COMPLIANCE MANAGEMENT AND SYSTEM-BASED SUPERVISION

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SUMMARY

This paper describes the backgrounds and experiences of a project by the Province of Noord-Brabant, The Netherlands, involving a new form of supervision: system-based supervision (SBS). The aim of this System is to use the quality of self-regulation of large-scale industrial companies with high-risk processes for the purpose of customizing supervision and improving compliance by assessing their compliance management system (throughout this paper, the term “compliance” is used to mean “regulatory compliance). Public supervisors of the Province use an audit methodology to assess each company’s level of internal control regarding regulatory compliance and risk management. If the compliance management system meets the set standards, the company is inspected less frequently. System-based supervision contributes to a more professional relationship between the supervising organization and the regulated company. System-based supervision contributes to a better understanding of how the companies assure measures for protecting the environment and stimulates companies to improve their risk management and compliance. The paper explains the preconditions for system-based supervision and discusses the experiences and pitfalls of the project.

1 INTRODUCTION

This paper explores and evaluates compliance assurance through company compliance management systems and is based mainly on a project by the Province of Noord-Brabant (hereafter the Province). The authors have been involved in this project. The Province is charged with the supervision of large-scale industrial companies in terms of their compliance with environmental legislation. These are companies which are operating processes and using substances which might be harmful to the environment.
Law enforcement was long driven by the principle: “trust is good, control is better.” This principle, however, does not do justice to companies and people that are doing their very best to achieve compliance. Compliance is not an automatism. Companies have to organise assurance of compliance. The assurance of compliance requires a supportive corporate culture and also an investment in an effective management system. The Province holds the opinion that companies with a good record in compliance management deserve more trust than companies which are more indifferent in terms of compliance management. We therefore have adjusted the principle of enforcement to: “confidence whenever possible.”

This paper describes the methodology for system-based supervision currently being applied in the Province. The first section introduces the theoretical backgrounds of assuming trust as a basis for inspections and compliance competence. The second section illustrates the possibilities of this new form of supervision and the preconditions required. The third section details the experiences in the Netherlands and especially in the Province in applying system-based supervision. The paper concludes with recommendations for working with this new method of supervision. Before focusing on system-based supervision, we will first explain why the Province has chosen a different approach to supervision. To comply with regulations is a time and money consuming task for industrial companies, especially when the government produces more and more rules as a consequence of perceived risks (Better Regulation Commission, 2006). While the Province wants to improve the quality of its enforcement results wherever possible, it also pursues a smarter approach aimed at reducing the inconvenience for regulated companies. Also, it wants to end the trend of imposing evermore rules and regulations, and instead restore focus on the underlying goal: the reduction risks to human health and the environment. It is obvious that this approach requires other competencies of both individual law enforcers and the entire organization of the Province.

1.1 Compliance Management Systems

Management systems used by private companies focus on optimizing operational aspects of business like quality, health, safety and the environment. Companies with management systems have the potential to ensure compliance with legal requirements in their own organization and contacts (the so-called compliance management). This potential is seldom or not used by law enforcers because the existing standards for management systems are not specifically aimed at securing compliance with legal requirements but rather at reaching better quality or environmental goals (e.g. ISO 9001 and ISO 14001). Therefore significant differences in compliance results among companies working with certified management systems are observed. And, the other way around, legislators do not always take into account management systems. The Province wants to close the gap between the aims of regulations and management systems.

Generally speaking, quality management is based on two elements, namely the assurance of quality and continuous improvement of quality. Assurance means that a certain stable level of quality is achieved by taking specific organizational measures.
The second element relates to the learning ability and is meant to maintain an ongoing process of improvement of quality through cycles of “plan, do, check, and act.”

The basis for compliance management is that these two principles are used specifically by regulated companies to assure and continuously improve compliance. For the purpose of this paper, a compliance management system is defined as an internal management system used by a company which is explicitly aimed at preventing the company from violating legal requirements and permit conditions (Huizinga et al., 2009). The fact that a regulated company operates an effective compliance management system has implications for the role of the law enforcer.

### 1.2 Differentiating Between Traditional Supervision and System-based Supervision

Following this introduction of company compliance management systems, it is important to clarify some other concepts and definitions. We differentiate between system-based supervision and output inspections. The distinction between system-based supervision (also referred to as meta-regulation) and output inspections can be explained using a model of learning in organizations.

In the traditional supervision approach, the regulator verifies whether or not output (for example actual emission levels) meets the legal standards. Thus, it is considered whether emissions exceed the standards, or certain technical provisions are met, and so on. This way of supervision is aimed at assessing the output and only results into actions of the company to end the violation. The learning effect is limited and has a shallow or so called single loop character (Argyris, 1978). For example, a company that violates an emission limit of mercury into the air is forced to takes measures to stop the emission, but is not necessarily compelled to examine the causes of the emission. The issue of how the management system failed to prevent the emission and how the internal controls have performed is usually not evaluated. The latter is exactly what system based supervision does.

System-based supervision brings about a deeper form of learning (double loop learning) because it focuses on the underlying processes, strategies, and procedures that aim to achieve compliance. System-based supervision thus intervenes in the structural causes of non-compliance and therefore brings about a structural improvement in compliance management. The combined efforts of system supervision and output inspections are referred to as “system-based supervision.”
1.3 Trust as a Basis

Trust forms an important aspect of the strategy. It is commonly recognized that trust leads to efficiency because of less monitoring and less transaction costs (Fukuyama, 1995) and is expected to lead to better compliance (De Goffau, 2008; Gunningham et al., 2009; Huizinga et al. 2009). Trust as a concept is too indistinct to use in a practical supervision strategy. It requires operationalization to benefit from the system dynamics (Six, 2010) to improve effectiveness. Covey (2008) distinguishes between trust based on little or no analysis, and trust based on analysis, thus making a difference between naivety and justified trust. We believe that the statement “confidence wherever possible” means that confidence should be given only in those situations in which it is justified by the facts.

Figure 1: Model for System-Based Supervision

Figure 2: Trust Matrix (Covey, 2008)
To further operationalize the concept of trust and to materialize the smart trust mentioned by Covey, we use the formula below (Benninga, 2007).

\[
\begin{align*}
\text{Trust} &= \frac{\text{credibility} \times \text{quality of relationship} \times \text{reliability}}{\text{conceit}}
\end{align*}
\]

This formula offers four specific aspects that every party participating in a particular relationship can work on to increase trust. In a supervisory relationship, trust exists when regulatory compliance is sufficiently assured and improved where necessary. These above-mentioned four factors of trust are used to develop criteria for compliance management systems. In this way, one is able to create a measure for compliance management, thus operationalizing trust. In the next paragraph is explained which specific features of the management system are assessed and the four levels of compliance competence recognized by the Province.

### 1.4 Levels of Compliance Competence

The Province has defined standards for four levels of compliance management according to which companies can be classified:

1. **Companies that do not want to and/or cannot assure compliance.** These companies are not willing to manage compliance or are not able to manage compliance because of the lack of competencies. These companies are unfamiliar with the principles of quality management. This does not necessarily mean that these companies are not in compliance, only that they are not assuring compliance using a management system.

2. **Companies with a certified or certifiable management system** in accordance with, for example, ISO 9001 or 14001/EMAS (Eco-Management and Audit Scheme). These companies have verifiably implemented quality management to some extent, but this is not specifically aimed at assuring regulatory compliance.

3. **Companies with an effective compliance management system.** These companies have a management system that is specifically aimed at assuring regulatory compliance.

4. **Companies with a proven compliance management system.** These companies have a management system that is specifically aimed at assuring compliance. The compliance management system has shown good results for several years and the company is working on continuous improvement.

The difference between level one and level two is that a level two company has a management system in operation, whereas a level one company does not. In level three, a company has a specific compliance management system. This is verified by an audit methodology using a checklist with forty-nine questions and verification items. The audit is performed by or in the name of the Province as public supervisors. Companies have to score positive on all essential elements and 50% of the important elements of the checklist. For every element, it is checked whether it is fit for purpose, whether it is documented, and whether it is implemented. Level four requires that the system meets additional criteria and that the system meets this level for at least two years.
Each of the four levels of compliance management calls for a different supervision approach (Table 1). When a company is in compliance management level 2, it can be invited to make arrangements about improving to level 3 and 4, in which case supervision is adjusted. This development model shows how companies and regulators can together progress to a higher level by focusing on a better assurance of compliance and appropriate methods of supervision that go with growing trust. In level 4, preventive supervision is limited to a yearly audit and few output samples.

**Table 1: Supervision Adjusted to the Level of the Compliance Management System**

<table>
<thead>
<tr>
<th>Compliance management level</th>
<th>Preventive supervision</th>
<th>Repressive Company has reacted adequately to a violation*</th>
<th>Repressive Company has not reacted adequately</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>On output</td>
<td>Traditional**</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>On output + arrangement SBS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>On output and system (50/50)</td>
<td>No penalty</td>
<td>Stricter penalty</td>
</tr>
<tr>
<td>4</td>
<td>On output and system (20/80)</td>
<td>No penalty</td>
<td>Stricter penalty</td>
</tr>
</tbody>
</table>

* i.e. the regulated company has identified and terminated the violation itself and has taken measures to prevent the violation from occurring again.

** traditional repressive supervision may mean written warning, financial penalty or coercion.
2 WHAT IS NEEDED FOR THIS NEW FORM OF SUPERVISION?

System-based supervision has its limitations and will only be effective if applied in a certain way in specific circumstances. System-based supervision is not a panacea for everything. Application of system-based supervision requires that a number of conditions are met. The overall basic requirement is a positive attitude (commitment) with regard to a targeted compliance management system, both from the company and the government. All people involved in this process need to have and show a positive attitude and believe that a compliance management system is an effective way to assure compliance.

For a company, this means that commitment is required not only from its manager for safety, health, and environment, but also its middle and top management. And equally, on the side of the government, there is the need for an enthusiastic policymaker, a management that understands the methodology, and a member of the board of executives who embraces the paradigm that competent companies can actually reduce the risk of environmental damage to an acceptable level which the Province agrees upon by means of compliance management systems. Last but not least, supervisors should understand and work in accordance with the principles of the method.

Starting from a positive commitment to system-based supervision, one can identify the other success criteria for this form of supervision. We have found during our project that the other conditions are confidence, competencies, vision, and methodology. (Note that “trust” and “confidence” are used as synonyms in this paper.) As these conditions are inter-related, meaning one condition cannot be met without the other. This implies that system-based supervision requires a multi-disciplinary effort, like playing chess on several boards at the same time (see Figure 4).

Figure 4: The Essential Ingredients for System-Based Supervision


2.1 Confidence

System-based supervision can only be effective if there is a certain minimum level of trust between parties. It is essential to leave the past behind and look forward with an open mind to arising opportunities. It is applicable to those companies that are intrinsically motivated to control their impact on human health and the environment, whether or not there are legal requirements to do so (Braithwaite, 2009).

Confidence is required as a prerequisite to sharing relevant and sometimes confidential information. A company will show its failures and mistakes in the confidence that the supervisor will give it room to improve its systems. Practically this means that the public supervisor refrains from interventions as long as the company pro-actively detects its own failures, repairs them and takes measures that will prevent that failure to occur again. Confidence is not only a condition for system-based supervision; it is also a product of it. As soon as supervisor and company work together to manage risks, they share interests. This yields even more confidence. This is not surprising if we look at the formula of Benninga, which we have presented above. In the system-based supervision process, both parties work on all four aspects of the trust formula.

2.2 Competencies

System-based supervision demands a number of competencies. The first competency concerns attitude.

Supervision according to the ideas of system-based supervision means that the traditional public supervisor effectively has to change his or her way of thinking and acting. Inspections, originally a classic output-oriented and suspicious way of supervising, are transformed into audits executed from the starting assumption that the system is effective and trustworthy. This requires an extension of the set of competencies of both the supervisor and the supervising organization. Open, transparent acting is crucial to reach the desired depth of discussion. The company must be transparent about the business process and what measures are taken to manage risks and meet regulatory requirements. The supervising authority should be transparent about the observations and the consequences of these observations. Both the regulated company and the public supervisor are expected to act proactively. If certain permit conditions cannot be met or are not expected to be effective, the company should react before the public supervisor notices a problem. This implies that the proactive company commits an assessment of the feasibility and suitability of regulatory requirements and communicates any problems with the authorities beforehand. An open communication about what could go wrong and what has been wrong is essential for building trust.

Another competency concerns knowledge about the auditing of risk management systems. Companies are expected to assure regulatory compliance and risk control
in their management systems. They do not need to create a dedicated management system alongside the existing one, but rather integrate compliance and risk control into existing control structures. A management system that is certified according to ISO 14001/9001, EMAS, or OHSAS forms a suitable basis.

The public supervisor is expected to understand the design, purpose, and working of these management systems as he has to judge these systems professionally. High-quality training in risk management for public supervisors was also one of the recommendations of the Better Regulation (2006). This job requires knowledge about management systems in general, and about auditing and communication skills in particular. On top of that, the public supervisor should have enough technical and legal knowledge to go into details during an audit whenever necessary. This implies intensive training for those supervisors who have been involved mainly in traditional supervision.

2.3 Vision

The most important paradigm that public supervisors and regulated companies have to share is that companies are capable of controlling environmental and safety risks and that this capability can be assessed. Clearly, the management of both the public supervising organization and the regulated company have a crucial role to play in this respect. The company has to clearly recognize the importance of controlling environmental and safety risks, and act consistently, not only on paper, but also in practice. The commitment of the management is thoroughly challenged during the compliance management audit. For parties on the government side, from executive to supervisor and permitting officer, there is a need for a clear policy based on the expectation that the regulated company can be in control. Maintaining trust towards participating companies is not always self-evident, especially when things go wrong.

2.4 Methodology

System-based supervision is only possible if there is a suitable methodology to measure the degree to which a company has assured compliance. The Province has found that the current auditing schemes like those based on ISO 14001 are not adequate, partly because the standard is not suitable and partly because the auditing practice is not reliable enough in terms of quality and independence. Therefore, the Province has developed its own standard and trained its own people to audit against this standard.

Once audited against this standard, it is found that companies improve their management system significantly, also with risk management (Van Dis, 2011). Doing this, confidence further grows and the company deserves more freedom of action, i.e., to chose the way they control its processes.
3 EXPERIENCES

In this chapter we share experiences from the project (Meerman, 2010). Experiences are related to the selection and participation of companies, the learning effect on the management system of regulated companies induced by system-based supervision, the competencies and attitude required for system-based supervision efficiency.

3.1 Selected Companies

The Province has pre-selected companies with a good track record concerning compliance and which were expected to use professional management systems.

A high percentage (80-85%) of the pre-selected companies participating in information meetings about system-based supervision decided to participate voluntarily in the project. This is perceived as confirmation of the approach aimed at transparency, partnership between public and private parties, and practical (non bureaucratic) project management.

It appeared from the first audits that the fourteen companies initially participating in the project scored relatively close to compliance competence level three. Almost all companies required a minor effort to reach level three, whereas all the companies needed an improvement in risk management.

The reasons for participation stated by companies were reputation enhancement, government recognition, efficiency, and reducing the risk for reputation damage.

3.2 Penalties

As part of system-based supervision, participating companies are required to measure their own level of regulatory compliance. This can make companies very vulnerable with regard to public prosecution. Penalties issued by law enforcers based on violations detected by companies are counterproductive to the open atmosphere of mutual learning and continuous improvement that parties wish to accomplish. This is called the transparency paradox (Gabriel-Breukers, 2008).

The Province has therefore decided to refrain from imposing penalties within its jurisdiction if:

a) a company takes measures to prevent a violation from occurring by operating an effective compliance management system and
b) a company detects a violation itself, discloses and resolves it, and takes measures to prevent this violation from occurring again.

A study into the legal consequences of the method of system-based supervision showed that there are no pitfalls and that it is within Dutch legal criteria (Van Bellen-Weijnen, 2009).
The Province has not yet been able to reach agreement with the public prosecutor on withholding penalties if a company actually measures and improves its regulatory compliance.

3.3 Another Way

Both the Province as law enforcer and the regulated companies participating in the project needed some time to get used to the new approach. It appeared to be important to speak the same language and show interest in mutual problems and positions.

Several challenges were encountered during the learning-by-doing approach which was chosen. The Province has identified challenges for supervisors both in terms of attitude and skills. For individual public supervisors adopting system-based supervision was nothing less than a culture shock. It is of crucial importance that supervisors carrying out system-based supervision are not focused on finding violations, but concentrate instead on the effectiveness of the management system in terms of risk management. The referential index had to be changed from legal requirements to what is important in terms of risks.

Another challenge was the lack of auditing skills. The Province had to train the supervisors thoroughly to become auditors while maintaining their technical and legal expertise.

The process has benefited from inter-vision meetings and peer review. An inter-vision meeting was organized every three to four months to look at the practical problems and pitfalls the supervisors faced. Teams consisting of two supervisors and one external coach were formed for execution of the audits. By reflecting on the audit reports, the audit team members learned how to interpret findings and formulate conclusions.

Another benefit of the process has been that companies and law enforcers no longer oppose each other, but recognize a common interest in managing risks. Some quotes from participating companies:

“Supervisors focus on risk management and giving positive feedback.”
“A new approach in enforcement of environmental regulations.”
“Our risk reduces because we look at items we both consider important.”
“This will lead to synergy between our different plants.”
“Supervisors now really differentiate between companies. Those who are in control are treated differently from those who are not.”
“Checking yourself sharpens the consciousness enormously.”
“System-based supervision helps us to show that we are a good sustainable company.”
3.4 Efficiency

System-based supervision does not immediately lead to improved efficiency in law enforcement. During the initial period of one to two years, investments have to be made in development of policy, instruments, training, and communication. Expectations based on the previous chapters are that supervision will be improved and made more efficient after this period of time. Calculations show that efficiency (measured in hours spent by supervisors) can improve by 60-70% for very big plants like refineries and chemical plants with equal or even improved effectiveness.

3.5 Incentive for Corporate Risk Management

An important principle of system-based supervision is that the supervisor and regulated company agree on the assumptions and criteria for effective risk management. This removes a traditional objection of companies that the public supervisor only focuses on compliance to the formal details of regulations instead of focusing on the risks that regulations seek to reduce. It was already recognized that system-based supervision contributes to a more professional relationship between supervising organization and regulated company (Van Bellen-Weijnen et al., 2010). Several participating companies have indicated that system-based supervision stimulates effective management of risk of environmental damage (Van Dis, 2011; Helderman, 2009; De Bree 2010).

3.6 Further Developments

Having taken its first few steps on a prolonged journey, the Province would like to share some of the developments the Province anticipates in the next couple of years. It foresees a further integration of system-based supervision and private management systems like high level structure ISO. While traditional supervision mainly focuses on different fields of output like emissions of hazardous substances, accident levels, food quality, waste, and so on, system-based supervision focuses on the general management system of the regulated company and will thus result into a further integration of public supervision for big and complex companies, thus serving better compliance and better environmental results.

Some companies use control systems that go beyond geographic borders. The Province has therefore initiated partnerships with other Dutch and foreign public supervisors to form teams. We cooperate with other s and have started a European project to examine the feasibility of international teams of supervisors for multinational industrial companies. This project is expected to yield results in September 2011. This might be a stepping stone towards the internationally organized supervision of multinational companies.

There are still legal challenges in the tension between trust-based form of supervision like system-based supervision on one hand and the formal penal law on the other hand. We already remarked that penalties can seriously damage trust
in the relationship between supervisor and regulated company, whereas that trust is needed to be able to analyze and further improve the level of compliance and risk management.

The concept of the self-controlled company does not only have implications for supervision. It can also have implications for permits and legislation (Parker, 2003; De Bree, 2006). An essential part of system-based supervision is the assessment of the management of social risks like environmental damage. As soon as it is verified that a company manages its environmental damage risks through system-based supervision, it thus implies that the company has designed and implemented lines of defense to mitigate the risks. These lines of defense are meant to reduce the risk of an undesired event from happening or to reduce the consequences of an undesired event in terms of damage to mankind and the environment. If these lines of defense are implemented and effective, the license does not need to prescribe how risks should be managed. The question of how risks are managed is moved from the licenser to the licensee. In this way, the license can become a lot simpler and risk management can become more flexible by leaving it to the professional know-how of the regulated company. A strict precondition is that the company analyses and manages the risks effectively.

System-based supervision is not only suitable for developed countries. When industrial plants are constructed in developing countries, supervision may very well be based upon the principles of system-based supervision, even in the case that no suitable health, safety and environmental legislation has been issued. Most multinational companies use advanced management systems to control hazards and environmental damage, which can be used as an object for supervision. Because of the competencies needed, however, the public supervisors may need to hire outside expertise to execute the system-based supervision.

4 CONCLUSIONS AND RECOMMENDATIONS

Although evidence is still scarce, we have presented both empirical and theoretical indications that system-based supervision can make supervision more efficient and effective at the same time, if applied with suitable tools to companies with potential for self control. As system-based supervision stimulates companies to pro-actively control environmental risks, it is expected to contribute to a better environment.

System-based supervision is a method that makes it possible to differentiate between companies with different levels of control. Supervision is a function of the degree to which companies control environmental and safety risks.

On top of that, system-based supervision can help to stimulate regulated companies to improve this control. The working mechanism is that companies are challenged about what they do to manage environmental risks rather than what standards they must meet. By clearly explaining what an effective compliance management system is, companies receive practical feedback leading to improvements on strategic and operational levels.
As system-based supervision affects the management system of the regulated company, it can only be applied in those industries where management systems are used. While these management systems may not be suitable as they are, they can serve as a focal point for optimizing compliance management by system-based supervision. The step-by-step approach of the four-level model makes it possible to improve in feasible stages. Levels three and four require serious effort and physical verification of the compliance management system by the authorities.

System-based supervision clearly requires a different role of the public supervisor than he is used to in traditional supervision. He should be open to cooperation with the regulated company while maintaining his preparedness to intervene when necessary. System-based supervision requires from the supervisor the ability to understand and assess, within a limited amount of time, the level of control within a company’s system. This means that his analytical and communicative skills are severely challenged.

For regulated companies, system-based supervision means that the way they are approached by the supervisor depends on their level of internal control. The more proactively and professionally they take their social responsibility, the more room they are given to organize things the way they perceive as most effective. This not only results in an adequate supervision style, but can also lead to less-detailed permits.

Developing countries can benefit from the instruments of system-based supervision. If multinational industrial groups build plants in developing countries, system-based supervision can make use of the internal management systems these companies use. Although these countries may not have detailed legislation, system-based supervision can still be promptly applied at low costs, because it is mainly based on risk management. As a result, no specific legislation is required for supervision, except the formal jurisdiction to supervise.

System-based supervision requires a different role of the supervising authority. System-based supervision cannot reduce risks to zero, but neither can other forms of supervision. If an incident occurs within a participating company in spite of all the controls, the Province should not revert to old reflexes, but act as a stable partner and contribute to improvements. As long as the company behaves proactively and in a responsible way, the supervising authority should be reluctant to intervene. It is especially in these situations that trust should demonstrate its value.

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1 This checklist is also available as a self assessment tool on http://www.brabant.nl/systeemtoezicht.
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