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How to Regulate Better? Regulation Reform in EU and the US Economy.

Every contemporary economics textbook contains a chapter analyzing various forms of market imperfections and methods of addressing them by the government. Most textbooks also analyze cases where the government cannot control its own actions and fails in regulation. Such failures are believed to be much more harmful to the economic development than the market imperfection which a given regulation is to address. In that situation, two solutions are possible: for the government to refrain from any regulatory activities based on the belief that the market has a built-in efficient self-regulatory mechanism or to take good care of the quality of regulation, limiting the incidence of failures to a minimum.

The first solution exists only in theory as a model useful only to examine ideal behavior of market entities.

The second one assumes that a certain level of market regulation is necessary and improving the quality of regulation is a good method of speeding up economic growth and prosperity. Therefore, it is necessary to search for methods of improving regulatory systems in place in particular countries. The regulatory reforms started in the 1990s follow that direction, trying to answer the question: How to regulate better?

These are accompanied by the increasingly common view among economists about a growing role of the institutional environment in the process of economic growth. Also empirical research indicates that differences in regulatory systems may be helpful to explain why some countries develop faster than others.

The analysis of such differences is used increasingly often in discussions on how to reduce the distance between the U.S. economy and those of the EU Member States.

The United States leads in rankings which rate competitiveness of the economy, it allocates a much larger portion of its revenue to scientific research than Europe, U.S. universities are more appealing for foreign students than European schools. The U.S. economy is more innovative and dynamic. All those and other examples of the American superiority over Europe are commonly known and quoted.¹ The EU's Lisbon Strategy was formulated in order to reduce the distance between Europe and the U.S. Its implementation, however, is seriously threatened. A question which arises is how important it is in this European race after the U.S. to remain persistent and consistent in reforming regulatory systems. Perhaps the utilization of U.S. experience in that regard will prove an effective way to increase European competitiveness. It is not the issue of achieving convergence of legal regimes. Differences in those regimes are the

¹ Cf.: W. Bieńkowski, „Rosnąca rola gospodarki Stanów Zjednoczonych w świecie: przyczyny i kierunek zmian”, in Amerykański model rozwoju gospodarczego. SGH 2006.

result of different legal cultures, traditions, systems of values on both sides of the Atlantic, which makes those differences permanent. What is worth following is the American model of regulatory reform management and it seems that a number of that model's components could and should be transplanted to the regulatory reform carried out within the EU.²

Upon its EU accession, Poland was incorporated in the process of transposing the European legislation and reforming the EU regulatory system. At the same time, significant changes in the regulatory system have been taking place as a result of system transformation (starting in 1989) and applied to all the economic sectors, including in particular capital markets, banking or privatization of state-owned enterprises.

The regulatory system currently in effect in Poland was thus emerging in very peculiar conditions: deep changes in legislation and the institutional environment had to be implemented within a relatively short period of time (the greatest time pressure was visible during the adjustment of Polish laws to the Community legislation), the distrust in private ownership inherited from the previous system (an entrepreneur was treated as a burdensome applicant rather than a partner) encouraged overproduction or even inflation of provisions regulating the institutional environment of business, insufficient numbers of well-prepared lawyers made the laws that were being written non-transparent and inconsistent.

A serious obstacle in drafting good legislation and implementing an efficient state model was also the highly politicized lawmaking process.

There is no doubt that the reform of economic, social and administrative regulations is extremely important for Poland and its progress will decide on the future level of civilizational development of Poland. Good implementation of the reform means not only introduction of formal rules and procedures but, mostly, capability to implement them. From that point of view, it is useful to borrow the good practice applied in other countries.

Regulatory Reform in the European Union

The Better Regulation legal regulation reform program was introduced at the level of the European Commission and Member States relatively late, in 2002, as a priority of the Lisbon Strategy (2000)³. Earlier, all the 15 Member States took part in a regulatory reform program within the OECD (1995).

The basic program objective is to simplify Community and national regulations and to reduce administrative burdens, which are particularly onerous and costly to small and medium enterprises, as well as to improve credibility of EU

² The UE Better Regulation program was adopted in 2002.

³ Communication From the Commission. Action Plan „Simplifying and Improving Regulatory Environment, COM (2002)

institutions among Community citizens. It is not the EU's intention to deregulate or limit previous efforts in the area of lawmaking.

In 2002-2007, a significant progress was achieved in implementing reform objectives. A number of documents were published concerning:

- Methods of Regulatory Impact Assessment⁴,
- Communication from the Commission on an EU common methodology for assessing administrative costs imposed by legislation⁵,
- Communication from the Commission on the outcome of the screening of legislative proposals pending before the Legislator⁶,
- Communication on the strategy for simplification of the EU regulatory environment⁷.
- First and Second Strategic Review of Better Regulation in the European Union⁸

The above documents are a good basis for the application of good regulatory principles both at the level of the European Commission and the European Parliament and of the EU Member States. What is worth noting is the fact that all the entities concerned took part in their preparation, the number of consultations organized by the Commission has been growing each year (for example, in 2005 there were 293 consultations in comparison with 37 in 2004). Increasingly often consultations are held via the Internet, which speeds up collection of comments and facilitates the process of making them available to the public.

In 2005 EC adopted a new strategy for simplification of existing legislation. A 3 year rolling programme proposed in the strategy lists 100 initiatives which foresee the repeal or modification of 222 legislative acts with successive amendments of 1,400 related regulations.⁹

In 2008 EC confirmed its political commitment to simplification by adding to its programme 53 initiatives for the period 2008-2009.

The Commission continues to screen the EU acquis, the screening process should be completed before the end of its term of office. Council and Parliament will examine jointly options for fast track procedures to remove obsolete legislation.¹⁰

To speed up the regulatory reform in Member States the EC suggested that the Better Regulation program should form part of national reports on implementation of the Lisbon Strategy program.

According to the EC, the majority (20) of Member States have and implement their own programs of regulatory reform. However, there is no

⁴ Regulatory Impact Assessment, SEC(2005)791

⁵ COM(2005)518

⁶ COM(2005)462

⁷ COM(2005)535

⁸ COM(2008)32

⁹ Report From the Commission „Better Lawmaking 2005”, SEC(2006)737, p.4.

¹⁰ Second strategic review of Better Regulation in the European Union, COM(2008)32, p.9

information on the quality of such programs, and particularly it is not known whether they are comprehensive and consistent, and actually improve the quality of legislation. Some of them probably only meet formal requirements which, for various reasons, are not put into practice.

Also non-EU states, including the United States, Canada, Australia and New Zealand, have their own regulatory programs and relatively good results. Those countries take active part in the regulatory reform initiated in 1995 by OECD and their successes had undoubtedly precipitated the European Commission's decision on setting up the Better Regulation program.

Particularly important from the point of view of the EU Lisbon Strategy implementation is the U.S. experience in carrying out regulatory reforms.

Progress of the Regulatory Reform in the United States

Much against popular beliefs, the United States is not a country with a low degree of regulation. Every year, federal government agencies issue about 4,000 new regulations¹¹.

What sets the U.S. apart among other countries is the different method of regulation, which is strictly linked to its pro-competitive approach to the economy as well as good transparency of the laws adopted, but mainly the high quality of cost and benefit analyses and alternative scenarios prepared for all major regulatory proposals. What is important is that analyses are drawn up by good specialists and the lawmaking process is public. The factor which supports the reform is the well-developed civic society. As a result, public debate over legislative drafts has a truly public character.

Also the private sector exerts pressure to accelerate public sector reforms. In the United States the economy is more liberalized than in Europe, and the private sector is particularly sensitive to any malfunction of the administration, which increases the cost of business operation. The private sector is also the source of innovative IT solutions and provides well-educated experts who are able to apply quantitative methods to analyze the impact of regulation.

The beginning of the public sector reform is usually regarded to have taken place in the 1980s when the disproportion in the quality of services between the private sector and the public sector was particularly large. The often quoted example is that of Maria Theresa who, after two years of efforts to set up a shelter for the homeless in a New York district, had to give up due to excessive bureaucracy. The adage: even the patience of saints is not enough to overcome American bureaucracy, became a motto for the proponents of fast changes.

Also in the 1980s, a strong control over government administration expenses began. Helpful in that regard proved to be the following measures:

¹¹ US Chamber of Commerce, Fighting for Your Business, 2006

- measurement of the productivity of government expenses and application of a number of procedures supporting cost cuts,
- introduction of cost control in the production of public goods and services,
- budgeting based on the performance of particular administration units¹²,
- preserving flexibility in the use of funds in various accounts, ability to use savings where they occur,
- promotion of productivity,
- the procedure for service quality management borrowed from the private sector, based on the concept of one-stop shop to take care of all the formalities necessary to set up a business and broad collaboration with citizens (social consultation mechanism, citizens' participation in making decisions on some budgetary expenses).

Greater effectiveness of the public sector is also encouraged by good cooperation of the central government administration with the local administration and civic organizations. OECD research indicates that as the economy grows so does the number of local administration officials. Central government administration seems to be burdened by bureaucracy, local officials (teachers, medical services, police) have a more direct input in improving the quality of public sector services.

Positive effects of regulatory reforms include reduction of employment levels in administration. For example, during Clinton's presidency, the number of government officials decreased by 17%, the resulting savings were used, for example, to increase the number of policemen patrolling the streets. Such a strategy certainly added popularity to the government but was also an important component of the program to improve public safety.

The introduction of innovation in administration was accompanied by a belief that such innovation must be continuous, without interruptions caused by changes in the government administration, and the experience of civil servants was treated as common public good. (Innovation is usually created by middle level employees and not by bosses). Innovation was helped by the appropriate organization where all employees of a given institution felt involved in the cost reduction process. Improvement of the quality of work of government employees was encouraged also by the application of a suitable promotion and remuneration system modeled on private sector practices (in 1996, the State of Georgia introduced a civil service recruitment process based on the recruitment policies applied by private corporations).¹³

A key role in overseeing the regulatory reform in the U.S. is played by the Office of Management and Budget. It has relatively strong powers which allow it to effectively control and coordinate the operation of 60 regulatory agencies. The Office oversees all major types of regulations except those which are

¹² Government Performance and Results Act, 1993

¹³ E. C. Karmack Government Innovation around the World. Ash Institute for Democratic Governance and Innovation, J.F.K. Kennedy School of Government, Harvard University, November. 2003

excluded from the President's authority, i.e. money supply regulation, safety of nuclear plants and certain elements of the anti-trust law. Annually, there are about 100 OMB-monitored regulations out of 4,500 new regulations adopted each year. Analysis of the impact of regulatory projects is the responsibility of a special OMB unit, OIRA (Office of Information and Regulatory Affairs) with only 25 staff who, however, are highly specialized in all areas and also use the assistance of external experts.

Adoption of new laws in the U.S. is governed by the following procedures: 1. Draft publication together with a cost and benefit analysis and an alternative regulatory scenario in the Federal Register and opening of a public debate (30-90 days), 2. Republication in the Federal Register (30 days before entry into force) together with a written rationale for all the amendments of the existing laws, after obtaining a positive opinion on the consistency of the proposed regulation with the government's economic policy, 3. Congressional evaluation. What is important is that the procedures are applied in practice and continuously improved in cooperation with independent experts from research centers. The experts are required to report their income and professional ties to avoid any conflict of interest. The public is informed on an ongoing basis about the quality of information used in the evaluation of regulations.

The reason for entrusting the regulatory reform to the OMB is, among other things, the annual cost of regulation per household; in 2001, that cost was US\$ 6,000. J.D. Graham, an OMB Director, called it an invisible tax whose amount is approximately equal to the annual budget revenue from income tax (\$ 800 billion)).¹⁴

The cost of regulation has been estimated for the past 30 years by particular regulatory agencies and the OMB. Currently, the cost arising from the obligation to apply new regulations is about \$ 1.5 billion annually while during Clinton's presidency it was \$ 5.7 billion and under G.W. Bush, \$ 8.5 billion¹⁵.

Despite the nearly thirty year history, the principle of cost estimation has not always been followed. Among the 115,000 published regulations, 20,000 have been verified prior to publication. In effect, only 1,100 regulations gained the status of being economically significant. This means, however, that a vast portion of applicable regulations have still not been analyzed to justify their existence.¹⁶

In 2001, the Regulatory Right-to-Know Act introduced an obligation to report annually to the Congress on the costs and benefits of regulations adopted by the U.S. federal government. Each successive report contains the estimated costs and benefits of regulations subjected to OMB's review over the past 10 years.

¹⁴ Statement of J.D. Graham, PH.D. Administrator Office of Information and Regulation Affairs before the Subcommittee on Small Business United States House of Representatives, April 28, 2005.

¹⁵ James L.Gattuso, Reining in the Regulators: How does President Bush Measure up?, Heritage Foundation, Sept. 28 2004.

¹⁶ *ibid.*

The 2006 report states that the annual benefits from adopting major regulations in 1995-2005 fell within the range of \$94 billion to \$449 billion, while the cost was between \$37 billion and \$44 billion. Over the past 25 years, the cost of introducing regulations increased by about \$123 billion, therefore, the average annual increase was at \$ 5 billion.¹⁷ At the same time, benefits from regulations increased threefold.

This optimistic picture of the effectiveness of regulatory reform is also a favorable assessment of the American administration's operations in the area of regulations.

Notwithstanding any reservations to the data presented in the report and their estimation methods, they constitute important information for economic policies: they confirm the hypothesis that quality regulation needs not bring damage to the market economy.

The issue regarded as a priority is the obligation to express costs and expenses in terms of money and to propose alternative scenarios to a given regulation. The purpose is to maximize net benefits. Thus, the public sector is subjected to the same rules of rational utilization of resources as the private sector.

The discussion evaluating regulatory activities of government agencies produced a number of demands for those agencies:

These are: 1. Monitoring of the work of officials responsible for particular regulations. 2. The obligation to publish on the Internet the information on costs and benefits of a given law. 3. Standardization of the assumptions adopted in calculating costs and effects. 4. Improvement of the methods of incorporating the uncertainty factor. 5. Limitation of agencies' ability to adopt economically non-viable regulations.¹⁸

Most of them are set out in the 2002 Information Quality Law. The law requires federal regulatory agencies to apply certain standards in preparing and publicizing the results of their operations.

An interesting initiative in regulatory reform is a focus on the need to control the volume of not only legislative acts themselves but also of the provisions explaining their application. Quite often particular agencies produce instructions containing considerably more pages than the regulation concerned.

Equally noteworthy is the program initiated in the 1980s to simplify the language of regulations. The language which is hard to understand for an average citizen makes it difficult to observe law, increases the cost of law enforcement, exposes citizens to sanctions caused by not understanding the laws in effect. Unfortunately, the effectiveness of that program is relatively low. Successive American Presidents, starting from R. Nixon, have been issuing decrees to that effect but their practical implementation still faces difficulties.

¹⁷ 2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities, Jan.2007.

¹⁸ R. W. Hahn Regulatory Reform: Assessing the Government's Numbers, Brookings Center for regulatory Studies, July 1998.

Cooperation of the U.S. and the European Union

U.S. cooperation with the European Union is based on the recommendations for cooperation in the regulatory reform, negotiated under the Economic Transatlantic Partnership. Implementation of those recommendations has been satisfactory and much progress has been achieved in many disciplines.

As a continuation of the above efforts, a road map for future cooperation in regulatory reform was developed at the EU-US summit (2005). The main elements of that document include: setting up a dialogue among higher level officials on best regulatory practices, identification of the methods to facilitate experts exchange and development of sectoral initiatives. The outcome of that cooperation is a progress in harmonizing provisions, applicable standards, regulatory systems in place on both sides of the Atlantic, based on a comparative analysis¹⁹.

The European Commission's Better Regulation Program received full support of the United States.²⁰ Regarded as its particularly interesting component was the initiative to develop a common legislative culture within the EU, with the purpose of increasing law transparency. Greater transparency means lower cost of business activities pursued by companies from both the EU and third countries. In principle, all the EU program components are consistent with the American regulatory reform, which bodes well for a good cooperation.

U.S. experts have some reservations about the absence of clearly formulated methods of implementing the proposed solutions, including especially the effectiveness of the open coordination method. Visible is also the lack of a sufficient precision in defining the consultation rules for particular reform stages or identification of the consultation participants. However, there is no doubt that adopting a number of solutions applied in the U.S. (e.g. extending the consultation period to 60 days) as well as the exchange of experiences encourage development of best practices for the regulatory system, assisting the OECD efforts.

A good example of the EU-US dialogue on regulation issues is the report prepared jointly by the OMB and the Secretariat General of the European Commission on the application of EU and US regulatory impact assessment guidelines on the analysis of impacts on international trade and investment.²¹ It contains two separate reports on existing methodology and practices on both sides of the Atlantic, and suggests some conclusions for future cooperation. OMB and EC have invited and received comments on it from many interested institutions on the following topics:

¹⁹ Draft Report to Congress on the Costs and Benefits of Federal Regulation 2005, p.31-33,

²⁰ US Mission to the European Union, Brussels, July 31. 2002

²¹ Brussels/Washington DC, May 2008, http://www.whitehouse.gov/omb/inforeg/reports/sg-omb_final.pdf

1. the importance of information on planned legislative and regulatory initiatives, and on transparency in the impact assessments analysis.

2. the value of having transparent impact assessment methodologies and procedures and a good system of quality control. Public consultation in the US and EU should help to achieve better quality of analyses.

3. the importance of making policy proposals public, which will allow governments in other countries to respond if they expect regulated issues (in that case international trade and investments) to be significant.

4. many respondents stated that impact assessments analysis should be available before a regulation is issued. Although this may not always be possible in the US, OMB does support the principle to release the analyses evaluating a given regulation as early as possible. In the European Union impact assessments are made available as soon as the Commission submits a proposal for legislation.

The report contains an interesting part on dealing with impacts on international trade and investment in practice, the list of examples of European Union impact assessments and many other useful information. In my opinion it is an excellent example of a good cooperation between the EU and the US on regulatory reform issues.

A certain discord in this optimistic picture of the U.S.-EU relations is caused by the European Commission's activities in the area of competition. Due to different objectives and policies pursued, a convergence in that area is relatively difficult. Although in 1990 the European Commission and the United States signed an agreement whose provisions, in the event of anti-trust proceedings, are binding on both parties its text does not contribute anything new in terms of harmonization of laws. In effect, U.S. and European enterprises pay a high cost to adjust their rules of conduct to complex and different regulations in force on both sides of the Atlantic.²² The discrepancy exists mainly in the criteria for approval of mergers or acquisitions in all those situations where at least one company is from the EU area. The criteria applied by the European Commission are stricter than those used in the U.S. and the EC often uses the right of direct control, examining the records and operating procedures in companies participating in a merger. The purpose of such conduct is to prevent companies active in the European market from gaining the so-called dominant position defined in terms of its share of revenues in the revenues earned on the global and European markets.

It seems that one of the reasons for the different approach of the EC and the U.S. to mergers and acquisitions is their differing view on market and competition. In the United States, there is a visibly high level of confidence in free market mechanisms, which is probably due to their market institutions being mature and

²² S.Walus, D.Tompkins, Impact of European Antitrust Regulations on Transatlantic Business, www.westga.edu/bquest/2004/europa.htm

very effective. The prevailing belief is that the market is not only capable of protecting competition but also of introducing new pro-competitive solutions. A characteristic of the European approach is a strategy based on restricting the number of companies operating in a given market. Those differences account for the different formulation of requirements for mergers to be regarded legal. In the EU, the Commission examines whether a planned merger will result in a dominant position threatening consumer interests. In the United States, a planned merger is examined in terms of whether it will affect the level of competition. The test is thus less rigorous (softer). Moreover, in the EU the threshold marking a dominant position is assumed to be 40% market share. In the conditions of the U.S. economy, such a threshold is believed to be absurdly low.

Another difference is the rule adopted in the American legislation, whereby the burden of proving legal non-compliance of a given merger rests with the government institution and verdicts in such cases are passed by courts. In Europe, it is the companies planning a merger who have to prove the planned transaction to be consistent with applicable laws.

Barriers in regulatory convergence result in a relatively large number of cases where a merger or an acquisition passes successfully the U.S. procedure but is deemed illegal under EU laws.

A certain facilitation in the complicated process of seeking approval for a merger may be the planned amendment of EC regulations, consisting of taking into account a cost analysis in decision-making. The very fact of attempting to measure the cost of rejecting or approving a merger and making that cost known to the public is very positive. It is certainly a step in the direction pursued by the regulatory system reform and simultaneously a symptom of approximation of U.S. and European procedures. An emphasis on measuring precisely the effects of regulation is a characteristic feature of the regulatory reform in the U.S.

A similarly positive response was provoked by the intention to incorporate expected changes in the technological progress into the analysis of regulation effectiveness. Rapid changes in technology shorten the amount of time within which a company gains a dominant market position.

Another facilitation in the current procedures is the idea that companies seeking merger approvals in particular EU Member States should be able to take care of all the formalities at a single institution within the EU.

Another example of dialogue between the EU and the US

Major Characteristics of the Regulatory Reform in the U.S.

1. The reform is carried out in a persistent and consistent manner. Successive U.S. Presidents attached great importance to regulatory reforms and their policies in that area may be termed, subject to certain reservations, as a policy of continuation.

2. The reform was initiated due to the pressure from the private sector demanding reduction of the discrepancy in the quality of services between the public and private sectors. The strong private sector is also the source of innovative management methods and technologies used by the public sector.
3. Effective reform management methods were applied, for example, by placing the institution responsible for reform coordination appropriately high within the administration's hierarchy and by introducing the requirement of annual reporting to the Congress on the progress of reforms.
4. The quantitative assessment of the impact of regulation is conducted in a professional manner. Every year, the general public is apprised of the total costs and benefits of issued regulations and the same information concerning particular regulatory acts. Much importance is attached to the quantitative approach (in terms of dollar amounts) to possibly all the benefits and costs, including also hard-to-measure effects of social regulations. Estimation methods are improved continually, good working relationships exist between the administration and research centers in that field.
5. The obligation to always present an alternative scenario of a planned regulation is complied with, which, together with the impact analysis, represents extremely precious information for decision-makers.
6. All draft regulations are subjected to public debate. Well-developed institutions of the civic society make it possible for citizens to exert an influence and sometimes even pressure to improve the quality of regulations.
7. Active civic society equipped with good information on the costs and benefits of regulations reduces the extent to which the lawmaking process could be politicized.
8. Cooperation with the EU is an important factor in improving the European regulatory system, including mainly the regulations applicable in new EU Member States.

Reform of the Polish Regulatory System

There is no doubt that the most in-depth reform of the regulatory system in Poland took place during its transformation from the central command economy to a market economy. The second phase of reforms included adjustment of Polish legislation to the Community law in connection with preparations for Poland's EU membership. Characteristics of those reforms were the following:

1. Unprecedented scope and rate of changes introduced.

2. Relatively low quality of the laws adopted, resulting both from the haste in implementing changes and from the absence of well-prepared specialists in various legal disciplines.
3. The lack of well-developed market economy institutions.
4. Use of both financial and advisory external assistance of international financial institutions and the European Commission, as well as the governments of particular countries, including the United States. On the one hand, the assistance speeded up the necessary changes but on the other hand, encouraged excessively superficial adoption of regulatory models and standards which were not always best suited to the specific nature of the Polish economic and social system.
5. Deficiency of strategic thinking among political elites, resulting mainly from the immature democracy and the highly politicized process of making economic decisions.
6. The burden of experience gained in the planned economy showing in a tendency to over-regulate, accompanied by distrust in market mechanisms and market institutions.

In sum, the period beginning in 1989 in Poland was marked by a growing volume of regulations to meet the needs of the emerging market economy and the requirements of EU membership and the criteria for obtaining international financial assistance. Much less attention was paid to the quality of regulations. Critical opinions in that regard were rare and dispersed, which limited their effectiveness.

The issue of caring for the quality of regulation was incorporated in the Polish government program after Poland became an OECD member (1996). The regulatory reform focused mainly on the formal aspect, i.e. on setting up appropriate institutions, defining procedures and scopes of authority. Thus, in Sept. 2000 an inter-ministerial team for the quality of regulation was set up, a textbook was prepared on drafting the Regulatory Impact Assessment, provisions on coordination of reform efforts were introduced in the Prime Minister's Office Regulations.

In 2002, the OECD report evaluating the progress of the Polish regulatory reform was published.²³ After becoming an EU member in 2004, Poland was covered by the regulatory reform program within the European Union (the Better Regulation program). A new interministerial team for modern regulation was set up (2006), the government approved the Regulatory Reform Program for 2006-2008. Poland is also participating in the joint OECD and EU Sigma program for new EU members.

From a purely formal point of view, the implementation of reforms may be assessed as good. This is how the European Commission rated Poland in its

²³ OECD Reviews of Regulatory Reform. Poland. From Transition to New Regulatory Challenges, OECD 2002

Communication of 2005. The table showing categories of measures adopted by EU Member States under the Better Regulation Program lists Poland, together with Denmark and the UK, at the very top.²⁴

An assessment of the actual aspect of the reform is much worse. Major weaknesses of the Polish regulatory system include:

- low operating effectiveness of the institutions responsible for the quality of regulation,
- inadequate coordination of those institutions' work, no coordination of reform efforts at an appropriately high level makes it easier for particular ministries to pursue their own interests at the cost of public interest,
- poor implementation of the most important reform aspect from the point of view of its quality: estimation of the costs and benefits of a given regulation, no information on the effects of government's regulatory activities makes it difficult to make rational decisions and renders the decision-making process itself more susceptible to political pressures,
- weak pressure from the private sector toward reforming the lawmaking system,
- low degree of the civic society organization, and thus weak pressure exerted toward improving the quality of regulations, especially the social ones.²⁵

Regulatory reform is a reform of bureaucracy conducted by the bureaucracy. Its effects depend on how effectively the government is controlled but also assisted by democratic state institutions. In this area there is much to be done in Poland to overcome the legacy of the previous system, consisting of the absence of a habit to respond continuously to all irregularities in the administration's operation and a skill to enforce changes favorable from the point of view of public interest.

There is no doubt that access to adequate information on the costs and benefits of legal regulations produced by the state and on alternative methods of regulating a given issue has an important role in stimulating social activity which forces the state to take greater care of the quality of regulations. Knowledge about the zlotys it costs, for example, a business to adapt to specific regulations, in combination with information about the benefits in terms of zlotys to be enjoyed by the consumer from those regulations, facilitate rational choices in terms of utilization of the available resources. There may, certainly, be reservations as to the selected method of estimating effects, the accuracy of data, the skills of people doing the calculation. It is obvious that at all stages of that calculation failures may occur and that there is a strong temptation to

²⁴ "Better Regulation for Growth and Jobs in the European Union", SEC(2005)175, p.17

²⁵ According to OBOP surveys, only 12% of Poles are affiliated with a non-governmental organization; there is still a strong mistrust in other people as well as institutions and organizations. OBOP 5-9 January on a sample of 1005 persons of 15 or older. *Gazeta Wyborcza* 23.01.2007.

manipulate data to obtain an outcome which would serve the interests of certain narrow groups.

However, for a politician and a citizen alike the effect of a given regulation expressed in cash, even if the estimate is imprecise or deliberately distorted, will always be better than no estimate at all.

Formally speaking, the procedures introduced in Poland in 2001 contain all the elements necessary to carry out a regulatory impact assessment in compliance with OECD and EU standards, and to identify the entities which a given regulation affects and to assess its impact on public finances, labor market, competitiveness and the situation of particular regions. A review of 163 major economic legislative drafts from 2002-2004 indicates clearly that the entities responsible for assessing the impact of regulations do not carry out their duties well. Only 28% of all assessments indicated costs or benefits of a given regulation, even fewer ones, only 12%, quantified effects of regulations, limiting themselves only to analyzing their impact on the state budget. Numerous reservations are provoked by the method used in computing effects, the selection or reliability of data, a frequent practice of purposefully understating the costs or overstating the benefits.²⁶ That work is performed by officials of the institutions drafting the bills, who lack specialized knowledge and good skills. They are also not motivated to enhance their qualifications in that area since nobody really evaluates the quality of the cost/benefit analyses prepared by them. The institution responsible to date for coordinating efforts in that area, the Government Legislation Center, performed only formal verifications, that is checking whether regulatory impact assessments contained all the elements enumerated in the relevant ordinance. However, the absence of sanctions for failure to submit a RIA or to include all its required elements has not been a barrier to setting in motion the legislative process.

All those poor solutions from the point of view of managing the lawmaking process are the cause of the above mentioned weaknesses of the Polish legal system: inflation of laws, instability and inconsistency of regulations, which encourage corruption. Most of all, however, they result in wasting public resources.

The public sector whose objective should be to address market failures, by generating a poor product in the form of poor quality regulation, lowers the potential for economic growth.

Another important element of the quality of regulation is the method of implementing provisions and of enforcing the law. In that area, much is to be done in Poland, starting from a reform of the judiciary and ending with focusing attention on the quality of lower tier regulations (ordinances, normative acts adopted by particular ministers).

²⁶ R.Zubek, K.H.Goetz, Final Report on the Ernst&Young “Better Government” Program, available on www.sprawnepanstwo.pl

Very often such provisions are delayed, blocking the entry into force of a given statute.

In evaluating the quality of regulation in Poland account must be taken of the quality of provisions passed by local government authorities. In 2000 only, local law publishing houses published 13,637 legal acts adopted by local government agencies²⁷. In that situation, one can hardly speak of a transparency of laws or proper monitoring of the lawmaking process.

Clearly visible is the lack of good cooperation between the local and central government at the regional level, resulting partly from the unclear distribution of authority.

Regulatory Reform Program for Poland, 2006-2008

In 2006, in response to the European Commission's recommendations Poland presented the Regulatory Reform Program 2006-2008 containing all the elements of the EU program, together with a schedule of changes and identification of the institutions responsible for particular program components. The program promises a number of important innovations, with major ones including: 1. Announcement of a future revision of the methods of preparing the regulatory impact assessment; that assessment should, according to the Ministry of Economy who authored the program, contain a thorough analysis of costs and benefits arising from regulatory activities. 2. Inclusion in the regulatory impact analysis of the estimated administrative burdens imposed on entities covered by a given regulation. 3. Empowering the Prime Minister's Office with a right to block draft legislation with inaccurate regulatory impact assessments. 4. Creation of a central RIA database. 5. Identification of the legal acts to be simplified and initiation of the simplification procedure. 6. Improvement of the process of implementing EU directives.

Particularly important from the point of view of the quality of regulation is the initiative to estimate the cost of administrative burdens and the efforts toward limiting them, as well as revision of the methods of compiling full regulatory impact assessments. According to recent analyses conducted by the Ministry of Economy, particularly burdensome for businesses are general information obligations; for example, in several Labor Law regulations there are 80 such obligations, which generate high costs on a nationwide scale (the annual cost of issuing an employment certificate by all the companies in Poland is about PLN 250 million). Hence, the proposal to reduce administrative burdens by at least cutting the frequency of reporting, exempting small and medium businesses from that obligation or a wider application of electronic communications.²⁸

²⁷ OECD Reviews of Regulatory Reform. Poland, op.cit. p. 50.

²⁸ *Rzeczpospolita* daily, 2 January 2007

The very fact that a program containing all the elements required by the EU program has been prepared is obviously very good. However, Poland's experience with implementing regulatory reforms indicates that the main barriers in reforming the law lie mainly in the highly politicized lawmaking process, poor coordination of the activities of particular government institutions, insufficient quality of social consultations and the lack of qualified specialists, especially in conducting quantitative analyses of regulatory impacts. Entrusting the oversight over the regulatory reform to the Minister of Economy does not guarantee smooth implementation of the program.

The oversight and coordination of reform efforts should be situated at the highest possible level of government administration, that is at the Prime Minister's Office. Unfortunately, the program speaks little of any planned changes in the scopes of authority of particular institutions or the oversight over their efforts. This entails a risk that the Polish government's regulatory reform program might share the lot of other unimplemented programs. The winners will be particular political interests, ambitions of high officials, inability to apply modern impact estimation methods, a belief that high quality law and fighting its overproduction will invite excessive liberalism and loss of control of economic processes. Regulation is still believed in Poland to be the only effective control tool and an attribute of power.

It is difficult to estimate presently to what extent the inflation of regulations in Poland is a legacy of the command management system and to what extent it results from the still unstable political system and ineffective government administration.

Future Directions of Changes in the European Regulatory System

The hitherto regulatory reform in Europe has been characterized by relatively highly dispersed activities carried out in particular states. Although there has been an exchange of experiences and a dissemination of good practice the coordination of those efforts has not been sufficiently strong²⁹. The legal regimes of Member States are collections of laws enacted at the Community level and national laws. The quality of the regulatory system is, therefore, decided by both the quality of the Community law and its effective transposition into the legal systems of Member States, as well as the quality of autonomous national regulations.

Community rules have been and are commonly criticized for their excessive detail, little transparency and burdensome administrative procedures; EU Member States have so far had little influence on the quality of EU regulations. A view that the low quality of the EU regulatory system is one of the causes for

²⁹ Since 1995, the regulatory reform has been carried out within the OECD, an organization affiliating 30 well-developed countries. OECD focuses on developing expert opinion recommendations for the governments of its member states.

the relatively low competitiveness of the EU economy is gaining more followers. That general opinion seems to have somehow forced the launch of reforms of the regulatory system at the entire EU level (2002).

Due to the short amount of time elapsed, it is still impossible to identify all the effects of that decision. Some of them consist of simplification and reduction of the volume of regulations, as recorded in successive EC communications.

What is worth noting is the positive impact of the decision to place reform management at the level of the European Commission. Thus, the United States has gained a partner in a single institution coordinating the activities of all 25 Member States. This creates better conditions for cooperation in approximating provisions concerning, for example, product safety, protection of the natural environment or standards standardization. One may expect that cooperation to result in a gradual convergence of some regulations, beneficial from the point of view of the cost of economic activity.

On the other hand, a much slower pace, if any, will characterize convergence in the area of liberalizing competition rules (including the operation of product markets), some aspects of the welfare state or the labor market, although, there is no doubt that the differences in those areas are the main reasons of Europe's lower competitiveness in comparison with the United States.³⁰

Moreover, from the point of view of Poland, the active role of the European Commission in reforming law entails an opportunity to rationalize the existing efforts to improve the quality of law. Lessons learned from the regulatory reform to date indicate that Poland needs an extremely radical change in its approach to reforms, consisting of comprehensive, consistent and prompt actions at each lawmaking stage. What we are observing now is merely an "adequate crawling" toward better government.

Doubtlessly, a shock therapy could begin from rebuilding the system of regulatory impact assessment. The politicians who make law and the entities to which it applies must have knowledge about the effects of proposed regulations. Presently, extremely important decisions from the point of view of public finance and the cost of business operations are made intuitively. One cannot help noticing how much room this leaves for errors and various abuses. In transitioning from the "crawling" stage to a quick-paced trot more use should be made of the American experience in terms of calculation methods, selection of indicators facilitating a comparison of the impact of various types of regulations, econometric models which serve as the basis for appraising the effects of regulations.

³⁰ Cf.: M.J.Radło, "Economic Reform in the European Union: Will the Lisbon EU Catch Up with the US" in: Reagonomics goes Global edit. W.Bienkowski, J.C.Brada and M.J. Radlo, Palgrave Macmilan 2006.

For some obscure reasons, academic communities show little interest in that type of research³¹. What is needed, therefore, is better cooperation between research centers and the public administration and the private sector; here, again the American experience could come handy.³²

The European Commission's commitment to the regulatory reform is particularly important for new EU members. The transfer of the reform management coordination to the level of the entire Community and the introduction of reform monitoring should speed up the process of improving the regulatory system, forcing not only the emergence of appropriate institutions and procedures but also the creation of an appropriate climate for regulation reforms. The right climate means, for example, transfer of the responsibility for reform coordination to the level of the decision-making center of a given country³³ and dissemination of the information on the benefits of reforming laws, expressed in terms of money.

Summary.

1. There is no single commonly recognized definition of a perfect regulatory system; however, there is a set of principles to be followed by governments caring for the quality of their regulatory systems.
2. The dispute about the role of government in the economy seems less sharp than before. There seems to be more support for the view that a certain degree of regulation is needed, both in the economic and social spheres. The dilemma of whether to regulate or not to regulate has been replaced by a search for such an extent of regulation which is optimal from the point of view of resources utilization. The discussion evolves around selection of the most precise and sophisticated tools of regulation.
3. Reasons why the experience of the United States is useful in implementing regulatory reforms in Europe, including especially in Poland: a. Broad use of public debate as a way of pressuring the government to enhance the quality of regulation; b. Strictly observed obligation to use quantitative methods to estimate regulatory impact and a good set of tools used to calculate costs and

³¹ At least, according to the Ministry of Economy officials supervising implementation of the regulatory reform in Poland.

³² The significance of combining private and public funds in research financing in the U.S. is pointed out by R. Rybarski "Uniwersytety jako element amerykańskiego modelu gospodarczego" in: Amerykański Model Rozwoju Gospodarczego, SGH, Warsaw 2006, p.66

³³ That view is shared by: R.,Zubek, K.H.Goetz in: "Wpływ reguł legislacyjnych na jakość ustawodawstwa", *Prawo i podatki*, November 2005, stating that: "Insufficient governmental control over the legislative process leads to an excessive growth of legislative activities and reduces consistency of the established law" and "A weakness of the Polish legislative process is the absence of Prime Minister's substantive intervention with the shape of legislative draft".

benefits of regulations; c. The use of regulatory effectiveness measures known from economics literature in areas such as health care, public safety, protection of the environment. d. Gradual assumption by the public sector of the management methods applied in the private sector; e. Care for the level of qualifications of the people employed at the institutions responsible for regulatory reform; f. Management and coordination of the reform efforts at an appropriately high level of administration, reporting obligation to the Congress.

4. Imperfection of the Polish regulatory system being the legacy of the pre-transformation period, the unusually fast rate of changes in connection with Poland's comeback to the market economy and EU membership requirements, as well as the lawmaking process being highly politicized. A better regulatory impact analysis and a wider use of public debate could limit somewhat the influence of politics on the legislative process.
5. Perfecting the regulatory system is a continuous and lengthy process. The effects of improving laws are delayed (they show after 10 to 20 years), therefore, the quality of law seems to be an unappealing subject for most politicians.
6. The OECD and the European Union, as well as the World Bank encourage the governments of particular countries to reform their regulations, supplying information and know-how, facilitating the exchange of experiences and cooperation. Incorporating regulatory reforms into the Lisbon Strategy by the EU may speed up qualitative changes in the legislations of Member States and intensify the EU-US cooperation.
7. The cooperation between the European Union and the U.S. is particularly important for the dynamics of the regulatory reform in Europe. The United States has a more institutionally competitive economy than Europe, American institutions have less bureaucracy than European ones and for that reason they encourage entrepreneurship. The American advantage in that regard is, among other things, the outcome of an effective and consistent regulatory reform.
8. "Reform of bureaucracy carried out by bureaucrats" is an expression used by communities skeptical about the reform outcome. However, that is a productive skepticism, which results in suggesting changes in the reform process, greater independence of the institutions assessing the impact of regulations, a greater role of the parliament in monitoring reforms (no regulation without representation).

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