



# Stakeholders' Role in Regulatory Outcome Evaluation: A Closer Look at Brazil's RIA Guidelines

*By Denis Guimaraes<sup>1</sup>*  
*(AGPR)*



Copyright © 2019

Competition Policy International, Inc. For more information visit [CompetitionPolicyInternational.com](http://CompetitionPolicyInternational.com)

October, 2019

## **Introduction: RIA and ROE - *ex ante* and *ex post* Tools**

As noted in our previous article, in 2018 the Brazilian government published its first Regulatory Impact Analysis (“RIA”) Guidelines (the “Guidelines”) for rulemakers.<sup>2</sup>

In addition to RIA, whose main topics of interest have already been explored, it should be noted that the Guidelines also deal with another topic relevant to the regulatory and antitrust community, namely regulatory outcome evaluation (“ROE”).

ROE is “the systematic evaluation process of an intervention to determine whether its objectives have been achieved.” Thus, unlike RIA, which is a form of *ex ante* policy analysis, ROE is *ex post*. A key consequence of this difference is that ROE should not be confused with RIA inspection or monitoring processes.<sup>3</sup>

Our preceding article included a list of topics to be addressed in an RIA report. After comparing the available alternatives and justifying the measure chosen to address a regulatory problem, the RIA report must present a strategy for implementing that measure, including how any inspection and monitoring should work.

Basically, the inspection strategy consists of defining how the practices of those subject to a regulation will be followed, so that the regulator can check whether their obligations are being met. The monitoring strategy, in turn, consists of defining indicators (quantitative or qualitative) that can be efficiently used (in terms of time and cost) by the authorities to keep track of the impact of the chosen regulatory measure after its implementation.<sup>4</sup>

Therefore, the *ex ante* RIA report sets out inspection and monitoring strategies as a foundation for ROE, an *ex post* evaluation of the actual “performance of the adopted or amended regulation, considering the achievement of desired objectives and outcomes, as well as other impacts observed on the market and society, resulting from its implementation.”<sup>5</sup>

## **Cases and Timing**

After distinguishing RIA from ROE, we will now discuss, with respect to ROE: (i) the main kind of cases in which it should be conducted; (ii) its timing; (iii) the government’s interest in stakeholder engagement; and (iv) its “principle-based approach,” focused on “reducing administrative burdens or promoting competition.”<sup>6</sup>

The Guidelines state that ROE should be conducted at least in two kinds of cases: (a) RIAs of Level II, i.e. when the complexity of the case or an expected significant regulatory impact demand the formulation of a complete RIA report; and (b) when RIA has been dismissed by the regulatory authorities due to reasons of urgency.

The rules regarding timing for conducting an ROE are: (a) when a regulation is analyzed through a RIA report of Level II, the regulation itself should set the ROE deadline; (b) when a regulation is enacted without RIA due to reasons of urgency, the ROE should be conducted within two years of such enactment.

## **Stakeholder Engagement**

Such periods of time (case-by-case or two years) between the enactment of a regulation and the conclusion of an ROE may seem quite long to stakeholders that have invested in providing input to the RIA. However, in fact, stakeholders do not simply need to wait for the authority conducting the ROE to see the actual impact of the regulation on their activities – and then wait again to see whether the authority has learnt from the ROE and will use this knowledge to feed into the next RIA to amend the regulation or create a new one. The section of the Guidelines on ROE also makes clear the importance of stakeholder engagement, both in the main text and in the references.

The Guidelines refer (among several other important publications<sup>7</sup>) to the UK's Magenta Book<sup>8</sup> to summarize three main kinds of ROEs that can be conducted: (i) the process evaluation; (ii) the impact evaluation; and (iii) the economic evaluation. In the first two cases, the importance of stakeholder engagement is very clear. The Magenta Book states that “[p]rocess evaluations will often include the collection of qualitative and quantitative data from different stakeholders, using, for example, group interviews, one to one interviews and surveys.”<sup>9</sup> Regarding impact evaluation, the Book advocates that the ROE look for changes “across different individuals, stakeholders, sections of society and so on, and [to] compare [them] with what was anticipated”<sup>10</sup> in the RIA.

Thus, it should be noted that stakeholder engagement should not be seen as a static action taking place during the RIA and/or ROE, but should preferably be a continuous activity of market observation and interaction with the regulatory authorities.<sup>11</sup>

## **Institutional Changes, ROE/RIA, and Competition Advocacy**

Indeed, the Brazilian Office for Public Policies (“SAG”) had been pointing out the importance of stakeholder engagement not only in different Guidelines they had been coordinating up to the end of the last federal administration in December 2018, but also in events that have included the participation of the private sector.

The new federal administration that took office in January 2019 has promoted some institutional changes, but the work of promoting best practices among Brazilian regulatory entities carried out under the last administration should continue. This will occur either through the SAG, and/or through the reformed Ministry of the Economy (resulting from the merger between the four previous Ministries of Finance, Planning, Industry and International Trade, and Labor), where former SAG members have been allocated to the Executive-Secretariat (right below the Minister of the Economy), and have already started to develop further work on a regulatory improvement agenda.

It can be anticipated that one of the focuses of that agenda will be working jointly with the reshaped secretariats for Competition Advocacy and Competitiveness (“SEAE”) and Evaluation, Planning, Energy, and Lottery (“SECAP”). These secretariats must (among other duties) (i) promote competition in regulated sectors; and (ii) analyze the regulatory impact of public policies. While (ii) should include both RIA and ROE, it must be recalled that they include the analysis of possible antitrust issues that may be part of the regulatory problem.<sup>12</sup> In other words, the Regulatory Improvement Agenda acknowledges the already

quoted OECD principle-based approach that promoting competition should be, in general and when the market features permit, a more efficient way of (not) regulating the markets, leaving specific regulatory measures (and imposing administrative burdens) to the cases in which they are indispensable, and according to RIA and ROE, where applicable.

## Conclusion

In conclusion, these are the main ROE features we wanted to address. We expect that the private sector will engage in further developing this know-how jointly with the Brazilian authorities.

---

<sup>1</sup> AGPR, Sao Paulo: [www.agpr.consulting](http://www.agpr.consulting).

<sup>2</sup> RIA guidelines and RIA guidebook for Regulatory Impact Analysis / Office for Public Policies – OPP [et al.]. Brasília: Presidency of the Republic of Brazil, 2018 (“OPP 2018”). The Guidelines have since been officially published in English.

<sup>3</sup> OPP 2018, p. 83.

<sup>4</sup> OPP 2018, p. 88.

<sup>5</sup> OPP 2018, p. 11.

<sup>6</sup> Regulatory Policy Outlook 2015 / OECD. Paris: OECD Publishing, 2015, p. 120.

<sup>7</sup> “What We Heard Report on Regulatory Reviews and modernization stakeholder consultations / Treasury Board of Canada Secretariat”, April 2, 2019; “OECD Best Practice Principles on Stakeholder Engagement in Regulatory Policy (Draft for Public Consultations),” OECD Directorate for Public Governance, 2017; “Stakeholder engagement examples by stage in the policy cycle / OECD Pilot Database on Stakeholder Engagement in Regulatory Policy,” OECD Directorate for Public Governance, available at <http://www.oecd.org/gov/regulatory-policy/pilot-database-on-stakeholder-engagement-practices.htm>. Guidelines on Stakeholder Consultation / European Commission Better Regulation Guidelines Chapter VII, 2015.

<sup>8</sup> The Magenta Book: Guidance for Evaluation. HM Treasury, London (2011).

<sup>9</sup> *Id.*, at p. 18.

<sup>10</sup> *Id.* at p.19; see also Avaliação de políticas públicas: guia prático de análise ex post, volume 2 / Casa Civil da Presidência da República [et al.]. Brasília: Casa Civil da Presidência da República, 2018, p. 14.

<sup>11</sup> Avaliação de políticas públicas: guia prático de análise ex ante, volume 1 / Casa Civil da Presidência da República, Instituto de Pesquisa Econômica Aplicada. Brasília: Ipea, 2018, p. 160.

<sup>12</sup> Institucionalização e Prática da Análise de Impacto Regulatório no Brasil / IBRAC – Comitê de Regulação do Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional. São Paulo: versão preliminar, 24 de junho de 2019, pp. 224-236.