Chapter 3

Assessing Chile's regulatory institutions

Institutions are fundamental to ensure that regulatory policy is properly implemented. This chapter starts by stating the rationale in order to aim at establishing mechanisms and institutions to promote regulatory reform, notably through oversight of regulatory policy procedures and goals. The chapter mentions the institutional set-up for regulatory governance, and also describes institutions with clear competences to promote regulatory policy in Chile. It looks at the executive branch, independent and autonomous entities, the legislative branch, and the judiciary along the constitutional court, and its co-ordination mechanisms. Finally, and of utmost importance, it describes the organisation and governance of regulatory agencies and supervisory bodies in Chile. It finishes by issuing recommendations on how to improve the set-up of the administrative architecture in order to ensure high-quality regulations.

Institutions and mechanisms to promote regulatory reform

The 2012 *OECD Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012) advises governments to "establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality." Details of this recommendation are described in Box 3.1.

Box 3.1. **Main features of oversight bodies to promote regulatory quality**

According to the 2012 *OECD Recommendation of the Council on Regulatory Policy and Governance*, oversight of regulatory procedures and goals should be promoted through:

- A standing body charged with regulatory oversight should be established close to the centre of government, to ensure that regulation serves whole-of-government policy. The specific institutional solution must be adapted to each system of governance.
- The authority of the regulatory oversight body should be set forth in a mandate, such as a statute or an executive order. In the performance of its technical functions of assessing and advising on the quality of impact assessments, the oversight body should be independent from political influence.
- The regulatory oversight body should be tasked with a variety of functions or tasks in order to promote high-quality evidence-based decision making. These tasks should include:
  - Quality control through the review of the quality of impact assessments and returning proposed rules for which impact assessments are inadequate;
  - Examining the potential for regulation to be more effective including promoting the consideration of regulatory measures in areas of policy where regulation is likely to be necessary;
  - Contributing to the systematic improvement of the application of regulatory policy;
  - Co-ordinating *ex post* evaluation for policy revision and for refinement of *ex ante* methods;
  - Providing training and guidance on impact assessment and strategies for improving regulatory performance.
- The performance of the oversight body, including its review of impact assessments should be periodically assessed.

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

Institutions are fundamental to ensure that regulatory policy is properly implemented. OECD countries have a variety of institutional set-ups for regulatory governance, which shows the need to respect administrative, legal, political and social conditions, in addition to allocating responsibilities carefully. In Chile there are institutions with clear

competences to promote regulatory policy, which will be presented in the following sections.

Executive

The 1925 Constitution in Chile introduced the presidential system as a government form in the country. A strong executive was reinforced by the current Constitution, approved in 1980 but fully effective since 1990. Chapter IV (art. 24 to 45) describes the powers and competences of the President of the Republic, including the following: preparation and promulgation of laws, enactment of decrees by delegation of the Congress in areas indicated by the Constitution and the execution of legal authority to implement laws through regulations.

The regulatory power (*potestad reglamentaria*) that the President can exert in order to implement laws by issuing decrees, regulations and instructions is relevant to understand the need to improve regulatory quality in the country. The process of exerting the regulatory power, e.g., the preparation of all regulations that complement the application of laws, does not follow detailed and strict procedures, as it is the case of the law-making procedure. This also implies that the quality of regulations, both in terms of legality and constitutionality, is ensured by different specialised institutions, but there is no formal mechanism that can review the pertinence, relevance and coherence between regulations and laws. Thus, some regulations that are legally valid, but do not correspond to what the law intended, may be found in the Chilean legal background.

Some key institutions in Chile play a relevant role in regulatory functions. Among them the following:

- *President of the Republic*. The presidential system makes the Chilean executive a strong actor in the law-making process. As in many other presidential countries, the executive is the main producer of law proposals debated in Congress. According to the Constitution, the President of the Republic can use the law initiative through a message (*mensaje*) and the Deputies and Senators can submit a motion (*moción*).[1] Both messages and motions have to be submitted in writing with an explanation of the reasons and a clarification of the various articles contained in the law. Furthermore, messages should include the source and the amount of financial resources needed, in the event that expenditures arising from the law are implied in the national budget.[2] The President is also responsible for nominating Presidential Commissions that are established for fixed periods of time to address issues of relevance for the country that might lead to legal amendments or new interventions.
- *Ministries*. Ministries are the superior institutions that collaborate with the President of the Republic in the administration and functioning of policy sectors. They are responsible for:[3] *i)* proposing and assessing public policies and programmes; *ii)* assessing and proposing regulations that are required for the functioning of their sectors; *iii)* ensuring compliance and enforcement of regulations in their sectors; *iv)* allocating resources and implementing the required activities in their sectors. Some ministries have introduced good regulatory practices. For instance, the Ministry of Transport has established a Regulatory Committee, headed by the minister and composed of heads of division, which sets priorities on what could be regulated, after a technical analysis and strategic views.

Some of the ministries most relevant to regulatory policies and quality control mechanisms are the following:

- *Ministry General-Secretariat of the Presidency*. The Ministry[4] is responsible for the legal and technical review of Supreme Decrees, as well as their coherence. It participates in the preparation of the legal agenda of the government and the review and analysis of draft proposals, making suggestions on the legal options to the President of the Republic, in consultation with the Ministry of Interior. The Legal Division is however not empowered to answer questions.
  - *Legal Division (División Jurídico-Legislativa).* Art. 9 of Law 18.993 establishes the functions of the Legal Division. The most relevant are to provide legal advice to the President of the Republic, the Ministry of Interior and other ministries; to participate in study commissions of law draft proposals at ministerial level; to analyse and submit draft law proposals to the National Congress that originated within ministries or any person in the executive; to propose the degree of urgency of draft law proposals in the government legislative agenda ; to follow up the draft law proposals in congress, informing ministries about possible amendments and their implementation; to prepare weekly reports on the status of the processing of draft law proposals, the possible urgency given by the President to some draft law proposals and any additional information; to be the link to the Constitutional Court in terms of processing draft law proposals, and to draw up executive decrees for laws.
  - *Inter-ministerial Co-ordination Division* (*División de Coordinación Interministerial*). Art. 10 of Law 18.993 establishes the functions of the Inter-Ministerial Co-ordination Division. The most relevant are those intended to co-ordinate the preparation of the report on ministerial goals in collaboration with the Ministry of Finance; to identify the co-ordination needs arising from the ministerial goals; to analyse and assess compliance with government plans and programmes; to assess the political and programming coherence of draft law proposals being analysed by the Legal Division; to analyse the consistency of the programmes by the intersectoral Commissions and Working Groups set up.
  - *Modernisation of the State Unit and E-Government (Unidad de Modernización del Estado y Gobierno Digital)*. This Unit is responsible for the implementation of ICT solutions and introducing digital government tools in order to improve the services and support that public institutions provide to Chilean citizens. They are in charge of administrative simplification projects and platforms to provide citizens with information and administrative transactions. The key objectives of this Unit are to increase the technological capacities of the State and the municipalities, and also to provide a more transparent and participative environment to meet citizens´ needs and to improve their lives.
- *Ministry of Finance*. This Ministry is the cabinet-level administrative office in charge of financial affairs, fiscal policy and capital markets in Chile. It provides support in planning, directing, co-ordinating, executing, controlling and informing all financial policies formulated by the President.

  - *Directorate of Budget* (*Dirección de Presupuesto*, DIPRES) has the responsibility, among others, to inform about the available funding of decrees before they are signed and ratified by the Minister of Finance, in order to ensure the control and execution of the national budget.[5] It performs *ex ante* programme evaluations. It also contributes to evaluating the allocation and use of financial resources in different government programmes, projects and institutions, through *ex post* evaluations.

- *Ministry of Economy, Development and Tourism*. It is responsible for promoting the competitiveness and modernisation of the productive structure in the country, private initiative and an efficient functioning of the markets, in addition to innovation and the international integration of Chile into the world economy. Two of their divisions are of relevance in this review:

  - *SMEs Division.* It is responsible for formulating and implementing policies and measures to support SMEs, focusing on increasing productivity so they can innovate, grow and internationalise. The main actions to support SMEs are: to improve financial conditions for SMEs, to help and provide assistance to SMEs to improve their managerial functions and to increase market opportunities for SMEs. This implies taking regulatory actions to support SMEs.

  - *Business Registration Division*. It is in charge of managing the registry of companies and businesses in Chile and it implements the one-day start-up policy (Your business in one day, *Tu empresa en un día*).

- *Superintendencias*. Superintendencies are institutions with a high degree of autonomy, as they are considered deconcentrated bodies.[6] In most cases, Superintendencies are responsible for controlling and supervising the legal framework of specific activities in their sphere of competence, such as pensions, banking, environment, etc. Superintendencies relate to the central government through ministries. They have their own legal statute and entity.

- *Productivity Commission* (*Comisión Nacional de Productividad*). Established in 2015 the Productivity Commission is a permanent body that will advise the government on productivity issues. Among its responsibilities, the Productivity Commission will identify constraints and obstacles related to regulations that hinder economic activity in a given sector or reduce the possibilities of economic development and growth of businesses. It will propose solutions to the national government after conducting analysis and research. The members (*consejeros*) of the Commission are mostly from academia and professionals related to economic activities from different backgrounds. They will have the political independence to provide analytical advice to the government and are supported by a Technical Secretariat to conduct the analysis and research.

Independent and autonomous entities

- *Comptroller General of the Republic*. This institution is responsible for providing information on the constitutionality and legality of the supreme decrees and the resolutions of heads of service that have to be processed by the Comptroller General.[7]

- *Council for Transparency*. An autonomous body that is responsible for promoting the transparency culture in the Chilean administration, ensuring that the right of access to public information is guaranteed for people. It promotes and creates capacities in terms of transparency, but also imposes sanctions on government officials who refuse to release public information.

Legislative

Even though regulatory evaluation is not a standardised and systematic practice in the executive branch, the legislative could articulate its own efforts with those of the administration. While it is true that not many parliamentary institutions in OECD countries have formally adopted regulatory quality tools, there are some good practices of regulatory evaluation, for instance, in the Swiss Federal Assembly and the Swedish Parliament (*Riksdag*) (see Box 3.2).

Box 3.2. **The legislative's role in promoting regulatory quality: Switzerland and Sweden**

The governmental system of **Switzerland** gives high priority to the evaluation of laws and federal government activities. Evaluation is undertaken by the Parliamentary Control of the Administration (PCA), which is part of the Parliamentary Services Department of the Federal Assembly. Established in 1991, the PCA is an example of a specialised service that carries out evaluations on behalf of Parliament. Evaluations are presented to Control Committees, which are mandated by the Federal Assembly to exercise parliamentary oversight of the activities of the Federal Government and the Federal Administration, the Federal Courts and the other bodies entrusted with tasks of the Confederation.

In the **Swedish Parliament** (*Sveriges Riksdag*) the Parliamentary Evaluation and Research Unit is in charge of *ex post* evaluation and co-ordination. The Unit was established in 2002 and was placed under the *Riksdag* Research Service. The Unit is headed by the Committee co-ordinator of the *Riksdag* Administration and works closely to support parliamentary oversight committees in their evaluation functions and undertakes, among others, the following tasks:

- Helping the committees prepare, implement and conclude follow-up and evaluation projects, research projects, and technology assessments.
- Locating and appointing researchers and external experts to carry out projects.
- Preparing background materials for evaluation and research projects at the request of committees.
- Requesting up-to-date reports from government agencies on the operation and effects of laws.
- Contributing to the structuring, implementation and final quality control of projects.
- Contributing to the general development of the committees' evaluation and research activities.

The *Riksdag* has twice (2001 and 2006) incorporated guidelines for follow-up and evaluation as one main task to be undertaken by committees. The guidelines state that the *Riksdag* must obtain information to assess if the laws adopted have had the intended effects, as well as other forms of follow up and evaluation, such as whether resources have been distributed in accordance with political priorities.

Source: OECD (2006), *OECD Reviews of Regulatory Reform: Switzerland 2006: Seizing the Opportunities for Growth*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264022485-en; and OECD (2010), *Better Regulation in Europe: Sweden*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264087828-en.

The Chilean Chamber of Deputies deserves particular mention for its efforts to improve the quality of regulations through *ex post* analysis of laws. The analysis and assessment of this institution is considered in chapter 7.

The legislative branch in Chile is composed of a bicameral National Congress, located in Valparaíso, comprising the Senate, with 38 Senators, and the Chamber of Deputies with 120 members of parliament (MPs). The main function of the Chamber of Deputies is to participate in the preparation of laws, together with the Senate and the President of the Republic.

The law-making process in Chile can be described as "co-legislation", as both the executive and the legislative play a relevant role. Both powers can submit law proposals and participate in discussions. The President is responsible for the promulgation of laws, once they have been approved by the legislative and is in charge of their publication. The Chamber of Deputies of the National Congress supervises the executive acts, and it can be vocal in government decisions, in the case where laws are not implemented in accordance with their original spirit.

Judiciary

The role of the judiciary in terms of regulatory quality is also relevant in Chile. Judicial review of regulations is part of the principle of jurisdictional control that can be exerted in different ways. In addition to the Constitutional Court (see chapter 3), protection and economic appeals may be lodged (*recursos de protección* and *amparos económicos*), details of which are given in section *appeal process for regulatory decisions* in chapter 6, to control regulatory interventions by central administrative institutions or at local authority level, such as municipalities (in this case complaints of illegality or "*reclamos de ilegalidad*").

The judiciary is described in Chapter VI of the Constitution of Chile. The most relevant institutions in the judiciary branch are:

- *Supreme Court*. The Supreme Court of Justice is the head of the Chilean judiciary system. It is made up of 21 members called "Ministers" (*Ministros*), designated by the President of the Republic, who selects them from among five candidates proposed by the Supreme Court, with the agreement of the Senate. Of the 21 members of the Supreme Court, 16 must be Appeal Court judges and 5 must be lawyers with no connection to the judiciary system and with a distinguished professional or academic career and several other requirements laid down by law. The Supreme Court of Justice is responsible for the management, correctional and economic superintendence of all the courts in the country, except the Constitutional Court, the National Board of Elections and the Regional Boards of Elections.
- One of the most important functions of the Supreme Court is to act as a Court of Cassation, ensuring that the law is applied in the same way to all similar cases, so as to maintain a uniform interpretation of the law throughout the country.
- *Courts of Appeal*. In terms of administrative regulation, jurisdictional control is guaranteed in several articles of the Constitution,[8] which establish the right to effective judicial protection. The Ordinary Courts of Justice are responsible for administrative and contentious matters, e.g., the judicial review of regulations by means of annulment or compensation.

- The Courts of Appeal acknowledge the right to lodge appeal or protective actions. There are seventeen Courts of Appeal in Chile. They have jurisdiction in almost all second-level courts, as well as ruling on proceedings in lower courts on other matters.
- *Special Courts*. There are certain special procedures where controversies and proceedings on administrative and contentious matters are held in special courts or tribunals, such as the Public Procurement Court, or issues related to electricity or municipal decisions. In areas where decisions are extremely technical, Chile has also moved forward in creating special courts, such as the Tax and Customs Courts, created by Law No. 20.322 of 2009, or Environmental Courts, established by Law No. 20.600 of 2012.

Constitutional Court

The Constitutional Court is not part of the judiciary, since it was set up as a body independent of any other branch of power. According to the Constitution of Chile,[9] the Constitutional Court is composed of ten members: three designated by the President of the Republic; four elected by the National Congress (two elected directly by the Senate; two elected at the proposal of the Chamber of Deputies subject to approval or rejection by the Senate, always with a two-thirds majority); three elected by the Supreme Court by secret ballot. All members must be lawyers with at least fifteen years of professional experience, with a distinguished professional or academic career and other requirements established by the Constitution.

The Constitutional Court is responsible for issuing various types of reviews on regulatory interventions:

- *Preventive control*. It can exert an *ex ante* review during the preparation of a law, that may be compulsory or optional, undertaken during the law-making process, a constitutional review or approval of treaties by Congress. This control is compulsory when the matter refers to laws interpreting the Constitution, constitutional organic laws and regulations related to those constitutional organic laws.
- *Repressive control*. It can also exert an *ex post* review of the constitutionality of existing laws that can be made using two different mechanisms. The first one refers to the action of non-applicability due to unconstitutionality, in the case of matters that were referred to the Constitutional Court by any of the affected parties or a judge. The second one is the action of unconstitutionality, by which a legal precept can be declared unconstitutional, by a vote of four-fifths of its members, as it was previously declared inapplicable.

The Constitutional Court is also competent on issues related to the constitutionality of Decrees with the force of law, decrees or resolutions presented by the President and rejected by the Comptroller General of the Republic or supreme decrees. In any of these cases, an appeal cannot be made against the unconstitutionality declared by the Constitutional Court and, consequently, the norm cannot come into force.

Co-ordination mechanisms

Co-ordination is essential to ensure regulatory quality in any country. In Chile, there are no formal co-ordination mechanisms between regulatory institutions, even if Law No. 18.575 that establishes the Constitutional Organic Act for the Administration of the

State points out that the institutions that are part of the State administration should observe, among others, the principles of responsibility, efficiency, effectiveness, co-ordination and transparency in their activities to meet their objectives and goals. Despite this requirement, co-ordination during the regulatory process is uneven. With a separation of functions, between ministries and superintendencies, co-ordination should be promoted and ensured, but this is not always the case. Superintendencies are not systematically invited to participate in the design of likely regulatory interventions as early as possible, although they might be required to do so in specific cases and sometimes they provide information to guide the regulatory decision to be made.

Co-ordination can also be ensured through institutions signing agreements with each other. This is not a general practice, but an informal way to agree on certain matters and ensure that issues are discussed, and potential conflicts are solved in an orderly way.

Co-ordination is also achieved, when it is about complex issues that require consensus and agreement, through the set-up of Presidential Commissions that have an advisory role on matters that might require legal amendments or new approaches to intervene. These Commissions do not have a clear structure, but they are composed of recognised specialists who might help in guiding the discussions on the topics they deal with and make recommendations after they have been established.

Organisation and governance of regulatory agencies and supervisory bodies

In most OECD countries, economic structural reforms have prompted the establishment of independent regulatory agencies and the revision of existing regulations. The 2012 *OECD Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012) advises governments to "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."

The organisation and governance of regulatory institutions in Chile is regulated mainly in two legal instruments: Law No. 19.882, which frames the civil service policy and the assignment of high-level managerial appointments, as well as Law No. 18.575 that establishes the Constitutional Organic Act for the Administration of the State, such as appointment of management, responsibilities, human resources policies and dismissal criteria. The different stages of the decision-making process are also clearly established.

Regulatory institutions are in general linked to and dependent on the central government. Regulators can be centralised, decentralised, legally autonomous or constitutionally autonomous, depending on the degree of autonomy from the executive power. There are no independent regulators in Chile, as understood in other OECD countries (see Box 3.3).

The governance arrangements of regulatory bodies, however, are not uniform in the Chilean administration, as each institution might present specific characteristics and the general guidance refers only to broad policy objectives and human resources administration. The potential lack of independence of regulatory bodies is more acute in some sectors, such as banking, where ministerial institutions or even superintendencies that have some regulatory roles cannot have the degree of independence that might be required to take certain decisions.

Box 3.3. **The development of independent regulatory agencies**

The powers held by independent regulatory agencies distinguish them from mere "administrative agencies" set up for managing part of the state administrations. Their powers allow authorities to issue opinions, set rules, monitor and inspect, enforce regulations, grant licenses and permits, set prices and settle disputes. Institutional arrangements, including the legal framework and the provisions for governance, as well as a given administrative and political practice are a necessary condition for the independence of regulators. Independence needs to be balanced with accountability. Accountability for regulatory authorities, which are at arms' length from political decision-makers is often obtained through a set of procedural means, including annual reports, transparency in decision-making, self and external evaluation.

Regulatory authorities in OECD countries are often established in key economic sectors, with a role to foster competition and also provide for technical or prudential oversight. The goal is also to minimise the potential for conflicts of interests and stimulate long-term investment in key infrastructure sectors as well as strengthen confidence and reduce institutional risk. The design and management of such regulatory agencies present significant challenges. Key issues in this respect include considerations on how to establish institutions that are:

- Competent, accountable and independent;
- At arm's length from short-term political interference;
- Capable of resisting capture by interest groups, but still responsive to general political priorities;
- Able to exercise delegated powers, including for example the power of granting licenses or imposing sanctions in specific cases;
- Capable of having decision-making procedures that take into account the particularities of the area being regulated, while at the same time maintaining transparency and accessibility for all stakeholders; and,
- Ensuring transparency and accessibility for all stakeholders.

Source: Córdova-Novion, C. and D. Hanlon (2003), "Regulatory governance: Improving the institutional basis for sectoral regulators", *OECD Journal on Budgeting*, Vol. 2/3, http://dx.doi.org/10.1787/budget-v2-art16-en.

Regulatory bodies are financed according to the Law on the budget of the public sector that is approved yearly. The general legal framework on the organic financial administration of the State lies in Law Decree No. 1263. There are additional financing sources for some sectoral regulatory institutions, such as international co-operation or tariffs imposed by inspections.

There are some exceptions to the general way of finance allocation. For instance, the Superintendence of Banking, according to the General Law on Banks, is financed through the resources obtained from the regulated entities, which are deposited in the Bank of the State and the Superintendency can make use of them. The Expert Panel on electricity issues is responsible for solving discrepancies between the regulator and generation, transmission and distribution companies, and its maintenance costs are covered by the companies in the electricity sector, according to the General Law on Electricity Services.

In the Chilean legal framework overlaps may be found between the powers and responsibilities of regulatory bodies. In the absence of formal mechanisms to solve this issue, the solution is sometimes the abstention to act or address those potential conflicts, which reduces the effectiveness of regulatory interventions.

In terms of implementation of regulatory interventions, there are some institutions exclusively dedicated to the supervisory role, the superintendencies (*superintendencias*), as is the case in other Latin American countries, such as Colombia and Ecuador. They mainly operate in three sectors: concessioned public sectors, social security and financial markets. However, the separation between the regulator and the implementer does not apply to all sectors and there are no clear rules on which cases this rule should apply to or not. It depends on the economic sector and the existing institutions and particular competences they have been assigned to.

Ministries are generally the ones that oversee the adequate functioning of the various institutions that are in charge of sectoral regulatory policy, either in their regulatory (regulator) or in their supervisory role (superintendency). In some sectors, the law clearly states who is responsible for what. For instance, in the energy and electricity sector, the Ministry of Energy (sectoral policy), the National Commission of Energy (regulator for tariffs and technical regulations for the operation of energy installations) and the Superintendency of Electricity and Fuels (supervisor) share the various roles in the sector.

Effectiveness of regulatory institutions is only monitored by compliance with internal management goals and targets established by the institution itself. There is no institution responsible for ensuring that those goals are met, but the Council of the Internal General Audit of the Government plays a preventive and monitoring role to support the President´s Office in assessing governance systems, risk management, compliance and internal control of the public administration entities.

Accountability of regulatory institutions is set in political and administrative terms. The executive power has to present to the legislative power an annual report on goals met and needs, as established by the Political Constitution of the Republic. The Comptroller General is also making institutions accountable, as it exerts the legality and budget control of bodies of the State administration. In addition, the Transparency Law has contributed to increasing accountability as regulatory institutions are obliged to publish their financial activities and according to Law No. 19.886, which deals with public procurement, also obliges regulators to make their tenders public.

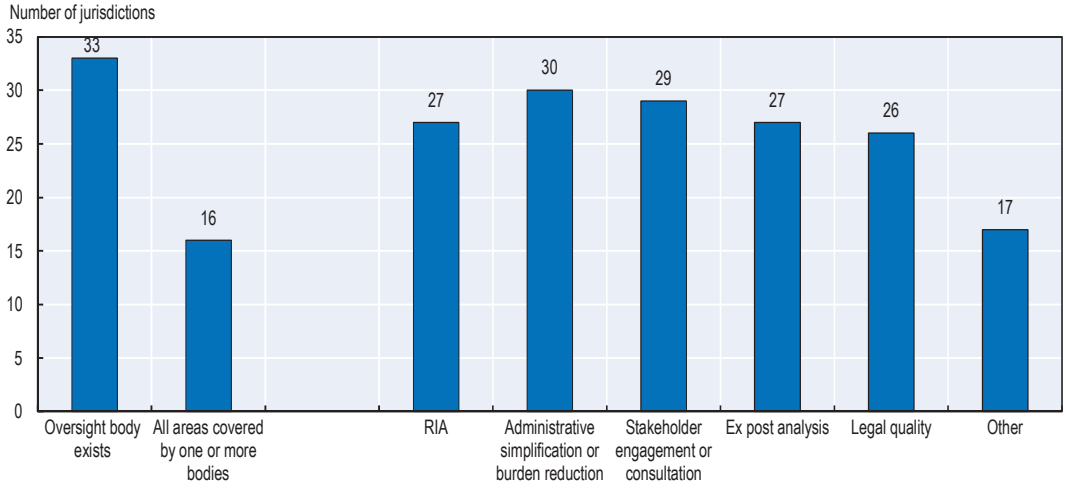
Some regulators have also started to make the results of their activities public, even if there are no performance indicators related to specific targets and the effectiveness of their regulatory intervention. In some cases, however, regulators are publishing the use of financial resources in their activities, analysis of their policies and programmes, and some quality indicators that are used to monitor their activities.

Assessment and recommendations

The government of Chile must set up an oversight body in charge of regulatory policy located at the centre of the government. This unit could build on the existing work of the Legal Division and the Interministerial Co-ordination Divisions within SEGPRES. The unit should ensure a co-ordinated and consistent approach to the design and implementation of laws and regulations across the jurisdictional space of Chile. It should provide support to all government ministries through training and methodologies including on regulatory management tools such as regulatory impact assessment administrative burden measurement and reduction. This unit would require dedicated staff to carry out its mandate. Staff background should include expertise in law economics social sciences and public management.

One of the main weaknesses of Chile's institutional set-up for regulatory reform is the lack of a regulatory oversight body. International experience shows that regulatory reform must be led by a dedicated institution, located at the centre of government, with clear responsibilities. An oversight body for regulatory quality is essential to ensure that regulatory policy is promoted and implemented with a whole-of-government approach. The governance challenge, the ability of the oversight body to co-ordinate the government-wide implementation of regulatory policy effectively, should be one of the main considerations in deciding which institution could play this role. Thirty-two OECD countries report having constituted some form of regulatory oversight body performing different functions (see Figure 3.1).[10]

Figure 3.1. **Areas of responsibility of oversight bodies**



Note: Based on data from 34 countries and the European Commission.

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

In considering various options for the institutional model to be adopted, the government of Chile should take a number of issues into account. First, the fact that several institutions already perform some of those functions, but without a clear mandate and capacities to be in charge of promoting regulatory quality. For instance, SEGPRES

benefits from its position at the centre of the government and its co-ordination role, DIPRES is in a powerful ministry and has high-technical expertise, and the Ministry of Economy, Development and Tourism has a constituency related to entrepreneurship that would naturally be part of an agenda for regulatory reform. But promoting regulatory quality within the State administration requires more than just a clear mandate. It is a matter of having political engagement and commitment, as well as a clear capacity to mobilise various institutions and stakeholders in a common strategy.

Second, there is a need in Chile to set up such an institution in a legal, administrative and political context in which substantial political support is required to ensure that institutions of the State administration with regulatory and supervisory powers engage in the promotion of better regulation practices and the use of various regulatory tools to improve performance. In presidential systems, the support and engagement of the executive has been essential to introduce, implement and sustain regulatory reform. Institutional arrangements using a top-down approach and a strong quality control mechanism, such as in the case of Mexico and the United States, have proven successful OECD experiences. In Chile, the introduction of new practices, procedures and tools should be accompanied by the firm commitment to achieve a cultural change in the medium and long term, which requires strong political support to the regulatory reform agenda in a sustained way.

Third, an oversight body needs to have clear responsibilities and lead an agenda of regulatory reform at the central level. Any arrangement would require allocating responsibilities to perform the main functions: co-ordination, advocacy, challenge and facilitation, which include the following tasks:

- *Co-ordination*. A regulatory oversight body has to co-ordinate the efforts for regulatory reform within the whole administration. It should be responsible for setting the standards by which regulators should operate, based on an agreed agenda for regulatory quality. It should also help avoid duplication of functions and responsibilities and ensure that co-ordination mechanisms are in place for regulators to achieve regulatory coherence.
- *Advocacy*. The oversight body has to promote regulatory reform as a continuous process to ensure the improvement of the regulation, and that the required standards are met by regulators. It should engage in disseminating good practices within the administration. It has to reach out to stakeholders outside the administration to have champions of reform also outside the administration.
- *Challenge*. The oversight body has to challenge the quality of regulations through the use of impact analysis. This means that once an institution has prepared an impact assessment, the oversight body should be able to receive it and make comments and suggestions on the quality of the analysis and the process by which the regulator produced it. A strong oversight body might have the power to reject an impact assessment that does not comply with the agreed standards and request the regulator to revise it; and,
- *Facilitation*. The oversight body has to facilitate regulatory reform initiatives among regulators through training, raising awareness and capacity building activities. The main task is to achieve a cultural change within the administration.

Those functions need to be gradually introduced, as they are not present at the moment, and expanded only when the system has been able to absorb them and implement them in a proper way. In the current context, SEGPRES seems to be in a

position to lead the regulatory reform efforts, as it is the natural co-ordinator of government policies, for coherence in government interventions and for the modernisation of the public administration. However, in order to perform this role, the stated capacities for regulatory reform should be created. Support from other institutions, such as the Ministry of Finance and the Ministry of Economy, Development and Tourism could be envisaged, as they already play functions related to regulatory reform.

Some current responsibilities and practices could be the starting point for this process. For instance, SEGPRES already conducts the legal review of main draft laws and regulations (only *reglamentos*) prepared by the executive, ensuring regulatory coherence and legality. Consolidating the legal review could be an initial step, in which clear standards, guidelines and tools are designed and introduced, improving the criteria against to which regulation is assessed. Then regulatory reform, and in particular the use of tools, such as Regulatory Impact Analysis (RIA), requires including the economic assessment of regulation, i.e. to understand if there is sound evidence that benefits outweigh costs in regulatory intervention. This capacity and approach is clearly missing at the centre of the government at present. Therefore, additional capacities are needed to take this responsibility forward. The current *ex ante* assessment efforts have to be promoted, but also upgraded to the level of making the use of RIA compulsory for the whole administration.

In addition, SEGPRES co-ordinates efforts on digital government and simplification of procedures and formalities within the State administration, while the Ministry of Economy, Development and Tourism is responsible for this topic in relation to businesses. Upgrading these policies to a comprehensive programme of administrative simplification is necessary to ensure the promotion of regulatory quality across the administration. Among the various tasks that are required to put in place a simplification programme are: reviews of the current stock of regulation, identification of more cumbersome regulations and procedures, measurement of administrative costs imposed by regulations to businesses and citizens, broader legal simplification and the use of ICT to support the simplification programme take place.

Thus, the governance challenge, the ability of the oversight body to co-ordinate the government-wide implementation of regulatory policy effectively, should be one of the main considerations in deciding which institution could play this role. The current Chilean system needs to carefully allocate clear responsibilities and introduce the legal changes and incentives that are needed to ensure that regulators start changing their regulatory practices.

An advisory body at the highest political level could help the government of Chile to promote and advocate regulatory reform. This body should involve key ministers and/or deputy ministers and a wide range of stakeholders to identify and agree on key priorities discuss progress and take any corrective actions that are needed to advance implementation of key regulatory reforms. The Ministry of Economy, Development and Tourism for example could be the Secretariat for such a platform and it could work closely with the advocacy body to ensure that legal and regulatory amendments are proposed after sound analysis of the regulatory constraints faced by the business community.

Regulatory quality is a constant process that requires advocacy and promotion at the highest levels of government. Many OECD countries have relied on advisory bodies for

regulatory reform to shape a national agenda for regulatory quality. Such institutions have contributed to putting the topic of regulatory governance and reform on the political agenda and engaging with stakeholders that otherwise would not have the appropriate channels to express their views and support for the reform process. Multi-disciplinary teams are important in these types of advisory bodies, particularly when countries are at the initial stages of the reform process and need to have a broader picture of where the key priorities lie.

Chile has a tradition of establishing presidential commissions to deal with specific topics that are of national interest and that normally provide feedback and evidence on the way forward for reforms. They help the government in the implementation of reform agendas and they contribute to legitimising and providing transparency to that process. The possibility of establishing such a commission, or a similar mechanism, to support shaping the regulatory reform agenda would be an adequate step to engage with different stakeholders and identify high-level experts that could contribute to the design and implementation of such an agenda for regulatory reform.

In particular, such an advisory body could help identify the main constraints in regulatory sectors. For instance, such a mechanism could have representation of various stakeholders, such as private sector members, who could help identify key regulatory bottlenecks that should be tackled to make markets more competitive and efficient. The Ministry of Economy, Development and Tourism, for example, could be the Secretariat for such a platform, and it could closely work with it to ensure that legal and regulatory amendments are proposed after sound analysis of the regulatory constraints faced by the business community.

It would be important to give this mechanism a permanent role instead of a limited life. This will ensure continuity in its work and give it a long-term perspective, which is essential for engaging in the medium and long-term reform process. It should also have the support of a technical secretariat that could provide analytical inputs to its work, helping members of the mechanism to adequately identify the key areas in which the government should concentrate their efforts for further improvements.

The government of Chile needs to create institutional capacities for regulatory reform. The oversight body should be tasked with the preparation of key guiding documents such as manuals checklists brochures etc. to help regulators to get acquainted with the use of regulatory management tools and procedures. Workshops courses seminars and training will also be important mechanisms to learn and share experiences among regulators. The long-term aim would be to create small dedicated units within policy-making institutions charged with the promotion of regulatory quality.

Capacities are essential for regulatory reform. Any programme whose intention is to improve the quality of regulation needs to build internal and external capacities to manage the process and make sure the implementation of the selected tools is successful and sustainable over time. As Chile is starting the discussion, it will be important to carefully define the best ways to create capacities in this field.

Any regulatory reform programme has to be supported by the development of capacities among regulators. Chile has a well-structured public administration with high technical capacities in several policy fields. Some regulatory bodies are recognised by

their expertise. Workshops, courses, seminars and training are important mechanisms to learn and to share experiences among regulators. The preparation of key guiding documents, such as manuals, checklists, brochures, etc. is another way of exchanging information and helping regulators to get acquainted with the use of tools and procedures. The oversight body has to be given the task of training and guidance in the use of regulatory tools and strategies for improving regulatory performance, in addition to creating its own capacities to play that role.

Capacities can also be built within the administration by engaging with the regulators. Some countries, like the United Kingdom, have created dedicated units within the institutions exclusively responsible for the promotion of regulatory quality and the use of specific tools. This has led to establishing a network of experts that disseminate good regulatory practices and help committing to the use of tools in a systematic way. Expanding the regulatory culture of pursuing good practices within the administration is essential to sustain reform in the future.

Institutional capacity has to be created as well with external stakeholders, such as the private sector, consumer associations, academia, etc., making with stakeholders and adopting a culture that promotes good regulatory practices is also important to support the regulatory reform agenda of the government. Stakeholders have to be key players in the use of regulatory tools, such as public consultation, RIA or simplification of administrative procedures.

Regulatory institutions in Chile need more accountable and autonomous governance arrangements in order to enforce regulatory portfolios ensure efficiency and deliver better regulatory outcomes. Chile might benefit from reviewing the governance structure of its regulatory institutions in order to make them more accountable and protect them from major political changes or government interference.

Efficient and effective regulators, with good regulatory management and governance practices, are needed to administer and enforce regulations. OECD countries have found (OECD, 2014) that there is scope to enhance governance of regulators as part of broader initiatives to improve regulatory outcomes. Appropriate governance arrangements for regulators to support improvements in regulatory practice over time, and strengthen the legitimacy of regulation. The diversity of regulatory agencies in OECD countries and around the world corresponds greatly to legal, administrative, political and economic conditions in each country. The current institutional framework in Chile does not offer the possibility for them to act at arm´s length from ministerial and executive power, as happens in other OECD countries. In Chile, as in other Latin American countries, such as Colombia, regulatory bodies are characterised by strong ministerial power within the presidential administration. Governance arrangements of regulatory bodies respond to that logic and the way in which autonomy, accountability and transparency are structured should be understood within that institutional perspective.

Several issues related to the governance of regulatory bodies could be questioned and more evidence is required to reach conclusions in that sense. For instance, even if most of the heads of such institutions are selected through a competitive selection process in Chile, the President nominates and removes them. This clearly indicates dependence on the executive power, even if the degree of autonomy given might help to prevent strong political interference. However, this situation does not allow for taking forward some

principles, as the line between policy design, regulatory decision and sanctions capacity is sometimes not clearly established.

Chile might benefit from reviewing the governance structure of the regulatory institutions, in order to make institutions more accountable and protect them from major political changes or government interference. The "deconcentration" given to regulators could benefit from more "autonomy" and even "independence", particularly in sectors where the State has interests and regulators also have to promote a fair and level playing field. Greater autonomy could be considered in cases where the institutions need to be autonomous or independent to maintain public confidence, and particularly when their decisions have significant impacts on regulated parties and there is a need to protect the agency´s impartiality.

In addition, it would be important to strengthen their governance structure by improving the way they are headed. In many OECD countries, regulatory institutions are not led by only one director or president, but by a board of directors that could ensure impartiality and have staggered terms of office, which do not always coincide with the presidential one, thereby strengthening their independence by separating the term of office of regulators from the term of office of government. The process of selecting and appointing the various members of the board is not only a task for the executive, but the legislative might also be involved, as the Parliament or Senate participates in the selection and nomination process. In order to minimise the political interference of executive or ministerial oversight, members of regulators have to comply with strict and clear guidelines and policies of conflict of interests.[11]

Accountability could also be strengthened by the inclusion of good regulatory practices and the use of regulatory tools that would contribute to improve consultation processes, transparency in decision-making, and the way they communicate with the public. The absence of such a regulatory quality policy negatively impacts on decision-making processes, reducing the possibility of making interventions more efficient and outcome-oriented. Regulatory institutions and superintendencies, being part of the same regulatory system, should be encouraged to actively participate in the promotion of principles for regulatory quality.

Superintendencies should be granted more autonomy to better enforce regulations. Governance arrangements of superintendencies could be improved by ensuring that independence from ministerial intervention is preserved while at the same time putting in place greater accountability disciplines. The OECD Best Practice Principles on the Governance of Regulators can provide important guidance in this regard.

Superintendencies in Chile play an important role in the implementation and preparation of regulation. They are considered highly specialised bodies that have good human and financial resources to undertake their tasks, which relate to regulated economic sectors and deliver social services. In most cases, superintendencies have a mandate to enforce and ensure compliance with regulation, which is established in laws that created them. They conduct these tasks mainly through sanction powers. In other cases, they also have some regulatory functions, which are shared with the corresponding ministry that heads the sector in which they operate. These regulatory functions are not always precise and in some cases the regulatory responsibilities cover innumerable matters that might overlap with other institutions or expand to powers that are not described in a detailed manner in their creation law.

Superintendencies have autonomy and legal personality, but they are linked to the ministry heading the economic sector in which they act, which reduces their autonomy (not to mention that they are not fully independent). They are considered "deconcentrated administrative bodies" (*órganos administrativos desconcentrados*) and therefore they are subject to constitutional precepts, such as legality, respect of fundamental rights, separation of powers, etc. They are not subject to the "*toma de razón*" made by the Comptroller General, by which their legal acts should be subject to scrutiny in their legality, since they publish resolutions or circulars that are considered general compulsory norms. These types of norms, however, can be appealed in courts of justice.

Superintendencies have the prerogative to construe the law, which grants them broad interpretation powers on how to apply the sectoral law that rules their economic sector or service delivered. This, in the particular case of ensuring compliance with the law, gives them extensive inspection powers that, on several occasions, have been appealed by regulated entities. Even if several court decisions have found inspection powers of superintendencies lawful and constitutional, their powers and the way they are used could be seen as excessive and unfair, posing questions on the constitutionality of their activities.

Governance arrangements of superintendencies could be improved by granting them greater autonomy and ensuring that independence from ministerial intervention is preserved. Some of the possible changes that could be promoted are the following. First, instead of having a single head of the institution (*superintendente*), a board could be established to break the direct link with ministerial guidance and dependency. Second, specific procedures should be launched to nominate and dismiss board members. Third, the selection of superintendents should be part of a transparent process, in which other institutions, such as the legislative, can participate, supporting and approving presidential nominations. Fourth, appointments of superintendents could be staggered, so there is no political dependence on the executive, periods of terms do not coincide with the presidential term and there is continuity of the implementation of regulatory delivery.

In addition, superintendencies need to be more transparent both in their procedures and in their outcomes. More information for regulated entities on how decisions are made, on what sanctions are applied and against which criteria, results of their supervisory role, information on how they conduct administrative procedures, and public consultation procedures when it comes to introduce regulation, etc. is necessary to gain trust and confidence among regulated entities. It is also essential to move from a sanction attitude to a more educational one that could reduce costs to the society and businesses in terms of compliance.

Co-ordination mechanisms between regulatory institutions have to be strengthened to improve all stages of the regulatory process. Given the centralised nature of the Chilean administration greater resources need to be applied to make ministries work together and ensure that regulatory decisions are properly discussed and enforced. Early and organised participation of superintendencies in the regulatory process particularly in the sectors where they play the exclusive role of supervision and control is essential to improve the quality of regulations. For the regulatory system as a whole inter-ministerial co-ordination would require the introduction of some incentives and sanctions.

Chile has a separation of functions between institutions participating in the regulatory process, which are not as clearly established as in other countries, such as Colombia. Generally, ministries and other types of bodies, such as commissions, are responsible for policy and regulatory formulation, while superintendencies are in charge of supervision and control of such regulation. This is not the case in every single regulated sector, as mentioned already, but in some areas the institutional set-up considers the existence of different actors responsible for specific parts of the regulatory process.

This separation of functions requires intensive co-ordination mechanisms and good communication channels between all institutions. Institutions need to talk to each other when it comes to designing, applying and monitoring regulation, as otherwise the information flow could be severely reduced and limited. Inter-ministerial co-ordination seems to be a serious constraint in Chile from the design to the implementation of regulation, as different institutional actors have to be engaged in the process without the existing formal procedures that can ensure enough discussions take place at the early stages of the regulatory process. Given the centralised nature of the Chilean administration, greater resources need to be applied to make ministries work together and ensure that regulatory decisions are properly discussed and enforced. Some OECD countries have specific institutional arrangements that support inter-ministerial co-ordination, not only through regulator meetings of the cabinet and technical discussions on specific relevant matters guided by the centre of the government (President´s office or Prime Minister´s office), but also inter-sectoral co-ordination mechanisms to ensure relevant institutions discuss and participate in the decision-making process. More importantly, there seems to be a greater need for technical co-ordination to ensure that solutions are backed by co-ordinated discussions.

For the regulatory process itself, the lack of formal tools to improve the quality of regulations, such as RIA or internal consultation, is a challenge to ensure that all institutions have the same vision, information and data to make correct decisions, avoiding overlaps and inconsistencies. Early and organised participation of superintendencies in the regulatory process, particularly in the sectors where they play the exclusive role of supervision and control, is essential for improving the quality of regulations as well. Due to their functions, superintendencies also have valuable information that should be used when preparing future interventions. Quality real-time data and information about developments must be produced in any given sector, so that early warnings can be identified and issues addressed that might call for a regulatory response.

For the regulatory system as a whole, inter-ministerial co-ordination would require incentives and sanctions to be introduced. Incentives could vary, but some OECD countries have relied on financial ones to ensure that the way the budget is spent is linked to better performance indicators of regulators. Today Chile´s budget allocation is mainly driven by performance through the "system of evaluation and management control", which could be used to set the basis for better regulatory performance. For instance, resource allocation in the budget is generally linked to government priorities, where regulatory issues (outputs and outcomes) could be included. In addition, some sanctions could also be envisaged, such as "name and shame" practices, in which low performers tend to be discouraged by making their limited performance public. The introduction of certain tools, such as RIA, could help in this regard, as those that prepare and use the tool could be shown as good practices within the administration, while low performers would be presented on the opposite side.

Notes

1. According to Article 65 of the Constitution, the motion cannot be proposed by more than ten Deputies or five Senators.
2. Article 14 of Law 18.918.
3. Article 19 of the Organic Constitutional Law 18.575.
4. Art. 6 of Law 18.993 that creates the Ministry General-Secretariat of the Presidency of the Republic.
5. Art. 2, No. 8 of the Decree with force of law No. 106 of 1960 that establishes regulations for the Budget Directorate.
6. In the Chilean administration, deconcentration is a process by which functions are delegatedby a higher institution to a lower one. This is normally regulated by law and the deconcentrated body has its own personality, competences and assets. It is however dependent on the hierarchy of the delegating institution.
7. Art. 1° of Law 10.336 that establishes the revised text of the Law on organisation and attributions of the Comptroller General of the Republic.
8. Articles 6, 7, 19, 20, 38, 76 and 93 of the Constitution of Chile establish principles of jurisdiction and competence, protecting citizens from abuse, illegal intervention or harm.
9. Constitution of Chile, Chapter VIII, articles 92-94.
10. Preliminary data from the 2014 OECD Regulatory Management Indicators survey.
11. See, for instance, the Policy on Conflict of Interest of the Independent regulator and competition authority for the UK communications industries (OFCOM), www.ofcom.org.uk/about/policies-and-guidelines/policy-on-conflicts-of-interest/.

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