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## **From chasing violations to managing risks: origins, challenges and evolutions in regulatory inspections.**

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# 1. Introduction

*GOVERNOR. I have called you together, gentlemen, to tell you an unpleasant piece of news. An Inspector-General is coming.*

*AMMOS FIOD. What, an Inspector-General?*

*ARTEMY FIL. What, an Inspector-General?*

*GOVERNOR. Yes, an Inspector from St . Petersburg, incognito. And with secret instructions, too.*

*AMMOS. A pretty how-do-you-do!*

*ARTEMY. As if we hadn't enough trouble without an Inspector!*

*Nikolai GOGOL – The Inspector General (1842)*

As in Gogol's quote, the arrival of a government inspector is still something that elicits instant reactions of fear and worry in a number of countries – including Russia, and most countries that used to be part of the Former Soviet Union. Most of these inspectors nowadays, by contrast with Gogol's, come to inspect and control not State institutions, but private ones, particularly businesses. "Inspectors" and "inspections" come under different names – "control", "surveillance", "supervision" – so speaking about "inspections" will not draw instant reactions in some countries, and these will only come when the notion is explained, "translated" into the appropriate words. The reality, however, in most parts of the world, is that inspections (under whichever name) are one of the most frequent and important ways in which businesses experience their relations with state authorities. While scholars and governments often look at "regulations" in a more abstract way, businesses will typically relate more to the actual experience they have of regulations, which is through procedures such as permits and licenses, and through inspections – particularly if the latter are frequent, burdensome, or otherwise problematic.

Certainly, this situation is not unique to regulations affecting business activity, and to inspections that control compliance with them. For most citizens, "laws" likewise are often distant abstractions, and the way they are experienced is primarily through concrete processes: obtaining documents, marrying or inheriting, and of course: dealing with the police. The comparison with the police is apt: to some, the police is an indispensable defense wall against crime, and a good (and strong) police one of the main elements that separate civilization from barbarism. To others, the police is a fiend, an enemy, a body that seeks to oppress them regardless of what they have done – and, as recent events in the United States once again show, such feelings are definitely not confined to actual criminals.

What this highlights is the essential ambiguity of inspections and control: absolutely necessary for some, oppressive and hostile for others. Just as many – from environmental defenders to trade unions through anti-corruption groups – will clamour for more inspections and control, others – businesses, "better regulation" bodies, libertarians – will tend to argue for less. Again, the same ideological and interest-based divisions can be seen as for law enforcement by the police – some asking for more, others pointing out its downsides, limits, unintended consequences etc. What is striking is that much of these discussions, at least in the particular case of inspections, take place with a considerable lack of investigation and understanding of what inspections

actually are, how they function in practice, and what impacts they have. Pre-conceptions abound, analysis is scarce.

There are many questions that deserve to be asked. What are inspections exactly, and are they just a form of “law enforcement”, or something different? What is their place in a broader range of actions aiming at implementation of regulations? How are they organized, planned, conducted in practice? And what is their impact on compliance, public welfare, economic growth? These are all fundamental issues, and without at least some level of response on these, trying to decide the question of “more or less” inspections is meaningless.

The past decade has seen a growing interest in the question of inspections (and, more broadly, of enforcement and “regulatory delivery”, i.e. all activities and tools that can be used to make regulations better complied with and implemented). Major steps in this emergence of the question were the 2005 *Hampton Review* in the United Kingdom, and the publication of the OECD’s *Best Practice Principles for Regulatory Enforcement and Inspections* in 2015. Going further east, interest in the question started earlier, with various post-Soviet and post-Communist governments initiating reforms of government inspections from the late 1990s. Much of this work was (and still is) supported by the World Bank Group.

The significance of the issue stems from its relevance for economic development, for achieving public welfare goals, and for strengthening the rule of law. From an economic perspective, even though the real importance of the “burden” created by regulations and their enforcement is disputed, there is some consensus that the broad complex of “institutions” (which include rules and their enforcement) is crucial to economic development (Rodrik 2003), and that reforming (making more efficient and flexible, etc.) regulations (in particular for product markets) has important benefits for productivity and long-term growth (Bourlès *et al.* 2010, OECD 2015 a, IMF 2015 etc.). As we will discuss, regulations and inspections also have important effects on integration in international trade (see Rodrik 2003 for the interaction between “trade” and “institutions”). For public welfare, the evidence of regulatory effects is mixed, but there is generally a strong “social demand” for regulatory protection against risks, solid economic (Ogus 1994) as well as non-economic (Feintuck 2010) justifications for regulations in a number of areas, and ensuring that they reach their stated purposes more effectively, and at lower cost, is important. Finally, just as effective practices in enforcement and inspections are an important element to foster legal compliance (Kagan 1994, Ayres and Braithwaite 1992, Tyler 2003), bad inspection and enforcement practices can lead to breakdowns in legitimacy, regulatory capture, corruption (Djankov *et al.* 2001). Thus, “good” inspections contribute to a range of public benefits (economic growth, protection against risks, consolidation of a sound legal order), whereas “bad” ones can endanger all these simultaneously. While the magnitude of such effects is still very difficult to assess, they are nonetheless real and make the object well worthy of investigation.

### **1.1. Research question – do risk-based inspections lead to better outcomes at reduced costs?**

Nonetheless, answering conclusively all questions regarding nature, methods and effects of inspections would be a very tall order, far beyond the scope of this research, and maybe beyond reach in any case, at least based on the data currently available. What this research aims at achieving is somewhat more modest, and will draw on two sets of sources. The first is existing research on regulatory enforcement and compliance (spanning over 40 years of work in a variety of fields). The second is “practical experience” as constituted where possible by hard (quantitative) data, but also by the specifics (qualitatively described) of inspection structures, practices, visions and first-hand accounts of practitioners and stakeholders.

The interconnected questions this research will try to answer (or for which it will at least attempt to see if an answer *could be found given additional data*) are the following: are inspections really a specific “object”, what

are some of the main aspects and variations of practices in inspections, and are there methods that can allow inspections to achieve better outcomes *both* from the public welfare and safety perspective, and from the economic growth one?<sup>1</sup>

The central question is clearly the last one: what are these methods that could allow for a “win-win” result, whereby the goals of inspections are better achieved (assuming, of course, some clarity on the said goals<sup>2</sup>) – and the entities and people subject to inspections (mainly: businesses) experience less burden from these inspections (and possibly even some support, that helps rather than hinders growth)?

The proposition we will try and put to the test in this research is the following: do risk-based approaches to inspection allow for better outcomes (in terms of safety, health, public welfare), or at least constant outcomes, while doing so at a lower cost for the state budget and/or for the economy? Or, if testing this statement conclusively should prove elusive at this stage, are there sufficient indications that this may be the case, and does it appear possible in principle to test it further, if additional data were to be collected?

In other words, this research will look at so-called “risk-based” and “smart” approaches to inspections and enforcement and try to identify what they entail, how they differ from other practices, and see whether they achieve their stated goal of reconciling improved outcomes in terms of health, safety and other public goods, and reduced economic burden or barriers.

Emerging through the research, we will also see the importance of the question of *trust* – between economic and social actors, and trust by citizens in the state, regulations and their enforcement. We will try and understand better how the need to restore or consolidate trust is a fundamental driver of the development of inspection systems – and whether (and in what ways) “risk-based inspections” can help strengthen this trust (or whether they threaten, as some claim, to undermine it).

a. Risk-based inspections and “Smart Regulation”

This question squarely puts this work in the perspective of the “smart regulation” research and policies that have developed over the past couple of decades and which, following the sub-title to Ayres and Braithwaite’s 1992 *Responsive Regulation*, attempt to be “transcending the deregulation debate”. Referring to “smart regulation” is, however, more a way of signalling the complexity and contentiousness of the issue. Indeed, “smart regulation” is an expression that has been given a number of definitions, and the basic tenets of which are far from being undisputed – and its current usage is quite far from the specific meaning that Neil Gunningham, who coined the term, originally gave it.

Different definitions include references to “responsiveness” and “cooperation” and to “protecting” and “enabling” – but also to the “usual” meaning of “smart” in management jargon, i.e. “specific, measurable, achievable, realistic and timely”<sup>3</sup>. At its core, “smart regulation” is based on the idea that regulation can be

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<sup>1</sup> As we shall see, there are significant limitations in terms of data in order to reach any conclusive answer to this question, both on the economic and on the effectiveness sides. As a proxy for economic impact, we will mostly consider the administrative burden created by inspections (excessive burden being generally to some extent a drag on growth), the availability of clear guidance to businesses and the coherence and predictability of inspections and enforcement (both counting as positive). In terms of effectiveness, we will focus on inspection functions where at least some key outcome data is available and reasonably reliable (e.g. occupational safety), but will not look into questions of attribution, which would go vastly beyond this research. Rather, we will limit ourselves to comparative cases.

<sup>2</sup> A number of inspection agencies have mandates that tend to be defined purely in terms of implementing legislation, without consideration of what public welfare interests they should aim at supporting. Assessing (and improving) their effectiveness is, without redefining their goals, very difficult (if not impossible), as we will discuss further.

<sup>3</sup> See definition in External Advisory Committee on Smart Regulation (Government of Canada) 2004, available at <http://publications.gc.ca/collections/Collection/CP22-78-2004E.pdf> - and for an alternate definition, e.g. here:

*simultaneously* more effective and more flexible, more efficient, more friendly to growth and innovation. Reforms to make inspections more risk-based have clearly been designed with the same aim: “more effect, less burden”, as per the Dutch motto, or “prosperity and protection”, as per the English one.<sup>4</sup>

What these mottos really mean, and how they translate into practice, is the first question. The second one is even more important: does “smart regulation” actually delivers on its promises? Many groups and authors have challenged this claim, and still do<sup>5</sup>. Through this research, we will try and bring our modest contribution to this debate and to the construction of knowledge on regulation and its effects, by attempting to investigate in details what the “enforcement” side of “smart regulation” really consists of, what different practices exist, and with which results.

#### b. Main elements of the research - hypotheses

Having defined broadly the central problem this work seeks to investigate and the question it will try to respond to, going further requires to break down further the research questions into a series of fundamental constitutive parts:

- The “inspections object”: do regulatory inspections constitute a specific “object”, distinct from the regulations they are aim at controlling (and enforcing) compliance with<sup>6</sup>? what do they entail, and how they are organised, conducted etc.? What is supposed to be the goal of these inspections and of the associated measures and activities? Is there consensus on these questions, or not – and, if there is dissent, what basis can be adopted for this research?
- “Risk-based inspections”: what are the different meanings put behind these words? Is there some kind of “professional consensus” on what this entails<sup>7</sup>? What claims are made about these practices? How do “real” risk-based inspections look like, and how much do they differ from non risk-based ones (to the extent that such a group can be defined)? And what are the results of the introduction of risk-based methods?
- Measuring outcomes: what are the challenges involved, the limitations of existing data and methods to assess effectiveness and other aspects? To what extent can these be corrected for to make existing data more useful? To which extent do apparently conflicting results also reflect improperly formulated questions and/or incorrect understanding of what is being assessed? And what would be needed to have more significant results in the future?

In respect to these three main groups of issues, we make the following hypotheses:

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<https://www.ec.gc.ca/eseee-em/default.asp?lang=En&n=1F37FC50-1&offset=2&toc=show> (used by Environment Canada). For the academic definition as per Gunningham, see further in the section on “Antecedents and sources”.

<sup>4</sup> The two mottos can be found (a) for the Dutch one, in the documents presenting the inspections reform programme (*Vernieuwing Toezicht*), e.g. here: <http://www.inspectieloket.nl/english/> - (b) for the English one, in BRDO publications, e.g. here: <https://www.gov.uk/government/publications/local-regulation-ensuring-prosperity-and-protection>

<sup>5</sup> Just to give a couple of examples of stakeholders groups criticizing so-called “Smart Regulation”, see: <http://www.cela.ca/collections/justice/public-good-regulation-smarter-smart-regulation> (in response to the Canadian report referenced above) and a recent criticism by EU Trade Unions of the European Commission’s “Better Regulation” programme: <http://www.euractiv.com/sections/health-consumers/european-commissions-better-regulation-has-killed-150000-says-etic-314030>

<sup>6</sup> While there is a significant amount of publications focusing on inspections and enforcement, this does not *ipso facto* answer the question. First, many consider more the volume than the methods. Second, there remains far more discussion of and research on “regulation” than on inspections, controls, etc. Third, there continues to be a frequent assumption that what matters most is how rules are formulated, and that this determines the subsequent inspections and enforcement measures. For these reasons, it still makes sense to ask the question of inspections as a separate research object.

<sup>7</sup> Again, this question is not necessarily obvious to answer, and there remain important disagreements both on the relevance of risk-based approaches, and on their meanings. See e.g. Rothstein, Borraz and Huber 2013.

- “Inspections” are a distinct object, with their own, specific range of effects, which are distinct from those of the underlying regulations they are supposed to help implement. Their goal is to promote social welfare along the lines of the regulations they cover, in particular by helping to decrease or mitigate specific risks. Under the word “inspections” are also understood a number of compliance-promoting tools. It is legitimate to organize inspection (and related) activities in ways that help achieve better results in terms of overall goals (safety, public welfare etc.), even if this has to be done at the expense of other values or legal principles (e.g. strict equality of treatment). Thus, effective inspections entail a fundamental element of discretion, and *how* to structure and limit this discretion is an important issue.
- “Risk” is a fundamental way to define what inspections are aiming at preventing or mitigating, to prioritize resources, and to select the most appropriate activities and instruments for interventions. To be effective as a criterion based on which to organize inspection activities, risk needs to be properly defined as the combination of the likelihood of a hazard actually resulting in adverse effects, and of the potential magnitude of these effects (taking into account both their scope and severity). Understandings of risk which are partial (looking only at magnitude of hazards, or at likelihood of accidents, or focusing on violations of rules rather than on actual effects) result in sub-optimal outcomes in comparison. In order to be effectively used, risk-based approaches require adequate, as-comprehensive-as-possible, up-to-date data.
- “Outcomes” of inspections should be reduced/mitigated risks, resulting in higher public welfare for the population, in a variety of ways (better health, reduced deaths and injuries from preventable accidents, protected environment, but also higher state revenue allowing for better funding of public priorities etc.). Inspections can also have negative outcomes: reduced business activity, higher prices and lower choice on the market, etc. – particularly when practices are poor. In many cases, attributing outcomes to inspections is very problematic, and thus attributing evolution in outcomes to changes in practices is similarly difficult. This is both because the phenomena observed are complex and multi-causal, and because of limitations in available data. Nonetheless existing data, in particular when looking at cross-country comparisons, allows to lend support to the central thesis of this research, i.e. that risk-based inspection approaches result, all else being equal, in better outcomes and/or lower costs. Furthermore, it is possible to conceive of ways through which better data could be produced, and hypotheses further tested in the future.

## 1.2. Antecedents and sources for the research

Research on inspections is not new, even though it has not necessarily always (or even frequently) been formulated as the object being studied. The earliest works considered in our research date back to the 1960s, and considerable work was done in the last four decades – thus, way before government or international programmes targeting “inspections reform” started to take hold.

The justification for this research lies therein that very little of the existing (and considerable) research has looked precisely at this combination of issues, and that none (to our knowledge) has done so in a way that seeks to overcome the limitations and difficulties in getting highly precise and reliable data by going broader, i.e. through a comparative investigation that reaches across regulatory functions and countries. The closest possibly (and a major source of inspiration we readily acknowledge) may be *Responsive Regulation* by Ayres and Braithwaite (1992), a seminal work on the topic but that looked less specifically at methods, and did not use “risk” as a central concept (focusing rather on “responsiveness” or “tit-for-tat”). Recent, important work like Malcom Sparrow’s *Character of Harms* looks across functions and countries, and does consider risk (or “harm”), but with a stronger focus on operational, problem-solving questions, and not on overall goals and effectiveness of the system. Very significant work has been done on risk and regulation, including considering

the issue across jurisdictions and regulatory functions (Wiener 2003, 2006 - Boudier and Löfstedt 2014 etc.) – but this work only considers inspections and enforcement incidentally, and looks at risk more in terms of defining it and understanding its different aspects, than of using it as a guiding principle for regulatory activities. Finally, very interesting work is being done that looks specifically at how inspectorates work, how they use risk and other methods (e.g. “responsiveness”, proportionality etc.) to target their actions and promote compliance, and with which results (e.g. Tilindyte 2012, Yan, van Rooij and van der Heijden 2015 etc.) – but such work has so far mostly been done on a relatively limited range of countries and issues, and from a perspective that emphasized the testing of models rather than a more “practice based”, “bottoms up” approach.

a. Drawing on research findings – literature review

What we aim at doing here is to try and connect more strongly theory and practice, and to look at inspection methods, risk, and effectiveness *in combination*. Thus, while we will draw strongly on a wealth of excellent, prior research work, we hope the way the ingredients are combined will be sufficiently novel to produce new and useful results. From this perspective, several strands of research are relevant to this work on inspections, risk-based methods and effectiveness<sup>8</sup>:

- Drivers of compliance: a key aspect of understanding better what inspections should aim at, how they produce results, and how to make them more effective, is the investigation of what produces compliance. While the “deterrence” model formulated by Gary Becker (Becker 1968) still is used widely, there is ample evidence that it explains (at best) a limited part of compliance variations (Kirchler 2007). Later studies have sought to develop more complex and comprehensive models of compliance, looking at social, cultural, psychological as well as economic drivers. This is particularly relevant to our study, and scholars of “voluntary compliance” (e.g. Scholz 1984) and of “procedural justice” (in particular Lind and Tyler 1988, Tyler 1990) have put forward an understanding of the complexity of compliance drivers, of the potential for counter-productive effects of (perceived) “unfair” enforcement, and of the complementarity (and varying strengths and weaknesses) of different approaches that is particularly fruitful for practitioners and students of inspections and enforcement. Works that present a typology of compliance profiles, and of the effects of enforcement actions on each profile, are also very useful (e.g. Elffers and Hessing 1997, Voermans 2014). Overall, this research is greatly indebted to the typology of compliance drivers and their interaction set forth by Tyler in *Why people obey the law*.
- Studies of institutions and methods: whether conducted from a sociological, economic or regulatory studies perspective, starting from the 1980s, there have been a number of works studying how inspecting institutions are organized and conduct their work (monographies and comparative studies of a couple of inspecting institutions, as well as broader studies looking at range of institutions and their practices). Some of the most relevant for our research include in depth investigations of how specific agencies work (e.g. Grabosky and Braithwaite 1986 – Hawkins 2002 on the UK’s Health and Safety Executive – HSE), comparisons of “regulatory styles” across countries (Vogel 1986 on environmental regulation in Britain and the US), but also (and most significantly) broader, thematic and problems-based reviews of practices (in particular Pressman and Wildavsky 1973, Sparrow 2008, Mertens 2011 – or with a narrower focus Robben 2010). Also important in this category are analytical

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<sup>8</sup> Assigning works to these different categories only purports to make it easier to follow the different aspects of research that we have tried to combine. Many books and articles span across several topics, and us listing them in one category only means that from our perspective this is their dominant contribution, not that they are not relevant to other issues.



works commissioned by regulatory agencies themselves, in particular the UK's HSE, which has a long and distinguished research tradition (e.g. Centre for Corporate Accountability 2007).

- Regulations and enforcement: studies considering the interface between rules and enforcement, and how to make enforcement more effective, are a central “pillar” of the literature used for this research. The most central reference in this category is Ayres and Braithwaite’s *Responsive Regulation* (1992) which, over 20 years after publication, continues to be a significant inspiration not only for researchers but for practitioners. Along with the “procedural justice” vision of compliance drivers, “responsive regulation” clearly is one of the models that have had the most influence on our own research. Author authors have, around the same time as Ayres and Braithwaite, developed related visions of how regulatory enforcement can be conducted in ways that are more effective to promote and achieve optimal compliance levels. This includes Kagan and Scholz (both 1994), but important insights can also be found in works that focus on specific functions but attempt to draw broader lessons from case studies (Hawkins 1984). Following on the “responsive regulation” model, Gunningham (1999, 2003 – and 1998 with Grabosky) has been one of the main proponents of a broader approach to enforcement and compliance promotion that they named “smart regulation”<sup>9</sup>. All these works have major relevance for this research and can be said to form part of its foundations..
- Risk and regulation: the growing category of “risk studies” is so large and rich that some clarification is needed as to which ones are most relevant for this research. While “fundamental” considerations of the role of risk in the society (and of understandings of and reactions to risk from a sociological and psychological perspective) are to some extent relevant, they are mostly useful for inspecting institutions themselves, in order to better understand how to communicate about risks and what reactions to expect from the public. In this first group are pioneering works like Slovic’s on risk perception (1987) and Beck’s on the “risk society” (1986). The most relevant for this research, because of its significance for inspecting institutions’ understanding of how to work with the public, is Slovic’s. Following on these early works, a number of authors have looked at how risk is managed in a public policy context, both from a normative and from a descriptive viewpoint. A number of institutions and projects (International Risk Governance Council, Duke University “Rethinking Regulation”, UK Risk and Regulation Advisory Council, Dutch Risk and Responsibility Programme) are or have been involved in this field, leading to a large amount of fruitful work (e.g. Renn 2005 – Balleisen, Benneer, Krawiec and Wiener, in press – Boudier 2009 - van Tol, Helsloot and Mertens 2011, Helsloot 2012). Equally significant are authors trying to show and understand the diversity of regulatory responses to risk, and how these are influenced by a number of political, institutional, social factors (e.g. Hood, Rothstein and Baldwin 2001, Carrigan and Coglianese 2012). While all these streams of research are extremely useful to build a better understanding of what “risk” can mean, what policy (in particular regulatory) responses exist, and of what factors drive specific responses, only few of the published works fully correspond to our research focus, which is the way in which risk can be (and is) used as a tool to select instruments and approaches, and to focus resources. We will see that most work from this perspective is to be found mainly not in academic writing (though there are of course some important contributions on this, e.g. Black 2005, Black and Baldwin 2010 and 2012 etc.), but in documents developed by inspecting institutions, governmental and intergovernmental bodies.
- Studies of regulation and regulatory instruments: while it would add little to reference them at each and every step, it bears repeating the obvious, which is that such research could not have been done without the underlying “infrastructure” provided by many years of research on what regulations are

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<sup>9</sup> Gunningham defines “smart regulation” as a “form of regulatory pluralism that embraces flexible (...) forms of social control which seek to harness not just governments but also businesses and third parties” and relies on “the use of multiple rather than single policy instruments and a broader range of regulatory actors” (Gunningham 2010, p.131). While fully compatible with the definitions used by governments or the EC, it is different in its emphasis. We will come back to this issue in the theoretical part of this research.

(and should be) used for, how rules work, what the downsides and upsides of different types of regulation are – even when such studies did not specifically focus on (or cover) inspections and enforcement issues. Particularly useful for our research have been works by Ogus (1995, 2004), Black (1997), Diver (1983) and Baldwin (1990, 1995).

- Finally, one more area of relevance is the field of legal studies on executive and administrative discretion. Unfortunately, this is an area where most research and writing tends to be country specific (focusing on each country's administrative law and legal tradition), and where the scope of this research did not allow us to fully engage. The relevance of the issue to risk-based inspections and enforcement is clear: if discretion is somehow illegitimate or severely constrained, responsive regulation, risk-based targeting and proportionate enforcement will all be impossible or highly difficult. The challenge was that considering seriously and thoroughly the literature on this topic would have required a major time investment, given that this is mostly not treated as an independent topic, but will be found as part of broader studies of administrative law, the executive branch, administrative bodies. We thus cannot in any way claim to have done a comprehensive review on this side, and have relied on more cursory research. We did nonetheless look through a variety of works on this issue, over a variety of legal systems (mostly French, British and American, for language reasons), in order to back up our analysis (e.g. Treves 1947, Williams 1994, Shapiro 1994, Solum 2002, Endicott 2011, Tifine 2012) This has been sufficient to show that a significant number of legal scholars and legal doctrines support the vision of discretion that is put forward and used in this study, but clearly a more thorough investigation of this issue would be an important area for future research. In addition, during the course of the preparation of this research, we participated in organizing an international seminar on regulatory discretion (held in December 2013 in The Hague), which allowed to discuss, enrich and validate many of the ideas put forward here on this topic<sup>10</sup>.

b. Drawing from the practice – experiences from inspecting agencies and reformers

The review and consideration of existing research and literature is one of the key elements of its study, but its deeper foundation is in the consolidation and analysis of inspection practices across a wide range of functions and countries, as well as of the practical work undertaken to reform and improve them, including the research and guidance produced by international institutions (World Bank Group and OECD) and national ones (e.g. the United Kingdom's Better Regulation Delivery Office – BRDO) in order to support "better practices" in inspections. In order to better understand how this "practical perspective" was captured, and how we have used it, breaking it down a bit is required – considering the types of sources, the relevance of the practices, and the use we put them to.

First, there are several ways to approach the practice, different *categories of sources*:

- Reviewing documents (guidelines for inspectors, guidance for businesses, reports, etc.) produced by inspecting institutions and (to use a short name) "reform promoters"
- Analysing available data (official data produced by inspecting institutions as well as representative surveys)
- Conducting interviews, focus groups, seminars etc. directly with inspectors, inspection institutions management, businesses, reform promoters etc.

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<sup>10</sup> See seminar agenda and contents: [http://www.ial-online.org/2014/01/international-seminar-on-regulatory-discretion-summary-of-findings-and-presentations/?doing\\_wp\\_cron=1430754528.4743070602416992187500](http://www.ial-online.org/2014/01/international-seminar-on-regulatory-discretion-summary-of-findings-and-presentations/?doing_wp_cron=1430754528.4743070602416992187500)

In preparing this research, we have made extensive use of our experience leading or supporting reform work on inspections for the past 11 years in a number of countries. Through this work, we have had the chance to have frequent, in depth discussions with “inspections practitioners” in close to 30 countries. While this work also draws strongly on publicly available data and documents (including some that were prepared in connection with the reform work in which we were involved), these first-hand discussions are what brings it the strongest connection with practical experience. Annex 1 includes a summary of the countries covered, and of the types of interactions, persons interviewed and consulted, etc.

The second relevant differentiation is based on *what can be learned* from these different sources:

- Actual practices – what inspecting institutions are doing “on the ground”, how inspectors conduct their work, but also how it is planned, how resources are allocated, how often different kinds of establishments are visited etc.
- Goals and visions – what inspecting institutions are expected to achieve by the governments they report to, and how they themselves conceive of their mission, but also at a deeper level of detail how they understand and conceive “risk”, “compliance” and other key organizing elements of their work
- Impacts and outcomes – how effective are inspecting institutions’ activities in terms of reaching their stated goals, and in terms of reducing and mitigating risks, increasing social welfare etc. – and, looking at intermediary outcomes that are sometimes easier to assess, what are the effects of their activities in terms of compliance, trust, legitimacy etc.

A third perspective is the *value (example or counter-example)* given to the cases and practices considered – i.e. the extent to which they correspond to a risk-based practice, or the opposite:

- Many countries and institutions exhibit a mix of both risk-based practices, of techniques intending to promote compliance in “smart ways”, and aspects of their work which are decidedly more “traditional”, which contradict or limit their intent to work in a risk-focused and risk-proportional way – looking at these limitations and contradictions can help understand the challenges involved in introducing these approaches, and also why results can at times appear unclear
- A few institutions (or at least some elements of their practices) can be seen as strong examples of what risk-based approaches purport to be – these examples will be used to show in greater detail what the actual practice of risk-based inspections is, and to look at the impacts and results to the extent that they can be measured
- Many countries and institutions will, on the contrary, provide examples of “non-risk based” practices. This can mean that there is no active effort to target resources and visits, that no difference is made between types of violations, that punishment is the main indicator rather than improving compliance, etc. Looking at these examples (and their variations) allows to understand what is the alternative to risk-based approaches (and what is the most common prevailing practice)
- In a number of cases, countries or institutions will be considered that still exhibit to a considerable extent traits of “non-risk based” practices but have started reforms in the direction of “smarter”, risk-based approaches. Through these, we will try and see what can be found in terms of the conditions of possibility for such reforms, their key elements, and whether any results can be assessed (and if so, which ones).

### 1.3. Structure of the research

A final point to consider is *how we will structure and use* these findings from the practice. Arguably, an optimal way would have been to present clear case studies and to make direct comparisons between inspecting institutions with contrasting approaches, but otherwise similar characteristics. There are several reasons why

we in fact have *not* chosen this path. First, there are no “pure” examples of practice, one way or the other, so the findings may not, in fact, be so illuminating. Second, publicly available data is incomplete for most institutions and most countries, and gaps can only be partially bridged through more qualitative information (guidance documents, interviews etc.), and they do not offer the same level of evidence. Given that these gaps in data for the most part cannot be addressed without considerable time and resources (e.g. conducting representative surveys), most such “case studies” would have been incomplete, and not fully comparable. Third, considering the problematic character of much of the data, the difficulties in attributing changes in outcomes to specific factors (i.e. disaggregating multi-factor effects), and the fragilities of purported causality models in social sciences, we are not fully convinced that a case-study approach would have, in fact, yielded stronger results, even assuming data gaps had been mostly filled. Rather, then, that to chase an improbably chimera of certainty, we have chosen to embrace the incompleteness and uncertainty inherent to our field of research, and instead try and find whether we can find data and evidence that are rich enough to provide real insights on practices, and to support (or disprove) the *likelihood* (and not the certainty) that certain practices may have certain effects.

As a result of this, this research will not be structured around case studies, but will use different aspects and elements from different institutions and countries where relevant, i.e. where their practices and available data best allow to help understand a specific aspect of the issue. The structure we will follow goes from definitions and key theoretical underpinnings, through findings from the practice, to the evidence provided by available data, and its limitations:

- In a first part, we will first provide an overview of the historical origins of the current systems of regulatory inspections and of what the word covers in terms of variety of institutions, fields and practice. Due to the vast scope of this question, we will limit ourselves to a couple of functions, selected for their importance in modern inspection systems and because they were generally the first to be developed in the 19<sup>th</sup> century: occupational safety and health, and food safety. We will try and see to what extent this historical investigation, however limited, can help us shed some light on the relationships between inspection systems and risks (real and perceived), and trust.
- The second part will cover the theoretical perspectives relevant to our research. We will start by looking into the research on drivers of compliance, and into other key theoretical underpinnings (in particular on regulatory discretion, and on the purpose of regulation. This will be followed by a cursory review of existing research on risk and regulation, to better understand the meaning and relevance of the term. ).Finally, we will consider the relevance of the issue for economic growth, as it is one of the justifications for policy reforms affecting regulatory inspections.
- The third part will then consider what the actual practice of inspecting institutions looks like, and confront the theoretical perspective with these elements of practice. First, we will discuss theoretical and actual limitations of available data, in terms of allowing us to capture the effects of inspections and of changes in methods. Then we will consider and compare examples of “non risk-based practice” (or “insufficiently risk-based”) and examples of inspections that define themselves as risk-based, attempting to understand what such practices consist of, what effects they produce, how their outcomes compare. As part of this, we will attempt to better define what, exactly, risk-based inspections mean in practice, and discuss instances of what we think are misunderstandings of what “risk” means in this particular context, which lead to problems in implementation and inaccurate assessment of results.Finally, we will review a few cases of ongoing or past reforms from one system to another, so as to understand their aims, logic and results.
- In conclusion, we will consider the evidence for the contention that risk-based inspections are more effective and more efficient, i.e. produce better (or constant) public welfare outcomes (and trust) at constant (or reduced) costs. In addition, we will briefly look at what further work could be undertaken in order to produce better, more conclusive data and findings.

The selection of the cases and examples used in this research was guided by a set of criteria. First, and most importantly for scientific “robustness”, cases were selected for their relevance. Regulatory domains studied (food safety, occupational safety and health) are both among the first to have seen the emergence of “modern inspectorates”, among the most important from a public “risk perception” angle, among the most significant in terms of institutional size and number of inspection visits, etc. Thus, they are quite acceptable proxies for the rest of the regulatory fields, in that they form a very important part of the total. Countries selected for the historical review are some of the most important and influential economies in the periods considered, and cover the most influential legal and administrative traditions. Cases selected in the third part illustrate strongly the different approaches to inspections and enforcement – risk-focused and risk-proportional vs. “risk averse” and “zero tolerance”, for instance. Since a limited number of examples had to be chosen, the effort was to take cases that would have a high significance (large economies or groups of countries, major inspection functions) and sufficiently contrasted practices.

Second, availability of data. Since the purpose of the research was to attempt a comparative study of inspections across time, countries and regulatory domains, it was inherently impossible to also undertake considerable research to “construct” data where it is not already available. Thus, the cases chosen were all instances where publications existed, quantitative data was easily available, specific surveys had been done and their findings released, etc.

Finally, familiarity. Because the study focuses largely on methods and practices, it was important that the author be as knowledgeable as possible about the practices in the cases used. To some extent, therefore, the selection of these cases was “path dependent” on the author’s professional activities over the past twelve years, which allowed to get more details and depth in insights.

#### **1.4. Limitations in scope**

There are a number of important topics that, due to the need to somewhat limit the scope of this research, we will only superficially touch. Among these are the related issues of corruption and capture. While both theoretical accounts and empirical evidence suggest these are quite important in relation to inspections, and some of the reforms we consider in the second part have been launched precisely with the aim to decrease them, we will not be able to conduct a full discussion of this question. We will, however, attempt to shed some limited light on such issues, and lay down some markers for further, future research.

One of these questions that will have to remain to some extent unanswered is, however, of more significance than others – it is that of the economic impact of risk-based inspections, in comparison with other, “non-smart” practices. One of the main contentions of regulatory reform of all kinds, “better regulation”, “smart regulation”, is that they will allow for stronger (and/or more diversified, more sustained) growth (and more jobs), as a result of increased investor confidence, greater innovation and technology adoption, stronger competition, etc. For some countries, these growth benefits can also result from a better access to foreign markets – when such access was constrained by regulations that did not conform to WTO and/or EU approaches, for instance. Sceptics, however, point out that whatever changes to competitiveness are induced by such “micro-level” reforms are dwarfed in terms of growth and employment by the effects of “macro-level” policies (both fiscal and monetary), and of more “fundamental” growth drivers (demography, geography, capital, etc.). Seriously considering the merits of both perspectives would require an entirely different, major research undertaking – and economic skills that the author of this work clearly does not have.

What we will instead have to limit ourselves to, in this research, is a modest assumption: that, all things being otherwise equal, the advantages provided to economic activity by a “better” or “smarter” inspections regime will give economic benefits. These may be at the margin, but nonetheless real. For smaller economies, less

integrated into international markets, the benefits may be stronger. While we will not be in any position to test the validity of these assumptions from an economic perspective, we will nonetheless refer to some of the existing research that can back it up (such as Koedijk and Kremers 1996 – Djankov, McLiesh and Ramalho 2006 – Loayza, Oviedo and Servien 2005) and consider a few concrete examples and cases of changes that may, indeed, contribute to substantial economic benefits for the countries that have implemented them.

A final note is that, in this research, we have attempted to present findings for a double audience: academics and researchers on the one hand, and “practitioners” (regulators, regulatory reformers) on the other. This has meant that the volume of the work increased significantly, because we attempted to clarify issues that would be relevant for each audience, even while other points may appear relatively self-evident to one group. We hope the readers will show some indulgence and navigate this work to the sections that are of highest relevance to them.