

Enforcing the law: Strategies used by regulatees and enforcement officials

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This paper discusses the strategies used by regulatees and enforcement officials in law enforcement processes. The enforcement literature mentions typologies of regulatees (well-intentioned or ill-intentioned) and enforcement styles (accommodative versus sanctioning). Officials run the risk of mismatch in their choice of enforcement style. Applying a compliance strategy to ill-intentioned regulatees can lead to ineffectiveness and capture. Applying a sanctioning strategy to well-intentioned regulatees can damage the cooperative relationship.

The risk of mismatch derives from the strategies used by regulatees: ill-intentioned ones may use the same strategies as well-intentioned ones to provoke accommodative enforcement. We begin by presenting a detailed inventory of strategies that might be developed by regulatees. Some examples of strategies regulatees use are 'phantom strategy', 'mirror-imaging', 'dilemma-sharing' and 'showing hard feelings'. We then discuss counter-strategies used by officials. What enforcement strategies can cope with the strategies used by regulatees? Examples of strategies officials use are 'contextualizing', 'portfolio management' and 'creating redundancy'.

Our paper is based upon empirical studies. We use illustrations from weapons inspections in Iraq and our research at the Transport and Water Management Inspectorate in the Netherlands (enforcement of safety and environmental regulations for aircraft, taxis and lorries, merchant ships and fishing vessels).

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1 Introduction

Law enforcement is a hot topic. Calls for stronger enforcement are often heard after a disaster. International terrorism and growing feelings of insecurity, moreover, are making for greater tolerance of strict measures.

This paper discusses the practice of enforcement. Enforcement is essentially a question of influencing behavior, and the key question is what enforcement strategies are effective. We describe the strategies used by regulatees towards enforcement officials, giving practical examples of how organizations present themselves in a positive light, hide incriminating information and evade sanctions. We then describe strategies to enable officials to deal with this behavior.

This paper is based upon empirical studies. We use illustrations from weapons inspections in Iraq and our research at the Transport and Water Management Inspectorate (enforcement of safety and environmental regulations for aircraft, taxis and lorries, merchant ships and fishing vessels).

1.1 The enforcement network

As already indicated, what we are interested in is the relationship between officials and regulatees. They interact within a network of players, and we set out some important features of this network.

A variety of players

Basically we are concerned with the interaction between a single official and a single regulatee, but any particular official is required to deal with more than one regulatee, and a regulatee may be confronted with various officials, each applying different rules. Also, officials and regulatees form part of fragmented organizations: a regulatee can for instance be a company with various echelons (a management echelon and a technical/operational echelon, or a parent company and subsidiaries). A law enforcement organization can also be heterogeneous, with different officials dealing with different aspects of a regulatee's business operations.

In addition to officials and regulatees we need to identify:

- *The managerial and political echelon* Officials are managed by a managerial echelon, above which there may be a political echelon. The two echelons may have different ideas about how enforcement should be carried out. An official can take advantage of this: he will often be in a position to take stronger action if there is political support for his actions.
- *Third parties* Private citizens, the media, representative bodies, other government agencies, other enforcement agencies, suppliers and competitors (Hutter, 1997) influence the enforcement process directly or indirectly. An official can use complaints from members of the public in his enforcement strategy, for instance; a regulatee, conversely, can use the press to expose what it considers to be unreasonableness on the part of an official.

This paper is concerned with the interaction between officials and regulatees, but this cannot be seen in isolation from their respective networks, as it is clear from the strategies they employ that they are constantly taking advantage of their relationships with other players.

Interdependence

Officials have formal power over regulatees: they can carry out inspections and intervene in situations where the rules are not being obeyed. These powers make regulatees dependent upon officials. The dependence works both ways, however, as officials are dependent on regulatees from information and cooperation.

- There is an information asymmetry between officials and regulatees. A regulatee has in-depth knowledge of its activities, which can be complex, both technically (e.g. chemical plants, waste processing plants, nuclear power stations) and legally (cf. the

many, sometimes conflicting, requirements the regulatee is expected to meet, cases in progress) or organizationally (previous undertakings by other enforcement agencies). In a situation of this kind, an official checking whether a regulatee is obeying the rules needs information which the regulatee has (see e.g. Hutter, 1997, p. 158). The less visible potential contraventions are, the greater the information dependency. Also, the more specialized the required knowledge, the greater the regulatee intimacy needed (Hawkins, 1984, p. 14).

- The official's aim is to correct any non-compliant behavior on the part of regulatees. Simple measures such as education or warnings are generally to be preferred to heavy-handed ones such as legal action and force. It is the regulatee, however, which decides to what extent to modify its behavior following a particular intervention, so a cooperative relationship with it can be in the official's interest.

The interdependence is shown most clearly in the case of repeat players (Galanter, 1974), i.e. regulatees that receive regular visits from officials, thus becoming familiar with their expectations and reactions (Hawkins & Hutter, 1993). If the interactions are repetitive, officials and regulatees develop relationships and they can play the enforcement 'game'.

1.2 Interaction between official and regulatee

We use the 'game' metaphor for the interaction between official and regulatee (see also Hawkins, 1984, pp. 118-22). First we describe the main typologies as set out in the enforcement literature: the enforcement styles of officials and the types of regulatee. We then describe the matches and mismatches that can occur when applying the various enforcement styles to the various types of regulatee.

Officials: sanctioning or accommodative

The literature on enforcement often identifies two styles of enforcement (Hawkins, 1984, p. 3; Reiss, 1984; Hutter, 1997; Sparrow, 2000, p. 34). The first style is one of 'sanctioning', 'deterrence', 'legalism', 'compulsion', 'coercion' and 'penalism'. The second is characterized by terms such as 'compliance', 'accommodation', 'conciliation', 'compromise' and 'remedialism'.

- *Sanctioning style*: this style revolves around the idea that rule-breaking needs to be punished so that the regulatee will obey the rules in future. Enforcing the rules is key. This style is of a binary nature: there is a rule and it is either contravened or not. If it is, the official takes action. Inherent in this style is a unilateral and hierarchical relationship between the official and the regulatee.
- *Accommodative style*: enforcement is a process of consultation and negotiation in which the official tries to educate the regulatee to obey the rules. It is of a serial and incremental nature (Hawkins, 1984, p. 129): negotiating is a process of give and take, so any improvement in the regulatee's behavior will be gradual. Instruction and training are ways of achieving this aim.

Regulatees: well-intentioned or ill-intentioned

The literature identifies various ways of classifying types of regulatee. We have selected three:

- A matrix of types of regulatee with one dimension being well-intentioned/ill-intentioned and the other dimension being familiar/unfamiliar with the rules (Baldwin & Cave, 1999, pp. 101-2).
- A threefold classification into 'amoral calculators', 'political citizens' and 'organizationally incompetent' (Kagan & Scholz, 1984). This typology is only concerned with *offenders* so it does not include the 'ideal' regulatee.
- A fourfold classification of types of regulatee into 'socially responsible', 'unfortunate', 'careless' and 'malicious' (Hawkins, 1984, pp. 111-3).

The common factor in all the typologies is the distinction between well-intentioned and ill-intentioned regulatees. The latter deliberately break the law to serve their own interests. The

former want to obey the rules in principle but break them as a result of lack of knowledge or resources, carelessness or misfortune.

1.3 Mismatch

In the interaction between officials and regulatees the various types of regulatee are confronted with the various enforcement styles. By simplifying the typology of regulatees to well-intentioned/ill-intentioned we find a matrix of interactions: well-intentioned/ill-intentioned regulatees are confronted with a sanctioning style or an accommodative style.

	Sanctioning style	Accommodative style
Well-intentioned regulatee	Over-enforcement Type I error	
Ill-intentioned regulatee		Under-enforcement Type II error

It goes without saying that this matrix shows only the extremes of the various spectrums; things are not so straightforward in the real world. Nevertheless, for the purposes of this paper we shall stick with this simple model, as it reflects the essence of the enforcement problem as manifested in practice.

Two types of error

We see a mismatch when the sanctioning style is applied to a well-intentioned regulatee or the accommodative style to an ill-intentioned regulatee.

- *Type I error: under-enforcement—capture.* The risk when applying a lenient approach to an ill-intentioned regulatee is that enforcement will not be effective. Educating the regulatee does not work in the case of an ‘amoral calculator’, as the non-compliant behavior is not the result of lack of knowledge, resources or organization. If the regulatee is deliberately contravening the rules for the sake of profit it can take advantage of the leeway the official gives it and preserve the status quo. Thus an accommodative style can result in capture: the official becomes the regulatee’s captive (Ayres & Braithwaite, 1991).
- *Type II error: over-enforcement—drying up.* The regulatee in question wants to obey the rules but fails as a result of ignorance, lack of skill, carelessness or misfortune. An official who applies a sanctioning style in this case is failing to take account of the causes. This reaction can harm the relationship between the official and the regulatee. A cooperative attitude on the part of the regulatee is not productive; on the contrary, if the regulatee is open about its activities and shortcomings this will only result in sanctions. The risk of applying an over-strict approach to a well-intentioned regulatee, is that the official is ‘left high and dry’, the flow of information from the regulatee dries up.

Mismatch due to uncertainty

An official confronted with non-compliant behavior has to choose between a sanctioning and an accommodative style, facing him with a dilemma.

- He can trust the regulatee and wait to see whether it fulfils its promise to improve, thus keeping the relationship good. His constructive attitude can have a preventive effect in that it invites other regulatees to take the official into their confidence and ask him for advice. On the other hand, it can result in under-enforcement and capture. A decision to adopt an accommodative style can be due to fear of punishing someone unjustly and making legal mistakes.
- The official can opt for a hard approach, thus achieving an immediate effect: the undesirable situation is remedied. He covers himself by going by the book and adopting an independent stance. The sanctioning style can be motivated by negative experience in the past or with other companies. A hard approach can also have a preventive effect by deterring other regulatees from breaking the law. On the other hand it can result in over-enforcement and drying-up of information flows.

How effective the chosen strategy is depends on how well it matches the type of regulatee. The problem here is that the official does not always know what type of regulatee he is dealing with. Because of this uncertainty he runs the risk of applying the wrong enforcement strategy. Why is there this uncertainty about regulatees?

The description below shows that ‘good guys’ often display the same behavior towards officials as ‘bad guys’: an ill-intentioned regulatee, after all, is also better served by the official adopting an accommodative than a sanctioning approach. We refer to this kind of behavior as ‘strategic behavior’. This is self-interested behavior, often covert and sometimes malicious. The enforcement literature mentions ‘tricks of the trade’ (Hutter, 1997), ‘creative compliance’ (McBarnet & Whelan, 1999) and ‘protective strategies’ (Hawkins, 1984). The ‘strategies’ we describe here used by regulatees should not be confused with the ‘normal’ formulation of strategy for companies’ core activities. Regulatees’ strategies can be classified into three categories:

- *The regulatee pretends to be well-intentioned.* If the official discovers offences, these are the result of ignorance or factors beyond the regulatee’s control. Of course it is possible that the regulatee wants to obey the rules and does not often break them, but it is also possible that it is trying to conceal its real behavior and intentions.
- *The regulatee stresses its interdependence with the official.* By giving the official information, or asking him for advice, the regulatee invites the official to trust it and take on a consultative role. Again, this behavior can derive from the intention to solve problems, but it can also derive from the aim to avoid action being taken.
- *The regulatee responds positively to an accommodative approach,* saying it will set improvements in train. Any attempt at sanctioning will be met with strong objections. It is only a well-intentioned regulatee, however, that will actually set improvements in train, and only then would sanctions be misplaced.

2 Strategies used by regulatees

Let us now describe the various behaviors or strategies used by regulatees, using the threefold classification set out above: the regulatee pretends to be well-intentioned, stresses interdependence or responds positively to an accommodative approach.

2.1 Pretending to be well-intentioned

Regulatees employ strategies to conceal undesirable behavior from officials. They know how to evade inspections or destroy evidence. If the official detects any offences, regulatees can then employ strategies to influence his opinion, e.g. casting doubt on his expertise. Strategies of this kind are often based on network contacts or technical aids.

Mirror-imaging

Each official employs certain indicators in his investigations and has a particular search strategy. Mirror-imaging involves the regulatee trying to find out what indicators and search strategy the official employs; it can then modify its behavior in such a way that, although it breaks the rules, it does not score on those indicators and is not visible to the official using his search strategy.

- *Abolishing protective clothing at Iraqi sites* This is a very opportunistic example. One of the indicators for the presence of radioactive material used by the weapons inspectors in Iraq was the clothing worn by staff at a suspect site. If it provided protection against radiation, it followed that radioactive material was present, or had been present, at the site in question. When Saddam Hussein’s regime realized this, staff were made to go unprotected (Tucker, 1996).

- *Avoiding checkpoints* A less spectacular but very common example is the way taxi and lorry drivers evade checks. These are often organized in the form of an enforcement team stationed at a parking space, where they take vehicles off the road and inspect them. In practice drivers inform one another where such teams are operating with lightning speed: lorry drivers communicate using their radios and taxi drivers through their control rooms. Soon after setting up operations somewhere, inspectors see a rapid drop in the number of passing vehicles. The assumption is that drivers who have been warned choose a different route or park and wait until the inspection team has gone home (Koopmans-van Berlo & De Bruijn, 2005).

Phantom strategy

Offences can be rendered invisible, evidence can be destroyed. Thanks to the development of information technology, among other things, officials have more and more detection technologies at their disposal. Regulatees, on the other hand, can also take advantage of ‘deceptogenic technologies’ that conceal their behavior or neutralize the official’s technology (e.g. car-mounted devices that defeat speed checks).

- *Withholding tachograph discs* Research into the effect of tachographs on enforcing driving and rest times indicates that road hauliers and drivers withhold incriminating tachograph discs. This is referred to as ‘procedural fraud’. The easiest and most common way of doing this is by ‘losing’ some of the discs. If a driver has worked on a number of lorries he can mislead the inspector by showing him the discs from only one lorry (Anderson, 1998; (Anderson, 2001, pp. 234-42; Koopmans-van Berlo & De Bruijn, 2005).
- *Manipulating the tachograph* The tachograph itself can also be manipulated to conceal offences. A sturdy paper clip attached to the styli ensures that they record a ‘rest’ period while the vehicle is in motion. Alternatives include using special cables or broken fuses to disable the device. Other tried and tested methods include turning the clock and the vehicle odometer back. For this strategy regulatees can also make use of their networks: in some cases road hauliers have been discovered bribing workshop technicians to calibrate their tachographs incorrectly or mount the security devices incorrectly (Anderson, 1998; Anderson, 2001, pp. 234-42; Koopmans-van Berlo & De Bruijn, 2005).

Doubts about measuring techniques

Enforcement is always based on assessing a particular situation in relation to the rules. This assessment can be qualitative (is the fire alarm working?) or quantitative (in the form of measurements, sampling and computations). Doubt can always be cast on quantitative methods: the time at which or way in which the spot check was carried out, or the measuring technique used, may be open to question. There is always a certain imprecision and unreliability involved. Computations are based on assumptions: if the results are to the regulatee’s disadvantage the regulatee may question the method used. Here is an example from the regulation of aviation noise.

- *Demanding an adjustment for radar errors* When calculating the noise levels around Amsterdam Schiphol Airport the paths flown are reconstructed on the basis of radar data. Radar measurements, however, are inaccurate: they are off by forty meters on average. Improving the accuracy of radar is difficult for various reasons. The old Schiphol Act required ‘delta fields’ to be used to correct for radar errors, but these were abolished under the new Act in 2003. At the time Schiphol Airport wanted the correction system to be reintroduced, as in the worst case radar errors could produce an increase in computed noise levels such that the airlines would have to reduce their capacity by almost twenty percent. The Transport and Water Management Inspectorate, however, did not regard the radar error as a problem, since it could just

as easily turn out to the industry's advantage as to its disadvantage (Koopmans-van Berlo, 2003, pp. 77-78).

Stretching: externalizing the playing field

The regulatee can lay the explanation for its behavior at the door of third parties or external factors: other government agencies laying down conflicting rules; fellow operators breaking the law on a much larger scale; superiors refusing to invest; or suppliers failing to deliver the new system. See also the following quotation from an inspector: 'They have all sorts of excuses: delay in arrival of spares and breakdowns and this and that; the factory being on holiday and not being able to produce the goods. There's stacks of that; I think that's all part of the game really.' (Hawkins, 1984, p. 120). A variant is citing 'factors beyond our control': the economy, the state of the art, or the weather.

If the intentions are good but there are factors beyond the regulatee's control, a compliance approach makes sense; an official who goes ahead and employs a sanctioning style is showing that he does not trust the regulatee.

- *Referring officials to the driver or owner* In the transport industry it is generally vehicles and their drivers that are the subject of checks. Inspectors stop lorries, taxis and buses at the roadside and check their loads and the drivers' papers. When vessels are inspected in port or at sea, it is the master of the vessel who is addressed. These people, however, are in many cases not the owner of the company: that is the manager of the transport company or the shipping company. In the case of shipping there is also the crew. Drivers or masters may pass the buck to these people when inspected. A driver who does not comply with the driving and rest times, for instance, may be doing so out of fear of dismissal ('if I complain there are plenty of drivers who won't'). Overloading a lorry mainly benefits the company owner, who enjoys the additional profit, rather than the driver. It is the ship-owner or shipping company that invests in vessels, not the master. He may also pass the buck to the crew: after all, what is the point of him taking steps if the crew take no notice?
- *Citing bad weather as a factor beyond our control* When it comes to regulating noise around Schiphol Airport, the regulatees sometimes cite factors beyond their control. Air traffic is highly dependent on weather conditions when it comes to deciding which runways to use. If the weather is not as forecast, flights have to be switched to other runways than those anticipated, which can cause local infringements of the noise limits. The airlines regard it as unfair if they are held to account for this, as the infringement is not due to excessive air traffic or bad planning. The new Schiphol Act in 2003 introduced a weather clause under which an airline can demonstrate that an infringement was due to unusual weather conditions (Koopmans-van Berlo, 2003, pp. 74 & 77).

2.2 Stressing interdependence

As pointed out in the introduction, officials and regulatees operate in an interdependent relationship. The regulatee can use this relationship to induce the official to adopt a cooperative stance. Even if the official has discovered offences, the prospect of a good relationship, with information and cooperation from the regulatee, may lead him to decide not to apply sanctions.

Holding out a carrot

If an official is dependent on a regulatee for large quantities of information, the regulatee can employ it strategically, constantly holding out the 'carrot' of information to the official, e.g. reports of incidents or changes in the company. In return for this the official has to adopt a cooperative stance, as he will be penalized for a sanctioning approach by having the information tap turned off.

- *Keeping quiet about a vessel going into dry dock* Inspectors always come and take a look when a fishing vessel goes into dry dock, as they can see things which cannot be inspected when the vessel is in the water. In dry dock the ballast tanks, which are normally full of water, are emptied, for instance, and parts of the vessel that are normally below the water line are visible. Masters usually tip off the inspectors when their vessels go into dry dock, or ask the repair yard to do so; sometimes, however, they ask the yard not to inform the inspectors. Yards generally accede to these requests so as to keep their customers happy. If a master considers that the inspectors are too demanding he can thus conceal the defects.
- *Letting the inspector find out for himself* Masters usually know precisely what things are and are not in order on their vessels. A master who cooperates with an inspection will meet the inspector, tell him about the state of the vessel and possibly take him on a guided tour. He will mention incidents and near misses, repairs, any damage that has occurred, and things that do not seem to be in order. If the master does not tell the inspector anything, the latter has to rely entirely on his own observations.

Dilemma-sharing

Sharing dilemmas and putting questions to the official automatically results in a communicative relationship. The regulatee apparently does not object to obeying the rules but is faced with a difficult problem. This kind of open and constructive attitude pressurizes the official to also adopt a cooperative stance; moreover, an official who has looked into the regulatee's problem must at least show some understanding when the regulatee breaks the rules. Rapid and harsh intervention may be out of place in a relationship of this kind.

- *Gaining understanding for the decision* A regulatee can try to induce the official to show understanding for its decision. The more logical the decision and the more the official is able to relate to it, the greater the likelihood that he will be flexible. If a driver has to drive on a little longer because the shop where he has to deliver his refrigerated goods is nearly closing, the official may turn a blind eye. The same applies to a driver who might drive on a bit longer after a week on the road so as to be able to sleep at home.
- *Suggesting a compromise* An official can only check whether certain rules are being obeyed (e.g. whether the correct scale of charges is being applied) when the taxi is conveying a customer. On the other hand, he realizes that there is a risk of his check putting pressure on the relationship with the driver—who is causing a delay to his customer as a result of it. Carrying customers is a taxi driver's bread and butter. In our study we observed a situation where the driver shared his dilemma with the official: while the customer protested vehemently about the delay, the driver asked the official to let him drive on, offering to leave all his papers behind, deliver the customer and then return.

Cascading concessions

The regulatee can strengthen its position by erecting lots of hurdles. Each time the official clears a hurdle, the regulatee claims it has made a concession to the official. The more concessions the regulatee makes, the weaker the official's position. This places great pressure on the official not to take matters to the limit but to be satisfied with a half-way house.

- *Allowing fewer people onto each floor* An example of this strategy was given by Gabrielle Kraatz-Wadsack, a weapons inspector in Iraq for UNSCOM. She visited the headquarters of the Iraqi air force with 44 staff. On each floor the Iraqis raised objections as to who was allowed to go to the next floor. 'As we went up from one floor to the next the tension grew and fewer people were allowed up. Finally we were on the top floor, where the room containing the safe was. They were only prepared to let me in if I went in just with my Iraqi escort.' When she finally found documents in

the safe relating to biological weapons used in the Iran-Iraq war they were snatched from her. There was not much she could do: for one thing she was on her own. The Iraqis kept making concessions, each time allowing people to go up to the next floor. This weakened the inspector's position: by the time Kraatz was on the top floor the Iraqis had made so many concessions that her moral position as regards demanding the papers in the safe was seriously weakened (interview with Kraatz-Wadsack in Trouw, 2002).

2.3 Welcoming an accommodative approach, objecting to sanctioning

An accommodative stance on the part of the official is rewarded by the regulatee, which promises to remedy shortcomings quickly and do better in future. A sanctioning approach however is penalized by the regulatee, which tells the official it finds his approach completely misplaced.

Mea culpa

The regulatee admits it is in the wrong and says it is very willing to discuss with the official what steps to take. This can enhance the regulatee's credibility. If the regulatee also promises—for instance—to launch an in-depth investigation into what has gone wrong, its credibility is increased still further. Undertakings of this kind inspire confidence on the part of the official, who has the impression that his accommodative approach is working. This may indeed be the case and the improvements may actually be made, but it is also possible that the regulatee will maintain the status quo and take advantage of the time it has gained.

- *Promising to remedy matters within the time limit* There is a certification system for shipping: a vessel may only sail if it has the requisite valid certificates on board. When a certificate or renewal is applied for, inspections are carried out. If any defects are found it is customary to give the owner a period in which to remedy them. In the meantime the vessel can continue to sail, provided the safety risks are within bounds, which is usually the case. The owner can simply say he will remedy the defects within the grace period.
- *Banned ships abusing dispensations* Vessels with serious defects are not allowed to sail until these have been remedied. The vessel is usually granted a dispensation to sail to a designated repair yard to have repairs carried out. There are cases where this has been abused: the international Port State Control's list of banned ships includes a number of vessels 'which jumped detention' or 'failed to call at an indicated repair yard' (Paris MOU web site).

Showing hard feelings

Regulatees can show hard feelings in response to officials' demands, sanctions or proposed sanctions. The enforcement measures are regarded as unreasonable, e.g. because of the high cost to the regulatee. A regulatee that shows hard feelings when a sanction is applied can make it more difficult for the official to stick to his guns: the official may start to doubt the reasonableness or legitimacy of his approach and may back off as a result.

- *Cooperating less in the wake of 'persecution'* When the new Passenger Transport Act was introduced in 2000 the government also decided to enforce the law more strictly. Taxi inspections were stepped up by 50%. Enforcement was to be repressive and fast-track, to which end the Minister extended police powers. As a result taxi drivers were less cooperative. Industry associations were critical: the police were subjecting honest drivers to 'persecution' while letting their dishonest colleagues off almost scot free. Individual drivers also used this argument: they protested and complained that they were subjected to increasing checks even though they had everything in order.

- *Labeling the requirement to show your driver card as an infringement of privacy*
Taxi drivers evidently regard displaying their driver card and taxi license as an infringement of their privacy. They are required to do so but often do not. In our study we observed an argument about this between a taxi driver and an official during a check. The driver complained to the official about the requirement, which he regarded as unreasonable, that his driver card should be displayed at all times: ‘Everyone can see my name and date of birth; they order all sorts of things in my name; have you any idea what you can get up to these days on the Internet with a name and a date of birth?’.
- *Demanding a transitional period when a new enforcement system is introduced*
A few years ago the Dutch government brought in a new system for detecting overloaded lorries (rules on overloading had been in existence for some time). Sensors in the motorway and cameras automatically recorded any overload. This dramatically increased sanctions on overloading. The haulage industry did not agree at all with the stepping-up of enforcement: until then the rules had hardly been enforced, so firms were not aware that they were breaking them. Now that they were, solving the problems of overloading turned out to be a complex business. In most cases technical modifications would be needed to lorries, but modifying existing vehicles would be expensive, as the investment would have to be written off over a relatively short period. The industry therefore demanded a seven-year transitional period during which they could postpone making the required modifications until they had bought new vehicles (Koopmans-van Berlo & De Bruijn, 2005).

Taking hard actions

Hard feelings can lead to hard actions on the part of officials. If an official cannot be persuaded by arguments, regulatees have more drastic measures at their disposal: the question of whether they are right or innocent can be fought out in the courts.

- *Claims for damages by Onur Air*
Following a series of incidents, a number of warnings and a period of closer surveillance the aviation authorities of four European countries banned the Turkish airline Onur Air from flying. The airline responded with indignation and threatened to take legal action and claim damages. It commissioned a study which claimed that the ban was not justified on the grounds of the incidents as air safety was not in jeopardy. The authorities, however, upheld the ban until the Turkish government adopted a proper improvement plan. After two weeks—sooner than announced—the ban was lifted, whereupon Onur Air held the aviation authorities in question liable for the cost of the period when the airline was not allowed to fly, plus the damage to its reputation. On top of this its lawyer announced that all claims against Onur Air by tour operators would be passed on to the authorities (NRC, 2005, p. 13; Trouw, 2005, p. 13).

3 Counter-strategies used by officials

The previous chapter described strategies that regulatees can employ in interaction with officials. These strategies make it difficult for the official to gauge what approach—accommodation and dialogue, or sanctioning—will be effective. How can officials overcome this problem? We now set out a number of strategies that officials have at their disposal.

3.1 Portfolio management

Portfolio management can be used to adapt the enforcement strategy to the nature of the regulatee. Portfolio management involves identifying relevant characteristics of regulatees and factors that give an insight into the various types of regulatee. The response to any offences discovered can then be based on these insights.

Basing enforcement strategy on a portfolio

When deciding what form enforcement should take, an important consideration is what kind of behavior regulatees display. Examples of possible variables to distinguish offenders from rule-abiders, and well-intentioned from ill-intentioned regulatees, are:

- How familiar the regulatee is with the rules
- How well organized the regulatee is
- How far the regulatee agrees or disagrees with the rules
- The regulatee's financial situation
- Whether the regulatee is a repeat offender

Combinations of these factors are selected based on strategic choices, and together the combinations make up the enforcement organization's portfolio. As a portfolio reflects a strategic choice, it can only be made public to a limited extent: it would lose its efficacy if it were to become public knowledge, as regulatees would be able to employ strategies in response to the choices.

- *The main offenders as regards lorry overloading* For a long time lorry overloading was tackled in the Netherlands by identifying vehicles visually, taking them off the road and weighing them at the roadside using a mobile weighbridge. If they were found to be overloaded a fine was imposed and the firm was ordered to send a second lorry to take part of the load. The approach, then, targeted individual lorries and their drivers. Once a new automatic weighing system was introduced it was possible to collect data on overloaded lorries *on a company-by-company basis*, thus bringing in a form of portfolio management. A top twenty of companies with the most or the worst offences was compiled and inspectors visited their managements to find structural solutions (Koopmans-van Berlo & De Bruijn, 2005).
- *Target factors in Port State Control* Merchant ships are subject to the international Port State Control inspection system. Vessels are selected for inspection based on a target factor, which is calculated for each vessel based on certain parameters. Vessels from countries on the blacklist of flag states or of countries that have not signed all the conventions are more likely to be inspected, as are vessels inspected by classification societies with a poor record and those with 'outstanding deficiencies' (Paris MOU web site).
- *Policy on taxis in the big cities* Following the liberalization of the Dutch taxi market, problems developed in the big cities, especially Amsterdam. There were a lot of drivers with totally inadequate street knowledge and language skills and unsafe vehicles. Incidents of aggression and customers being defrauded were the order of the day. Inspectors too were faced with increasing aggression. Enforcement measures were immediately changed accordingly: priority was given to inspecting taxis, and bus inspectors were switched to inspecting taxis. Inspections were concentrated on the cities by drawing in inspectors from the outlying areas. As the problem group consisted mainly of self-employed people, the focus was shifted from company inspections to roadside checks. Checks were also scheduled at night. Inspectors took courses on self-defense and operated in conjunction with the police. The inspectors and officers were given new repressive powers, resulting in a fast-track approach. This response is a good example of portfolio management, where the enforcement agency adopts a strategy based on the nature of the offenders.

Building up a memory

There is an important precondition for setting up a portfolio: the enforcement organization must have the ability to build up a memory. A dossier must be kept on each regulatee in respect of the variables selected for the portfolio. This requires systematic monitoring of regulatees' behavior by the inspector and the ability to interpret this behavior; this in turn means that the inspector must be able to combine different types of information, not only physical behavior but also legal behavior and social attitude towards inspectors.

- *Automatic memory-keeping: Weighing in Motion* The dossiers on haulage companies that broke the rules on overloading, as mentioned above, are built up using a sophisticated technology. Induction loops, sensors and cameras are installed at strategic points on various motorways to register overloading and photograph the number plates. The data from the sensors and cameras are processed automatically by a computer and stored in a central database. An automatic link with the national registration number database enables vehicle data to be associated with the firms that own the vehicles. In this way automatic company dossiers of offenders are created on a round-the-clock basis. Organizing the data in this way not only enables a top twenty of offenders to be compiled but also patterns of times and places where offences take place to be identified (Koopmans-van Berlo & De Bruijn, 2005).
- *Informal memory-keeping: coordinating the work of officials* A memory can also be built up informally: here the emphasis is on officials sharing their knowledge. The Transport and Water Management Inspectorate's fisheries inspectors manually enter the results of company inspections in computer dossiers. They exchange more informal information and identify patterns in regulatees' behavior at regular staff meetings. They keep in contact by telephone while touring the port, enabling them to consult one another about inspections carried out elsewhere on the vessels they encounter.

3.2 Redundancy

When it comes to dealing with strategies employed by regulatees, secondly, it is important to have information redundancy, i.e. an official should have access to multiple sources of information. Redundancy goes hand in hand with intelligence, i.e. collecting and combining data intelligently—often indirectly—so as to provide relevant information on how regulatees operate.

If a regulatee is withholding information from an official or concealing its non-compliant behavior, the official may be able to ascertain this from external sources. Redundant information also helps the official to expose a regulatee using a cover story. It gives the official a better insight into the type of regulatee he is dealing with and enables him to gauge the effectiveness of particular types of intervention better.

Having multiple sources of information also makes the official less dependent on the regulatee. As a result the regulatee has less scope for putting pressure on the official with promises of information; on the contrary, the official becomes less predictable to the regulatee, as the regulatee does not know what information the official has. Supplying him with incorrect or misleading information is therefore risky. The regulatee's uncertainty also puts the official in a position to employ a bluffing strategy. A 'suggestion of knowledge and authority' is a common device for forcing someone to cooperate (Hawkins, 1984, pp. 140-50).

Data-linking: combining information

Data-linking involves combining different kinds of inspection data. The inspector checks whether the various data—statements, financial records, logbooks, measurement data—that he has on the regulatee are consistent. The regulatee's story has to be consistent with the capabilities of the technology it is using; payroll data must correspond to production hours, and so on. This strategy requires inspectors to apply different methods of inspection at the same time. Technology can play a major role here, e.g. detection systems based on satellite pictures and photography, and sample analysis.

- *Tracking down VX nerve gas in Iraq* The weapons inspections in Iraq provide an example of redundancy in inspection data (NRC, 2002). The UN inspectors suspected Iraq of having manufactured VX nerve gas, which Iraq denied. The inspectors tracked down a plant and took samples which demonstrated that VX gas had been produced. The Iraqis admitted that it had been made but said that they had never been able to stabilize it. The inspectors then set out to find 'proxies'. How many precursor

chemicals had been produced? (The right combination of precursor chemicals yields VX gas.) How much VX was produced? Where did the waste go? The Iraqis took the inspectors to a site where the chemicals had been dumped. Soil samples indicated degraded by-products of VX and its precursors. The information was insufficient, so the inspectors asked about the containers used to transport the chemicals. These turned out to be empty and chlorinated, but one inspector found something strange on the lid of a container. A sample showed that it was stabilized VX gas. The Iraqis admitted that they had been able to stabilize VX gas but said it had never been used in weapons and moreover it had been destroyed. The inspectors persevered and went to a site where Scud missiles had been dismantled. Again they took samples, this time of the destroyed warheads, and did indeed find stabilized VX gas (Ritter & Rivers Pitt, 2002, pp. 30-31).

- *Verifying tachograph data* Every lorry is fitted with a tachograph to record driving and rest times. When describing regulatees' strategies we mentioned that drivers can tamper with the tachograph or the discs. Inspectors, however, have an effective counter-strategy: redundancy. By comparing tachograph discs with payroll data they can ascertain whether discs have been withheld: if drivers have been paid, they have been driving. When the digital tachograph is brought in it will provide even more opportunities for redundancy, as the new device records data not only on driver cards but also in its own memory (Koopmans-van Berlo & De Bruijn, 2005).
- *Visual observation to detect taxi fraud* It is known that some taxi drivers commit fraud by not keeping compulsory journey records, thus not only evading tax but also making it impossible for inspectors to check their driving and rest times. The big cities in the Netherlands have therefore introduced a new strategy, visual observation. Inspectors conceal themselves near taxi ranks—e.g. in an office building overlooking the square—and make a note of the number plates and departure times of taxis picking up passengers. They then visit the taxi companies' offices and check whether the journeys in question are listed in the records: if not, there is fraud taking place.

Contextualization: exchanging information with third parties

Another strategy is contextualization, involving third parties in the enforcement process. Inspectors gather information not only from their own observations and inspections but also making use of contacts in their networks, who can provide both hard and soft information.

Employees may have an interest in their company abiding by the rules, e.g. if the regulations protect their own safety. A competitor may also have an interest in a fellow operator obeying the rules, as those that break the rules can harm the industry's image or enjoy an unfair advantage. The regulatee's suppliers and customers, other enforcement agencies, local residents and pressure groups can also supply officials with relevant information.

- *Municipalities reporting lorries that take detours* When discussing regulatees' strategies we outlined how lorry drivers avoid checkpoints. Inspectors try to reduce this by checking the most popular detours at the same time as the motorway checks, making use of contacts with the outlying municipalities where the detours are made (municipalities that have problems with peaks in heavy goods traffic can report drivers taking detours to the Inspectorate) (Koopmans-van Berlo, 2003, p. 43).
- *Informal relationships in the fishing industry* The Transport, Public Works & Water Management inspectors make extensive use of informal relationships in their oversight of the fishing industry. They spend a lot of time touring ports and keep in contact with all the people and companies in 'their' ports. Firstly there are the contacts with the fishermen themselves: superintendents or crew members inform them of problems on their vessels. A fisherman's wife asks an inspector if he can influence the men's high-risk behavior at sea. Masters mention abuses committed by their competitors to inspectors en passant. Then there are the contacts with the industry partners: inspectors

regularly go into the repair yards to find out what repairs are being carried out on vessels. Suppliers can also provide useful tips, e.g. a water supplier may know if legionella has been found on a vessel. Inspectors protect their sources of information carefully: they never let a regulatee know where their information comes from, instead raising the subject e.g. as a general topic of conversation.

- *Complaints desks* Officials can collect information on regulatees reactively as well as pro-actively (Hutter 1997). Third parties can be involved in providing information, e.g. by setting up complaints desks. The Dutch taxi industry has one, for instance: new legislation requires scales of charges and driver identity data to be clearly displayed, and this information makes it easier for passengers to report taxi drivers who break the rules. There are also complaints desks in the aviation industry: local residents can report aircraft noise problems; passengers can complain to the Airline Passenger Complaints Desk; and there is an Air Safety Desk for people to report situations which they consider to be unsafe.

3.3 Variety of approach

Officials have a wide range of enforcement styles at their disposal, the extremes of which we have already outlined, the accommodative style and the sanctioning style. Portfolio management and redundancy help officials to decide which style is appropriate. We now describe some enforcement strategies—including combining the two styles—that can have a powerful effect, while taking the pressure off the relationship between the official and the regulatee.

The shadow of the law

The official approaches the regulatee using an accommodative style but making it clear, implicitly or explicitly, that he intends to switch to sanctioning if the regulatee's behavior does not improve. A threat of sanctions is often at least as effective as actual sanctions. The enforcement literature refers to the 'benign big gun' (Ayres & Braithwaite, 1992), the 'shadow of hierarchy', 'the shadow of the law' (De Bruijn, 2005), or the 'tacit threat' (Tucker 1996; De Bruijn, Ten Heuvelhof & In 't Veld, 2002). This strategy is fair play: the regulatee gets what it deserves. The risk of capture is limited, as the bad guys soon slip up and the official switches to sanctioning.

Adding all the intermediates between the two styles into the equation, we obtain the pattern of an enforcement pyramid or sanctioning pyramid (Ayres & Braithwaite, 1992, p. 35; Baldwin & Cave, 1999, p. 100; Sparrow, 2000, p. 20). The official starts out with lenient strategies (education, relying on self-regulation). Regulatees that do not respond are faced with more heavy-handed action (warnings, fines, having their permits suspended). The strategy can also be applied in the opposite direction: an official can switch from sanctioning to a more accommodative style if the regulatee's behavior improves.

- *Dealing with overloading inside or outside the gate* We have already mentioned the Weighing in Motion using Video system employed by the Transport and Water Management Inspectorate to detect overloaded lorries. Company dossiers and a top twenty of major offenders are automatically produced from the overload data. Inspectors visit these companies and confront their managements with the data on their vehicles. A specific strategy employed by inspectors is to offer a choice between an 'inside the gate' and 'outside the gate' approach. 'Inside the gate' means cooperating with the inspectors on company premises, with preventive checks and advice. If the company refuses to cooperate in this way it automatically opts for the 'outside the gate' approach, where inspectors target the firm's vehicles in roadside checks and apply appropriate sanctions. The Public Prosecutions Department, moreover, can impose heavier penalties for offences if the Inspectorate indicates that the company's behavior has not improved following a visit. The 'outside the gate' threat thus pressurizes the management to cooperate with a preventive 'inside the gate' approach (Koopmans-van Berlo, 2003, p. 40).

- *Regulating the fishing industry: a flexible or stamp-it-out approach* Fishing vessels are not permitted to sail unless they have all the requisite certificates, which have to be renewed periodically, or reissued, based on the relevant inspections. Dutch inspectors frequently use the ‘shadow of the law’ strategy here. They have far-reaching powers: they are permitted to gain access to a vessel at all times, revoke certificates and detain vessels. They rarely have to use these powers, however. They describe their relationship to regulatees in terms of ‘coaching and support’ and ‘mutual trust’. Following an inspection they pass on their ‘comments’ to the master, who is given a period of grace. If he does not have the repairs carried out with sufficient urgency or betrays the inspector’s trust, the inspector gradually increases the pressure, coming to reinspect more frequently, threatening to reinspect just before sailing, giving official notification of minor defects, issuing a highly restricted certificate, and finally threatening to refuse a new certificate or to detain the vessel. As soon as the regulatee brings its vessel into line with the rules, however, the certificates are issued immediately and any detention is lifted.

Contextualization: applying pressure from third parties

The above examples illustrate how officials can influence the behavior of regulatees. Third parties can also exert an influence on regulatees (self-regulation within the industry, other enforcement agencies using their powers, publicity in the media or the political arena, or customer selection based on quality). Officials can make intelligent use of this power of third parties to influence regulatees: they can achieve the desired effect while taking the pressure off the relationship between the official and the regulatee, as the pressure on the regulatee does not come from the official. A cooperative relationship is still possible and the risk of capture is reduced (Ayres & Braithwaite, 1991).

A particular form of contextualization is ‘naming and shaming’, i.e. giving full or restricted publicity to regulatees’ poor performance. Naming and shaming is an attractive strategy when the regulatee sets great store by its reputation (Ayres & Braithwaite, 1992, p. 22). Including a company on a shame list can damage its reputation. In this way the official involves third parties—the public or clients, or fellow operators or industry partners—who can influence the regulatee’s behavior.

- *Threatening to report a regulatee to the European merchant shipping authority* In mercantile shipping a major role is played by what are known as ‘recognized classification societies’, which are responsible for a large proportion of vessel certification. Oversight of the classification societies is organized primarily on a country-by-country (flag state) basis. If the classification societies in the flag state do not come up to scratch, an accommodative enforcement style is applied, focusing on dialogue, education and recommendations. The third party in question here is an international one: the EU can withdraw recognition from a classification society that is not performing properly. Thus the sanction remains outside the direct relationship between official and regulatee, while the official has a means of coercion, as the flag states’ regulatory bodies are required to report their findings on classification societies to the European Maritime Safety Agency. Officials can thus threaten to make a report of this kind.
- *Naming and shaming in merchant shipping* There is another interesting example relating to the oversight of mercantile shipping: naming and shaming. The international Port State Control organization publishes annual white lists, grey lists and black lists classifying all the flag states by their performance. This provides an incentive for the flag states’ regulatory bodies to keep their national inspection systems up to scratch or tighten them up. A quality flag is not just a question of prestige, after all, it also attracts the better shipping companies. Naming and shaming is also applied to individual vessels (‘rust buckets’). The Port State Control regularly sends out glossy brochures parading the recent deficiencies of a particular ‘sub-standard ship’ and its

crew in words and color photographs. Each brochure invariably ends with a list of the actions taken (Paris MOU web site).

- *Naming and shaming in the aviation industry* Although publishing blacklists is not yet common practice in the aviation industry, there is clearly a trend towards greater openness. In 2004 an aircraft full of French tourists crashed in the Red Sea. It emerged that Switzerland had banned the airline, Flash Airlines, from flying because it had failed to comply with safety standards. Under pressure from the media the UK also released a list of airlines banned from British airspace. The European Commission brought in a scheme to enable blacklists of unsafe airlines to be published on the Internet. In 2005 the ban imposed on Onur Air by the Dutch Transport and Water Management Inspectorate—whose example was followed by a number of other European countries—received extensive publicity in the media. Meanwhile the European Union has announced that it intends to coordinate the sanctioning of airlines more effectively. In 2005 the Inspectorate started publishing on its web site a list of airlines that are under close surveillance. Here passengers can read that these airlines comply with the minimum standards but travelers need to decide for themselves between low prices and high levels of service.

4 Conclusion

This paper proceeds from the assumption that enforcement is only effective if officials' enforcement styles correspond to the type of regulatees they are dealing with; otherwise there is a mismatch. An accommodative style applied to an ill-intentioned regulatee can result in ineffectiveness and capture. Confronting a well-intentioned regulatee with a sanctioning style can result in the relationship being affected and sources of information drying up.

The risk of mismatch is due to the fact that regulatees can employ strategic behavior. Even a 'bad guy' can pretend to be well-intentioned, respond positively to an accommodative style and object to sanctioning. Pressure can also be put on an official with a promise of a good relationship and information.

Officials can deal with this by incorporating portfolio management and redundancy in their approach to enforcement, making it easier to identify the different types of regulatee and thus enabling the enforcement style to be geared to the situation. Combining the different styles takes the pressure off the relationship between the official and the regulatee and eventually exposes the bad guys. Positive behavior is encouraged, negative behavior discouraged.

We have looked at the inner workings of enforcement organizations, where enforcement actually takes place. The strategies described are standard practice in some sectors, whereas in others they are not on the agenda, are under discussion, or are out of the question. Insight into the generic patterns that manifest themselves in all types of enforcement can contribute to the development of enforcement policy and inspection practice.

5 Afterword

It goes without saying that the reality is more complicated than the dichotomies of enforcement styles and types of regulatee used here. Not only are there all sorts of intermediate forms and variations, other factors are also involved. We set out the most important ones and indicate the implications for the work of inspectors.

- *Dynamic behavior on the part of regulatees* Regulatees' behavior can differ depending on the matter in hand. A regulatee may behave responsibly in general but disagree fundamentally with a few rules and refuse to obey them. Regulatees' behavior can also differ over time: an 'immoral calculator' may develop—e.g. as a result of personnel

changes—into a responsible company. On top of this, the ‘regulatee’ is often a company with a large number of employees.

- *Limited resources* Officials have only limited resources at their disposal, so they have to decide which regulatees to focus their attentions upon. The concept of enforcement styles particularly involves the interaction between officials and regulatees once non-compliant behavior has been detected. Planning inspections comes before this.
- *Risks of non-compliant behavior* While the type of regulatee may play a major role in the choices made by the official, it is not the only relevant variable. Breaking the rules can cause damage: for example, not complying with driving and rest times can result in an accident owing to fatigue. Officials can decide to focus on rule-breaking that entails a major risk of damage. The distinction between limited and extensive damage, temporary and permanent damage, repairable and irreparable damage, or visible and invisible damage may also be a factor. Political preferences as regards enforcement are often based on a risk approach of this kind.
- *The cost of enforcement* Enforcement entails a cost to both the enforcement agency and the regulatee: not only does complying with the rules require investment, carrying out or undergoing inspections also costs time and money. Enforcement also yields a dividend, though: compliance has a social utility. The choices made by officials may be influenced by cost-benefit considerations: action that has a low cost to the enforcement agency and the regulatee but is highly effective is more attractive than action that has a high cost to both parties and only a limited or temporary effect.

These factors can be taken into account in the enforcement strategies of portfolio management, redundancy and variety of approach. Portfolio management is ideally suited to apportioning scarce inspection resources. Officials can decide to focus entirely on the suspected bad guys. Inspections can be based on knowledge of the nature of offenders and offences (physical location, type of firm, type of vehicle, times). Other variables can also be included in portfolio management, e.g. ability to neutralize damage that has occurred; the permanence of the effect achieved by action; and the cost of enforcement to the regulatee.

Redundancy is a good strategy for revealing dynamic behavior on the part of regulatees, as multiple sources of information provide insight into regulatees’ behavior on various fronts. Variety of approach is also a good way of dealing with dynamic behavior: in particular the possibility of going down the enforcement pyramid gives scope for a regulatee that displays improvements in its behavior.

Nonetheless, the practice of enforcement is not as straightforward as outlined in this paper, because of dynamic behavior, limited resources and the relevance of a risk approach and cost-benefit considerations. Further research into these factors and the effects they have on officials’ enforcement strategies would therefore be worthwhile.

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