

Corruption and Controls

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Abstract

Anti-corruption is a relatively recent policy which calls for controls. They represent the most effective means in rebalancing institutions which are not fully informed: 'secrecy', in fact, characterizes infringements and corrupt behaviour.

Alongside criminal investigation, administrative controls and administrative investigation should be considered crucial because they intervene at early stages, when corruption has been developing, allowing real prevention.

This article analyses some points that we should remember in order to connect controls and corruption correctly: first of all, controls have a hybrid nature: not only are they a way to combat or prevent corruption but also they are real occasions for corrupt transactions; furthermore, controls are a cost and administrative capacity of control is limited; moreover, planning controls is not a simple task; and finally, sanctions following controls must be effective in order to deter.

The article also analyzes what is needed in matters of corruption controls, with special reference to good rules (aiming at a legal system with fewer but better rules, rules which work as incentives, rules capable of designing good institutions). There is also a need for good practices (in order to improve the understanding of corruption processes, to reduce controls, to cooperate in investigating cases of corruption).

Finally, the article warns about the fact that corruption controls produce more bureaucracy and that early detection of corruption would mean, in this perspective, to make a diagnosis of 'corruptibility' starting from rules.

Keywords: corruption, controls, inspections, administration, regulation.

A Corruption: Moving towards a Preventing Approach Is Not without Risks

Administrative corruption seems to be developing into an epidemic, characterized by exponential growth all over the world, especially during recent years. Despite its pervasiveness and character (if 'petty' or 'grand' corruption¹), there are two

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1 On this point, see S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, Cambridge, Cambridge University Press, 1999, p. 27, where 'petty' administrative corruption has been distinguished from political (or 'grand') corruption, which "occurs at the highest level of government and involves major government projects and programs".

preliminary controversial points: corruption, in fact, is difficult to define² and even more difficult to measure.³

For these reasons, the institutional debate often risks focusing on corruption perception rather than on corruption reality.⁴ Notwithstanding this caveat, the problem of corruption is undoubtedly concrete and oppressive.

Corruption, which is “as old as government itself”,⁵ has crossed legal systems, history and cultures, and currently presents itself as a “ubiquitous aspect of political society”,⁶ practically all over the world. At the same time, it has expressed a relative stance because a behaviour which could be considered corrupt in one country or at one time might not be considered corrupt elsewhere or at different times.⁷

For centuries, corruption has been viewed as a sort of unavoidable pathology⁸ which should be approached (only when indispensable) from a *criminal* point of view, *i.e.* by *ex-post* reactions (prosecuting bribery or other kinds of corruption infringements).

Anti-corruption, on the other hand, is a relatively recent policy:⁹ it has necessitated the evaluation of corruption even from an *administrative* (and *regulatory*) point of view, carrying out procedures and mechanisms in order to perform proactive policies to prevent (*ex-ante*) corruption cases (duties of disclosure, conflicts of interest, whistleblowers and controls).

This phenomenon is no longer approachable only from an *ethical* point of view (*i.e.* referring to ethical codes or to codes of conduct) nor only from a *criminal* one (*i.e.* by criminal law and criminal sanctions). It should also be considered from a more objective perspective, thanks to the increasing contribution of *economics* and *administrative law* (*i.e.* by administrative mechanisms based on an incentive/disincentive approach). From this point of view, corruption is in reality a “process with the criminal act at the very end” and there is an urgent need for “a

2 On the academic debate about this point, see M. De Benedetto, ‘Administrative Corruption’, in J. Backhaus, *Encyclopedia of Law and Economics*, Springer (on line), 2014, pp. 1-2.

3 See J.A. Gardiner, ‘Controlling Official Corruption and Fraud: Bureaucratic Incentives and Disincentives’, *Corruption and Reform*, Vol. 1, 1986, p. 40; F. Anechiarico & J.B. Jacobs, *The Pursuit of Absolute Integrity. How Corruption Control Makes Government Ineffective*, University of Chicago Press, 1996, p. 14. See also, F. Mendez & F. Sepulveda, ‘What Do We Talk about When We Talk about Corruption?’, *Journal of Law, Economics and Organization*, Vol. 26, No. 3, 2010, p. 493.

4 The Transparency International Annual Report is based on a Corruption Perception Index. On this point, see B.A. Olken, ‘Corruption Perceptions vs. Corruption Reality’, *Journal of Public Economics*, Vol. 93, Nos. 7-8, August 2009, p. 950.

5 R. Klitgaard, *Controlling Corruption*, University of California Press, Berkeley and Los Angeles, 1988, p. 7.

6 J.A. Gardiner, *The Politics of Corruption*, Russel Sage Foundation, New York, 1970, p. 93.

7 On this point, see F.J. Warin, M. Farhang & E. Goergen, ‘Understand the Risks’, *IFLR*, February 2012, p. 25.

8 See Gardiner 1970, p. 93.

9 On this point, see De Benedetto 2014, pp. 1-2.

very early detection and intervention method”¹⁰ because “crime-and-punishment strategies may have little success”.¹¹

Starting from this approach, corruption has paradoxically revealed some possible positive effects. There are cases where it could be considered ‘functional’ to the agency’s mission, when “the agency cannot accomplish its mission through legally sanctioned techniques, and ‘cuts corners’ to get *something done*”.¹² There are cases in which it has been evaluated as capable of ensuring economic development, because sometimes “the propensity for investment and economic innovation may be higher outside the government than within it”.¹³ There are, finally, cases where corruption is taken into account as a tool to correct inefficient regulation, for instance, when “corruption may reduce the administrative costs of regulatory processes”.¹⁴

Even though academics agree about the idea that corruption costs more than its possible produced benefits,¹⁵ economics should be considered as “a powerful tool for the analysis of corruption”¹⁶ and indispensable to the understanding of the real dynamics of human behaviour and to carry out a proper reaction based on the adoption of effective anti-corruption policies.

In fact, corruption (from the economic point of view) could be evaluated as a way to influence bureaucracy, as an “extra-legal institution used by individuals or groups to gain influence over the action of the bureaucracy”.¹⁷ This is to say that “the existence of corruption *per se* indicates only that these groups participate in the decision-making process”.¹⁸

However, there is large agreement between academics about the opinion that corruption represents an evil even from an economic point of view, because it “distorts incentives, undermines institutions, and redistributes wealth and power to the undeserving”.¹⁹

This largely shared opinion has contributed – especially during the last decade – to a wide and increasing interest in anti-corruption policies by international actors as well as by national governments. In some way, anti-corruption policies, operating at every level of government, have produced (and are producing ever

10 T. Vander Beken, ‘A Multidisciplinary Approach for Detection and Investigation of Corruption’, in C. Fijnaut & L. Huberts (Eds.), *Corruption, Integrity and Law Enforcement*, Kluwer Law International, Den Haag, 2002, p. 275.

11 M. Johnston, ‘Why Do So Many Anti-Corruption Efforts Fail?’, *New York University Annual Survey of American Law*, Vol. 67, No. 3, 2012, p. 476.

12 Gardiner 1986, p. 35.

13 N. Leff, ‘Economic Development through Bureaucratic Corruption’, *The American Behavioral Scientist*, 10 November 1964. On this point, see also P. Mauro, ‘Corruption and Growth’, *Quarterly Journal of Economics*, Vol. 110, No. 3, 1995, p. 681.

14 A. Ogus, ‘Corruption and Regulatory Structures’, *Law & Policy*, Vol. 26, July-October, 2004, p. 333.

15 *Ibid.*

16 Rose-Ackerman 1999, p. xi; See, on this point, L. Ionescu, ‘The Economics of Anti-Corruption’, *Contemporary Readings in Law and Social Justice*, Vol. 3, No. 1, 2011, p. 116.

17 Leff 1964, p. 8.

18 *Ibid.*

19 R. Klitgaard, ‘Subverting Corruption’, *Finance & Development*, Vol. 37, June 2000, p. 2.

more) a complex framework of real States' obligations to repress but also to prevent corruption.²⁰

The World Bank, for example, gives loans to developing countries requiring the putting in place of regulatory and institutional mechanisms to fight corruption,²¹ so anti-corruption policies become a sort of condition for obtaining the loan.

At the EU level, it was recently affirmed that "relevant institutions do not always have sufficient capacity to enforce the rules"²² in matters of anti-corruption, and recommendations have been given to States, especially on the issue of public procurement.²³

Specific recommendations have also been given to states by GRECO, Group of States Against Corruption – established in order "to improve the capacity of its members to fight corruption"²⁴ – recommendations which are submitted for evaluation reports.²⁵

Various recommendations are also given by the OECD, such as in the case of *Transparency and Integrity in Lobbying*²⁶ or *Combating Bribery of Foreign Public Officials in International Business Transactions*.²⁷

However, this shift, which has so strongly contributed to the emerging anti-corruption policies, is not exempt from some risks.

- The first risk is that anti-corruption can often be reduced to an appearance of prevention rather than to real prevention²⁸ because corruption is very difficult to know and even more difficult to measure in its real dimension, as we have seen.²⁹
- The second risk is that anti-corruption produces more bureaucracy, and bureaucracy is one of the causes of corruption itself: it creates a sort of

20 See J. Bacio Terracino, *The International Legal Framework against Corruption. State's Obligation to Prevent and Repress Corruption*, Cambridge, Intersentia, 2012. For a first analysis, see OECD, *Public Sector Corruption. An International Survey of Prevention Measures*, Paris, 1999.

21 See Ogus 2004, p. 329; Guidelines on *Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*, 2006, revised 2011.

22 EU *Anti-Corruption Report*, COM 2014, 38 final, p. 2.

23 *Ibid.*, p. 34.

24 Statute of the GRECO, Appendix to Resolution (99) 5, Art. 1.

25 See GRECO, *Compliance Report on Italy*, adopted at its 51st Plenary Meeting, Strasbourg, 23-27 May 2011, Greco RC-I/II (2011) 1E.

26 OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, 18 February 2010 – C(2010)16.

27 OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009.

28 See J. Jacobs, 'Dilemmas of Corruption Controls', in Fijnaut & Huberts (Eds.), 2002, p. 287.

29 On this point, see D. Serra, 'Empirical Determinants of Corruption: A Sensitive Analysis', *Public Choice*, Vol. 126, 2006, p. 225; T. Andrei, B. Oancea & F. Dananau, 'The Analysis of Corruption in Public Administration. A Quantitative Method', *Lex et Scientia International Journal (LESIJ)*, No. XVII1, 2010, p. 435.

vicious circle³⁰ in which “corruption control and bureaucracy are mutually dependent”.³¹

- The third and last risk is that anti-corruption makes it more difficult to recruit capable and honest people in government.³²

In general, anti-corruption policies should proceed prudently and take care to avoid that the future of corruption controls be “not less corruption, but more bureaucracy”.³³

B Performing Controls on Something or Keeping Something under Control?

Controls are crucial in preventing corruption for many reasons, most importantly as tools in implementing anti-corruption policies.

First of all, controls are needed because human behaviour is fallible and corruptible and, consequently, “an efficient, rational corruption-free state [...] does not actually exist anywhere”.³⁴ Secondly, human behaviour changes when subject to controls and people under observation tend to behave in a more cooperative way.³⁵ Finally, corruption “lives in the dark”, and controls may represent a very effective means in rebalancing institutions which are not fully informed,³⁶ the most effective tool for collecting data about the way in which corruption works. Corruption – as we have seen – presupposes secrecy,³⁷ which represents the greatest threat to the integrity of public officials.

While controls are considered crucial in the framework of anti-corruption policies, their effectiveness is controversial: traditional corruption controls have even been considered inadequate, “outdated and counterproductive”:³⁸ one such

30 See Anechiarico & Jacobs 1996, p. 204.

31 F. Anechiarico, ‘Law Enforcement or a Community-Oriented Strategy toward Corruption Control’, in Fijnaut & Huberts (Eds.), 2002, p. 287.

32 See Jacobs 2002, p. 285. On this point, see also Rose-Ackerman 1999, p. 68; S. Rose-Ackerman, ‘Corruption and Conflicts of Interest’, in J.B. Auby, E. Breen & T. Perroud (Eds.), *Corruption and Conflicts of Interest. A Comparative Law Approach*, Edward Elgar, 2014, p. 5. See, finally, R.E. Messick, ‘Policy Consideration When Drafting Conflicts of Interest Legislation’, in J.B. Auby, E. Breen & T. Perroud (Eds.), *Corruption and Conflicts of Interest. A Comparative Law Approach*, Edward Elgar, 2014, p. 123.

33 Anechiarico 2002, p. 300.

34 Johnston 2012, p. 477.

35 On this point, see M. Ernest-Jones, D. Nettle & M. Bateson, ‘Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment’, *Evolution and Human Behavior*, Vol. 32, 2011, p. 173: “there have been many demonstrations that the physical presence of other people in the room, or other non-verbal cues of proximity or visibility, produces more cooperative behaviour”.

36 In this regard, compensating whistle-blowers has been considered critically by Anechiarico & Jacobs 1996, p. 199 and by Ogun 2004, p. 338.

37 On this point, see M. Mosquera, *Negotiation Games in the Fight against Corruption*, Edmond J. Safra Working Papers, No. 46, 19 June 2014, in particular 6.

38 Anechiarico & Jacobs 1996, p. 193.

example has been mentioned by the European Commission regarding the case of control mechanisms in public procurements in Italy.³⁹

The most relevant question, in this regard, is “how much corruption is reduced by various corruption controls?”⁴⁰ What do we mean by controls? Which notion of control should be adopted in a discussion on preventing corruption? The concept of control itself is, in fact, not uniform among different jurisdictions. In some legal systems, it is strictly connected with regulatory enforcement;⁴¹ elsewhere, it expresses a sort of parallel activity, alongside (more than in the service of) ordinary administration.⁴² In order to adopt a cross-border and functional meaning, we might propose a first definition of control (in the perspective of anti-corruption) as a very neutral and minimal concept: controlling something or someone in order to ensure that (some public or private) activities conform to established standards and laid-down procedures.

When the object of controls is an administrative activity, there are what we conventionally define *administrative controls*: internal controls, budgetary controls, controls performed by national Courts of Audit, internal inspections and so on. When the object of controls is an economic private activity, we will have *administrative investigations*, such as in the case of competition or fiscal law. In this framework, inspections (“any type of visit or check conducted by authorised officials on products or business premises, activities, documents, etc.”⁴³) probably constitute the prototype of control.

Many public and private bodies are involved in performing different kinds of controls, sometimes specifically devoted to anti-corruption, more often directed to other purposes but indirectly contributing to anti-corruption: Courts of Auditors, Anti-Fraud Offices, several bodies of Inspectors, Police officers and independent authorities.

If there are so many controls and so many controllers, “why do so many anti-corruption efforts fail”?⁴⁴ Firstly, in approaching anti-corruption controls it should be clear that the only sustainable institutional goal is reduction. Corruption, in fact, is considered impossible to eradicate⁴⁵ and – as a consequence –

39 See European Commission, *Annex Italy to the EU Anti-Corruption Report*, COM(2014)38 final, 3 February 2014, p. 12: “The Court of Audit concluded on several occasions that the public procurement process is proper, procedures are respected, and winning bids indeed seem to be the most advantageous, but in contrast, the quality of deliverables is intentionally compromised in the execution phase. While not necessarily indicating corrupt practices, such irregularities, and the Eurobarometer indicators above, illustrate the vulnerabilities of the current control mechanisms, notably as regards the implementation phase of public contracts”.

40 Jacobs 2002, p. 289. On this point, J. Cartier-Bresson, *Pratiques et contrôle de la corruption*, Paris, Association d’Economie Financière, 1997.

41 On this point see E. Bardach & R.A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, Transaction Publishers, New Brunswick, New Jersey, 2010, originally published in 1982 by Temple University Press, p. 123.

42 See M.S. Giannini, ‘Controllo: nozione e problemi’, in *Rivista trimestrale di diritto pubblico*, 1974, p. 1263, where he mentioned an ‘English’ concept of control alongside a ‘French and Italian’ one.

43 OECD, *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, 2014, p. 11.

44 Johnston 2012, p. 467.

45 See Ogus 2004, p. 342.

“anti-corruption policy should never aim to achieve complete rectitude”.⁴⁶ Secondly, controls are not all “equally efficacious in preventing corruption, nor equal in their impact on bureaucracy”.⁴⁷ An effective system of controls, oriented towards anti-corruption objectives, should be built looking at the cost of controls, at their specific objects, at good timing and at their effects.

The question, however, could be viewed as keeping corruption under control instead of performing controls over specific activities: in this perspective, the World Bank itself includes the *control of corruption* as one dimension of governance in the Worldwide Governance Indicators (WGI) project.⁴⁸

In order to have an overview of the various fields in which different controls operate, it could be useful to refer to the “Principal-Agent-(Client)” model,⁴⁹ as many academics have already done. Moreover, this model could also lead to further and important consequences in a discussion on anti-corruption controls: in this article, we will try to extend it to the different kinds of controls, in order to design a well-working and structured system of controls in an anti-corruption perspective.

First of all, the great contribution of this model to the understanding of corruption is that it gives the opportunity to take a comprehensive look at various transactions and related controls by attracting even corruption-free infringements and non-criminal activities to the broad analysis of complex corruption processes.

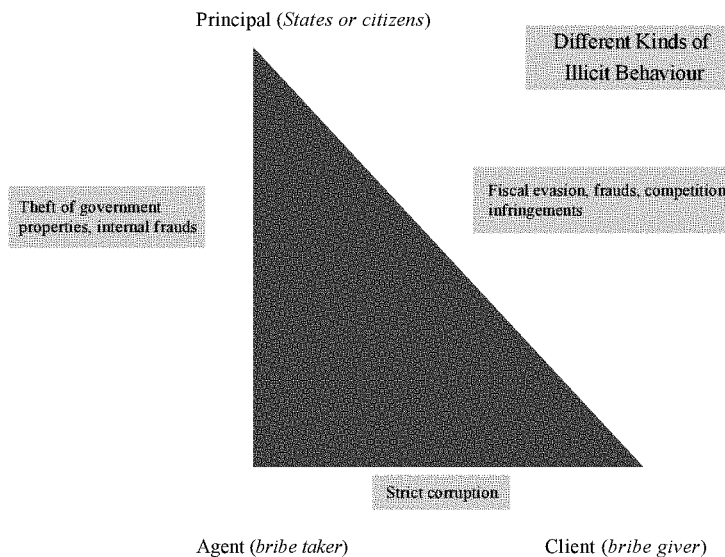
Even though in cases of corruption there is a bribe-giver and a bribe-taker (as actors in the criminal behaviour), corrupt processes involve three actors, in a sort of triangle: the Principal (the State and its citizens, always considered the victims), the Agent (the civil servant in charge of administrative tasks) and the Client (the enterprise or the citizen).

46 See Rose-Ackerman 1999, p. 68.

47 Jacobs 2002, p. 291.

48 “Control of corruption captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as ‘capture’ of the state by elites and private interests”.

49 E.C. Banfield, ‘Corruption as a Feature of Government Organization’, *Journal of Law and Economics*, Vol. XVIII, 1975, p. 587; S. Rose-Ackerman, *Corruption. A Study in Political Economy*, Russell Sage, 1978; See Klitgaard 1988; D. Della Porta & A. Vannucci, *The Hidden Order of Corruption. An Institutional Approach*, Ashgate Publishing, Farnham, Surrey, UK, 2012; See, finally, S. Andersson & T. Bergman, ‘Controlling Corruption in the Public Sector’, *Scandinavian Political Studies*, Vol. 32, No. 1, 2009, p. 45.



M. Robinson (Ed.), *Corruption and Development*, Routledge, 2004, p. 110

There is agreement about the point that corrupt transactions in a strict sense, which present criminal relevance, are performed mainly in the Agent–Client relationship (e.g. bribery, extortion) even if “the distinction between active or passive corruption and between extortion and bribery means little because both parties must agree before corruption can occur”.⁵⁰

Nonetheless, some behaviour could be considered criminal also in the Principal–Agent and in the Principal–Client relationship, generally here illicit behaviour is oriented towards rent-seeking, in other words to gain advantages which are not justified by a legitimate economic activity. However, in effect, “this is not considered to be corruption since it does not include the active (or passive) collusion of an agent of the state”.⁵¹

Although we cannot define these cases as corruption in a strict sense, they express today an illicit rent-seeking activity,⁵² an effort to achieve *l’argent facile*,⁵³ an extra income⁵⁴ by circumventing⁵⁵ or directly by breaking the law; and tomorrow a need to corrupt in order to hold onto the illicit extra income. In this sense,

50 Rose-Ackerman 1999, p. 53.

51 M. Robinson (Ed.), *Corruption and Development*, London, Routledge, 2004, p. 110; See also R. Bowles, ‘Corruption’, in B. Bouckaert & G. De Geest (Eds.), *Encyclopedia of Law and Economics*, Volume V. *The Economics of Crime and Litigation*, Cheltenham, Edward Elgar, 2000, p. 476.

52 See J.G. Lambsdorff, ‘Corruption and Rent-Seeking’, *Public Choice*, Vol. 113, 2002, p. 97.

53 G. Gaetner, *L’argent facile. Dictionnaire de la corruption en France*, Editions Stock, 1992.

54 See J. Van Klaveren, ‘The Concept of Corruption’, in A.J. Heidenheimer, M. Johnston & V.T. Levine (Eds.), *Political Corruption. A Handbook*, Transaction Publishers (1993 third printing; first printing 1989), p. 25.

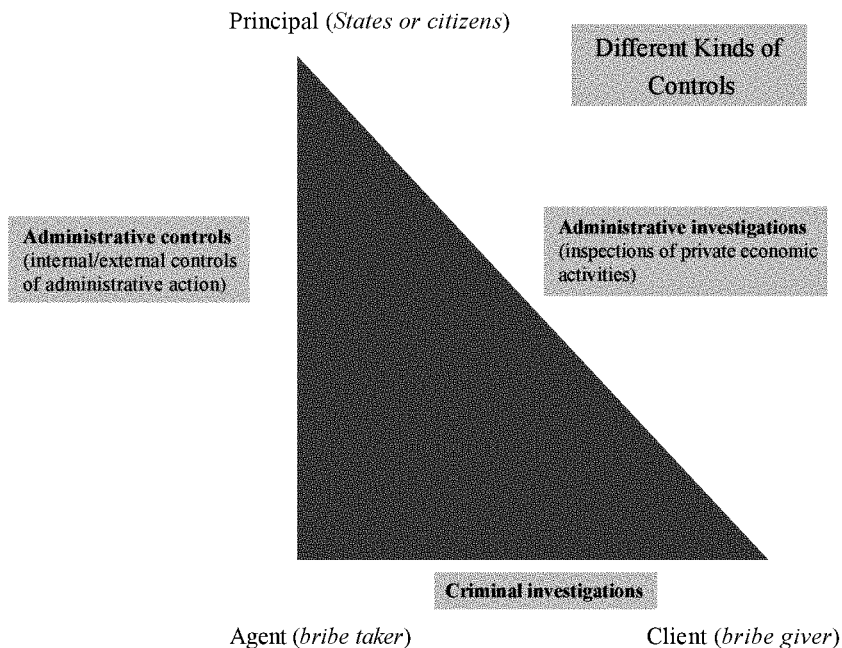
55 As in the case of creative compliance, R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, 2012, p. 232.

they should be taken into account because they prepare the ground for corruption.

If we pay attention only to the transactions between Agent and Client, we are looking at the very end of the process, when corruption occurs and when repression is needed, while a preventive approach necessitates a “very early detection”⁵⁶.

The institutional response to prevent corruption involves a tool-kit: the already mentioned controls over administrative action (*administrative controls* such as internal controls, budgetary controls, controls performed by national Courts of Audit, internal inspections, which are directed towards Principal-Agent transactions), inspections on private economic activities (*administrative investigations* such as in the case of competition or fiscal law, directed towards Principal-Client transactions) and, of course *criminal investigations* into specific cases of corruption (Agent-Client transactions).

It is possible to describe this system of controls in the following way:



C What We Should Remember (to Connect Controls and Corruption Correctly)

Institutions have long looked forward to effective systems of controls in order to prevent, as far as possible, infringements and criminal behaviour. Sometimes, a sort of illusion has permeated contributions to this matter: the most important

⁵⁶ Vander Beken 2002, p. 275.

example is probably Bentham's Panopticon⁵⁷ which expressed the idea of a rational and effective system of controls capable of strengthening the administrative capacity to inspect, thanks to the architecture of controls and to the given (and ultimately illusory) perception of 'always-present' controls. In fact, the circular structure in which such a prison would be built allows a single inspector to watch all inmates without them knowing when they are being watched.

Despite the importance both of the architecture of controls and of the perception of 'always-present' controls, the Panopticon model presents limits and side-effects.⁵⁸

A less ambitious (but more concrete) perspective suggests that we must keep in mind a small number of things when approaching the issue of 'corruption and controls', things that might appear evident but at which it is useful to take a closer look because they have to be considered globally.

I Controls Have a Hybrid Nature

Controls have a hybrid nature: not only are they a way to combat or prevent corruption but also they are real occasions for corrupt transactions.

Let us consider an inspection which represents the prototype of controls, remembering that inspection is, of course, the proper means which an inspector (as a "law enforcement official"⁵⁹) can use to check if a given public/private activity conforms to established standards. However, during such an inspection (for instance, a fiscal inspection) there is concrete contact between the agent and the client, which creates the opportunity for corrupt arrangements. This is particularly dangerous from two different points of view.

The first is when the client has an interest to hold onto the extra income which comes from illicit activities (fiscal evasion) and which is jeopardized by the inspection, whatever the cost. The second is when the fiscal officer in charge of the inspection seeks to obtain an illicit extra income through the inspection and has the concrete opportunity to extort the client.

57 J. Bentham, *Panopticon or the Inspection-House*, London, T. Payne, 1791, now in J. Bowring (Ed.), *The Works of Jeremy Bentham*, Vol. 4, Russell and Russell, New York, 1962. On this topic, see M. Foucault, *Surveiller et punir. Naissance de la prison*, Edition Gallimard, Paris, 1975.

58 See K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first edition 1944), Beacon Press, 1971, p. 117: "His [Bentham's] Industry-Houses were a nightmare of minute utilitarian administration enforced by all the chicanery of scientific management"; see also M. Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation*, Duke University Press, 2000, p. 21.

59 Bardach & Kagan 2010, p. 31.

This structural danger in performing inspections has been confirmed by a number of ethical codes for inspectors,⁶⁰ adopted in many regulatory sectors, with the purpose of limiting abuses and illicit behaviour and to give guarantees to citizens and enterprises. Therefore, regulators should know that when they establish a control they are, at the same time, opening a door which could turn the control itself into an opportunity for making illicit profit.

II Controls Are a Cost

What are the costs created by controls in anti-corruption policies? Controls represent a real cost, or rather “practically all corruption controls involve costs and trade-offs”⁶¹.

Firstly, there are administrative costs for institutions and public bodies in charge of controls, such as the necessary funding for an anti-corruption bureau or an inspectorate. Secondly, there is a more general cost in the shifting of resources from other administrative activities, in the “deflection of attention and organizational competence away from other important matters”.⁶² Thirdly, controls constitute a cost also for businesses and citizens who are involved in an inspection, for instance, in terms of resources directly devoted to the control and necessary to cooperate and to comply with the inspection, in terms of administrative burdens related to control activities (because businesses and citizens are required to maintain and exhibit records)⁶³ and in terms of resources necessary to establish specific internal anti-corruption controls. Fourthly, there could be some costs arising from non-compliance (for example, during an inspection or as a consequence of the violation of a duty of disclosure) or connected with possible reputational damage coming from the control itself. Finally, corruption exercises a “destructive effect [...] on the fabric of society [...] where agents and public officials break the confidence entrusted to them”⁶⁴ and in so doing, produces more transaction costs.⁶⁵

For these reasons, the system of controls should be sustainable, and it is advisable to reduce the number of controls and to maximize their effectiveness.

60 On this point, see J. Monk, *Reform of Regulatory Enforcement and Inspections in OECD Countries*, OECD, Paris, 2012, point 67, p. 22: “It is important that inspectors themselves have a code of ethics because it helps regulate individual behaviour to prevent conflicts of interest, regulatory capture, and corruption and protects the interests of those being regulated. It also encourages management to be honest and honourable in their day to day activities and avoids the culture of ‘anything goes’ attitude. When respected, it can help prevent complaints and appeals against inspectors saving valuable time and resources for inspection authorities as these types of cases can take a considerable amount of time and effort to resolve by managers as well as ‘demotivate staff’”.

61 Jacobs 2002, p. 292.

62 Klitgaard 1988, p. 27.

63 See, in this regard, the Hampton Report, H.M. Treasury, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, March 2005.

64 C. Nicholls *et al.*, *Corruption and Misuse of Public Office*, Oxford University Press, 2006, p. 1.

65 On this point, see O.E. Williamson, “Transaction-Cost Economics: The Governance of Contractual Relations”, *Journal of Law and Economics*, Vol. 22, No. 2, 1979, p. 242: “Governance structures which attenuate opportunism and otherwise infuse confidence are evidently needed”.

III *Administrative Capacity of Control Is Limited*

As we have seen, even if the Panopticon ideal has become (in a certain way) outdated, both the architecture of controls and the perception of being controlled are important elements in making a system of controls effective.

In reality, controls are always expensive⁶⁶ (also in anti-corruption) and the administrative capacity is always limited, so it could be necessary to decide the amount of controls and the extent to which we should combat corruption *via* controls.

The first point, in this perspective, is to define the capacity of the single institution to perform inspections or other kinds of anti-corruption controls, because every oversight body and every inspectorate have limited capacity of surveillance (both in terms of workload and in terms of competences).

It is possible, in this light, to define an “optimal amount of corruption”,⁶⁷ which depends directly on the administrative capacity to perform limited control activity: the point of intersection of the curves, which describes the quantity of corruption, and the marginal social cost of reducing corruption identifies this optimal amount.

IV *Planning Controls Is Not a Simple Task*

If administrative resources for controls are limited, then administrations should decide how to enforce anti-corruption regulation *via* limited controls. In this regard, there are many questions: How many controls? Who (and what) should be subject to controls? When should controls be carried out? What transparency should be given to controls? Responding to these questions means planning controls from an anti-corruption perspective and implies a decision about their objectives, available resources, methodology, priorities and timing.⁶⁸

Despite the fact that almost every jurisdiction carries out the planning of anti-corruption controls, it is nonetheless a tough task because of the already mentioned lack of knowledge and information about corruption. Institutions are not fully informed, and this means that planning activities in this matter are surrounded by an unavoidable ‘fog’.

For this reason, anti-corruption controls – which should be guided by a risk-based approach⁶⁹ in order to be effective – express specific difficulties especially in mapping the most dangerous areas or cases of administrative activity in which it is more probable to find evidence of corruption.

66 On this point, *see*, in general, Anechiarico & Jacobs 1996, p. 193.

67 Klitgaard 1988, p. 27.

68 *See*, on this point, U.S. Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Inspection and Evaluation*, January 2012, especially where ‘planning’ is analysed, pp. 9-10.

69 In general, Baldwin, Cave & Lodge 2012, p. 281.

The risk-based approach to enforcement (and criminal justice)⁷⁰ leads to important consequences in matters of anti-corruption controls:⁷¹ the UK Hampton Report, for example, requires “robust risk assessment methodologies to programme inspections so that no inspection takes place without a reason”;⁷² in the Netherlands, in 2011, the Government launched an initiative called ‘Inspection Holiday’, which “aimed at strongly reducing the burden of inspections for (a) low-risk and (b) higher-risk but consistently compliant businesses (the equivalent of what is called in the UK ‘earned recognition’)”.⁷³

V *Sanctions Following Controls Must Be Effective in Order to Deter*

While administrative capacity to perform controls is limited and anti-corruption controls are costly, it is also important to increase their effectiveness in preventing corruption cases: for this purpose, anti-corruption controls as a system should be strongly informed by deterrence, aiming to prevent infringements by threatening (and effectively imposing) sanctions.

According to the most relevant contribution on this topic,⁷⁴ the individual decision about compliance is a result of an economic reasoning which connects the cost of compliance, the size of the penalty but also the risk of incurring the penalty.

From a merely theoretical point of view, increasing the amount of a fine should mean increasing compliance but if the risk of incurring the fine is low (because the system of controls is ineffective or because of recurrent amnesties and pardons which undermine the deterrent effect of the sanctions), then there could be the paradoxical effect that the increase in the fine will produce side effects, such as an increase in the size of the bribe necessary to corrupt.⁷⁵

The greatest problem in anti-corruption policies is, ultimately, to make sanctions proportionate and certain (as far as possible) and, therefore, an effective deterrent. They should enter into the individual cost-benefit analysis on compliance and make compliance more convenient than corruption.⁷⁶ Otherwise, sanctions will operate as a mere indicator for the amount of the bribe without being a deterrent.

70 On this point, see OECD, *Risk and Regulatory Policy. Improving the Governance of Risk*, 2010, p. 51. See also OECD, *Comparison of Risk Management Policies in OECD Countries*, 2006.

71 See J. Black & R. Baldwin, ‘When Risk-Based Regulation Aims Low: Approaches and Challenges’, *Regulation & Governance*, Vol. 6, No. 2, 2012, p. 131; J. Black, ‘The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom’, *Public Law*, 2005, Autumn, p. 512.

72 Hampton Report 2005, p. 3.

73 F. Blanc, *Inspection Reforms: Why, How and with What Results*, OECD, 2012, p. 41.

74 G.S. Becker, ‘Crime and Punishment: An Economic Approach’, *Journal of Political Economy*, Vol. 76, 1968, p. 169.

75 See Ogus 2004, p. 336.

76 See J.A. Gardiner & T.R. Lyman, ‘The Logic of Corruption Control’, in A.J. Heidenheimer, M. Johnston & V.T. Levine (Eds.), *Political Corruption. A Handbook*, Transaction Publishers, New Brunswick, 1993 (first published 1989), p. 833.

Table 1 *In short: a first approach to anti-corruption controls*

What we should remember	Warnings	Suggestions
Controls have a hybrid nature	When a control is established, an opportunity for illicit profit arises	Limiting and good design of controls
Controls are a cost	All corruption controls involve costs	Proportionate and effective controls
Administrative capacity of control is limited	Controlling everything is impossible	Sustainable objectives in anti-corruption
Planning controls is not a simple task	The lack of information about corruption makes planning controls difficult	Increasing information on how corruption works and improving the quality of data in order to plan controls
Sanctions following controls must be effective in order to deter	If the risk of being sanctioned is low, increasing fines influences the size of the bribe instead of compliance	Proportionate, certain and effective sanctions

D What We Need (in Matter of Corruption Controls)

I Good Rules

The problem of preventing corruption *via* regulation is not limited to strict anti-corruption rules but is more generally connected to all kinds of regulation and especially to the economic and social one.

Thus, the problem concerns good regulation in itself, regulation capable of making rules effective, of ensuring enforcement and increasing compliance.⁷⁷ Bad quality regulation is, in fact, an opportunity for transgression or a mere tool for creative compliance.

1 Fewer but Better Rules

Very often politicians mention regulation as the main solution to a social or to an economical problem, especially when corruption arises. In reality, regulation itself has been recognized as a direct factor that promotes corruption.⁷⁸

Firstly, over-regulation could increase bureaucratic and discretionary powers as well as monopoly⁷⁹ and in this way could create more favourable conditions for corruption: “insofar as government officials have discretion over the provision of these goods [licenses, permits, passports and visas], they can collect bribes from private agents”.⁸⁰

77 In general, on this point, G.S. Becker & G.J. Stigler, ‘Law Enforcement, Malfeasance, and Compensation of Enforcers’, *Journal of Legal Studies*, Vol. III, 1974, p. 1.

78 See V. Tanzi, ‘Corruption around the World: Causes, Consequences, Scope, and Cures’, *IMF Staff Papers*, Vol. 45, No. 4 (December), 1998, p. 10.

79 See Ogus 2004, p. 331.

80 A. Shleifer & R.W. Vishny, ‘Corruption’, *Quarterly Journal of Economics*, Vol. 108, No. 3, August 1993, p. 599.

Secondly, over-regulation multiplies the number of legal schemes which are available for opportunistic use. In fact, regulatory inflation leads to increasing opportunities for creative compliance, a real strategy to achieve extra income, thanks to the regulations. This contributes to nurturing a corruptible social environment and allows ever more corruption: “the possibility of its transgression or perversion is always already inscribed into the law as hidden possibility. This, then, is the secret of law”.⁸¹

Finally, the same regulatory process could be an occasion for corruption. Special attention should be paid, in particular, to the steps in the procedures which allow access for individuals or group interests. In this regard, consultations could “increase the opportunity for corrupt transactions”.⁸²

2 *Rules as Incentives (Not Only Negative Incentives)*

In order to prevent corruption, it could be very useful to adopt an incentive/disincentive approach in regulation, operating as a system of rewards and penalties,⁸³ as a mix of “carrots and sticks”.⁸⁴

There is widespread agreement on the opinion that “corrupt incentives exist because state officials have the power to allocate scarce benefits and impose onerous costs”.⁸⁵ Reducing incentives to corruption and increasing its costs could involve structural reforms and could deeply change the way in which regulation is adopted. For instance, “if a subsidy program is eliminated, the bribes that accompanied it will disappear as well”.⁸⁶

An incentive/disincentive approach to regulation represents, in any case, “the first line of attack in an anticorruption campaign”⁸⁷ and leads to important consequences in preventing corruption.⁸⁸

A first point is that when sanctions operate as disincentives, they should be proportionate and well calibrated. In fact, sanctions express an intrinsically economic logic, which could greatly help regulators in making laws effective. A second point is that sometimes “in the presence of corruption, it is optimal to impose (or at least threaten to impose) non-monetary sanctions more often”,⁸⁹ there are cases in which sanctions could be considered as a system of prices so different disincentives should be more effective than mere monetary fines: a relevant example could be disqualification from operating in the market for being a

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

82 Ogus 2004, p. 341.

83 See Klitgaard 1988, p. 77; Gardiner 1986, p. 42.

84 Rose-Ackerman 1999, p. 78.

85 *Ibid.*, p. 39.

86 *Ibid.*

87 *Ibid.*, p. 68.

88 See Klitgaard 1988, p. 78.

89 N. Garoupa & D. Klerman, ‘Corruption and the Optimal Use of Nonmonetary Sanctions’, *International Review of Law and Economics*, Vol. 24, 2004, p. 220.

'bad actor', which sometime exerts effective deterrence. In this framework, "the stigma of crime has become a penalty itself".⁹⁰

Moreover, in other cases it would be better to operate via incentives, rewarding enforcement⁹¹ and compliant groups.⁹² This idea is not new and was, in a similar form, already proposed in 1766 by Giacinto Dragonetti in his *Trattato delle virtù e dei premi*.⁹³ Recently, an increase of carrots and a decline of sticks have been highlighted by scholars as a general tendency in legal systems: "in societies with more specialisation and division of labor, carrots will be used more often",⁹⁴ especially in cases in which law-makers are not fully informed.

3 *Designing Institutions*

As we have seen, anti-corruption policies produce dedicated bureaucracy which carries out specific activities and interferes with ordinary administration. Anti-corruption tends to prevail and, as a consequence, administrative reforms seem to have been reduced in importance or to have become marginal.⁹⁵

Instead, designing institutions – both from a procedural and organizational point of view⁹⁶ – is crucial in order to enforce regulation and to put into place conditions for the effective prevention of corruption. Furthermore, regulators should take care when designing institutions because "internal organisation of institutions influences their members' propensity to corruption".⁹⁷

There are institutions which need an accurate design, for example, institutions which exert monopolistic or discretionary powers, which give incentives or which are in charge of controls. Here, in fact, an interest to achieve illicit extra income could arise more frequently and an early warning for corruption is needed. These kinds of institution and their powers should be well designed, focusing on their most critical aspects, from an anti-corruption perspective.

In particular, special attention in designing these institutions should be paid to the way in which hierarchies work (for example, if superiors of low-level officials are honest or dishonest),⁹⁸ to decisions which are taken by individual offi-

90 E.H. Sutherland, 'Is "White Collar Crime" Crime?', *American Sociological Review*, Vol. 10, No. 2, 1944 Annual Meeting Papers (April 1945), p. 136.

91 See Becker & Stigler 1974, p. 13.

92 On this point see Gardiner & Lyman 1993, p. 837; Ogas 2004, p. 337.

93 G. Dragonetti, *Treatise on Virtues and Awards*, first English translation in 1769.

94 G. Dari-Mattiacci & G. De Geest, 'The Rise of Carrots and the Decline of Sticks', *University of Chicago Law Review*, Vol. 80, No. 1, 2013, p. 346.

95 On this point, see Anechiarico & Jacobs 1996, p. 204.

96 See Ogas 2004, p. 338; See also, P. Cohen & A. Marriott, *International Corruption*, Thomson Reuters, 2010, Chapter 11, p. 13: "how to design an effective anti-corruption compliance programme".

97 E. Carbonara, 'Corruption and Decentralisation', Dipartimento Scienze Economiche, Università di Bologna, *Working Papers*, No. 342/83, 2000, p. 2.

98 On this point, see S. Rose-Ackerman, 'Which Bureaucracies Are Less Corruptible?', in A.J. Heidenheimer, M. Johnston & V.T. Levine (Eds.), *Political Corruption. A Handbook*, Transaction Publishers, 1993/1989, p. 808.

cers or by collegial bodies and to the degree of transparency in procedures.⁹⁹ Transparency itself could help to reduce the opportunities for corruption by making “the process and content of decision-making more visible”.¹⁰⁰ More in general, we could say that institutions should be informed to an “anti-corruption principle”¹⁰¹ which expresses a organizational stance.

Another point regards the question of whether there is a need for dedicated anti-corruption institutions or if anti-corruption could be the result of a well-working institutional system. Specialized anti-corruption institutions are required by international treaties against corruption¹⁰² even though “there is no strong evidence that existence of anti-corruption bodies always help to reduce corruption”.¹⁰³ In any case, the United Nations and the Council of Europe anti-corruption conventions established “criteria for effective specialised anti-corruption bodies”: they should be characterized by independence, specialization, adequate training and resources.

Furthermore, the OECD itself has noted that “preventive functions are so numerous and diverse, covering all aspects of good governance, that they cannot be performed by a single institution”¹⁰⁴ and the problem of a well-working institutional system remains.

Table 2 *In short: regulating anti-corruption controls*

What we need (good rules)	Warnings	Suggestions
Fewer but better rules	Regulation is a direct factor that promotes corruption	Limiting regulation and increasing its quality
Rules as incentives	Regulation produces incentives to transgress and to corrupt	Combining carrots and sticks
Designing institutions	Anti-corruption could strengthen bureaucracy	Organizational and procedural design

II *Good Practices*

Not only are good rules important but also good practices, as “part of the broader regulatory process”.¹⁰⁵ Good practices do decisively contribute to regulatory enforcement. The idea that it is possible to bring about real changes through rules

99 See Gardiner & Lyman 1993/1989, p. 837; see also Ogus 2004, p. 830; L. Allio & N. Rangone, ‘Anti-Corruption and Transparency Initiatives for a More Accountable and Efficient Public Administration in Italy’, *Report Prepared for the OECD Secretariat*, October 2014.

100 Gardiner & Lyman 1993/1989, p. 837; Ogus 2004, p. 830.

101 Z. Teachout, ‘The Anti-Corruption Principle’, *Cornell Law Review*, Vol. 94, March 2009, p. 341, which is considered strictly connected to the separation-of-powers principle.

102 See OECD, *Specialised Anti-Corruption Institutions. Review of Models*, Paris, 2008, p. 5. On the topic of special anti-corruption bodies, see also C. Sandgren, ‘Combating Corruption: The Misunderstood Role of Law’, *International Lawyer*, Vol. 39, No. 3, 2005, pp. 729-730.

103 *Ibid.*, p. 6. On this point, see K. Crider & J. Milyo, ‘Do State Ethics Commissions Reduce Political Corruption? An Exploratory Investigation’, *UC Irvine Law Review*, Vol. 3, 2013, p. 717.

104 *Ibid.*, p. 15.

105 Baldwin, Cave & Lodge 2012, p. 227.

alone is a serious mistake which should be avoided. Rather, it is opportune to return proper importance to enforcement (and to good practices).

1 *Understanding In-Depth Corruption Processes: The Role of Information*

Understanding corruption processes is indispensable to making effective anti-corruption policies and in order to keep corruption under control.

As we have seen above, there is a general lack of knowledge and information about corruption: this element is a real character of corruption.¹⁰⁶ A first point is that we need “to know in which ways the interests of businesspeople and public officials coincide”.¹⁰⁷ A second point is that “we need to have a better comprehension of citizens’ underlying motivations to engage in corrupt activities”.¹⁰⁸

For these purposes, it is indispensable to gather, as well as to analyse in depth, information in order to achieve knowledge on how corruption works and “in order to raise the chances that corruption will be detected”.¹⁰⁹

On the other side, attention should be paid to the risk (always present) of information overload,¹¹⁰ which threatens effective knowledge. The availability of information and its analysis aids institutions in “effectively detecting and investigating incidents of corruption”.¹¹¹ It is possible to say that exchanges of information and criminal intelligence¹¹² could represent real ‘new law enforcement tools’ as a consequence of “the application of new technologies to the deterrence and detection of crime”.¹¹³

Information, thanks to a well-functioning network of criminal and administrative data banks, flows between institutional actors in charge of anti-corruption tasks in different areas:¹¹⁴ criminal investigation, administrative controls and administrative investigation.

For example, a national fiscal data bank (such as the Italian *Anagrafe Tributaria*) regularly gives information to criminal investigations. Criminal records should give back to this fiscal administration insights about the corruption mechanisms. This will allow the step “from information to indicators” and, in so doing,

106 See Jacobs 2002, p. 290: “it is hard to think of any other crime which so lacks an indicator of prevalence”.

107 C.H. Stefes, ‘Measuring, Conceptualizing, and Fighting Systemic Corruption: Evidence from Post-Soviet Countries’, *Perspectives on Global Issue*, Vol. 2, No. 1, Autumn 2007, p. 14.

108 *Ibid.*, pp. 14-15.

109 Klitgaard 1988, p. 94.

110 See A. Greycar & R.G. Smith (Eds.), *Handbook of Global Research and Practice in Corruption*, Edward Elgar, 2011, p. 289: “many organization suffer from ‘information overload’”.

111 *Ibid.*, p. 290.

112 See *The Hague Programme: strengthening freedom, security and justice in the European Union* (2005/C 53/01), in particular point 2.6, *Crime prevention*: “initiative of the Commission to establish European instruments for collecting, analysing and comparing information on crime and victimisation and their respective trends in Member States, using national statistics and other sources of information as agreed indicators”. See also *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01).

113 On this topic, from an historic point of view, see N. de Katzenbach & R.W. Tome, ‘Crime Data Centers: The Use of Computers in Crime Detection and Prevention’, *Columbia Human Rights Law Review*, Vol. 4, 1972, pp. 49-50.

114 See Greycar & Smith 2011, p. 290.

the improvement of the fiscal administration's capacity to detect infringements.¹¹⁵

2 Reducing Controls (and Related Administrative Burdens)

Reducing controls in anti-corruption is not only a question of limited administrative capacity, as we have seen above.

Of course, reduced resources could suggest that administrations must economize and improve results through reforming, reducing and making controls more efficient. It was noted, in fact, that the *édifice de surveillance* has become too towering so that there is a need for a real *moralisation par une démultiplication des contrôles*.¹¹⁶

However, this problem of reducing controls and related administrative burdens has gained centre stage as a question which is not only limited to the area of anti-corruption controls but is of general interest. In fact, there is currently a great debate – at national level as well as among international organizations – on the topic of inspection reform: inspections are considered ever more decisive for regulatory enforcement.

From the UK Hampton Report¹¹⁷ to World Bank¹¹⁸ and OECD Reports,¹¹⁹ as we have seen previously (Para. 3.4), there is an increasing and convergent quest for a risk-based selectivity and proportionality in inspections which should be considered not only as a tool for administrative enforcement but also as administrative burdens for citizen and enterprises. So the key idea could be expressed as “better understanding for fewer, more effective and less intrusive controls”.

3 Cooperating and Adopting a Whole Approach

Adequate knowledge, understanding and effective contrast of corruption are possible only by strengthening administrative cooperation between actors involved in anti-corruption policies.

This involves a two-level response.

Cooperation is needed at national level, inside governments and among administrations and national anti-corruption institutions.

Cooperation is also needed at supranational and international level, improving administrative cooperation in detecting and investigating corruption inci-

115 *Ibid.*, p. 292.

116 B. du Marais, *Droit public de la régulation économique*, Presses de Science Po et Dalloz, 2004, p. 250.

117 *See*, on this point, HM Treasury, Hampton Report, 2005, p. 1: “there should be no inspections without a reason, and data requirements for less risky businesses should be lower than for riskier businesses; resources released from unnecessary inspections should be redirected towards advice to improve compliance”. *See also* Blanc 2012.

118 Investment Climate Advisory Services-World Bank, *Inspections Reforms: Do Model Exist?*, December 2010, and *How to Reform Business Inspections. Design, Implementation, Challenges*, January 2011.

119 *See recently*, OECD 2014.

dents and, where necessary, developing specific informative strategies, such as the improving of a European Criminal Record.¹²⁰

In fact, corruption presents a global stance, and increasing international cooperation in combating corruption is indispensable: this is clear at the EU level and at further levels, as in the case of GRECO, Group of States against Corruption, or as in the case of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Table 3 *In short: enforcing anti-corruption controls*

What we need (good practices)	Warnings	Suggestions
The role of information	Lack of knowledge and information about corruption	Improving information and knowledge
Reducing controls	Controls produce costs to enterprises and citizens	Reducing administrative burdens
Cooperating in controls	Corruption is not only a national phenomenon, single states cannot keep it under control	Administrative cooperation in anti-corruption

E From Regulation to Corruption: Are Controls a Real Bastion?

Some kinds of regulation present more risk than others,¹²¹ especially when they create or reinforce monopoly and discretionary powers, allowing bureaucratic agents to manage incentives and disincentives for other officials, citizens or enterprises.¹²²

Many areas of regulation present interest in this regard at national as well as at EU level; they include fiscal law, competition law, financial law, administrative law (in particular, public procurement law) but also any kind of social regulation and so on.

On the one hand, some people may comply with regulation: compliance is always possible even where there are opportunities to gain extra income, because people can be motivated to comply. Compliance might depend on legal (external) forces, because established controls and sanctions exert effective deterrence. Compliance could also depend on extra-legal (internal) forces such as personal morality or effective social controls.¹²³

On the other hand, others may not comply. Non-compliance can be explained very simply: regulation *per se* allows public officers, citizens or enterprises to per-

120 See C. Stefanou & H. Xantachi (Eds.), *Towards a European Criminal Record*, Cambridge University Press, 2008.

121 See Baldwin, Cave & Lodge 2012, p. 236, in particular “predicting compliance”.

122 See Rose-Ackerman 1999, p. 39.

123 On this topic, see C.R. Sunstein, ‘On the Expressive Function of Law’, *University of Pennsylvania Law Review*, Vol. 144, 1996, in particular 2026 and R. Cooter, ‘Expressive Law and Economics’, *Journal of Legal Studies*, Vol. 27, 1998, p. 585.

form possible illicit behaviour (or engage in creative compliance) in order to achieve an extra income, searching for rent seeking. Regulation can be considered, in these cases, as a tool to make profit.¹²⁴

Infringements can be carried out with or without corruption. Corruption is not necessarily present with fiscal evasion, various kinds of fraud (agriculture, food, etc.), competition infringements, false declarations (to achieve, for example, social benefits), money laundering¹²⁵ and so on. Such corruption-free infringements may have criminal relevance but in some jurisdictions may also be simple administrative violations. In any case, infringements (and creative compliance) prepare the ground for corruption because they require (in the same way as corruption) secrecy and have a strict relationship with corruption, as we have seen in Para. 2.

Controls over administrative action (*administrative controls*), controls over private activities (*administrative investigation*) and *criminal investigation* have been established to limit this dangerous tendency to opportunistic and non-compliant enforcement, but they operate from a less than fully informed position.

Different scenarios are possible. Firstly, controls could be simply ineffective, as in a large majority of cases. The system of controls works but only formally or is not fully informed, so it can not work. Therefore, it allows an *area of unreported illegality*, constituted by a number of corruption-free infringements which permeate the economic and institutional fabric. Secondly, controls could be effective and capable of focusing on infringements, making it dangerous to hold onto extra income. Sanctions work in the perspective of deterrence, the system of controls contributes to maintaining a robust *area of legality*. Thirdly, controls are considered an opportunity for (active or passive) corruption. People who have already engaged in illicit behaviour (or in creative compliance) want to hold onto extra income, and for this purpose they 'jump' into the *area of corruption* together with public officers in charge of controls. The system works but in a corrupt way; secrecy characterizes ever more transactions. Criminal investigation is the most important tool to detect corruption at this stage.

These three scenarios are not mutually incompatible, on the contrary every legal system presents a certain degree of legality, unreported illegality and corruption, even if different mixes are possible: at the end of the day, "corruption should be seen as the norm, not the exception".¹²⁶

Even though we are used to thinking that criminal investigation constitutes the strongest tool in prosecuting corruption, it comes too late, at the very end of the process. For this reason *administrative controls* and *administrative investigation* should be considered crucial because they intervene at early stages, when corruption has been developing.

124 See Ogus 2004.

125 On this point, see D. Chaikin & J.C. Sharman, *Corruption and Money Laundering. A Symbiotic Relationship*, Palgrave MacMillan, 2009.

126 G.E. Caiden, O.P. Dwivedi & J. Jabbara (Eds.), *Where Corruption Lives*, Kumarian Press, 2001, p. 23.

On the other hand, administrative controls and administrative investigation can receive great help from criminal investigation itself, which can contribute to an understanding of the working mechanisms of corruption during its entire process. Such administrative tools ultimately represent an indispensable complementary activity alongside *criminal investigation*. Moreover, administrative controls and administrative investigation should give back information to the law-maker about possible red flags¹²⁷ in regulation: there are, in fact, dangerous provisions which more frequently produce incentives to infringe and corrupt.

Some consequences may be observed. The Principal is not always the victim, as presupposed in the Principal-Agent-(Client) model. The Principal is, in fact, responsible for adopting legislation (or regulation) which creates favourable conditions for extra income (firstly) and (therefore) for corruption: in other words, the Principal is not always benevolent and does not always have “full control over the legal framework”.¹²⁸

Early detection of corruption would mean, in this perspective, to make a diagnosis of ‘corruptibility’ of rules, analyzing them with a criminal approach and highlighting – where possible – the influence of interest groups on legislators. Therefore, regulation should be prepared by tools which may help to identify and remove recurring factors causing corruption, such as corruption impact assessment,¹²⁹ which is a specific, dedicated methodology in the framework of wider impact assessment.

When corruption-free infringements are carried out, they should be discovered, thanks to administrative controls and administrative investigations. In particular, there should be automatic alerts in the systems of control (based on data banks and criminal records), but there should be also a strong policy of giving incentives to public officers in charge of the most delicate and discretionary tasks, in order to give them reasons in resisting possible opportunities of corruption.

As we have seen, corruption during controls is necessary when people want to hold onto extra income produced by infringements. If governments want to make effective anti-corruption policies, corruption should be prosecuted and sanc-

127 The European Anti-Fraud Office (OLAF) produces “compendiums of anonymised cases which comprise a short description of the techniques used by fraudsters, vulnerabilities and fraud indicators (‘red flags’)”, available at <http://ec.europa.eu/anti_fraud/policy/preventing-fraud/index_en.htm>.

128 Lambsdorff 2002, pp. 97-98.

129 In some legal systems, Corruption Impact Assessment (CIA) has been introduced, even if with different approach and methodologies. In the Czech Republic, Corruption Impact Assessment has been analysed in the framework of Regulatory Impact Analysis, as a specific tool oriented to identify corruption risk factors in legislative procedures. In 2006, the Independent Republic of Korea introduced CIA revising the Anti-corruption National Law. In particular, CIA examines ease of compliance (demand), property of discretion (supply) and transparency of administrative procedure (procedure). In 2011, new criteria have been added to the list: interest conflict and inappropriate execution of budgets. On this topic see, T. Hoppe, *Anti-Corruption Assessment of Laws (‘Corruption Proofing’)*. *Comparative Study and Methodology*, Regional Cooperation Council, November, 2014; A. Tamyalew, *A Review of the Effectiveness of the Anti-Corruption and Civil Rights Commission of the Republic of Korea*, The World Bank, May 2014.

tioned, but firstly there is the need to improve knowledge through giving incentives for information.

One way could be to introduce powerful tools, such as leniency programs already effective in competition law, which have been “very successful in fighting cartels”¹³⁰ and able “to obtain insider evidence”.¹³¹ In the same way, it would be important providing for quick and effective sanctions, capable of affecting individual cost-benefit analyses and of ‘touching’ real interests (such as the already mentioned disqualification from operating in the market).

Information and consequent knowledge on how corruption works should flow from corruption cases and from various kinds of controls back to regulators in order to make possible a better understanding of the risky character of regulation.

Table 4 *In short: controls of “corruption-free” infringements*

Controls	Results	Anti-corruption policies
Ineffective controls	Unreported illegality	Empowering administrative investigation (red flags)
Effective controls	Legality	Incentivizing public officials
Effective but corrupt controls	Corruption	Improving knowledge (leniency programs)

Preventing corruption is not only a question of finding crimes, at the very end of the process, but to make legitimate profit simple, extra income difficult and dangerous and crimes economically inconvenient. In this framework, it is important to remember that corruption controls involve costs and “therefore they should carry the label ‘use with caution’”.¹³²

130 Available at <<http://ec.europa.eu/competition/cartels/leniency/leniency.html>>.

131 *Ibid.*

132 J. Jacobs 2002, p. 292.