

Defensive Behaviour and Bad Regulation: Problems and Remedies

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Abstract

This study explores defensive bureaucracy by civil servants from the regulatory perspective. The problem can be illustrated through the “regulatory approach”. This includes an analysis of the relationship between bad regulation and defensive practices, among other things, as the research has been enriched with empirical findings that might help regulators reduce defensive behavior. The paper is organized as follows. The first part explains the problem from the regulatory angle, focusing on poor regulation and its weakness – such as legal uncertainty, legislative complexity and inflation, the fragmentation of responsibilities, and more – all of which seem to promote defensive behaviour. Within this framework, the second part investigates public procurement regulations with their gaps and weakness, tending to induce over-precaution. The third part examines the issue from the behavioural sciences perspective in an attempt to shed light on the circumstances most likely to induce defensive behaviour. Lastly, the paper proposes some remedies, suggesting how regulation to address defensive behaviour might be shaped.

Keywords: legal uncertainty; regulatory approach; legislative inflation; behavioural insights

Riassunto. *Comportamento difensivo e cattiva regolazione: problemi e rimedi*

Lo studio tenta di esplorare la burocrazia difensiva dal punto di vista della regolazione. Il problema può essere spiegato attraverso l’approccio regolatorio, consentendo in questo modo di analizzare il rapporto tra (cattiva) regolazione e comportamento difensivo. Lo studio è strutturato nelle seguenti parti. La prima tenta di indagare la questione a partire dalle criticità connesse ad una bassa qualità del quadro regolatorio – ovvero incertezza, complessità, inflazione, stratificazione e altre – che sembrano favorire il comportamento difensivo. Nella seconda si focalizzerà l’attenzione sul Codice degli appalti, evidenziando le lacune dalle quali trae origine la burocrazia difensiva. Nella terza si prevede di esaminare il contributo delle scienze comportamentali, individuando gli errori cognitivi ricorrenti che rischiano di promuovere un comportamento difensivo. Infine, il contributo cercherà di formulare alcuni rimedi.

Parole chiave: incertezza giuridica, approccio regolatorio, inflazione legislativa, errori cognitivi

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1. Introduction

This essay explores the link between defensive administration and (bad) regulation. According to the “regulatory” perspective, bad quality regulation contributes to enhancing defensive behavior.

In fact, legal uncertainty associated with complexity, instability, fragmentation of all kinds of regulation may increase the defensive behaviour. Focusing attention on public procurement in Italy, some studies have shown that an unstable framework of rules seems to incentivize defensive behaviors.

By adding a behavioral lens it is possible to develop the analysis. Behavioral studies have demonstrated that human characteristics can have a relevant role on the decision-making process. The cognitive capacities are not infinite, and individuals are affected by biases and heuristics – such as availability, loss aversion, status quo, inertia, the misperception of risk and others – that can influence to the defensive attitude.

The findings of behavioral economics may widen the analysis of the problem of defensive bureaucracy and improve strategies to face it.

2. The Regulatory Approach

There is a large agreement on the idea that defensive administration is promoted by bad regulation and legislation¹, which includes legal uncertainty, legislative complexity, legislative inflation, regulatory overlap, and regulatory burdens.

Empirical research showed that bad regulation plays a significant role in producing defensive behavior (Battini and Decarolis, 2019; Piersanti, 2017).

The mechanism is simple: excessive regulation leads to increasing administrative complexity and uncertainty, which causes over-precaution on the part of civil servants.

Some scholars argued that «when the rules which a public authority needs to follow are quite clear, the risk of chilling behaviour is small. When the law is vague or ambiguous, chilling behaviour is more likely» (De Mot and Faure, 2014, p. 125).

The question of defensive behaviour is strictly related to three different aspects.

Firstly, in a multilevel decision-making process, a growing number of interconnected and intertwined societies push the demand for legislation, resulting in an ever-increasing number of rules that «tend to originate from a great variety of sources, are complex and not always well coordinated» (Voermans, 2008, p. 128).

¹ In this paper, we will employ the broad definition of regulation provided by the OECD for which «regulation refers to the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers» (OECD, 1997).

Such an intricate network of public bodies (at international and national level) risks producing very detailed and burdensome regulation that is not easy to manage by civil servants.

Secondly, in the Italian system, the separation between political and administrative spheres has been hampered by a legislative «flooding» on administrative decisions (Casini, 2019, p. 18). By analysing the relationship between politics and administration, it is possible to argue that these two stages are not well-distinguished, constituting instead a «hybrid» model (Casini, 2014, p. 21).

The following causes have been identified: a very intense use of law (or law decrees) in fields reserved to public administration; a greater focus on the timing of the decision, rather than on its content (Lupo, 2010); excessive attention to the symbolic dimension of new provisions (and their potential effects), that are announced through social media, to the point that scholars coined the term *tweet-made-law* (Casini, 2019, p. 19). In synthesis, the legislator seems to be driven by a desire to satisfy public opinion, producing numerous laws and reforms, regardless of their potential effects.

Thirdly, rapid social change presents new or unexpected situations – especially in times of tragedy – requiring prompt and effective regulations as in the case of the devastation caused by the COVID-19 pandemic.

For instance, regarding the response to the COVID-19 pandemic, it has been argued that «regulation is the way to balance different public interests such as health, economic freedoms and fundamental rights» (De Benedetto, 2020a, p. 2), and, «[r]ather than a structured model, Italy's response consists of a frontline where people, together with their multi-level governments, are experimenting with a regulatory balance among competing values. The equation is complex, a real conundrum. It requires considering not only the competing concerns of health and business but also fundamental rights – a variable which is not relevant in the same way in different parts of the world» (De Benedetto, 2020b).

In fact, the COVID-19 pandemic has dramatically brought the question of defensive bureaucracy to the surface, so the ability of public authorities to respond, the creation of an adequate and timely feedback mechanism, and the quality and rapidity of decisions can be

considered key elements in adopting good regulatory practice and understanding and meeting the immediate needs of citizens (Crepaldi, 2021).

Public administrations are invited to perform in terms of “resilience”, but «[w]hen legislation is too frequently bad quality, adopted on the basis of unclear objectives or without the adequate gathering of evidence, consultation, indicators (necessary for ex-post evaluation) and with an insufficient assessment of different regulatory options, making it highly probable that the law will be ineffective (*bad quality legislation*)» (De Benedetto, 2021, p. 9).

Therefore, bad quality legislation and regulation represents one of the sources of complexity that contributes to the inefficiency of bureaucracy.

3. Public Procurement Regulations

Public procurement represents a field where the link between legal uncertainty and “normative metastasis” (Zeno-Zencovich, 2020) of the Italian legal system and defensive bureaucracy is particularly evident (Cafagno, 2018).

Italian public procurement regulation consists of both hard and soft law. As for hard law, the main example is the Public Procurement and Concession Contracts Code (“Code”), which has been modified several times², while soft law consists of decisions and guidelines issued by the National Anti-Corruption Authority.

Public procurement legislation is characterized by fragmentation, institutional overlaps, norm collisions, and others problematic aspects (Auby, Breen and Perroud, 2014; Racca and Yukins, 2014).

According to the European Commission, «[t]his has resulted in a lengthy, complex and onerous procurement code, which contracting authorities and economic operators have

² EU Directives 2014/23/EU, 2014/24/EU and 2014/25/EU were transposed into Italian law by Legislative Decree no. 50 of April 18 2016, known as the “Public Contract Code”. The Code was modified by Decree-law n. 76 of July 2020, passing with amendments into Law no. 120 of September 11 2020. Finally, the new Code enters into force on 1 July 2023 by Legislative Decree no. 36 of 31 March 2023. The regulatory framework on public procurement can be considered ‘unstable’.

difficulties to work with» (European Commission, 2016, p. 121).

Given its complexity, public procurement legislation seems to create opportunities for «creative compliance» (Baldwin, Cave and Lodge, 2012, p. 70; De Benedetto, 2017, p. 58) and even non-compliance (Mattarella, 2011, p. 67).

Moreover, the complexity of the legislative framework may produce undesirable or dysfunctional results (La Spina and Majone, 2000, pp. 191-192; Sunstein, 1990, pp. 407-408).

In most cases, apparently legitimate bureaucratic practices may actually favour illicit behaviours, so the causes of potential violations can be found «inside the law» (Khan, 2006, p. 219).

As a result, some scholars have identified several corruption risk factors within the legislation itself (D'Alberti, 2013).

Although civil servants might not purposely set out to break the law, due to uncertainty and vagueness regarding licit and illicit behaviours, they find themselves “choosing not to choose” (Sunstein, 2015), to the detriment of the public interest (Battini and Decarolis, 2019).

Studies have shown that public procurement rules seem to incentivize defensive behaviours. Research promoted by Stefano Battini and Francesco Decarolis examines defensive practices through data collected by means of a questionnaire submitted to numerous public administrators (the so-called RUPs) active in the public procurement sector for works, services, and supplies (Battini and Decarolis, 2020; Bottino, 2020).

The findings confirm the presence of defensive administration among RUPs. The respondents also stated that the perception of defensive behaviors are linked to the complexity of public procurement regulations.

A second study analyses the dynamics of the public contracts market between 2012 and 2016; it includes information on the award and performance of work, service, and supplies (for awards amounting to or exceeding €40,000.00), with particular emphasis on the phases of the award procedure adopted by the contracting authorities, the economic aspect of public contracts, the purchasing bodies, and – lastly – in the territory (Camera dei deputati, 2017).

Briefly, this study remarks the reduced demand for public contracts relating to work, service, and supplies. The 2016 market trend seems to have been affected by the entry into force of the new Code as well as the new procedural constraints introduced by the Code itself.

This result has been underlined by the Italian Supreme Audit Institution, which has stated that analysis of risks linked to the Code can be explained through defensive behavior by civil servants (Corte dei conti, 2017).

Lastly, the bad regulatory framework has generated significant distrust in public procurement as well as a very negative perception towards public administration (Piersanti, 2017; OECD, 2009).

Some scholars have argued that legal uncertainty and bad regulation have contributed to a crisis of confidence in regulation and legislation (De Benedetto, Lupo and Rangone, 2021).

In general, the crisis of confidence in regulation can be illustrated by looking at litigation and corruption.

Litigation could be considered as a valid tool to report on the extent of bad regulation. In particular, it is necessary to assess its effects on public procurement.

The Italian Council of State has published a study on the impact assessment of review procedures in the public procurement sector. The research provides, on the one hand, a summary of the activities of the public administration in terms of procurement procedures and, on the other hand, the number of review procedures for the award of public supply and public works contracts (Veltri, 2019).

According to the study, in 2017-2018, the total number of procurement procedures is fixed at 238,101 (the procurement procedures are doubled compared to 2015-2016) and these data can be justified by the clarifications introduced by the legislator on the public procurement rules. Then, focusing attention on litigation, the number of review procedures was 3,457 in 2017 and 3,603 in 2018: respectively 1.4% and 1.5% of the total procurement procedure (while in 2015-2016 the data of review procedures was about 2.6%).

Despite the slight increase of review procedures in the previous years, the result is a significant decrease in the rate of review procedures, taking into account the increasing

trend of procurement procedure publications.

This phenomenon can be explained by the following reasons: the economic crisis, the cost of litigation and the innovative mechanism introduced by the legislator in 2016, the so-called “rito super accelerato” (Veltri, 2019).

Corruption is a second measure which is characterized by secrecy and lack of information; therefore, this is very difficult to estimate (De Benedetto, 2016).

Bad regulation can be defined as a perverse incentive and a direct factor that promotes illicit behaviours. The result is that rules might both increase opportunities for corrupt transactions and constitute a serious threat to the proper functioning of the market.

The crisis of confidence in regulation is linked to the idea that “rules can breed corruption” (De Benedetto, 2022) i.e. «there is a direct proportionality between legislative inflation and corruption: the more regulation the more possible violation and consequently, the more opportunities for officers in charge of controls to prey on citizens and enterprises and to obtain bribes» (De Benedetto, 2017, pp. 56-57).

4. Findings from Behavioural Science

The traditional economic theory postulates that people think and decide in an economic (or always rational) way, i.e. looking at following aspects: utility maximization, standard preferences, autonomous decision-makers, among others.

This school of thought relies on the rational choice theory (Sen, 1994): its premises are based on the fact that human actors are self-interested, and they rely on a proper cost-benefit analysis to maximize expected net benefits (Becker, 1976).

This neoclassical approach has been partially criticized by the work of philosophers, economists and psychologists, who have broadened the nature of rational behavior in human decision-making.

For instance, Friedrich von Hayek argued that «[t]he assumption of a perfect market, then, means nothing less than that all the members of the community, even if they are not

supposed to be strictly omniscient, are at least supposed to automatically know all that is relevant for their decisions. It seems that that skeleton in our cupboard, the “economic man”, whom we ha exorcised with prayer and fasting, has returned through the back door in the form of a quasi-omniscient individual» (Von Hayek, 1948, p. 45).

Milton Friedman labelled the orthodox economic theory as “unrealistic” (Friedman, 1953).

Research in several fields – which we include within “behavioral law and economics” or more neutrally and precisely “law and behavioral sciences” (Sibony and Alemanno, 2014) – has enriched the assumptions of economics with other information on real people’s behavior.

Findings from behavioural science have demonstrated that people are not always rational and that they are subject to recurring cognitive biases in decision-making as they are influenced by how data and information are presented. They care more about present losses than future gains, and individual behavior is greatly influenced by other people’s perceived behaviors, and so on (Rangone, 2017, pp. 73-74).

Herbert A. Simon awarded the Nobel Prize in 1978 for his theory of bounded rationality, argued that economics-based strategies do not work «when we are seeking to explain the decision maker’s behavior in complex, dynamic circumstances that involve a great deal of uncertainty» (Simon, 1978, p. 14).

For this reason, the bounded rationality theory is based on the assumption that people have memory lapses and untapped brain power, and they use mental shortcuts to bridge a gap (Jolls, Sunstein and Thaler, 1998).

Then, Daniel Kahneman – awarded the Nobel Prize in Economics in 2012 – and Amos Tversky, in their prospect theory, argued that people’s capacities do not allow them to respond to all problems in an appropriate way and «systematically violate the requirements of consistency and coherence» (Tversky and Kahneman, 1981, p. 453).

With the aim of explaining the individual decision-making process, it is possible to illustrate two modes of thinking that all of us are familiar with.

There is one mode or one way for thoughts to come to mind, the so-called “System one”,

which is intuitive, and which operates automatically and quickly, with little or no effort and no sense of voluntary control. In particular, this generates impressions, intuitions, intentions, impulses and feelings (Kahneman, 2012a). The System One is essentially what comes up automatically in our memory.

Then, there is another way that thoughts come to mind, the so-called “System Two”, which supports more detailed and specific processing. System Two is addressed to complicated activities, it is based on a series of steps before choosing, requiring more attention, and searching memory to find the answers; and this is definitely not the intuitive way (Kahneman, 2012a).

Daniel Kahneman argued that the first system, «is generally very good at what it does: its models of familiar situations are accurate, its short-term predictions are usually accurate as well, and its initial reactions to challenges are swift and generally appropriate. System one is affected by biases, however, systematic errors that is prone to make in specified circumstances» (Kahneman, 2012b).

This way, the human decision-making is affected by systematic errors, – i.e. heuristics or rules of thumbs – to reduce complex tasks or simplify problems (Baron, 2014).

Briefly, there are three main types of heuristics: availability, anchoring and representativeness.

Availability is where people tend to think that events are more likely if an example is readily called to mind or available. For instance, a familiar risk, like a terrorist attack, is considered a greater risk than another, such as an excessively hot summer (Sunstein, 2006).

The anchoring is based on the idea that people solve problems by starting from an initial guess or salient starting point that is later adjusted to generate a final answer. For example, when individuals do not know the distance or the number of people found in a city, they use anchoring biases to identify a solution.

The representativeness captures the idea that probabilities are evaluated by the degree of representativeness that an event or object can have in a class of events or objects. This type of heuristic, also called the “law of small numbers”, uses stereotypes and the similarity criterion, while it abstains from calculating probabilities.

The use of a limited number of heuristics violates logical principles and, in certain situations, leads to biases, anomalies and errors.

5. Biases in defensive behaviour

Recently, the cognitive sciences have investigated civil servants and their common biases and heuristics.

In this part I will analyse under what circumstances – termed heuristics and biases – defensive bureaucracy is more likely to occur.

a) The availability

Starting from a bad or negative episode, human behaviour literature has shown that this can be attached to memories of civil servants, affecting their decision-making process (Kahneman, 2012b).

For instance, in some cases, traditional and new social media (television, newspaper, Facebook, Instagram and many others) have a tendency both to publish bad news³ and to emphasize the proceedings that involved civil servants. Therefore, they are oriented to think of their role as potentially more dangerous than it really is. Notwithstanding the chance to be held liable by the court is very low, civil servants are affected by these negative public campaigns (Caravita, 2021).

The statistics on the crime of abuse of office seem to confirm that there are very few convictions compared to the number of open cases.

The first and most striking statistic is the high number of dismissals: 79% of the cases in 2022 were dismissed (the same figure is the same as in 2021). This means that almost eight out of ten complaints are rejected. In 2022, 3.536 out of 4.481 cases were closed with a dismissal (Gatta, 2023, p. 167).

b) Loss aversion

Defensive behaviour can be explained in terms of “loss aversion” bias, i.e., civil servants

³ Various titles of newspapers have labeled the Italian University in the following ways: “*Malauniversità*”, “*Università bandita*” and so on (Bonini, Serranò and Zunino, 2021).

react to a perceived loss more negatively than if it were a matter of a mere failure to obtain a gain; for most people, perceived losses generally weigh more heavily than equivalent gains. Civil servants try to avoid penalties (losses) rather than pursue benefits or advantages (pecuniary or status gains).

In the light of the strict balance between negative and positive incentives, civil servants are likely to fear losses and adopt undue precaution (Battini and Decarolis, 2020).

c) *Status quo*

People are more likely to be locked into the defaulted option because actively choosing is more costly in time and effort.

As observed above, a consequence of loss aversion is that people have «a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages» (Kahneman, Knetsch and Thaler, 1991, pp. 197-198).

On the other hand, as mentioned above, individuals tend to prefer avoiding losses to acquiring equivalent gains, however, whether an event is “marked” as a loss or a gain depends not only on facts, but on a range of elements, including how the event is framed. The status quo is considered as the “reference point” and, starting from this point, it is possible both to manipulate the framing and to change our tendency (Sunstein, 1997).

Moreover, the status quo is linked to the phenomenon of “commission bias”, *i.e.*, «people would much prefer to make an error of omission than one of commission, even in the context of vaccinating their children, where commission bias can greatly increase risks to children» (Sunstein, 1997, p. 1181).

d) *Inertia*

Excessive regulatory complexity can also give rise to serious consequences by increasing the power of inertia (Sunstein and Thaler, 2003; Di Porto and Rangone, 2013).

When rules are both abundant and unclear, compliance requires more resources and time. This way, there is greater likelihood of finishing the “bandwidth”, referring to the cognitive capacity underlying the ability to solve problems, retain information, engage in logical reasoning, and so on (Schilbach, Schofield and Mullainathan, 2016).

On the other hand, in some cases (for example, in technical and highly controversial

instances), inertia may be a positive consequence (as the result of a costs and benefits analysis), where its absence might also increase the likelihood of error.

Thus, inertia and the status quo might be a «product not of a behavioural bias, but of a vivid awareness of the full range of costs and benefits» (Sunstein, 2014b, p. 6).

e) The misperception of risk

The way issues are presented can affect the range of variables considered and the choices people make in situations of uncertainty.

Studies and experiments have emphasized «how the manner in which choices are framed (how risks and uncertainties are portrayed and who portrays them) can impact upon the choices that people make» (Weyman and Barnett, 2016, p. 131).

As mentioned above, the regulatory framework for public procurement increases the unjustified fragmentation of responsibilities, which can influence compliance and increase the likelihood of sanctions or penalties. In other words, defensive barriers are associated with perceiving the risk of being detected and punished (Cafagno, 2018).

From a behavioural point of view, «this is related to a misperception of chance, meaning the limited capacity of individuals to evaluate risk and probability» (Rangone, 2017, p. 195).

Some evidence seems to confirm that civil servants make only a limited evaluation of the consequences of their decision, i.e., «a decision maker who faces multiple decisions tends to choose an option in each case without full regard to the other decisions and circumstances that she faces» (Rabin and Weizsacker, 2009, p. 1508).

At any given time, civil servants have few resources at their disposal to pursue optimal strategies, and they sometimes adopt a defensive bureaucracy stance due to a misperception of the risk of incurring penalties, thus violating the basic assumptions of probability (Rangone, 2012).

Therefore, policy makers should be taken to mediate misperception of risk, especially when assessing the efficacy of increasing monitoring or the infliction of penalties by government agencies (Djawadi and Fahr, 2013; Mittone, 2006).

6. New empirically informed regulation tools: the nudge

In order to achieve the goal of regulatory quality, regulators can utilise a variety of Better Regulation tools – such as Planning, Evaluation and fitness checks, Impact Assessment, Stakeholder consultation, Feedback mechanisms and so on – both to gather real feedback from end-users and to elaborate a proper set of regulatory options (European Commission, 2021, p. 19).

However, even if regulators do not use impact assessment or adopt stable consultations, they should take into account the cognitive distortions.

According to Richard H. Thaler and Cass R. Sunstein, regulators/authorities can design a context, from which people can make the best choices for themselves. Acting as choice architects, regulators use some nudges to guide people to make better choices.

The nudge, according to its theorists, is «any aspect of the choice architecture that alters people's behaviour in a predictable way, without forbidding any options or significantly changing their economic incentives» (Thaler and Sunstein, 2008, p. 6).

The nudging theory is based on the libertarian paternalism, i.e., regulators have the possibility to establish the “best” choice for people (or what choice behaviour is best), but without eliminating freedom of choice (Lunn, 2014, p. 22).

In this way, people are encouraged towards the better choice, and, at the same time, they can always still choose a different option, preserving their right to choose what to do. In other words, a nudge can be illustrated as a feature of the social environment that affects people's choices without imposing coercion or any kind of material incentive.

Traditionally, nudge can be linked with the following tools, such as default rules, smart disclosure⁴, active choosing/prompted choice; non-monetary rewards; uses of social norms, and others.

The nudge programme has been incorporated into several jurisdictions and it presents many positive points (Lunn, 2014). Nudges are very simple to implement, cheap, and they

⁴ Smart disclosure can significantly improve tax-compliance, leading tax-payers to make more informed decisions. Considering individual's cognitive capacities that are not infinite, particularly their attention is very limited, and standard tax system that is not simple to be well-understand, policies should provide a clear and salient information.

can favour social objectives, such as healthy eating, road safety, waste reduction, savings policy, climate change, poverty, and so on.

Although nudge presents several positive points, perhaps, the most critical factor is related to the ethical question, i.e., nudging tends to work best when users are unaware that their behavior is influenced by choice architecture. On this regard, the question is whether nudges should be counted as unacceptably manipulative or as an interference with freedom (Whyte and Selinger, 2011).

Moreover, some authors have pointed to the “behavioral paradox”, i.e., regulators (or choice architectures) are boundedly rational too and they may be affected by behavioral failures: «although government agencies increasingly use behavioral irrationalities as a justification for government intervention, the paradox is that these same government policies are also subject to similar behavioral inadequacies across a broad range of policies» (Viscusi and Gayer, 2015, p. 1106).

7. Possible Remedies to defensive administration

Although there is no magic wand to solve the problem and albeit with some caveats, the literature examined so far helps to identify some tools that may contribute to limit defensive bureaucracy and its consequences⁵.

The first is to improve the quality of regulation.

Several scholars and international organizations have recommended regulatory reforms. Recently, the Italian National Recovery and Resilience Plan (“Plan”) has recognized that the current regulatory framework is detrimental to the life of citizens and to economic initiatives (Italian Government, 2021). The Plan focuses on improving the effectiveness and quality of regulation (De Benedetto, 2018). Specifically, it recommends the following measures: planning government regulatory initiatives to allow for the adequate preparation of

⁵ On this topic the literature recommends several caveats, such as the impossibility of eliminating all complexity. Indeed, complexity may even produce some benefits, making legislation more accurate or more certain, favouring more efficient forms of social control.

measures, including through consultations; the introduction of better regulatory instruments; the use of drafting techniques to make clear, consistent, and comprehensible rules, and the incorporation of behavioral findings, including real people's reactions to regulatory measures.

Secondly, regulators should consider the limits and biases of civil servants – such as misperception of risk, inertia, status quo, loss aversion, and so on – thus improving the quality of regulation (Rangone, 2012).

The OECD suggested applying the findings of behavioral economics to the decision-making process, even though the application of behavioural insights to policymaking is still an unsolved problem (OECD, 2017). Indeed, the literature has raised doubts about «how to turn the plentiful empirical findings about human behaviour into operational regulatory tools» (Alemanno and Spina, 2014, p. 437). Many authors have argued that behavioural findings can be integrated into Regulatory Impact Assessment or Impact Assessment; in this way, empirical information can effectively contribute to drive better regulation in the European Union (Alemanno, 2012, p. 3). By emphasizing evidence-based decision-making, the European Commission may use impact assessment to produce empirically informed regulation: it can be used to gather real information from stakeholders, including cognitive errors and limitations as well as to formulate alternative regulation options, to display the best choice and favour the compliance of stakeholders (Sunstein, 2000).

As mentioned above, the idea of nudge, inspired by paternalist liberalism, is rooted in an understanding of these limits and biases that people are subject to in various situations where they have choices to make. Nudging possesses an inverse methodology to address individual behavior, which does not entail the enactment of the normative provisions; in this way, the first result is to reduce the potential negative incentive, i.e., the over-regulation: «the proclaimed advantage in doing this is that public policy-makers might influence our everyday choices and behaviors without recourse to injunctions or bans» (Hansen and Jespersen, 2013, p. 4).

Thirdly, monitoring the performance of civil servants (and their level of compliance) should be guided by a risk-based approach (De Benedetto, 2015).

Any penalties should be well-calibrated and proportionate if they are to be an efficient deterrent. Risk analysis has been introduced in the context of the fight against corruption, especially in public procurement (Lorenzoni, 2017). According to risk-based approaches, the National Anticorruption Authority in 2021 has implemented a new project with the aim to identify the indicators considered at the greatest risk – such as choice of procedures, contract award criteria (the most economically advantageous tender), exclusions, cost variance, time variance, variants and others – in order to select the sectors where to focus the preventive measures (ANAC, 2021).

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