Chapter 10. Public Governance

Introductory note

The PFI User’s Toolkit responds to a need for specific and practical implementation guidance revealed from the experience of the countries that have already undertaken a PFI assessment.

Development of the Toolkit has involved government users, co-operation with other organisations, OECD Committees with specialised expertise in the policy areas covered by the PFI and interested stakeholders.

This document offers guidance relating to the PFI chapter on Public Governance.

The PFI User’s Toolkit is purposely structured in a way that is amenable to producing a web-based publication. A web-based format allows: a flexible approach to providing updates and additions; PFI users to download the guidance only relevant to the specific PFI application being implemented; and a portal offering users more detailed resources and guidance on each PFI question. The website is accessible at www.oecd.org/investment/pfitoolkit.
Public Governance

Public governance refers to the formal and informal arrangements that determine how public decisions are made and how public actions are carried out, from the perspective of maintaining a country’s constitutional values when facing changing problems and environments. The principal elements of good governance refer to accountability, transparency, efficiency, effectiveness, responsiveness and rule of law. There are clear links between good public governance, investment and development. The greatest current challenge is to adapt public governance to social change in the global economy. Thus the evolving role of the State needs a flexible approach in the design and implementation of public governance.

Public governance is important for investors and their businesses. It helps build trust and provides rules and stability needed for planning investment in the medium and long term. It facilitates a smooth and productive interaction between the State and the general public, no longer based on rigid traditional “control and command” approaches, but on flexibility, guidance, communication and persuasion. Public governance is currently more participative and transparent. Regulatory clarity and certainty are valued by businesses and citizens. Innovative mechanisms to monitor and evaluate public management are commonly used to improve transparency and build credibility, important determinants of investment.

This chapter addresses two key dimensions of the public governance agenda relevant to investment and maximising its benefits: i) regulatory governance and the rule of law; and ii) public sector integrity, including the contribution of international co-operation. These topics are linked to others in the PFI. This chapter offers a more focused perspective on the core elements in the backdrop of performing public governance. From an OECD policy-experience perspective, the main goal is to support the assessment and analysis of policy making systems, capacities for fair compliance and their interaction with investors and economic agents. The challenge is to adapt these elements to some given policy specificities, resources availability and investment needs.

The 9 key PFI questions on Public Governance relate to:

Regulatory governance and the rule of law:
- Regulatory reform framework
- Coordination across government
- Regulatory impact analysis (RIA)
- Public consultation
- Simplifying the administrative burden
Public sector integrity:

- International standards and national legislation
- Application and enforcement
- Review mechanisms
- International initiatives
Regulatory Reform Framework

10.1. Has the government established and implemented a coherent and comprehensive regulatory reform framework, consistent with its broader development and investment strategy?

Rationale for the Question

Regulatory policy is about the process by which regulations are drafted, updated, implemented and enforced. Regulations which encourage market dynamism, innovation and competitiveness improve economic performance. The aim of regulatory reform is to increase efficiency and effectiveness and to have a better balance in delivering social and economic policies over time. Regulations which are poorly designed or weakly applied can slow business responsiveness, divert resources away from productive investments, hamper entry into markets, reduce job creation and generally discourage entrepreneurship. Nothing contributes more to investor confidence about regulation than predictability and the recognition that rules achieve their objectives. The quality of public services, which is shaped by regulation inside government as well as regulation for private sector providers, significantly influences the investment climate. From an investor’s perspective, regulatory policy should provide strong guidance and benchmarks for action by officials and set out what investors can expect from government regarding regulation.

Related PFI questions:
- Question 2.1 on an investment climate strategy
- Question 6.1 on a regulatory framework for corporate governance

Key Considerations

Regulatory governance is not a synonym for deregulation. It is about providing consistent and coherent rules for changing environments. Long-term planning in regulatory reform improves public sector efficiency, responsiveness and effectiveness, but short- and medium-term programmes with concrete objectives can nevertheless drive the pace of reform, demonstrate results and maximise accountability.

No single model for regulatory reform exists: historical, political, legal and cultural factors all play a role. Three elements are nevertheless essential to set up a coherent and comprehensive regulatory framework: policies, institutions and tools.

- Design of a coherent, comprehensive, “whole-of-government” approach to regulatory reform. A regulatory reform agenda is a dynamic, long-term, multi-disciplinary process. It requires:
  - clear timelines, targets and evaluation mechanisms;
- support at the highest political level to obtain the necessary impetus;
- explicit and measurable regulatory quality standards;
- continuous improvements in regulatory management capacity;
- a focus on both the creation of new regulation (i.e. the flow) and the review of existing regulation (i.e. the stock). Managed differently but in co-ordination, both aim at ensuring high quality regulation that meets clear policy objectives.

- Setting up regulatory institutions. Regulatory policy needs to find its place in a country’s institutional architecture (see Question 10.2). The institutional context for implanting regulatory quality is complex and remains fragmented, with particular areas of difficulty such as the relation between trade policy and domestic regulatory institutions. Approaches need to be tailored to different country contexts. All institutions with regulatory functions need to be harnessed to the regulatory quality agenda, and all parts of the administration must be included with differentiated roles (whole-of-government concept).

- Introducing the use of regulatory and policy tools for regulatory reform. Legal reforms which improve access to regulation and reduce excessive discretion of regulators and enforcers – a key source of corruption – strengthen the rule of law. The main regulatory policy tools are Regulatory Impact Assessments (see Question 10.3), public consultation (see Question 10.4) and administrative simplification (see Question 10.5). Tools to ensure systematic regulatory implementation and compliance include access to judicial review, such as fair mechanisms for appeals, and the use of accountability requirements. The distinction between developing and implementing regulations is far from clear cut since there are feedback loops which can lead to useful redesigning of regulatory frameworks.

**Policy practices to scrutinise**

These considerations suggest that the regulatory reform framework and its consistency with a broader development and investment strategy should be assessed. Three key OECD elements help to guide regulatory policy:

The [OECD Guiding Principles for Regulatory Quality and Performance](https://www.oecd.org/gov/regulatory-quality/OECD-Guiding-Principles-for-Regulatory-Quality-and-Performance.pdf), whose first principle advises countries to “adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation”, assessed against the following elements:

(i) serve clearly identified policy goals, be effective in achieving those goals, and evaluate the results of the regulatory programme; (ii) have a sound legal and empirical basis; (iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; (iv) minimise costs and market distortions; (v)
promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

The **OECD Reference Checklist for Regulatory Decision-Making** helps countries to verify that public policy is well defined and implementation effectively established. It is often incorporated into regulatory policy as a checklist for ensuring high regulatory quality:

- **Is the problem correctly defined?** The problem to be solved should be precisely stated, giving evidence of its nature and magnitude and explaining why it has arisen (identifying the incentives of affected entities).

- **Is government action justified?** Government intervention should be based on explicit evidence that it is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

- **Is regulation the best form of government action?** Regulators should carry out, early in the regulatory process, an informed comparison of various regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

- **Is there a legal basis for regulation?** Regulatory processes should be structured so that all regulatory decisions rigorously respect the “rule of law”; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.

- **What is the appropriate level (or levels) of government for this action?** Regulators should choose the most appropriate level of government to take action, or if multiple levels are involved, should design effective systems of co-ordination between levels of government.

- **Do the benefits of regulation justify the costs?** Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives and should make the estimates readily available to decision-makers. The costs of government action should be justified by its benefits before action is taken.

- **Is the distribution of effects across society transparent?** To the extent that government intervention affects income distribution and social equity, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

- **Is the regulation clear, consistent, comprehensible and accessible to users?** Regulators should assess whether rules will be understood by likely users...
and, to that end, should take steps to ensure that the text and structure of rules are as clear as possible.

- **Have all interested parties had the opportunity to present their views?** Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as businesses and trade unions, other interest groups, or other levels of government.

- **How will compliance be achieved?** Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

The **APEC-OECD Integrated Checklist on Regulatory Reform** helps governments to evaluate their own regulatory reform efforts. It has a multidisciplinary dimension including market openness and competition. Some key questions are:

(i) To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies? (ii) How strongly do political leaders and senior officials express support for regulatory reform to both the public and officials, including the explicit fostering of competition and open markets? [...] (iii) What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies? (iv) To what extent do regulation, competition and market openness policies avoid discrimination between like goods, services, or service suppliers in like circumstances, whether foreign or domestic? [...] (vi) Are the policies, laws, regulations, practices, procedures and decision making transparent, consistent, comprehensible and accessible to users both inside and outside government, and to domestic as well as foreign parties? [...] (vii) Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing? [...] (ix) Do the authorities responsible for the quality of regulation and the openness of markets to foreign firms and the competition authorities have adequate human and technical resources, to fulfil their responsibilities in a timely manner? [...] (xi) Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?

**Resources for further study**

The OECD has been a pioneer in the analysis of regulatory policy frameworks, building a solid framework of guiding principles and policy experiences, accumulated through extensive country reviews of most OECD countries as well as Brazil and Russia ([www.oecd.org/regreform](http://www.oecd.org/regreform)). The OECD has gathered regulatory quality indicators for member countries. Recent OECD publications include:


The World Bank Group and Regional Development Banks have developed regulatory reform programmes. Public Governance Indicators are available at www.govindicators.org.

Information and the policy experiences of several regulatory policy institutions in different countries are publicly available, including Australia, Canada, Denmark, Germany, Ireland, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, Poland, Switzerland, UK and US.
Co-ordination across government

10.2. What mechanisms are in place for managing and co-ordinating regulatory reform across different levels of government to ensure consistency and a transparent application of regulations and clear standards for regulatory quality?

Rationale for the question

Multi-level regulatory governance is becoming a priority in many countries. High quality regulation at a certain level of government can be compromised by poor regulatory policies and practices at other levels, adversely affecting business investment and economic performance. The most common problems that affect the relationship between the public and the private sectors are duplication, overlapping responsibility and low quality. These affect public service delivery, public perceptions, business services and activities, as well as investment and trade. Following certain principles and good practices for high quality regulation in a coherent way as well as facilitating co-ordination among regulatory institutions at different levels of government can bring improvements to the regulatory system as a whole.

Related PFI questions

Various aspects of intra-governmental cooperation and dialogue are covered in the following questions:

- Question 2.5 on IPA dialogue mechanisms
- Question 4.4 on competition policy evaluation and intra-governmental communication
- Question 9.1 on cooperation to establish infrastructure priorities

Key considerations

Applying regulatory principles and quality standards at all levels of government is fundamental to maintain economic dynamism and a country’s attractiveness. A regulatory system is by nature fragmented and needs a certain degree of co-ordination to ensure coherence and compatibility of policy objectives. Regulatory governance cuts horizontally across policy areas and often confronts traditional, unconnected and competing institutions. Some parts of government might not understand, or even actively resist, both regulatory compliance and innovation. Devolution of regulatory powers to sub- and supra-national levels of government implies that regulatory reform now involves several layers of government, especially for implementation, enforcement and compliance.

Effective co-ordination requires a clear definition of regulatory powers which avoids overlapping responsibilities, together with negotiation mechanisms to surmount decision-making divergences. All parts of central government – the executive, the legislative and the judiciary – have key roles to play in supporting the regulatory quality process. The executive, composed of line ministries, is the
most active regulator in many countries. OECD country experience suggests that
some central co-ordination and control is essential for successful regulatory
governance. Even if each regulatory institution has its own objectives and goals,
too often incentives to undertake regulatory reform are unevenly disseminated.

Officials’ capacities might vary across the government, and capacity building and
training is essential, especially in innovative regulatory environments
undertaking reforms and using performing policy tools.

When new institutional structures are set up, they usually encounter resistance
from existing structures and often have inadequate resources and authority.
Innovative institutions and co-ordination arrangements might be controversial
and find established interests hostile. This should not discourage reform. One of
the most powerful mechanisms for co-ordination is communication, both
between the State and private sector, and among government institutions. High
political support is vital, but acceptance of reform from the public as well as
within the public administration is also essential for success.

A key element to enhance communication is greater transparency. Transparency
is an essential part of all phases of the regulatory process: from the initial
formulation of regulatory proposals to the development of draft regulations,
through to implementation, enforcement, review and reform as well as the
overall management of the regulatory system. Transparency reduces the
chances of regulatory capture, facilitates enforcement, reduces uncertainty,
enhances the sense of ownership by regulation makers and users, and builds
trust in public policy by intensifying accountability.

**Policy practices to scrutinise**

An assessment of Question 10.2 calls for an examination of the following issues:

- **Co-ordinate regulatory reform at different levels of government.** Institutional co-
  ordination mechanisms derive in some cases from constitutional
  arrangements, but there are also informal co-ordination mechanisms that
  facilitate the design and implementation of regulatory policy. Some countries
  have established permanent discussion tables, ad hoc conferences or formal
  policy dialogue initiatives between the centre and lower levels to minimise
  potential conflict and to find ways to harmonise regulatory policy.

- **Integrate transparency in the regulatory process.** To facilitate communication
  and transparency and improve regulatory clarity and consistency: consult with
  interest parties, draft in plain language, simplify and codify legislation, create
  registers of existing and proposed regulation, and use ICT to disseminate
  regulatory material.

- **Manage and coordinate regulatory reform through responsible institutions.**
  Effective and credible mechanisms inside the government for managing
  regulation are indispensable. A selection of institutional mechanisms is
  provided in Box 1.
Harmonise regulations internationally. The regulatory environment where citizens and businesses operate is composed of complex layers of regulation stemming from supra-national, national and sub-national levels of government. In this area regulatory harmonisation is important and requires adequate resources.

**Box 1. Institutional mechanisms for multi-level coordination**

| **Parliaments** | • Draft primary legislation and generally delegate responsibilities for secondary legislation and regulation. |
| **Line ministries** | • Most active in making regulations (e.g. secondary legislation). |
| | • Specialist law drafting offices within line ministries increasingly help to enhance regulatory quality. |
| | • Ultimate guarantor of transparency and accountability. |
| | • Is regulation fully consistent with primary legislation? |
| | • As judicial review is often costly and time-consuming, many regulated groups, particularly SMEs and individuals, are not likely to use the judiciary to defend their rights, resulting in lower levels of compliance. |
| | • Co-ordinate, monitor regulatory quality. |
| | • Offer technical support and advice. |
| | • Associated with an effective, comprehensive regulatory policy. |
| | • Key engine of reform through advocacy at centre of government. |
| | • More effective if placed close to traditional management functions such as budgeting or presidency, rather than in line ministries tied to specific policy and regulatory functions. |
| | • A careful balance is needed: too much concentration of responsibility, authority and expertise in one place may undermine interest, commitment and responsibility in other parts of government; too little power and the body will be ineffective. |
| | • [Regulatory quality oversight bodies in OECD countries](pp. 63-67) |
| | • Involved at all stages of the regulatory process but commonly participate early on to assist in defining positions and options. |
| | • Depending on their status, authority and position in the decision process, they can greatly influence final decisions (building consensus), or merely be one of many information sources (providing expertise). |
| | • Tasks mainly involve drafting and reviewing proposals, |
or reviewing existing regulation, as well as policy planning.

- Involve members from outside of government.
- Can identify priorities, propose specific reforms and advocate for regulatory quality.
- Neutral regulatory oversight of liberalised and privatised sectors.
- Prudential oversight of competitive markets.
- Should operate under the same disciplines as other rule-makers when making rules or interpreting them.
- Should be competent, accountable, transparent, accessible and capable of resisting capture by interest groups, while being responsive to general political priorities.

These considerations suggest the need to assess the mechanisms for co-ordinating regulatory governance in a complex government structure, ensuring consistency and transparency in the application of regulations, including:

1. formal or informal mechanisms for co-ordinating regulatory development and its reform. It is important to verify if the government has designed and endorsed clear standards for regulatory quality and confirm that the mechanisms comply with these standards. The effectiveness of the co-ordination mechanisms and the degree to which all relevant stakeholders are involved should be assessed. This should be analysed at both the central, and the local and the supranational levels. International law validity, international treaties and harmonisation mechanisms for regulation are essential elements for this area.

2. mechanisms for transparency, especially if evaluation processes are used to ensure a well-functioning regulatory system (see transparency tools under Question 10.4). This might include a detailed list of any clear regulatory quality standards formalised and used by the government, including principles, manuals or toolkits. The use of regulatory and policy tools (not included among the tools detailed in the next three sections), as for example plain language drafting requirements. To complete the assessment, any indicators related to regulatory institutions to map the institutional situation, such as time series of conflict resolution, perception surveys, human and financial resources allocated, and the evaluation of policies should be collected.
Resources for further study


The European Union is a prime example of multilevel regulatory governance, with the European Commission playing a leading role in designing, implementing and promoting a flexible regulatory framework (http://ec.europa.eu/enterprise/regulation).
Regulatory impact analysis (RIA)

10.3. To what extent are regulatory impact assessments used to evaluate the consequences of economic regulations on the investment environment? Are the results of these assessments made public on a timely basis?

Rationale for the question

Regulatory Impact Analysis (RIA) is a policy tool widely used in OECD countries. RIA examines and measures the likely benefits, costs and effects of new or changed regulations. It provides decision-makers with valuable empirical data and a comprehensive framework to assess options and the possible economic, social and environmental consequences of their decisions. RIA is used to define problems and to ensure that government action is justified and appropriate. A poor understanding of the problems at hand, or of the side effects of government action, can undermine regulatory efforts and result in regulatory failures. Many countries rely on RIAs to avoid regulations that impose unnecessary restrictions on investment. In the absence of a requirement to assess the impacts of a proposed regulation on market openness (or indeed an explicit requirement to select a regulatory approach based on market openness considerations), RIAs offer a potentially useful tool for considering the impacts of regulation on investment decisions.

Related PFI questions

Various aspects of cost-benefit analyses are discussed in the following questions:

- Question 1.6 on discrimination against foreign investors
- Question 2.6 on investment incentives
- Question 3.4 on targeted trade policies
- Question 4.5 on industrial policies

Key considerations

RIAs are applied differently in each regulatory system, depending on policy priorities and context. There are, however, certain basic elements that should be part of a complete process of impact analysis:

- Define the policy context and objectives and identify the problem that triggers action by government.
- Identify and define all possible regulatory and non-regulatory options that could achieve the policy objective, including doing nothing.
- Identify and quantify costs, benefits and distributional effects for the options considered.
- Design enforcement and compliance strategies for each option, including an evaluation of their effectiveness and efficiency.
- Develop monitoring mechanisms to evaluate the success of the policy proposal in achieving its objectives and feed that information into the development of future regulatory responses. Prior to evaluation, RIA should assess the impact of non-compliance.

- Consult the public systematically to provide the opportunity for all stakeholders to participate in the regulatory process. This provides important information on the costs and benefits of alternatives, including their effectiveness.

The OECD has developed 10 good practices for RIA that might provide a baseline reference. They should not be interpreted as guidelines for a unique model of RIA but rather as a flexible approach that must be adapted to the specificities and needs of each regulatory system.

- **Maximise political commitment to RIA.** Reform principles and the use of RIA should be endorsed at the highest levels of government in a broad context of regulatory reform. RIA should be supported by clear ministerial accountability for compliance.

- **Allocate responsibilities for RIA programme elements carefully.** Locating responsibility for RIA with regulators improves “ownership” and integration into decision-making. A central body is needed to oversee and assess the RIA process and ensure consistency, credibility and quality (as discussed in the previous section).

- **Train the regulators.** A regulator is a person or an organisation controlling the content of regulation. Formal and properly designed training builds the necessary skills to do high quality RIA. The training and development of RIA should be supported by guidelines.

- **Use a consistent but flexible analytical method.** Analytical methods can vary as long as RIA identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses. Mandatory guidelines should be issued to maximise consistency. The best analytical methods provide little benefit if the RIA system design is inadequate.

- **Develop and implement data collection strategies.** Data quality is essential to effective analysis. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints. The goal is to maximise objectivity and comparability of data and analysis. But even in cases when information is scarce and data not easily available, RIA might nevertheless be very useful for policy makers.

- **Target RIA efforts.** Resources should be applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes (screening RIA to allocate resources wisely). This should be done in a realistic manner, after prior assessment of available resources for RIA and establishing clear priorities in advance.
Integrate RIA with the policy-making process, beginning as early as possible. Regulators should see RIA insights as integral to policy decisions, rather than as another bureaucratic “add-on” for external consumption. Excessive routine has been found to hamper the quality of results.

Communicate the results. Results of RIA must be communicated clearly with concrete implications and options explicitly identified.

Involve the public extensively. Effectively including this tool in the regulatory processes requires general acceptance within the government and from the private sector. Clear incentives for developing RIA should be put in place: rewarding systems, promoting simplification and improvement of the RIA process, training programmes, and support to professional staff development. Inputs from outsiders improve the quality of analysis by clearly manifesting concrete benefits or costs (see Question 10.4.).

Apply RIA to existing, as well as new, regulation.

Policy practices to scrutinise

The following elements might be employed to assess how RIA helps to understand better the consequences of economic regulation on investment:

- Are there methods to assess regulatory proposals from a legal, social and economic perspective? Do they include the main elements explained above and the 10 good practices (including the use of clear guidelines and oversight mechanisms)?
- Which issues are included in the analysis (impact on businesses, environment, social equality, etc)? Is the impact on investment one of them?
- Who is responsible and who is involved in undertaking these assessments?
- Are there any supervision mechanisms to ensure quality standards?
- Are technical assistance and support provided through the process?
- Is public consultation part of these assessments?
- Are there evaluation mechanisms to determine if the assessments were used during the policy making process?

Resources for further study

The OECD has been a pioneer in the field of regulatory reform, including in developing a knowledge framework for RIA (www.oecd.org/regreform). This work is reflected in the following publications:

- Regulatory Impact Analysis: Best Practices in OECD Countries (1997);
- Regulatory Impact Analysis (RIA) Inventory (2004);
- RIA in OECD Countries and Challenges for Developing Countries (2005); and
- **Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers** (2007) provides a wealth of information on RIAs, including preconditions for introducing them, designing the RIA framework and preparing for implementation. Given the potential capacity constraints of countries and a variety of conditions, the objective of this publication is not to specify how a RIA must be undertaken but to raise issues that an analyst may need to address to build a framework to conduct RIA. The publication is a living document which will evolve as more evidence is gathered on how emerging and developing countries introduce the use of RIA and consolidate a RIA system.

The **European Network for Better Regulation** aims to expand and disseminate the current knowledge of regulatory processes as well as the degree and mode of implementation of impact assessment procedures in EU member states. ENBR is developing a database of impact assessments in EU member countries.
Public consultation

10.4. What public consultation mechanisms and procedures, including prior notification, have been established to improve regulatory quality, thereby enhancing the investment environment? Are the consultation mechanisms open to all concerned stakeholders?

Rationale for the question

Laws and regulations should be developed in an open and transparent fashion, with appropriate parliamentary control and procedures for effective and timely inputs from interested national and foreign parties. This should include potential domestic and foreign investors as well as affected business, trade unions, other civil society, wider interest groups and other levels of government. Public consultation helps to identify a problem, assess the need for government action and select the best option available. It enhances regulatory quality, and indirectly, improves the investment environment by i) bringing into the discussion the expertise, perspectives and ideas of those directly affected; ii) helping regulators to balance opposing interests; iii) identifying unintended effects and practical problems; iv) providing a quality check on the administration's assessment of costs and benefits; and v) identifying interactions between regulations from various parts of government.

On the one hand, consultation helps to ensure that the affected parties understand the nature of regulation, why it is needed and what is expected from them. On the other hand, it also offers the possibility to the public to affect the regulatory process. Both elements make consultation a tool to enhance voluntary compliance and reduce reliance on enforcement and sanctions. Regulatory stability and rationality help create accessible markets for investors.

Certain challenges in public consultation must be addressed in order to avoid failures: i) the quality of information must be carefully managed and assessed, ii) to build legitimacy, consultation needs open and accessible procedures, which would imply increasing transparency when deciding who and when to consult, and ensuring access to outsiders and less organised stakeholders, especially in rapidly evolving societies with changing interests; iii) consultation capture by powerful interests must be avoided. In addition, the way comments are dealt with by government determines the credibility of the process, and low levels of credibility, certainty and regulatory quality usually scare away investors.

Related PFI questions:
- Question 2.6 on consultations with investors
- Question 3.2 on consultations on planned changes to trade policies
**Key considerations**

Best practices in public consultation are highly contextual, selecting different forms of consultation depends on the concerned regulation and the stakeholders affected. The main forms and tools available for public consultation should be used in the right combination successfully to improve regulatory quality:

**Types of public consultation:**

- **Notification:** Communicating information on regulatory decisions to the public is a key building block of the rule of law. It is a one-way process of communication in which the public is treated as a passive consumer of government information. Notification does not, by itself, constitute consultation but can be a first step. *Prior notification* allows stakeholders the time to prepare themselves for upcoming regulatory measures and to be able better to comply with existing regulation.

- **Consultation** involves actively seeking the opinions of interested and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation.

- **Participation** is the active involvement of interest groups in the formulation of regulatory objectives, policies and approaches or in the drafting of regulatory texts. Participation usually facilitates implementation and improves compliance, consensus and political support. Governments are likely to offer stakeholders a role in regulatory development, implementation or enforcement in circumstances in which they wish to increase the sense of “ownership” of, or commitment to, the regulations beyond what is likely to be achieved via a purely consultative approach.

**Tools for public consultation.** ICT has multiplied their potential and reach.

- **Informal consultation** includes all forms of discretionary, *ad hoc* and non-standardised contacts between regulators and interest groups. It takes many forms, from phone-calls to letters to informal meetings, and occurs at all stages of the regulatory process. The key purpose is to collect information from interested parties, but informal consultation can also involve tacit agreements on the content of proposed regulations.

- **Circulation of regulatory proposals for public comment** is a relatively inexpensive way to solicit views from selected stakeholders and is likely to induce affected parties to provide information. Furthermore, it is fairly flexible in terms of timing, scope and form of responses and hence is among the most widely used forms of consultation. This procedure is generally more systematic and structured than informal consultation. The negative side of this procedure is that not all affected stakeholders are necessarily included, especially the less organised ones.
- Public notice-and-comment is more open and inclusive and usually more structured and formal. As there is public notice, all interested parties have the opportunity to become aware of the regulatory proposal and are thus able to comment. There is usually a standard set of background information, including a draft of the regulatory proposal, discussion of policy objectives and the problem being addressed, often an impact assessment of the proposal and, possibly, of alternative solutions. This information can greatly increase the ability of the general public to participate effectively in the process. Participation might be minimal except for a few controversial proposals. The right communication channels should be adapted to reach potentially concerned groups.

- Hearings are public meetings on particular regulatory proposals at which interested parties and groups can comment in person. Regulatory policy makers may also ask interest groups to submit written information and data at the meeting. A hearing is an infrequent and independent procedure, usually supplementing other consultation procedures. Public meetings provide face-to-face contact in which dialogue can take place between regulators and affected parties and among interest groups themselves. Key disadvantages are time and place constraints and the risk of unfocused discussions.

- Advisory bodies usually offer technical advice or bring about general consensus on regulatory proposals (see Question 10.2).

Policy practices to scrutinise

The following elements are useful to assess how public consultation is actually improving regulatory quality, thereby enhancing the investment environment:

- The fundamental assessment should analyse all public consultation types and mechanisms available and applied by regulatory authorities. Which are the key elements they consider when choosing one or the other? To have a good idea of their application, detailed accountability of public consultation processes should be gathered, including notification, consultation and participation. These figures should include a reference to the percentage of existing and new regulations consulted. Effective means of communication should be defined, including open websites, official gazettes and other publications, and any communication channel open to citizens.

- Quality consultation mechanisms should facilitate the inclusion of all interested stakeholders in order to obtain better grounded policy. Policy debate should be encouraged as part of the regulatory making process. How open are existing consultation mechanisms? Are there any evaluation mechanisms for the effectiveness of public consultation? Are all parties consulted? Are consultations restricted in terms of time, space and content? If so, why?
Resources for further study

- The OECD has worked extensively on public participation in policy making. A key reference on how to develop public consultation is the publication *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making*. The Handbook is a practitioner’s guide designed for use by government officials and offers a practical road map for building robust frameworks for informing, consulting and engaging citizens during policy-making. It recognises the great diversity of country contexts, objectives and measures in strengthening government-citizen relations and hence offers no prescriptions or ready-made solutions. Rather, it seeks to clarify the key issues and decisions faced by government officials when designing and implementing measures to ensure access to information, opportunities for consultation and public participation in policy-making.

- A good starting reference to public consultation is the European Commission website on its relations with civil society ([http://ec.europa.eu/civil_society](http://ec.europa.eu/civil_society)).
Simplifying the administrative burden

10.5. To what extent are the administrative burdens on investors measured and quantified? What government procedures exist to identify and to reduce unnecessary administrative burdens, including those on investors? How widely are information and communication technologies used to promote administrative simplification, quality services, transparency and accountability?

Rationale for the question

Administrative simplification is the most commonly used regulatory reform tool. It aims at reducing and streamlining government formalities and paperwork – the most visible component of which is often permits and licences. Evidence from many countries suggests that the administrative burden imposed on businesses is significant, with small-to medium-sized enterprises (SMEs) particularly affected. The informal economy often reflects administrative burdens that businesses, especially SMEs, cannot meet. The right level of regulation, including attention to compliance costs when regulations are designed (through the RIA process), can help remove incentives for informal economic activity, with benefits for government, workers, and investors. It is also important to consider the cumulative effect of all the regulations to which enterprises are subject, not just those that have been introduced recently. Increasingly, governments are making use of information and communication technologies as a means of reducing administrative burdens. Excessive red tape adds to business costs, can impede market entry and lower competitive pressures (also see the chapter on Competition Policy) and reduces the incentive to innovate. In addition, it creates uncertainty that can disrupt business planning and hinder the ability of businesses to respond quickly to new market opportunities. Ultimately, this discourages new investment by both domestic and foreign firms and weakens economic performance.

Related PFI questions:

- Question 1.1 on investment laws and regulations not imposing unnecessary burdens
- Question 2.4 on streamlining administrative procedures
- Question 3.1 on administrative barriers to trade

Key considerations

Horizontal and multi-level co-ordination is needed within government to ease requirements and resource constraints to comply with administrative procedures. A single business must comply with requirements issued by different public institutions. The role of the government is to ensure that this compliance is feasible and simplified so normal business activity is not overloaded with additional and unnecessary responsibilities. Despite clear
benefits, cutting red tape may encounter resistance from created interests inside and outside administration. Strong political support, solid communication strategies and clear and transparent measurement of benefits and costs can help overcoming these difficulties.

The following elements should be considered:

- **Process re-engineering** is based on the review of information requirements for government formalities, their redesign and simplification to optimise them, reduce their number and the burdens they impose on business and citizens. This process aims at facilitating compliance. An efficient approach should make inspection and oversight more targeted, reducing unproductive random inspections and concentrating the use of government resources.

- One-stop shops are designed to promote interaction between government and the general public, and less commonly within government administration, with as few contact points as possible. The aim is to save resources in the provision of services. They serve as a focal point to provide information, issue or accept notifications, formularies and obtain licenses and other requisites. They are also referred to as “single window” or “service counter”.

- **Silence-is-consent/denial** is a tacit mechanism for approval of applications once a fixed period of time expires. It can facilitate simple processes that have low levels of risk. This method improves efficiency of administrative procedures as well as frees government resources.

- **E-government** (electronic-government) is not only about electronic dissemination of documents. It also offers great possibilities in improving coherent and efficient regulatory interactions between government, businesses and citizens. Increasingly, governments are using ICT to reduce red tape. The main e-tools available are: electronic procedures, electronic data filing, electronic one-stop shops and e-procurement. Intensive use of ICT applied to administrative simplification should be done thoughtfully and after a re-engineering process of administrative work and organisation to complete a coherent strategy.

- The **Standard Cost Model (SCM)** provides a simplified, consistent method for estimating the administrative costs imposed on business by government. The SCM is currently the most accepted methodology and it has helped authorities in the estimation of red tape, providing a justification for administrative simplification strategies and a clear picture of the benefits provided by these policies to citizens, businesses and government. This methodology is costly to develop and, in some cases, its results might fail to meet the proposed objectives. Countries have usually worked on cutting red tape for many years prior to using this model.
**Policy practices to scrutinise**

In assessing administrative simplification strategies to reduce burdens on the economy in general, and on investors in particular, the following questions should be considered:

- Is the government designing or applying a programme to reduce administrative burdens? Does this programme have quantitative and qualitative targets? What are they? Are there any surveys measuring perceptions on red tape and on government’s strategies for administrative simplification? Is there an established system to measure administrative burdens? (The size of the informal economy often reflects administrative burdens imposed on business) What kind of accountability mechanisms are in place to monitor the programme(s) over time?

- How is government streamlining administrative procedures? Are there one-stop shops established to reduce red tape? What are their responsibilities, do they provide information, accept notification and issue licences and permits? Is ICT used in the programme to promote administrative simplification, quality services, transparency and accountability? Is the “silence is consent/denial” rule systematically applied?

- Is there a reallocation of powers and responsibilities taking place among institutions and levels of government (supra-national, national and sub-national)?

**Resources for further study**

- The OECD has been working on administrative simplification for many years. There are three key recent publications on this: *Cutting Red Tape. National Strategies for Administrative Simplification* (2006), *Cutting Red Tape. Comparing Administrative Burdens across Countries* (2006), and *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries* (2003). National reviews of the Netherlands and Portugal are available.

- The World Bank *Doing Business* project measures business regulations and their enforcement across 181 countries and selected cities at the sub-national and regional level ([www.doingbusiness.org](http://www.doingbusiness.org)).

- The SCM (Standard Cost Model) Network, formed in 2003 by some European countries, is an informal group working in the area of administrative burdens to share developments and foresee future advances. ([www.administrative-burdens.com](http://www.administrative-burdens.com)).
International standards and national legislation

10.6 To what extent have international anti-corruption and integrity standards been implemented in national legislation and regulations? Do penal, administrative and civil law provisions provide an effective legislative and regulatory framework for fighting corruption, including bribe solicitation and extortion as well as promoting integrity, thereby reducing uncertainty and improving business conditions for all investors?

Rationale for the question

Corruption distorts competition and adds uncertainty to business operations, both of which can reduce levels of foreign and domestic investment and hence economic development. To address these concerns, governments should consider enacting provisions, mostly in criminal law, but also in the civil and administrative regulations, to prevent and sanction corruption of domestic public officials. Over the past decade, many governments have developed standards of conduct to address conflicts between public officials’ private interests and their public duties. The original focus was on traditional sources of influence, such as gifts or hospitality offered to public officials, as well as personal or family relationships. With increased co-operation between the public and private sectors, many countries have also established standards of conduct for tackling other potential conflicts of interest, such as business interests (e.g. in the form of partnerships, shareholdings), affiliations with other organisations and post-public employment.

Policy practices to scrutinise

The first question relates to the implementation of international standards. The second concerns the actual legislation and regulations at the national level to combat corruption, including those enacted or made to implement international standards. Given the close relationship between the two questions, they should be assessed at the same time. Regarding the implementation of international standards, what national laws and regulations exist on anti-corruption? To what extent do these implement international anti-corruption and integrity standards? Does the law prohibit, for example, the bribery by corporations of public officials for the purpose of obtaining or retaining business or other improper advantages? Is the domestic anti-corruption framework effective in combating corruption and promoting integrity?

To assess the implementation of international standards (see Question 10.9), the following criteria and indicators should be considered:

- Legislative provisions which prohibit public officials, whether directly or through intermediaries, from soliciting or receiving any undue pecuniary or other advantage or from engaging in extortion. These provisions might be established as an offence within the general penal law or as part of specific legislation on anti-corruption and integrity. They might relate to domestic or
foreign bribery or both. Many anti-corruption conventions require parties to establish offences. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions includes Agreed Common Elements of Criminal Legislation and Related Action.

- Legislative provisions making it a criminal offence for legal persons (whether individuals or corporate entities) “intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”. This is the definition of the foreign bribery offence, as set out in Article 1(1) of the OECD Convention on Combating Bribery. Where this offence can be established by building on pre-existing domestic bribery offences, this has the advantage of being able to refer to case law interpreting applicable terminology, such as: intent; the offer, promise or giving of a bribe; undue pecuniary or other advantage; or performance of official duties.

- Definitions of “public official” and “foreign public official” can draw on international standards. The OECD Convention on Combating Bribery, for example, defines this term as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation”.

- The OECD Convention permits only two exceptions to the offence of bribing a foreign public official. The first (Commentary 8) applies where the advantage was permitted or required by written law or regulation (including case law) of the foreign public official’s country. The second (Commentary 9) applies for “small facilitation payments” in very specific circumstances, i.e. where they are not made to obtain or retain business or other improper advantage. Countries that choose to adopt either of these two exceptions should ensure that they do not exceed the strict limits of the exceptions, which would create a gap in their implementation of the Convention.

- Establishing an effective framework to combat corruption also requires the creation of appropriate sanctions for bribery offences. Sanctions should involve effective, proportionate and dissuasive criminal penalties, which should be measured according to the particular facts of each case. For natural persons, this should include sufficiently long periods of imprisonment to permit mutual legal assistance and extradition. If criminal responsibility is not applicable to legal persons under the legal system of a country, proportionate and dissuasive non-criminal sanctions should be applicable, including monetary sanctions. This might include, for example, exclusion from entitlement to public benefits or aid; temporary or permanent
disqualification from participation in public procurement or from the practice of other commercial activities; being placed under judicial supervision; and a judicial winding-up order. With all bribery offences, sanctions should include the seizure and confiscation of the bribe (and its proceeds) or the corresponding property value.

- Fighting effectively against corruption requires thorough and consistent investigation, prosecution and sanctioning. Many governments have established separate **investigation and prosecution units**, with special training, facilities and expertise to equip them with effective anti-corruption capabilities. Such units should be capable of working with other law enforcement agencies, including through sharing information, and should be independent so as to avoid the possibility of political interference or influence.

- Where a **statute of limitations** restricts the period within which criminal action can be brought, this should be as long as possible. The investigation of domestic and foreign bribery offences is often complex, with allegations sometimes not surfacing until after the retirement of a public official. Furthermore, the transnational nature of many bribery cases may require mutual legal assistance which can take many months (and sometimes years) to obtain. Since the length of statutes of limitation normally depends on the maximum penalty applicable to the particular offence, it is important to ensure that corruption offences attract high penalties. Given the seriousness of corruption offences, some countries such as Canada and the United Kingdom impose no statute of limitations for the offence of bribing a foreign public official.

- Laws and regulations disallowing the **tax deductibility of bribes** are part of an effective framework for fighting corruption by making the proscription against bribery more visible. Tax authorities can play a key role in detecting and deterring corruption. Tax auditors and relevant officials need to be aware that bribes are not deductible, and consideration should be given to obliging them to report any bribes they identify to management, corporate monitoring bodies and law-enforcement authorities.

- Where **bank secrecy laws** exist, governments should seriously consider lifting or creating an exception to bank secrecy in the context of the investigation of bribery offences. Similar exceptions exist in many countries as a result of party status to the **International Convention for the Suppression of the Financing of Terrorism** and anti-money-laundering obligations (such as those under the Financial Action Task Force).

- Identifying situations where **conflicts of interest** might arise helps to promote integrity. Legislation and regulations should provide clear and realistic descriptions of what circumstances and relationships can lead to a conflict of interest. Such rules should target situations in which the private interests and affiliations of a public official might, or do, conflict with the
proper performance of official duties. This might relate to public/private partnerships, self-regulation, exchanges of personnel, and sponsorships. Rules should be supplemented by organisational strategies and practices which are capable of identifying the variety of conflict of interest situations. Clear rules on what is expected of public officials in dealing with conflicts of interest must be established. The OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service provides useful tools for the development and implementation of an effective conflict of interest policy, as well as a Toolkit to help public officials put it into practice.

**Resources for further study**


A table of applicable sanctions in the jurisdiction of the majority of States parties to the OECD Convention on Combating Bribery is available as an Annex to the Working Group on Bribery Mid-Term Study of Phase 2 Report.
**Application and enforcement**

10.7 Do institutions and procedures ensure transparent, effective and consistent application and enforcement of laws and regulations on anti-corruption, including bribery solicitation and extortion and integrity in the public service? Have standards of conduct by public officials been established and made transparent? What measures are used to assist public officials and to ensure the expected standards are met? Are civil society organisations and the media free to scrutinize the conduct of public officials' duties? Are “whistle-blower” protections in place?

**Rationale for the question**

Many public institutions are involved in applying and enforcing laws and regulations on anti-corruption and integrity. Agency specific guidelines and practical measures (e.g. staff rotation, specific training or briefing etc.) may need to be developed to enforce anti-corruption and integrity standards in parts of the public service that are particularly exposed to corruption. Specific risk areas include law enforcement, public procurement, export credit, development assistance as well as customs and tax administration.

Codes of conduct are often developed to provide standards of conduct in a single concise document. These should be made available and adequately communicated to all public officials. Socialisation mechanisms, such as training and counseling, raise employee awareness and help develop their skills for meeting expected integrity standards in daily practice. In addition, human resource management policies should provide suitable conditions and incentives for public officials, such as basing recruitment and promotion on merit, providing an adequate remuneration and taking ethical considerations into account in recruitment and performance appraisal.

Reporting any suspicion of misconduct by public officials can be required by law and facilitated by organisational rules. Whistle blowing, the act of raising concerns about misconduct within an organisation, is a key element of good governance to ensure transparency and accountability. A range of institutions and procedures such as Ombudsman, Inspector General, complaint procedures and help desks or telephone lines could enable public officials and citizens to expose wrongdoing. Their effectiveness also depends on public confidence that people who make bona fide reports about wrongdoing receive proper protection against retaliation.

**Related PFI questions**

Transparency in rules and regulations and in their application and enforcement is a core principle of the PFI and reappears throughout the policy chapters. See in particular:

- Questions 1.1 and 1.6 on investment policies
- Question 4.1 on competition laws
- Questions 10.2 on 10.5 on public governance
Policy practices to scrutinise

These questions concern the overall framework for fighting corruption and promoting integrity. They require considering the overall criminal law system, administrative checks and balances, and the institutional means for law enforcement from an anti-corruption and integrity perspective. The criteria and indicators to examine cover a broad range of institutions and issues.

In reviewing Question 10.7 the following criteria and indicators should be examined:

- The **existence of bodies that include within their competence the fight against corruption**, including bribe solicitation and extortion. These bodies must have the necessary independence and autonomy to perform their functions, subject to checks and balances to prevent abuse, and sufficient human and financial resources to effectively apply and enforce laws and regulations on anti-corruption. Where more than one body is involved in the fight against corruption, procedures should exist for information sharing and cooperation. Inter-agency communication has proved vital in detecting bribery in public administration, with a number of countries establishing centralised co-ordination agencies to improve information sharing.

- The establishment of **codes of conduct for public officials** and subsequent dissemination and related training. These codes should be clear and transparent and be combined with strict sanctions against public officials involved in corruption. Public sector managers should likewise receive clear guidance and training on the manner in which allegations of corruption should be dealt with, including referral mechanisms to law enforcement authorities, procedures for the protection of informants, and the means for dealing with an official against whom allegations have been made. Codes of conduct might take the form of government-wide documents or involve a series of subject-specific codes. In either case, the content of these codes should take into account areas of public service which are particularly at risk of receiving or soliciting bribes or of resorting to extortion, including law enforcement, public procurement, export credit, development assistance, and customs and tax administration.

- The **reporting by domestic officials** to superiors, prosecutors or other public authorities of instances where they or other domestic officials have been promised, offered or given a bribe by foreign nationals or companies should be facilitated. Officials should know, for example, how to report on such occurrences and how this will be dealt with. Where the bribe involves another official, sufficient safeguards should be put in place (such as whistleblowing and witness protection programmes) to ensure that reporting is not discouraged by the prospect of the reporting person being penalised in some way. Procedures might allow officials and public employees to provide anonymous information to those responsible for investigating corruption and integrity matters. Steps to treat communications
as confidential need to take into account the rights of the accused person, and the possibility that disclosure of the information might be necessary to conduct an investigation and/or prosecution. Indicators of the success of these mechanisms and of codes of conduct and public sector training can include instances of such reporting by domestic officials.

- **Reporting of promises, offers and bribes by competitors, employees or other private individuals**, including the media, should also be facilitated. Procedures might include, for example, both formal mechanisms for reporting and anonymous hot lines. Procedures should guard against malicious false reporting by competitors such as by obtaining independent verification of allegations before taking further action.

- The existence of **adequate accounting requirements, independent auditing, and internal company controls** are also essential for detecting and preventing corrupt practices. By way of example, companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts, and they should be required to maintain adequate records of the sums and the means by which money is received and spent. Likewise, auditors who discover indications of a possible illegal act of bribery should be required to report this to management and, as appropriate, to corporate monitoring bodies. Consideration should also be given to imposing a duty to report to law-enforcement authorities.

- **Sharing information** received from public officials, companies or individuals with other concerned countries contributes to the international framework of combating corruption. In complex or large-scale corruption cases, information sharing can be essential and hence should be facilitated either by direct mechanisms or by allowing sufficient flexibility within the existing system. This matter is considered further under Question 10.9.

- Effective **public awareness and assistance programmes** are essential to the successful detection and reporting of corruption and practices lacking integrity. These include activities (e.g. public campaigns) and information (e.g. easily accessible websites). Private sector awareness of laws and regulations on anti-corruption is essential and it may be desirable to establish, or assist professional bodies in carrying out, training programmes for lawyers, accountants, auditors and others. Awareness of both prohibited conduct and mechanisms for detecting, reporting and investigating corrupt and dishonest conduct should be enhanced. Whistleblower and witness protection programmes should be publicised through public awareness campaigns, online information and public and private sector training. Although indicators of public awareness may be difficult to ascertain, a complete lack of referrals of suspicious conduct may be indicative of a corresponding lack of awareness or understanding, rather than an absence of corrupt practices.

- As part of private sector awareness, individuals and companies might be permitted to submit a **request for an opinion** (based on the facts of a
prospective transaction) as to whether the transaction would constitute an offence of bribing a public official. Such assistance should not create undue exceptions to corruption offences or otherwise undermine anti-corruption and integrity laws and regulations. Private initiatives to develop corporate codes of conduct or compliance schemes to enhance internal company controls and militate against companies or their employees engaging in corrupt practices might also receive assistance. The OECD Guidelines for Multinational Enterprises and the OECD Principles on Corporate Governance, as they relate to issues of bribery, can provide useful guidance in this regard.

**Resources for further study**

Reference can be made to the institutional structure of individual countries, such as that in the United States for example (see the report *Organizations, Transparency, and the Fight against Corruption: Institutions of Integrity in the United States*). Consideration of such issues within a number of OECD Anti-Bribery Convention States parties is made part B(2) of the OECD Working Group on Bribery Mid-Term Study of Phase 2 report.

The Revised Recommendation of the OECD Council, adopted on 23 May 1997, sets out recommendations (Recommendation V) on Accounting Requirements, External Audit and Internal Company Controls.
**Review mechanisms**

10.8 Do review mechanisms exist to assess the performance of laws and regulations on anti-corruption and integrity?

**Rationale for the question**

Independent review is essential to help enforce laws and regulations on anti-corruption and integrity. In general, the legislative branch undertakes reviews of public service activities. Other common types of evaluation range from external independent investigation by the Ombudsman or the Inspector General to specific judicial or ethics reviews. In addition, monitoring compliance may be based on internal controls, widely used to detect individual irregularities and systemic failures and is likely to be accompanied by independent scrutiny which makes public officials accountable to the public for their actions. Transparency in government operations ensures accountability, helps combat corruption and promotes democratic participation by informing and involving citizens. In recent years, public access to official information has significantly improved, in particular with the development of freedom of information legislation and the growing use of electronic procedures. Coupled with an increasingly active media and well-organised interest groups, this has led to more vigilant public scrutiny over public officials’ behaviour.

**Related PFI questions:**

Periodic reviews are another core principle of the PFI. See, in particular, the following questions:

- Question 1.5, 1.6 and 1.7 on reviews of various aspects of investment policies
- Question 2.3 on performance reviews of the IPA
- Question 3.4 on reviews of trade policies
- Question 6.8 on reviews on corporate governance
- Question 8.1 on the review of the human resource development framework

**Policy practices to scrutinise**

The question focuses upon domestic mechanisms capable of assessing the performance of laws and regulations on anti-corruption and integrity. Which bodies or office holders hold such functions and what is their level of independence, their competence over such matters and the outcome of any assessments?

This requires an examination of the following criteria and indicators:

- The **existence of review mechanisms** may depend upon the constitutional framework, such as the existence and role of parliamentary committees, corporate governance commissions or public ombudsmen. Judicial decisions
on corruption and integrity cases can be useful indicators of the clarity of applicable laws and regulations and the frequency of their use. This information needs to be supplemented, however, by other independent mechanisms to assess the operation and implementation of anti-corruption and integrity legislation. These might include ‘passive’ reporting requirements for bodies that play a role in fighting against corruption, such as the submission of annual written reports to parliament. More ‘active’ mechanisms could include the establishment of independent officers capable of overseeing and investigating the conduct and overall operation of bodies responsible for fighting corruption, so long as this oversight does not interfere with the independence of such bodies.

- **Review mechanisms** could also consider the following: prosecutions and any difficulties experienced in achieving convictions; penalties imposed upon conviction, as well as the confiscation of bribes and their proceeds, and whether these have met the legislators’ intentions; the application of pre-trial search and seizure procedures or mechanisms for pre-trial confiscation; the existence and nature of auditor and financial institution reports on threshold or suspicious transactions; the nature and operation of internal company controls; or the number and type of tax claims made in circumstances where claims have been determined to amount to bribes.

- Assessing the performance of laws and regulations on anti-corruption and integrity **should not be restricted to action by the State**. The media, non-governmental organisations and individuals can help to identify deficiencies in the performance of laws and regulations or ways in which they might be improved. To take advantage of these insights, regular review mechanisms could include, for example, the opportunity for submissions by the public to be provided to a parliamentary review committee.
International initiatives

10.9 Is the government a party to international initiatives aimed at fighting corruption and improving public sector integrity? What mechanisms are in place to ensure timely and effective implementation of anti-corruption conventions? Do these mechanisms monitor the application and enforcement of the anti-corruption laws implementing the conventions?

Rationale for the question

Corruption cannot be addressed at the domestic level alone. Only concerted, internationally coordinated action can contribute meaningfully to stamping it out. Governments have consequently adopted a number of international and regional anti-corruption instruments. Although these instruments may have different focuses, they generally aim at ensuring a holistic approach that encompasses preventive measures as well as repressive provisions to fight domestic and foreign corruption. Moreover, they contain provisions regarding mutual legal assistance, which facilitate detecting, investigating and sanctioning corruption.

Related PFI questions:
International initiatives and agreements reappear throughout the PFI. See, for example, the following:
- Questions 1.5 – 1.8 on investment agreements and instruments
- Question 3.3 on international trade agreements
- Question 7.6 on international principles of responsible business conduct

Policy practices to scrutinise

What treaties and other initiatives on anti-corruption and integrity is the government party to? Are there mechanisms to ensure effective implementation and compliance with them? Question 10.8 addressed the issue of mechanisms to assess the performance of laws and regulations on anti-corruption and integrity. The current question also considers review mechanisms, but in the context of assessing the application and enforcement of laws and regulations which implement treaties on anti-corruption to which the government is a party. While there will be an overlap between these two questions, the assessment criteria listed below are more specific than those identified for Question 10.8.

The following criteria and indicators should be examined:

- **Party status** to international and applicable regional initiatives on anti-corruption and public sector integrity requires identification of conventions and related initiatives. Anti-corruption and integrity initiatives can include documents or procedures established under treaties or more informal but
equally useful guidelines established by entities interested in combating corruption and promoting public sector integrity. International developments on the subject should be regularly reviewed and adherence should be considered.

- **Indicators of effective implementation** can include domestic cases (from the time of allegation through to acquittal or conviction and sentencing) that fall within the scope of the requirements of treaties to which the government is a party. Where domestic bribery cases have not fallen within these parameters, this may be because such cases did not arise, the laws and regulations under which the conventions are implemented were not sufficient, or undue discretion was applied at the political or prosecutorial level. Judicial decisions or comments on anti-corruption law and practice may likewise be useful indicators of implementation and application, such as the suitability of offence provisions or the means by which institutions charged with applying treaty obligations are operating. If, for example, prosecutions often fail to establish certain elements of anti-corruption and integrity offences, this might reflect either inadequate legislation or poor investigative practices. Analysis of the patterns of sentencing for corruption cases might also be useful in determining whether the anti-corruption framework implements requirements, such as in the OECD Convention, for effective, proportionate and dissuasive criminal penalties.

- **External indicators of performance** are also useful. An awareness of international rankings and reasons for these can be helpful, including the various tools developed by Transparency International and other non-governmental organisations.

- A common element of international and regional conventions and other initiatives on anti-corruption involves **co-operation between States**. Given the transnational nature of bribery of foreign public officials and the susceptibility of international transactions to corruption, consultation and co-operation with appropriate authorities in other countries, whether spontaneously or upon request, is important. The compatibility of existing agreements and arrangements for mutual international legal assistance should be examined and the government should consider entering into new agreements if necessary. The **Agreed Common Elements of Criminal Legislation and Related Action** (Annex to the Revised Recommendations of the OECD Council, adopted 23 May 1997) can facilitate cooperation, including extradition, since it is only through the existence of common elements in the criminal legislation of both States involved that requests for extradition can proceed, or legal assistance rendered.

  - **Internal procedures** must exist to allow for mutual legal assistance and extradition, including on how government departments are to respond to mutual legal assistance requests or the conditions under which the courts will issue a rendition
order in the context of an extradition request. Consideration of reasons for failed requests for rendition or legal assistance can provide useful indicators of inadequacies in such procedures or in the law including, for example, evidentiary thresholds required before assistance or extradition can be granted.

- **Monitoring the application and enforcement of anti-corruption law and practice** can be achieved internally (see PFI question 10.8) and externally. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, for example, provides for systematic follow-up to monitor and promote the full implementation of the Convention. This is put in place through a system of peer reviews, through which examination teams (comprising examiners from two States parties) undertake a review of another State party’s law and practice to determine the level of compliance with the Convention and what steps should be taken to achieve full or better compliance. Mutual evaluations can therefore be very useful in learning from others’ experiences and suggestions. The Council of Europe Group of States against Corruption (GRECO) undertakes similar evaluations.

**Resources for further study**

- Treaties on anti-corruption include: the OECD Convention on Combating Bribery of Foreign Public Officials; the United Nations Convention against Corruption; the African Union Convention on Preventing and Combating Corruption; the Council of Europe Criminal Law Convention on Corruption (and its Additional Protocol); and the Inter-America Convention against Corruption. Each of these treaties adopts different procedures for implementation and review. The OECD Convention, for example, undertakes periodic peer reviews and is accompanied by commentaries and recommendations on the Convention.

- Further initiatives on anti-corruption include: the United Nations Global Programme against Corruption (undertaking technical assistance, international coordination, and policy development and research); the World Bank Public Sector Governance Programme (which has a thematic group on anti-corruption); the Asian Development Bank (ADB) Governance and Anticorruption Action Plan, together with the joint ADB/OECD Anti-Corruption Initiative for Asia-Pacific; the OECD Development Assistance Sub-Committee on Governance; various research and advisory papers by the International Monetary Fund on corruption and its impact, including *How Corruption in Public Investment Hurts Growth*; and the World Trade Organization Working Group on Transparency.