

Chapter 7

Ex post regulatory evaluation in Chile

Chapter 7 describes the importance of designing and implementing an ex post regulatory evaluation for norms. The evaluation of existing policies through ex post impact analysis is necessary to ensure that regulations are effective and efficient. In some circumstances, the formal processes of ex post impact analysis may be more effective than ex ante analysis in informing an ongoing policy debate. The chapter expresses the rationale of why this practice should be considered early in the policy cycle, and introduced in the regulatory cycle by the government of Chile. Furthermore, it presents the idea of broadening the scope of evaluation towards programmes and institutions.

Ex post evaluation of regulations, policies and institutions is a key part of the regulatory governance cycle that should be encouraged as an on-going activity. The feedback regulators can obtain from a systematic *ex post* evaluation process can make a difference in the way they deal with regulatory concerns and can help to make regulation more effective and efficient. *Ex post* evaluation is also essential to make regulators and their decisions more accountable towards the public.

Ex post evaluation of regulations

The evaluation of existing policies through *ex post* impact analysis is necessary to ensure that regulations are effective and efficient. In some circumstances, the formal processes of *ex post* impact analysis may be more effective than *ex ante* analysis in informing an ongoing policy debate. Consideration should be given early in the policy cycle to the performance criteria for *ex post* evaluation, including whether the objectives of the regulation are clear, what data will be used to measure performance, as well as the allocation of institutional resources. It can be difficult to direct scarce policy resources to review existing regulation; accordingly, it is necessary to systematically programme the review of regulation and ensure that *ex post* evaluation is undertaken and given priority. Practical methods include embedding the use of sunset clauses or requirements for mandatory periodic evaluation in rules, scheduled review programmes, and standing mechanisms by which the public can make recommendations to modify existing regulation.

Box 7.1. Ex post evaluation of laws in OECD countries

In **France**, several organisations monitor the correct implementation of regulations and supply information for evaluating regulations once they have been implemented. One of these bodies is the French National Assembly. The Commission of Constitutional Law, Legislation and General Administration of the Republic deals with issues about constitutional law, organic laws, internal rules, electoral law, public freedom, security issues, administrative law, civil service, judicial organisation, civil law, commercial law, general administration of the State and territorial collectives. The Commission prepares a number of reports for information on topics of interest to the French society. It also prepares control reports on the application of certain laws (*Rapports sur la mise en application de la loi*). In most cases, these reports contain an analysis of proposed amendments that are discussed in parliament, as well as points of view of various stakeholders interested in the issues. The Commission also publishes a yearly report on the implementation of approved laws and an overall assessment for each legislature. It examines the ability of the government to implement the law using enabling decrees.

In **New Zealand**, the Regulations Review Committee, a specialist committee within the House of Representatives, examines all regulations, investigates complaints about rules, and examines proposed regulation-making powers in bills. Although it carries out technical scrutiny of regulations, the committee seems to rather watch over the constitutionally proper use of regulation-making powers than dealing explicitly with regulatory quality or conducting *ex post* evaluation. The committee scrutinises existing regulations, it is composed of seven voting members and by convention it is chaired by a member of the opposition. It can only analyse draft regulations if referred to it by a minister. A complaint should be made in writing and needs to set out how the person or the organisation making the complaint has been aggrieved. It should also address one of the following:

Box 7.1. *Ex post* evaluation of laws in OECD countries (cont.)

- the relationship between the Act and the regulations;
- the practical operation of regulations;
- the implementation of the policy in regulations;
- the regulation-making process itself.

Source: French National Assembly, www.assemblee-nationale.fr/commissions/59051_tab.asp; and Parliamentary Counsel Office of New Zealand, www.pco.parliament.govt.nz/law-drafting.

Chile is one of the few OECD countries that have formalised the *ex post* review of laws in the legislative. The Law Evaluation Department (*Departamento de Evaluación de la Ley*) was created by an agreement of the Commission on Internal Regime, Administration and Regulations, issued on 21 December 2010.¹ The main responsibilities of this department are:

1. Evaluating the legal norms approved by the National Congress in co-ordination with the Secretary of the Commission in charge. The evaluation is made based on the effectiveness and influence on society. The Department might propose corrective measures to improve the implementation of the law evaluated.
2. Creating and maintaining a network of social organisations interested in participating in the evaluation process.
3. Informing the Secretary-General, through the Commission of Internal Regime, Administration and Regulations, about the results of evaluations.
4. Suggesting amendments to the current legislation, if needed.

The Law Evaluation Department is in charge of developing a three-stage project to evaluate the effectiveness of laws. The three stages cover the following issues: technical analysis, citizens' perception and preparation of a final report. The analysis of laws has the following objectives:

- Determining the degree of compliance with the expected objectives when the law was passed.
- Identifying the externalities, impacts and non-desired effects when Congress was legislating.
- Knowing citizens' perception about the law and its implementation.
- Proposing corrective measures to the law and its implementation.

Citizens' perception is a fundamental stage in the suggested approach for *ex post* evaluation of laws in Chile. As part of the various stages for law evaluation, citizens' perception is an important component of the methodological approach. The Law Evaluation Department has designed tools to collect information about that perception, such as on-line questionnaires, on-line chats, questionnaires for particular groups,

1. This was formalised by Official Note 381 of the Presidency of the Chamber of Deputies. The agreement was ratified by Resolution 857 of 27 January 2011 signed by the Secretary-General of the Chamber of Deputies.

development of focus groups, workshops, etc. It also built a database containing registries of civil organisations and people that are linked to the Chamber of Deputies, in terms of their participation in legislating, supervising or representing particular stakeholders. The Law Evaluation Department has also created a Citizen Forum, an open space for personal or virtual participation, where civil organisations or citizens are able to express their opinions.

Each assessment is presented in a report that generally contains the description of the research, an analysis of the information gathered, conclusions, recommendations and a dissemination strategy. To date, the Law Evaluation Department has conducted the six reviews presented in Box 7.2.

Box 7.2. *Ex post* reviews prepared by the Law Evaluation Department of the Chamber of Deputies

To date, the Law Evaluation Department has published six reports that review relevant laws for the Chilean society. All reports present conclusions and recommendations to the executive and Legislative to improve and update laws. The main features and findings of the reports are described as follows:

- The first report reviewed Law No. 20.413 which determines who is considered an organ donor and the manner in which they may manifest their intention. The Law was published in 2011 and the review showed that the definition of universal or alleged donor was a theoretical concept with no practical use. The law was not executed in accordance with the presumptions originally established, since the family’s permission is still required when removing organs from a citizen. The recommendations referred to legal amendments in the definition of universal donor and to the need to strengthen the public health institutions that maintain the national list of patients waiting for an organ, as well as to enhance the planning and management of permanent education campaigns with a budget allocation for this matter.
- In November 2012 Law No. 20.422, which establishes norms on equal opportunities and the social inclusion of people with disabilities, was reviewed. The conclusions showed there were institutions, in which some entities were in charge of complex responsibilities with limited resources and lack of data and information. The recommendations therefore pointed to the need to improve the governance of these institutions and allocate sufficient resources to be able to implement the respective policy.
- The third evaluation exercise, published in June 2013, was on Law No. 18.600, which establishes norms for the mentally disabled. The report showed that there were inaccuracies in the treatment of the exercise of legal capacity of mentally disabled people, their rights potentially being violated through the figure of provisional trustee and inconsistencies with international treaties and conventions. Recommendations included amendments to the legal framework for mentally disabled people, the repeal of the figure of provisional trustee and the update of the legal and social language used in the law.
- In June 2013 the Department evaluated Law No. 20.348 on the right to equal remuneration. The wage gap between men and women persists in Chile, which calls for incorporating the gender perspective in public policies and laws. In addition, the current law does not provide adequate incentives or a solution to those affected by the problem of wage discrimination. The recommendations therefore suggested to incorporate the concept of “work of equal value”, incentives and adequate sanctions for enforcement.

Box 7.2. *Ex post* reviews prepared by the Law Evaluation Department of the Chamber of Deputies (cont.)

- In January 2014, the report on Law No. 20.000, which sanctions the illicit traffic of narcotics and psychotropic substances, was published. It included a discussion on the current national and international debate about this topic, as well as the focus on deficiencies in the legal body and the way it is implemented by certain institutions. The recommendations for improvement included incorporating new tools and parameters in the law, such as the role of the accused in the distribution chain, the existence of direct contact with the consumer, the tools used and the amount of money seized, in addition to better defining the term of micro-traffic.
- In August 2014, the review of Law No. 20599 that regulates the installation of pylons and aerials for telecommunication transmission, was finalised. The report focused on the authorisation process, the role of civil society in the discussions, the potential damage associated to this infrastructure, and the urban impact of aerials. The recommendations suggested to improve the authorisation process, to set tougher parameters to install aerials, and to improve co-ordination among institutions involved in the process.

All the reports have been presented to the Chamber of Deputies and they are public documents at the disposal of any citizen, interested institution and different powers accessible through the official portal: www.evaluaciondelaley.cl.

Source: Cámara de Diputados (2014), *Evaluated Laws. Term 2011-2014*, Evaluación de la Ley, Santiago.

The results of the various reviews have contributed to preparing legal amendments to the laws that were reviewed. For instance, the Ministry of Health and the parliamentarians in the Health Commission in the Chamber of Deputies used the report on organ donation to prepare the legal amendments that were finally approved. The report on Law No. 20 000 contributed to the legal and citizens' discussions, helping to change the criteria in authorising the farming of cannabis and the approach to illicit drugs. The review of Law No. 20 599 also helped to prepare the legal amendments presented to Congress.

After some years' work, the Law Evaluation Department has identified the need to conduct *ex post* evaluation on secondary regulations (*reglamentos*), as in some cases there are substantial discrepancies between laws and *reglamentos*, which should be consistent and reflect a harmonious legal framework. The preparation and amendment of *reglamentos* is a competence exclusive to the executive, which calls for the executive to also carry out an *ex post* review. The Law Evaluation Department has proposed collaboration with SEGPRES to conduct *ex post* evaluation on *reglamentos* and create a history of how they are prepared and their required amendments.

Another *ex post* work that has been promoted and improved in Chile is the work conducted by the *Ex post* Evaluation Department of the Budget Directorate of the Ministry of Finance. Even if the *ex post* evaluation is mainly oriented towards ensuring that expenditures have been made in accordance with what was proposed improve transparency and efficiency in the use of public resources, the technical team has developed capacity and it could be feasible to learn from that experience to support the *ex post* analysis of regulations.

Ex post evaluation of regulatory programmes and institutions

Information on the performance of regulatory reform programmes is necessary to identify and evaluate if regulatory policy is being implemented effectively and if reforms are having the desired effect. Regulatory performance measures can also provide a benchmark for improving compliance by agencies with the requirements of regulatory policy, such as reporting on the effective use of impact assessment, consultation, simplification measures, and other practices.

Box 7.3. *Ex-post* evaluation of regulatory programmes in the United Kingdom

The **United Kingdom** is ahead of many other OECD countries with its understanding of the importance of *ex post* evaluation of specific Better Regulation policies, in developing processes for this, and in using the results to strengthen specific practices (such as *ex ante* impact assessment). Good use is also made of the evaluation work of the independent National Audit Office (NAO). The depth and number of individual policies launched underlines the need for a strong and sustained *ex post* evaluation of their effectiveness.

The NAO provides an external, professional, concrete, independent view on the quality of regulatory management. It has provided, over the last few years, valuable input to key Better Regulation programmes and processes such as impact assessment and simplification. It has recently been engaged in joint review activities with the Better Regulation Executive (BRE). Its independence is an asset that has played an important role for these activities. The National Audit Office has produced a number of reports since 2001 on aspects of regulatory reform, in particular the Impact Assessment process, the Administrative Burdens Reduction Programme, and business perceptions of regulation. Despite considerable efforts to improve the business experience of regulation, there has been little discernible progress in improving business perceptions of regulation. In its 2011 Report on Delivering Regulatory Reform, NAO has made the following recommendations to continue improving regulatory reform in the United Kingdom:

- **Good information and co-ordination is essential for the effective management of the use of resources.** Past work to measure administrative costs and compilation of a Forward Programme of proposed new regulations have helped in managing these aspects of regulation and strengthening incentives for departments. Departments and the Better Regulation Executive know which areas of regulation continue to concern business most but do not have a clear picture either of the size of the policy costs and benefits resulting from the stock of existing regulation, or of the capacity of businesses and others to respond to new proposals. The Better Regulation Executive should identify cost-effective ways of strengthening its understanding of the costs and benefits of regulation as experienced by business and use their findings to guide future work on reviewing and reforming regulations.
- **Departments differ in the vigour with which they are seeking to identify opportunities to simplify regulations.** The Department for Environment, Food and Rural Affairs is reviewing all of its stock of regulation in order to identify opportunities to reduce regulatory costs in order to offset the cost of proposed new regulations. Other departments are not, however, and all departments should consider such a review.
- **Evaluation and feedback remains a weak element of regulatory management.** The Better Regulation Executive has recently implemented changes intended to improve in this area. It should also work with departments to strengthen incentives for departments to plan, and then carry out, evaluation of regulations after they have been implemented, and to use the findings to revise the regulations accordingly.

Box 7.3. *Ex-post* evaluation of regulatory programmes in the United Kingdom (cont.)

- **Businesses remain concerned that they are not consulted before new regulations are introduced.** Policy-makers should increasingly try to engage with businesses before formal consultation, using routes such as business organisations, the Small Firms Database and stakeholder groups. Details of this informal consultation should be included and published in Impact Assessments.
- **There is as yet no detailed implementation plan in place for delivering the coalition government’s regulatory reform objectives.** To strengthen its programme management approach the Better Regulation Executive should develop and consult on an implementation plan covering the life of the new regulatory reform programme. The plan should define what success will look like and how it will be measured, and include a timetable for activity, as a baseline for the programme management of regulatory reform in the future.
- **Clarity over accountability and effective incentives on departments are important in achieving good quality regulation.** To improve the quality of regulation the Better Regulation Executive should work together with the Cabinet Office to develop a clearer statement of accountabilities for departments and the Better Regulation Executive.

Source: OECD (2010), *Better Regulation in Europe: United Kingdom*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264084490-en>; NAO (2011), “Department for Innovation, Business and Skills: Delivering Regulatory Reform”, Report by the Comptroller and Auditor General, London, February.

Since Chile does not have a programme on regulatory quality there has not been any *ex post* evaluation of such an instrument. Nor is there is any mechanism to evaluate the performance of regulatory institutions, apart from the fact that institutions have to meet some objectives and targets that are specified in laws founding them.

Assessment and recommendations

Ex post review of laws should be strengthened and the recommendations by the Law Evaluation Department should be used to further improve regulatory quality.

The successful introduction of *ex post* evaluation of laws in the Chamber of Deputies in Chile is a clear example of the relevance of periodically reviewing the legal framework in order to keep it valid and coherent over time. The work conducted so far in Chile shows that *ex post* evaluation of laws can provide good evidence for legal amendments that should benefit society as a whole. This work has to be carried out in more depth and strengthened in order to become a systematic process that promotes regulatory quality. It could also benefit from the inclusion of sunset clauses or review clauses, which would compel regulators to promote *ex-post* reviews after some years' validity.

The work conducted by the Law Evaluation Department is becoming a reference within the Chamber of Deputies when they need to review a given law. It has also provided a framework for stakeholders’ participation, which value the work done in

hearing their opinions and assessing how laws have affected them. The methodology selected, even if it could be improved to introduce more evidence-based techniques, has proven to be useful to approach citizen's perceptions in relation to specific laws.

The Law Evaluation Department could benefit from extended support and resources and the expertise from additional professionals to support a multi-disciplinary team in charge of reviewing existing laws. The reports should continue to be public and it would be important to ensure that they are used for further decision-making.

The government of Chile should introduce ex post evaluation of secondary regulations.

Chile has been a pioneer in the *ex post* evaluation of laws, but additional steps should be undertaken to ensure that other regulations, in particular secondary regulations, are also part of this systematic work and that the whole legal system benefits from this process. The laws and regulations should be periodically reviewed and done in cooperation with the executive and the legislative, taking into account that most information on the implementation side lies in the regulatory bodies of the executive branch. The executive, therefore, should actively participate in this process and ensure that the institutions responsible for the implementation of laws co-ordinate with each other.

The *ex post* review of laws and regulations should contribute to improving the quality of the regulatory system as a whole. It should also be linked to the introduction of *ex ante* RIA, as this will allow the regulatory development cycle to be closed and ensure that both new and existing regulations follow a comprehensive approach to impact assessment that can help regulators identify when and how regulatory intervention is required. Over the years, *ex ante* assessments could set the baseline for conducting *ex post* evaluation of regulations.

Once a programme for regulatory quality is introduced, ensure that its performance and impact is reviewed regularly.

Many OECD countries periodically conduct reviews to assess the performance of regulatory reform programmes, policies and tools. This helps governments improve their design and implementation, ensuring that they are responsive to the needs that regulation imposes on society. Countries also use this process to refine strategies, engage with stakeholders, and make the regulatory system more transparent and accessible. If external bodies, such as auditors or comptrollers, conduct these reviews, it will help ensure accountability in the regulatory system and regulatory institutions.

For a country like Chile, where there is currently no regulatory reform programme, it would be important to think that once a regulatory quality strategy is developed and introduced, that it would be reviewed at some point, in order to ensure that such a policy achieves its objectives. It would also be important to allocate that responsibility to an external body which can provide recommendations for further improvement.

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From:
Regulatory Policy in Chile
Government Capacity to Ensure High-Quality Regulation

Access the complete publication at:
<https://doi.org/10.1787/9789264254596-en>

Please cite this chapter as:

OECD (2016), "Ex post regulatory evaluation in Chile", in *Regulatory Policy in Chile: Government Capacity to Ensure High-Quality Regulation*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264254596-11-en>

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