

Good Government and Regulatory Quality Yearbook 2022, published in 2023

Executive summary¹

The Yearbook of Good Governance and Regulatory Quality is an annual publication of the Fundación Democracia y Gobierno Local, with the collaboration of the Federation of Municipalities of Catalonia and the support of the National Market and Competition Commission (Comisión Nacional del Mercado y de la Competencia), which analyses each year, with the participation of renowned experts from different disciplines (Law, Economics, Public Management, Political Science...), the main issues related to good government and good administration.

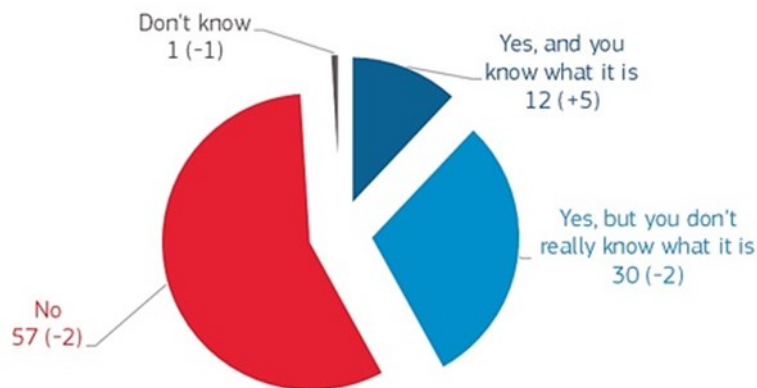
The Yearbook is prepared with the prior holding of a Living Lab, that is, a methodology to innovate in social challenges in a collaborative way, to share information and experiences. This method provides more creative contexts, with horizontality and empathy; more representative, as the participating community (which goes beyond the purely academic) is articulated according to the challenge to be solved and seeks experimentation and co-creation.

The Yearbook addresses topics such as the quality of regulation, the protection of whistleblowers, the impact of behavioural sciences on public management, conflicts of interest, codes of ethics or conduct, artificial intelligence, corruption prevention, the evaluation of public policies and the role of lobbies, among others. These issues are dealt with from an academic and practical management perspective, with analysis of relevant national and international documents and the development of models of management instruments that may be useful, with a special focus on the local level.

As is well known, in addition to Spanish legal norms and jurisprudence, the right to good administration is recognised in the Charter of Fundamental Rights of the European Union - approved in 2000 and incorporated into the Treaty on European Union (Treaty of Lisbon) of 13 December 2007, ratified by Instrument of 26 December 2008, in its article 6 - and is very frequently applied by the European Court of Human Rights. The European Commission published in 2019 a Eurobarometer survey on citizens' awareness of the Charter. According to the survey, although the situation has improved slightly since 2012, only 42% of respondents had heard of the Charter and only 12% were aware of its content.

¹ Translated from the Spanish version using DeepL.

QB1 Have you ever heard of the Charter of Fundamental Rights of the EU?
(% - EU)



(March 2019 - June 2012)

The results also show that six out of ten respondents would like to have more information about the Charter and where to turn if their rights are violated.

Finally, the importance of good governance has recently been highlighted again by the 2023 study on good governance in European states, promoted by the Swedish government.

In this context, the Yearbook of Good Government and Regulatory Quality 2022, published in 2023 and directed by Professors Ponce (UB) and Villoria (URJC) and coordinated by Prof. Capdeferro (UB), is largely, but not exclusively, devoted to experimentation in the development of public policies and legal standards, with special attention to the local world, because it is a subject that has not yet been explored in Spain and needs reflection for its growing application in practice.

The Yearbook includes, firstly, various doctrinal studies by recognised specialists. Thus, it includes Professor Descalzo's transversal analysis of good government in general, its relationship with the concepts of good governance and administration and its specific application to the local sphere.

Professor Domènech contributes with a study on the definition of experiments in relation specifically to legal regulations, describing the most outstanding types and explaining the usefulness of experimental regulations, as well as their legal limits, including in the final part an appendix with some of the experiments that Spanish law provides for.

The second study is by Mr Menéndez-Morán, referring to the energy transition and regulatory sandboxes. The Yearbook continues with an article by Estelle Chambas, PhD in Public Law and lecturer at the University of Paris Panthéon-Assas, who presents a very interesting overview of experimentation, law and public policy in France, which may be of great interest as an inspiration for future developments in Spain, given the cultural, social and legal proximity of the neighbouring country.

The section of doctrinal studies closes with the contribution of Mr López and Mr Contreras, who provide a vision of the subject from the relevant perspective of the National Market and Competition Commission (Comisión Nacional del Mercado y de la Competencia).

Two texts are included in the "practices" section. The first article is by Professor Bru Laín and is entitled "Evidence-based policy and basic income experiments: the case of Barcelona". The second is by David Agrait and is entitled "Test beds and regulatory experimentation in the local sphere: the city of Madrid. Considerations for the drafting and processing of sandbox municipal ordinances".

The Yearbook closes with the usual sections on good administration and good government in general of documents of interest, selected and annotated international and national jurisprudence and selected and annotated relevant bibliography.

In view of the previous Living Lab held and the analyses included in this 2022 Yearbook, the following conclusions can be highlighted here (a total of 13) which, in turn, imply proposals and recommendations for regulators and public managers (a total of 11):

Conclusions:

1. It is perfectly possible from a legal and methodological point of view to carry out experiments in Spain today, as elements of empirical methodology, in the social sciences, including Law, just as has always been done in the natural sciences, including regulatory or normative experiments, as has been done for years in other countries in our environment and as has recently begun to be done in Spain with the figure of the sandboxes.
2. It can be argued that the legal possibility of carrying out experiments is backed by the Spanish Constitution (SC) itself, which in its articles 31.2 and 103.1 establishes the principles of good administration of efficiency, economy and effectiveness in public activity.
3. Experimentation in the development of public policies and legal standards is linked to the issue of public policy evaluation, currently regulated at the state level in Law 27/2022, of 20 December, on the institutionalisation of public policy evaluation in the General State Administration.
4. Article 2 of this law states that a public policy is "the set of actions aimed at satisfying the general interest or solving a public problem or need, in any of its forms of deployment in rules, strategies, plans, programmes, measures, or any other equivalent denomination". Likewise, its Additional Clause number 5 states that "The State Agency for the Evaluation of Public Policies will collaborate with the competent ministries in the elaboration of the ex ante evaluation

methodologies referring to the impact forecast of the Regulatory Impact Analysis Report".

On the other hand, Article 10 indicates the different types of evaluations depending on the time phase of the public policy, while Article 26 states that "Each ministry shall ensure that an ex ante and an ex post evaluation is carried out for those public policies within its sphere of competence that have a special repercussion on the budget or are of great relevance due to their expected impact on the social or economic sphere. The criteria for determining the relevance of public policies in terms of the budget, the economy and their social impact shall be approved by regulation" and that "3. The purpose of the ex ante evaluations in paragraph 1 shall be to analyse, with a cross-cutting and participatory approach, the public value of the actions under analysis. For this purpose, aspects such as the impact on gender equality, on the demographic challenge, on the digital transformation, on the green transition, or on the repercussions in the field of children, social inclusion or administrative rationality, among others, are relevant".

5. There are different types of experiments that can be carried out to evaluate public policies, including those included in legal norms. In the regulatory field, the European Union's better regulation toolbox of 2021 has included regulatory sandboxes as an emerging method to be used.

6. Although experimentation, at least in the letter of the law, is not unknown among us before the sandbox era, initiatives have been scarce compared to other countries around us, also at the local level.

7. In the formal legal sphere, it is worth mentioning the regulatory pilot tests that have been contemplated in Catalan legislation since 1989, and are now included in the Catalan law on transparency, access to information and good governance, which states that "The public administration may promote pilot tests prior to the approval of new regulatory measures to verify their suitability. These pilot tests must be implemented through agreements signed with the representative entities of the affected sectors, with the effects and conditions determined by the agreement", art. 64.4 of Law 19/2014, of 29 December, on transparency, access to public information and good governance).

8. The experimental instrument that has been standing out for some years now are the sandboxes. In recent years, these regulatory testbeds have been developed in the financial (Fintech) and energy sectors in Spain, following in the footsteps of other countries.

9. In the financial sector, sandboxes have been pioneeringly regulated in Spain by Law 7/2020, of 13 November, for the digital transformation of the financial system. In the preamble to this law, the regulatory sandbox is presented in the following terms: "Title II is the central part of the Law, as it regulates the controlled testing space, i.e., with its own characteristics, what is known in Europe and internationally as the regulatory sandbox. It is a set of provisions that cover the controlled and limited performance of tests within a project that may provide a technology-based financial innovation applicable to the financial system,

defined as one that may give rise to new business models, applications, processes or products with an impact on the financial markets, the provision of all types of financial and complementary services or the performance of public functions in the financial sphere".

10. Following the path of the financial sector, Spain also has a sandbox in the energy sector. The development of the energy sandbox is included in component 8 of the State Plan for Recovery, Transformation and Resilience, just and inclusive energy transition 16062021-Componente8.pdf (lamoncloa.gob.es) (C8 R4 sandboxes or regulatory testbeds).

11. In this area, Royal Decree-Law 23/2020, of 23 June, approving measures in the field of energy and other areas for economic reactivation, in its art. 4. 11 introduced an additional twenty-third provision in Law 24/2013, of 26 December, on the Electricity Sector, according to which "regulatory test beds may be established in which pilot projects are developed in order to facilitate research and innovation in the field of the electricity sector", covered by calls from the Government in which the particularities and, where appropriate, certain exemptions from the corresponding electricity sector regulations may be established. Finally, the legislatively envisaged model has been developed through Royal Decree 568/2022, of 11 July, which establishes the general framework of the regulatory test bed for the promotion of research and innovation in the electricity sector:

"In this way, by virtue of the empowerment that the twenty-third additional provision of Law 24/2013, of 26 December, grants to the Government, this Royal Decree will contribute to the transformation of the electricity sector by facilitating the intended innovative process by protecting, in a controlled, delimited and supervised manner by the competent Administration, the performance of tests for the development of pilot projects with high innovative potential that will ultimately benefit the consumer, the electricity sector and society in general."

Article 23 refers precisely to regulatory learning:

"Article 23. Regulatory learning.

The information extracted from the development of the pilot projects, as well as from the report foreseen in article 19, shall be taken into account in the procedure for drawing up rules with the status of law and regulations, in accordance with the provisions of article 26.1 of Law 50/1997, of 27 November, of the Government".

12. Experimentation in the field of public policy and regulation has several benefits. It allows regulation to accompany social innovations in a timely manner, avoiding delays; it helps to detect secondary or collateral effects and, in the case of negative effects, to prevent them; it opens up the possibility for public authorities and civil society to obtain valuable information; it legitimises decisions; it facilitates change and innovation procedures by persuading possible reluctant agents; it helps to confront contexts of great complexity and uncertainty; and, in short, it connects with the improvement of public management and citizens' right

to good administration, giving way to regulatory learning processes and feedback between different sectors.

In these test spaces, projects are detected that are related to the absence of regulation, uncertainty and legal insecurity, which is useful for identifying legal gaps. On the other hand, although there is no legal obligation to review regulation, these tests help a lot to understand the sector and provide expertise to regulators, and are also positive for private companies that participate and see their projects endorsed as interesting by them.

13. Likewise, the conduct of experiments in the field of public policy and regulation is subject to various legal limits.

These include the need to respect the principle of legality and the reservation of the law if it affects rights subject to the law; the principle of equality, which is not violated if the different treatment given to different situations is justified and the existence of a general interest underlies it; the principle of proportionality, which requires the least possible restriction of the rights of those affected by experimentation and that its benefits of all kinds outweigh its costs or the right and the principle of good administration, which requires that experimentation be carried out by the authorities with due diligence and due care.

Recommendations:

1. The starting point in Spain, especially at the local level, is the very low quality of regulations and their uncontrolled proliferation, with practically no evaluation of their effectiveness, as we have had occasion to expose in other Yearbooks. The use of experimentation is recommended as an element to stem the tide of regulation and as an instrument for regulatory improvement, making it possible to ascertain by means of experimental evaluation whether or not a law, regulation, plan or municipal ordinance has fulfilled the objectives set when it was implemented experimentally, and in the latter case to proceed to its modification or to the cessation of its effects.

2. The use of experimentation will not prosper in Spain without adequate training of public managers in charge of developing public policies and approving regulations. Likewise, our legal-administrative culture and the legal limits that must be respected with experimentation, so unknown in our country, recommend the approval of a general, simple and flexible legal framework that enshrines its possibility and its limits.

3. As regards the training of public managers in experimentation, this is once again a crucial issue, which we have already discussed in general terms in the first Yearbook on regulatory quality. Without the right know-how, the text of regulations can remain a dead letter. Work on this issue is therefore crucial. The Catalan example, where regulatory foresight, admittedly scarce, has existed since 1989, is interesting in this respect.

4. As far as this general, simple and flexible legal framework is concerned, it can already be deduced from the sectoral regulations adopted in the financial and energy sectors, as well as from the application experiences that are being developed. In our opinion, the State's competences in the field of the bases of the legal system and of the Public Administrations and common administrative procedure (art. 149.1.18 SC) would allow for the approval of the same, which should be included in the 2015 Common Procedure Act, among the articles 129 et seq. dedicated to the exercise of regulatory power and the drafting of bills. In its regulation, the guidelines established by the Spanish Constitutional Court (TC) should be borne in mind, especially in its decision 55/2018, on the possibilities and limits of state regulation.

5. Likewise, these State competences with respect to the local sphere would recommend amending the Basic Local Law of 1985, especially Art. 49 referring to the procedure for drafting local regulations, which has not been modified since 1985. This amendment could establish the general guidelines for experimentation in the local sphere.

6. Together with this possible basic state regulation, induced by the already existing sectorial regulations, it would be advisable for the Regions and local bodies, within the scope of their powers of self-organisation, development of the state bases of the legal system and of the common administrative procedure, to incorporate into their legal systems those specificities they consider necessary.

7. In any case, although we postulate that such regulation should exist in order to provide legal certainty to public authorities and market operators, we insist that it should be minimal and flexible.

8. Among the issues that such a legal regulation with the status of law to be approved should include key issues that avoid a blank referral, constitutionally prohibited, to future municipal regulations or ordinances and to the specific test protocols that may be approved.

9. Thus, a regulation should be made on the possibility of experimentation, the necessary respect for the principle of equality, proportionality and good administration, in the terms set out above.

10. In this sense, the French experience, with all the nuances derived from the fact that it is a much more centralised state than Spain, seems to us to be of extraordinary interest, given that it has spent decades tackling both the construction of a legal system of experimentation and its application in practice with hundreds of experiments, in areas as relevant as the legislation controlling the price of housing rents, for example. In this field, avoiding automatic transplants, cross-fertilisation between legal systems can be an unquestionable source of inspiration and the study of French evaluations can be a bank of experiences to avoid the mistakes made there and to move forward by learning from their successes.

11. Beyond the necessary regulation of the general framework for experimentation, it is recommended that its practice be increased, especially at

the local level, and that progress be made towards quality experimentation. To achieve this, it is necessary to guarantee as far as possible the internal validity of the experiments carried out, i.e. the extent to which they make it possible to exclude explanations for the observed results other than the experimental treatment, and to claim that the experiment is the cause of the observed changes. This requires the establishment of a control, counterfactual or control system, an object on which the experimental modification does not take place. In the case of experiments involving human subjects, the samples should be composed of individuals with similar characteristics, of adequate size, with random assignment of participants to the experimental and control groups, and with adequate control measures to avoid affecting internal validity.