Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An ex ante assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes1, and the adoption of rules to promote responsiveness, such as "silence is consent".2 Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

Compliance and enforcement

The practical roll-out of the Hampton recommendations is a fundamental and comprehensive effort to embed risk-based regulatory management at ground level. This is an area where there have been significant developments since the 2002 OECD report. There appears to be steady progress in taking forward the Hampton recommendations, energetically spearheaded by the BRE (Better Regulation Executive). The changes proposed by Hampton were innovative and have been a source of inspiration to other countries (everybody has heard of Hampton). Change was also particularly necessary in the United Kingdom, given its complex and overlapping structures for enforcement. Consistent change across all regulatory agencies and local authorities will take time. The

recent BRE and National Audit Office (NAO) reviews of progress note this issue in relation to the five major regulators. The mix of initiatives which has been put in place, including statutory requirements on regulators (the Regulators' Compliance Code) as well as softer approaches such as the Regulators Hampton Implementation Network Group to exchange views seems appropriate to the challenge.

Recommendation 6.1. The BRE needs to keep up the pressure in the roll-out of reforms

Box 6.1. Comments from the 2002 OECD report: Enforcement

Tendencies toward a regulatory policy based on performance instead of command-and-control based rights and obligations create new challenges for the appraisal of regulations. Some important regulatory areas such as occupational health and safety regulations have in recent years increasingly adopted general standards. This means that actors are given greater freedom to determine what action will best meet the regulatory goal. It also means that the concrete content of the standard is determined by enforcement and adjudication authorities *ex post* rather that by the regulator *ex ante*. Both these effects create challenges for the appraisal of regulatory proposals since they are faced with the uncertainties of the behavioural response of actors to the standard and how the authorities will interpret it. Thus, while this sort of performance-based regulation should, in principle be less restrictive, it does make it more challenging for the public authorities to appraise regulatory proposals in advance, since they will be faced both with uncertainty about how the regulated will respond and how interpretation of the standard will develop.

To reduce the variability in the quality of enforcement, in particular between local governments, the United Kingdom government - in close involvement with relevant stakeholders- have developed an Enforcement Concordat. The Concordat is a voluntary non-statutory code aimed at helping compliance, describing what business and others can expect form enforcement officers. The vast majority of local authorities and central agencies have adopted the concordat.

Rebalancing enforcement resources away from inspections in order to put more effort into preventative advice on compliance is a major step forward. Rebalancing resources is one of the most important developments following the Hampton Report, even if its application remains uneven.[3]

Monitoring compliance rates is also important. The new approach does not invalidate monitoring of compliance rates. Compliance is not monitored as such (some countries do this). A clear picture of compliance rates could help in evaluating the effectiveness of current enforcement initiatives, and guide next steps in enforcement policy.

Recommendation 6.2. It would be useful to collect data, using the records already compiled by agencies and local authorities, in order to have a strategic picture of underlying trends and difficulties.

The new regulatory sanctions regime is another positive development. The new regime gives regulatory agencies new, more flexible civil administrative sanction powers as an alternative to criminal prosecution. It is too early to assess its effectiveness in practice.

The Hampton recommendations relating to regulatory structures and the need for agency rationalisation remain important. The United Kingdom's crowded regulatory

structure would be made more manageable with further rationalisation wherever this is possible. The Hampton Report spoke of the "right regulatory structure", recognised that there was a limit to what could sensibly be done, but still drew attention to the problem. It advocated consolidation of national regulators, better co-ordination of local authority regulatory services, and clearer prioritisation of regulatory requirements. These comments remain valid.

Recommendation 6.3. Consideration should be given to how the current regulatory structure could be further streamlined, and the creation of any new agencies or other regulatory structures should wherever possible continue to be avoided.

Appeals

Recent developments appear to be reinforcing the judiciary's engagement in regulatory issues. The Human Rights Act has extended the role of the courts in areas such as data protection and civil liberties, and the courts appear to be increasingly involved in rulings on guidance materials produced by the government, as well as experiencing a rise in litigation.

Recommendation 6.4. Consideration should be given to reviewing the changes in the role of the judiciary which may be usefully addressed by Better Regulation processes. The deployment of certain Better Regulation policies could help to address any emerging issues. Setting policy in open sessions for example, makes subsequent challenge more difficult.

Box 6.2. Comments from the 2002 OECD report: Appeals

There is a growing tendency for judicial review to be sought of regulations of major economic or commercial significance, and even of constitutional questions. In 1999, out of 4 959 applications to the High-Court for permission to apply for judicial review, 1 373 were granted. Access to judicial review is constrained. Except in Scotland, an application to the High-Court takes place in two stages. First a single judge of the Court considers whether there is an arguable case. If there is, he grants permission to proceed to a full hearing before a panel of judges. The application must be made in any event within three months of the action or decision, which is complained of. In sum, judicial review is limited to issues of legal authority, fundamental procedural fairness, and gross proportionality to proper purposes, while it is nearly impossible to appeal the content of a regulation.

Background

Compliance and enforcement

Monitoring of, and policy on, compliance

Compliance is not monitored as such. National regulatory agencies and local authorities vary significantly in both how they monitor and record compliance, and the accuracy of these records. However many regulators, particularly local authorities, have developed systems configured around reporting requirements. The main quality assurance body for local government, the Audit Commission, requires that local authorities report on rates of non-compliance.

The UK policy approach to compliance since the Hampton review (see below) has been to rebalance enforcement resources so that inspectors spend more time advising on compliance, in order to minimise the risk that businesses will be in breach of regulations. This is a fundamental part of the risk-based approach to enforcement. The idea is that a more proportionate approach to inspections releases time to help businesses understand better what they need to do to comply with regulations.

Box 6.3. The Food Standards Agency: A new approach to compliance and enforcement

Starting with the slogan "Safer food, Better Business" the Food Standards Agency carried out a GBP 2 million research programme with SMEs (directly, not through representative organisations) on the issue of compliance. The research revealed that SMEs (especially the smallest firms) often did not know, let alone understand, the regulations they were supposed to comply with. A new approach was therefore launched by the agency in 2005. This included a campaign and materials aimed at SME management; DVDs to train staff in 16 languages (to counter large staff turnover and also the many different nationalities found in the restaurant trade); training programmes for inspectors emphasising a tailored approach to visits and coaching; and an emphasis on simplicity in the materials given the little time that SMEs can spend on this. The approach was appreciated. An agency survey found that 80% of SMEs considered it useful, and 45% said it improved profitability.

The BRE considers that the approach developed by the Food Standards Agency could be replicated, although it would be difficult to fit all areas.

The Macrory review on regulatory sanctions[4]

This review, carried out in 2006 in the wake of the Hampton Report (Box 6.4), made nine recommendations. In addition to the recommendations, the Macrory report set out six "Penalties Principles" and seven characteristics.[5] The report aimed at ensuring that regulatory agencies had a set of modern and flexible sanctions to use, that were proportionate and appropriate relative to the risks faced. The government accepted its recommendations in full, and these have been taken forward through the Regulatory Enforcement and Sanctions Act 2008. This gives regulators new civil administrative sanction powers, based on the report's recommendations, as an alternative to criminal prosecution when this is not a proportionate response. Monetary penalties have been made more flexible. There is also more flexibility with compliance notices (the time that can be given firms to get back into compliance after they have been found in breach of regulations). The report also raised some deeper issues, including a concern that regulators can act as judge and jury, and the need for a radical overhaul of the tribunal system.

A new policy on enforcement

Responsibilities for enforcement are divided between national regulatory agencies and local authorities, with the latter carrying out four times as many inspections as the former. There has been a succession of reviews over the last few years leading to a reappraisal of the approach to enforcement, which is now being taken forward on the ground, with statutory backing where needed. The statutory basis now includes the Regulatory Enforcement and Sanctions Act, enacted in July 2008, and the Regulators Compliance Code, a statutory code of practice for regulators which came into force in April 2008. The act imposes a statutory duty on five economic regulators,[6] and enables a

minister to impose a similar duty on any other regulator, not to impose or maintain unnecessary burdens.

The Hampton Review

The Hampton Review sought to embed a new policy approach to enforcement, based on proportionality and risk-based assessments to help target resources on "high-risk" businesses that are unlikely to comply with regulations, and reduce the administrative burden on those that do. The level of enforcement was not proportionate to risk, and this was affecting business competitiveness. The review built on initiatives and trends that are already started.[7]

Hampton found that risk assessment, though widely recognised as fundamental to effectiveness, was not comprehensively implemented by enforcers. It also found that the system as a whole was unco-ordinated, that there was inconsistency in the application of regulation, and that good practice was not uniform. There were too many forms, and too many duplicated information requests. Inspections must be streamlined. The review and its recommendations (which were all adopted by the government) mapped out the work needed to fully embed risk assessment in enforcement by regulators, including local authorities.

Hampton also underlined the importance of what it called the "right regulatory structure". This concept included better impact assessments for the creation of regulations that are easier to enforce and understand; consolidation within national regulators to create a "simpler more consistent structure"; fewer regulators; better co-ordination of local authority regulatory services; clearer prioritisation of regulatory requirements by central government departments and national regulators; and better accountability throughout the regulatory system.

Box 6.4. The Hampton Report recommendations

- Comprehensive risk assessment should be the foundation of all regulators' enforcement programmes.
- There should be no inspections without a reason, and data requirements for less risky businesses should be lower than for riskier businesses.
- Resources released from unnecessary inspections should be redirected toward advice to improve compliance.
- There should be fewer, simpler forms.
- Data requirements, including the design of forms, should be co-ordinated across regulators.
- When new regulations are being devised, departments should plan to ensure enforcement can be as efficient as possible, and follows the principles of the report.
- Thirty-one national regulators should be reduced to seven more thematic bodies.

An important Hampton recommendation was that the number of national regulatory agencies should be reduced. Specifically, Hampton recommended that 31 bodies should be merged into 7 thematic ones. This had already started to happen, with the consolidation of regulators that led to the establishment of OFCOM (communications) and the FSA (financial services), among others. The establishment of OFSTED

(education inspections) has reduced the number of education inspectorates from 11 to 4. Funding cuts have helped the process along, and not least, encouraged the take up of the new approach to enforcement.[8] More mergers are in the pipeline.

The Regulators Compliance Code

The Regulators Compliance Code is a statutory code of practice which came into force in April 2008.[9] The aim of the code is to ensure that inspection and enforcement is efficient, both for the regulators and those they regulate. The code gives the seven Hampton principles relating to regulatory inspection and enforcement a statutory basis:

- 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.

Taking stock of progress: the Hampton implementation reviews

The BRE and NAO have jointly carried out reviews of the five major national regulators to assess whether they have adopted the principles of good regulatory practice set out by Hampton.[10] The reviews assessed performance against the principles of an effective regulatory regime. These principles were the design of regulations; sanctioning (based on the recommendations of the Macrory Report); advice and guidance; focus on outcomes; data requests; and inspections. Each review was carried out by a team of four made up of the BRE, the NAO, an external stakeholder (local authority enforcement representative, National Consumer Council, trading standard body), and another regulator to act as peer reviewer. There is no formal scoring or rating system as regulatory agencies are too different (for examples as regards their powers and independence). Also, the Hampton principles have to be given effect according to the context within which each regulator operates. Reports on the reviews of the five major regulators were published in March 2008. In addition a compendium report that draws out key messages from the individual assessments was published in July 2008 by the NAO. Further reviews of 31 national regulatory bodies that were in scope of the Hampton Report are being conducted from October 2008. As well as further reviews, the Regulators Hampton Implementation Network Group has been set up to exchange views and generate discussion.

The reviews concluded, broadly, that there is progress, but it is uneven and changing the culture takes time. There are some good examples. Some agencies have been risk-

based for some time. Advice and guidance from regulatory agencies could be improved. There is often a disconnect between the "top of the shop" (management) and on the ground. Regulators are not sharing best practice as much as they might.

Appeals

There are a number of avenues: administrative appeals; ombudsmen; the Human Rights Act 1998; and judicial review by the courts.

Administrative appeals

Administrative appeals – rather than appeals to the courts – are the first recourse for appeals in relation to regulatory decisions. All public bodies which have significant dealings with the public need to have well-publicised and easy-to-use complaints procedures. One central web site provides easily accessible information about complaint procedures with direct links to relevant departmental and agency web sites. Some public bodies have their own external adjudicator.

Ombudsmen

The second route for administrative complaints is to an ombudsman. Most United Kingdom public bodies are within the jurisdiction of an independent ombudsman. Accessibility to ombudsman services has been the subject of criticism in the past. The Cabinet Office, which is responsible for the system, implemented reforms in 2007, which will allow ombudsmen to work collaboratively on cases relevant to more than one of their jurisdictions, to carry out joint investigations and to produce joint reports.[11]

The Human Rights Act

The Human Rights Act 1998, which incorporates the European Court of Human Rights into the UK legal system, provides further safeguards and possibilities to appeal regulatory decisions. The UK courts must respect the rulings of the European Court in Strasbourg in relation to the European Convention of Human Rights. If an act is contrary to the European Convention on Human Rights, they can declare it incompatible but not override it. The parliament usually changes the act as a result.

Judicial review

Judicial review may be used where there is no right of appeal, or where all other avenues of appeal have been exhausted. The scope of judicial review is potentially very large. Judicial review allows judges (and through judges, citizens and other stakeholders) to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. The conduct of government authorities may be challenged on the grounds that their actions may be unlawful, irrational, or that they have followed improper procedure. These accusations must be based on set procedures or laws that have been enacted by the parliament.

Judicial review is relevant to many areas of regulatory policy, including licensing (whether licences have been applied properly), and supervision of the actions of regulatory agencies. Guidance notes and codes of practice drafted by government authorities to clarify laws and regulations (including Better Regulation procedures such as the Code of Consultation) may also be the subject of judicial review.

Developments

The introduction of the European Court of Human Rights into UK law has enlarged the role of the courts in areas such as data protection and civil liberties, and imposed new constraints on the executive. The courts also appear to be increasingly involved in rulings on "soft law", that is, materials issued by the executive such as codes of practice or guidance (including Better Regulation material such as the Code of Practice on Consultation), which are increasingly considered judiciable. Another development that is leading to an increase in the involvement of the judiciary in regulations is the rise of a more risk-averse society. Combined with a "no win, no fee" approach to legal challenges, this, according to anecdotal comments made to the OECD team, has led to a rise in litigation.

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. One local authority interviewee put it this way: "Why inspect compliant businesses? This is what Hampton changed."
4. "Regulatory Justice: making sanctions more effective", 2006.
5. A sanction should: *i)* aim to change the behaviour of the offender; *ii)* aim to eliminate any financial gain or benefit from a non-compliance; *iii)* be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; *iv)* be proportionate to the nature of the offence and the harm caused; *v)* aim to restore the harm caused by regulatory non-compliance, where appropriate; and *vi)* aim to deter future non-compliance.

   Seven characteristics. Regulators should: *i)* publish an enforcement policy; *ii)* measure outcomes not just outputs; *iii)* justify their choice of enforcement actions year on year to stakeholders, ministers and the parliament; *iv)* follow-up enforcement actions where appropriate; *v)* enforce in a transparent manner; *vi)* be transparent in the way in which they apply and determine administrative penalties; and *vii)* avoid perverse incentives that might influence the choice of sanctioning response.
6. OFT, OFGEM, ORR, OFWAT, POSTCOMM.
7. For example, the Department of Health Concordat led to the establishment of an advisory group of regulators, inspectors and users set up by statute in 2004 to debate regulation in the health sector. It provides an independent voice in the debate, and has been working on a bottom up approach to the regulation of health care issues, including a risk-based approach where appropriate.

8. For example OFSTED's budget was cut from GBP 240 million to GBP 180 million.

9. Under the Legislative and Regulatory Reform Act 2006.

10. The five regulators are: the Health and Safety Executive, the Environment Agency, the Office of Fair Trading, the Food Standards Agency, and the Financial Services Authority.

11. A Regulatory Reform Order was used to implement the reforms.