The Quality of Regulation in the Service of Preventing Corruption

Corruption Impact Assessment (CIA)

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Abstract

This article describes the Corruption Impact Assessment (CIA), which is a better regulation tool suggested by the OECD, with the fundamental purpose to enhance the regulatory quality.

The first part explains some risk-corruption factors of the legal framework. The first factor is represented by the number and complexity of rules, which can be a negative incentive to corruption as well as to produce negative consequences for the proper functioning of the market. The second factor is intrinsically linked to the ambiguity in legal drafting, which does not encourage the right interpretation of norms; therefore, there is the question of the rule of law. The third factor refers to the lack of regulation concerning pressure group participation in the regulatory process and, as a result, the lack of transparency in identifying both benefits from norms and the relevant beneficiaries.

The second part focuses on CIA, which is considered a sub-category of traditional Regulatory Impact Assessment. It detects the factors in regulations that cause corruption, and its main potential is to prevent future corruption facilitated by bad regulation. Then, this part illustrates the implementation of CIA by Korean governments: the Anti-Corruption and Civil Rights Commission (ACRC) carries out the CIA, realizes its guidelines – which are based on three fundamental criteria, i.e., compliance, discretionality and transparency – and supports the application of the tool in the regulatory cycle.

Finally, the third part discusses the results given by CIA. This new anti-corruption strategy needs that regulators take into account the results, providing for their publication to inform stakeholders; otherwise there is the possibility of the CIA use being formal, rather than substantial.

Keywords: corruption, regulation, quality, impact assessment, risk.

A Corruption-Risk Factors in the Legislation

Regulation is usually considered as a perverse incentive and a direct factor that promotes illicit behaviours. In some circumstances, excessive and inefficient reg-

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European Journal of Law Reform 2016 (18) 2
doi: 10.5553/EJLR/138723702016018002006

ulation might be counterproductive, favouring violations.[1] Focusing attention on a specific pervasive crime, *i.e.*, corruption – which is an umbrella term that includes bribery, fraud, extortion, kickbacks, conflict of interests and so forth – this is intrinsically linked to the structural weaknesses and gaps of the legal framework.[2]

In this way, it is possible to create a perfect breeding ground for the so-called "corruptibility of rules"[3] or "corruption proofing."[4] According to these approaches, there are corruption-risks that appear at the end of the decision-making process, a product of the process itself, *i.e.*, laws or other forms of regulations that could favour corruption on coming into force. For instance, a procedure for acquiring a licence might be complicated and vague and as a result motivate both agents (public officials) to ask for bribes and clients (citizens) to pay with the objective of speeding up the administrative procedures.

This allows agents to create preferential treatments or obstacles for clients while acting "inside the law"[5]; therefore, in most cases bureaucratic practices appear perfectly legitimate. Thus, the reasons of the violations are to be found within the law, which is defined as the "secret" of the law[6]; in this perspective, some scholars have identified some corruption-risk factors contained in the legislation (laws, decrees and other secondary legislation).

First of all, a corruption-risk factor is connected with over-regulation that has been widely discussed in the literature, as well as in institutional environments.[7] In the presence of a great amount of rules, in combination with complexity and other irrationalities of the legal system, this might both increase opportunities for corrupt transactions, and constitute a serious threat to the proper functioning

1 On this point, *see* M. De Benedetto, 'Corruption and Controls', *European Journal of Law Reform*, Vol. 17, No. 4, 2015, pp. 479-501; P. Grabosky, 'Counterproductive Regulation', *International Journal of the Sociology of Law*, Vol. 23, 1995, pp. 347-369.

2 On the academic debate about this point, *see* O. Kurer, 'Why Do Voters Support Corrupt Politicians', *in* A.K. Jain (Ed.), *The Political Economy of Corruption*, London and New York, Routledge 2001, pp. 63-86; A. Ogus, 'Corruption and Regulatory Structures', *Law And Economics Working Paper Series*, 2003, pp. 2-16; J. Pope, 'Parliament and Anti-corruption Legislation', *in* R. Stapenhurst *et al.* (Eds.), *The Role of Parliament in Curbing Corruption*, Washington, The World Bank 2006, pp. 51-67; J.G. Lambsdorff, 'Invisible Feet and Grabbing Hands: The Political Economy Of Corruption Welfare', *in* A. Breton *et al.* (Eds.), *The Economics of Transparency in Politics*, Aldershot, Ashgate Publishing Limited 2007, pp. 123-150.

3 M. D'Alberti, 'Lotta alla corruzione e crescita economica', *in* L. Paganetto (a cura di), *Giustizia sociale, occupazione e crescita*, Eurilink Edizioni 2013, pp. 65-70.

4 T. Hoppe, *Anti-Corruption Assessment of Laws ('Corruption Proofing'). Comparative Study and Methodology*, Regional Anti-Corruption Initiative 2014, p. 10.

5 M.H. Khan, 'Determinants of Corruption in Developing Countries: The Limits of Conventional Economic Analysis', *in* S. Rose-Ackerman (Ed.), *International Handbook on the Economics of Corruption*, Cheltenham, Edward Elgar Publishing Limited 2006, p. 219.

6 M. Nuijten & G. Anders (Eds.), *Corruption and the Secret of Law. A Legal Anthropological Perspective*, Aldershot, Ashgate Publishing 2007, p. 12.

7 M. De Benedetto, 'La qualità della funzione regolatoria: ieri, oggi e domani', *Historia et ius*, No. 9, 2016, pp. 1-19; A. Ogus, *Regulation: Legal Form and Economy Theory*, Oxford, Clarendon Press 1994.

of the market.[8] Regulatory inflation leads for the so-called "creative compliance",[9] *i.e.*, a real strategy to achieve extra income that can develop two kinds of corruption.

- 'Grand corruption' is characterized by few entities or individuals with relevant economic effects. For example, the Italian legal framework on the Public Procurement, which is based on a multiplication of norms, obscure procedures, administrative burdens and so on, produces a set of rules that seems designed to favour corruption.[10]
- 'Petty corruption' refers to many entities or a high number of individuals with modest economic effects. This is linked with the fact that a regulation might create a situation where the relatively best solution for individuals is to ask for a bribe or other form of corruption. An example might be a hypothetical situation in which a provision has fixed very harsh conditions for the extension of a temporary residence permit, with a large degree of discretion to extend such an authorization.[11]

A second corruption-risk factor is ambiguous linguistic formulation, *i.e.*, provisions in the drafting of legal acts, which have unclear or obscure meaning and hence can bring into question the rule of law.[12] A measure with contents too vague may cause various forms of impartiality, favouring one who has close relations with the state or public administration (understood in their multilevel structure), and it distorts competition by creating an inequality of opportunities between economic operators.[13] The result is a complicated compromise between political parties, and this agreement can be illustrated starting from different points of view and this does not allow a well-defined interpretation.[14]

The third and last occasion for corruption could be the legislative process itself. This factor is linked with the possibility to access the legislative process by external subjects (*e.g.*, lobbyists, interest groups or other entities), which are able to insert/modify pieces of legislation to achieve their private objectives. Legislators can be pushed to enact a law even in the absence of an illegal exchange; in fact, they can be influenced by various elements that the "lobbyist" proposals are

8 U. Morera & N. Rangone, 'Sistema regolatorio e crisi economica', *Analisi Giuridica dell'Economia*, No. 2, 2013, pp. 383-394.

9 R. Baldwin, *Rules and Government: Non-Statutory Rules and Administrative Law*, Oxford, Oxford University Press 1995, p. 185.

10 G. Barbieri & F. Giavazzi, *Corruzione a norma di legge. La lobby delle grandi opere che affonda l'Italia*, Milano, Rizzoli 2014; F. Di Cristina, 'La corruzione negli appalti pubblici', *Rivista Trimestrale di Diritto Pubblico*, No. 1, 2012, pp. 177-226.

11 A.J. Heidenheimer, 'Perspectives on the Perception of Corruption', *in* A.J. Heidenheimer & M. Johnston (Eds.), *Political Corruption: Concepts and Contexts*, New Jersey, Transaction Publishers 2002, in particular p. 150.

12 B.G. Mattarella, *La trappola delle leggi*, Bologna, il Mulino 2011, in particular pp. 63-72.

13 In this regard, *see* Conseil D'État, *Rapport public 2006 – Sécurité juridique et complexité du droit* (Paris 2006), p. 287. "Le principe de sécurité juridique inspire des préoccupations essentielles relatives à la qualité de la loi et à la prévisibilité du droit, et comporte donc à la fois des dimensions statique et dynamique".

14 G. Amato, 'Ricordi in tema di chiarezza legislativa', *in* R. Zaccaria (a cura di), *La buona scrittura delle leggi*, Roma, Camera dei deputati 2012, pp. 21-27.

European Journal of Law Reform 2016 (18) 2
doi: 10.5553/EJLR/138723702016018002006

in the public interest.[15] In other words, regulatory capture is not necessarily illegal; rather bad rules or the absence of a regulation on lobbying activity are conditions that promote illegal acts.[16]

The proposed typology, which is not limited to corruption-risk factors listed here,[17] may serve during the decision-making process as a basis for conducting analysis of existing laws or draft laws with the aim of minimizing corruption-risk factors created by those laws. Therefore, regulation should be prepared with technical tools, such as Corruption Impact Assessment (hereinafter CIA), to analyze legislation, identifying and (where possible) removing risks of corruption.

B Corruption Impact Assessment

The central point of this article is that many opportunities for corruption arise from bad regulation, which is used as a tool to pursue private interests. Many authors and studies have recognized regulation and its quality as causes of corruption; in other words, "corruption and bad regulation are often two sides of the same coin."[18]

In this perspective, the OECD has suggested facing such corruption-risk factors, such as excessive regulation, regulatory burdens, ambiguous provisions, opaque consultations and so on, which may open up opportunities to circumvent the law.[19] The occurrence of these "regulatory failures"[20] is the reason why legislators should both implement a specific policy dedicated to regulatory quality and adopt better regulation tools to evaluate the effects of measures as well as their negative incentives.[21]

In this way, CIA, which is a specific, dedicated methodology in the framework of wider Regulatory Impact Assessment (hereinafter RIA), is an analytical mechanism designed to prevent corruption in legislative procedures that seeks possible

15 Regulators are not always rational and are subject to recurring cognitive biases in decision-making. On this point, *see* C.R. Sunstein, 'Financial Regulation and Cost-Benefit Analysis', *The Yale Law Journal*, Vol. 124, 2015, p. 263; A. Alberto & A. Spina, 'Nudging Legally. On the Checks and Balances of Behavioural Regulation', *International Journal of Constitutional Law*, Vol. 12, 2014, pp. 429-456.

16 N. Lupo, 'Quale regolazione del lobbying?', 2006, available at: <www.amministrazioneincammino.luiss.it>; P.L. Petrillo, 'Democrazie e lobbies: è tempo di regolare la pressione', *Forum di Quaderni Costituzionali*, 2015, pp. 1-8.

17 For example, another typology of corruption-risk factor might be the following: lack of a comprehensive justification for a legal act; failure to provide a clear estimate of the cost and financial impact of the draft legal act; conflicts of legal provisions (the presence of primary legal norms within a draft regulatory act [by-law]); allocations of powers, competencies and duties (establishment of parallel duties); and so on.

18 Lambsdorff 2007, p. 123.

19 OECD, *Corruption Impact Assessment – Assessing and Eliminating Corruption Risks*, 2009.

20 G. Majone, 'What Price Safety? The Precautionary Principle and Its Policy Implications', *in* G. Majone (Ed.), *Risk Regulation in the European Union: Between Enlargement and Internationalization*, Robert Schuman Centre for Advanced Studies 2003, pp. 33-51.

21 On this point, *see* C.M. Radaelli, 'Regulating Rule-Making via Impact Assessment', *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 23, 2010, pp. 89-108.

solutions, starting from an institutional point of view. It is an instrument of good regulation that identifies and removes corruption-risk factors from new and existing legislation. Given that CIA is an ex-ante tool to evaluate risks that might favour corrupt behaviours, this can be also considered as 'preliminary risk analysis', which has the purpose to estimate the probability that a corruption-risk will occur; therefore it requires risk management.[22]

Such corruption-risk analysis should not be conducted in isolation but should be seen as an integral component of the broader process of assessment of draft legal acts; risk analysis procedure has the following steps:

1 *Problem definition*: evaluates pieces of legislation that might create negative incentives and indicate whether this question has been resolved in the past; the relevance of the incidence of corruption associated with the issue is important.
2 *Context identification*: identifies affected subjects, *i.e.*, individuals or groups of entities that might directly or indirectly be interested by the legislation under examination.
3 *Detection of corruption-risk factors*: analyzes relevant aspects (areas of regulation) that can be affected by the draft law, *i.e.*, (a) compliance – every individual should satisfy all elements (procedures and formalities) of the regulation, the latter usually requires high costs to achieve full compliance[23]; (b) level of sanctions – excessive sanctions and disproportionate penalties might constitute an obstacle to stakeholder compliance[24]; (c) discretionality – whereas, on the one hand, a certain degree of discretionality by public officials is necessary, on the other, the use of discretion based on wrong motivations or an unjustified expansion of such power may create conditions to increase illicit behaviours[25]; (d) control mechanisms – which produce poor or contradictory results, lack of transparency, limited access to information and inadequate system of controls, lead to an increase of corruption.[26]

22 J. Chvalkovska, P. Jansky & M. Mejstrik, 'Identifying Corruption in Legislation using Risk Analysis Methods', *World Academy of Science, Engineering and Technology*, Vol. 6, 2012, pp. 281-285.

23 In this regard, *see* R. Villarreal, *Regulatory Quality Improvements for Preventing Corruption in Public Administration: A Capacity Building Perspective*, in the Expert Group Meeting on: "Countering Corruption in the Public Sector", New York, 25-28 June 2012, p. 26.

24 The amount of sanctions applied by legislators should be well balanced to be a valid deterrent. For an emphasis on this point, *see* G.S. Becker & G.J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers', *The Journal of Legal Studies*, Vol. 1, 1974, pp. 1-18, in particular p. 4.

25 On this point, *see* U. Mynt, 'Corruption: Causes, Consequences and Cures', *Asia-Pacific Development Journal*, Vol. 7, 2000, p. 4. Although discretion is a source of corruption, a public official exercises his/her discretionary power as required by law: "it is not possible to devise rules and regulations that are watertight and foolproof [...]. Hence, some flexibility and discretionary powers will have to be given to administrators in interpreting and implementing rules."

26 Relevant discussion can be found in B.A. Olken, 'Monitoring Corruption: Evidence from a Field Experiment in Indonesia', *Journal of Political Economy*, Vol. 115, University of Chicago Press 2007, pp. 200-249; F. Anechiarico & J.B. Jacobs, *The Pursuit of Absolute Integrity. How Corruption Control Makes Government Ineffective*, Chicago, University of Chicago Press 1996, p. 193; D. Serra, 'Combining Top-down and Bottom-up Accountability: Evidence from a Bribery Experiment', *Journal of Law, Economics & Organization*, Vol. 28, Oxford University Press 2011, p. 570.

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doi: 10.5553/EJLR/138723702016018002006

4 *Corruption-risk analysis*: provides an estimate of the likelihood that a corruption-risk factor will occur and its potential impact.[27]
5 *Conclusions and recommendations*: includes a list of measures and procedures to reduce or eliminate corruption-risk factors. The result will be a detailed report that illustrates concerned subjects and corruption-risk factors associated with them, suggesting solutions and positive incentives, in terms of "sticks and carrots".[28]
6 *Evaluation ex-post*: provides a wide methodology to include best and bad practice. CIA reports should include clear data and information to allow for an effective public control on remedies adopted, monitoring their application.

I The CIA Checklist

CIA has been introduced in different countries: the Republic of Korea,[29] which is considered a best-practice[30]; the Czech Republic,[31] although in a first-draft version; and others. Even if with different approaches and methodologies, in general this tool is implemented by governments or independent agencies through standard checklists with the aim to promote CIA application within of the regulatory cycle.[32]

Checklists are focused on the following three fundamental criteria: "ease of compliance" (demand), "property of discretion" (supply) and "transparency of administrative procedure" (procedure). The analysis of these aspects can be explained "as to what extent corruption factors create an incentive for citizens to offer a bribe (demand for services) or for public officials to ask for a bribe (supply side of services) as well as to what extent there are risks in the interaction of both sides (procedural aspect)".[33]

First, the 'ease of compliance' provides an evaluation of the adequacy of the burden of compliance, adequacy of the level of sanctions and possibility of prefer-

27 The analysis can be illustrated with an equation: A corruption-risk factor (d) = number of corruption cases (n) × the probability that a risk will occur (π) × size of corruption cases (v).
28 S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, Cambridge, Cambridge University Press 1999, p. 79.
29 A. Tamyalew, *A Review of the Effectiveness of the Anti-Corruption and Civil Rights Commission of the Republic of Korea*, World Bank 2014, p. 24 *et seq.* In 2006, the Independent Republic of Korea introduced CIA revising the Anti-corruption National Law. The Korea independent agency (Anti-Corruption & Civil Right Commission) conducts CIA to remove corruption-causing factors out of newly enacted/revised laws, current law, administrative rules, autonomous regulations and internal regulations of public service-related organizations. In particular, in 2013 the ACRC conducted the CIA on 1.325 newly enacted or amended bills, and recommended improvements for 357 corruption causing-factors inherent in 169 laws and regulations to the relevant organizations.
30 On this point, *see* ACRC, *Mongolian Officials Learn "Corruption Impact Assessment" from Korea*, 18 Giugno 2014.
31 J. Chvalkovská, P. Jansky & J. Skuhrovec, 'CIA, Index a další nástroje prevence korupce (nejen) v legislative-', *in* P. Kohout (Ed.), *Boj proti korupci*, Úr-ad vlády C-eské republiky, Národní ekonomická rada vlády (NERV) Praha, 2011, pp. 89-96.
32 Checklists are written as questions (in a table form) to which policy-makers should answer yes or no.
33 Hoppe 2014, p. 29.

ential treatment. This criterion takes into account regulatory costs, administrative burdens and conditions required by laws, which should be set to support compliance; in other words, it evaluates whether the level of costs and burden to comply with the legal obligations are appropriate.[34]

At the same time, this aspect monitors the level of sanctions, *i.e.*, whether the content and level of sanctions are appropriate when compared with those found in similar laws. Then, it focuses on the risk that a legal act might promote the interests of particular groups or individuals, without a public interest justification. Especially, this checklist evaluates whether one or more entities try to get themselves unfair advantages (as a result of a preferential treatment), intervening directly into law; for example, privileged groups of subjects might strengthen their position thanks to regulation. As already mentioned, this is a risk associated with the so-called state-capture, in which certain categories of subjects are able to establish rules to pursue their private interests.[35]

The "property of discretion" is the overseeing of the abuse of public power, *i.e.*, clarity of discretionary regulations, appropriateness of the scope of discretion and objectiveness and concreteness of exercising discretion. This criterion evaluates excessive discretion in terms of establishment of excessively long deadlines, allocation of authority to apply a provision (take decisions) without imposing clear criteria for such a decision, failure to state clear deadlines for decisions, failure to require competitive procedures for the allocation of contracts, licences and so on.

II The "Transparency of Administrative Procedure" Concerns: Accessibility and Openness of Information, Predictability and System of Controls

The first of these sub-criterion is linked to the access to information in terms of possible restriction through a direct or indirect exclusion, absence or inadequacy of provisions and procedures to ensure that stakeholders are informed of all their rights and duties in relation to a draft law, absence or inadequacy of provisions to ensure that citizens have access to the information they need to fulfil their legal rights or duties, absence or inadequacy of provisions and procedures to ensure that citizens have access to information on the implementation of the draft law.

The second sub-criterion refers to the form of information disclosure,[36] *i.e.*, how data and information are organized for end-users.[37] In particular, this criterion evaluates both the accuracy and clarity of the language, seeking to use understandable expressions or technical terms. The third sub-criterion focuses on con-

34 For example, the requirement of costly verified documents that are not relevant to the issue.

35 For example, rules that adjust the obligations in the field of environment, set up standards or conditions of access to a particular industry or a particular public good and so on.

36 On this point, *see* C.R. Sunstein, *Simpler: The Future of Government*, New York, Simon and Schuster 2013. In the U.S. there is a particular attention placed on smart disclosure, according to this approach, regulations should provide simple and clear information for end-users.

37 On this point, *see* C.R. Sunstein, 'Nudges.gov: Behavioral Economics and Regulation', *in* E. Zamir & D. Teichman (Eds.), *The Oxford Handbook of Behavioral Economics and the Law*, Oxford, Oxford University Press 2014, p. 721. For example, regarding the tax-law, many studies and experiments have shown the role of salience for taxation.

European Journal of Law Reform 2016 (18) 2
doi: 10.5553/EJLR/138723702016018002006

trol mechanisms, *i.e.*, whether a draft law establishes clear procedures for the supervision of its implementation. Moreover, this aspect evaluates how controls have been adopted; for instance, the requirement of direct personal contact might be a vehicle favouring a bribe.[38]

C Conclusions

The central question illustrated in this article is that many of the conditions that favour corruption can be found within the decision-making process, rather than outside it.

Whether a public official abuses of his or her role or interests groups establish some rules to pursue their objectives, either can be considered as negative incentives. Some scholars have defined such behaviours as a legal corruption[39] because "the ruler effectively created legislation to provide legal basis for his actions."[40]

Some scholars and international organizations have recommended launching regulatory reforms, with the goal of enacting laws and others forms of regulations capable of encouraging compliance, rather than transgression; from this perspective, good regulation can help to limit corruption and other illicit behaviours. This preventive anti-corruption strategy suggested by OECD requires that legislators intervene during the legislative process, identifying loopholes and vulnerabilities in laws, *i.e.*, every draft law should be "corruption proofed".[41]

According to this approach, CIA can be considered as an analytical tool contributing to corruption prevention in the legal system; in particular, this instrument evaluates the form and substance of drafted or enacted legal rules in order to minimize the risk of future corruption that such legislation could facilitate.

Starting from the South Korean experience, CIA implementation is more efficient when supported by checklists that are based on three key criteria, *i.e.*, compliance, discretionality, and transparency. In this way, CIA provides a series of categories of relevant information for policy-makers, enriches the evidence base of the proposals (*i.e.*, sheds light on their positive and negative points), and increases RIA efficiency in terms of corruption.

Therefore, legislators should take CIA findings seriously, modifying the provisions that have weak elements and providing clear documents to inform stakeholders; otherwise, there is a real risk of using CIA in only a formal, rather than a substantial way.

38 *See* D. Mookherijee & I.P.L. Png, 'Corruptible Law Enforcers: How Should they be Compensated?', *The Economic Journal*, Vol. 105, 1995, p. 145. Many authors raise doubts because there is a real risk that the agent (inspector) and the principal (supervisor) may be the same person, creating the possibility of a harmful conflict of interests. Moreover, especially during an inspection, it is possible that agent and client will mutually agree to make an arrangement to jointly receive illicit income or other advantages.

39 B.M. Mitnick, 'Capturing "Capture": Definition and Mechanisms', *in* D. Levi-Faur (Ed.), *Handbook on the Politics of Regulation*, Cheltenham, Edward Elgar Publishing 2011, in particular p. 46.

40 J.G. Lambsdorff, 'Corruption and Rent-Seeking', *Public Choice*, Vol. 113, 2002, p. 104.

41 *See* Pope 2006, p. 51.