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EU4Environment

Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova, Ukraine

Regional seminar with Eastern Partnership countries on risk-based approaches to environmental compliance assurance

Sharing experience on benefits and challenges of risk-based approaches

ISSUES FOR DISCUSSION

25 November 2020, 13h – 16h Paris time

Virtually through ZOOM

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Purpose of the seminar and questions for discussion

1. This note aims to present some key elements of Environmental Compliance Assurance Systems (ECAS) and provide a basis for discussion at the regional seminar with Eastern Partnership countries on risk-based approaches to environmental compliance assurance on 25 November 2020. The meeting will aim to take stock of the most recent developments and priorities in the field of environmental compliance assurance in Eastern Partnership countries. It will also facilitate the sharing of experiences and good practices from OECD and Eastern Partnership economies in adopting risk-based approaches to environmental compliance assurance, exploring commonly encountered challenges and methods to support mandated and voluntary compliance.

2. The seminar is organised by the OECD as part of the “European Union for Environment” (EU4Environment) Action. EU4Environment is a regional programme funded by the European Union which supports six EU Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova, and Ukraine) in setting mechanisms to better manage environmental risks and impacts, and also aims to demonstrate and unlock opportunities for greener growth. The Action’s activities are implemented by the OECD, UNECE, UNEP, UNIDO, and the World Bank, under the guidance of the European Commission’s Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) and Directorate-General for Environment (DG ENV). The programme was launched in 2019 and will continue until the end of 2022.

3. Output 3.2 of the EU4Environment Action on Environmental Compliance Assurance and Liability Regimes falls under the third component of the programme on “An Environmental Level Playing Field”. This output aims at achieving reform of regional and national compliance assurance systems and instruments in EaP countries. This may include drawing up inspection plans using the EU Industrial Emissions Directive (IED) as a reference and providing support to the development of mechanisms for damage compensation, including those covered by the provisions of the EU Environmental Liability Directive (ELD) with regard to the prevention and remedying of environmental damage (2004/35/EC – EU ELD).

4. The discussion at the meeting will be guided by the following questions:
- What have been the latest policy developments in the area of environmental compliance assurance in your country?
 - What have been some of the successes, including innovative approaches to compliance assurance, and challenges?
 - What are the priorities in environmental compliance assurance going forward, including possible support by EU4Environment?
 - What kind of risk-based approaches to environmental compliance assurance have been used and with which results?

Concept and benefits of environmental compliance assurance

5. Environmental compliance assurance refers to governmental activity aimed at ensuring that regulated entities adhere to environmental regulations. Its main functions are to promote voluntary compliance, detect non-compliance, reverse non-compliance and impose penalties for non-compliance.

6. An ECAS comprises *promotion* of environmental compliance through information-based or economic instruments; *monitoring* of environmental compliance through approaches such as on-site inspections, reports from the public or self-monitoring by companies; and *enforcement* action against violators including administrative or criminal sanctions. The various ECAS components are complementary. For example,

compliance promotion activities can prevent behaviours that would otherwise require monitoring while enforcement measures can ensure effective follow-up activities in addition to detecting non-compliance (European Commission, n.d.^[1]; European Commission, 2018^[2]).

7. A well-functioning ECAS has wide-ranging societal and economic benefits. It can help countries obtain better environmental outcomes at lower overall costs by focusing scarce resources where they are most needed and can be most effective. Compliance protects public health and promotes the rule of law and good governance. It can increase investor confidence by reducing business risks, stimulate innovation and create new jobs, and promote a level playing field among companies. In addition, compliance assurance activities could enhance transparency and promote citizen involvement in enforcement (European Commission, 2016^[3]).

Characteristics of effective Environmental Compliance Assurance Systems

Supporting framework

8. An ECAS needs to be underpinned by clear and effective environmental regulatory and permitting regimes and a robust institutional framework. It should reflect the Polluter Pays Principle (OECD, n.d.^[4]) according to which the polluter must bear the cost of reducing pollution according to the extent of the incurred societal damage or the exceedance of an acceptable level of pollution. There is a range of tools to implement this principle including command and control, economic instruments and voluntary approaches.

9. Efforts to prevent environmental non-compliance should embody a life-cycle approach, which starts with effective design of legislation, involves a range of activities upon its adoption, and ends in legislative review and revision (European Commission, 2008^[5]). The regulatory regime comprises the definition of permissible levels of pollution such as the Ambient Quality Standards (AQS), the Maximum Allowable Concentrations (MAC) and the Emission Limit Values (ELVs) which should be based on normal operating conditions and be reliable and enforceable. The EU IED establishes the main principles for permitting and control for large industrial installations based on an integrated approach and the application of best available techniques (BAT), with extensive involvement of industry and environmental organisations in the process of setting out BAT Reference Documents (BREFs) that serve as a basis for setting permit conditions (European Commission, n.d.^[6]).

10. As regards the issuance of permits, the department issuing permits should normally be separate from the one that deals with inspection and enforcement. The public should have the opportunity to comment on permit applications and access information on awarded permits, as is the practice with the IED (European Commission, n.d.^[6]). One-stop shops for issuing permits increase the consistency and predictability of the permitting process and reduce the administrative burden. Ideally, permits should also include information on the monitoring of emissions and operations to be carried out by the operator such as self-monitoring, and define possible offences and sanctions. The IED uses an integrated approach for large industrial installations taking into account the whole environmental performance of an installation. On the other hand, Small and Medium-Sized Enterprises (SMEs) with low environmental risk increasingly tend to rely on standard rules, from simplified permitting to activity-based requirements (Mazur, 2012^[7]).

11. Institutions involved in environmental compliance assurance should include a well-resourced and staffed environmental regulatory agency and an inspectorate with clearly identified mandates, and tools to maintain independence and protect them against undue political influence or corruption (OECD, 2009^[8]). They should have access to robust data and be transparent about their activities, for example, by publishing compliance assurance and enforcement policies and their outcomes (European Commission, n.d.^[1]). Some resources developed by the OECD to build capacity of inspectorates include the *Guidance on Individual Competence Development within Environmental Inspectorates of*

Eastern Europe, Caucasus and Central Asia (EECCA) (OECD, 2011^[9]) which presents examples of good practices from EECCA and OECD countries, and *Assuring Environmental Compliance: A Toolkit for Building Better Environmental Inspectorates in Eastern Europe, Caucasus, and Central Asia* (OECD, 2004^[10]) which compiles methodological and organisational approaches. Various other institutions are involved in the “environmental compliance value chain” such as customs, the police, specialised law enforcement bodies and audit bodies (European Commission, 2018^[2]). Inter-ministerial and inter-agency coordination and consultation mechanisms should ensure the smooth and effective interaction of the various entities involved in the chain (Mazur, 2011^[11]).

Compliance promotion

12. Compliance promotion focusses on communicating the importance of compliance and providing assistance with compliance including public information on regulations and penalties, advice, guidance and technical assistance. It also includes incentives and rewards for compliance such as programmes rewarding top performers or the reduction of penalties for voluntary discovery and action to remove non-compliance, and incentives to adopt green technologies (e.g. grants/preferences/low interest loans). It facilitates and encourages self-monitoring, self-certification, self-reporting and voluntary auditing including the use of Environmental Management Systems (EMS) (European Commission, 2018^[2]).

13. These activities are key within an ECAS because there is evidence that information-based instruments increase the probability of compliance and detection of non-compliance. Moreover, deterrence activity reduces enforcement costs and the need for a physically omnipresent environmental enforcement agency (OECD, 2003^[12]). It also has particular significance for SMEs which lack information about environmental requirements and green practices, and have difficulties with resources and skills (Mazur, 2012^[7]). As a result, the trend for some time has been to move away from traditional command-and-control approaches that focus on regulation (permission, prohibition, standard setting and enforcement) to approaches that focus more on prevention and going beyond compliance (OECD, 2009^[8]). It is increasingly argued that it is in a company’s self-interest to move beyond compliance with existing legislative requirements and rather adopt a “proactive” stance on the environment (OECD, 2004^[13]).

14. At EU level, compliance promotion policy and ideas are reflected in the 2012 *Commission Communication on Improving the Delivery of Benefits from EU Environment Measures: Building Confidence through Better Knowledge and Responsiveness* which contains a set of ideas aimed at helping Member States to improve implementation on the ground, for example, the necessity of reliable and accessible information for professionals and the public (European Commission, n.d.^[14]). Providing information that is robust at a scientific and technical level while also being useful and understandable to the general public necessitates close collaboration between environmental scientists, statisticians, ICT experts and administrators (European Commission, 2018^[2]).

Monitoring of compliance

15. Compliance monitoring can be proactive and reactive and usually comprises planned or ad hoc inspections, ambient air monitoring, self-monitoring and reporting of violations and reviewing of such information, audits and recognition of management systems (European Commission, 2018^[2]). It is aimed at verifying compliance, detecting non-compliance, identifying those responsible for non-compliance, analysing the causes of non-compliance and contributing to compliance enforcement, promotion, and rule-setting (European Commission, 2018^[2]).

16. Inspections are an integral part of any environmental monitoring regime. The *OECD Regulatory Enforcement and Inspections Toolkit* offers government officials, regulators, stakeholders and experts a tool for assessing inspection and enforcement (OECD, 2018^[15]). The *Recommendation of the European Parliament and of the Council of 4 April*

2001 Providing for Minimum Criteria for Environmental Inspections in the Member States assists EU Member States in carrying out inspection tasks through non-binding criteria for the planning, carrying out, following up and reporting on environmental inspections (European Parliament and Council, 2001_[16]). Its main features are now found in the IED which also contains provisions on minimum inspection frequencies to be determined using risk-assessment (European Commission, n.d._[1]).

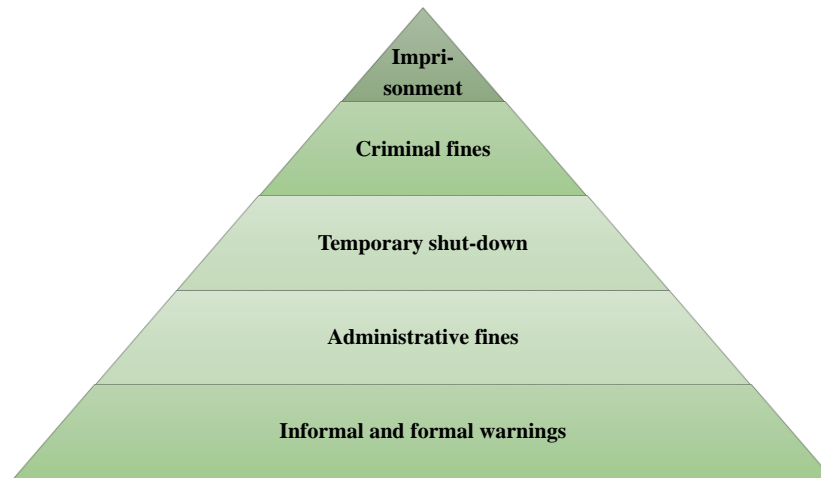
17. Self-monitoring by companies is crucial, because it can help make environmental protection a shared responsibility and economise scarce government resources. It could either be done by the operators themselves, with proper certification of an operator's self-monitoring system, or outsourced to an accredited third party. Self-monitoring and reporting has been increasingly modernised and simplified to reduce costs for businesses and regulators (OECD, 2009_[8]).

18. NGOs and communities should also be able to conduct independent monitoring and verification, and have channels to report non-compliance, especially as they are often the first to become aware of a breach (European Commission, 2008_[5]). Confident telephone lines, complaint-handling procedures, and enforcement oversight bodies and ombudsmen can be useful for this purpose. An important indicator of the effectiveness of environmental compliance assurance is how fast and effectively an intervention takes place after an alert from the public to the authorities (European Commission, 2008_[5]).

Enforcement of compliance

19. Enforcement refers to action taken to compel compliance with environmental regulations. It also aims to prevent, limit and remove the harm caused to the environment or human health; ensure that non-compliance does not result in economic benefits to the violator and deter non-compliance (European Commission, 2018_[2]).

20. It is good practice to have in place a pyramid of enforcement measures (Figure 1), starting with informal and formal warnings, and then proceeding to more serious measures such as administrative fines, temporary shutdowns and criminal penalties. Enforcement actions draw on a variety of laws, including civil and liability law for enforcing contracts and liabilities, administrative law and practice for administrative penalties or other administrative actions such as a permit cancellation, and criminal law for criminal sanctions (European Commission, n.d._[1]). Countries have been focusing on making enforcement measures more proportionate to the extent of non-compliance and on using administrative rather than criminal responses more often for less severe violations (OECD, 2009_[8]). For environmental enforcement measures to be effective, it is key that companies see penalties as sufficient, that non-compliance practices are likely to be detected and that punishment of non-compliance is likely. Countries should ideally have an enforcement policy in place to ensure a general understanding about offences and consequent penalties, as well as a transparent process for deciding and issuing penalties, and a robust appeals process.

Figure 1. Enforcement pyramid

Source: (Mazur, n.d._[17]).

21. When setting administrative fines, there is a need to account for the economic benefits of non-compliance and the seriousness of the offence (OECD, 2009_[17]; OECD, 2010_[18]; Mazur, 2011_[11]). Administrative discretion could be used to reflect unique circumstances, and additional factors (aggravating/mitigating factors) might be considered such as the willingness/negligence of the offender, the history of non-compliance of the offender, the offender's ability to pay, public interest (e.g. local employment), and the level of cooperation with the enforcement agency. Nationwide consistency and transparency in the application of administrative fines are important as well as effective collection of fines (OECD, 2009_[17]). There should ideally be options to partially replace monetary payments of fines with alternative environmentally beneficial expenditures or environmental remediation.

22. Some countries include provisions requiring violators to remedy environmental damage, which can comprise primary, complementary or compensatory remediation and should be based on the evidence of harm (OECD, 2012_[19]). For example, the EU ELD requires Member States to operate a system of liability for environmental damage based on the Polluter Pays Principle, and requires the establishment of a causal link between the activity and the damage (European Commission, n.d._[20]). Equivalency analysis is used in OECD countries to assess environmental damage (OECD, 2012_[19]). The European Commission is in the process of developing guidelines on a common understanding of the term "environmental damage" (European Commission, n.d._[20]).

23. Financial security instruments, such as environmental insurance can help to implement liability provisions in case the responsible party lacks funding to conduct remediation activity. Yet, environmental insurance has been slow to develop due to various factual and legal uncertainties in assessing environmental damage (OECD, 2012_[19]).

Towards risk-based systems of environmental compliance assurance

24. An environmental compliance assurance approach that has emerged is to undertake compliance assurance interventions on the basis of risk. For example, the mandatory requirements on environmental inspections included in the IED require site visits to take place using risk-based criteria. Risk-based environmental compliance assurance helps authorities to make compliance assurance more effective while reducing the administrative cost. Indeed, there is increased evidence that risk-based targeting results in a higher rate of detection of non-compliance (OECD, 2009_[8]).

25. Risk-based approaches can extend to compliance promotion activities, monitoring such as inspections, as well as follow-up and enforcement (European Commission, n.d._[1]).

Risk assessment can be conducted at a strategic or operational level. At a strategic level, it provides a way to estimate the likelihood and impact of non-compliance, helping establish broad priorities. At an operational level, it provides a way to carry out inspections and other interventions in the most efficient manner (European Commission, n.d.^[1]; European Commission, 2018^[2]).

26. There are various methods that could be used to categorise entities, for example, risk-based categories of installations or scoring systems (OECD, 2009^[8]). Risk-based categories could be done by economic sector, with a minimum inspection frequency set for each, with the higher-risk installations visited more frequently and requiring lengthier visits. Local and operator-specific risk factors could also be considered to further prioritise inspection activities by the competent authorities (OECD, 2010^[21]). Scoring systems could involve a list of criteria corresponding to risk factors, with a score for each criterion (OECD, 2010^[21]). The targeting of compliance monitoring should follow the same principles across a country, and national and subnational environmental authorities should have a partnership mechanism while leaving some space to deal with local environmental concerns (Mazur, 2011^[11]).

27. Challenges to risk-based environmental compliance assurance include the lack of data, poor quality of existing data, or inefficient data management to provide for an objective decision (OECD, 2010^[21]) as well as ensuring sufficient incentives to lower risk installations to comply with environmental regulations.

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