From chasing violations to managing risks: origins, challenges and evolutions in regulatory inspections.
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Summary

Regulations edicted by governments to govern certain aspects of economic activities have existed for thousands of years, but have rapidly increased in number and expanded in scope and complexity over the past century and a half, with an acceleration in the last few decades. Given that these regulations generally have significant utilitarian goals (and often symbolic ones as well), it is not surprising that governments have also increasingly developed instruments to control and increase compliance with these rules: inspections and enforcement, generally conducted by specialized structures created (or transformed) for this purpose. Such regulatory inspections (and the institutions that conduct them) have not, however, appeared everywhere and in every area at the same time, nor have they developed in identical ways and at identical pace. There are considerable differences in history, structures, resources, and methods – both between countries, and within a given country between different regulatory domains.

Whether, and to what extent, these efforts at making businesses or citizens comply with regulations have been successful is also a complex issue. In most countries, outcomes in terms of health and safety have improved, but it is hard to tell how much is owed to increasing prosperity, and how much to regulatory compliance – or how much compliance owes to increased resources, skills and a changing society, and how much to enforcement efforts.

In recent years, following on concerns about "regulatory burden" and efforts to achieve "better" or "smarter" regulation, attention has also turned to inspections and enforcement. Government reform programmes have been launched, national and international institutions have developed guidance documents, and research has been done on whether, and how, inspections and enforcement could be made more effective, more efficient (less costly and/or burdensome), or both. Strong claims have been made that adopting risk-based approaches, i.e. focusing control efforts on establishments and issues presenting the highest risks, and taking enforcement decisions on the basis of risk, would reduce burden and costs, and increase effectiveness.

In spite of this, there is so far no conclusive body of evidence on the extent to which these claims are realised, and also no universally accepted understanding of what these "smarter" inspections would entail. There have been, in recent years, some important efforts to compare inspection practices and risk-based regulation between different countries, but generally not trying to look at effectiveness issues. Conversely, studies that have tried to look at compliance or effectiveness effects have rarely taken a comparative perspective. Academic literature on compliance also often remains divided between conflicting perspectives, emphasizing e.g. deterrence or voluntary compliance as primary drivers. Even though a number of scholars have developed more balanced, complex models of compliance, these are not always widely used by either academics or practitioners of regulation.

This research first considers the question of what exactly "smart inspection" practices, based on risk-based inspections, risk-proportionate enforcement, but also including efforts to promote compliance through other ("softer") measures, consist of. It seeks to examine the history of their development, and considers their theoretical underpinnings, as well as their legitimacy to the extent that they rely on a specific way of openly embracing organized regulatory discretion. Finally, and possibly most importantly, it attempts to look at whether evidence can be found regarding the effectiveness of such "smarter" approaches, and how it compares to other inspection methods which are not (or less) risk-based, and take less of a responsive approach to enforcement.

Consideration of the history of the development of inspection institutions and practices focuses on several cases – food safety and occupational safety and health (OSH) in Britain and the US, as well as France, Germany, the Netherlands, and the EU as a whole (for food safety).

The cases were selected for a combination of reasons: food safety and OSH were among the very first regulatory areas where inspectorates were created, they remain among the most high-profile and strongly resourced ones, and the countries considered were generally among the first to set up such institutions, among the most important economies of the period considered, and/or offer interesting contrasts in terms of trajectories and approaches.

This historical review leads to several findings, in particular that the creation and development of inspection structures and practices is generally linked more to risk perceptions than to scientific risk assessment, that path dependency plays an important role in determining today's setups and approaches in various regulatory fields and countries, and that some countries (and the EU, in food safety) have increasingly embraced risk-based approaches in inspections, while others remained (for a variety of reasons) more reluctant to do so.

The literature review covered several aspects: general perspectives on regulation and regulatory instruments, as well as their economic consequences, explanatory models for regulatory compliance, perspectives on regulatory discretion, and risk-based regulation.

Fundamental works on regulation and rules, including by the likes of Ogus, Diver or Baldwin, show the impossibility of achieving perfect rules, and the trade-offs that have to be accepted when chosing between more specifications-based or more outcomes-based norms, between more certainty and more flexibility. These lead to emphasize the importance of the enforcement stage.

Research on the economic consequences of regulation is complex, and often inconclusive. Porter and others have shown that, in some cases at least, higher regulatory requirements can actually go along with increased competitiveness. Rodrik, Djankov and many others have, however, concluded that poorly administered regulations, burdensome procedures, arbitrary enforcement etc. could have significant negative consequences – showing once more the importance of how regulations are "delivered".

Very different models of regulatory compliance have been put forward – from those focusing on deterrence and rational calculations (Becker), to far more complex models emphasizing procedural justice and legitimacy, but incorporating several other factors (Tyler, Lind). Experimental results tend to produce diverging results in a number of cases, but the complementarity of compliance drivers seems to be the most convincing perspective: capacity to comply (knowledge, finances) is fundamental, social conformity and legitimacy are strong drivers, and deterrence (rational calculations) is a driver of generally lower strength than conformity and legitimacy but can play a strong role for some people or companies, and/or in some circumstances (as not all rules are viewed in the same way by all people). This shows the importance of a balanced approach to enforcement – and a risk-focused one, to avoid pushing those who would willingly comply towards resistance, and to improve procedural justice as well (as criteria for decisions are made clearer).

Perspectives on the legitimacy of executive and prosecutorial (and, by extension, regulatory) discretion are highly conflicting – and, in addition, differ according to legal traditions. At least in the Common Law and Roman-French traditions, however, there is overall a strong deference to the opportunity principle, which offers room for regulators to adopt a responsive approach to enforcement, in line with a broader risk-based framework. Thus, while such discretion is not unproblematic, there is at least a significant body of legal writing and case law to support it.

Finally, risk and regulation research points both at the relevance of the issue, and at the very different ways in which risk is defined and managed. While some authors (e.g. Black and Baldwin) also point out the challenges existing in terms of having sufficient information for proper risk-based planning, practice suggests that, for a number of inspection functions, this challenge should not be overstated.

Overall, the literature review points both at the importance of the inspections and enforcement stage, at the need to have an approach that covers all compliance drivers in a balanced way, and at the crucial and complex role of discretion. It also shows that there are different understandings of risk, and that the meanings that have been used by some researchers differ significantly from what is commonly accepted e.g. by the OECD or government-level institutions – which may explain some apparently disappointing research findings.

Case studies form the last part of the research, and allow to try and test the hypotheses and look for an answer to the research question. The first (and most detailed) case study looks at OSH inspections in Britain and Germany (building in part on previous research by Tilindyte). The second considers inspections in countries of the Former Soviet Union, how they compare to practices in OECD/EU countries, and what have been the results of efforts to reform them in a more risk-based direction. The last one looks in a shorter manner at a few EU countries and at some salient aspects of existing practices and reform efforts. The chapter then considers available data and whether it could allow to search for correlations between inspection practices and outcomes, and concludes that the quality of data would not allow for robust findings.

The first case considers the evolution of OSH inspections in Britain in the past decade and a half, and compares the number of inspections, methods and outcomes with Germany. The case was selected because OSH is relatively unique among inspection functions in that at least one of the outcome indicators (fatal occupational accidents) has a high level of reliability and comparability. Harmonization of data by Eurostat makes it easy to compare. The case shows that British OSH inspections are strongly risk-focused, risk-proportionate and responsive in enforcement decisions, and also put a strong emphasis on guidance and compliance support. The data shows that whereas British OSH inspections are several times less frequent than German ones, outcomes are significantly better over the past 15 years and more. In addition, the frequency of inspections has gone down in both countries, but fatal accident rates have also gone down (more strongly so in Germany, where the level was far higher at the beginning). While this is not enough to prove that risk-based approaches caused this better performance, the case certainly suggests that they may have played a role, and in any case disproves the idea that more inspections would necessarily be correlated with better outcomes.

The successive cases lead to the same findings. Data from surveys conducted by the World Bank Group in the Former Soviet Union shows typically very high levels of inspections coverage, without this resulting in any way in high levels of compliance or positive outcomes. Moreoever, reforms resulting in a very significant decrease in inspections numbers do not lead to any worsening of outcomes. On the contrary, countries that underwent significant reforms of inspections towards a more risk-based, compliance-promoting approach (e.g. Lithuania) also tend to have better outcomes. A brief consideration of OSH inspections in France reinforces the findings from the Britain-Germany comparison: France has vastly more frequent inspections than Britain, combined with a "zero tolerance" approach grounded in a view of compliance as purely deterrence-driven, and has outcomes that are significantly worse than the EU-28 average (whereas Britain has among the best, or the best results, depending on the year considered). Survey data on inspections in Italy shows that inspections there tend to target many times the same businesses, resulting in a high level of burden for around a third of businesses, with limited positive effects.

In conclusion, and while the research has limitations that do not allow to produce decisive proof, there is a significant body of research and evidence that suggests that risk-focused inspections, risk-proportionate and responsive enforcement, and a balanced approach aiming at using all drivers of compliance does produce better results. In any case, the opposite idea to "smart inspections", i.e. that any reduction in inspections numbers and reduced severity of enforcement would lead to lower compliance and worse results, appears to be clearly disproved. It is also clear that the issue lends itself to considerable follow-up research: deeper investigation of methods and outcomes, more systematic review of countries and regulatory areas, etc. Achieving more conclusive findings in terms of effectiveness of inspections and of specific approaches, however, may remain largely elusive given data limitations and the complexity of the phenomena studied. Focused experimental studies, if possible and adequately resourced, could alleviate the data quality problem – it would then remain to be seen how robust the results would be in terms of determining any causality.