

11 Compliance promotion

The most basic assumption for any regulatory instrument is compliance. Without a systematic compliance practice from regulated entities, policy objectives will not be reached. This chapter addresses the promotion of compliance as a principle of the enforcement process. The chapter first describes the principle and relevant international practices and tools. Furthermore, it assesses compliance practices promoted by OEFA and provides recommendations to improve regulatory enforcement.

Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists (OECD, 2014^[1]), (OECD, 2018^[2]).

Promoting and supporting compliance should be considered a duty of inspection and enforcement activities, than relying on an “everyone should know the law” approach, or seeing advice and guidance as activities that should be left only to private consultants. In response to new risks and growing demands from citizens, the state is developing and imposing new and frequently complex regulations. In this framework, it is inadequate to assume that business operators or citizens can get to know and understand what is expected from them without any assistance. This is the case in modern regulations, covering increasingly technical topics, which are often set in terms of performance and outcomes, amongst others. Rather, promoting and supporting compliance should be a key priority and function of inspection and enforcement structures. The former should be anchored in legislation and in the official mandates of these structures, and significant resources should be allocated to develop and spread guidance and information to regulated subjects, particularly those lacking the resources to obtain or understand the information themselves, e.g. SMEs.

Regulators, inspection and enforcement structures should analyse barriers to compliance and work to overcome them, actively and regularly, in particular if they relate to information. Reviewing and assessing barriers to compliance is essential and should be a core activity. Legal foundations should exist for inspection agencies to give advice and for it to provide regulated entities regulatory certainty (“assured advice”).

A variety of complementary tools related to advice and information can be delivered through guidance documents, “on-the-ground” information, etc. Different channels need to be used according to the issues and audiences, and inspection structures should use all of them actively. Practical and clear guidance documents should be prepared covering the most widespread business activities and regulatory issues as well as the key risks – and be actively disseminated, including through consolidated internet portals. Active outreach to new businesses, business associations or sectors with most identified difficulties should be organised using visits, conferences, web-based information, etc. Besides, inspection visits should be used as key moments to inform, explain and provide advice. Guidance must be elaborated and given with great care.

Legal foundations should exist for the practice of “assured advice” and it should be used as much as possible to increase regulatory certainty. It consists in giving legal guarantees to regulated subjects that, if they follow the advice officially given by the regulator, they will not be held in breach of their duties, even if at a later point another official reaches a different conclusion. However, this practice must be designed in a way that it does not limit the willingness of the inspectors to share their opinion in more informal communications with the regulated subjects. Providing this kind of advice should not take off the responsibility from inspected subjects. When provided with an “assured advice”, the regulated subject should not need to follow conflicting advice from other sources. Hence, the “assured advice” should be made available to other enforcement authorities, e.g. through a shared information system.

Compliance promotion: guiding principles and tools

All legal acts, regulations and instruments prepared and adopted by OEFA are systematically made accessible to all stakeholders for *ex ante* consultation. These include guidelines to EFAs and inspectors, amongst others. All of these documents are published online with a deadline for stakeholders to provide comments. Following this, a ‘Commentators’ Meeting’ (*Reunión de Comentaristas*) is organised. The document approved is then published online together with a comments’ matrix where the various comments received are addressed one by one.¹

Compliance promotion has recently become a guiding principle of environmental inspections and enforcement in Peru. It is now entrenched in legal acts, and OEFA's management regularly communicates about the need to inform regulated entities about their obligations. For instance, OEFA Regulation on Inspections clearly states among the guiding principles of the inspections' function that its performance shall promote guidance and persuasion with regard to compliance with regulatory requirements and the correction of infringements (Art. 4.h of the Regulation).

A number of measures to ensure effective compliance promotion have been taken by OEFA. Trainings, workshops (e.g. 151 training activities organised by the Academy of Environmental Auditing in 2018 on regulatory requirements, inspection strategies and instruments used by OEFA) and other events addressed to, or including, business operators are being carried out. These include in particular events with the National Society of Industries² and the National Society for Mining, Petroleum and Energy.³

A 'matrix of environmental requirements' has been developed and made accessible online. Queries can be addressed to OEFA through an online form,⁴ by calling one of the toll-free phone numbers provided by OEFA, or by going in person to an office of OEFA. During the calendar year 2018, OEFA (both OEFA's headquarters in Lima and provincial delegations of OEFA) dealt with a significant number of queries, as shown in Table 11.1.

Table 11.1. Number of queries handled by OEFA in 2018

	Online	Phone	On-site
Lima	1 882	4 250	2 140
Province	294	1 547	13 951

Source: OEFA (n.d.[3]), *Organismo de Evaluación y Fiscalización Ambiental*, <https://www.gob.pe/minam/oeфа> (accessed 14 October 2019).

Also, as mentioned in Chapter 5 on Responsive regulation, the *Fines Calculation Methodologies* developed by OEFA establish that an operator who voluntarily remedies a non-compliance found before the enforcement process would not be sanctioned. On the other hand, recidivism or intentionality are a ground to increase the amount of the administrative fine.

Relevant legislation (Art. 257 of Single Consolidated Text of Law on General Administrative Procedure) has a provision that corresponds to some aspects of "assured advice" – i.e. an error induced by the Administration, or by a confusing or illegal administrative provision, is a case where the economic operator will not be held liable for the violation. This has been reported to be applicable also with regards to the responses to queries.

The measures mentioned above are an important foundation, but a variety of additional and complementary tools and activities should be developed and used in the future – e.g. toolkits, guidelines and manuals for business operators, standardised risk-based checklists, amongst others. For instance, checklists are a valuable tool from different perspectives: they help inform business operators on the requirements they should comply with and allow greater transparency, enhanced homogeneity during inspections, and better focus on the elements that are crucial from a risk-based perspective. Standardised risk-based checklists would be especially useful for EFAs, where the paradigm shift towards a risk-based approach and compliance promotion is in many cases still at early stages. In turn, this should improve confidence towards inspection and enforcement authorities.

In practice, it has however been observed that there is a paradigm shift that is yet to be entirely completed (especially in local EFAs, but also to some extent in OEFA itself) and that relates to *why* compliance should be promoted – not just to do what the rules say, but in order to protect the environment and the public well-being. This is explained to some extent by the formalism of the regulatory system in Peru, but it also needs to be considered by OEFA's management to ensure an actual transformation in practice. This has an

impact on how information is communicated while promoting compliance: which are the most important regulatory requirements to comply with, how to do so, and why. As mentioned above, preparing manuals, guidelines, toolkits (with simple explanation in clear and plain language, drawings and pictures), but also for instance talk shows on the radio targeting MSMEs could be considered.

Securing compliance and “going beyond”

Advisory inspections’ are now allowed by applicable legislation. The Single Consolidated Text of Law on General Administrative Procedure⁵ foresees that within the compliance promotion approach advisory inspections may be carried out. As explained in OEFA’s Regulation on Inspections (see Article 3 of the Regulation), this type of inspection is aimed at promoting compliance with environmental requirements by sharing knowledge about regulatory requirements applying to the specific inspection subject, and has no punitive purpose. It can be carried out only once. Subjects of ‘advisory inspections’ can be regulated entities that have never undergone an inspection, micro and small enterprises, or they can be used in other situations where OEFA considers it appropriate to improve the management of environmental risks. The activity consists in informing the operator about the requirements they must comply with, and in performing the relevant checks. No sanctions can be imposed, unless “damages or significant risks’ are found, or ‘the effectiveness of environmental enforcement is endangered”.

While the introduction of “advisory inspections” is a valuable idea – only recently allowed by the legislation in force – their use could be improved to ensure that their objective is met. While the conditions, procedure and rules of such inspections are apparently clear within OEFA, from an outside perspective a number of elements should be clarified. In particular, the exceptions to imposing sanctions could be further explained as they seem too wide and vague (and thus risk discouraging businesses from requesting such advisory visits). Additionally, there is no known planning of such inspections; the conditions, processes, amongst others, need to be more detailed – in particular Art. 13 of OEFA’s Regulation on Inspections states that advisory inspections may be carried out on certain circumstances, but the language used is not that of an obligation to perform such inspections when the defined circumstance are met. OEFA’s decision to perform these inspections on micro and small businesses is understandable, as these operators are more likely to be unaware of applicable regulatory requirements and of the best compliance strategy to manage their risks, especially when they have not yet undergone any inspection. OEFA might want to consider that larger businesses may also need this kind of advice. These businesses could be included in such a scheme, on a cost-recovery basis.

In addition to the introduction of advisory inspections, OEFA has adopted further measures aimed at supporting and guiding compliance. For instance, by means of Resolution of the Boards of Directors No. 030-2018-OEFA/CD⁶ it was decided that the imposition of sanctions on business operators of solid waste facilities was to be done only after the performance of an advisory inspection, based on risk, proportionality and step-by-step improvement.

Some other measures (‘incentives’) have been introduced with the purpose to encourage compliance. First, as mentioned in Chapter 5 on Responsive regulation, when an operator remedies voluntarily a non-compliance before the enforcement process starts, no sanction is applied. This is a novelty, as in this case the operator is excluded from administrative responsibility – instead of such remediation being a simple attenuating factor. Second, the amount of the fine imposed can be reduced a) if the business operator makes a clear statement in which they recognise their responsibility, or b) pays the fine within 15 days.⁷

The “discount” for speedy payment of fine tends to decrease appeals, but may reduce the overall perception that the system is fair (operators are pushed to pay regardless of whether they agree, as delays mean higher penalties). OEFA may want to also consider other incentives to promote good practices – for instance, celebrating or rewarding compliant operators by implementing tools such as a publicly-advertised rating of the level of compliance (and risk management). The incorporation of compliant businesses into

the Registry of Good Environmental Practices, currently in use, is an interesting initiative – although OEFA still requires clarifying further how exactly it makes use of it. Incentives could even be applied to EFAs with good practices in terms of compliance promotion – but also of risk prevention and management amongst others, A good practice example of the latter is the introduction on the ‘Declaration on first year of business’ in Lithuania by the nine larger inspectorates with the support of the government (see Box 11.1). The government announced the adoption of the Declaration in the presence of the signatory inspection, enforcement bodies and the media.

Box 11.1. Declaration on first year of business (Lithuania)

The “Declaration on first year of business”, introduced in 2011, is an innovation that was part of the inspections in Lithuania. The nine largest regulatory delivery bodies signed a joint declaration by which they committed to use sanctions only as a last resort measure when performing inspections on businesses that have started to operate less than one year before the date of the inspection visit. The purpose of the statement was to allow enough time for new businesses to get acquainted with relevant regulations and how to comply with them. Although regulatory delivery bodies were not required by law to sign the declaration, the major ones saw it as an appropriate tool to ensure the necessary balance between the need to protect public interests and adopting a collaborative approach to their relationships with businesses, and a way to promote compliance. The declaration also received the Prime Minister’s strong support. Data from the Labour Inspectorate shows that 78.26% of companies received advice from inspectors during the first year of their operation. In 2014, 50 regulatory delivery agencies out of 60 had voluntarily signed the declaration.

**DECLARATION
on the first year of business**
14 September 2011
Vilnius

We, the undersigned business supervisory institutions (hereinafter referred to as supervisory institutions), represented by the supervisory institution heads, in seeking to increase the state’s competitiveness, improve the business environment and business supervision functions, encourage job creation and retention, and decrease the administrative burden on businesses and residents.

Having determined that businesses starting operations need methodological assistance and consultation and that supervisory institutions are competent to provide such assistance, in seeking to help new businesses operate successfully in a competitive environment, noting that the most important supervisory task is ensuring adherence to acts of law and that fines and other sanctions are only one means toward this end, rather than an end in itself, recognising that fines are not the most suitable means to apply to new businesses, especially small ones, obligate ourselves:

- *to refrain from applying punitive measures (fines, restrictions on activity, and so forth) during the first year of a business (no less than twelve months from the moment when the business – natural person, legal entity, or other organisation or a subsidiary of a legal entity or other organisation undertaking legally regulated economic activity within the territory of the Republic of Lithuania – or its activity came under the supervision of a supervisory institution) and, upon identifying a violation, to first determine an appropriate deadline for correcting the violation, a deadline which can be extended in the event of objective circumstances;*
- *to devote resources for consultation and providing methodological assistance to businesses during their first year of operations (for example, contacting a new business and offering consultations services, preparing consultative seminars, answering businesses’ inquiries and requests, amongst others).*

Appreciating that acts of law grant supervisory institutions the right to apply punitive measures without restricting their discretion in applying them through this declaration, we jointly obligate ourselves to apply punitive measures to businesses during their first year of operations only in exceptional cases, as a last resort, after first evaluating whether adherence to acts of law cannot be ensured by other means (for example, by issuing an order or by consulting), and only when they are necessary and unavoidable in seeking to prevent harm to society, the interests of other persons, or the environment when such harm or danger is of great significance.

Source: World Bank (n.d.^[4]), *The Future of Business Regulation: Case study: Making better use of information* (forthcoming).

To properly decide which “incentives” – or other compliance promotion measures or tools– would be the most adequate and effective and how to articulate and use them. OEFA would benefit from following best international examples and developing a vision for, or a strategy on, compliance promotion. This could, amongst others elements, be based on a) a periodic analysis of barriers to compliance, b) research on alternative options/channels to promote compliance, as well as c) active engagement with the private sector and other stakeholders.

OEFA is also making efforts to organise, or join, groups and events set to reflect upon possible improvements related to their regulation and activities. One example of these is the *Ex post* Evaluation Working Group.⁸ Another example is the participation in the “Workshop on strengthening environmental management”, held in November 2018. OEFA should seize these opportunities – including meetings and work of the Behavioural Economic working group⁹ – to analyse barriers to compliance, possible communication channels, and early engagement with stakeholders amongst others. See Box 11.2 for an example from the United Kingdom to promote compliance using behavioural insights.

Assessment

Compliance promotion is a new principle in Peru. OEFA has done substantial efforts to develop tools and measures to promote compliance. However, further work is needed to secure the actual cultural shift from a formalistic approach to compliance to a result-oriented approach – i.e. compliance being checked and promoted to effectively protect the environment, and not for the sake of performing checks. This is especially true for EFAs other than OEFA.

Relevant legislation foresees that an error induced by the Administration (e.g. providing erroneous guidance) cannot be subject to liability. This applies also to queries submitted to OEFA.

In addition to the positive measures taken by OEFA’s management to effectively promote compliance, further tools can and should be developed – such as toolkits, guidelines and manuals for business operators, and standardised risk-based checklists (to be used e.g. for inspection objects of lower risk and/or by other EFAs). To decide which compliance promotion measures, tools would be the most adequate and effective, OEFA would benefit from developing a strategy on compliance promotion.

Recommendations

- Despite the use of inspection plans by OEFA for each inspection performed, and the development of a tool aimed at allowing to record data and information in a way that allows for further analysis and use, standardised risk-based checklists would be a valuable tool to be considered. Standardised (and published) risk-based checklists inform businesses operators on the requirements they should comply with, allow greater transparency, enhance homogeneity during

inspections, and ensure that inspectors focus on the elements that are crucial from a risk-based perspective. They also allow determining the updated risk rating of the establishment directly from the checklist results. Standardised risk-based checklists would be especially useful for other EFAs, where the paradigm shift towards a risk-based approach and compliance promotion is in many cases still at early stages. This should in turn improve confidence towards inspection and enforcement authorities. A first step to build these lists would include SENACE sharing with OEFA the environmental obligations of the subjects under the inspections scheme.

- OEFA should use the *ex post* evaluation and behavioural economic working group (and other resources if/as necessary) to regularly analyse reasons for non-compliance, as well as alternative and complementary information and engagement channels with stakeholders.
- OEFA should consider the introduction of additional tools such as toolkits, guidelines/manuals for business operators, simple illustrated brochures for MSMEs, that could be used by OEFA to help inform business operators on a) which are the key regulatory requirements they need to comply with, b) why this is important, and c) how they can comply.
- Considering that the ‘advisory inspections’ are a relatively new tool, OEFA should assess its effectiveness after a reasonable period of implementation. The assessment should consider clarify the relevant procedure, planning, amongst others, for such inspections.
- OEFA may want to consider some additional incentives to promote good practices – for instance, rewarding compliant operators by implementing a publicly-advertised rating of the level of compliance (and risk management). See Box 11.2 for an example from the UK. The incorporation of compliant businesses into the Registry of Good Environmental Practices currently in use, is a good example of “incentives” that can be used, provided that information on this is adequately disseminated and the Registry advertised. Incentives could be applied to EFAs with good practices in terms of compliance promotion – but also of risk prevention and management.

Box 11.2. UK Health and Safety Executive’s regulatory approach to construction: an example of use of behavioural insights

Application to the construction industry and characteristics thereof

Traditionally, construction is one of the highest risk sectors. Given its nature, it presents numerous challenges and hazards on top of a fragmented supply chain that involves numerous contractors and subcontractors. Poor occupational safety and hygiene performance meant the industry tended to have one of the highest rates of fatal occupational accidents, and inadequate attention to risks create longer-term health effects.

Key elements of HSE’s regulatory approach

As a way to involve different stakeholders of the construction sector, the HSE organised a “Summit”, where the industry was challenged to ‘Turn Concern into Action’. In advance of the event and in partnership with HSE, various stakeholder groups drew up Actions Plans designed to deliver a range of changes. The approach was designed to encourage the industry to show ownership of the risks it creates and to work better in partnership across the supply chain to manage them. It required the industry to move from a reactive approach focused on what happened on construction sites to a more strategic, proactive approach, covering upstream aspects. This created the opportunity and need for HSE to revise its regulatory approach for construction.

HSE created a new Construction Division (CD) to develop the approach mentioned above and to ensure its efficient and consistent delivery. In 2001, the HSE gradually developed an intervention strategy focused on prevention, guidance, specific interventions for small companies, supply chain approach and greater enforcement consistency.

The -key objectives of the revised approach included:

- securing industry ownership of OSH challenges and a commitment to action and engagement with workers;
- engaging with key intermediaries, stakeholders and other regulators to enable cultural change towards risk management;
- improving and clarifying the regulatory framework;
- developing a communication strategy, guidance and clear standards for the construction industry and SMEs in particular;
- targeting critical points of the supply chain.

A central element to achieve these objectives was the reliance on an Influence Network (IN) model.

The Influence Network (IN) model

The IN model was crucial in shaping and prioritising HSE interventions. The HSE focused first on larger companies and their supply chains and then it engaged with harder-to-reach small businesses and sites. The emphasis was on fostering proactive risk management by risk creators themselves rather than HSE using most of its resources carrying out inspections to tell industry what it should be monitoring.

This model incorporated 39 human, hardware and external factors through four influence levels:

- Environmental: political, regulatory, market, social influences that affect strategic decisions.
- Policy: internal culture, contracting strategies or company management and structure.
- Organisational: training, planning, procedures, supervision, which influence the “direct” level and reflect the culture, way of working and behaviour in organisations.
- Direct: competence, risk perception, equipment operability and maintenance or operating conditions, which directly influence the probability of adverse outcomes.

Each factor was given a performance rating. Afterwards, factors were assigned a weight to assess how influential each one was on the overall performance in the next layer. A factor with a poor rating and significant influence was given a higher priority in the Intervention Strategy than factors with the same rating, but less influence.

This data served as basis to calculate an overall risk index and identify the most influential factors. In addition, the analysis allowed HSE to track variations in ratings and index, and determine “critical influence paths”, and thus understand variations in factors, and why and where interventions were effective (or not).

Early use of the IN led to the an intervention strategy emphasising:

- Early engagements with clients, designers and contractors on large projects;
- Supply chain interventions (e.g. defining issues and solutions with industry, clarifying enforcement expectations and applying them consistently by inspectors);
- Sustained contact with key players with wide (national/multi-site) influence (e.g. contractor head office/CEOs, repeat clients like internal traders);

- Tracking back from findings during site observations to address shortcomings strategically at their source – e.g. with suppliers, designers or clients, or at board level with contractors, to secure real engagement on improvement;
- Co-operation with trade bodies or groups of similar suppliers to achieve shared understanding of safety requirements (encouraging innovation and standards development by the industry) and making the playing field more even;
- Delivering a range of initiatives targeted at SMEs
 - Accessible guidance (e.g. Absolutely Essentials, Busy Builder leaflets)
 - “Working Well Together” national initiative delivering “Safety and Health Awareness Days” to engage locally and raise awareness and competence
 - Intensive inspection activity or “blitzes”.

HSE shifted some resources away from site inspections to early engagement in the supply chain (with clients, designers and contractors) and joint development of industry guides and codes. This led to a reduction in the number of site inspections, but not in overall resources. The model offered flexibility and, thus, sustainability.

Source: Blanc, Myers and Ottimofiore (n.d.^[5]), *Using behavioural approaches in regulatory delivery: the experience of Britain’s Health and Safety executive in a comparative perspective* (forthcoming).

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- World Bank (n.d.), *The Future of Business Regulation: Case study: Making better use of information* (forthcoming).. [4]

Notes

¹ See an example of comments' matrix available at: <http://www.oefa.gob.pe/wp-content/uploads/2018/02/res-006-2018-oefa-cd-matriz.pdf>.

² See for instance <https://www.oefa.gob.pe/noticias-institucionales/oefa-realizo-conferencia-sobre-su-funcion-de-supervision-a-las-empresas-de-la-industria-quimica>; <https://www.oefa.gob.pe/noticias-institucionales/oefa-participa-en-conversatorio-organizado-por-la-sociedad-nacional-de-industrias>; <https://www.oefa.gob.pe/noticias-institucionales/oefa-participa-en-conversatorio-organizado-por-la-sociedad-nacional-de-industrias-2>.

³ See for example <https://www.oefa.gob.pe/noticias-institucionales/presidenta-del-consejo-directivo-participo-en-conversatorio-de-la-sociedad-nacional-de-mineria-petroleo-y-energia>.

⁴ Available at: <https://www.oefa.gob.pe/contacto/formulario-de-contacto>.

⁵ See Chapter II of Title IV of the Law, and in particular Art. 228-G.2.

⁶ Available at: <https://busquedas.elperuano.pe/normaslegales/disponen-publicacion-del-proyecto-de-resolucion-de-consejo-d-resolucion-n-030-2018-oefacd-1723870-1/>.

⁷ The recognition of responsibility as incentive to encourage compliance is based on the Single Consolidated Text of Law on General Administrative Procedure Art. 257.

⁸ See in particular Preamble and Section 2 of this Review.

⁹ See Chapter 2 of this Review.



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