

# **3**

## **Policies and institutions for regulatory governance in Brazil**

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

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## Regulatory policy in Brazil: an overview

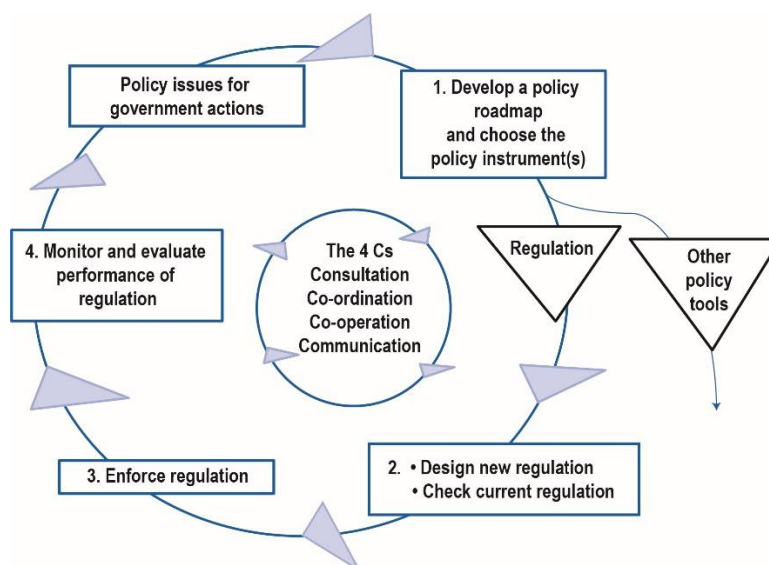
In Brazil, the better regulation agenda dates back to 2007 with the creation of the PRO-REG programme. This coincided with the 2008 OECD Review of Regulatory Reform of Brazil (OECD, 2008<sup>[11]</sup>), which provided recommendations that boosted the policy on better regulation in the country. The main objective of PRO-REG was to improve the quality of regulations issued by the federal administration. In its first phase (until 2013), the programme focused on the diagnosis of the regulatory environment and on the development of capacities for improving the normative framework in the country. After 2013, the main emphasis of the initiative was the dissemination of good regulatory practices and tools. Since 2016, better regulation initiatives have gained momentum.

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

## Legal framework for regulatory policy in Brazil

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

Figure 3.1. Regulatory policy cycle



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

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

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

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

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

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

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

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

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

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

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

##### **The case of Canada**

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

**Table 3.1. Regulatory lifecycle approach**

Key aspects

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

Source: (Government of Canada, 2018<sup>[3]</sup>).

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

Source: (Government of Canada, 2018<sup>[3]</sup>).

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

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

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

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

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

#### **Recommendation of the Council on Regulatory Policy and Governance**

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

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

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

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

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

## Key institutions for regulatory policy in Brazil

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

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

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

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

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

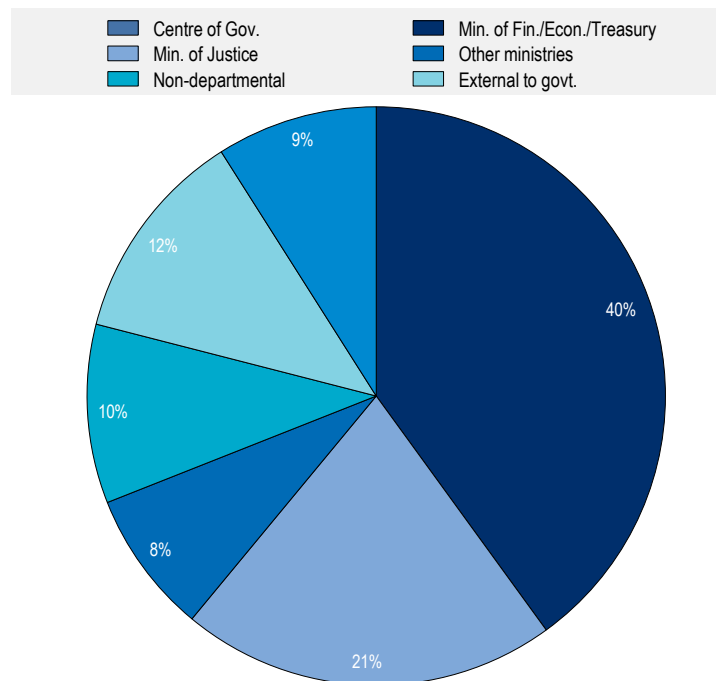
**Table 3.2. Regulatory policy management tools and entity responsible of their supervision**

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

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

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

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



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

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

### ***Core regulatory oversight functions in Brazil***

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

### ***Quality control of regulatory management tools***

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



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

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

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

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

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

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

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

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

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

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

### Box 3.5. Capacity building for RIA in Australia

#### The Office of Best Practice Regulation

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

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

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

### **Co-ordination on regulatory policy**

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

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

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

#### **Box 3.6. United Kingdom's regulatory policy ecosystem**

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

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

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

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

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

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

### ***Systematic evaluation of regulatory policy***

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

## **Regulatory policy in Brazil: Beyond the building blocks**

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

## **Forward planning**

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

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

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

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

## **Inspection and regulatory enforcement activities**

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

### Box 3.7. High-quality inspection and enforcement systems

#### OECD Regulatory Enforcement and Inspections Toolkit

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

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

Source: OECD (2018<sup>[16]</sup>), *OECD Regulatory Enforcement and Inspections Toolkit*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264303959-en>.

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

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

## Notes

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

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

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

<sup>4</sup> Economic, Brazilian Cost (*Custo Brasil*), Social, Environmental, Security and Defence, Agriculture, Mining, Education, Infrastructure, and Health.

<sup>5</sup> Agreement on Trade and Economic Cooperation between the Government of the Federative Republic of Brazil and the Government of the United States of America Related to Trade Rules and Transparency.

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