Chapter 6

Considering regulatory compliance, enforcement and appeals in Chile

To achieve its intended objective, a regulation must be complied with. This chapter looks into compliance and enforcement mechanisms. It offers and approach to regulatory enforcement and compliance, seeing that a crucial performance indicator for any regulation is the degree of compliance it generates. It takes into account the use of risk-based approaches for the design and implementation off regulations to be introduced gradually in the Chilean government. Furthermore, it touches upon the justification of having an appeal mechanism that allows for the redress of regulatory abuse by regulators in Chile.

To achieve its intended objective, a regulation must be complied with. A mechanism for the redress of regulatory abuse by regulators should also be in place as a democratic safeguard in a rule-based society and as a feedback mechanism to improve regulations.

Approaches to regulatory enforcement and compliance

A crucial performance indicator for any regulation is the degree of compliance it generates. An *ex ante* assessment of compliance is increasingly part of the regulatory process in OECD countries, although the level of resources and attention focused on it varies significantly.

Box 6.1. The Table of Eleven in the Netherlands

The **Netherlands** has engaged in pioneering work to ensure that compliance and enforcement are considered at the start of the rule-making process. Efforts by the Ministry of Justice to raise awareness go back over two decades, via the Directives on Legislation, the legal quality criteria that it applies, and the Practicability and Enforcement Impact Assessment that it also undertakes. The Netherlands developed the so-called "Table of Eleven" determinants of compliance, which have widely influenced other countries' efforts in this field.

The Inspectorate of Law, now called the Expert Centre on the Administration of Justice and Law Enforcement, within the Ministry of Justice, acts as consultant to ministries on issues of enforcement in relation to regulatory proposals. The Expert Centre regards enforceability assessment as essentially probabilistic, recognising that there is significant uncertainty. It aims to identify the two or three key "risk factors" for compliance/enforcement in relation to each regulatory proposal to enable policy makers to address these issues in advance. The review is made as consistent as possible through adoption of standard checklists and other instruments. A key tool is the "Table of Eleven" determinants of compliance.

The Table of Eleven was developed jointly by the Ministry of Justice and Erasmus University and derives from academic literature in the areas of social psychology, sociology and criminology, supplemented by the ministry's practical experiences and viewpoints on law enforcement. The table is divided in three parts:

- Spontaneous compliance dimensions. These are factors that affect the incidence of voluntary compliance - that is, compliance that would occur in the absence of enforcement. They include the level of knowledge and understanding of the rules, the benefits and costs of complying, the level of acceptance of the "reasonableness" of regulations, general attitudes to compliance by the target group and "informal control", and the possibility of non-compliance being sanctioned by non-government actors.
- Control dimensions. This group of factors determines the probability of detection of non-complying behavior. The probability of detection is directly related to the level of compliance. The factors considered are the probability of third parties revealing non-compliance, the probability of inspection by government officials, the probability of inspection actually uncovering non-compliance and the ability of inspection authorities to target inspections effectively.
- Sanctions dimensions. The third group of factors determines the expected value of sanctions for non-compliance, that is, the probability of a sanction being imposed where non-compliance is detected and the severity and type of likely sanctions.

Source: OECD (2010), *Better Regulation in Europe: the Netherlands*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264084568-en.

In general, compliance rates in Chile are thought to be high, but there is no monitoring mechanism that can prove this finding. Results from inspections,[1] the number of sanctions[2] applied and the level of complaints[3] received reflect that compliance rates are rather good. However, the approach to enforcement remains punitive rather than preventive, and regulators still prefer to inspect rather than teach regulated entities on better ways of achieving compliance. In the last few years the trend towards training public and private actors has increased in order to promote collaborative ways of compliance.

Institutions that have inspection functions are responsible for planning and managing their own inspection approach, but they normally do not follow a coherent and objective methodology. Control institutions, such as the Agriculture and Livestock Service or the Regional Ministerial Secretariat of Health, have a clear inspection role, but they still could improve in their role if they were to integrate techniques and more analytical and economic analysis of what they would like to achieve through collaborative inspections. The Customs Service, for instance, despite improvements, is overwhelmed by the number of inspections to be carried out and it does not always have the human resources to so promptly. Complaints from business associations, such as the Supermarkets Association, have reported that border inspections create delays that affect the sale of perishable goods (Bonilla, 2014).

Institutions with inspection functions do not normally publish their strategies or their results, and they conduct inspections on an ad hoc basis. Improving inspections in Chile is also related to reducing time and costs for businesses in getting permits and licenses, as well as to unify procedures and provide services on time.

Some positive experiences, however, can be shared. The Under-secretary of Transport plans its inspections based on the analysis and assessments of the results obtained the previous year. They also include views from the main stakeholders in the planning, which reflect adjustments in the methods and parameters used in their activities, to improve the quality of inspections. The results are proposed in an Annual Inspection Plan, which is flexible so as to incorporate actions as contingencies and priorities could be included as activities evolve. However, risk-based approaches are of no use here, as data collected to date do not allow for such an approach and there are no incentives for those complying with the regulations.

The Superintendency of Environment has also started to plan its inspections better, mainly by giving priority to certain activities, identifying risk activities, non-compliers and areas that suffer from environmental stress. In addition, it has drawn up Enforcement Programmes (*Programas de Cumplimiento*) which offer the possibility for non-compliers to either respond to the proposed sanction within ten days or to submit an Enforcement Programme by which they undertake to comply with certain specific measures in an established timeframe under the direct supervision of the Superintendency. If the regulated entity does not comply with its Enforcement Programme the sanction would be increased, and the fine could be doubled.

In terms of sanctions, each institution with enforcement responsibilities has its own sanctions and applicability procedures. When someone does not comply with regulation, an infringement procedure is launched with a possibility of imposing a sanction (a fine in most cases). Some institutions, such as the Superintendency of Environment, have reviewed their system of fines, in order to update it and make it an effective dissuasive mechanism to comply with regulations. In some policy fields, such as agriculture, regional directors, representing the ministry at regional level, can apply sanctions and

fines that might vary from region to region. Regulated entities and citizens can appeal such sanctions. Appeals against sanctions can represent up to 30% of the total sanctions applied.

Use of risk-based approaches

Regulators should be required to develop, implement and review regulatory compliance strategies against risk-based criteria. Risk assessment, risk management, and risk communication strategies for the design and implementation of regulations should be introduced gradually to ensure that regulation is targeted and effective. Regulators should also build an accountable system for the review of risk assessments accompanying major regulatory proposals that present significant or novel scientific issues, for example through expert peer review. However, the government of Chile should bear in mind that the implementation of risk-based approaches to regulatory enforcement requires specific institutional capacity, which may take time to develop. Consequently, the application of these approaches must be planned and incremental.

Box 6.2. **The application of the principles of risk in compliance and enforcement in the United Kingdom**

The **United Kingdom** Hampton review on reducing administrative burdens through better compliance and enforcement practices was published in March 2005. In April 2008, the United Kingdom issued *The Regulators Compliance Code*, a statutory code of practice intended to ensure that inspection and enforcement are efficient, both for regulators and those they regulate, and based upon risk principles. The Code gives the seven Hampton principles relating to regulatory inspection and enforcement, a statutory basis, and is binding on UK regulators. It requires the following:

- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.
- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources in the areas that need them most.
- Regulators should provide authoritative, accessible advice easily and cheaply.
- No inspection should take place without reason.
- Businesses should not have to give unnecessary information or give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

It was important to review the success of these measures in practice and in July 2008, the United Kingdom National Audit Office reported on reviews of the performance of the five largest regulators in implementing the Hampton principles. The regulators were the Environment Agency, Health and Safety Executive, Financial Services Authority, Food Standards Agency, and the Office of Fair Trading. The general conclusion was that regulators had accepted the need for risk-based regulation and, in most cases, had established mechanisms to assess risk and direct resources accordingly. There were, however, a number of common challenges faced by

Box 6.2. **The application of the principles of risk in compliance and enforcement in the United Kingdom** (*cont.*)

regulators. Among these the development of a comprehensive risk assessment system to deal with a wider range of risks, including those applying to the regulated sector generally and at the level of the firm, so that resources could be applied effectively. The review concluded that there was considerable value in regulators sharing their knowledge and experience.

Source: United Kingdom Government (2005), "Reducing Administrative Burdens Effective Inspection and Enforcement", The Hampton Review – Final Report, March, www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf; United Kingdom (2007), "Regulators Compliance Code: Statutory Code of Practice for Regulators", Department of Business Enterprise and Regulatory Reform, 17 December, www.berr.gov.uk/files/file45019.pdf; and United Kingdom Government (2008), "Regulatory Quality: How Regulators are Implementing the Hampton Vision", National Audit Office, www.nao.org.uk.

There is no clear promotion of risk management and risk assessment in the regulatory process in Chile. One of the main issues that affect the introduction of risk-based approaches in regulatory activities is the lack of adequate information and the unavailability of historical databases that could provide accurate data on the evolution of the supervisory and control function.

However, there are certain policy fields where these topics have been explored. Risk analysis and risk management are mainly used in the financial sector, insurance and pension funds management and the activities related to prevention of money laundering and terrorist activities. The Superintendency of Stocks and Insurance, Superintendency of Banks and Financial Institutions, Superintendency of Pensions and the Financial Analysis Unit develop risk strategies. Other regulators, such as Customs and the Agriculture and Livestock Service have also introduced risk strategies in their inspection operations and supervision roles.

The Agriculture and Livestock Service also conducts their inspections based on risk-based approaches. The Service prepares an annual plan for inspections that should ensure compliance with the current regulation. Each inspection unit has established inspection standards that are built based on a universe of inspected entities, following a risk analysis. The selection of that universe is then correlated with budget availability to ensure that inspections can really take place.

Appeal process for regulatory decisions

The role of the judiciary is essential for regulatory quality control and economic performance. The effectiveness of the process arises from the ability of the judiciary to consider the consistency of regulations with principles of constitutionality, including notably proportionality and the right to be heard. It also arises from scrutiny by the courts of whether secondary regulation is fully consistent with primary legislation. A feature of regulatory justice is the existence of clear, fair and efficient procedures to appeal administrative decisions and regulations. Regulatory authorities must exercise their powers only within the scope permitted by their legal mandates, treat like cases in a like manner, and have justifiable reasons for decisions, and for any departure from regular practice. Embedding the principles in law and providing for effective appeal processes

prevents abuse of discretionary authority, and preserves the integrity of the regulatory system.

In general there are two ways to challenge a regulation:

- The first option is the procedure established in the regulation itself, which normally includes an instance that could review the sanction imposed by the authority that issued it. Law No. 19.880 from 2003, which sets the basis for the administrative procedures that regulate the acts of institutions of the State administration, establishes the principles for reversal and hierarchical recourse against decisions by the administration. Citizens also have a right to an extraordinary recourse of revision according to the same law. In some cases, there might be two proceedings, as the hierarchically superior institution can also play the appeal role, but this does not always happen. There is always the possibility of challenging the administrative act either by judicial means, lodging an action in the ordinary courts of justice by an application to have a public right declared null and void, or by administrative means with a petition to the Comptroller General of the Republic. Both types of action can be mutually exclusive, but using one does not deny the person the right to use the other.
- The second option is the appeal to have the act declared inapplicable due to its unconstitutionality, which is an external mechanism of the regulation. This appeal requires the affected party to make a formal appeal to the Constitutional Court against a specific regulation, which is the court responsible for handing down an opinion and verdict.

The different types of appeal stem from the specific sectoral regulations, particularly related to fines and sanctions, which can describe up to a hundred types of administrative procedures.[4] By establishing those procedures, regulatory institutions have offered various types of protection to citizens, depending on the sector. Accordingly, there are old mechanisms, such as those of the Agriculture and Livestock Service, and more modern mechanisms, such as those of the Superintendency of Environment.

All administrative regulation is bound by jurisdictional control. Both at constitutional and legal levels, there is a right to effective judicial protection. In this respect, Articles 6, 7, 19, 20, 38, 76 and 93 of the Constitution describe the different types of measures related to the judicial protection of citizens, such as principles of legality and competence, the right to effective judicial protection, the action of constitutional protection of fundamental rights, such as the jurisdictional recourse in emergency cases against any arbitrary or illegal act or omission that could imply privation, disturbance or threaten the legitimate execution of rights and guarantees protected by the law, the patrimonial responsibility principle of the administration, the competences of the Constitutional Court and the principle of inexcusability that links the courts of justice to their fields of competence.

Law No. 18.575 that establishes the Constitutional Organic Act for the Administration of the State and Law No. 19.880 are the key legal instruments to ensure a judicial review of administrative acts. Administrative contentious cases are a matter for the ordinary courts of justice, which can review regulations and determine a "contentious of nullity" (*contencioso de nulidad*) to set the principle of juridicity or rule of law or a "contentious of compensation" (*contencioso de indemnización*), which can lead to reparation for the damage caused. Courts of Appeal also accept the recourse to protection, in extraordinary cases where arbitrary or illegal acts or omissions imply privation,

disturbance or threaten the rights and guarantees that are included in Article 20 of the Constitution.

The current government has paid particular attention to ways in which the role of judges and the judiciary can be improved to ensure legal protection for citizens, but also to expedite justice. The subject of environment illustrates this trend, as the creation of special Environmental Courts was a consequence of the need to improve access to justice and ensure that judges are promoting the protection of citizens (see Box 6.3).

Box 6.3. **Environmental courts in Chile**

The design of the environmental institutional set-up in Chile has evolved rapidly over the last few years. The Ministry of Environment is responsible for policies and regulations, while the Environmental Evaluation Service is responsible for the management of the System of Environmental Impact. The Superintendency of Environment is in charge of supervising enforcement and compliance of the tools for environmental management and the Environmental Courts have been established to handle the "dilemma of efficiency-effectiveness of the regulation with regard to the rights of the regulated and citizens".[5]

Environmental Courts are a special judicial body, whose main role is to solve environmental controversies, according to Law No. 20.600 of June 2012. They are not part of the judicial power in Chile, even if they are under the directive, correctional and economic dependence of the Supreme Court. Law No. 20.600 has established three environmental courts: in the north (Antofagasta), in the centre (Santiago) and in the south (Valencia) of the country. Environmental courts are collegial mixed bodies (they are composed of three ministers, two lawyers and a professional in natural sciences, and two deputy ministers, one lawyer and one professional in natural sciences). The President of the Republic with agreement of the Senate appoints ministers, while the Supreme Court nominates them.

Among other matters, environmental courts are responsible for:

- Studying appeals lodged against supreme decrees that establish the primary and secondary environmental regulations and emission norms.
- Receiving lawsuits to obtain reparation for the environmental damage.
- Receiving lawsuits against resolutions of the Superintendency of Environment.
- Authorising provisional measures, suspensions, or sanctions by the Superintendency of Environment.
- Studying the appeals presented by any citizen or business against the verdict of the Committee of ministers or executive director that solves the administrative recourse when their observations have not been taken into consideration during the environmental evaluation process.
- Studying the lawsuits against the administrative acts of ministries or public services in the implementation and execution of quality norms, emission norms or prevention or decontamination, when they infringe the law, the norms, or the objectives of the above-mentioned tools.

Law No. 20.600 states that environmental courts should be responsible for appeals against the illegality of certain administrative acts and norms issued by the Ministry of Environment, the Superintendency of Environment, the Environmental Evaluation Service, the Committee of Ministers or any other body responsible for environmental issues. It should also respond to lawsuits for environmental damage.

Source : www.tribunalambiental.cl.

Assessment and recommendations

Enforcement strategies driven by compliance, more than sanctions, should be promoted among regulatory institutions and superintendencies, making use of risk-based approaches to deploy their resources better.

As in many other Latin American countries, enforcement in Chile is mainly seen within the framework of command-and-control regulation, applying sanctions to those who do not comply with the regulations in force. Institutions have made progress in setting sanctions that are in proportion to the rules broken, as an appropriate deterrent for non-compliance. The laws that create each regulatory institution in Chile establish the type and amounts of sanctions that should be applied, which gives each institution the freedom to introduce the sanction mechanisms in relation to the behaviour to be punished.

Despite it being an important step to have an appropriate system of sanctions, regulators in Chile should also promote compliance through other means, such as education, codes of conduct and self-regulation schemes, which are less punitive and more consensus-based, and influence behaviour change to promote compliance.

For this to happen there is a clear need for change in the regulator´s culture. Regulators should help regulated entities, whether businesses or citizens, to better understand the regulations and requirements in place with which they have to comply. Regulatory processes should be more transparent in order to guarantee access to information with regard to requirements in a timely manner. Regulators should also be supportive regarding actions to encourage regulated parties to comply with regulations, and not only punish them through sanctions. This means that superintendencies, mainly in charge of supervision and control, and regulators also with that function, should be encouraged to participate actively in any regulatory reform initiative so they can participate in the cultural change required to deal with enforcement shortcomings.

The government of Chile should streamline the various channels for administrative and judicial review.

There is scope to improve the various channels for administrative and judicial review that the Constitution and different legal instruments in Chile grant to citizens. There are different levels and mechanisms to ensure that citizens are protected against arbitrary regulatory decisions, but the system could be encouraged by more streamlined and flexible procedures, the use of ICT and more specialised technical capabilities.

Good experiences have already been had in certain sectors, such as the environment, where judicialisation presents a serious issue to be faced. The sector shows that simplification and specialisation have been important in order to cope with the degree of expertise required to take decisions and the need to have special channels to deal with the increasing number of cases. An appropriate institutional set-up to solve administrative and judicial appeals is essential to promote transparency, accountability and responsiveness. This is why the example of environmental regulation could be replicated in other sectors where the existing mechanisms impose excessive costs, are lengthy and unnecessarily constrain all the actors involved.

Notes

1. Compendium of Statistical Series 1990-2013 of the Labor Directorate, in particular its inspections role, www.dt.gob.cl/documentacion/1612/articles-95234_recurso_1.pdf.
2. Detailed sactions of the Superintendency of Health between 2007 and 2012, www.supersalud.gob.cl/documentacion/569/w3-article-7173.html.
3. Statistical Reports of the Financial Analysis Unit, available since 2009, www.uaf.cl/estadisticas/.
4. In a study published in 2005, Carmona identified about 120 special contentious administrative cases in 2003, a number that gradually increased up to 140 in the latest years. This has led to a "contentious inflation" in the Chilean system. Carmona Santander, Carlos (2005), "El contencioso administrativo entre 1990-2003" in Ferrada Bórquez, Juan Carlos (coord.), *La Justicia administrativa*, LexisNexis, Santiago, p. 204
5. Message sent by the President Michelle Bachelet to Congress when transmitting the law proposal that created the Environmental Courts.

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