate legislation. However, according to Article 71 of the Constitution, the president, the two chambers of the federal Congress, and the state legislatures have the right of initiative in relation to primary legislation, while only legislation originated by the president is, in practice, subjected to RIA. There is no formal or informal obligation to perform an impact analysis of the legislation either *ex ante* or *ex post*, or to carry out public consultation on the impact and effects that the intended legislation has on society. This contrasts sharply with the regulatory improvement policy applied within the federal public administration.

This inconsistency in the treatment of primary legislation is an important one in practice, not least because a substantial majority of legislation originates in the federal Congress and, therefore, is outside the scope of RIA scrutiny. Table 4.2 below shows details of legislation considered by Congress during the current legislature (*i.e.*, since late 2009). During this period, 669 bills were approved by Congress, but only 27 of this number were initially proposed by the president; 642, or 96%, of the laws passed by the current legislature originated with the federal Congress and were, presumably, not subjected to RIA scrutiny.[1]

Table 4.2. Bills approved by the 2009 to 2012 legislature

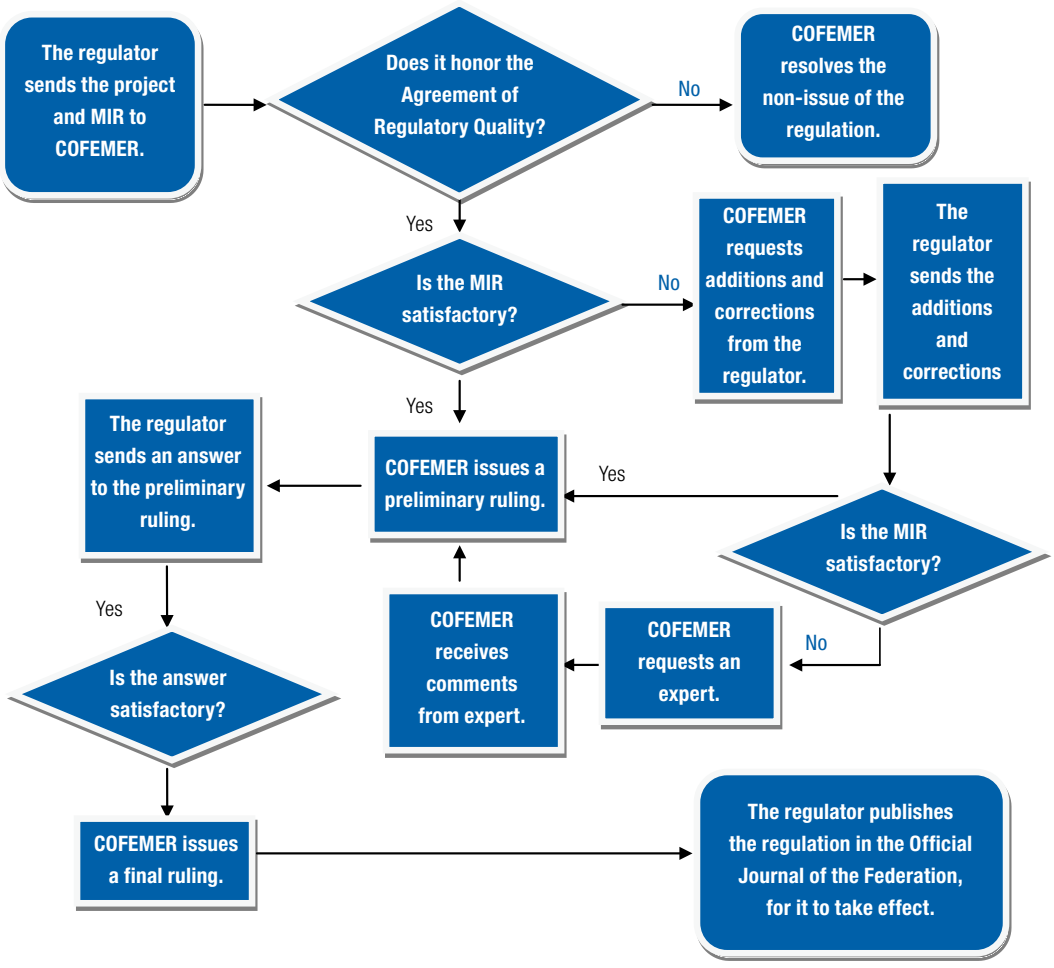
Origin	Processed	Approved	Rejected	Pending
Executive power	34	27	0	7
Senate	286	14	9	263
State legislatures	74	3	4	67
Legislative Assembly of the Federal District	4	0	1	3
Chamber of Deputies	4669	625	417	3627
Total	5067	669	431	3967

Source: adapted from website of the Federal Congress of Mexico, www.congreso.gob.mx, accessed 15 April 2012.

While RIA is not formally applied to such legislation, some scrutiny does occur from a regulatory quality assurance perspective. Specifically, where legislative proposals from Congress are likely to have substantial economic impacts, it is probable that COFEMER, when requested, will provide a formal opinion on the proposal, as will relevant ministries and regulators. The opinions received are integrated by the Ministry of the Interior, which represents the formal link between the Executive and the federal Congress, and conveyed to Congress.

However, while such scrutiny is doubtless of value, it is not part of a formal systematic process and clearly represents a lower, and less consistently applied, level of assessment than the more formal process adopted in respect of draft laws originating with the president. This suggests that a significant gap in the regulatory quality assurance process exists in relation to draft laws originating in Congress. Moreover, there is a risk of strategic moves to take advantage of this gap in the coverage of formal RIA scrutiny requirements, as some ministries, backed by private and public interest groups, may consider using the Congress to initiate laws to bypass the "checks-and-balances" process (Cordova-Novion, 2007, p. 233).

Figure 4.1. The RIA process in Mexico



Source: Federal Commission for Regulatory Improvement of Mexico responses to OECD questionnaire, 2012.

The fact that formal RIA scrutiny is apparently being applied to a very limited share of Mexico's new legislation highlights an important area to focus on for future reforms of the RIA system.

Process requirements for RIA

Figure 4.1 provides a diagram of the Mexican RIA process, which is established via the Agreement of Regulatory Quality. This agreement is intended to create guidelines that must be followed by ministries and decentralised agencies of the federal public administration when issuing regulations with compliance costs and which are, as a result, subject to the regulatory improvement process set out in Title 3A of the LFPA. Specifically, the RIA guidelines are included in a manual, which is attached to the agreement.[2] The RIA Manual indicates the deadlines set for COFEMER to issue a resolution on regulatory projects.

Initial "triage"

The Mexican RIA process commences with a determination of the type of RIA to be prepared. As noted above, a key reform adopted in 2010 was to differentiate RIA requirements between moderate- and high-impact regulatory proposals, in order to enable for a larger proportion of RIA resources to be devoted to the latter, thus increasing the expected productivity of the RIA process. However, the current RIA process actually distinguishes between eight different types of RIA, as follows:

- High-impact RIA: It is prepared when, as a result of the use of the Regulatory Impact Calculator (see below), it is concluded that the potential impact of the draft submitted to the COFEMER for consideration is high. In addition, the COFEMER may request the preparation of a high-impact RIA, even where the calculator has rated the regulatory impact as being moderate.
- Moderate-impact RIA: It is prepared when the calculator rates the potential impact of the draft regulation submitted to the COFEMER as moderate.
- High-impact RIA with competition impact analysis: It is prepared when, as a result of the use of the Regulatory Impact Calculator, it is concluded that the potential impact of the draft submitted to the COFEMER for consideration is high; and additionally, as a result of the competition impact checklist (see below), it is concluded that the draft regulation contains actions that could impact the intensity of competition, economic efficiency and consumer welfare, either by restricting or promoting specific changes in market conditions.
- Moderate-impact RIA with competition impact analysis: It is prepared when the calculator rates the potential impact of the draft regulation submitted to the COFEMER as moderate; and additionally when, as a result of the competition impact checklist, it is concluded that the draft regulation contains actions that may affect competition in markets.
- High-impact RIA with risk analysis: It is prepared when, as a result of the use of the Regulatory Impact Calculator, it is concluded that the potential impact of the draft submitted to COFEMER for consideration is high; and additionally when, as a result of the risk impact checklist (see below), actions intended to address, mitigate or lessen a risk have been identified.
- High-impact RIA with competition impact analysis and with risk analysis: It is prepared when the criteria for high-impact RIA with competition impact analysis are met, and additionally when, as a result of the risk impact checklist, actions intended to address, mitigate or lessen a risk have been identified.
- Periodic updating RIA: It is prepared in cases where regulations must be periodically updated, but the updated rule is not expected to impose any additional obligations. This would include cases where instruments with limited life spans are being renewed without substantive change. A periodic updating RIA will update the analysis contained in the initial "substantive" RIA to reflect the current situation, rather than developing an entirely new analysis. The periodic updating RIA can therefore be applied in cases where the initial analysis followed either the high-impact or moderate-impact requirements. Evidently, however, if no RIA has previously been prepared, this path cannot be taken.

- Emergency RIA: It is to be used where specific eligibility criteria are satisfied. These require that the instrument have a lifespan of not more than six months and that it is designed to address an immediate harm and that no previous emergency RIA has been prepared in relation to the same issue. Emergency RIA can be submitted up to 20 days after the regulatory instrument has been adopted.

Permission to prepare either a periodic updating RIA or an emergency RIA must be given to the regulatory agency by the COFEMER. By contrast, agencies prepare a moderate-impact or a high-impact RIA, based on the results derived from the use of the Regulatory Impact Calculator. Additionally, the modalities of competition impact analysis and risk analysis are prepared depending on the results produced by the answers provided to the competition impact checklist, and the risk impact checklist, respectively.

Regulatory Impact Calculator

The initial assessment to determine whether a high-impact or a moderate-impact RIA will be prepared is conducted via the application of the Regulatory Impact Calculator. This tool has been developed with reference to Australian and British regulatory cost calculator models[3] and, in broad terms, follows the precepts of the Standard Cost Model approach[4] to assessing administrative burdens. That is, it involves identification of all expected impacts of the proposed regulations at the most disaggregated level, determination of the number of affected parties, and the average cost per impact, as well as the number of years over which impacts are expected to occur.

The calculator comprises ten questions, three of which relate to the expected impact on demand of the regulatory proposal, three relate to the expected impact on supply, and three relate to the number of firms and/or individuals expected to be affected.[5] The development of the calculator included a process of "road trials" against existing regulation, in order to test its accuracy and reliability. The ten questions that comprise the calculator are accorded different ratings, on a scale of 0.5 to 2.5 points. Given the extent of this weighting, it will clearly have a significant impact on the outcomes.

The calculator is configured as an online tool and the regulator is only able to apply it once to a given regulatory proposal. Thus, there are safeguards against attempts to "game" the results. The calculator process can therefore be regarded as "automated" in that it does not rely on individual judgements regarding the regulatory proposal, other than those that are involved in answering the specific questions that comprise it. Even here, the scope for the exercise of subjective judgement seems to be limited, given the nature of many of the questions. The main exception in relation to this observation is that, as noted above, the COFEMER has the right to request that a high-impact RIA be undertaken even if the result given by the calculator is that the proposal appears to be a moderate-impact one. This appears to be a safeguard to be applied in situations where significant impacts are not detected by the calculator's simplified approach.

Competition impact checklist

Drawing heavily from the OECD's Competition Assessment Toolkit (OECD, 2011a), the competition impact checklist contains fourteen questions intended to determine whether the draft regulation limits the number or range of suppliers, limits the ability of suppliers to compete, limits the choices and information available to customers, or reduces the incentive of suppliers to compete. The checklist is planned to be part of the online tool which

encompasses the impact calculator, and contingent on the answers provided, the tool will indicate the regulator whether a competition impact analysis must be done. As in the case of the dichotomy high- vs. moderate-impact RIA, the COFEMER retains the power to demand that a high-impact RIA with competition impact analysis is prepared by the regulators, regardless of the results dispensed by the online tool.

The section for competition impact analysis which is added to the RIA template contains four main sections: the identification of the regulatory actions or mechanisms that could restrict competition, a description of such actions or mechanisms, a justification to include such actions or mechanisms in the regulation in light of the fact that they will harm competition, and a description of whether alternatives to the regulation were considered. It is to note that the RIA manual does not specify whether the justification must include quantitative elements, which implies that the regulator is free to add them or not.

As part of the modifications to the RIA Manual to insert the competition impact analysis, a clear-cut procedure to review this analysis by the Federal Competition Commission of Mexico (COFECO) was also added. The procedure includes response times by the COFECO to the request of comments by the COFEMER, as well as the procedures and periods for the hypotheses in which additional information must be sought from the regulator to complete the analysis.

Risk impact checklist

Similar to the competition impact checklist, the risk impact checklist is planned to be embodied in the same online tool as in the impact calculator. The risk impact checklist contains six questions to help the regulator determine whether the proposed piece of regulation is aimed at reducing risks for human, animal of vegetal health, for public security, labour hazards, the environment, or consumer protection. Depending on the answers provided, the tool will specify to the regulator whether a risk impact analysis must be done.

The template for risk impact analysis which is added to the RIA template contains four main sections: identification of the risks to be prevented or mitigated, description of the regulatory actions which are pretended to manage such risks, recognition of whether different groups are affected in different levels of magnitudes by the risks and the measures proposed to manage such variations, and finally, whether there are risk trade-offs between different groups or situations and an explanation for such trade-offs.

The role of the COFEMER in RIA

The COFEMER notes that they typically engage in a number of preliminary and informal discussions with regulators as they prepare for the RIA process and conduct initial research and analysis. However, once the regulator formally submits a draft RIA, the process is quite formal and extremely transparent.

The RIA submitted formally to the COFEMER is based on an electronic form, containing a detailed set of standard questions, with drop down menus being used in many cases to provide response prompts. These questions cover the core elements of RIA, including problem definition and identification of regulatory objectives, detection of feasible means of achieving these objectives (whether regulatory or non-regulatory), benefit and cost assessments of each option, and comparison of the resulting net present values (NPVs). However, a number of specific features of the online form are notable, such as the following:

- Any differential impacts on large vis-à-vis small and medium enterprises must be noted;
- BCA calculation occurs via an integrated calculator using a Standard Cost Model (SCM) type methodology that requires estimates of the costs of individual compliance obligations to be built up via inputs of unit cost, frequency, and number of affected parties;
- Where a full BCA is not possible, provision is made for a qualitative analysis to be included;
- Since 2010, compliance and enforcement strategies to be adopted have also been required to be addressed explicitly;
- The consultation undertaken prior to the RIA being completed is required to be summarised; and
- A specific section for competition impact analysis as described above, if the online tool requests so;
- A specific section for risk impact analysis as described above, if the online tool requests so;
- Space is provided for comments to be made to the COFEMER.

The draft RIA, when completed by the regulator, is automatically published on the COFEMER website. This enables all stakeholders to view the analysis and provide comments and responses. Any such comments received are published, as are COFEMER's comments on the draft RIA.

The regulatory agency is then required to respond substantively to the comments published by the COFEMER. Once a satisfactory response has been received, the COFEMER will certify the RIA as final and the regulatory process proceeds. Again, publication of the relevant documents occurs at the time. Notably, however, an exception to RIA publication does exist: a regulator may request that the RIA be excluded from the publication requirement where it believes that the achievement of the policy objective would be undermined as a result, or other significant harms would occur.

In practice, regulators' responses to COFEMER's comments on the draft RIA will frequently fail to address adequately all of the concerns raised in relation to the analysis. In such circumstances, the revised draft may be deemed by the COFEMER to constitute another draft RIA, rather than a final document.

Responsibility for RIA

The OECD's 1997 RIA best practices highlight the need to allocate responsibilities for RIA programme elements carefully. This fundamentally refers to the locus of responsibility for preparation of the RIA and for the quality control function. However, the question of who takes responsibility for the RIA document constitutes an important additional element.

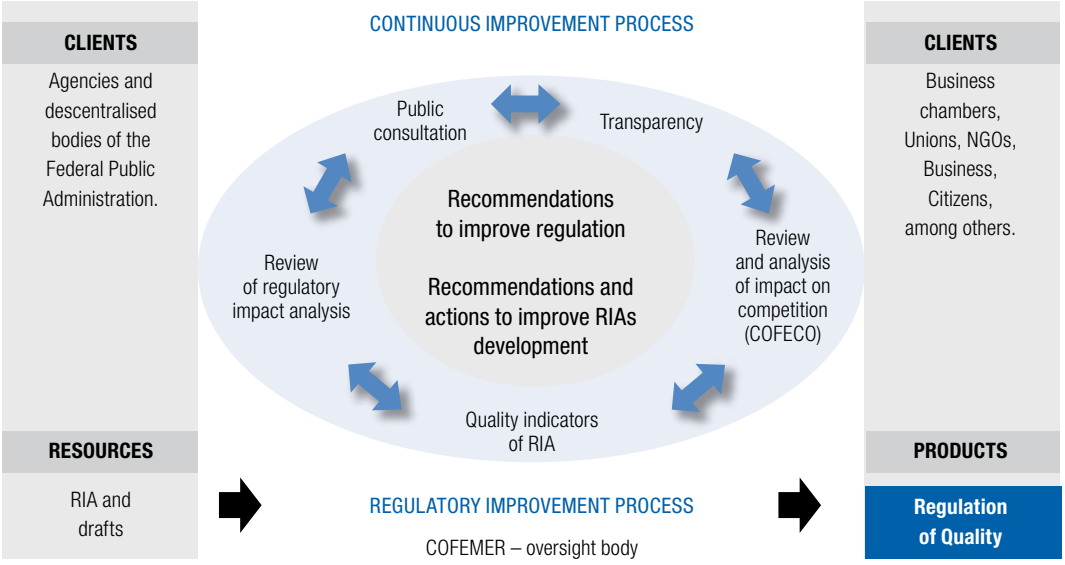
Under the current Mexican RIA arrangements, there is an electronic signature process for authorising the draft RIA to be sent to the COFEMER for assessment. Responsibility for this authorisation lies with the official within the agency who is responsible for the better regulation agenda. This person will usually be a senior official (*i.e.,* deputy minister or chief administrative officer).

By contrast, many OECD countries require the RIA to be authorised either by the head of the relevant regulatory agency or by the minister responsible for the regulatory proposal. The concept of requiring ministers to take personal responsibility for the content of the RIA document has been a feature of RIA systems at least since the mid-1990's (OECD, 1997, p. 17). Particularly where the RIA document is publicly available, such a requirement has the potential to be a powerful factor in encouraging a high-level analysis to be completed.

Quality Management System for RIA

The COFEMER has given considerable importance to embedding a culture of regulatory quality within the ministries and decentralised bodies involved in the regulatory improvement process. Thus, with the purpose of ensuring better quality in the development of regulation and RIAs, the COFEMER created and implemented, in November of 2012, a Quality Management System of the RIA to identify the best practices on RIA along with areas of improvement for each regulatory body. The importance of creating a Quality Management System reaches beyond quality indicators as it takes into consideration all the parties to the system (internal and external clients, Federal Competition Commission and the COFEMER as an oversight body), while aiming at having feedback and solutions to continuously improve the regulatory process and, hence, the quality of regulation (see Figure 4.2).

Figure 4.2. Continuous improvement process



Source: COFEMER and LATIN REG (2012), *Quality Management System of the RIA*, Mexico City.

The Agreement on Quality Management System of the RIA establishes the criteria to assess the quality of high-impact and moderate-impact RIAs sent by ministries and decentralised bodies to the COFEMER during a year. It allows for specific, quantifiable assessments for each ministry and decentralised body through the global quantity indicator, as it enables to appropriately rate the quality of RIAs sent throughout a year.

The COFEMER has already performed assessments for RIAs submitted in 2011, based on the criteria of the system and the employment of the global quality indicator. A total of 269 high-impact and moderate-impact RIAs were received in 2011, out of which 98% were subject to the quality analysis and only 2% considered inapplicable. Out of the 263 RIAs that were assessed, 87.8% were classified as satisfactory, 10.6% as not satisfactory and 1.5% as deficient, with an overall grade of 76; whereas 77% of the ministries and decentralised bodies were rated as adequate or outstanding.

Despite the positive results, based on the Quality Management System of the RIA, the COFEMER was able to identify improvement opportunities in the elaboration of RIA for the year 2011, as it was the cost-benefit analysis and incomplete RIAs due to the lack of information for regulators to identify and justify its regulatory actions. The results highlight the importance of the Quality Management System, where a continuous improvement of the regulatory process is attained through evaluation, transparency and internal and public consultation. The system, therefore, stands as an important tool for feedback and recommendations for better regulation, as it also enables increasing the capacity of public officials to prepare better RIAs.

Improving capacities

The 2010 changes to RIA requirements were intended in part to focus RIA resources on the most significant regulatory proposals, but also signalled a move to increase the stringency of RIA requirements, particularly in relation to high impact regulation. This intent is reflected in the more detailed set of headings contained in the online RIA form and in COFEMER's statements that they expect more "disaggregated" analyses to be completed, which address explicitly a wider range of RIA topics.

The Economic Intelligence Unit

A key recent initiative taken by the COFEMER to support the RIA process and enable higher quality analysis is the creation of the EIU. The EIU is a subsidiary part of the COFEMER, which is charged, in part, with providing relevant technical information, including economic, scientific and academic findings, to improve the quality of regulatory analysis. A significant part of the EIU's work involves the provision of input into COFEMER's assessments of draft RIA. Thus, the creation of the EIU is intended, in part, to increase the rigour of the scrutiny, which the COFEMER applies to draft RIA. To this extent, it functions as a mechanism which creates pressure on regulators to increase their own RIA capacities, to deal with the more rigorous scrutiny process that will be applied by the COFEMER.

However, in many cases, the unit also provides assistance to regulators at an earlier stage of RIA development. This reflects COFEMER's view of its role as including assisting regulators who are developing high quality regulation to document its benefits and thus meet the RIA scrutiny requirements. Thus, the EIU also operates to some degree as a direct source of improved analytical capacity for regulators. In both aspects of its role, an underlying objective of the EIU is to encourage regulators to recognise the need to take full account of the results of international research in developing their analyses and to research international practice when identifying options to address policy problems, and to ensure that appropriate methodological approaches are taken. The EIU is also closely involved in the process of identifying means of improving *ex ante* RIA through better methodological approaches.[6]

The work of the EIU in supporting regulators to undertake better RIA can be compared with the "Helpdesk" approach adopted in the Netherlands in the late 1990's and identified in an OECD review as a promising practice worthy of consideration by other OECD countries (OECD, 1999b). That review highlighted the benefits of providing access to specialist expertise and addressing the reluctance of regulators to divert resources to RIA by providing "free" resources as key benefits.

These benefits seem to be significant in the context of Mexico's use of the EIU. The gains from such an approach will be particularly significant in contexts in which many regulators lack capacities. The COFEMER reports that the EIU's input frequently leads to substantial improvements in the initial quality of the analysis by identifying important data and research findings to be incorporated in the RIA.

The COFEMER sees the EIU as an essential tool in achieving medium-term improvements not only in the quality of RIA, but also of the quality of the underlying regulatory proposals. This appears to imply moving to emphasise further the unit's role in providing positive assistance directly to regulators, vis-à-vis its role in RIA assessment, a direction which the COFEMER has indicated it intends to pursue in the near future. A potentially significant issue in this regard relates to the need to manage potential conflict between the two roles. As pointed out in a review of the Australian experience:

"Regulatory reform bodies have also sought to enhance RIA quality by offering internal consultancy services to regulatory agencies, to provide relevant expertise and guide them in carrying out RIA tasks. However, they have generally had limited success in carrying out this function, arguably because of perceived conflict between this role and their RIS assessment function. For many regulators, interactions with regulatory reform bodies in the course of reviewing RIS inevitably become adversarial in nature. In consequence, developing the cooperative relationships needed to underpin a successful consultancy role becomes difficult if not impossible" (Deighton-Smith, 2007, p. 161).

The strong role being taken by the EIU in training regulators on RIA disciplines (see below) may be positive in this regard.

Training programmes

The OECD has consistently emphasised the importance of developing regulators' capacities as a core element of the regulatory quality agenda.[7] Regulators must develop sufficient technical capacities to enable the preparation of high-quality RIA, while the systematic use of RIA at such a level is expected to lead toward cultural change over time within regulatory agencies, embedding the regulatory quality agenda in policy making practice. Training and capacity development is therefore a core role of regulatory reform agencies.

The COFEMER has moved to very substantially increase its focus on training in recent years. From a starting point in which training was largely conducted only "on request", it has in recent times both massively increased the number of officials being trained in RIA disciplines and moved to tailor training to the needs of individual regulatory agencies. For example, during 2010 the COFEMER conducted 17 training sessions which were attended by 476 officials from 53 agencies and decentralised bodies. This compares with 370 officials trained in 2009 and 147 in 2008 (COFEMER, 2011b, p. 13; COFEMER, 2010). The COFEMER provides training to officials from all levels of government.

It should be noted that these training and consultation activities are complementary with other training activities carried out by the COFEMER that extent beyond RIA, embracing a wide range of regulatory quality issues. These include the Diploma on Regulation (see Chapter 3. Regulatory policy and institutions, subsection "Training and capacity building") and training for state and municipal officials (see Chapter 7. Multi-level regulatory governance, subsection "Capacity building for regulatory reform in states and municipalities").

While the recent adoption of this programme of training means that its success cannot yet be measured confidently, the COFEMER reports that initial evaluations have been undertaken and yielded positive results. Notably, the curriculum appears designed to place RIA requirements in a much broader conceptual context, incorporating discussion of issues such as competition assessment, network economics, theories of oligopoly and deregulation

Use of external consultants

While the EIU's role in providing technical assistance to regulators can be expected to enhance their RIA capacities to a significant degree, it cannot on its own meet the needs created by the increase in the rigour of RIA requirements that have resulted from the 2010 changes.

Previous OECD research points to a tendency for rapid increases in the RIA quality standards required by regulatory reform bodies to lead regulators to move toward the employment of expert consultants as a means of gaining access to increasingly important technical skills. It also suggests that regulatory reformers have at times encouraged this approach as a means of improving RIA quality in the short term (OECD, 2009a, p. 47). The use of external consultants can have a positive impact on both policy development and RIA quality, particularly if they are engaged early in the process and regulators seek to use the process as a mechanism for knowledge transfer.

Conversely, it has been argued that an underlying purpose of RIA is to lead to cultural change within regulatory agencies, with a progressive adoption of RIA-based disciplines as core elements of basic policy development. In this view, contracting specific RIA development expertise could be seen as a limiting factor in terms of the achievement of such long-term policy change. However, the specific use made of this expertise by regulators is important in determining its usefulness: "The RIA consultancy in some cases acts as the springboard for transfers of knowledge on a broader range of regulatory quality issues, including maters such as different regulatory approaches, risk analysis, design of alternative policy tools and the like. In such cases, it is not tenable to argue that continuing and even increasing use of external RIA consultancy is indicative of the failure of RIA to embed itself in the policy process" (Deighton-Smith, 2007, p. 158).

The Mexican context appears to be one in which external experts have historically been little used in either the RIA context or the policy process more generally. However, the recent increase in the rigour required by the COFEMER in RIA documents, together with pressures for better quality analysis created by the very transparent nature of the Mexican RIA process, will potentially lead to pressure for regulators to move in this direction.

Independent experts

The context for the above consideration of the potential role of external consultants is one in which the COFEMER already has the ability to require regulators to use the services of an external expert in certain defined circumstances. Specifically, where a regulator's response substantially fails to address the concerns with the draft RIA raised by the COFEMER, and the RIA relates to a high-impact regulatory proposal, the COFEMER may request the appointment of an independent expert. This appears to be a unique aspect of the Mexican RIA process.

According to the RIA Manual,[8] if an expert is appointed at COFEMER's request following an agency's failure to address its concerns with RIA, the cost of the appointment is charged to the regulatory agency's budget. The scope of the expert's role will be, at a minimum, to review the aspects of the RIA that the COFEMER has highlighted as inadequate. The regulatory agency is able to choose the expert to be appointed from a list prepared by the COFEMER of experts approved for review of RIA in particular areas of expertise. In this case, the appointment of the expert is automatically approved by the COFEMER. Alternatively, the regulatory agency may propose an expert for appointment, in which case the COFEMER will assess his training and expertise, as well as the potential for conflicts of interest, before determining whether to approve his appointment.

The COFEMER then provides the terms of reference for the expert review. The expert's report is due within forty working days of his appointment and his conclusions must be taken into account in the further development of the RIA.

The expert review process was implemented as part of the 2000 RIA reforms. It is used relatively rarely in practice; however, the COFEMER believes that it has significant value as an incentive for regulators to respond appropriately to their comments on draft RIA. This reflects, in particular, the fact that a COFEMER request for the appointment of an expert will inevitably lead to delay in the regulatory process and additional cost, as well as the possibility that the expert's findings may lead to a broader reconsideration of the issues underlying the proposed regulation.

The range of experts potentially able to be used is extremely broad. For example, in one case relating to a NOM regarding vehicle weight and dimension standards, the opinion of an expert from the University of Texas was sought.

As noted above, the "expert opinion" provisions of the Mexican RIA system are innovative in nature and possibly unique among OECD countries. They appear to give rise to a number of important benefits. Most obviously, the expert opinion can act as a "circuit-breaker" where there is disagreement between the COFEMER and a regulator on RIA issues. The use of an independent party would in itself appear to give rise to greater opportunities for conflict resolution.

In addition, this mechanism is also clearly a means by which substantial additional subject-matter expertise can be brought to bear within the RIA process. The issue of adequate technical capacity to prepare high-quality RIA is a significant one for regulators in all OECD countries and is likely to be particularly acute where there are broader capacity issues across the public sector. Moreover, the COFEMER suggests that this aspect of the RIA process has a significant impact in encouraging higher levels of compliance by regulators, implying both better RIA and, presumably, better policy outcomes.

Methodological issues in current RIA requirements

The OECD recently published a substantial discussion of methodological issues in the context of RIA and, in particular, of BCA (OECD, 2009a, Chapter 3). This included a survey of methodological guidance materials published in a subset of member countries with well-advanced RIA programmes, assessment of this guidance against the conclusions of the research literature on the relevant issues, and identification of key areas for further reform. The following discussion considers the approaches to these methodological issues currently adopted in Mexico in light of this material.

Discount rates

Most OECD countries recommend the use of specific discount rates in the context of providing methodological guidance on the preparation of RIA, albeit discretion to adopt rates other than the proposed "benchmark" rates is usually provided and the conduct of sensitivity analysis using different rates is also often counselled. The OECD has found (OECD, 2009a, p. 84) that, among 11 countries for which data could be identified, recommended real discount rates varied from 3.5% to 10%, while sensitivity analysis using rates varying from 3% to 15% is also proposed.

Many of the guidance documents identified as the source of discount rate recommendations provide little or nothing in the way of a conceptual rationale for the rates recommended. Hence, there is little transparency as to the reasons for the observed wide divergence in recommended rates.

Mexico's Ministry of Finance recommends the use of a 12% real discount rate in BCA conducted by government agencies and, accordingly, the COFEMER recommends the use of this rate in the RIA context. As the above discussion indicates, this is a very high rate, compared to that used in other OECD member countries for which data has been compiled—indeed, it is higher than that found in any of the 11 jurisdictions considered.[9] However, in practice, only high-impact regulations are required to be subjected to the benefit/cost calculator and, hence, to a formal BCA. COFEMER advises that, within this context, most regulators apply alternative discount rates in practice and that the rates actually used will, in some cases at least, vary widely from the benchmark 12% rate. For example, in one case cited by the COFEMER, an inflation rate of 3.8% was cited and was used as a discount rate. At the same time, if the COFEMER believes that the discount rate adopted by the regulator is inappropriate, and the rate used is significant in determining the outcome of the BCA, it can require an alternative rate to be adopted.

The current arrangements suggest that a wide range of discount rates are used in practice in Mexico for RIA purposes. By contrast, previous OECD analysis has concluded that:

"There is a strong argument that RIA guidance documents should recommend a specific discount rate or rates to ensure policy coherence, rather than leaving this issue to be determined in a decentralised manner by regulators. […] consistency in the choice of discount rate favours optimisation of the expenditure of regulatory resources. This does not necessarily imply that a single rate should be used for all regulatory purposes, but does imply the need for consistent approaches, so that like regulatory expenditures are assessed using like discount rates" (OECD, 2009a, p. 92).

The wide range of rates recommended in different OECD countries is likely to reflect, at least in part, different views on the appropriate conceptual basis for the setting of the rate, with the opportunity cost of capital and the social rate of time preference being the two approaches that are used in most cases. There are sound arguments for the use of both of these conceptual approaches, while the differences in recommended discount rates across OECD countries are likely largely to reflect different views on which perspective should be taken as a "base case". However, the United States RIA guidance material counsels that the RIA should be completed using two different discount rates (3% and 7%) that reflect both conceptual perspectives (Office of Management and Budget 2003, p. 34).[10] Other OECD countries deal with this issue, at least implicitly, by arguing that sensitivity analysis should be conducted with respect to discount rates, albeit that a single "base case" rate is nominated.

Value of Statistical Life (VSL)

A second fundamental variable in relation to quantitative BCA is that of the "Value of Statistical Life". The COFEMER does not currently include recommendations on appropriate VSL for use in RIA in its guidance materials; however, it has indicated that it is currently reviewing this issue and intends to provide such guidance in the near future.

A wide range of VSL figures have been proposed in research literature and adoption of different values will clearly have a substantial impact on estimated benefit outcomes where health and safety related regulation is under consideration. Despite this, OECD 2009 found that only one of the RIA guidance documents reviewed recommended a specific VSL figure for use in the RIA context: the European Union recommended a relatively low figure of €1 million. Other guidance on the subject included citation of a range of results arising from the literature, with both the US and Canadian guidance documents citing a range of USD 1-10 million. As with the discount rate, different conceptual approaches to VSL can be adopted, with human-capital and willingness-to-pay based approaches being the key alternatives. The former systematically leads to the adoption of lower VSL estimates than does the latter. However, both RIA guidance documents and the research literature demonstrate a tendency to favour the latter approach (OECD, 2009b, pp. 94-96).

The OECD has previously argued (*ibid.*) in favour of the inclusion of specific recommendations on VSL as a priority area for improvement of RIA guidance, while there is some recent evidence of a tendency by member countries to move in this direction: for example, in Australia, both the federal and Victorian (state) governments now recommend a value of AUD 3.5 million should be adopted (Office of Best Practice Regulation, 2008),[11] based on the outcome of a literature review commissioned specifically for this purpose.

Public consultation

For many OECD countries, systematic public consultation processes have traditionally been a key part of the regulatory process and considered as an essential requirement in ensuring its legitimacy. However, a clear trend that has followed the widespread adoption of RIA and the increasing use of quantitative BCA is the use of public consultation as a means of gathering empirical information to support this analytical activity (OECD, 2002, pp. 68-69). This reflects the fact that consultation is often the most cost-effective means of obtaining the required data, while an open, public consultation process also implies that data will be obtained from numerous sources, enhancing its reliability and legitimacy.

Consultation in Mexico is strongly influenced by the requirements formally established in two separate pieces of legislation. First, as discussed above, the LFPA sets out specific public consultation requirements as an integral part of the RIA process. Second, more recently adopted transparency legislation has established more general consultation requirements that are independent of the RIA process itself. In particular, this law requires all regulatory proposals to be published on the website of the relevant ministry or regulatory agency.

As discussed above, the RIA process itself provides important public consultation opportunities, as well as important safeguards to ensure that adequate account is taken of comments received from stakeholders. In particular, the COFEMER publishes all draft RIA as soon as they are received, as well as its comments on the draft RIA and all inputs received from stakeholders. This generalised publication of a wide range of RIA-related documentation is possibly unique among OECD member countries. Importantly, publication of COFEMER's response to the draft RIA provides stakeholders with additional information that can potentially allow them to participate more effectively in the process. For example, by highlighting weaknesses in the analysis, this material may assist stakeholders to identify data or other materials they possess which could be fed into the analysis to enhance its quality. More generally, the publication of all stakeholder comments on the proposal provides the basis for a more detailed dialogue on its merits among interested parties. The COFEMER believes that the publication of this wide range of RIA-related documents is a key factor in ensuring that regulators take account of COFEMER's opinions and, hence, that it is a critical success factor for the RIA process.

The draft RIA is required to be open to consultation for at least 20 working days but, in practice, much longer consultation periods appear to be the norm. This reflects, in part, the need for the COFEMER to undertake its initial analysis of the RIA document and publish its response. Consequently, it appears that the process provides extensive opportunities for stakeholder input. The COFEMER also supports effective engagement in consultation by actively providing the draft RIA to key stakeholders and soliciting their inputs in many cases.

However, while consultation on the basis of the draft RIA is extensive in nature and is one of the strengths of the impact assessment process, there is no formal requirement for consultation to be conducted prior to its publication. While the adoption of the transparency law appears to have significantly expanded the amount of consultation effort undertaken by regulators overall, there are wide divergences in practice between regulators. The COFEMER states that some regulators undertake substantial pre-RIA consultation, while others do none, preferring to use the RIA process as their main consultation vehicle. This transfer of consultation responsibilities to the COFEMER does not help advancing a whole-of-government approach, in which each ministry must commit to regulatory quality.

Consultation can play different roles at the various stages of the regulatory process, so that extended post-RIA consultation, while of substantial value in its own right, is not a complete substitute for pre-RIA consultation. The OECD has previously noted an evolving tendency to adopt different forms of consultation in combination, to improve its overall performance. This reflects growing understanding of the strengths and weaknesses of different consultation strategies and of the fact that they are therefore suited to different specific circumstances and to different stages in the consultative process. As consultation is often beginning much earlier in the policy making process, it is increasingly common for it to be conducted in several stages, with different mechanisms employed at different times (OECD, 2002, p. 69).

In the Mexican context, it has been noted that the post-RIA consultation is often very much oriented toward technical issues. The COFEMER suggests that this is a result of the fact that much of the analysis presented in RIA documents is itself highly technical in nature. However, this, in turn, can be seen as a result of the fact that a proposed regulation is well-advanced in its development by the time the draft RIA has been published. In fact, the OECD recorded the concern from regulated agents, such as business chambers and associations, to have the opportunity to comment and issue opinions on draft regulations at earlier stages of the rule making process. They expressed their concern that once the regulatory proposal reaches the COFEMER, there is no much room to modify it.

Key findings and policy options

Consultation should be enhanced and be made systematic from the early stages of regulatory development, in order to advance in the whole-of-government approach to regulatory improvement

While consultation on the basis of the RIA in Mexico is extensive in nature and is one of the strengths of the impact assessment process, there is no formal requirement for consultation to be conducted prior to this assessment. The adoption of the transparency law appears to have significantly expanded the amount of consultation effort undertaken by line ministries and regulators overall, but there are wide divergences in practice.

While some line ministries and regulators undertake substantial pre-RIA consultation, others do none, preferring to use the RIA evaluation process as their main consultation vehicle. In fact, there is no legal obligation for line ministries and regulators to publicise the regulatory proposals and engage in public consultation at the early stages of the regulatory cycle. This transfer of consultation responsibilities to the COFEMER does not help advancing a whole-of-government approach, in which each ministry must commit to regulatory quality.

The COFEMER sometimes receives comments on RIA documents from a large number of stakeholders, which is laudable, but there are potential gains in engaging in consultation with the public at early stages of the regulatory governance cycle as well: extended consultation during RIA evaluation, while of substantial value in its own right, is not a complete substitute for pre-RIA consultation.

Despite the public consultation mechanisms currently available, the OECD recorded the concern from regulated agents, such as business chambers and associations, as to having the opportunity of commenting and issuing opinions on draft regulations at earlier stages of the rule-making process. They expressed their concern that once the regulatory proposal reaches the COFEMER, there is not much room left to modify it.

The Mexican government should consider enhancing the current consultation requirements by mandating that regulators and ministries conduct consultation with stakeholders at early stages in regulatory development. This consultation should be completed before a draft RIA document is prepared and submitted to the COFEMER, and should provide input to that document. The scope, depth, and nature of pre-RIA consultation could be commensurate with the impact of the proposed regulation, so that high-impact regulations would merit extensive early consultation. Such prioritisation would help target resources and avoid "consultation fatigue". See Box 4.1 for an example from the UK.

The development of a culture of pre-RIA consultation should go hand in hand with the adoption of mechanisms, safeguards and rules of engagement to prevent interest groups from trying to delay the process, and to avoid the risk of regulatory capture. Regulatory transparency and consultation should not be employed as instruments by interest groups to either stall the regulatory process or influence the orientation of the regulation to benefit private interests, to the detriment of the objectives of public policy.

Pre-RIA consultation could provide a better way for individual citizens and businesses and other less well organised and resourced stakeholders to express their views, thereby providing useful information to policymakers to improve the rule making process from early stages. In particular, the following potential benefits can be identified:

- Early consultation can potentially spot in a timely way situations in which the identified problem has been poorly understood and does not, in fact, merit government intervention.

- Problems in terms of the acceptability of a regulatory proposal to key stakeholders may be identified at an earlier stage and this factor taken into account more effectively in the process.
- Engagement with the public at an earlier stage of the policy process, before there is strong commitment to a particular regulatory path, may help to identify additional tools (regulatory or non-regulatory) to address the policy objectives, potentially yielding more effective responses.
- Consultation at an early stage can be conducted on a less technical and more inclusive basis. Wider participation decreases the possibility of regulatory capture and increases the perceived legitimacy of the resulting regulation.

A number of different approaches to adopting pre-RIA consultation could be taken. A new law on regulatory policy and governance or amendments to the LFPA would be strong mechanisms to support it. Specific consultation guidelines could be issued by the COFEMER that would set out broad expectations as to the nature, extent, and specifics of pre-RIA consultation, including who should be consulted, what information should be made available regarding the proposal, and how much time should be allowed for responses to be received.

In addition, the sections of the RIA template where regulators explain what prior consultation with stakeholders has been undertaken and summarise the main viewpoints received could be upgraded in order to require a more specific explanation about the methodologies employed and how public participation was encouraged. For the case of moderate-impact regulation, when pre-RIA consultation does not take place, the regulator should be asked to explain why. For the case of high-impact regulation, a requirement that pre-RIA consultation be carried out before a specific regulatory proposal was finalised should be adopted. Besides providing guidance materials, the COFEMER could offer training to improve consultation practices.

In consequence, the role of the COFEMER should be to ensure that valid and systematic input from stakeholders is considered by ministries and agencies. By promoting and facilitating a culture of timely and effective consultation, the COFEMER will ensure a whole-of-government approach, in which the line ministries and regulators assume their own share of responsibilities in consultation.

During the RIA evaluation process, the COFEMER should also consider requiring regulators to publish a non-technical summary of the RIA document, together with specific questions to stakeholders that would highlight the key issues in question. This can help to enhance the ability of the general public and other smaller stakeholder groupings to participate in public consultation on regulatory proposals.

Finally, Mexico should consider setting up mechanisms to have consultation after the enactment and implementation of regulation, as a way to assess regulatory performance. This approach presupposes that performance indicators and the plan for *ex post* assessment of regulation should be part of the RIA. In this way, Mexico's policy on better regulation would adopt performance evaluation in a "life cycle" approach.

The quality and accountability of RIA analysis could be improved further

As a means to enhance RIA quality and accountability, the Mexican government should consider the merits of having the minister responsible signing off the RIA in order to certify its quality. The concept of requiring ministers to take personal responsibility has been a feature of RIA systems at least since the mid-1990's (see Box 4.2). This would constitute an

Box 4.1. Public consultation in the United Kingdom

The United Kingdom has a longstanding tradition of general consultation, with a flexible framework. Currently, the legal instrument that establishes this framework is the Code of Practice on Consultation, published in 2000 and revised in 2004 and 2008. The code applies to all central government departments and those agencies which have a close relationship with a parent department. With a few exceptions, such as emergency legislation or tax, consultation takes place in all policy areas and must follow the Code. Public justification must be provided if the code is not applied.

In the 2008 revision of the code, which consisted in a programme of 20 stakeholder events around the United Kingdom to hear views on how the government consults and where improvements could be made, the stakeholders expressed negative views on the consultation process, such as poor organisation on information access, lack of transparency and responsiveness to stakeholders opinions, and a need for an independent quality monitoring of government consultations. In response to these concerns, the code was updated, taking into account the following five criteria:

- When to consult: Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Duration of the consultation exercise: Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Clarity of scope and impact: Consultation documents should be clear about the process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
- Accessibility of consultation exercises: Consultation should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- The burden of consultation: Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Source: OECD (2010), *Better Regulation in Europe: United Kingdom*, OECD, Paris, doi: 9789264084490-en.

important quality assurance factor, since it creates direct incentives within the regulatory agency or ministry for high quality RIA to be developed. Particularly where the RIA document is publicly available, such a requirement has the potential to be a powerful factor in encouraging a high-level analysis to be completed. Furthermore, ministerial endorsement would foster accountability within ministries, thereby driving deeper a regulatory reform culture among those responsible for developing and administering regulations.

At the same time, Mexico should consider to exempt sectoral regulators from this mechanism. In the framework proposed by the OECD in this report, in which there is strengthened independence and accountability of regulators (see Chapter 6), regulators should be directly responsible for the quality of RIA.

Box 4.2. Ministerial endorsement of the RIA: International experience

One example of a requirement for ministerial authorisation of the RIA document is that of the United Kingdom. As early as 1996, it implemented a requirement for ministers to personally consider the RIA document and to sign a Regulatory Quality Certificate, which confirmed that the proposed regulations strike an appropriate balance between benefits and costs. The ministerial approval requirement has been maintained to date and is supplemented by a second approval process. Thus, the minister is required to endorse public RIA documents, while the approval process is further strengthened by the parallel requirement for the ministry's chief economist to endorse the accuracy of the benefit and cost estimates, and the impact analysis which it contains. Where there is no minister directly responsible for the regulatory proposal, the RIA must be endorsed by the chair or chief executive of the department or agency in question.

Another notable example of a ministerial approval requirement is that of the Australian state of Victoria. Here, the requirement is directly established in primary legislation. The minister must provide, in respect of all delegated legislation, a written certificate stating that the RIA requirements of the Subordinate Legislation Act have been complied with and that, in his/her opinion, the RIA document adequately assesses the likely impact of the regulatory proposal. In this case, the importance of ministerial endorsement of the RIA document is further strengthened by the legislated requirement for review of the proposed regulation and its accompanying RIA document by a parliamentary committee, which may recommend its disallowance in cases of significant procedural defect.

Source: OECD (1997), *Regulatory Impact Analysis: Best Practices in OECD Countries*, OECD Publishing, Paris, doi: 9789264162150-en; United Kingdom Government (2011), Impact Assessment Toolkit. UK Government, London, August 2011. www.bis.gov.uk/assets/biscore/better-regulation/docs/i/11-1112-impact-assessment-toolkit.pdf.; and Parliament of Victoria, Australia (1994), Subordinate Legislation Act 1994 (No. 104/1994). www.legislation.vic.gov.au.

The COFEMER sometimes appears to duplicate efforts by redoing the technical analyses contained in RIAs presented by line ministries and regulators. This reduces the incentives for ministries and agencies to do quality regulatory proposals, since they know their analyses will be improved anyway. This dynamic also hinders the adoption of a whole-of-government approach. Instead, COFEMER's role should focus on quality control, ensuring that regulatory proposals and their RIAs fulfil high professional standards and are publicly credible and fully compliant with policy expectations. Ministries and agencies should possess specific expertise, know their stakeholders and be in a good position to develop regulations. The COFEMER should demand and rely on this responsibility to avoid duplication. In consequence, it should consider the benefits of adopting additional measures to support regulators to obtain access to adequate technical capacities to undertake high quality regulatory development and RIA. Potential strategies could include:

- Reshaping the Economic Intelligence Unit (EIU) to interact and collaborate with the units of regulatory improvement suggested previously. Through these units, the EIU would develop a dedicated capacity to provide technical assistance on benefit/cost assessment of regulatory proposals to line ministries and regulators at early stages of policy development, up to the point where preliminary RIA documents are lodged. This proposal assumes that the adequate regulatory instruments are created or modified to formally establish the attributions of the EIU.

- Considering the possibility of making use of private sector expertise, where appropriate, to supplement, not replace, internal resources and build capacities to conduct assessments of the impact of proposed regulation. In this task, the Mexican government needs to be careful to avoid the emergence of "clienteles" or interest groups behind consultants, which would imply a risk for the objectivity of their analyses.

The COFEMER should continue its current efforts to provide methodological guidance to ministries and regulators to assist them in preparing high-quality RIAs that adopt consistent approaches and assumptions. See Box 4.3 for relevant international experiences. Special focus should be given to review current advice on discount rates and ensure that the advice provided is consistent with Mexico's circumstances and underpinned by a sound policy rationale; and to develop guidance on appropriate estimates for the Value of Statistical Life in the Mexican RIA context.

Box 4.3. International experience on guidance to carry out RIA

The Victorian Guide to Regulation provides a framework for the design and assessment of government regulation. The Victorian Competition and Efficiency Commission (VCEC) provides a good example of methodological guidance to prepare RIA. The commission meets the departments preparing RIA early in the process of policy development and at key moments. It also offers regular and free training workshops for policy officers who prepare RIA to provide them with an introduction to the process and equip them to prepare high quality analyses (i.e., cost-benefit analysis). The VCEC may debate the quality of problem definition, data, analysis, and alternatives examined, but does not take policy positions. It may also provide lists of consultants to support departments in preparing RIA, but does not endorse any provider. Finally, the VCEC has developed guiding materials on cost effectiveness, cost recovery, costing methodologies, the suggested value of statistical life, and consultation practices, among other topics.

In Canada, the Centre of Regulatory Expertise (CORE) exercises strong leadership and expertise in implementing the Cabinet Directive on Streamlining Regulation by providing expert advice and services to help departments build their internal capacity to develop sound, evidence-based regulatory proposals, and to facilitate the development and promotion of best practices and learning opportunities for federal regulators. The CORE consists of a director and five experts on risk assessment, cost-benefit analysis, performance measurement, evaluation, and a "generalist" with a broad range of experience in many aspects of regulatory development, including instrument choice, regulatory co-operation, triage, and regulatory co-ordination. CORE experts are at the disposal of departments to offer the following guidance: i) analytical services (experts can be assigned to a department for periods from two weeks to two months); ii) coaching/advisory role based on periodic meetings to assess progress and provide feedback; iii) workshops/presentations, and iv) peer review by providing feedback on analyses before completing the regulatory submission. The CORE also accepts applications to cost share consulting services should departments lack financial resources to hire them.

Source: adapted from the website of Victorian Competition and Efficiency Commission of Australia, www.vcec.vic.gov.au, accessed 6 February 2013 and website of Treasury Board of Canada Secretariat, www.tbs-sct.gc.ca, accessed 6 February 2013.

Notes

1. Furthermore, three of the approved initiatives originated in state legislatures. These are not subjected to RIA.
2. Published on 26 July 2010 in the Official Journal of the Federation (DOF) and available at www.cofemer.gob.mx/documentos/marcojuridico/acuerdos/AcuerdoPlazos26072010.pdf
3. Material on the Australian Business Cost Calculator can be found at *www.finance.gov.au/obpr/bcc/index.html*.
4. *www.administrative-burdens.com*.
5. Another notable aspect of the calculator is that the questions include one which asks if this proposal relates to one of several sectors of the economy that, historically, have been characterised by high levels of regulatory cost. These include gas, electricity, transport, telecommunications, patents, and pharmaceuticals.
6. The EIU also provides assistance in reviews of existing regulations, including the conduct of *ex post* RIA, and takes a leading role in relation to the COFEMER's training activities, as discussed below.
7. For example, the 1997 RIA Best Practices include "Train the Regulators", while OECD (2009b, p. 43) highlights the need to provide regulators with assistance in preparing RIA through a three-part strategy, including publication of guidance documents, provision of training, and *ad hoc* technical assistance, as required.
8. *Manual de la Manifestación de Impacto Regulatorio*, Official Journal of the Federation, 26 July 2010.
9. The data analysed in OECD (2009), chapter 3, derive from nine OECD member countries, one sub-national government and the European Union.
10. OMB (2003) includes useful discussion of the underlying rationale for adopting the opportunity cost of capital and the social rate of time preference approaches and suggests the contexts in which each is likely to be more appropriate. It also provides specific justification of the particular rates recommended in the US context.
11. This document was published after the drafting of the material subsequently published as OECD 2009.

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