

Netherlands Scientific Council for Government Policy

The Hague, 16 September 2013

Comments on OECD consultation documents:

- *Best Practice Principles for Improving Regulatory Enforcement and Inspections*
- *Principles for the Governance of Regulators*

Introduction

The Netherlands Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid* - WRR) hereby presents its comments on the draft OECD-document *Best Practice Principles for Improving Regulatory Enforcement and Inspections* and the draft OECD-document *Principles for the Governance of Regulators*. These comments are based on the analysis and recommendations of a recent WRR report for the Dutch government: *Supervising Public Interests. Towards a Broader Perspective on Government Supervision* (The Hague, September 2013).

A broader perspective

Both consultation documents outline in clear, concise and comprehensible terms general principles for guiding the operational activities and governance of enforcement or inspection agencies. It should be noted that the draft *Best Practice Principles for Improving Regulatory Enforcement* focuses on compliance with laws and regulations and the associated enforcement interventions. Although this is a relevant and legitimate position in and of itself, it is too limited to maintain an effective response to the rapid changes in technology and society, the rising expectations to which regulatory enforcement agencies are subject, and the existence of risks that cannot fully be defined in laws and regulations. It fails to combat the misconception that maximum compliance offers 100% quality and safety in products, services, and our working and living environment.

The WRR is advocating a broader perspective, i.e. a more inclusive view of government enforcement structures that allows for social complexity and dynamics. This broader approach can increase the added value of government supervision for society.

Core elements

What are the characteristics of that broader perspective? The WRR distinguishes six interrelated elements:

- 1. Take public interests as the starting point for improving the activities of inspection agencies and market regulators.** This position seems self-evident. However, in emphasising the best compliance outcomes, the degree of compliance with laws and regulations is the dominant starting point. Aiming to achieve the highest possible levels of compliance while keeping the costs and burdens as low as possible may stifle flexible responses to new circumstances and technologies. In devoting all their time and energy to enforcing rules, no matter how trivial, enforcement organisations may ignore or miss more significant or complicated problems. Moreover, as time passes and conditions change, precise rules often lose their efficacy. Following the rules may not always be sufficient and/or necessary to achieve the best possible outcomes. Ultimately, the drive to improve the effectiveness of enforcement structures should be aimed at attaining regulations' intended outcomes rather than at regulatory compliance as such. *The WRR suggests that the best-practice principles for improving regulatory enforcement and inspections should more explicitly address the sometimes ambiguous relationship between the (intended) effects of compliance and public interests.*
- 2. Clarify the desired and obtained societal benefits of supervision, so that they can be properly considered in relation to costs and burdens.** Positioning societal benefits more centrally in supervision policy and practice facilitates a balanced assessment of societal benefits with respect to burdens. This also creates a realistic image of what may be expected of supervision and helps legitimise supervision and the supervisors. More than is the case at present, many supervisors could provide more insight into the effectiveness and efficiency of supervision as part of their public accountability. *The WRR strongly endorses the principle that regulatory enforcement and inspections should be evidence-based and measurement-based. In addition, supervisors should report publicly and regularly on the fulfilment of their objectives and the discharge of their functions.*
- 3. Engage more explicitly with the interplay of forces in a supervisory domain.** Considerations relating to setting up, executing and terminating government supervision must be based on a clear analysis of the existing 'governance structure' in a sector. This involves mapping out and tracking the entire societal arena in a supervisory domain, including the existing checks and balances, societal forces and resilience, and (dis)incentives. It also involves identifying the role that supervision can best play in that arena in order to bring about the desired societal order and to guarantee public interests. This might be referred to as *governance-based supervision*. *The WRR endorses the principle that supervisors should thoroughly analyse and capitalise on the potential of market forces and civil society actions in order to achieve regulatory objectives (i.e. public interests).*

- 4. Acknowledge and strengthen the reflective function of supervisory agencies.** Supervisors are in a unique position to signal problems at an early stage where public interests are at stake. They not only serve as tools for making an impact on the world outside (effectors), but also as sources of up-to-date knowledge of the issues in their domain (detectors). Reflecting on that domain means signalling cross-domain and cross-border societal trends (e.g. internationalisation) and domain-specific developments (e.g. technological innovations) that may have an impact on public interests and the checks and balances in the relevant domain. Reflection also means analysing problem areas in laws and regulations that frustrate the supervisor's performance. In so far as it is risk-based, reflection is not restricted to reducing risks posed by infractions of the existing rules. A reflective supervisor also considers systemic risks and risks not (yet) covered by the law. However, the reflective function is not restricted to analysing risks, whether posed by infractions of rules or not. It also implies that the supervisory agency is alert to best practices and new opportunities. Reflective supervisors assist regulated entities in improving standards beyond minimal compliance in order to enhance their performance accordingly. They do not hesitate to put issues on the public agenda, and make an active contribution to the debate about 'the state of the sector'. *The WRR strongly supports the 'policy role' and responsibility of supervisory agencies to advise and contribute to the policymaking (and policy evaluation) process. The supervisor's activities should not be restricted to reducing risks posed by (potential) violations of rules, but should also include signalling, reflection, and feedback.*
- 5. Safeguarding the impartiality of supervisors is essential to acquiring and retaining societal legitimacy and public confidence.** Supervisors should distance themselves from the executive government, the legislature and, of course, from those being supervised. Only then can they give authoritative feedback to the legislative and executive institutions responsible for structuring their domain, and only then can they escape from 'capture'. To guarantee that impartiality, formal independence is vital. This is not an aim in itself, but rather an underlying condition for the supervisor's impartial attitude. Of course, a supervisor is obliged to operate within the power delegated by the legislature and has a special responsibility to publicly account for its actions. Various accountability relationships can and do exist side by side. The legislature and the executive government are the most important actors supervisors have to address. However, a more proactive form of communication with society in a broader sense is essential. *The WRR argues that supervisors, whether situated within or outside a ministry, should be allowed sufficient independence and autonomy so as to safeguard impartial decision-making.*
- 6. Bring overall government vision up to date.** While it is true that, for instance with regard to certain characteristics of the 'operate' phase of supervision, there are differences between various sectors and types of supervision that require a customised approach, the key issues and general principles associated with supervision as a class of its own are strikingly similar. These similarities are an important basis for a cohesive, cross-sector government policy. *The WRR endorses the principle that governments should adopt transparent and consistent policies on regulatory enforcement and inspections, preferably along the lines just indicated.*

Conclusion

Government supervision – in all shapes and sizes – plays a vital role in achieving policy and regulatory objectives and in guaranteeing public interests. It is a 'basic institution that

matters'. By focusing on the public interests to be served, highlighting and substantiating the societal benefits of supervision in relation to the costs, relating the role of supervision to the forces in its domain, and strengthening the reflective and signalling role of supervision, a shock-proof and balanced supervision policy can be supported. Despite our comments, and hopefully strengthened by our suggestions, the principles outlined in both consultation documents will contribute to that goal.

A handwritten signature in blue ink, appearing to be 'J.A. Knottnerus', written over a light blue horizontal line.

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