

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 processes, and the adoption of rules to promote responsiveness, such as “silence is consent”. 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

A risk-based approach to enforcement has already gathered momentum and needs further encouragement. Denmark has made compliance and enforcement a greater priority over the past years and has been developing new approaches. Enforcement authorities have started to roll out a risk-based approach, and a number of inspection bodies now use risk analysis. The small size of the country and the concentration of enforcement responsibilities within central government inspection agencies have facilitated the development of the new approach as inspection agencies have accumulated a thorough knowledge of companies. Experiences such as that of the Veterinary and Food Administration show that the

involvement of front line enforcement workers can encourage acceptance of new approaches.

Recommendation 6.1. Communication on the new approach should not be neglected, in order to highlight the positive effects, and also provide reassurance, where needed, to sometimes risk averse citizens and parliament.

Appeals

The appeal system rests on administrative procedures and complaint boards within ministries, with the general courts as last resort, and this seems to work well. The creation of boards is considered a generally effective tool for addressing and resolving complaints, and avoids overcrowding the courts. The boards are subject to control mechanisms and transparency rules. Their decisions can be appealed to courts. The parliamentary ombudsman also plays a significant role in the development of good administrative practices. The publication of its conclusions can give it significant power. These structures appear to avoid the complications of some other countries systems, which leave greater scope for judicial review and litigation. Denmark understandably wants to keep it that way. However the diversity of complaint boards and differences in their legal framework may make it difficult for citizens to get a clear view of the complaint system. This calls for further attention to ensuring transparency of these bodies.

Background

Compliance and enforcement

Compliance monitoring

A number of administrative bodies monitor compliance rates on a regular basis, which is associated with the development of risk-based enforcement policies. While there is no overall assessment of the level of compliance with regulations, monitoring in respect of particular sectors indicates high levels of compliance. As an example, the Ministry of Taxation, which has developed a strategy to enhance compliance (Box 6.1), assesses the general level of compliance by measuring the under-declaration of personal income, which it estimates at below 4% of GDP. Another example is the Danish Veterinary and Food Administration (an agency under the Ministry of Agriculture, Food and Fisheries), which monitors compliance in support of risk-based controls. Officials report that 25% of food companies have gained “elite status” (defined as having received no remarks for four inspections in a row over a minimum of one year), 75% of retail businesses have had no remarks in their latest inspection, and 5% were fined.

Responsibilities for enforcement

Enforcement of regulations is mainly the responsibility of central government. Municipalities have some responsibilities regarding enforcement of regulations applying to businesses (in relation to spatial planning, waste management, and environmental protection). Within ministries, departments often delegate the task of enforcing regulations to agencies or directorates, which have some managerial autonomy but are integrated in the ministerial hierarchy. Examples are: the Veterinary and Food Administration within the Ministry of Agriculture; Food and Fisheries; and the Road Safety and Transport Agency within the Ministry of Transport.

Box 6.1. Compliance and enforcement policy of the Ministry of Taxation

The tax administration in Denmark uses a number of strategies to sustain and enhance compliance with tax regulations. The tax system in Denmark is highly based on self-assessment and voluntary compliance. A balanced mix of service and enforcement strategies are used in order to make it easy to comply and difficult to evade:

- Service and information policies to ensure taxpayers understand their rights and obligations making it as easy as possible to comply.
- Audit and enforcement activities to verify non-compliance.
- Activities to influence social behaviour in order to promote voluntary compliance by using the media to campaign against underground activities.

Regulatory enforcement is considered to have commenced when the first enforcement letter is generated in the systems. Typically, one or two enforcement letters will be issued. If the arrears remain unsettled, distraint procedures will be initiated and implemented (including the issuing of summonses).

Distraint may be levied either at the offices of the authorities or by carrying out a distraint call. The collector will decide what enforcement steps are to be taken on a case-by-case basis. The distraint procedure is considered completed when, for instance, a manageable payment arrangement has been negotiated, and the items seized have been registered in the distraint notice (also termed the inventory) and picked up, if applicable.

Distraint levied is followed up on an ongoing basis, for instance by following up payments, petitions for compulsory sale, endorsement of postponement in respect of distraint registered on real property, releasing distraint on real property, etc. until the arrears have been settled. A major part of the enforcement effort is expended on monitoring the group of tax debtors who have the potential for paying in due time, but who tend to obtain additional credit by postponing settlements. Minor arrears, such as student loans, licence fees and the like are transferred to “Enforcement”, which then initiates automated enforcement.

Policy on enforcement

Development of risk-based enforcement policies

The Danish government has initiated a cross-governmental project to develop an enforcement strategy to be applied by all ministries with business regulation, which would use a risk-based approach. The government plans to use the experience from other countries when developing the strategy, in particular the recent experience of the United Kingdom following the Hampton report.¹ Some academic work also sheds some light on development of risk-based policies in Denmark. The Confederation of Danish Industries has been involved in a project with the Copenhagen Business School on control and enforcement. The project has compared seven areas of regulations, and tried to set up a model to define targets, level of risks, processes associated. Result show that the approach to control is very different according to areas of regulation in Denmark, and that there is no explicit definition of the risks. Some agencies are experiencing pressure on resources (such as in the area of environment and health), and are changing their approach to control, towards increased differentiation in control systems.

The proposed strategy combines risk-based controls, reinforced sanctioning and increased guidance to business to promote higher compliance. It is expected to include the following elements:

- overall prioritising of enforcement efforts;
- a differentiated control based on businesses level of compliance;
- improved guidance of businesses;
- co-ordinated control across ministries/authorities;
- effective sanctioning (including different types of sanctions); and
- systematic learning and effect-evaluations of enforcement efforts.

Several ministries have already developed enforcement systems based on the evaluation of risk. This is the case of the Danish tax administration and the Ministry of Agriculture, Food and Fisheries (Box 6.2). Several interviewees noted that Danish society shows a rather high level of risk aversion, which is reflected in the parliament. However constraints on the labour market have also made it urgent to find ways to make inspectorates more efficient with fewer resources.

Box 6.2. Enforcement policy within the Ministry of Agriculture, Food and Fisheries

The Ministry of Agriculture, Food and Fisheries has several agencies, which are specialised in the implementation and enforcement of regulations in specific areas. These agencies have developed risk-based enforcement policy, as shown in the following examples:

- The Danish Veterinary and Food Administration has introduced risk-based enforcement with respect to food regulations, and is to extend it to veterinary regulations. The administration determines the frequency of inspections on risk assessment. For example, restaurants are controlled three times a year. If they have no problem four times in a row, the frequency of inspection will be reduced. Conversely sanctions result in additional inspections as part of a follow-up procedure. In this case additional control is financed by a fee. The system was developed in co-operation with the inspectorates (such as deciding the frequency system).
- The Danish Plant Directorate uses a risk-based approach in as many areas as possible, given EU regulations. In the area of feeding stuffs, for example, EU regulations stipulate that control is targeted and carried out on a risk basis. In Denmark, the degree of control at the single company level is based on a risk categorisation of the companies. With respect to organic farming and seeds, EU legislation states that all organic farms and factories are fully controlled at least once a year. The same approach is applied in the area of seeds control. Therefore the risk based approach is limited to on-the-spot inspections.
- In 2006 the Directorate of Fisheries adopted a risk-based strategy. It is still developing measures and a new risk-analysis programme is expected to be implemented in the autumn of 2008. In January 2007 a national control plan was introduced to allocate inspection resources in accordance with established priorities and a risk assessment group was established.

Enforcement and the grey economy

The Danish government has also developed a specific enforcement policy to tackle the grey economy. In 2004, it launched the Fair Play Programme to combat moonlighting,

social fraud and illegal employment. The programme associates four approaches: *i)* co-ordination of Denmark's authorities; *ii)* increase in unannounced inspections; *iii)* initiatives such as a publicity campaign to promote a change in attitude of the public towards moonlighting and social fraud; and *iv)* consideration of increased power for inspection entities or higher penalties. The Fair Play Programme has been revised and strengthened in 2006 and again in 2008.

Appeals

General principles

The Danish Public Administration Act,² which applies to all branches of the public administration, including local governments, sets requirements on citizens' access to information and right to appeal administrative decisions. According to the law the administration has to provide grounds when its decision is not in favour of the party concerned, and has to provide written guidance on the right to appeal, including on where to appeal and any time limit to do it. Citizens can send a complaint to the administration. The government has established a number of dedicated units to deal with these complaints. The decisions of the administration and of these complaint boards can be appealed in the court system.

Appeal entities

Unlike most other countries, the Danish judicial system does not have special courts for administrative matters, criminal matters, civil matters, or for constitutional matters. The Supreme Court hears appeals on all matters. District (ordinary) courts hear and resolve cases related to probate, bankruptcy, enforcement, land registration and administrative issues, with two high courts and the Supreme Court as the second and third tier for appeal.

Many complaints relating to administrative decisions are dealt with at the administrative level, through a number of complaint boards set up within ministries (sometimes referred to as "administrative tribunals"). Complaint boards are independent in making their decisions, although they do not have the same level of independence from government as do judicial courts. They are also subject to control mechanisms. In particular their decisions can be brought in appeal to Danish courts, and fall under the supervision of the parliamentary ombudsman (Box 6.3).

The objective of these boards is to ensure independence in handling complaint cases and to provide an efficient system for handling complaints (as otherwise complaints can get "lost" in the ministry's tasks). Complaint boards are often seen as a low-cost, fast decision maker that prevents long court cases, and avoids crowding courts. Several interviewees for example considered that the creation of the Food and Veterinary Complaint Unit in 2008 has improved the complaint system in the area of food inspections.

Most complaint boards are administrative bodies (falling under the general provisions of administrative legislation and under review by the courts and the ombudsman), but there is no single legal framework. There are also dissimilarities in size and competences. Some complaint boards offer similarities with judicial courts in terms of organisation and composition, and fulfil functions which in other countries are dealt with by administrative courts. In a few cases (for example the Refugee Board, the Business Board of Appeal (*Erhvervsankenævnet*) under the Ministry of Economic and Business Affairs), they are considered as "quasi-judicial bodies", which implies that their decisions can be appealed to a limited extent.

Box 6.3. Complaint boards in Denmark

Complaint boards are dedicated entities of ministries charged with processing complaints of citizens relating to decisions of the administration.

Members of complaint boards are usually appointed by the government or a municipal council. Complaint boards are independent from local councils or ministers in processing cases, making their decisions, and launching or terminating an investigation. A board that makes binding decisions on citizens must be established under an act of the parliament, which defines its statute.

Most boards are subject to the same control mechanisms as other administrative courts, in particular the Public Administration Act and the Access to Public Administration Files Act. They are not subject to the processing rules governing the courts. Their decisions may be appealed to the ordinary courts. They cannot be appealed to another administrative authority unless otherwise specified in their statute. The complaint boards fall under the supervision of the parliamentary ombudsman, which can investigate the case as a result of a complaint or by its own initiative.*

Examples:

- The Food and Veterinary Complaint Unit was created in February 2008 within the Ministry of Agriculture, Food and Fisheries. It deals with complaints of business on decisions of the Danish Food and Veterinary Agency. It is independent from the agency, and its decisions can be appealed in ordinary courts.
- The Competition Appeals Tribunal is the appeal body for decision made by the Danish Competition Council and the Danish Competition Authority. It consists of five independent experts (three lawyers and two economists). Its decisions can be further appealed to ordinary courts. The chairman of the Competition Appeals Tribunal is a justice of the Supreme Court.
- The Danish National Tax Tribunal is the supreme administrative appeal authority for cases involving taxation, VAT, duties, customs duty and property valuation (for example citizens can appeal the decisions made by their local tax authorities and the local tax appeals boards). The National Tax Tribunal is not a court, although there are many similarities. The tribunal consists of a president, 3 chairmen and 28 members. Seventeen tribunal members are appointed by the Minister of Taxation while eleven are elected by the Danish parliament. At least nine tribunal members meet the conditions for being high-court judges and will normally be employed by the two regional high courts. The other members widely represent the Danish society. The tribunal consists of seven offices in which lawyers prepare the cases. The National Tax Tribunal decides on about 4 000 cases concerning tax and duties, and about 500 cases concerning property valuation each year. The work of the Danish National Tax Tribunal is governed by the Tax Administration Act as well as the rules of procedure for the tribunal.
- The Refugee Board is the second instance of appeal for assessing a claim for asylum. It is considered as a quasi judicial body, and its decisions are final. Asylum cases are heard by a board consisting of three members. The refugee board is an institution under the Ministry of Refugee, Immigration and Integration affairs. It is at the same time independent from the political process and does not take instructions from the parliament or the government. The chairman must be an appointed judge. One member is appointed by the Ministry of Refugee, Immigration and Integration Affairs, and one member is appointed upon nomination from the Council of the Danish Bar and Law Society.

- The Nature Protection Board of Appeal (*Naturklagenævnet*) and the Environmental Board of Appeal (*Miljøklagenævnet*) are two independent appeal boards, which are part of the Ministry of the Environment. The Nature Appeals Board is the appeal body for administrative decisions made in accordance with regulations of real estate (such as law on nature protection, forest law, summer-cottage law). The board consists of a chairman, who is appointed by the Minister for the Environment, two high-court judges and a number of political members who are appointed by the political parties represented in the Finance Committee of the Danish parliament. The Environmental Appeals Board is the supreme appeal body for a number of decisions taken under the Environmental Protection Act, the law on Land, the law on environment and gene technology, the law on chemical products, law on sea-environment, law on water supply and law on right of access to documents on environment. The Nature Protection Board of Appeal and the Environmental Board of Appeal are considered administrative bodies and are subject to the general administrative legislation. Decisions made by the boards may be brought before the courts and the boards are subject to the supervision of the parliamentary ombudsman.

* See Jon Andersen (2007), “Administrative Tribunals in Denmark”, available at www.council-on-tribunals.gov.uk/adjust/item/comment_denmark.htm.

Parliamentary Ombudsman

The position of the Ombudsman was established in 1955, based on the Swedish model. His/her activities are defined in the Parliamentary Ombudsman Act of 1996. The Ombudsman is appointed by the *Folketing* following each general election. He/she is independent from the government, and reports his/her activities to the parliament through an annual report.

The Ombudsman can initiate an investigation concerning public administration, either as a consequence of a complaint or on his/her own initiative. Any citizen may lodge a complaint directly to the Ombudsman, but must have gone through an administrative recourse first. The investigation covers both the content of the decisions and the processing of the case by the administrative authority. The Ombudsman’s conclusions are made public.

The jurisdiction of the Ombudsman covers both central and local government administrative bodies. This includes complaint boards. Judicial courts are outside his/her jurisdiction, which implies that the Ombudsman will neither investigate court rulings nor investigate on cases brought before the courts. The Ombudsman has wide powers to obtain information from the public administration. The outcome of his/her investigations is on an advisory basis and has no binding effect. The Ombudsman investigates over 4 000 cases each year, a large number of which relate to complaint boards.

Notes

1. See OECD (2009), “Better Regulation in the United Kingdom”, GOV/PGC/REG(2009)4/ANN4.
2. Act 571 of 19 December 1985, “The Danish Public Administration Act”.