

Chapter 5

Compliance and enforcement of regulation in Peru

This chapter discusses the approaches applied by the Government of Peru to advance regulatory enforcement and compliance. The institutional arrangements and practices across enforcement agencies vary widely, yet some common trends are found. There is no general policy on regulatory compliance and enforcement across government agencies. Peru should include the policy of inspections and enforcement of regulations as an integral part of its regulatory policy, and should include general guidelines relating to horizontal objectives such as ethical behaviour, organisation and planning of inspections, and transparency towards the subjects of inspections.

Regulation is a key tool for achieving the social, economic and environmental policy objectives of governments. Governments have a broad range of regulatory schemes reflecting the complex and diverse needs of their citizens, communities and economy. Ensuring effective compliance with rules and regulations is an important factor in creating a well-functioning society and trust in government. If not properly enforced, regulations cannot effectively achieve the goals intended by the governments. Regulatory enforcement is therefore a major element in safeguarding health and safety, protecting the environment, securing stable state revenues and delivering other essential public goals. Inspections are the most visible and important among regulatory enforcement activities.

Legal and institutional framework

This section describes the framework that underpins the work done by Peruvian authorities to advance regulatory enforcement and compliance. In particular, it focuses on the general legal and institutional settings within the executive, as well as the general organisation of enforcement and inspection functions (see Box 5.1).

Box 5.1. Definition of some key terms in enforcement and inspections

In this paper, “enforcement” will be taken in its broad meaning, covering all activities of state structures (or structures delegated by the state) aimed at promoting compliance and reaching regulations’ outcomes – e.g. lowering risks to safety, health and the environment, ensuring the achievement of some public goods including state revenue collection, safeguarding certain legally recognised rights, ensuring transparent functioning of markets etc. These activities may include: information, guidance and prevention; data collection and analysis; inspections; enforcement actions in the narrower sense, i.e. warnings, improvement notices, fines, prosecutions etc. To distinguish the two meanings of enforcement, “regulatory enforcement” will refer to the broad understanding, and “enforcement actions” to the narrower sense.

“Inspections” will be understood as any type of visit or check conducted by authorised officials on products or business premises, activities, documents etc.

From the perspective of this paper, “regulatory enforcement agencies”, “inspecting agencies” or “inspectorates” are all essentially synonymous (as in practice there is fluidity in the way they are called in various countries). The preferred wording adopted generally in the paper will be “regulatory enforcement agencies”.

Source: OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264208117-en>.

Whilst adoption and communication of a law sets the framework for achieving social, economic and environmental policy objectives, effective implementation, compliance and enforcement are essential for actually meeting these objectives. Compliance with regulations is in the first instance the responsibility of citizens and businesses. However, the delivery of regulatory outcomes cannot be effective without a proper enforcement of regulations. Regulatory enforcement is therefore a major element in safeguarding health and safety, protecting the environment, securing stable state revenues and delivering other essential public goals. Inspections are one of the most important ways to enforce regulations and to ensure regulatory compliance (OECD, 2014).

In Peru, according to Article 23 of the Organic Law of the Executive Branch (LOPE), line ministries have among their duties the obligation to “comply with and enforce the regulatory framework related to their field of competence, exerting the appropriate

sanctioning authority”. Therefore, ministries, such as the Ministry of Communications and Transport, and the Ministry of Health, have enforcement and inspection units to perform these tasks.¹

Apart from line ministries other public entities that include Economic Regulators such as OSIPTEL (telecommunications) or OSINERGMIN (energy); Specialised Technical Organisations, such as OEFA; and some *Superintendencias* such as the Supervisory Agency for Labour Oversight (SUNAFIL) or the Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS), also have oversight, control, and enforcement functions. The legal status, degree of independence, budget and other characteristics vary across these entities, just as their enforcement practices do (see Section *Tools and practices*). A clear example is the SBS, which is a constitutionally autonomous institution, organised under public law, which purpose is to protect the interests of the public in the fields of the financial, insurance private pensions systems, and it has the same public regime as the Central Bank of Peru.

Regional and local governments also have enforcement and inspection responsibilities. This chapter does not, however, assess the enforcement functions of regional and local governments which are analysed in Chapter 6.

For the purpose of this report, the classification in Table 5.1 of inspectorates assessed in this report is made to describe and assess the practices of enforcement and inspection in Peru. There are other many other inspectorates in Peru, but for practical matters only a sample of them were included in this report. Care was taken to have in the sample a wide breadth of institutional design and practices.

Amid this diverse set of institutions with enforcement functions, in Peru there is no general policy on regulatory compliance and enforcement across government agencies. In general each institution has its own legal framework and its own set of enforcement practices developed over the years.

Table 5.1. **Classification of inspectorates assessed as part of this report**

Inspectorates within line ministries	Inspectorate agencies with a larger degree of independence
General Directorate of Environmental Health and Food Safety, Ministry of Health	Agency for Environmental Assessment and Enforcement (OEFA)
General Directorate of Medicines, Inputs and Drugs, Ministry of Health	National Institute for the Defence of Free Competition and Protection of Intellectual Property (INDECOPI)
	National Superintendence of Customs and Tax Administration (SUNAT)
	National Superintendence of Sanitation Services (SUNASS)
	Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS) ¹
Several inspectorates inside the Ministry of Transport	Supervisory Agency for Investment in Public Transport Infrastructure (OSITRAN)
	Supervisory Agency for Persons, Cargo and Goods Road Transport (SUTRAN)
	Supervisory Agency for Private Investment in Telecommunications (OSIPTEL)

1. Constitutionally autonomous body.

For all inspectorates except for the SBS, besides Article 23 of LOPE, the only common legal foundation is the General Administrative Procedure Law (LPAG) that regulates the way in which public administration entities interact with the public at large, through the establishment of uniform standards and principles governing all administrative acts including enforcement and inspection decisions. For instance, the LPAG sets general rules as to how to undertake administrative procedures, the use of silent is consent or non-consent rule, appeal mechanisms with regard to administrative decisions, and the determination of sanctions. This framework, however, is too general given that it is not aimed specifically at enforcement and inspection procedures.

Therefore, it may be said that there are as many regulatory frameworks for undertaking enforcement/inspection activities in Peru as there are enforcement agencies. Each of them has its own legal foundation and internal rules on how to implement them.

Line ministries have a legal foundation in their sectoral regulations that gives them the specific legal basis to undertake enforcement/inspection activities. For example, the Civil Aviation Law in the Ministry of Communications and Transport, or the General Health Law and the Law on Pharmaceutical Products, Medical Devices and Sanitary Products in the Ministry of Health.

In terms of organisation, inspectorates within line ministries normally have a rank of directorate (or lower) and are under the umbrella of a general directorate. For instance, within the General Directorate for Environmental Health in the Ministry of Health, there is the Directorate for Inspection on Environmental Health and Animal Safety. In some ministries such as the Ministry of Communications and Transport, some areas, e.g. railways, may have enforcement/inspection functions whereas for other areas these functions are shared with or exercised by more independent regulators such as the transport regulator (SUTRAN) and the Infrastructure regulator (OSITRAN). In any case, each inspectorate has its own rules to undertake inspections which are sometimes formalised through manuals, guidelines or internal regulations, but whose application is not necessarily supervised.

Independent enforcement agencies (other than economic regulators) also have their own legal framework. Most of these agencies were created by law in different sectors or policy areas such as the environment (OEFA) or the financial sector (SBS), and under different institutional arrangements. For instance, in the case of the SBS its framework is set in the Law 26702 Text of General Law of the Financial and Insurance Systems and Organic Law of the Superintendence of Banking and Insurance. Given their technical nature, they are able to better concentrate on their regulatory and/or enforcement functions. Accordingly, new enforcement agencies tend to have a different vision of enforcement activities and inspections, which is to some extent more in line with international practices (see Section *Tools and practices* below).

Capacities to undertake inspections

This section reviews the existing capacities of Peruvian authorities to undertake inspections and ensuring effective compliance with regulations. The focus of the analysis is on the availability of human and material resources.

Enforcement activities not only create burdens for businesses and citizens but also involve administrative costs for public agencies. The challenge for governments is to develop and apply enforcement strategies that achieve the best possible outcomes by attaining the highest possible levels of compliance, while keeping the costs and burden as

low as possible (OECD, 2014). Keeping government costs as low as possible, however, requires effective and efficient enforcement and inspection agencies, which in turn requires assuring a minimum of human and material resources and capacities for implementing inspections.

Human resources

Creating and keeping a high quality professional base of enforcement agents is essential to ensure effective inspections and enforcement, and regulatory compliance. Governments should therefore adopt human resources management plans for regulatory enforcement agencies and personnel. These plans should include training and development of competencies, performance and evaluation guidelines, and compensation schemes, among other elements.

By law, public entities in Peru must have human resources management plans; however, they tend to be comprehensive and thus are not focused on the enforcement/inspections functions. For instance, the Ministry of Health has an Annual Personnel Development Plan which integrates the needs and requirements of all the different areas of the ministry, including those with enforcement functions. Nevertheless, given that budgets are limited it is not clear how these needs and requirements are weighted overall. Moreover, these plans tend to focus mostly on training needs and don't take into account other elements such as compensation schemes that normally have an impact on career development. As a result, enforcement agencies, in particular line ministries do not have human resources management plans tailored to the needs (and future needs) of their enforcement and inspections duties.

Independent enforcement agencies tend to suffer less from these difficulties. In the one hand because they are not under the direct authority of a line ministry, which gives them more leeway to tailor their human resources management plans; and on the other because for some of them such as OEFA or SUNAFIL their main mandate is regulatory enforcement, and therefore tend to adopt specific practices. For example, average monthly salaries tend to be higher for inspection officers in independent agencies (PEN 6 300 in OEFA, and PEN 8 000 in SBS) compared to those in line ministries (PEN 4 500 in the Ministry of Health).² Independent agencies also make use of third party inspectors (outsourcing to the private sector) whereas this is not the case in line ministries.

Another problem with inspectorates within line ministries is their lack of co-operation and exchange of experiences, in particular in the terms of human resources management. For instance, there are five different inspectorates in the Ministry of Health and there is almost no communication, co-ordination, or exchange of information or experiences among them.³ This illustrates how inspection policies and practices are not only sector specific or institution specific, as there might be as many policies and practices as there are inspectorates.

Material/financial resources

Undertaking inspections and enforcement activities carries a cost for public authorities, not only in terms of staff, training and premises, but also in the form of paperwork, equipment, information management, etc. So it is important that enforcement agencies do have the necessary resources to perform their task.

In Peru, enforcement agencies are normally endowed with funds from the government budget; however, these funds are often deemed to be insufficient to carry out their enforcement/inspection responsibilities. Here again, this is less of a problem for independent enforcement agencies who usually have a second source of funds through the contribution for regulation (*Aporte por Regulación*), which are charges from regulated subjects.

The following comparison illustrates the differences in the general budgets allocated to enforcement/inspection activities. Whereas four inspectorates (out of five) of the Ministry of Health reported a combined budget of almost PEN 4 million (PEN 3 928 850) in 2015, the OEFA reported over PEN 100 million (PEN 101 338 060) and the SBS had more than PEN 150 million (PEN 150 406 320) for the same period.⁴

As in other fields, the use of Information and Communication Technologies (ICTs) has also become a very useful tool for enforcement/inspection processes. Efficient processes must have data collection mechanisms and systems to ensure data quality and its continuous updating. For example, these systems can help monitoring compliance of those under the jurisdiction of the enforcement/inspection agency compiling information on where they are and the history of the results of past visits. Systems of information management may help as well to integrate online databases and mechanisms for gathering information in a systematic and timely manner; integrate databases that allow the selection of individuals/businesses to be controlled, scheduling inspection visits, the allocation of resources based on risk criteria, monitoring of results, assessment of inspectors performance, etc.; and provide public information on the risk of the sector and the company.

In Peru, many enforcement agencies still work without automated information management systems, in particular those within line ministries. Although some of them are in the process of developing or acquiring such systems, it is often the case that they rely on more traditional methods or on systems useful for some tasks but not fit for a comprehensive management of the enforcement/inspection process. Independent enforcement agencies are better equipped, although it is difficult to assess the operation of their systems.

Capacities for implementing inspections

Effective enforcement requires in addition to having the technical and inspection skills, the necessary staff to control the subjects to the regulation and improve compliance. One recurrent complaint is that inspectorates don't have enough personnel to undertake all the necessary inspections they have to. Although this is in part due to the fact that they often lack targeting strategies and selection criteria such as risk based inspections, it is also true that they are often understaffed, in particular within line ministries.

There is of course no an absolute number of staff required for undertaking inspections, as this is a function of the regulation itself, the universe of subjects to the regulation, enforcement approach, inspection strategies, risks involved, amongst other elements. However, authorities must make sure that inspectorates have the necessary staff to implement inspections and ensure compliance. One way to do this is through a system of indicators (information management system) allowing to assess performance of inspectors and of inspection units in terms of inputs, outputs, and outcomes.

Some inspectorates also made reference to the poor performance of regional and local level inspections. For instance, the Direction for Drug Enforcement from the Ministry of Health mentioned that in some regions sanctions had never been imposed or that drug warehouses from the public sector had never been controlled or inspected, all this due to the lack of capacities.

In this sense, independent enforcement agencies such as OEFA, SUNAFIL, in addition to their more focused vision of enforcement/inspections, they are in general better endowed and equipped, and as a result have better capacities to undertake inspections.

Tools and practices

This section reviews the tools and practices used by enforcement agencies in Peru. In particular it focuses on inspection procedures, the general approach to inspections, complaint and co-ordination mechanisms, and performance evaluation.

As mentioned in *Section Legal and institutional framework* the lack of cross-sectoral policies on enforcement and regulatory compliance in Peru has given rise to an array of enforcement agencies, governance arrangements and inspection practices. Moreover, each enforcement agency has its own set of tools and enforcement practices.

Inspection process

Enforcement/inspection activities may normally be seen as a process which is undertaken according to a series of steps. In general terms, these steps are:

1. the selection of the individuals or businesses that will be inspected;
2. carrying out the inspection *in situ*;
3. imposition of sanctions in case of non-compliance.

The effectiveness and efficiency of regulatory enforcement depends on the tools and procedures used during each step of the inspection process. Enforcement agencies in Peru follow formally or informally these steps; however, the tools and practices used therein do not in general abide by principles on which effective and efficient regulatory enforcement and inspections should be based (see Box 5.2).

Selection of the individuals or businesses that will be inspected

One of the most important decisions of enforcement agencies is to select individuals that will be monitored through an inspection. Given that governments have limited resources, they cannot inspect each and every individual under supervision, and therefore need decision criteria to select those individuals that will be inspected. In recent years one of the most important reforms to enforcement and inspection systems has been to help make these decisions based on an analysis of the risks involved, i.e. risk-based inspections (see Principle 3 in Box 5.2).

Risk-based inspections, however, are not the rule among enforcement agencies in Peru, in particular within line ministries. Although most inspectorates develop annual work plans that guide their inspection activities, these work plans do not necessarily integrate risk analysis. They sometimes use criteria such as inspecting a percentage, say 10%, of the files or individuals on their records or, depending on the size of the universe of individuals or businesses to be monitored, they inspect them all at least once or twice a year; finally, they also carry out inspections when there is a complaint from a third party.

Box 5.2. International best practice principles: improving regulatory enforcement and inspections

Based on expert papers, an extensive review of practices in OECD and non-OECD countries and on research conducted on this topic over the past three decades, the OECD presented some key principles on which effective and efficient regulatory enforcement and inspections should be based in pursuit of the best compliance outcomes and highest regulatory quality. The principles address the design of the policies, institutions and tools for promoting effective compliance – and the process of reforming inspection services to achieve results.

1. **Evidence-based enforcement.** Regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly.
2. **Selectivity.** Promoting compliance and enforcing rules should be left to market forces, private sector and civil society actions wherever possible: inspections and enforcement cannot be everywhere and address everything, and there are many other ways to achieve regulatory objectives.
3. **Risk focus and proportionality.** Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aiming at reducing the actual risk posed by infractions.
4. **Responsive regulation.** Enforcement should be based on “responsive regulation” principles: inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses.
5. **Long term vision.** Governments should adopt policies and institutional mechanisms on regulatory enforcement and inspections with clear objectives and a long-term road-map.
6. **Co-ordination and consolidation.** Inspection functions should be co-ordinated and, where needed, consolidated: less duplication and overlaps will ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness.
7. **Transparent governance.** Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results oriented management. Execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded.
8. **Information integration.** Information and communication technologies should be used to maximise risk-focus, co-ordination and information-sharing – as well as optimal use of resources.
9. **Clear and fair process.** Governments should ensure clarity of rules and process for enforcement and inspections: coherent legislation to organise inspections and enforcement needs to be adopted and published, and clearly articulate rights and obligations of officials and of businesses.
10. **Compliance promotion.** Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists.
11. **Professionalism.** Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency: this requires substantial training focusing not only on technical but also on generic inspection skills, and official guidelines for inspectors to help ensure consistency and fairness.

Source: OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264208117-en>.

There are exceptions to this rule, for instance the Inspectorate for Food Hygiene normally focuses its work on controlling foods with a higher level of risk and consumption according to the season of the year; they also inspect food processing plants depending on the risk that the product represents for human consumption. Likewise, other inspectorates, in particular independent enforcement agencies increasingly incorporate risk analysis. For instance, OEFA uses a combined approach whereby they focus on activities or stages of the productive process that can potentially harm more the environment and on those environment components (soil, air, water, etc.) that are more at risk due to the activities of the firms supervised. Another example is SBS, which has also adopted oversight criteria based on risks and international standards.

It is important to note that the development of inspection systems based on risk in a growing number of countries has been made possible not only by the adoption of a more rational approach, but also through the use of ICTs, as well as information management systems, which in many enforcement agencies in Peru is a pending task (see Principle 8).

Carrying out the inspection in situ

In many emerging economies an important part of regulatory costs stems from the sometimes excessive and uncontrolled discretion that creates opportunities for inspectors during a visit, which can lead them to abuse their mandate and power and even be tempted to engage in illegal or corrupt acts. It is therefore important that procedures, rights and obligations to carry out an inspection are clear and known to those being inspected. To accomplish this, the authority must publish the detailed procedures in a simple and accessible manner, covering every step of the inspection process. The procedures must be supported by precise legal requirements, and in particular detail the processes that inspectors must follow. Similarly, and beyond the guidance for inspectors, the authority must also establish procedures that allow filing a complaint or appeal against excessive discretion by inspectors during the visit (see Principle 9).

In Peru it is commonplace across enforcement agencies to have some sort of directives or guidelines for inspections *in situ*, which may take an array of different forms such as rules, protocols, instructions, technical manuals, guidelines, amongst others. However, a number of key problems with these directives have been identified.

One major problem with these directives is that they are often informal (i.e. they have not been officially approved by the institution, for instance they have not been published in the official gazette *El Peruano*) which makes their application questionable, optional and discretionary. Even when they have been formally approved, it is sometimes difficult for the public to get hold of them and thereby to be aware of how inspections will occur and their rights and obligations during the inspection process.⁵

Another important problem is that these directives are too general and therefore do not cover the whole inspection process or they do it without the necessary detail, creating important loopholes and opportunities for misbehaviour by inspectors. For instance, the use of inspection checklists with the legal requirements to be inspected is not a common practice. Moreover, no evidence was found that in these rules and guidelines a prominent place is given to practices and tools designed to prevent corruption, regulatory capture and the promotion of transparency.

Another area of concern is that these directives rarely take into account the perspective of those being inspected and thus do not make explicit their rights or set out complaint mechanisms which can be used in case of need. Finally, although an inspection

report is normally prepared during the inspection, a copy of the report is not necessarily given to the subject of the inspection at the end of the visit.⁶

Imposition of administrative sanctions in case of non-compliance

Sanctions are meant to act as a deterrent to non-compliance; however, they might become a serious problem if they are set by the inspector or enforcement agency without previously communicating the criteria for such penalties.

In Peru, sanctions are normally prescribed by law, so the role of enforcement agencies is to determine the level of sanctions or penalties according to the infraction committed and following a sanctioning procedure, which is regulated by the LGPA or by other sectoral laws. Having a framework procedure for the imposition of sanctions is a welcome development as it sets a minimum “due process” standard; however, it is not enough to understand the criteria or the factors taken into account when imposing a sanction.

Guidelines or manuals setting out in a transparent manner how they determine the sanctions they impose is yet a practice not adopted by all enforcement agencies.⁷ For instance, under the sanctioning procedure, before the imposition of sanctions, the authority has the obligation to hear and receive a defence statement from the defendants, but it is not clear how this statement is taken into account and how it influences the level of the sanction. In the same line, with limited cases such as in the SBS, no evidence was found of the use of “compliance guidelines” which are public documents setting out the criteria used to establish control strategies, penalties and sanctions that may go until the closure of the establishment or criminal penalties for wilful and repeat offenders.

Approach to inspections

As the foregoing suggests, enforcement and inspections in Peru are not in general risk-focused (see Principle 3), based on information integration (see Principle 8) or on “responsive regulation” principles (see Principle 4). They rather rely on the more traditional approach of checking all legal requirements without regard to the risks involved, the specific circumstances, or the historic compliance record of those being monitored.

This reflects the general fact that inspections in Peru are not seen as an essential part of regulatory policy and therefore as a key tool to achieve broader policy and regulatory outcomes. Very often compliance and enforcement are just seen as part of the day-to-day work and not as a key element to attain higher policy objectives. This in turn is reflected in a narrow institutional vision that gives precedence to outputs, e.g. number of inspected businesses, number of sanctions, over policy outcomes such as lives saved, extent of competition or reduction in toxic emissions. As a result, the focus of enforcement strategies and inspection activities is not in line with modern approaches (see Box 5.3).

As mentioned before, little evidence was found of the use of “compliance guidelines” which are public documents whose rationale is helping individuals/businesses to progressively comply with the norm, but also allowing for proportional coercive solutions to non-compliance. Compliance levels with regulations are not in general monitored either.

In the same line, with limited cases such as in the SBS, enforcement agencies take little or no effort to communicate with the (future and potential controlled) subjects of regulations about how to meet regulatory requirements, or to share information on how to comply with the rules (see Principle 10).

Although this holds true in general, there is an important distinction on the approach taken by line ministries and independent enforcement agencies that tend to have a different vision of enforcement activities, supported by more transparent governance (see Principle 7).

Box 5.3. Risk-based inspections

A system of risk-based inspections aims to reduce and minimise routine inspections that often produce lower results in terms of accidents prevention, abuses or flagrant breach of regulations. Basically, a risk-based inspection system focuses on individuals/facilities/enterprises producing or dealing with processes and products of greater risk. Such a system is more a process than an organisational arrangement, which requires continuous improvement based on intelligence (in the sense of better exploiting information flows) and information management geared to a better understanding of the levels of performance or results.

The guiding principles of a risk-based inspection are:

- Regulators and the regulatory system as a whole should use broadly risk assessment / analysis to concentrate resources on the areas that need it most.
- Companies and individuals who constantly violate regulations must be identified quickly and face proportionate and meaningful sanctions.

The objective of the system is to assist the enforcement authority to select the most appropriate and cost-effective controls and implement verification tasks by optimizing the efforts and costs for the inspector and for the subjects under control. Some key features and advantages are:

- It focuses on the points of the import, production or distribution chain that pose the greatest risk
- Maximises consumer safeguards and security
- Promotes a preventive rather than a reactive approach to controls by individuals
- Provides more time and resources for inspection visits that have been prioritised
- Optimises the efficiency of controls and the use of inspection resources
- Minimises costs to individuals through improved sampling and concentration in products or processes of high risk by reducing unnecessary costs of inspection and testing
- May significantly reduce inspection costs by focusing efforts on the riskiest cases
- Promotes the development of risk-based regulations that are more transparent than many prescribed regulations, and encourages mutual recognition and equivalence between trading partners

Source: OECD (2010), *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264082939-en>; OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264208117-en>.

Complaint mechanisms and appeals

The possibility to appeal against regulatory decisions, including those related with enforcement and inspection activities, is a fundamental aspect of the rule of law. An effective and efficient enforcement system must provide readily accessible and transparent means for filing claims and complaints from citizens and businesses under control.

As in many other countries, in Peru the judiciary plays an important role in reviewing administrative acts and decisions through clear and predictable – although very often lengthy – procedures. At the administrative level, Chapter II, Title III of the LGPA defines different types of administrative appeal mechanisms and sets out the appeal process which is applicable to all administrative acts. As such, citizens and businesses have recourse to these mechanisms to appeal enforcement decisions taken by regulatory and enforcement agencies.

Beyond these mechanisms, administrative complaints can also be filed according to the LGPA. These complaints have to be filed before the immediate superior of the authority responsible for the procedure, who must rule within three days. This complaint mechanism is a good starting point. However, in practice, it does not seem to be an easily accessible and transparent means to deter potential unwanted practices from inspectors and public officials in charge of enforcement activities. No evidence was found, for instance, of information being disseminated through flyers or leaflets, clarifying the possibilities, mechanisms and rights to file complaints.

To ensure the credibility and impartiality in the resolution of these complaints it is important that they may be anonymous in order to avoid reprisals from public officials. Also, an independent unit of the enforcement/inspection agency should be responsible for resolving them under certain circumstances, for example in the case of serious professional misconduct, except if the case is referred to the judiciary.

In order to improve this complaint mechanism, enforcement agencies in Peru should also review the range of options, such as setting a dedicated hotline to receive complaints from the public, and designating a public official to assess the complaints received and making recommendations to improve the system overall so as to help reducing corruption and making the process more transparent.

Co-ordination

Given the institutional context in Peru, where multiple inspectorates work across the public administration, Co-ordination among them is essential in order to assure a minimum of effectiveness and efficiency in enforcement and inspection activities. Co-ordination allows avoiding duplications and overlaps, reduces inspections costs for the government and burdens for citizens and businesses, and makes enforcement functions more consistent across the government (see Principle 6).

Sometimes inter-agency agreements are not enough to improve inspections performance. In such cases, governments must analyse the benefits of reforming existing structures – through mergers and consolidation of inspectorates or setting up co-ordination bodies – to achieve the expected results in terms of effectiveness and efficiency.

As pointed out in the section on *Legal and institutional framework*, there are diverse sets of institutions with enforcement functions in Peru, including at regional and local levels. At the same time, in terms of organisation, there is no institutional model or arrangement that has been applied consistently across different inspection bodies, which most of the time were created on an *ad hoc* basis. As a result, co-ordination among inspectorates differs greatly from one sector to another. However, overall co-ordination is practically non-existent.

It is common that line ministries consider inspections not only as sector specific, but as area/unit specific, given that it is not rare that different administrative units in charge of inspections coexist inside a ministry without any co-ordination, exchange of information or sharing of experiences among them. For instance, this is the case in the Ministry of Health of Peru where five inspectorates, including the Sanitary Control and Surveillance Directorate, coexist and do not have co-ordination mechanisms even for those core activities that inspections have in common.⁸ These inspectorates have no formal obligation to co-ordinate with other enforcement/inspection bodies, and when they do it, they co-ordinate on an *ad hoc* basis depending on the specific circumstances under consideration.

At another level, the central government has delegated responsibilities and surveillance functions to subnational governments. These delegated functions are exercised by regional or local governments who have their own inspection bodies. For instance, workplace inspections for medium and large enterprises are responsibility of central government – through SUNAFIL –, leaving to subnational governments the responsibility to inspect smaller business (less than 10 employees).

Finally, as in other areas analysed so far, new enforcement agencies tend to have in general a better record in terms of co-ordination. This is due not only to their capacities (see Section *Capacities for implementing inspections*) and their more modern approach to inspections of these agencies, but most importantly to their institutional arrangement itself. For instance, by law OEFA has direct enforcement functions in environmental matters in five sectors, i.e. mining, energy, fishery, large scale agriculture and industry, and will over time have competence in other sectors as well. However, wherever OEFA has no direct enforcement functions it has the competence to supervise other public entities that hold mandates of environmental enforcement either at the national, regional or local levels. This is part of its leading role in the National System of Environmental Evaluation and Enforcement.

Transparency and performance assessments

Transparency is a cornerstone of an efficient inspection system. Enforcement and inspection activities may be undermined if inspectors do not observe basic administrative procedures and therefore violate procedural rights. This happens when the enforcement authority or the inspector do not clarify the reasons for their actions or inform individuals of their rights. To address these problems, enforcement agencies may issue:

- Formal step-by-step manuals and guidelines to conduct inspections *in situ* (see sub-section *Carrying out the inspection in situ* above)
- Codes of conduct, integrity and ethical behaviour for inspectors and enforcement personnel (OEFA is the only enforcement agency in Peru that was found to have a code of ethics)

- Establish complaint and appeal mechanisms (see the sub-section *Complaint mechanisms and appeals* above)

Finally, it is important that enforcement agencies create permanent monitoring and performance assessments. These monitoring mechanisms can be assimilated to accountability efforts by the authority, and where the subjects of regulation can play an important role.

In Peru, this type of assessments are exceptional and when they are carried out they tend to measure performance in terms of inputs (budgetary, human, and material resources) and outputs (number of inspection visits, complaints, fines, etc.) instead of concentrating on measuring results (outcomes).

Assessment

There is no general policy on regulatory compliance and enforcement across government agencies. Moreover inspections are not seen as an essential part of regulatory policy

There is an important distinction on the approach taken by line ministries and independent agencies with regard to inspections—which is a key component to improve compliance and enforcement. Line ministries consider not only inspections as sector specific, but it is common that inside a Ministry, different administrative units in charge of inspections coexist without any co-ordination, exchange of information or experiences among them.

There is little evidence that regulatory institutions conduct inspections based on risk assessment. In general, inspection activity has to be differentiated between economic and social regulators and ministry agencies. For instance, there are regulators which inspect all regulated entities and others inspect a sample of them.

A notion in which inspections are regarded as a key tool to achieve policy and regulatory outcomes has not been developed across ministries and agencies. Very often compliance and enforcement are just seen as part of the day-to-day work, despite the fact that they represent a key element in regulatory policy to attain higher policy objectives. This in turn can be reflected in a narrow vision that gives precedence to outputs over policy outcomes.

Step-by-step manuals and guidelines to conduct inspections to achieve policy objectives with transparency and integrity is not a standard practice in Peruvian institutions

Each institution conducts inspections according to its own regulatory framework, but in several cases inspections processes are not further developed in written guidelines. Additionally, no evidence was found that in these framework and guidelines, a prominent place is given to establish the inspection practices as a tool designed to prevent corruption, regulatory capture and promote transparency.

The governance arrangements on inspections between central and local government can hamper the effectiveness of inspection to reach policy objectives

The central government has delegated responsibilities and surveillance functions to subnational governments which can affect the inspection process, the capacity to inspect and the expected policy results from this task.

For instance, workplace inspection's responsibilities have split horizontally between central and subnational governments in some sectors. Workplace inspections for medium and large enterprises are responsibility of central government, leaving to subnational governments the responsibility to inspect smaller business (less than 10 employees).

Considering that institutional capacity and adequate personnel for inspections are weaker at subnational level, and that the quantity of business in the small and micro category is much larger, the risk of having an ineffective inspection policy for the workplace is much larger for subnational governments. The situation can be aggravated when considering that small business are more prone to not complying with regulation given their larger likelihood to be part of the informal sector.

Key recommendations

- Peru should include the policy of inspections and enforcement of regulations as an integral part of its regulatory policy. The Peruvian government should include and emphasise the importance of compliance and enforcement as part of its broader policy statement to achieve its general objectives of sector regulation.
- This would include addressing the governance of inspection authorities through a cross-cutting policy. This would imply reducing the fragmentation of inspection authorities, improving co-ordination and communication, sharing of information and best practices (including at different levels of government), and reforming the administrative units in charge of inspections within line ministries in order to provide them with more independence from other regulating areas.
- The cross-cutting policy mentioned before should include general guidelines relating to horizontal objectives such as ethical behaviour and corruption prevention, organisation and planning of inspections, and transparency towards the subjects of inspections. It should also include guidelines to implement a risk based approach for inspections, information integration and sharing, and widespread use of third parties to carry out inspections (see Box 5.4 for an international example).
- In order to ensure the effectiveness and efficiency of regulatory enforcement and inspections adequate human, technological and financial resources should also be available to agencies.

Box 5.4. Good practice on risk-based inspections: Chicago's Food Inspection Forecasting

There are over 15 000 food establishments across the City of Chicago that are subject to sanitation inspections by the Department of Public Health (CDPH). Three dozen inspectors are responsible for checking these establishments, which means one inspector is responsible for nearly 470 food establishments. Given the large number of inspections that inspectors have to complete, the time and effort it takes to discover critical violations can mean prolonged exposure to potential disease, illness, and unsanitary conditions at some food establishments.

The CDPH, the Department of Innovation and Technology, a private insurance company and a civic consultancy teamed up to create a computer algorithm to prioritise which establishments were to be inspected first. The analytical model forecasts the likelihood of critical violations for each establishment. It uses results from previous sanitary inspections, weather data, and information from other departments, available on Chicago's open data portal, which provides user-friendly access to more than 600 data sets.

During the pilot of implementation of the algorithm, establishments with critical violations were found, on average, 7.5 days earlier than with the normal operation procedure. As a result of this approach, the risk of patrons becoming ill is potentially reduced.

The risk-based initiative taken by the Department of Public Health goes in line with three International Best Practice Principles for Regulatory Enforcement and Inspections: risk focus and proportionality, responsive regulation and information integration.

Source: Adapted from <https://chicago.github.io/food-inspections-evaluation/> and Chicago Tech Plan Website: <http://techplan.cityofchicago.org/2014-progress/effective-government/> (accessed 14 April 2016); OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264208117-en>.

Notes

1. Even though Peruvian authorities make a distinction between supervision, audit or investigation, and sanctioning functions, they are all part of the concept of enforcement used in the OECD literature and in this chapter, see Box 5.1.
2. *Source:* Various ministries and agencies of Peru, responses to OECD questionnaire, 2015.
3. The Ministry of Health issued a new by-law *Reglamento* of Internal Organization and Functions of the Ministry of Health, through Supreme Decree No. 007-2016-SA, published on the 12 of February of 2016, which consolidates many of the inspection activities. In these cases, co-ordination and exchange of information should improve.
4. *Source:* Various ministries and agencies of Peru, responses to OECD questionnaire, 2015.
5. In the case of the SBS, the entities are aware of their rights and obligations during the inspection process due to the fact that, three weeks in advanced to the inspection in situ, the SBS asks for all the information that would be required to the entity. However, there could be special urgent cases in which the SBS could ask for information without advance.
6. In the case of the SBS the inspection report is normally shared with the entity supervised, as it is an obligation established in Article 359 of Law No. 26702 Text of General Law of the Financial and Insurance Systems and Organic Law of the Superintendence of Banking and Insurance. Also, it is an obligation that the entity's board of directors must take knowledge of the inspection report in the next immediate session after the SBS issued the report to the entity.
7. Exceptions include SBS, OEFA; INDECOPI and SUNASS who do have these guidelines.
8. As pointed out before, as a result of a the new by-law *Reglamento* of Internal Organization and Functions of the Ministry of Health, several inspection offices were merged, which should address several of the coordination challenges.

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