

Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text – for example appeals are considered in Chapter 6).

Assessment and recommendations

Public consultation on regulations

Consultation processes are well established, both through formal rules and in practice, and have been evolving. Although public consultation is not required for all regulations, in practice most regulatory projects are subject to some form of consultation. There is a well-established practice of formal consultation of specific stakeholders stemming from constitutional requirements. An important transition has taken place over the last couple of years, from reliance on formal requirements to experiments with broader and more flexible forms consultation, often based on the Internet, carried out by different ministries and agencies. In particular, the implementation of the *Simplex* Programme has provided the opportunity to develop new forms of consultation with external stakeholders, which can be considered as a successful experience.

The new legal framework for consultation together with the planned Code of Good Practice are positive steps towards promoting more effective, open and user friendly consultation across all ministries, not just the best performers. The quality and scope of consultation practices appear to vary across ministries, and open consultation is not yet fully embedded. The government is now preparing a new legal framework and a Code of Good Practice, which should help to promote good practices. There is a particular need to

promote more user friendly deadlines, and provide more systematic feedback on the results of consultation, so as not to discourage those who are putting big efforts in the provision of comments. Public consultation usually takes place within short deadlines and at a late stage in the development of regulations, which does not allow stakeholders sufficient time to contribute and reflect on how they could be affected. Nor does it encourage public ownership of the policy under development. Feedback on the use made of comments also appears to be poor.

Recommendation 3.1. Portugal should ensure that the new legal framework and Code of Good Practice under development includes clear instructions to consult early in the process of developing regulations and to provide feedback.

Public communication on regulations

*Portugal has also made positive progress in enhancing access to the legislative stock and more generally to the administration, making a strong use of ICT in doing so. The *Digesto* initiative, and other initiatives to enhance transparency of the rule making process (Official Gazette on line, website of the Assembly of the Republic and individual ministries) show that Portugal has understood the need for a more transparent approach tailored to the needs of business and citizens without a legal background or support. The launch of comprehensive portals for citizens and business has also transformed access channel to public services and administrative procedures. Business might welcome increased simplicity through the adoption of common commencement dates as it can avoid the need to be on a regular lookout for new or revised regulations.*

Recommendation 3.2. As well as current initiatives under the *Legislar Melhor* Programme, consideration should be given to establishing common commencement dates for the introduction of new regulations.

Background

Public consultation on regulations

Consultation required by the constitution or by law

Public consultation during the development of new regulations in Portugal has traditionally been a somewhat formal process. It has been largely driven by legal requirements, many of them stemming from the constitution of 1976, which ensured that consultation was given a considerable role in lawmaking. The introduction of formal requirements for external consultation in the constitution constituted a breakthrough in the development of regulations in Portugal and was part of the democratisation process. The constitution defines the domains in which consultations are inescapable and institutionalised. For example, consultations are enshrined in labour market negotiations. For matters not listed in the constitution, consultation of specific stakeholders can also be mandated by specific laws.¹ In addition, the Rules of Procedure of the Council of Ministers² determine the bodies responsible for holding the consultation and the identity of stakeholders to be consulted. They also provide for the possibility of open consultations on the government's official website.³ The Rules of Procedure of the Assembly of the Republic define what type of consultation is to take place and when, which mostly deal with the phases of the parliamentary legislative procedure when consultation is to take place.

General management of public consultation

There is no overall oversight on consultation procedures, and few specific rules governing the way that the process of consultation is carried out. Each ministry is responsible for making consultations, except when the draft regulation has an impact on the autonomous regions. In this case the Presidency of Council of Ministers co-ordinates the process. This means that the people and organisations consulted may vary widely according to the ministry undertaking the process. Nevertheless, some trends can be observed:

- Open public consultations tend to take place at a rather late stage of law making, once the government has finalised the draft.
- Consultation has been mainly developed for draft primary regulations, and seems more limited when it comes to secondary regulations.
- Reporting results is up to individual ministries. In many cases results of the consultation do not give rise to specific reports and stakeholders participating in the consultation process can only deduct results from the ensuing legislation published in the Official Gazette. They may not be told about the entities consulted and the concerns raised in the consultation process. This can limit the capacity of stakeholders to provide inputs to consultation processes, and jeopardise their interest in participating in consultation. There are however notable exceptions. The government has prepared reports on consultation on the *Simplex* Programme and published them on the Internet.
- As regards deadlines, the Code of Administrative Procedures,⁴ which regulates the management of secondary regulations, provides for a minimum of 10 days when specific stakeholders are consulted in writing. The 10-day deadline seems also to prevail in case of restricted consultations on draft primary regulations. In case of large open consultation processes the consultation can take several weeks. In the case of the *Simplex* 2007 and *Simplex* 2008 the consultation period extended over 3 weeks.

Consultation of the social partners

The Portuguese government also consults social partners and civil society through the Economic and Social Council (CSE, *Conselho Económico e Social*), which was created in 1991 based on a constitutional requirement. CSE's mission is to advise the government, promote the involvement of economic and social players in the government's decision-making process, and provide a forum for dialogue between social partners and other civil society organisations. In the course of this work the CSE draws up opinions on draft legislation and economic policy programmes submitted to it by the government or on its own initiative. Members include representatives of the government, workers' and employers' organisations, the autonomous regions and municipalities, as well as representatives of civil society (such as professionals, researchers and universities, consumer and environment associations, universities).

Development of new forms of public consultation

In the last decade the Portuguese government has extended the scope of consultation to new fields and new stakeholders, thereby going beyond constitutional requirements and established representative bodies. The initiative for open consultation has relied on individual ministries, and varied across ministries. Several ministries have led open consultations, using the Internet and in some cases creating dedicated websites for

consultation. The Ministry of Environment has, for example, a well-established practice of open consultation. At this stage there is however no common framework in the government for publicising consultation notices and comments in a systematic way. The parliament has also made specific efforts to develop consultation, along with the publication of draft laws and related documents on its website.

Open consultation is also usually more established in independent regulatory agencies, which have a more recent administrative culture and work in specialised areas where stakeholders can be more easily identified. The energy regulator, ERSE, is often referred to as a best practice in this respect. ERSE has two permanent consultative bodies, the consultative council and the tariff council, which it consults when preparing secondary regulations. These bodies are made up of consumer and business representatives. Comments of the bodies are made public, as well as the consultation papers. ERSE has to answer all comments and publicise its answers. It also conducts open public consultation through its Internet website.

The elaboration of the *Simplex* Programme has led to experiences in open consultation procedures across all ministries. In 2007 the government introduced public consultation in the preparation of the programme and publicised the draft programme for comments. It also held consultation for the preparation of *Simplex 2008*.⁵ The process of consultation involved all ministries. AMA co-ordinated the process and compiled results, but comments were dispatched to relevant ministries. Overall the government received numerous comments, demonstrating support and demand for reform in that area. A significant number of measures in *Simplex 2007* and *Simplex 2008* (around a quarter according to SEMA) were identified out of these comments and suggestions (see Box 3.1).

Box 3.1. Consultation for the preparation of *Simplex 2008*

SEMA conducted a public consultation procedure for the elaboration of *Simplex 2007* and *Simplex 2008*.

Consultation on *Simplex 2008* took place over a three-week period, from December 21, 2007 to January 15, 2008. SEMA published a call for comments on its website and the government's portals. The process was fully open, with no requirement of membership in representative organisations.

The consultation was based on a document spelling out measures envisaged by each ministry to simplify administrative procedures for businesses and citizens during 2008. Participants were invited to comment on measures included in the document, but also to suggest new measures. SEMA sent the comments to the relevant ministries, which had an obligation to reply to comments and suggestions, as well as elaborate and publicise a final report with analysis of the results of the consultation. SEMA published a synthesis report on the consultation process on its website (Presidency of the Council of Ministers, 2008a).

The objective of the consultation was to inform citizens on the government's programme, receive comments and suggestions on planned initiatives, use this input to integrate new initiatives, and redraft or eliminate some measures. The underlying objective was also to promote a more open and transparent relationship between the government and citizens and businesses.

Ministries received 515 suggestions, out of which 65 were integrated in the final version of *Simplex 2008* (7 as new measures, 54 as amendments on planned measures, and 4 as amendments to existing measures). This accounts for 34% of the measures in the final *Simplex 2008*. 54 suggestions were also considered for future *Simplex* programmes. Most of the remaining suggestions were disregarded because they were not simplification measures (such as questions or claims). Others were not considered either because they were already in *Simplex 2006* or *Simplex 2007*, or because they were not feasible.

An example of new measures integrated in *Simplex* 2008 following the consultation process is the simplification of communication between businesses and central government (allowing electronic transmission of information for registration to the tax administration and social security administration, update of commercial register, ensuring valid amendment to these updates).

The Ministry of Justice, which is a leading institution in the implementation of the *Simplex* Programme, has established a specific consultation process for this. In July 2005 it set up the Commission for the Simplification of Registry and Notary Acts, also known as the De-formalisation Commission, to help it identify areas for reduction of administrative burdens and bottlenecks in the judicial system. This Commission is now considered a major player in the administrative simplification initiative. It comprises 28 organisations, which cover a broad scope of stakeholders (ministries and regulatory agencies, business associations, regional chambers of commerce, professional representatives, trade unions, consumers). Over the past three years the De-formalisation Commission has met on a monthly basis and suggested initiatives to simplify administrative procedures to the Ministry of Justice. This experience could be extended to other fields as SEMA plans to set up regular panels to consult on the *Simplex* Programme.

Current initiatives to promote public consultation

The *Legislar Melhor* Programme takes account of the increasing importance of the involvement of stakeholders and the public in the policy-making process, and foresees the development of new procedures of open consultation, using the Internet. It provides for the elaboration of a new legal framework on public consultation in the development of new regulations, and the production of a code of practice on regulations. Both the new legal framework and the code of practice are currently under preparation.

The objective of the planned new legal framework is to promote the participation of stakeholders in the development of regulations by giving more certainty in the consultation process and making it more fluid and easy to administer. The government plans to establish formal open or direct consultation procedures for organisations and individuals, either public or private, in the elaboration of laws without prejudicing informal consultations. For examples, it will define rules regarding relevant information to be added to the project when launching consultation, publication of draft regulations, deadlines, format of responses.

The planned Code of Good Practice is intended to be a reference tool for both civil servants and stakeholders, and will not have a binding character. It sets out to create an integrated approach to consultation, encouraging officials to publicise the process and launch it as soon as possible to maximise the benefits it can bring. The Code is to provide guidelines on both formal and informal consultation, considering the latter as a complement to formal consultations to be used from the start of the making process of regulations and throughout the consultation process. Through the Code, the government also aims at better managing relationships with stakeholders and increasing the transparency of the consultation process, by encouraging officials to provide reports on the consultation and feedbacks on how comments are taken into account.

Public communication on regulations

Publication of regulations

As required by article 119 of the constitution, all regulatory acts are published in the Official Gazette (*Diário da República*). This includes laws enacted by the Assembly of

Republic and the Legislative assemblies of the autonomous regions, executive laws and regulatory orders and other decrees issued by the government, rules of procedures of the Assembly of the Republic, the Council of State and the regional assemblies, as well as decisions of the superior administrative court. Unless otherwise specified in the text, the new regulations enter into force five days after publication in the Official Gazette.⁶ In addition to this formal requirement, in some cases, individual ministries send information directly to affected parties in the framework of regular institutional contacts. There is no systematic approach to such communication of information, and practice can consequently vary across ministries.

In 2006 the government undertook to reform the Official Gazette, as part of the *Legislar Melhor* Programme. The online version of the Official Gazette, which had been developed since the 1990s, was given full-legal value in July 2006. As of 1 January 2007, paper was eliminated both for the publication of the journal itself and for the transmission of official texts for publication in the Official Gazette. The online version of the Official Gazette is free of charge, with search, storage and printing capabilities.⁷ The transition from paper to electronic publication first required to give full-binding legal force to the online version of the Official Gazette.⁸ The government estimated that transition to electronic transmission would save EUR 4 million related to publication and distribution costs.

Central registry of regulations

The launch of the electronic version of the Official Gazette has been closely associated with the development of an online central registry of regulations. The government created a comprehensive legal database, “*Digesto*”, at the end of 1992 to facilitate access to existing regulations. The *Digesto* offers several degrees and types of information.⁹ The online version of the *Digesto* database was integrated in the Official Gazette’s website in September 2006. Consultation of this database is free of charge. A subscription service is available for more advanced research capabilities and information. The Presidency of the Council of Ministers plans to create further dynamic hyperlinks to other legal databases (such as those of the Assembly of the Republic, Constitutional Court, and independent administrative bodies) and to set up a specific database for the consolidation of legislation.

Online registries of regulations also exist at the level of ministries and specialised bodies, such as independent regulators or other administrative bodies. In some cases, these databases are extremely comprehensive. For example, the registry of the Environment Ministry includes EU primary and secondary regulations, as well as jurisprudence and administrative decisions.¹⁰ Other examples include the databases of the Ministry of Justice, which were recently renewed with a thematic organisation,¹¹ the Ministry of Agriculture,¹² the Ministry of Economy and Innovation,¹³ and the Ministry of Education.¹⁴ Regulatory agencies also publicise information on regulations in their specific area of activity on their websites.

Portals

As part of its programme for e-Government, Portugal has launched comprehensive portals for citizens and business, which aim at facilitating relationships with the administration and providing a privileged access channel to public services and administrative procedures. The Citizens Portal and the Business Portal provide a single point of access to a wide range of 100 public organisations and entities, and gives the possibility to find information and obtain a number of certificates. The range of online services for citizens should be expanded with the development of the Citizens Card. The Card is an electronic identification document, which can be used for electronic

authentication when accessing public electronic services. The Citizens Portal and the Business Portal are managed by AMA.

Notes

1. Some individual laws provide for mandatory consultation of specific stakeholders when the planned regulation affect them, such as the National Association of Municipal Authorities, environmental organisations, public professional associations such as the Portuguese Bar Association, the Portuguese Chamber of Solicitors, or the Portuguese Association of Medical Doctors.
2. Established by Resolution of the Council of Ministers 64/2006.
3. www.portugal.gov.pt.
4. Decree Law 442/91 of 15 November 1991, “Code of Administrative Procedures”.
5. In the initial stage of the programme in 2006, the government did not hold formal consultation although some simplification measures, which required adoption of a new law, were submitted to consultation.
6. Law 74/98 of 11 November 1998, relating to the publication, identification and form 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.
7. www.dre.pt.
8. Decree Law 116-C/2006 of 16 June 2006 established that the Official Gazette will be published by electronic means and made available as a public service with free and universal access. Legal value of the electronic edition of the Official Gazette resulted from Law 26/2006 of 30 June 2006, which amended Law 74/98 relative to the publication, identification and formulation of laws.
9. The *Digesto* includes detailed information on the legal and regulatory acts published in the official gazette (through the PCMLEX database), information on collective labour agreements (REGTRAB database, compiled by the Ministry of Labour), administrative and budgetary opinions of the Directorate-General for Public Administration (DGAP OPINIO) and the Directorate-General of the Budget (DGO DOUT).
10. SIDDAMB Integrated System for Environmental Information at: www.siddamb.apambiente.pt.
11. www.dgpj.mj.pt/sections/leis-da-justica.
12. portal.min-agricultura.pt/portal/page/portal/MADRP/PT/servicos/guias_uteis/legislaca.
13. www.legislacao.min-economia.pt.
14. www.min-edu.pt/np3/133.