

# 5 Responsive regulation

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This chapter describes the practices followed by OEFA to design inspections based on the actions of the regulated subjects. It also addresses the legal instruments available that grant OEFA the possibility of implementing differentiated regulatory responses based on a series of criteria and considerations. Additionally, this chapter presents an assessment of the practices followed by OEFA and proposes areas for further improvements.

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*Enforcement should be based on “responsive regulation” principles; that is, inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses (OECD, 2014<sup>[1]</sup>), (OECD, 2018<sup>[2]</sup>).*

The principle of responsible regulation involves allowing legislation for (or, at least, not prohibiting) a differentiated (responsive) enforcement, providing an appropriate framework for discretion – including boundaries and accountability. Responsive regulation delivers better outcomes than uniform sanctioning.

Enforcement response should depend on the circumstances and consider elements such as the seriousness of the violations in terms of risk, record of accomplishment, overall situation in establishment, readiness to comply and improve, intent or lack thereof, dissimulation and openness. Discretion should be allowed, but it has to be restrained by the application of principles and criteria, as risk-proportionality and accountability.

The gradation of available sanctions should be adequate to allow credible deterrence through escalation – light enough to use it when needed, strong enough to outweigh potential profits from non-compliance. Legislation should foresee a range of differentiated responses. At the same time, inspectorates should ensure that inspections are followed-up on to guarantee compliance in cases of the use of softer responses.

Clear distinction, but also effective articulation, is needed between regulatory activities focusing on promoting compliance, and law-enforcement activities focusing on fighting crime. Regulatory inspections should be clearly distinct from law enforcement in the criminal sense; however, effective articulation between both activities is required in order for the system to avoid gaps.

Enforcement practices should differentiate responses according to the regulated subject’s track record, risk assessment, effectiveness of different options and date of establishment of the business – with new businesses treated distinctly. This means considering the impact of the enforcement response on future compliance, both inside and outside the establishment. While the former reflects the possible response of staff and management to the enforcement actions, one example of the latter is the exemplarity effect. Sufficiently detailed guidance and strong professional skills for inspectors are indispensable to assess the situation on site properly.

## **Responsive (proportionate) enforcement**

The principle of responsive regulation is embedded in OEFA’s Regulation on Inspection. The document foresees that inspections should be carried out in a ‘modulated manner’, depending in particular on the type of requirements that are being checked, the seriousness of the alleged non-compliance, the track record of the regulated business and other factors allowing a proportionate intervention towards compliance with regulatory requirements (Art. 4.h).

The greatest effort concerning the implementation of this principle has been made in the area of responsive, or proportionate enforcement. The legislation allows for different conclusions from the inspections and, therefore, for differentiated measures or sanctions.

Art. 245.1. of the Single Consolidated Text (TUE) of the Law on General Administrative Procedure allows for different possible conclusions of an inspection. The following outcomes are included in the Law: 1) certification or record of compliance; 2) recommendation of improvements or corrections; 3) warning of the existence of non-compliance without administrative liabilities; 4) recommendation to initiate a procedure to determine administrative liabilities; 5) adoption of corrective measures; 6) other possible conclusions as provided for by special laws.

Relevant laws and regulations (e.g. Art. 135ff LGA, and Art. 22ff of OEFA's Regulation on Inspections) provide for different sanctions and measures with the objective of creating a credible deterrence through escalation of sanctions. It implies a flexible approach, a light enforcement when needed and strong enough actions to outweigh potential profits from non-compliance.

A classification of non-compliances and sanctions based on the relevant risk level found and the potential negative impact of the non-compliance enables to determine if these are minor, serious or very serious (or minor and serious, depending on the source document). OEFA prepared Fines Calculation Methodologies<sup>1</sup> for different sectors under its competence. Such methodology seeks to deter violations through escalation of sanctions taking into account at least the following elements: illicit benefit, probability of detection<sup>2</sup>, and damage (potential and actual). Additional factors may be taken into consideration, for instance a) when there is available information to determine the market value of the damage, b) when aggravating and mitigating factors exist.

A list of aggravating and mitigating factors is also available for the imposition of fines (Presidencia del Consejo de Ministros, 2013<sup>[3]</sup>), (OEFA, n.d.<sup>[4]</sup>). For instance, when an operator remedies voluntarily the non-compliance before the enforcement process, the sanction is reduced;<sup>3</sup> by contrast, the amount of the fine is increased in case of recidivism or intentionality, and depending on how many environmental aspects or contamination sources are impacted. The fine is also proportionate to its environmental impact, as well as to the reversibility of such impact. A Manual explaining the approach, the different aggravating and mitigating factors, amongst others factors has been prepared and is freely available to the public (OEFA, 2012<sup>[5]</sup>).

However, available instruments (such as the ones mentioned above, including the 'methodology to assess the environmental risk') do not seem to bring clarity on whether aggravating and mitigating factors are to be taken into account for enforcement actions and measures other than fines. If so, this should be clarified, as well as the rules on how these factors are to be considered; otherwise, it is recommended that OEFA also considers implementing such factors for sanctions and measures other than fines. Some exempting or extenuating factors are already foreseen in the Single Consolidated Text (TUE) of the Law on General Administrative Procedure (Art. 257) and would deserve to be further developed, and guidance on their implementation prepared.

## Consideration of the characteristics of regulated entities

OEFA's Regulation on Inspections and new Guidelines on Environmental Inspections foresee that inspections' planning and conduct need to consider the track record of businesses (OEFA, 2019<sup>[6]</sup>). This principle is made clear in Art. 4.h) of the Regulation. Information about the track record of inspected subjects is available, from a negative perspective, on the Registry of Environmental Violators (RINA). In addition, it is clear that recidivism is an aggravating factor when a fine is calculated; however, the implications of a positive track record are uncertain in practice. For instance, does a business with an impeccable compliance history deserve a different treatment, in particular when it comes to imposing measures? Moreover, the impact of aggravating and mitigating factors in measures and sanctions that are not fines is unclear.

Micro and small newly-established businesses are entitled to "guidance inspections" based on Art. 245.2. of Single Consolidated Text (TUE) of the Law on General Administrative Procedure. Specifically, it foresees that inspection authorities "shall try to perform some inspections solely with guidance purpose".<sup>4</sup> OEFA followed the route opened up by the legislator to develop further the concept of 'guidance inspections'.

According to Art. 13 of OEFA's Regulation on Inspections, these are inspections focused on guiding the operator on how to achieve compliance with key regulatory requirements, without punitive purposes. Based on this provision, a guidance inspection may be performed only once, and if no previous inspection has ever been undertaken in the case of natural persons running a business or micro and small businesses. OEFA introduced this new kind of inspection based on findings indicating that this group of operators often are not aware of the regulatory requirements they must comply with, as they do not have enough information and have never been inspected before. However, besides the introduction of the 'guidance inspection' itself, nothing indicates that these types of businesses need to be treated distinctly during normal inspections, or when deciding on an enforcement measure.

## Effectiveness of different options

In theory, enforcement actions and inspection decisions are based on the effectiveness of the different available options, but this has not yet been implemented. Meaningful results and impacts are being measured for the first time, *ex post* evaluations of strategies and tools implemented under the current management are yet to be performed, and previous information is not entirely available and/or reliable.

A common approach on the evaluation and decision making regarding possible enforcement decisions would add value to OEFA's work. Besides, it would help govern the necessary use of a certain degree of discretion during inspections. The United Kingdom Health and Safety Executive's Enforcement Management Model could be a good example (see case study in Chapter 14 on International experience on inspection policies and enforcement). Even though, it would be advisable to develop a simpler and shorter tool to avoid overwhelming inspectors.

In practice, the use of "responsive regulation" by OEFA (and the SINEFA) – i.e. having a variety of intervention choices that can be selected and used depending on the characteristics and behaviour of the operator so as to meet regulatory goals – is yet to be further developed. The regulatory system still relies largely on a traditional control scheme based on: 1) authorisation; 2) inspection; 3) verification of compliance; 4) imposition of sanctions for non-compliance (or decide not to).

There has been an ongoing effort under the current management of OEFA to guarantee transparency and communication and to provide advice to the private sector. This work, however, needs to be continued and deepened so as to successfully and progressively move from an approach where complementary solutions to secure compliance are looked into and developed, to a clearer and more holistic strategy on the development of intervention choices (see Chapter 3 on Selectivity and Chapter 11 on Compliance promotion).

## Assessment

Applicable legislation provides for differentiated conclusions from an inspection, leading to differentiated enforcement measures or sanctions (e.g. Law of General Administrative Procedure and OEFA Supervision Regulation). Methodologies exist to impose and calculate fines based on the determination of the seriousness of non-compliance and other elements.

Different sanctions and measures are applied based on the results from the inspection. Non-compliances and sanctions are classified as minor, serious and very serious, based on the relevant risk level and potential negative impacts. The Fines Calculation Methodology takes into account appropriate criteria, allowing for responsive enforcement. It remains to be defined whether and how some factors (for instance, mitigating and/or aggravating) are also applied to measures and sanctions other than fines. Further clarification is needed on whether and how a positive track record is taken into account.

In theory, enforcement practices should use differentiated responses based on the characteristics of the inspected subject. A number of measures have been developed, and are applied, to ensure this. Nonetheless, there is no clear guidance yet on how to consider the effectiveness of the different options, and how exactly and when the characteristics of inspected subjects must be taken into account must be clarified.

## Recommendations

- Consider developing a comprehensive framework to manage discretion and responsiveness in enforcement inspired e.g. by the UK HSE's Enforcement Management Model.
- Clarify and establish specific rules on the use of discriminating factors, such as aggravating and mitigating ones, in the determination of measures and sanctions other than fines.
- Consider developing guidelines on how to consider the effectiveness of different enforcement options.
- Clarify the rules of guidance inspections and consider broadening their use to other kinds of businesses, when appropriate. The guiding document should include information on the mandatory use and planning of guidance inspections.
- Consider taking into account characteristics of the regulated establishments when conducting regular or special inspections and develop clear rule. These characteristics could include the age of creation of the business, the size of the company (SMEs), and track record.

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## Notes

<sup>1</sup> Available at: <http://www.oefa.gob.pe/wp-content/uploads/2013/03/SE2013031200.pdf>.

<sup>2</sup> From the consultation of the methodology, there is no way to understand why this criterion is used, nor how it is assessed, nor whether it is an aggravating factor or other.

<sup>3</sup> By 20% if there was no harm done and by 10% if harm already occurred before the infraction was remedied.

<sup>4</sup> The entire provision in Spanish reads as follows: “Las entidades procurarán realizar algunas fiscalizaciones únicamente con finalidad orientativa, esto es, de identificación de riesgos y notificación de alertas a los administrados con la finalidad de que mejoren su gestión.”



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