Chapter 4

The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true- impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have- or should have- a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional "command and control" regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use "soft" approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

Assessment and recommendations

Procedures for making new regulations

There has been good progress to strengthen the procedures and guidance for the development of new legislation. Very little was in place until recently. A practical guide to help law drafters is under preparation to complement the 2006 Rules of Procedures of the Council of Ministers, which have established common rules for the preparation of regulations. This has been a major achievement of CEJUR and should feed through into better quality drafting and planning for new regulations.

Recommendation 4.1. It is important that the practical guide encompasses all aspects of rule making, including legal quality, consultation and impact assessment. Putting the guide on line would facilitate its use by all law drafters.

Ex ante impact assessment of new regulations

An embryonic policy for effective ex ante impact assessment of regulations is apparent, especially with the Simplex Test. A form of impact assessment has been formally introduced, both in the rules of procedures of the executive and of the parliament. The government has also introduced the *Simplex* Test for new draft regulation, mainly to assess the administrative burdens which the regulation could impose on citizens and businesses. The *Simplex* Test is now well known within ministries, and the practice of making *ex ante* impact assessment (even if focused on administrative burdens) and considering alternatives to regulation is making its way in the administrative culture. The first benefit of the *Simplex* Test is that it has made officials in central government aware that good regulation requires preparatory work, including questioning expected consequences. There are limits to the Test, but with this recent new tool, Portugal has made a significant step towards enhancing regulatory quality and controlling regulatory production. Throughout the OECD study mission, interviewees underlined the progress.

While the initiatives so far fall short of a fully effective ex ante impact assessment policy, they are a useful starting point for strengthening the current approach. The current review of the Test following its pilot phase is an important opportunity to take stock of the following issues and how they might be best addressed in the Portuguese context:

There is a need to move from a static to a dynamic approach. The *Simplex* Test is currently a static exercise – a snapshot of regulatory proposals at an early stage in their development. Effective *ex ante* impact assessment implies a dynamic process over time. Updating assessment as the draft progresses can help authorities to assess the regulation as it develops. It will also allow a more authoritative reference to an assessment which has been done on the final version of the text, and not on an early version which will have been modified significantly.

Recommendation 4.2. The government should refine the *Simplex* Test procedure to ensure that assessments are updated as a draft progresses.

There is a need to broaden the scope of assessments, taking account of the proportionality principle. The analysis underlying the *Simplex* Test (which is essentially based on a long questionnaire) and explanatory note is very limited. The *Simplex* Test does include some elements of a broader assessment, but focuses mainly on administrative burdens, not the full-fledged broader range of policy effects and potential costs and benefits. It can be legitimate to have different levels of impact assessments, proportionate to the subjects and their complexity. The overall aim should be to get the right balance as the current version of the *Simplex* Test is both too long and complex, and at the same time offers an inadequate basis for capturing effectively the full consequences of a proposed regulation.

Recommendation 4.3. The government should put in place a system for assessing the impact of new regulation to capture the full consequences (benefits as well as costs) of draft regulations, beyond what is already done with respect to administrative burdens in the *Simplex* Test, and taking account of the need to secure a proportional approach.

Publishing results of impact assessment and using public communication are important for transparency of public choices and medium term efficiency. The results of the *Simplex* Test currently remain confidential, even within the government. The confidentiality can be justified in the early phase of launch and implementation of the new policy. It is however now necessary to set when and how the *Simplex* Test can be communicated to interested parties and parliament. One argument for not making impact assessment publicly available is that this is preparatory work aimed at providing insights to the government. This is indeed the case, but the study can be made public once choices have been made and the draft is to be published or in the case of draft laws when the draft is communicated to the parliament. Another element of transparency to be improved is public consultation. There is currently no specific link made between public consultation processes and *ex ante* impact assessment. The development of the *Simplex* Test should involve effective public consultation of stakeholders in order to identify prospective issues.

Recommendation 4.4. The government should take steps to publish impact assessments, at least when the draft is communicated to the parliament, and engage external stakeholders systematically in the impact assessment procedures, in order to support a more effective and systematic assessment of potential impacts.

The institutional support needs to be strengthened. CEJUR, via its responsibility for the *Legislar Melhor* Programme, has the formal responsibility for overseeing impact assessment. However, as a legal centre for the quality of drafting it does not have the necessary economic competences or resources for overseeing a more robust impact assessment process. Strengthening the institutional framework also requires a change of culture across the administration, notably a willingness to engage in more systematic and open exchanges on the development of new policies and associated regulations.

Recommendation 4.5. The government should consider how CEJUR can be strengthened, in order to support and if necessary challenge ministries in the development of impact assessments.

The parliament needs to be part of the process of strengthening impact assessment. The role of the parliament in the development of legislation is strong in the Portuguese system. The parliament has already taken a number of initiatives of its own to strengthen procedures for the evaluation of draft regulations, including not least the requirement for a wide ranging technical note to be attached to drafts which it will enact. The parliament also has its own rules for ensuring transparency of the law-making process through public consultation including via its website, and the collection of data from external experts (see Chapter 4). It has recently engaged a reflection on the development of a more formalised impact assessment procedure. It makes sense for parliamentary initiatives to be worked up in co-operation with the government, in relation to draft regulations (whether initiated by the government or the parliament) which are to be enacted by the parliament.

Recommendation 4.6. The government and the parliament should exchange views and ideas on the further development of impact assessment relating to draft bills that will be enacted by the parliament.

Alternatives to regulation

Steps are being taken to promote alternatives to "command and control" regulations. The *Simplex* Test for new regulations raises the issue of alternatives. The *Simplex* Programme for the reduction of administrative burdens also increasingly highlights the use of alternatives. This progress needs to be consolidated.

Recommendation 4.7. The government should consider how to further raise awareness and embed the use of alternatives in the regulatory culture, including setting up specific guidance for officials. This guidance could be a part of the practical guide mentioned above.

Background

General context

The structure of regulations and the law making process in Portugal

It is important to note that in the Portuguese system, primary laws may be enacted by the Assembly of the Republic, by the government, and by the regional legislative assemblies of the Azores and Madeira. This means, as will be seen, that procedures for assuring legal quality and impact assessment may vary according to the entity responsible for enactment. There are, very broadly speaking, two main sources of primary legislation (see Box 4.1):[1]

- Legislation that is initiated by the government or the parliament, and enacted by the parliament (laws). The number of proposals, that result in a law, which are initiated by members of parliament is in comparable terms with those initiated by the government.[2]

- Legislation that is initiated by the government, and enacted by the government (decree laws).

Box 4.1. The structure of Portuguese regulations

Primary regulations

There are three main types of primary law:

- Constitutional laws. Amendments to the constitution, which can only be enacted by the parliament.
- Other laws enacted by the parliament.
- Decree laws (*decreto-lei*) enacted by the government under the framework authority of the parliament.

Secondary regulations

Secondary regulations are issued by the government and can be classified into the following categories:

- Regulations approved by the Council of Ministers. They include *decretos regulamentares* (regulatory decrees), *decretos* (simple decrees) and *resoluções* (resolutions). They are subject to the same legal and technical quality requirements as primary regulations initiated by the executive.
- Regulations approved individually or collectively by members of government (Prime Minister, ministers, secretaries of state). They include *portarias* (regulations) and *despachos normativos* (regulatory orders).
- Regulations issued by directorate generals (heads of public services) or regulatory agencies, under the authority of their parent ministries.
- Regulations issued by local municipalities.

Regional regulations

The autonomous regions of Azores and Madeira are mandated to issue regional decree laws (approved by their parliaments) and regional regulatory decrees (approved by their governments). These are limited to matters of regional scope and address matters set out in their Political and Administrative Statutes.

The parliament is the source of the most important legislative powers, including that of amending the constitution. It is entrusted with the power to enact legislation on all matters, except for those which are the exclusive responsibility of the government. The parliament's legislative powers are based on three types of competence:

- Exclusive competence, laid down in article 164 of the constitution, reserved for matters which can only be legislated by the Assembly of the Republic.

- Partial exclusive competence, as laid down in article 165, regarding matters that can also be delegated to the government by means of a law of legislative authorisation (the government then approves a decree law, which must respect the subject, purpose, extent and duration of the authorisation. The constitution grants equal value to laws and decree laws.

- Shared competence, in all matters not covered by the previously mentioned provisions, where both the parliament and the government may enact legislation.

The government has exclusive legislative power over matters that concern its own organisation and proceedings.[3] When the parliament has enacted a law of legislative authorisation, the government may enact further legislation within the limits of the subject

area authorised by the parliament. The government may also develop the basic principles set out by parliamentary laws, so long as they are not within the exclusive competence of the parliament. Lastly, the government can legislate over all matters that are not within the exclusive competence of the parliament.

Box 4.2. The Portuguese law making process

Primary regulation (legislative acts) may be enacted by the Assembly of the Republic, by the government and by the Regional Legislative Assemblies of the Azores and Madeira. The procedures for the development of new regulations thus vary according to the body responsible for its enactment.

Enactment of primary regulation by the Assembly of the Republic (laws)

The parliament's legislative powers are based on three types of legislative competence: (i) exclusive competence, laid down in article 164 of the constitution, reserved for matters which can only be legislated by the parliament; (ii) partial exclusive competence, laid down in article 165, regarding matters that can also de delegated to the government by means of a law of legislative authorisation (the government then approves a decree law, which must respect the subject, purpose, extent and duration of the authorisation; and (iii) shared competences, in all matters not covered by the previously mentioned provisions, where both the parliament and the government may enact legislation.

The power to initiate legislation lies with members of parliament, parliamentary groups and the government, and with the parliaments of the two autonomous regions. Subject to the terms and conditions laid down by law, groups of a minimum registered electors may also initiate legislation (presently a minimum of 35 000, under Law 17/2003).

All legislative proposals submitted by members of parliament or parliamentary groups are preceded by a short justification or exposé of the grounds for the bill.

In the case of bills proposed by the government, the justification or exposé of the grounds for the bill has to include a description of the social, economic, financial and political situations to which the bill applies, information on the benefits and consequences of its application, and a digest of the current legislation on the matter in question.

Proposals are submitted to the office of the President of the Assembly, who has the power to accept the drafts or to reject them on the grounds of manifest unconstitutionality (a decision which may be subject to an appeal to the plenary of the Assembly).

Following its admission, proposals are subject to a first, preliminary, reading by the specialised committee, which then produces a first recommendation to the plenary – this intervention represents the first step in assessing the quality and impact of the proposal. Sometimes, when a bill's importance or specialist subject matter so justifies, the parliament may form an *ad hoc* committee to consider it.

A first reading by the plenary then follows: the proposal is presented by the initiative's proposer, followed by a summary of the recommendation prepared in committee and its main conclusions by the committee's rapporteur. At this stage the discussions and vote focus only on the overall objectives and scope and the general principles of each bill.

After the first vote by the plenary, the proposal is sent back to the specialised committee for a detailed debate over the impact and quality of the proposal, and vote. After a vote by the committee, the proposal is once again subject to a final vote in the plenary. Once a bill has been passed, its final text shall be the responsibility of the competent committee. The committee may not modify the content of the proposal legislation and shall restrict itself to perfecting the text and systematising the act. All modifications shall be subject to a unanimous vote. The final text shall be drafted within a default five days time limit or other time limit if set by the parliament or by the parliament's president.

Following the approval of draft legislation by the parliament (proposals become Decrees of the Assembly at this point), they are sent to the President of the Republic for promulgation. The President

may, at this moment, choose to submit the decree to the Constitutional Court for preventive review of constitutionality. In case the Constitutional Court issues a judgment of unconstitutionality, the President must, under the terms of the Portuguese constitution, veto the decree and submit it once again to the Assembly of the Republic, which then must expurgate the detected unconstitutionality before resubmitting it to the President.

If no issues of constitutionality arise, the President has the power to veto the proposal on its merits (in which case the Assembly of the Republic may still confirm it by a qualified majority) or to promulgate it. If the latter occurs, the Prime Minister must then sign the decree, which is then published in the Official Gazette (*Diário da República*).

Enactment of primary regulation by the government (decree laws)

The government has exclusive legislative power over matters that concern its own organisation and proceedings. Additionally, when the Assembly of the Republic has enacted a law of legislative authorisation the government may legislate within the limits of the subject area authorised by parliament. The government may also develop the basic principles set out by parliamentary laws, as long as they are not within the exclusive competence of the parliament. Lastly, the government can legislate over all matters that are not within the exclusive competence of the parliament.

In contrast to the parliamentary procedure, where the initiative may come from members of parliament, parliamentary groups, government, groups of citizens or regional parliaments, in the governmental legislative procedure the only source of initiatives are the members of government themselves.

All legislation enacted by the government is subject to a discussion and vote by the Council of Ministers, in terms regulated by the Rules of Procedure of the Council of Ministers (Resolution of the Council of Ministers 64/2006). Legislative proposals are accompanied by an explanatory note and the *Simplex* Test.

The explanatory note includes information on the legal framework of the matter being regulated, cost benefit analysis, gender mainstreaming assessment, consultations that have taken place. The *Simplex* Test is aimed at providing information on administrative burdens, using an adaptation of the Standard Cost Model (SCM), as well as identifying the compatibility of the proposal with e-Government tools, the degree of consolidation represented by the proposal and the use of alternatives to regulation (self-regulation and co-regulation).

Each legislative initiative must be in accordance with the detailed drafting guidelines established in the appendix to the Rules of Procedures of the Council of Ministers (currently approved by Resolution of the Council of Ministers 64/2006), and with the legislation on the identification, drafting and publication of legislation (Law 74/98).

Once a proposal has been admitted by the Secretary of State of the Presidency of the Council of Ministers' office, it is included in the weekly legal drafts list which is distributed by electronic means to the other government departments every Friday. Until the legal draft is scheduled for discussion at the meeting of secretaries of state, the other government departments may send their questions, comments or suggestions, as well as amendments proposals, to the Department that has introduced the legislative initiative.

Prior to discussion in the Council of Ministers, the proposal shall be first debated in the meeting of secretaries of state, chaired by the Minister of the Presidency of the Council of Ministers, and composed of one secretary of state representing each government department, as well as the Secretary of State of the Presidency of the Council of Ministers. Once the meeting of secretaries of state has approved the initiative, it is presented for discussion in the Council of Ministers for final approval.

The legal act (decree law) is then signed by the Prime Minister and the relevant ministers taking into account the subject matter. The President who promulgates the act may call upon the Constitutional Court to analyse the constitutionality of the proposal (in identical terms to the procedure regarding acts passed by parliament) and/or exercise his power of veto. Once promulgated by the President, the proposal is subject to the Prime Minister's signature and sent to the Official Printing Office for publication in the Official Gazette.

Development of secondary regulations

Secondary regulation (administrative regulations) may be enacted by the government and the public services under its direction and supervision, the regional legislative assemblies and the regional governments of the Azores and Madeira, local authorities and independent administrative authorities (mostly regulators).

Regarding the development of secondary regulations by the government, a distinction must be made between acts that must be approved by the Council of Ministers and those that are passed by the members of government themselves (individually or collectively).

Regarding the first category, which includes regulatory decrees (*decretos regulamentares*), simple decrees (*decretos*) and resolutions (*resoluções*), the procedure for the adoption of decree laws is fully applicable.

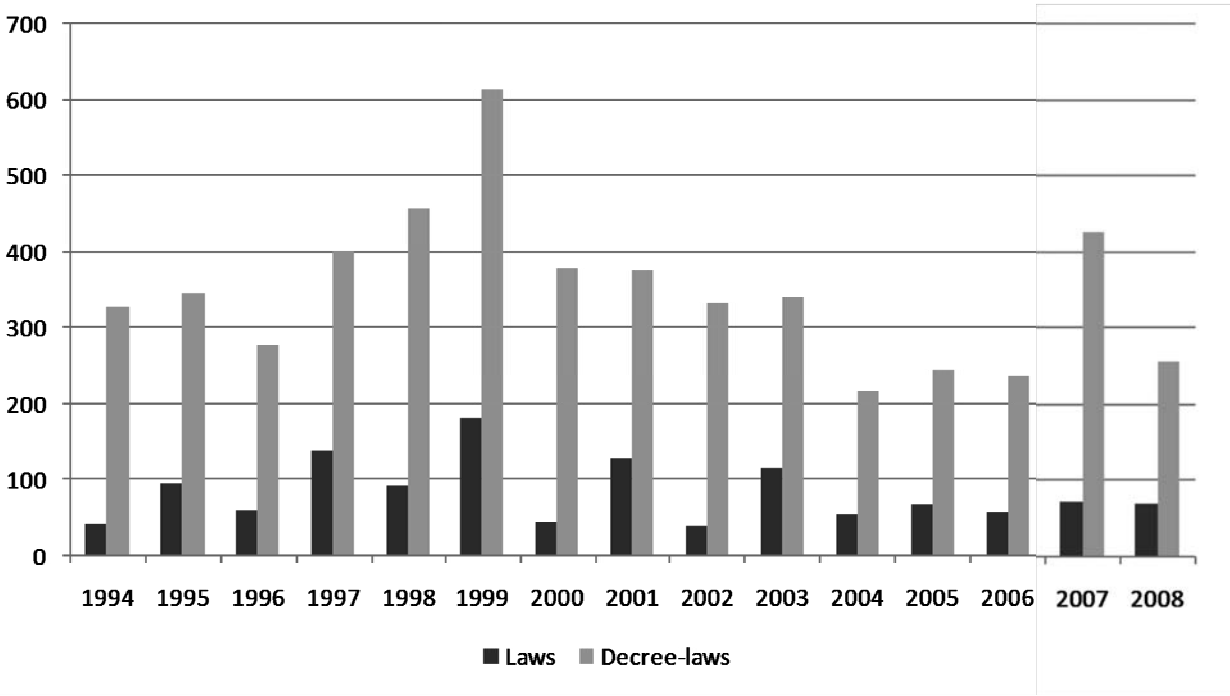
The second category of secondary regulations, passed by the members of government (individually or collectively), includes two main types of administrative regulations, regulation (*portarias*) and regulatory orders (*despachos normativos*). The procedure for each of these types varies considerably according to the subject of the regulations and to the individual ministries concerned, but the main characteristics of the regulatory procedure of the Council of Ministers are present in the few existing rules of procedure that are laid down in the Code of Administrative Procedure: a mandatory explanatory note with a summarised assessment of impact (article 116 of the Code), consultation with stakeholders (article 117), in some cases with prior publication of the draft regulation in the official gazette (Article 118), quality control by the legal services of the ministry or by the member of government's staff and drafting control prior to the publication in the Official Gazette. However the degree of implementation of all the items referred and laid down in the Code is not known, and estimates indicate some difficulty in enforcing the rules of the Code of Administrative Procedure in the overall scope of the public administration.

A third category of regulations under the auspices of the national government is made up of administrative regulations passed by public services (directorate generals or public institutes) under the dependency of individual members of government. Although the degree of innovation of these regulations is considerably inferior to that of the *portarias* and *despachos normativos*, it represents a portion of secondary regulations passed by the public administration. Procedurally, the rules of the Code of Administrative Procedure described in the previous section are applicable to these regulations as well and the difficulty in implementing them is similar.

Trends in the production of new regulations

There is no clear trend in the number of new regulations enacted annually over recent years. The number of new laws has largely depended on the political cycle. The executive is by far the largest contributor in terms of number of enacted regulations (Figure 4.1). This needs to be balanced with the fact that the laws adopted by the parliament are often framework laws addressing broad policy issues which will be fleshed out in more detailed regulations.

Figure 4.1. Annual production of laws and decree laws in Portugal, 1994-2008



Source: Government of Portugal.

Procedures for making new regulations

Forward planning

Planning for government rule-making is first laid down in the government programme at the beginning of the government's term. Furthermore, the government usually publishes an action plan for broad-scope reforms, which sets a calendar for the approval of regulations (*e.g.* Reform of the Judicial System, Reform of the Public Administration, Budgetary and Fiscal Reform associated with the control of the public deficit, the *Legislar Melhor* Programme, to name a few). The Council of Ministers usually adopts a resolution to approve these programmes, in some cases following informal consultation of some stakeholders, which is published in the Official Gazette and on the government's official website.

More detailed planning of the government's rule making activities is done on a monthly basis through the agenda setting procedure for the Council of Ministers. The objective is to co-ordinate the government's internal activity, and in this case planning is not publicised outside government. Within parliament, rule making is also planned on a monthly basis through the Parliamentary Leaders Conference, which comprises representatives from each parliamentary group, the Minister for Parliamentary Affairs, and the Bureau of the Assembly. As regards the preparation of secondary regulations, the government has set up an electronic monitoring system to notify relevant Departments of the need to issue secondary administrative regulations or measures required by enacted regulations.

Administrative procedures for preparing new regulations

The main procedural sources for the preparation of new regulations are the 2007 Rules of Procedure of the Assembly of the Republic (for primary legislation enacted by

Parliament),[4] the 2006 Rules of Procedure of the Council of Ministers (for primary legislation enacted by the government and some secondary regulations, as well as primary legislation initiated by the government and enacted by parliament),[5] the 1991 Code of Administrative Procedure (for remaining secondary regulations),[6] and the 1998 Law on the Publication, Identification and Formulation of Law.[7] A large part of these rules have been established or revised over the past two years as part of the *Legislar Melhor* programme. The government has undertaken to complement them with guidelines on consultations and on the drafting process, which are currently under preparation, to support ministries and regulators in the development of new regulations.

Regulations initiated by the government and enacted by the parliament or the government

The Rules of Procedure of the Council of Ministers and the Code of Administrative Procedures provide for common rules in the development of new regulations, but practice can vary depending on the ministries and the subject at stake. The formal procedure requires that draft regulations are accompanied by an explanatory note and the *Simplex* Test (see below). However the degree of implementation of all the items referred to and laid down in the Rules of Procedure and the Code of Administrative Procedure can vary across ministries, and there seems to be some difficulty in enforcing the rules across the whole administration.

The government is currently preparing a "practical guide for people and institutions involved in legal drafting". The guide, which will develop the content of the Rules of Procedure, is intended to be a reference tool for any person involved in the drafting of primary or secondary regulations and is meant to improve compliance through higher quality drafting. It should also provide support in ensuring the use of plain language in legal drafting, as specified in the Rules of Procedure of the Council of Ministers. The publication of this guide comes alongside increased efforts to train officials in legal drafting. The government is co-operating with Parliament in this area, as it plans to ensure harmonisation in legal drafting through workshops on best practices and use of common guidelines and standards.

The parliament's own rules of procedure (see below) are also intended to apply to government initiated legislation, and parliament expects the government to produce a technical note similar to the one it imposes on its own bills. The parliament, however, underlines that the government is not making such notes available.

Regulations initiated by the parliament and enacted by the parliament

The 2007 Rules of Procedure of the Assembly of the Republic apply. A formal requirement has been introduced for parliamentary services to prepare a "highly demanding" technical note to accompany draft bills. This note should include an analysis of compliance with requirements in formal and constitutional terms, under the Rules of Procedure, and with the law governing the form of bills. It should also include the national, EU and international framework for the issue, a list of other relevant pending Portuguese and EU initiatives, and a summarised historical outline of the issues raised. It should also describe the social, economic, financial and political background, outline the expected benefits and consequences of the regulation in terms of financial, gender and environmental impact, and expected costs of implementation. In many cases the note extends to a large document. The note is annexed to the formal opinion of the Parliamentary committee reviewing a draft bill, and accompanies the draft throughout the legislative process.

Legal quality

The Presidency of the Council of Ministers is responsible for controlling the legal quality of primary and secondary regulations initiated by the government. These are initially prepared by staff within ministries. Within the Presidency of the Council of Ministers, the Office of the Secretary of State of the Presidency analyses the text and proposes adjustments, in co-operation with the relevant ministries, before the text is sent to the Council of Ministers. Consultants of CEJUR often participate in this process, when they are requested to conduct specific analysis on the conformity of the proposals with respect to the constitution, EU law and other higher level regulations.[8] Legislation enacted by the government is subject to a discussion and vote by the Council of Ministers, in terms regulated by the Rules of Procedure of the Council of Ministers (Resolution of the Council of Ministers 64/2006). Legal quality control of secondary regulations is carried out by the legal services of the relevant ministry. The main challenge faced by ministries is to cope with the flow of new regulations generated by policy reforms in a large number of areas, while sustaining the quality of the texts.

Quality control of draft bills initiated by the parliament is mainly carried out through specialised parliamentary committees, which are in charge of examining proposed texts and making recommendations to the plenary. These committees are composed of a number of members of parliament, legal advisers to the parliamentary groups, and officials of the Assembly of the Republic. In some cases, when bills concern particularly important subjects or involves a high level of expertise, the parliament sets up an *ad hoc* committee to examine the bill. Committees may propose to the President that bills be put to public discussion.

Plain language drafting

The Rules of Procedures of the Council of Ministers include an annex, which spells out requirements concerning drafting of regulations. This provides law drafters with rules on the structure and presentation of regulations, and on formal drafting requirements. In addition to a number of style rules (such as use of abbreviations, foreign language, acronyms, etc.), the text requires "clarity of language". It recommends writing "short, clear and concise sentences", using a plain language level, and avoiding vague expressions. Furthermore, in the framework of the *Legislar Melhor* Programme, the Presidency of Council of Ministers has undertaken the preparation of a practical guide for people and institutions involved in legal drafting. The guide, which is at a very early stage of preparation, will be an online database, with interactive tools, hyperlinks, model examples of draft legislation, specific guidelines.

The role of the parliament

The parliament, as explained above, has taken a pro active stance in the measures to strengthen the process of developing effective new regulations. The Office of the President of the Assembly of the Republic has the power to accept draft bills or to reject them on the grounds of manifest unconstitutionality (a decision which may be subject to an appeal to the plenary of the Assembly). Proposals are then subject to reading by specialised parliamentary committees as seen above.

Ex ante assessment of the impact of new regulations

As the previous sections indicates, both the government and the parliament have been active in developing new and strengthened approaches to the development of regulations, including as regards *ex ante* impact assessment.

Government initiatives on ex ante impact assessment

The *Legislar Melhor* Programme includes measures to strengthen *ex ante* impact assessment in the development of regulations. The Rules of Procedure of the Council of Ministers, adopted in 2006, stipulate that draft regulations (primary or secondary), which are presented to the Council of Ministers, should be accompanied by an explanatory note and subject to an *ex ante* impact assessment. The purpose of the explanatory note is to provide complementary information on the legal draft, allowing other ministries to grasp what the draft sets out to achieve and place its effect in context. It includes information on the legal framework of the matter being regulated, cost benefit analysis, gender mainstreaming assessment, and consultations that have taken place. A key development is the establishment of the *Simplex* Test to assess expected administrative burdens of new regulations.

The *Simplex* Test

The *Simplex* Test, launched in 2006 as a pilot project and now confirmed as a standard procedure, aims to provide information on administrative burdens, using an adaptation of the Standard Cost Model (SCM), as well as identifying the compatibility of the proposal with e-Government tools, the degree of consolidation represented by the proposal and the use of alternatives to regulation (self-regulation and co-regulation). The *Simplex* Test is a particularly important new development as it is Portugal's first step towards effective *ex ante* impact assessment. The test has been partly inspired from Belgium's Kafka Test. Its purpose is to create a tool of self-discipline for law makers. The Rules of Procedure provide for an exception – which has to be justified by the relevant ministry – in case of "obvious simplicity" or urgency. The *Simplex* Test is required for all draft regulations (primary or secondary) going to the Council of Ministers, to assess the administrative burdens which the regulation would impose on citizens and businesses. The test is carried out by the responsible ministry. CEJUR is formally charged with evaluating its quality.

The *Simplex* Test mostly contains questions to assess expected administrative burdens. A large part of the test includes multiple-choice questions to describe and quantify administrative burdens, which the draft regulation would impose and to identify ways to reduce them (such as use of electronic forms). However part of the test also addresses some basic principles of Better Regulation (see Box 4.3). This structure stems from the government's use of the *Simplex* Test as a pedagogical instrument for developing a more rigorous approach to law making in the absence of any institutionalised tradition of impact assessment. The test has a section focused on the foreseen use of ICT tools and on the possibility for consolidation of existing regulation as well as opportunities to resort to alternatives to regulations. It also includes questions on the provision for future *ex post* impact assessment and compliance evaluation.

Box 4.3. Structure of the *Simplex* Test

The Portuguese government introduced the *Simplex* Test in 2006. This is a technical instrument to help law makers preventively assess the «administrative burdens» imposed by legal rules. The first part of the test was inspired by Belgium's Kafka Test. Portugal was also inspired by the system for impact assessment used in the United Kingdom as well as the European Commission's "Impact Assessment Guidelines". The preparation of the *Simplex* Test drew on the conclusions and recommendations set out in the final reports issued by the EU's High-Level Group for Legislative Quality (Mandelkern Group) as well as groups set up in Portugal (namely the Commission for Legislative Simplification, which was created by a 2001 Council of Ministers Resolution, and the Technical Committee of the Strategic Programme for the Quality and Efficiency of the Government's Rulemaking Acts, which was created by a 2003 order of the Minister of the Presidency).

The current version of the *Simplex* Test is structured in four parts:

1. Identification of administrative burdens – assesses whether or not new burdens are going to exist, what sort they are, and any alternative solutions;
2. Cost assessment – quantifies the costs those burdens are going to impose on their target groups, using a formula inspired by the Standard Cost Model;
3. Evaluation of e-Government practices – assesses the new measure in accordance with the priorities and good practices of electronic administration (dematerialising procedures and forms, sharing information); and
4. Evaluation of consolidation practices – aims to promote legislative consolidation by precluding the creation of the labyrinth that can arise from a very intense legislative process that does not take the trouble to systematise and rationalise its output.

The *Simplex* Test is still in the implementation phase, and is currently under review following the first two years of implementation.

Next steps: Revision of the *Simplex* Test

Following the two year pilot phase, the *Simplex* Test is currently under review, which will result in a revised version. The new version should lead to streamlining the test (thereby addressing criticism of its complexity) and focus it on: *i)* the quantitative measurement of burdens on citizens and firms; and *ii)* the consideration of alternatives to regulations and measures to facilitate compliance in order to reduce administrative burdens.

Implementation of the *Simplex* Test so far

There is evidence that the *Simplex* Test has quickly become widely used for the preparation of new regulations and has helped to improve the rule making process. In 2006, 90% of the 333 drafts presented to the Council of Ministers had a *Simplex* Test attached. Initial figures for 2007 indicate a higher ratio. It is difficult to measure the extent to which the performance of the test has led to tangible changes in regulations. However interviews conducted by the OECD team confirmed that the *Simplex* Test is now well known across all ministries, and has been a decisive step towards establishing a framework for Better Regulation. It has helped make officials across ministries aware that good regulations require thorough consideration of impact in the preparation phase.

Interviews also revealed some – apparently – contradictory and critical views on the *Simplex* Test. The test is often considered too complex and long (12 pages).[9] In practice this has resulted in an uneven implementation across ministries as the test can be dismissed as an over simple check (just another administrative requirement to get rid of). The test is,

however, considered by others as insufficient to provide for a proper impact assessment. Impact assessment is still a new concept in the Portuguese administration, and we heard many concerns about the cost of performing impact assessment when preparing draft laws. The issues with the current approach may be summarised thus:

- The *Simplex* Test is carried out at a very early stage in the development of regulations. Replies to the questionnaire are not updated as discussions on draft regulations progress.

- The *Simplex* Test and the explanatory note remain confidential documents, both regarding their preparation and their results. There is no explicit link with public consultation in their preparation. The Rules for Procedure of the Council of Ministers consider them as internal documents of the government. They are not made publicly available, unless otherwise decided by the Council of Ministers. The *Simplex* Test is considered to be confidential to the government: it is not sent with the draft regulation when it goes to parliament.

- There is an absence of proportionality in the approach to the Test, which is a "one size fits all", when the reality is that regulations vary in their scope and importance. For the simpler forms of regulation the *Simplex* Test may be adequate, but for the more complex forms it needs to be strengthened.

- The *Simplex* Test only applies to regulations which go to the Council of Ministers, which underlines the need, in the Portuguese context (legislation can also be both initiated and enacted directly by parliament), of ensuring that parallel efforts are made to strengthen assessments of parliamentary legislation.

Parliament initiatives on ex ante impact assessment

The technical note explained in the section on procedures is intended to accompany draft bills initiated either by the government or parliament. Although it is not an impact assessment per se, the note can be considered as an important step in the direction of an impact assessment. Over the past year, a debate has developed over the implementation of this requirement. How should drafts undergoing impact assessments be selected? Should parliament use outsourcing? To support this discussion, parliamentary officials have sent a questionnaire to other European parliaments to collect information and experiences regarding impact assessment. Parliamentary officials plan to organise a seminar in 2009 on the issue to share good practices in this field with other parliaments. The Budgetary Technical Support Unit of the parliament has also conducted a study of budgetary impact assessment.

Alternatives to regulation

The use of alternatives to regulation is not yet a usual practice in the regulatory culture of Portugal, which is dominated by "command-and-control" regulations. There are a few examples of alternatives. Self-regulation has been promoted in the field of advertisement in the television media. Experiences in co-regulation exist in the banking and securities sector where a code of conduct has been implemented by the Portuguese Association of Banks and the Securities Market Commission.

As part of the reforms to simplify administrative procedures, officials have given increased consideration to alternatives to regulation over recent years. In the presentation of the *Simplex* 2006 Programme, the government committed to develop a culture of trust

between the administration and firms and citizens, and reduce unnecessary detailed regulations and multiple controls. It argued that many activities regulated by law could become self-regulated, co-regulated, or regulated by codes of conduct or technical rules and standards. The government is also considering the development of a standard to assess risk in the elaboration of regulations.

The possibility of using alternatives to regulations has also been included in the process for making new regulations. The *Simplex* Test and the explanatory note, which are attached to draft regulations sent to the Council of Ministers, include a section on the use of alternatives to regulation. When completing the *Simplex* Test officials have to examine the possibility of alternatives to regulation, namely self-regulation, co-regulation, the approval of codes of conduct or the adoption of contractual mechanisms to enforce the policies at hand. There has been however little guidance material made available on this subject.

Notes

1. Legislation is also enacted by the autonomous regions, which is not covered in detail in this report.
2. Initiatives from the government, members of parliament and parliamentary groups can end up into a single final proposal. Statistics for the X Legislature are as follows. During the first legislative session (10 March 2005 – 14 September 2006), there was a total of 137 proposals which resulted into 88 laws (72 proposals initiated by the parliament, 63 by the government, and 2 by autonomous regions). During the second legislative session (15 September 2006 – 14 September 2007), there was a total of 95 proposals which resulted into 72 laws (38 proposals initiated by the parliament, and 57 by the government), During the third legislative session (15 September 2007 – 18 July 2008), there was a total of 57 proposals leading to 46 laws (23 proposals initiated by the parliament, and 34 by the government). These statistics are available on the website of the Assembly of the Republic, at: *www.parlamento.pt/ActividadeParlamentar/Paginas/RelatoriosEstatisticas.aspx*.
3. Meaning that the government enacts such legislation as well as initiating it, and that it is not submitted to parliament at any stage in the process. This power is relatively unusual in the OECD context.
4. *Regimento da Assembleia da República* 1/2007, published in the Official Gazette of 20 August 2007.
5. Resolution of the Council of Ministers 64/2006 of 18 May 2006.
6. Decree Law 442/91 of 15 November 1991.
7. Law 74/98 of 11 November 1998 on the Publication, Identification and Formulation of Laws, amended by Law 2/2005 of 11 November 2005, Law 26/2006 of 30 June 2006, and Law 42/2007 of 29 August 2007.
8. These are national legislative acts which cannot be derogated by regular legislation (*i.e.* laws establishing the basis of a legal regulation must be respected by the decree law that develops it).
9. One interlocutor summarised the situation in terms of the need to "simplify the *Simplex* Test".