

4 Risk focus and proportionality

The chapter explains the relevance of the risk focus and proportionality approach, as a principle to enforce regulation and conduct effective and proportional inspections. It provides an analysis of OEFA's practices in line with this principle and concludes with an assessment and a series of recommendations to embed risk focus and proportionality in inspection practices.

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 aim at reducing the actual risk posed by infractions (OECD, 2014^[1]), (OECD, 2018^[2]).

This principle entails that applicable legislation allows and requires risk-focus and risk-proportionality. Legislation should allow for selectivity in inspection visits and for differentiation in enforcement response. The former means that not the entire universe of regulated subjects should be inspected, while the latter implies allowing for adaptation to circumstances and proportionality, as long as criteria are clear.

The existence of a common approach to risk assessment and risk management is important. If a common approach is not possible, at least a similar understanding and practices across different sectors and regulatory domains is desirable.

Risk should be understood as a combination of the likelihood of some adverse event with the potential magnitude and severity of the consequences of this event (harm). High risk is thus very different from high likelihood of violation. It is important to have an official set of tools and methods to assess and rate risks and to determine the appropriate response.

In a good supervision system, the majority of inspections should be proactive and the targeting of inspections, effectively based on risk. Risk factors taken into account for targeting should include at least intrinsic risk of the activity, scope of operations, vulnerability factors (location, population served), and past track records. Even when receiving complaints or other information, a risk-based methodology should inform the undertaking of reactive inspections: reliability or credibility of the information, seriousness of the risk outlined in the complaint, and past track records and/or previous complaints, amongst others.

Enforcement decisions should be based on risk proportionality. The assessment of an establishment should consider any violation and their characteristics. The inspector must consider whether these violations are part of a pattern, if they reflect a deliberately reckless behaviour or these are mistakes that the operator is ready to correct at the earliest. The inspector must also assess if these violations actually create harm or serious risks for public welfare (e.g. the environment) and the magnitude of the risks. As much as possible, there should be official guidance clarifying how risk proportionality works and how enforcement decisions should be taken.

Risk-communication is essential, and one of its key elements is to make it clear that risk management cannot be done by inspectors alone. Thus, this approach should be clearly and actively communicated to all stakeholders, with a view to manage expectations and improve outcomes. In the case of inspections and enforcement activities, this means transparency about risk criteria to make discretion legitimate, clarity about limitations in risk prevention to ensure expectations are correctly managed, and better information about key risks to improve compliance with crucial requirements and improve outcomes. Such information should target all key stakeholders: business operators, consumers, workers, citizens.

Approach to risk: guiding principles and common understanding

Applicable legislation and internal OEFA regulations (and guidelines) allow for (and, in some cases, require) risk-focus and proportionality.

- The LGA foresees that the design and implementation of public policies shall consider the prevention of environmental risks and damages (Art. 11.d). It also provides for the proportionality of enforcement-related interventions (Art. 11.h).
- OEFA's *Regulation on Inspections* foresees a risk-based approach among its guiding principles: "When performing an inspection, the environmental risk that may be caused by the performance of the regulated entity's activity shall be taken into consideration, taking into account the impact level and the probability of the occurrence" (Art. 4.d).

- Risk is also an underlying principle in SINEFA Law (Art. 11 and 22.A.).
- The vast majority of provisions related to the imposition of sanctions and measures refer to risk as the fundamental factor on which they shall be applied and calculated.

OEFA's leadership shows a strong support for a risk-based approach. Art. 4 of OEFA's *Regulation on Inspections* provides for a definition of risk in line with good international practice. There are several examples of tools and methods adopted to ensure a common and harmonised understanding of risks. Risk criteria for the different sectors of competence of OEFA have been introduced – (OEFA, 2018, pp. 41, 45, 49, 53, 57, 61, 65, 69 and 73^[3]).

It is to be noted that in the 2019 OEFA's PLANEFA, an effort has been made to use strictly empirical and fact-based criteria to plan inspection-related activities. These inspections relate to specific economic sectors under OEFA's coverage and are at contrasts with the experience of previous years, wherein planning was heavily reliant on socio-environmental conflicts. For instance, planning of industrial fishing and aquaculture establishments inspections relies on: a) the risk of impact on water due to effluent discharge; b) the risk of impact on air by emissions; c) the records with alleged infractions entailing moderate and significant risk (OEFA, 2018, p. 53^[3]). This example shows the use of criteria that are based on hard evidence and reflect risks that are inherent to this particular economic area. This is also the case for other sectors such as electricity, hydrocarbons, manufacturing and internal trade (OEFA, 2018, pp. 49, 45 and 57^[3]).

Most of the criteria reflect inherent risks for each sector. Some of the elements include dumping points in effluents by mining activities,¹ soils with presence of hydrocarbons, abandoned facilities and criteria generally taken into account in international good practices, such as the compliance history of economic operators. However, some could be revised and improved (see Chapter 2 on Evidence-based enforcement).

Guidelines for the inspections planning tool (i.e. *PLANEFA Guidelines* and relevant *Handbook*) based on risk prioritisation have also been prepared in a short period. Other tools that have been adopted include methodologies to: a) assess the severity of non-compliance based on pre-defined risk criteria and b) calculate fines reflecting risk-proportionality (for details see Chapter 5 on Responsive regulation). The Methodology to Assess the Environmental Risk (*Metodología para la estimación el riesgo ambiental*) is an online tool that takes into account the severity of the consequences and the probability of negative impacts happening to automatically calculate the level of risk (high, medium or low) (OEFA, n.d.^[4]). To determine the severity of the consequences, OEFA considers factors such as the quantity, the amplitude, the level of hazard and the type of environment harm concerned, while that the probability of a negative impact is divided into five categories.

Based on the result of this assessment, the non-compliance will be considered as serious (for high and medium risk), or not serious (when the risk is assessed to be low). While this is a very useful tool, it would benefit from being refined, allowing more gradation between risk levels. More importantly, the way the calculation is done results in most situations corresponding to “serious infringements”.

Table 4.1. Attendees to OEFA's risk methodology dissemination and training workshops

Year and topic	Regulatees	OEFA collaborators	Total attendees	Total hours
2017	30	56	86	11
Risk measurement methodology	30	56	86	11
2018	305	138	443	56
Risk measurement methodology	155	0	155	24
Risk measurement methodology and calculation of fines	150	138	288	32
Total	335	194	529	67

Source: OEFA (n.d.^[5]), *Organismo de Evaluación y Fiscalización Ambiental*, <https://www.gob.pe/minam/oeffa> (accessed 14 October 2019).

OEFA is making an effort to inform the private sector and other stakeholders about the approach and methods it follows. The dissemination strategy includes the publication of relevant documents as well as workshops and conferences to communicate on risk measurement methodology and calculation of fines (see Table 4.1).

Proactive inspections aimed at preventing risks

As far as could be observed, on-site inspections performed by OEFA's inspectors are also focused on risks, at least to a significant extent. Prior to the inspection, the characteristics and available information on the regulated establishment (including established IGAs) are studied to identify elements that deserve special attention. Characteristics such as the management of risks in more sensitive production points, processes, and the IGAs are the focal points of the inspection. The result of this preparation process is an inspection's plan (*plan de supervision*), which is a list of the elements that require special attention during a specific inspection. However, some aspects of the inspection still tend to be formalistic. For example, the verification of formal requirement is high time consuming, for which the relevance for risk management vis-a-vis the burdens they create need to be assessed. There also remains to be ascertained to what extent other EFAs, especially local ones, use a similar approach and process.

Currently, OEFA considers socio-environmental conflicts, complaints, records of accomplishment and sanctions as risk factors and prioritisation criteria for the planning of inspections. Socio-environmental conflicts and complaints are likely to result from a mix of facts and perception, which may introduce confounding factors during the prioritisation exercise. Furthermore, there appears to be insufficient differentiation regarding the type of non-compliance and sanctions and, thus, on the level of entailed risks.

In practice, OEFA's PLANEFA for 2019 is based on four general prioritisation criteria: a) dialogue opportunities² related to socio-economic conflicts; b) results of past OEFA's actions; c) requests from other public entities; and d) public perception on environmental quality, measured by the number and content of complaints. Prioritisation criteria still require including elements that pertain to intrinsic risks and scope of operations, amongst others. The planning is more risk-based when using criteria for specific sectors, as a number of intrinsic risks (typology of activities) are considered. However, the assessment of management competence of operators remains mostly absent, as well as whether the operation is in a critically vulnerable location or not.

The majority of inspections that OEFA conducts are regular, proactive and planned ones. During the first quarter of 2019, approximately 40% of the inspections carried out by OEFA were special ones (OEFA, 2019^[6]). The share of special inspections greatly varies from one specific sector to another. For example, the proportion of reactive inspections in the mining sector, over the first quarter of 2019, was of 77%, while special only represented 9% of those performed in the solid waste sector over the same period. Information shared by OEFA in July 2019 shows that approximately 30% of special inspections carried out are based on complaints, 30% on environmental emergencies, and 20% on intervention requests from other public authorities, which are not further assessed.

A management system for complaints has been developed.³ At a central level, officials assess the complaints received through the SINADA, the procedure mostly focuses on redirecting complaints to the competent authorities and making sure that they are formally complete. Afterwards, a number of criteria are considered for a deeper assessment of the complaint.

1. Risk of impact on the environment, or its components, to human health of lives within the relevant scope of competences
2. Existence of previous inspections
3. Existence of previous complaints
4. Presence of socio-environmental conflicts

5. Vulnerability of the area (natural protected area or urban area)
6. Credibility of the complaint
7. Impact in the media

A score to each criterion has been assigned depending on its “weight” in the overall assessment. The result of this assessment will determine whether an inspection is needed, and the kind of inspection depending on the level of overall risk obtained.⁴ See Box 4.1 for an international example of a complaints management system.

Box 4.1. Complaint management in the 2018 Greek Law on Supervision

Complaints related to the activity of an economic operator or establishment may be submitted by any natural or legal person to the competent supervisory authority via any available means of communication (for instance, e-mail, in writing, or by telephone).

The complaints are evaluated according to the following criteria:

1. Compatibility with the scope of the supervisory authority's competence.
2. Their presumably unfounded or unsubstantiated content
3. Submission of the necessary data to allow for an on-site inspection or survey to be carried out
4. The principal assessment that the report constitutes a violation of legislation
5. The extent to which the incident is repeated
6. The time that has elapsed since discovery of the problem
7. Assessment of the degree of risk as regards the direct or indirect effects on the public, or another aspect of the public interest
8. The group of consumers who are exposed to danger and possible use by vulnerable groups
9. The results of the testing of a sample supplied
10. Their credibility when they arise from repeated submission by the same complainant without having demonstrated their accuracy during previous inspections

Following the evaluation outlined in the previous paragraph, and depending on the severity of the complaint, the supervisory authority shall proceed with one or more of the following actions:

- a. Archiving of the complaint
- b. Registration of the complaint for the activity in question, which may be examined within the context of the broader inspection schedule
- c. Immediate priority investigation which may include an on-site inspection
- d. Informing the competent authority if this pertains to a complaint lodged *ultra vires*

The supervisory authorities are not required to reply individually or to carry out an on-site inspection following each complaint, nor to send a reply to the complainant, unless the relevant legislation stipulates otherwise for a specific supervision area.

The supervisory authority shall provide the necessary human and material resources for management and assessment of complaints related to the activity of the economic operators. The supervisory authority shall provide suitable training to the staff carrying out assessment of the complaints.

The supervisory authority may also assess other information of which it is made aware on its own initiative, such as publications in the mass media, social networking media, or other media, which shall be handled according to the manner in which the supervisory authority assesses complaints.

Source: OECD own research, based on Greek practices and the Art. 140 of Law on Supervision, Part D of the Omnibus Law 4512/2018.

As acknowledged by OEFA's management during the fact-findings missions, inspection-related activities are yet to become more proactive and preventive, and are still to a large extent reactive. For an agency as new as OEFA, this is understandable. OEFA recently started working towards implementation of good practice principles, has made efforts to gather the relevant data and moves in a country where economic operations can have negative impact on the environment and on neighbouring communities. However, efforts should be actively pursued to ensure that the approach and subsequent operations move from reactive to preventive measures to prevent harm more effectively.

Assessment

Applicable legislation and internal OEFA regulation and guidelines allow for risk-focus and proportionality. These are among the guiding principles of inspection and enforcement activities. Risk is defined according to good practice.

OEFA has developed a series of tools (e.g. methodology to impose sanctions based on existing risks, prioritisation criteria for planning of inspections) to promote a common approach to risk proportionality and focus. However, some of the criteria employed (socio-environmental conflicts, complaints and requests from other authorities) should be reviewed to ensure that the elements to be considered pertain to hard evidence, in which perceptions components are left behind.

The majority of inspections are regular (planned). Targeting of inspections is based largely on risk for specific sectors, such as hydrocarbons or electricity. A complaints' management system is in place and currently it is being improved. However, efforts need to be pursued to ensure that planning of regular inspections takes into account intrinsic risk factors and quantitative data better. Moreover, the salience of complaints should be a less dominant driver of inspection planning.

OEFA has developed tools and methodologies to assess risks and the potential effects of non-compliance to ensure that enforcement decisions are based on risk proportionality. These methodologies should be further developed to allow for more risk differentiation and avoiding that most of the assessments classify as serious non-compliance.

Risks itself, the risk management strategy and the risk-based enforcement approach are communicated to stakeholders clearly and actively. Although OEFA considers the reactions from stakeholders, the agency would benefit from doing it, not only through *ex ante* consultations.

Recommendations

- There is a need for the SINEFA system to rely more on fact-based and empirical prioritisation criteria as data are collected. In addition, the risk posed should be taken into account systematically; for example, when using the number of sanctions as prioritisation criterion, the gravity of violations should be considered.

- Ensuring that planning of inspections is always based on risks, employing hard measureable evidence, the vulnerability of the location and the management of risks by the operator, should be taken into account. This applies not only to prioritisation criteria for specific sectors under the scope of responsibility of OEFA, but also to 'generic criteria'.
- Aim at increasing the share of risk-led inspections employing hard measureable evidence. This should lead to a reduction in the share of reactive inspections. Further refining of complaints' assessment and the management process is a step towards the improvement of the system. These refinements should consider adequate predefined criteria, the requests of intervention from other authorities and emergencies.
- The methodology used to assess risks, and the resulting seriousness of non-compliance, could be further developed and refined to differentiate more between risk levels and levels of non-compliance.

References

- OECD (2018), *OECD Regulatory Enforcement and Inspections Toolkit*, OECD Publishing, Paris, [2]
<https://dx.doi.org/10.1787/9789264303959-en>.
- OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for [1]
 Regulatory Policy, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264208117-en>.
- OEFA (2019), *OEFA en Cifras, 1 Trimestre 2019. Reporte Estadístico*, [6]
http://www.oefa.gob.pe/?wpfb_dl=34939 (accessed on 14 October 2019).
- OEFA (2018), *Plan Anual de Evaluación y Fiscalización Ambiental del OEFA - PLANEFA 2019*, [3]
<https://www.oefa.gob.pe/planefa/planefa-2019> (accessed on 14 October 2019).
- OEFA (n.d.), *Metodología para la estimación del riesgo ambiental*, [4]
<https://www.oefa.gob.pe/metodologia-para-la-estimacion-del-riesgo-ambiental> (accessed on 14 October 2019).
- OEFA (n.d.), *Organismo de Evaluación y Fiscalización Ambiental*, [5]
<https://www.gob.pe/minam/oefa> (accessed on 14 October 2019).

Notes

¹ N.B. this is not a fully clear criterion in any case – does it refer to dumping points being inadequate or lacking water treatment or to the dumping points being a key control point (in which case this would rather be a checklist point). Risk criteria would gain by being made more precise.

² This refers to communication, engagement and information efforts carried out and/or planned so as to resolve socio-environmental conflicts, and which involve the different actors, in particular

³ OEFA, *Lineamiento de Atención a Denuncias* (relevant Guidelines), which is to be incorporated into the *Manual of Inspections' Procedures*, currently being prepared.

⁴ It is to be noted that there are inconsistencies in the information obtained on the complaints management system regarding some of the criteria used for the assessment, and on how inspections will be scheduled based on the assessment.



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