

## Chapter 2

### Considering Chile's path towards regulatory reform

*Chapter 2 explains the core principles and legal instruments that set the policies the government of Chile implements to improve its regulatory quality. In doing so, it discusses the high regulatory production and the absence of a clear figure on the total national regulatory stock. The chapter recognises that regulatory reform is a relatively new concept in the Chilean administration. However and despite the fact that Chile does not have a comprehensive regulatory reform policy and programme, the government has various administrative and legal arrangements that support the preparation and implementation of regulation, as well as control quality mechanisms that frame the interventions of regulatory institutions. Finally, it describes the recent and current regulatory reform initiatives implemented by the Chilean government, highlighting the reforms done in the environmental regulation, competition advocacy, and international regulatory co-operation.*

## The administrative and legal environment for regulatory reform in Chile

Chile has been one of the most stable countries in the last few years, making progress in economic prosperity and lowering poverty. Per capita income more than doubled between 1990 and 2010 to become the highest in Latin America. Between 1988 and 1997, Chile grew at an average annual rate of 7.9%. In 1998 growth slowed to 3.2% and in 1999 the economy contracted (-0.8%). Then, from 2000 to 2003, growth returned, and in 2004 and 2005, real GDP rose sharply by 6.2% and 6.3%, respectively. GDP growth averaged 5.8% annually through 2010 and 2012. Balanced fiscal accounts have been complemented by low inflation, an open trade regime and favourable legislation for foreign direct investment (FDI). The key role of the Ministry of Finance in ensuring sound macroeconomic and budget management has allowed the country to continue with reform.

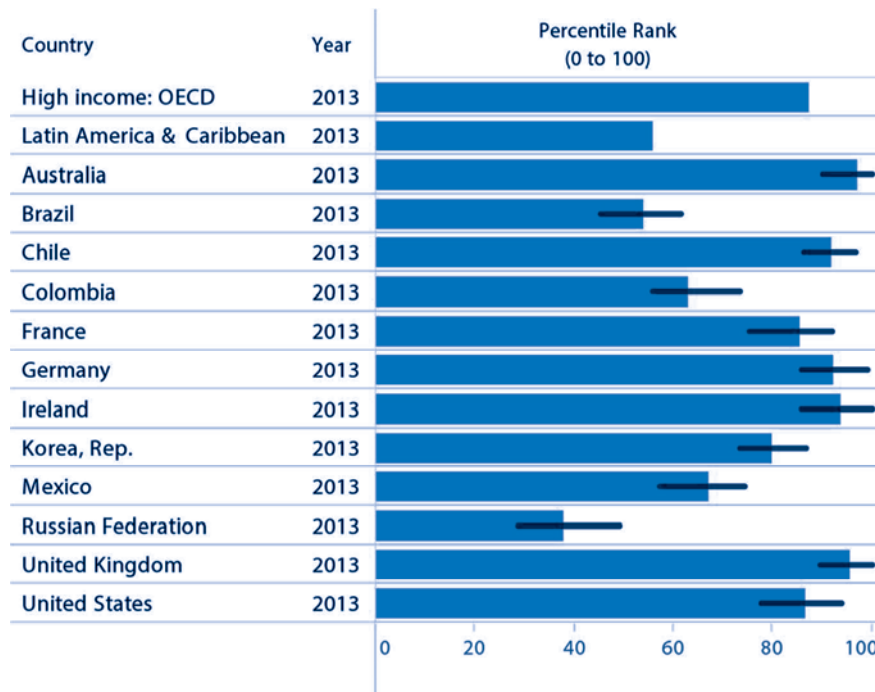
The opening of the economy has centred mainly on resource-based sectors, primarily copper mining and sub-products and the agro-food sector. Since the mid-1970s, Chile has undertaken a series of key reforms that reshaped the role of the State in the economy. The government of Chile decided to eliminate price controls, privatised public enterprises and opened up the Chilean economy to foreign trade, setting up the basis for the economic transformation of the country.

Macroeconomic stability has been a key factor of growth. Historically, low unemployment has resulted in labour-market tightness, but inflation remains contained. Strong domestic demand and weakening foreign markets have pushed the current account balance into deficit, which has been financed mostly through FDI, thus limiting the risk of capital flow reversals. Thus, Chile had a swift recovery from the global economic and financial crisis, which has supported gains in employment and real wages.

The strength and reliability of Chile's institutions have also had a favourable effect on growth. The quality of institutions and the stability of Chile's regulatory framework are comparable to those of OECD countries (see Figure 2.1), even if these comparison tools should be assessed with care and they do not offer evidence of the policy outcomes, but rather the processes and institutional set-up required for regulatory activities.

Chile is a unitary country, according to Article 3 of the Constitution of the Republic of Chile. This means that the only political and government centre lies at national level, and only the executive and the legislative have concurrent legal competences in the country. However, as happens in most Latin American countries, the executive power has a prevailing role in the design, implementation, supervision and monitoring of regulation. The regulatory practice and administrative culture are linked to a highly hierarchical approach within the public administration.

Figure 2.1. Regulatory quality in Chile



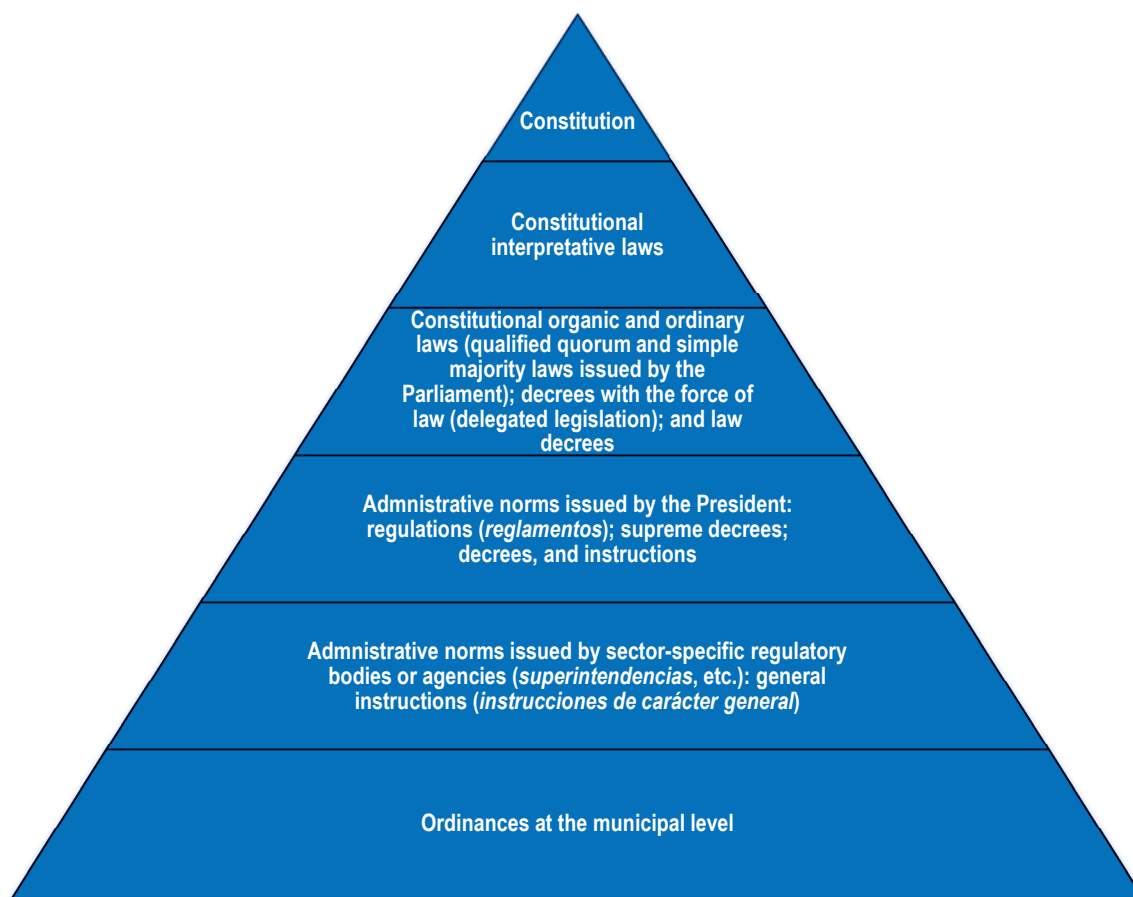
*Note:* The Worldwide Governance Indicators (WGI) are a research dataset summarising the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organisations, international organisations, and private sector firms. The WGI do not reflect the official views of the World Bank, its executive directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources.

Each of the six aggregate indicators, such as regulatory quality, are reported in two ways: (1) in their standard normal units, ranging from approximately -2.5 to 2.5, and (2) in percentile rank terms from 0 to 100, with higher values corresponding to better outcomes. This results from using an Unobserved Components Model (UCM) to construct a weighted average of the individual indicators for each source.

*Source:* Kaufmann D., A. Kraay and M. Matruzzi (2010), “The Worldwide Governance Indicators: Methodology and Analytical Issues”, *Worldwide Governance Indicators*, <http://info.worldbank.org/governance/wgi/index.aspx#reports>.

The Constitution establishes different types of laws, in relation to the matter they regulate, the procedure to be approved and the quorum: constitutional interpretative, constitutional organic, qualified quorum and simple majority.<sup>1</sup> In addition, the Constitution also refers to the legal framework that can include decrees with the force of law, laws issued by the President under specific powers delegated by Congress, regulations (*reglamentos*), decrees and instructions.<sup>2</sup> The secondary regulation, which is approved within the executive and helps implementing the primary regulation, offers the possibility for ministries and other regulatory bodies to have a degree of freedom in what type of instrument they choose to intervene. The hierarchy of legal norms in Chile is presented in Figure 2.2.

Figure 2.2. Legal norms in Chile



*Source:* Author's interpretation based on research.

Regulatory production is high and there are no clear figures on the total national regulatory stock. Laws are enumerated consecutively by the Legal Division of the General-Secretariat of the President's Office (*Ministerio de la Secretaría General de la Presidencia*, SEGPRES), which helps to understand the number of laws approved year by year in Chile (see Table 2.1). The number of laws is rather stable in Chile, and it also includes laws that amend or repeal other laws currently in force. Secondary regulations, on the contrary, are unknown so far, as most of it is produced at ministry level, and there is no centralised control on the number of regulatory instruments in the country. They are, however, available at a centralised register of laws (see section on *centralised registries*). The Congress Library estimated around 9 000 instruments of secondary regulations (resolutions, decrees, etc.) are produced annually. Some uncertainty remains for the legal production at the municipal level.

As in most countries, the executive is the main producer of regulation. In the law-making process, both the executive and the legislative have the prerogative to initiate a law proposal. However, the Constitution limits the legislative initiative to members of Congress in issues such as public expenditure, taxes, creation or reform of civil services, etc. The President has exclusive initiative in certain (important) issues: taxes, creation of new public agencies or public employment, matters concerning the state's finances, matters regarding social security and collective bargaining, among others.

Table 2.1. Number of new laws at the national level in Chile

Year	Number of laws
2001	78
2002	68
2003	67
2004	69
2005	95
2006	62
2007	87
2008	79
2009	94
2010	81
2011	80
2012	92
2013	69
2014	94

Source: OECD (2011), “Regulatory Management Indicators: Chile”, OECD, Paris, [www.oecd.org/gov/regulatory-policy/47827209.pdf](http://www.oecd.org/gov/regulatory-policy/47827209.pdf); and [www.senado.cl/appsenado/templates/tramitacion/index.php](http://www.senado.cl/appsenado/templates/tramitacion/index.php).

Despite a larger number of proposals from the legislative, most of those approved have their origin in the executive. According to the Constitution, the President of the Republic can use the law initiative through a message (*mensaje*) and the Deputies and Senators can table a motion (*moción*). Both messages and motions have to be presented in writing with an explanation of the reasons and clarify the various articles contained in the law. Messages, in addition, should also include the source and the amount of financial resources needed, in case expenses linked to the law are implied in the national budget.

In the rule-making process, ministries that are responsible for implementing the laws through regulation support the President. They are responsible for drafting regulation that is then checked against a legal quality control (see Chapter 3). Other type of institutions, such as superintendencies and commissions, also prepare regulations, but the quality control check is rather weak. Regulatory reform is a relatively new concept in the Chilean administration. Despite the fact of not having a comprehensive regulatory reform policy and programme, the government of Chile has various administrative and legal arrangements that support the preparation and implementation of regulation, as well as control quality mechanisms that frame the interventions of regulatory institutions. The following sections will be devoted to assessing the current practices and mechanisms in place.

## Regulatory policies and core principles

The 2012 *OECD Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012) advises governments to “commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.”

Regulatory policy is defined as “the process by which government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making” (OECD, 2012). Regulatory policy is integral to a formal, reliable process to link policy goals and policy actions with regulation.

#### Box 2.1. The 2012 Recommendation of the OECD Council on Regulatory Policy and Governance

The 2012 *Recommendation of the OECD Council on Regulatory Policy and Governance* provides governments with clear and timely guidance on the principles, mechanisms and institutions required to improve the design, enforcement and review of their regulatory framework to the highest standards; it advises governments on the effective use of regulation to achieve better social, environmental and economic outcomes; and it calls for a “whole-of-government” approach to regulatory reform, with emphasis on the importance of consultation, co-ordination, communication, and co-operation to address the challenges posed by the inter-connectedness of sectors and economies. The Recommendation advises governments to:

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.
2. Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.
3. Establish mechanisms and institutions to actively provide oversight of regulatory policy, procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.
4. Integrate Regulatory Impact Assessment (RIA) into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the trade-offs of the different approaches analysed to identify the best approach.
5. Conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.
6. Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the regulations. Such reports should also include information on how regulatory tools such as RIA, public consultation practices and reviews of existing regulations are functioning in practice.
7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.
8. Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.
9. As appropriate apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.

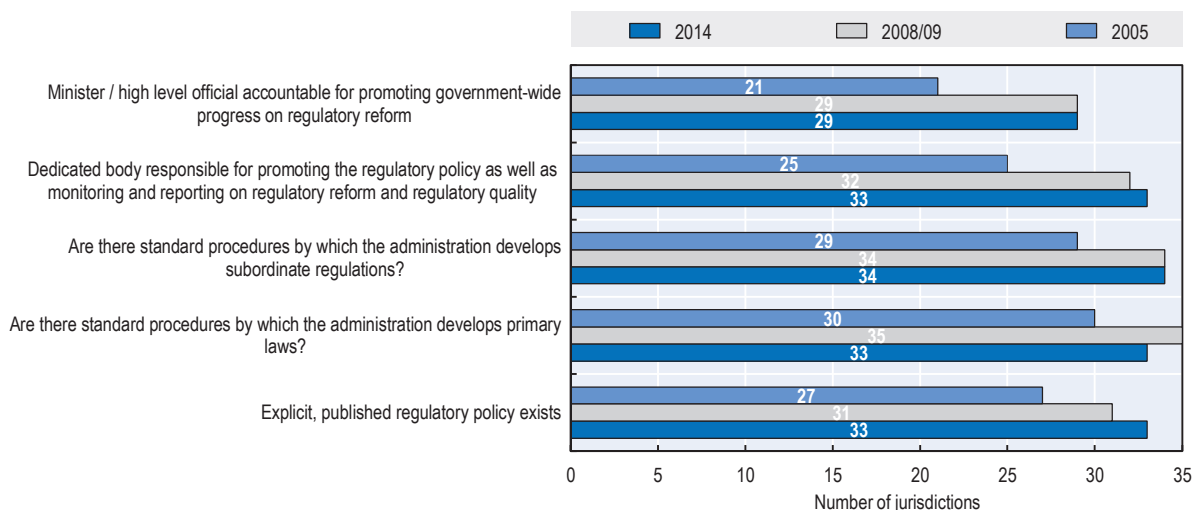
### Box 2.1. The 2012 Recommendation of the OECD Council on Regulatory Policy and Governance (cont.)

10. Where appropriate, promote regulatory coherence through co-ordination mechanisms between the supranational, the national and sub-national levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations.
11. Foster the development of regulatory management capacity and performance at sub-national levels of government.
12. In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

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

An effective regulatory policy has three basic components that are mutually reinforcing: it should be adopted at the highest political level; contain explicit and measurable regulatory quality standards; and provide for continued regulatory management capacity.<sup>3</sup> Most OECD countries have adopted an explicit whole-of-government approach to regulatory policy (see Figure 2.3).

Figure 2.3. Adoption of an explicit whole-of-government regulatory policy in OECD countries



Note: Based on data from 34 countries and the European Commission. Chile, Estonia, Israel and Slovenia were not members of the OECD in 2005 and so were not included in that year's survey.

Source: 2014 Regulatory Indicators Survey results, [www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm](http://www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm).

Achieving a whole-of-government approach to regulatory quality is not an easy and quick task. Many OECD countries have struggled with this endeavour for several years, and there is no recipe that could be translated into another country's context. However, there are important lessons that can be drawn from international experiences. Box 2.2



includes some ideas of key components of regulatory governance and how OECD countries have built programmes over years in order to address this issue.

**Box 2.2. Building “whole-of-government” programmes for regulatory quality: Key issues and some OECD experiences**

The objective of regulatory policy is to ensure that the regulatory lever works effectively, so that regulations and regulatory frameworks are in the public interest. Effective regulation can help countries to achieve sustainable growth, to find ways to handle complex and interrelated policy areas, to anticipate and manage risks more effectively, and to regain the trust of their citizens. Achieving that regulation helps mitigating those challenges that government face happens when countries manage to strengthen regulatory governance and manage to close the loop between regulatory design and evaluation of outcomes. This depends on a series of preconditions, among those:

- Institutional leadership and oversight;
- Evidence-based impact assessments to support policy coherence.
- Paying more attention to the voice of users, who need to be part of the process.
- Reviewing the role of regulatory institutions and the balance between private and public responsibilities for regulation with a view to securing accountability and avoiding capture;
- A renewed emphasis on consultation, communication, co-operation and co-ordination across all levels of government and beyond, including not least the international arena; and
- Strengthening capacities for regulatory management within the public service.
- Tools to evaluate and measure performance and progress.

Several OECD countries have tried for decades to ensure that their regulatory systems operate under those premises, very few have managed to achieve the comprehensive package required to achieve good regulatory practices. The development of an effective regulatory policy is an evolutionary process, which involves a broad scope of issues. Some countries have been grappling with the issue of where and how to start the process of embedding regulatory policy as a core element of good governance. An incremental approach has worked in some settings, such as the Netherlands or Denmark; some others – very few – have used a more comprehensive approach, such as the United Kingdom, Australia or Mexico.

Source: OECD (2010a), “Regulatory Policy and the Road to Sustainable Growth”, OECD, Paris, [www.oecd.org/regreform/policyconference/46270065.pdf](http://www.oecd.org/regreform/policyconference/46270065.pdf).

There is no regulatory policy and programme in Chile that could be followed by all government bodies, neither at central nor sub-national levels. The regulatory sectoral policies are not co-ordinated so principles and quality criteria are not followed in a sustained and orderly manner. At the sectoral level, efforts to include core principles of regulatory policy have been identified and promoted, but they have tended to be limited to transparency measures or some *ex post* quality control mechanisms.

Preparation and implementation of regulation does not follow standard procedures, as every institution is responsible for its own regulatory interventions, in response to its own responsibilities. There are, however, initial efforts to ensure coherence and co-ordination.<sup>4</sup>



Important elements of initial regulatory reform policies already in place are contained in the following existing legal documents:

- Political Constitution of the Republic of Chile. The Constitution is the highest hierarchical legal instrument in the country. It clearly establishes the matters that have to be regulated through a law and which type of law has to be used in specific circumstances. It also sets out the competences among the different powers (executive, legislative and judiciary).
- Law No. 18.575 establishes the Constitutional Organic Act for the Administration of the State includes the principles that rule the activities of the public administration in Chile. It also regulates the origin of judicial review of administrative acts.
- Law No. 19.880 establishes the mechanisms of administrative procedures that institutions of the State administration should be subject to (Administrative Procedure Law). Administrative procedures are understood as any process that ends in a written decision adopted by the public administration that transforms into a supreme decree, a resolution, a decision, or an agreement. It covers the administrative procedures of ministries, superintendencies, governorships and public services that enforce policies, as well as the Comptroller General of the Republic, the Army and Security Forces, regional governments and municipalities. It provides a reference framework for criteria, including the silent is consent rule, and minimal standards of the procedures by the administration in relation to citizens, making those relationships more transparent and predictable.
- Law No. 20.500 on associations and citizen participation in the public administration, enacted in 2008, includes consultation forms within the process to prepare regulations. The law establishes that the State should ensure different modalities for citizen's participation in its policies, plans or programmes, and it should offer information for citizens to participate.
- Law No. 20.285 on access to public information has closed a gap related to transparency in the administration, as it introduced a more transparent and open system for citizen's participation. In particular, the law has introduced the obligation for State administration bodies to keep available and updated information on their websites, including the current legal framework they apply, the formalities they provide to businesses or citizens and information on citizen's participation, such as public consultation. The law has also introduced a sanctions system in case those obligations are not met.
- Law No. 19.882 on the new human resources policy for public servants includes the system of high-level policy management (*sistema de alta dirección pública - ADP*) that regulates the recruitment of public servants in managerial positions in the implementation of public policies or service delivery. Senior civil servants (SCS) are considered a separate group and there is a centrally defined skills profile that applies to some organisations. The management of their careers and performance is accentuated and they are employed for a specific term which is shorter than for regular staff. They are recruited through a centralised system that undertakes the selection, training, evaluation and development of SCS. A good proportion of management positions are open to external recruitment and assessment centres are regularly used, with an independent Council overseeing the process and making final recommendations. The president and public service

directors are in charge of the appointment and dismissal of SCS. The minister and independent Councils have certain influence over the appointment/dismissal of general directors (highest level) and deputies in agencies (second highest level). The minister and others in the ministry have influence over the appointment/dismissal of other management levels. All advisors to the ministry's leadership turn over with a change in government, as well as many general managers, many deputy general managers and a few heads of division. A change of government normally implies changing some of the SCS.

- Law No. 20.416 that sets special norms for SMEs, published in February 2010, introduced a regulatory framework for SMEs. This law, known in Chile as the SME Statute (*Estatuto PyME*), officially introduced a form of *ex ante* assessment system in the country that is currently under way (see chapters 4 and 10). Article 5 of the SME Statute establishes a system according to which estimates about possible social and economic impacts of new or existing regulations affecting SMEs can be identified prior to implementation. These estimates are designed to consider the costs and benefits of proposed regulations, in terms of compliance.

Initial elements of core principles of regulatory quality are found in Chile. But much remains to be done in order to ensure that institutions of the State administration follow agreed procedures and core principles in the design and implementation of regulations. Current practices vary, for instance in terms of consultation or the use of the SME Statute, without ensuring their systematic application in the way regulations are prepared or implemented.

## Recent and current regulatory reform initiatives

Chile has made recent improvements in gradually introducing regulatory quality policies and principles. For instance, in early 2003, Law No. 19.912<sup>5</sup> in relation to the requirement for public information on technical regulations imposed by the World Trade Organisation was adopted and this introduced transparency principles in information exchange with interested parties and the need to consult on regulatory proposals.

In 2009 the Inter-American Development Bank contributed to the discussion on State reform in Chile and the idea of creating a quality agency for public policies was further elaborated, as this had been one of the main proposals of the government of President Michelle Bachelet. At that point, the government of Chile recognised the need to have an independent body in charge of measuring the impact of public policies. This would include not only *ex post* evaluation of programmes and policies, but also *ex ante* analysis of regulatory proposals and *ex post* analysis of existing regulations (Ferreiro, and Silva (2009). In 2012, additional work (Bellio et al., 2012) was conducted to propose an institutional design for such an agency, supporting the independence and accountability mechanisms that should frame its creation, but always focusing on public policies and programmes. In January 2014 the government of President Sebastian Piñera sent a bill to Congress to create the agency, but it was withdrawn.

In 2010 the Ministry of Economy, Development and Tourism introduced the SMEs Statute through Act No. 20.416,<sup>6</sup> which implemented the use of a form to establish the economic impact of regulatory proposals on SMEs. Regulation No. 80<sup>7</sup> from 2010 established that all legal interventions affecting SMEs should be accompanied by an explanation of the preparatory work carried out to support the regulatory intervention

making it available for the public, showing a simple explanation of the possible economic and social impacts on SMEs.

In February 2014, the government of President Sebastian Piñera circulated Presidential Instructions to all ministries requesting them to introduce good regulatory practices. Such good practices are: publication of draft regulatory proposals and regulations; promotion of plain language in the preparation of regulations and preparation of guidelines to explain the purpose, benefits and costs of regulations; conduct of public consultation in the preparation, modification or repeal of regulations; use of RIA in the preparation of draft regulatory proposals; and the periodic review of regulations.

In addition to the promotion of regulatory good practices, the Presidential Instructions advised regulators to send to the Legal Division of SEGPRES, in the preparation of supreme decrees, the following documents: the legal foundation that justifies the supreme decree, identification of possible existing regulation in that field, if co-ordination and dialogue with other institutions took place in the preparation of the draft supreme decree, if consultation was undertaken or not and the reasons for that, if there are costs associated with the draft supreme decree, the objective to be met by the regulation, the results of possible economic and social impact assessments, and the way the supreme decree would be implemented.

In May 2014 the Ministry of Economy, Development and Tourism proposed an Agenda for Productivity, Innovation and Growth.<sup>8</sup> The Agenda should be executed during the term of President Michelle Bachelet from 2014 to 2018. It contains 47 measures, 11 law proposals and 36 administrative initiatives, with a budget of USD 1 500 million. The Agenda has four main strategic objectives: to promote productive diversification, to support sectors with high growth potential, to increase productivity and competitiveness of businesses and to generate a new export boom.

The main strategic objectives are organised around seven lines of action:

1. Strategic investments and sectoral development plans.
2. Infrastructure for new developments.
3. Financing and management support for SMEs.
4. Support entrepreneurship and innovation.
5. Efficiency of regulation and in the offer of public services.
6. Better markets.
7. New institutionalality.

One of the main points of the agenda refers to the need to promote regulatory governance in order to assess the quality of regulations based on clear technical criteria and good practices. Measure 33 of the Agenda considers the creation of a special unit in charge of supervision, evaluation and co-ordination of regulatory quality in the national administration. The unit would undertake assessments of new and existing regulations, it would promote coherence and consistency among regulations and it would reduce unnecessary regulations to promote social welfare. These are initial ideas to integrate a more systematic and institutionalised approach to regulatory governance and to link it to productivity, innovation and growth.

As part of the measures already implemented, the government of Chile has set up a National Productivity Commission (*Comisión Nacional de Productividad*), which is a permanent body in charge of advising the government on productivity issues. The identification of regulatory constraints to increase productivity and recommendations to overcome them is among its main functions, which stress the relevance of ensuring that regulatory frameworks are aligned with policies promoting productivity and growth. Two of the main areas where the Productivity Commission will concentrate its activities are an assessment of productivity issues in the mining sector and reviewing previous productivity agendas of Chilean national institutions. Among OECD countries, the case of Australia stands out as a successful experience in linking regulatory reform to productivity and growth, providing institutional support for policy coherence, in addition to other countries that have set up similar institutions (see Box 2.3).

### Box 2.3. International experiences of regulatory policy and productivity: Australia, Denmark and Norway

According to Banks (2015), “policies that promote productivity can be difficult for governments to devise and even more difficult for them to successfully implement, given uneven political pressures and fragmented administrative arrangements.” This is why establishing public institutions that not only help governments identify the right policies, but that can also help educate the community about what is at stake is essential. For institutional arrangements to work, some features have to be carefully designed, notably: independent governance, transparent processes, solid research capacity and a frame of reference focused on improving economy-wide outcomes. Several OECD countries have made progress in this front and productivity has been the focus of some of the most innovative institutions to provide evidence-base for reforms.

**Australia** is a model framework among OECD countries for the application of regulatory reform strategies, as it has more than 20 years of experience in the application of regulatory management systems to improve regulatory quality supported by institutional arrangements. With a few exceptions, the key features for regulatory management that are promoted by OECD have been adopted and reinforced over time, and a number of novel approaches have also been developed. But the experience of Australia also demonstrates that constant and renewed efforts are necessary to deliver results. Australia, like all other OECD countries, has found that the process of reform itself requires constant re-invention.

The Business Regulations Review Unit (BRRU) was established in 1985 within the Federal Department of Industry, Science and Technology with responsibility for advising the government on proposed changes to regulation. In 1989 the BRRU was renamed the Office of Regulation Reform (ORR) and moved to the independent Industry Commission reflecting an emphasis by the government on reducing the cost of regulation for business, and in 1998 the Industry Commission became the Productivity Commission. The Australian Productivity Commission (PC) is a major source of innovative policy advice and analysis to the Australian government. It focuses on developing policy advice to raise Australia’s level of productivity and standard of living. The PC is an independent research and advisory body that gives counsel to the Australian government on a range of economic, social and environmental issues that affect the welfare of Australians. Its mandate is to improve the productivity and performance of the economy, taking into account the interests of the community as a whole, having regard to environmental, regional and social dimensions; not just the interests of particular industries or groups.

The PC is an advocate for reform and an authoritative source of advice on reform opportunities and strategies for policy implementation. Importantly, the scope of the Commission’s work covers all sectors of the economy, including the public and private sectors

### Box 2.3. International experiences of regulatory policy and productivity: Australia, Denmark and Norway (cont.)

and Commonwealth as well as State and Territory responsibilities. Primarily, the Commission undertakes applied economic analysis of policy issues with a focus on ways of achieving a more productive economy as the key to higher living standards. An important function of the PC is modelling the economic costs and benefits of alternative policy options. It may make recommendations on any matter that it considers relevant and it is up to the government to determine how to use the advice provided. The majority of its recommendations have been accepted. The PC has undertaken public inquiries on a wide range of topics including: the impact of competition policy reforms on rural and regional Australia, pro-competitive regulation of the telecommunications industry, assistance for Australia's automotive and textile clothing and footwear industries, cost recovery arrangements for government agencies, the impacts of legalised gambling and public support for science and innovation.

**Denmark** established in early 2012 a Productivity Commission, comprised of a group of senior representatives of business and academia, with its own secretariat. It was established by the government with a broad mandate to analyse the causes of poor productivity performance in that country and to make recommendations to improve it, both in the public and private sectors. It was required to consult widely and issue interim papers for public discussion. Its first report was broad in scope, with subsequent ones tackling particular areas seen as crucial to raising productivity, including a final major report in late 2013 on the tertiary education sector. The Commission's reports have been influential. Its findings and recommendations continue to be widely debated and discussed in Denmark, as well as in other Scandinavian countries facing similar issues.

The Norwegian Productivity Commission was set up by **Norway** in 2014 in response to a perceived need to reverse the slowing of productivity growth relative to labour costs. It is funded by the Finance Department and has a secretariat drawn from various ministries. It was inspired by the Danish equivalent, and the chair of Denmark's body was also appointed to the Commission, which is chaired by a respected Norwegian academic economist. Its work is to occur in two phases. The first, reflected in a report that was released in February 2015, involved a detailed analysis of Norway's productivity performance and contributors to its relative decline. The second, current phase, is focussing on more specific policy actions that are needed. The Commission is required to consult publicly and has been given a year to complete each phase of its work.

*Source:* OECD (2010b), *OECD Reviews of Regulatory Reform: Australia 2010: Towards a Seamless National Economy*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264067189-en>; Paris; Banks, G. (2015), "Institutions to Promote Pro-Productivity Policies: Logic and Lessons", background paper presented to the OECD Global Dialogue on the Future of Productivity in Mexico City, 6-7 July.

In some ministries, such as Agriculture or Transport and Communication, regulatory units have been established to improve the preparation and implementation of regulations. For instance, the Legal Unit in the Ministry of Agriculture is composed of lawyers and technical specialists that carefully look into the technical basis of regulation, as well as to the legal consistency and coherence with national and international regulations. The Under-Secretariat of Transport has created a Regulatory Committee that produced a regulatory agenda and ensured co-ordination and transparency in the preparation of regulatory interventions.

Two areas in which good regulatory practices have been improved are in environment and competition policies.



### ***Environmental regulation***

One of the areas where Chile has made progress in improving the quality of sectoral regulation is the environmental field. In 1994, Law No. 19.300 on the general basis of the environment, the Environmental Act, was issued and a system for environmental policies and regulations was designed. This included the various instruments for environmental management, such as emissions and environmental quality norms, as well as a compulsory procedure to prepare norms in the environmental field. Thus, a technical and economic study, e.g. an environmental impact analysis called AGIES (see chapter 4), was included as a tool to improve environmental interventions. The Law also included setting up an Environmental Impact System (*Sistema de Evaluación de Impacto Ambiental*) for all projects or activities with an impact on resources, health or waste management, among other criteria.

In addition, the environmental field has benefited from an organised and systematic rule-making procedure in which priorities are prepared through an Environmental Strategic Programme that establishes the required interventions. The initial phase includes the preparation of technical studies and the AGIES, setting up a working group and a wide-ranging technical committee including stakeholders, academia and civil society representatives that can follow up the technical discussions and the preparation of the draft proposal. Public consultation is then organised to discuss with different groups, with the Ministry of Environment typically receiving several comments on the draft proposal, as interested parties participate actively in the regulatory process. Once the proposal has been approved, the Ministry makes available a Public Board of Norms, which provides information on the statute and development of each norm.

Law No. 20.417 improved Law No. 19.300 by creating an institutional arrangement mechanism based on a multi-sectoral approach to address environmental issues in a co-ordinated manner. A Council of Ministers is in charge of taking relevant environmental decisions, in addition to ensuring public consultation as part of the process of environmental impact analysis. In addition, secondary regulations in the environmental field were modified to ensure that an e-PAC,<sup>9</sup> an electronic on-line platform, was used in the public consultation process and all information on the impact analysis process is public and accessible for any citizen interested in knowing how the decision is evolving. Citizens and businesses have 60 days to participate in the public consultation process by making comments on the environmental impact analyses.

### ***Competition advocacy***

Competition policy and advocacy are centralised at the national level in Chile. The enforcement of the Competition Law is the responsibility of the National Economic Prosecutor (*Fiscalía Nacional Económica*, FNE). Its duty is to defend and advocate for competition in all markets or productive sectors of the Chilean economy. Under the current system, the FNE submits complaints to the Free Competition Defence Tribunal (*Tribunal de Defensa de la Libre Competencia*, TDLC) for adjudication and decision. The Ministry of Economy, Development and Tourism is responsible for competition policy in the country.

The TDLC, which decides matters and orders remedies and sanctions, is an independent judicial body, subject to the supervision of the Supreme Court of Justice. A Chief Judge or Chairman heads the TDLC, and it has four expert members, or *Ministros*. All of them are appointed for six-year terms. The TDLC has two economists and three lawyers. The President of the Republic appoints the Chairman from a list of five candidates proposed by the Supreme Court, selected through a public examination of their

qualifications. The Central Bank Council appoints two members, and their qualifications are subject to public review. The remaining two members are appointed by the President of the Republic, from two lists with three candidates on each list, proposed by the Central Bank Council, and also selected through a public review of their qualifications.

The National Economic Prosecutor heads the FNE, which investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by the President of Chile from a list of candidates chosen after a public review process, which is handled by the agency in charge of recruiting high level public officials (*Alta Dirección Pública*). The FNE must investigate all valid complaints. It may initiate an investigation *ex officio*, and it may undertake sectoral investigations of particular markets. No special regulations govern FNE investigations. General rules for administrative processes are set out in the Administrative Procedure Act and the General Basis for Fiscal Administration Act. The FNE also applies an internal manual of procedural guidelines. Legal amendments to the Competition Law gave it stronger powers of investigation, such as a “dawn raid” and wiretapping. These require authorisation from the TDLC and an order from a judge of the Court of Appeals.

Competition advocacy is conceived in broad terms. Advocacy activities can include testifying, making submissions or issuing papers to the legislature, ministries, courts, sectoral regulators or municipalities, or making speeches to professional and trade associations, academic institutions and conferences and writing articles for publication. Even holding press conferences and publicly explaining the importance and implications of competition and market principles could be considered advocacy.

The Competition Law provides specific advocacy powers. The FNE may pursue non-contentious advocacy before a sector regulator or public authority. If the regulator rejects the FNE position, the FNE can file proceedings before the TDLC. The TDLC can also act on its own initiative to issue recommendations to eliminate regulatory constraints on competition. In some sectors, the TDLC also has the power to determine when competitive conditions require regulatory intervention to set prices. The competition institutions review the competitiveness of the electricity and telecom markets and determine whether rates are free or fixed. A proceeding to revise price regulations in the telecom industry has not been completed, after a decision from the regulator indicating its intended objective of liberalising this market.

The FNE may assess the potential impact on competition of legislative proposals. It may do so in response to requests from Congress or individual congressmen, or on its own initiative. This has happened on rare occasions.

## International regulatory co-operation

Chile has recently integrated fora where regulatory reform initiatives are shared among various countries. Within the OECD, since its full membership, it benefits from the work of the OECD Regulatory Policy Committee. The regulatory reform approach has been integrated gradually into its trade policies. In the framework of APEC, Chile has hosted some technical activities. Chile, however, does not have formal co-operation agreements on regulatory reform with any other country.

In the framework of the Trans-Pacific Partnership agreement (TPP)<sup>10</sup> and the Pacific Alliance (*Alianza del Pacífico*, AP),<sup>11</sup> some chapters on regulatory reform have been included. For instance, a whole chapter on regulatory coherence has been integrated into the TPP, requiring countries to have a more open and transparent regulatory process, based on evidence and impact analysis, eliminating obstacles to trade.



## Assessment and recommendations

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*The government of Chile must pursue regulatory improvement through the adoption of a formal explicit binding and consistent whole-of-government policy instrument with identified objectives and a clear communication strategy. This strategic instrument could take the form of a law or government resolution. It should spell out the key building blocks of regulatory management and governance. The realisation of this policy should be supported through a high-level institutional body to oversee the implementation and co-ordination of regulatory improvement in Chile. It should give the lead institution a mandate to take and enforce decisions and set clear objectives. Regular reports on progress towards achieving regulatory improvement objectives should be provided to the government. Having this single comprehensive instrument would also help communicate high-level political support for the implementation of the regulatory policy agenda in Chile.*

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Chile, one of the most stable and successful economic performers in Latin America, lacks a comprehensive regulatory policy that could contribute to taking advantage of the benefits of economic growth and development. The absence of a “whole-of-government” approach to regulatory quality contrasts with the relatively good quality of the regulations that, according to international comparisons, Chile has achieved. The openness and liberalisation of the economy that took place several decades ago, a less interventionist approach to regulation in key economic sectors and stable and reliable institutions at the central level might explain this apparent incoherence.

Despite these positive features of the Chilean model, some challenges remain. Introducing procedures, principles, institutions and tools for high-quality regulation that combined could lead to improved policy outcomes would help boost economic activity, improve net benefits of regulatory interventions in the Chilean society and consolidate the current efforts to deal with regulation in a more organised and co-ordinated manner. It is not enough to only have the constitutive elements of a regulatory governance system, but to use them in such a way that they deliver policy outcomes. This is where Chile faces important challenges, as the current system does not ensure that regulatory interventions in the medium and long-term will be achieving the best possible outcomes.

The design of a “whole-of-government” approach should be in relation to the administrative, legal and political characteristics of the Chilean system. It might be needed to raise the status of regulatory policy to a primary law, as the current legal approach does not offer many other alternatives. It might also be required to complement this high level commitment with clear guidelines and standards integrated into current legal instruments that can then support the adequate implementation of a regulatory quality policy. But most importantly, it will require additional efforts to create and consolidate a culture of “good regulatory practices” that can really make use of more organised, transparent and co-ordinated processes and tools.

Pursuing a “whole-of-government” approach to regulatory governance might take time and could only be achieved by the gradual introduction of the constitutive elements:

- The construction of a policy with clear principles and criteria, as well as strategic goals;

- The institutional set-up required to implement it, using the existing institutions and creating the required capacities for the new tasks; and
- The selection of regulatory tools that can help achieve the main goals established in the policy.

Some elements are already in place, so it would be possible to start with co-ordinating, restructuring and upgrading some of the existing components. In order to do this, high political support is required and decisions about who should be in charge of the agenda have to be made. This should take current practices into consideration, but also thinking ahead and envisaging that the required change in the administrative culture might need strong commitment, leadership and clear decisions to define the oversight functions attached to these tasks. This is why managing expectations is essential, in order to ensure a sustainable intervention. Changes of this nature do not take place overnight and require a constant commitment, including partisan support.

The government of Chile could benefit from establishing a roadmap that could set priorities. For instance, the need to have a clear definition of regulatory policy and criteria that, later on, will be promoted across the administration seems to be one of the first steps in the process. This requires entrusting a body with the responsibilities required to implement those principles and criteria. The selection of that institution has to be based, among other issues, on defining who is better placed in the current institutional set-up of Chile in order to take those tasks in hand, who has the capacity to mobilise the regulators and where capacities could be more rapidly expanded. This should take into consideration that today several institutions have responsibilities related to regulatory management and, in some cases, some of those tasks cannot disappear, but to be reinforced and gradually concentrated in one single body responsible for this.

In addition, the selection of tools is of major importance, as this will indicate how the priorities would be achieved. Bringing more evidence to decision making should be one of those priorities, therefore the use of Regulatory Impact Analysis (RIA) seems to be essential. The simplification of regulations should also be in the top priority of actions, and current practices already provide a good starting point to engage in more comprehensive reviews of existing regulations and procedures. Improving transparency in the regulatory process, namely improving consultation mechanisms, should also be promoted as part of the first set of tools to be focused on.

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*Regulatory policy should be consolidated further within the framework of broader economic reforms promoted by the government of Chile. Regulatory policy should be seen as an integral part of the whole agenda to connect productivity innovation and growth strategies. Regulatory policy should help to establish regulatory frameworks clear and transparent administrative procedures and tools for better policy evaluation. Regulatory policy should primarily be a mechanism to produce better regulatory outcomes which can contribute to boosting economic activity innovation competition and social cohesion.*

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Chile needs to introduce targeted measures that can help upgrade its regulatory system. Integrating a regulatory policy that is able to help the government improve the selection of instruments and ensure that regulatory interventions are properly assessed and achieve policy and regulatory outcomes is crucial for the future economic development of the country.

The connection between productivity and regulatory reform has been key in some OECD countries, such as Australia, showing the evidence that improving regulatory systems has a clear impact on growth and development. The setting up of a National Productivity Commission in Chile could be used as a starting point to identify priorities and to structure a broader agenda around it, where regulatory policy should find its place. As the case of Australia shows, the model there has facilitated advising the Australian government on a range of economic, social and environmental issues that affect the welfare of Australians. The Australian Productivity Commission plays an important role in advising the government on the impacts of existing regulations by providing *ex post* analysis of the effectiveness of regulatory policies and programmes. It has an established institutional function that has been effective at separating the policy evaluation process from the political process. A number of factors contribute to this. It has statutory independence and a standing function that is accepted by all major political parties. The Productivity Commission ensures that it gives clear consideration to the government's policy objectives; it does not substitute its own policy objectives. The conduct of reviews is undertaken transparently using broad welfare analysis that takes into account a diversity of policy considerations and the impacts on the overall economy. Its review processes ensures that it receives input from multiple actors, but it provides only one voice in the policy debate without crowding out others.

The National Productivity Commission in Chile could help setting an agenda for regulatory reform and define priority areas, which could then help identify the required tools, technical capacities and institutional arrangements for implementation.

## Notes

1. Article 63 of the Constitution of the Republic.
2. Article 35 of the Constitution of the Republic.
3. OECD (2002).
4. For instance, Decree 77 of the Ministry of Economy, Development and Tourism rules the procedures for preparation, adoption and implementation of technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures.
5. Law No. 19.912 that adapts legislation to the agreements with the World Trade Organisation adopted by Chile.
6. Law 20.416 establishes specific norms for SMEs
7. Regulation to dictate legal general norms that might affect SMEs.
8. [www.agendaproductividad.cl](http://www.agendaproductividad.cl)
9. <http://epac.mma.gob.cl/Pages/Home/index.aspx>.
10. The Trans-Pacific Partnership Agreement (“TPP”) is a free-trade agreement negotiated and signed in 2015 by twelve countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.
11. The Pacific Alliance is a Latin American trade bloc composed of four countries: Chile, Colombia, Mexico and Peru.

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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), "Considering Chile's path towards regulatory reform", in *Regulatory Policy in Chile: Government Capacity to Ensure High-Quality Regulation*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264254596-6-en>

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