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Selectivity

The chapter focusses on the selectivity principle, according to the *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections*. It presents the main insights of the principle in OEFA's practices and presents a general assessment of the practices and recommendations to improve OEFA's intervention in environmental policy.

Promoting compliance and enforcing rules should be left to market forces, private sector actions and civil society activities wherever possible: inspections and enforcement cannot take place everywhere and address everything, and there are many other ways to achieve regulations' objectives (OECD, 2014^[1]), (OECD, 2018^[2]).

The principle implies that alternatives to state-led regulatory enforcement are considered in the impact assessment process, looking at whether direct inspections and enforcement would be needed at all, or whether evidence suggests that compliance could be achieved by other means (likelihood of voluntary compliance, insurance mandates, etc.). It also suggest consider what existing structures or mechanisms could support this aim or which new ones may be required. In case state-led regulatory enforcement is truly required, regulators should consider which compliance incentives exist or can be used.

Another key consideration is the nature of the potential harm that the regulation aims at preventing. If the harm can be remedied at a reasonable cost (i.e. remediation is not impossible, and not far more expensive than prevention), enforcement may be relatively less needed than when harm would be very expensive to remedy (far more than prevention) and/or would be impossible to remedy (irreversible damage).

What matters in all cases is creating structures (legal and institutional) by which alternative mechanisms can be used in cases where they offer the best combination of effectiveness and efficiency. Alternatives to state-led inspections and enforcement are often seen as belonging into two categories that can be combined: mandatory third-party certification and insurance, and litigation-based approaches (class action). There are more options, but these are not seen as real alternatives to direct enforcement as they are less known or not widely used. In order for such schemes to be effective, adequate resources (such as information) and legal foundations are needed (e.g. liability for private sector actors that would fail to abide by the rules).

The importance of prevention in environmental protection

The entire National System of Environmental Supervision (SINEFA) still largely relies on controlling what economic operators are doing, based on an approach that is aiming to become more proactive and preventive rather than reactive. Effectively moving towards a more preventative strategy is crucial, as violations over environmental regulation can potentially cause major and irreversible harm, with difficult, lengthy or unlikely remediation or compensation. Measures and activities initiated by OEFA, as the performance of 'preventive environmental assessments', automatic monitoring networks, data gathering from public authorities and businesses, and a more systematic and appropriate information sharing and co-ordination with licensing authorities (as SENACE) are valuable but they need to be reinforced and multiplied to achieve risk prevention. See also Chapter 11 on Compliance promotion for information on tools and measures to strengthen risk prevention.

In a regulatory area where preventive action is essential to achieve regulations' goals, it is particularly important to find ways to effectively prevent harm and promote management of risks. It appears that specialised prosecutors have an active role in ensuring that the enforcement actions are imposed (and that they are very active in reaching out to OEFA to get information and expertise in ongoing procedures). This means that there are efforts to make the deterrence effect of courts-based enforcement work; for example, the recent interactive portal launched by OEFA for specialised environmental prosecutors' offices (OEFA, n.d.^[3]).

Alternatives to state-led regulatory enforcement

Environmental (private) consultants and consulting companies

During the review missions, some participants reported that the involvement of private consultants in the preparation of the ‘environmental studies’ to be approved by the licensing bodies did not work for the best—i.e. low-quality environmental studies with outdated information and technical gaps and inadequate environmental management instruments (*instrumentos de gestion ambiental* – IGAs). In this regard, improving the system with an adequate liability system against the consultant or consulting companies to ensure that proposed IGAs are appropriate, at an early stage, as well as a stricter accreditation system (including withdrawing accreditation when inadequate work has been found) – would appear to be a direction to consider. There is a penalty regime¹ since 2016 for consultants or consulting companies that support regulated entities getting licenses from SENACE. According to this, sanctions are to be applied to consultants and consulting companies when these: a) are not registered in the relevant registry, the sector, or the information provided is not accurate; b) use information that is not up-to-date or not accurate when preparing IGAs; c) do not provide suitable training to their employees as per relevant rules. Violations are sanctioned with fines, suspension or removal from SENACE’s registry of environmental consultants.

The liability system could be more effective if the IGAs designed by consultants were truly evaluated in their capacity to manage and reduce risks; for instance, a range of measures or sanctions can be applied to promote compliance and deter infringers. Consultants and consulting companies could be held liable: a) at the time of the assessment of IGAs by the relevant authorities, and b) if a negative impact on the environment occurs because of badly designed IGAs. The latter is already foreseen in the Single Consolidated Text (TUE) of the Law on General Administrative Procedure (Art. 140), and such rule could be further developed. It can however be expected that issues with environmental consultants will decrease if the number of *ex ante* requirements such as IGAs are reduced and substituted by relevant licensing reforms and these are only kept for really high-risk objects.

OEFA is competent for the supervision of environmental consultants.² Now, there is a dedicated unit in charge of the co-ordination of these types of activities. The recurrent problems with the appropriateness and quality of documents prepared by some consultants may deserve carrying out investigations and implementing a strategy to engage with the sector to find suitable solutions.

Other alternatives/complementary measures

OEFA has taken other alternative/complementary measures and mechanisms to ensure a better achievement of regulatory goals. These include the following:

- By means of a recent Decree published on 27 July 2019, sponsored by OEFA, operators from the manufacturing and internal trade sector operating without predetermined IGA can remedy the situation through a Declaration of Environmental Suitability (DAA) or a Programme of Environmental Suitability and Management (PAMA). These *ex ante* requirements are less burdensome and based on the level of risk of the performed establishment. See the Supreme Decree amending the Environmental Management Regulation for Manufacturing Industry and International Trade. While permits or environmental certifications are important devices, considering a thorough reform of the *ex ante* instruments in the environmental regulatory area would be needed in all sectors. This would help reduce unnecessary burdens on business and barriers to formalisation. It also helps at improving trust from business operators towards environmental authorities. It would involve maintaining the *ex ante* requirements only for operators or activities that pose the highest risks, but redesigning them if necessary to effectively ensure risk management and prevention. Today, the environmental certification is required even in cases where it is not necessary given the risk level; in other cases, the requirements could be lighter.

Additionally, the content of the resulting IGAs is in practice often inadequate. This means the process is burdensome and raises questions on its effectiveness. As a result, OEFA needs: a) reach out the licensing authority with amendments suggestions, and b) review the IGAs, prior to an inspection to select only those deemed necessary to check. Better institutional co-ordination i.e. with licensing authorities and the Ministry of the environment, is needed.

- OEFA has started implementing a scheme integrating some informal businesses (especially micro and small ones, as small mining operators) to ensure they not fall outside the scope of the regulatory system. This involves determining which the risks of the activity are and how to manage them instead of resorting to heavy licensing procedures (at most requiring a very simplified and streamlined permit).
- Substantial work aimed at strengthening prevention through compliance promotion or use of behavioural models approaches have been performed or initiated. A Behavioural Economic Working Group was recently created³ to help at identifying and analysing the issues encountered in the performance of environmental inspections and enforcement, find alternative solutions through neuroscience, psychology and behavioural economics tools, design and implement experimental solutions, and assess the obtained results. Besides, a Registry of Good Environmental Practices⁴ exists to promote their dissemination. Efforts have been made to engage with the private sector. However, its involvement at an early stage as an alternative to traditional “command and control regulations” is yet to be strengthened. Finally, a number of compliance promotion tools and measures have been developed (see Chapter 11 on Compliance promotion).

Assessment

While some alternatives to state-led regulatory enforcement exist, they are not implemented systematically or sufficiently during the *ex ante* or *ex post* assessment of regulation. They appear to be used in cases where traditional practices are not being effective.

Not all alternatives to state-led regulation used (such as the use of IGAs, or liability for environmental consultants preparing IGAS) seem to be effective. Some others alternatives are promising but still are at an incipient stage (Behavioural Economics working group, use of the Registry of Good Environmental Practices, integration of certain informal businesses), or are likely to have limited impact when irreversible harm has already occurred (enforcement actions by courts).

Recommendations

- Alternatives to state-led regulation need to be more systematically considered. In particular, OEFA should more systematically engage with the private sector (including regulated entities, managers, workers and other stakeholders) to find ways and channels to improve regulatory outcomes – starting at very early stages i.e. even before *ex ante* consultation on an already existing regulatory draft.
- Alternative/complementary mechanisms should be developed, but also evaluated in terms of effectiveness. This involves e.g.:
 - Intensifying the work of the Behavioural Economics working group and the use of the Registry of Good Environmental Practices to reinforce risk prevention.
 - Continuing and speeding the pace of integrating informal businesses – i.e. by determining the risks of their activities and defining how to manage them, instead of resorting to heavy licensing procedures.

- The MINAM should consider reforming existing *ex ante* requirements to keep them only for operators and activities that pose the highest risks, and make them more risk-focused.
- Carry out an assessment of the effectiveness and efficiency of the quality of IGAs in managing and reducing risks, to consider amongst other the Implementing a more appropriate liability system for environmental consultants. This assessment should also include the Registry of Good Environmental Practices.

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 Regulatory Policy, OECD Publishing, Paris, [1]
<https://dx.doi.org/10.1787/9789264208117-en>.
- OEFA (n.d.), *Portal Interactivo para las Fiscalías Especializadas en Materia Ambiental (FEMA)*, [3]
<https://www.oefa.gob.pe/cofema> (accessed on 14 October 2019).

Notes

¹ Resolution of the Board of Directors No. 008-2016-OEFA/CD of 26 April 2016,
<http://www.oefa.gob.pe/wp-content/uploads/2016/05/res-008-2016-oefa-cd-peruano.pdf>.

² See Preamble, section 2. Mandate and functions of OEFA.

³ Approved by Resolution of General Management No. 071-2018-OEFA / GEG.

⁴ Approved by Resolution of Board of Directors No. 034-2014-OEFA / CD.



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