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## PROBLEMS OF REGULATIONS FOR SME IN POLAND — INSTITUTIONAL AND CULTURAL CONTEXT

**Keywords:** regulatory impact assessment, SME, Poland.

**J E L Classification:** K20.

**Abstract:** This article is dedicated to institutional and cultural reasons of a deep gap between the expected quality of regulations by small and medium-sized enterprises (SMEs), and the very poor evaluation of effective legislations. The study is based on a theoretical review of the available reports, surveys, publications and practical experience of authors. It recognizes the necessity for a radical restructuring the process of creating new regulations. The key conclusion indicates the need to change the approach to legislation procedure by the SME sector itself. The paper argues that companies must exit current “dormant perception” about regulations. Without the active attitudes of the main recipients of the regulations it is impossible to increase the quality of law-making in Poland. The present mechanism determining the regulatory process keeps insufficient system, thereby producing defective legislation, not following the changes in highly competitive markets and hampering the process of the development of companies and the Polish economy. Potential initiatives to achieve a breakthrough of existing barriers for better regulations are presented.

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## PROBLEMY Z REGULACJAMI PRAWNYMI DOTYCZĄCYMI MAŁYCH I ŚREDNICH PRZEDSIĘBIORSTW W POLSCE – KONTEKST INSTYTUCJONALNY I KULTUROWY

**Słowa kluczowe:** ocena skutków regulacji, sektor MSP, Polska.

**Klasyfikacja J E L:** K20.

**Abstrakt:** Artykuł jest poświęcony analizie instytucjonalnych i kulturowych przyczyn występowania głębokiej luki pomiędzy oczekiwaną, a istniejącą jakością przepisów dotyczących małych i średnich przedsiębiorstw (MSP) oraz ocenie słabej skuteczności tych regulacji. Badanie opiera się na przeglądzie dostępnych raportów, badań i publikacji, a także na praktycznych doświadczeniach autorów. Wskazana jest konieczność radykalnej restrukturyzacji procesu tworzenia nowych przepisów. Jeden z kluczowych wniosków podkreśla znaczenie zmiany podejścia do procedury legislacyjnej przez sam sektor MSP. Firmy muszą przełamać obserwowany stan “uśpionego postrzegania” przepisów. Bez aktywnych postaw głównych odbiorców regulacji nie jest możliwa poprawa jakości stanowionego prawa w Polsce. Autorzy wskazują również na potrzebę istotnych zmian instytucjonalno-proceduralnych. Obecny mechanizm tworzenia regulacji w Polsce petryfikuje negatywne zjawiska występujące w procesie legislacyjnym. Stan ten ma daleko idące konsekwencje dla rozwoju firm, zwłaszcza dla sektora MSP, ale także całej polskiej gospodarki.

### ■■■ INTRODUCTION

This study is dedicated to institutional and cultural reasons of a deep gap between the expected quality of regulations by small and medium-sized enterprises (SMEs), and the very poor evaluation of effective legislations. Potential Initiatives to achieve a breakthrough of existing barriers for better regulations are presented. It recognizes the necessity for a radical restructuring of the process of creating new regulations. The key conclusion indicates the need to change the approach to legislation procedure by the SME sector itself. The paper argues that companies must exit current “dormant perception” about regulations. Without the active attitudes of the main recipients of the regulations, it is impossible to increase the quality of law-making in Poland. The present mechanism determining the regulatory process keeps insufficient system, thereby producing defective legislation, not following the changes in highly competitive markets and hampering the process of the development of companies and the Polish economy.

### **THE RESEARCH METHODOLOGY AND THE COURSE OF THE RESEARCH PROCESS**

The article is based on a theoretical review of available reports, surveys, publications and practical experience of authors.

### **THE SME PERCEPTION OF REGULATIONS – REASONS AND CONSEQUENCES**

In terms of the accelerating globalization, increasing strong tendency to integrate the countries with the large differences in economic development, legal systems, social, cultural or historical circumstances, as well as unprecedented rate of change in technology, the legislative system in Poland seems to be unwieldy. We are observing an increase of the importance of regulatory competition in which some countries or companies use the dysfunctional legal systems and regulatory arbitrage to gain a competitive advantage. In contrast, other countries or firms are losing in this market game<sup>1</sup>. These societies are suffering strong negative economic, social and political consequences. The companies are becoming helpless or passive due to the inadequate response to the phenomenon of regulatory competition. Authors agree with the OECD report, which say: “the excessive regulatory burden limits the development initiatives and encourages the corruption and the growth of the shadow economy.” (Administrative Simplification in Poland 2011, 16). At the same time the current financial crisis creates a wave of new regulations in an enormous scale. They brings some positive effects, but they also cause the phenomenon of over-regulation and legislative chaos. Regulations have become key determinant of competitiveness and they have limited the economic growth for the countries which are underestimating the importance of regulation in the modern world.

Since the beginning of the transformation, the quality of Polish regulations have become the subject of many studies, discussions and growing concerns due to insufficient response of regulators to the criticisms articulated by scientists and practitioners. For example, the report reviewing the process of the regulatory impact assessments (RIA) on the activities of SMEs recommends the carrying out of special tests. The routine of legislative procedure should start from the RIA test. In 2010, there were no such tests at all. When we look at recent years, this kind of tests were carried out very rarely and they didn't

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<sup>1</sup> Por. S. Kasiewicz, L. Kurkliński (2013), *Dryfowanie procesu regulacyjnego. Przykład ustawy o upadłości konsumenckiej*, Warsaw School of Economics, Warsaw.

respect the uniform methodological principles (Kowalski, Kowalewski, Lewandowska-Kalina, Kalina 2013, 7, 132).

The present financial crisis reveals unprecedented regulatory weaknesses of the Polish economy, especially related to the small and medium-sized enterprises (SMEs). We can call this situation as: “the drift of economic regulation”. It is indicated by a number of studies on the existing barriers to the development of the SME sector<sup>2</sup>.

If we look at this list of barriers from the point of view of the transformation of the Polish economy, the introduction of market mechanisms after 1989, it is almost a failure of the whole system of legislation. From one hand it means that:

- Polish authorities haven’t developed a strategy and regulatory policy, especially after the accession to the European Union,
- weak communication between the authorities and representatives of the business, – the system of economic law in Poland requires a thorough reconstruction, practically, a revolutionary breakthrough.

On the other hand, we can see positive aspects of the black list of barriers, because:

- there is a huge chance that it is possible to remove or reduce the negative impact of many barriers with relatively low cost,
- step by step, it is creating a new regulatory culture (system of institutions, rules, training, development of civic consciousness, etc ), but it is still weak and barely used,
- a number of initiatives are undertaken (e.g. “Efficient State”, “Better Regulation 2015”, “Let’s simplify the rules for companies”, “Second Chance”), they are giving some promises to progress improvement of legislative activities. But the implementation of these changes lags far behind the needs and promises declared by regulators.

More and more attention is paid to the importance of cultural differences of societies, importance of economic activities, including attitude to regulation. In this respect, it seems useful to cite the research of Dutch sociologist G. Hofstede. He proposed several dimensions of cultures. One of them is particularly important for the perception and compliance with the law (defining standards to act, obeying prescribed or prohibited rules by individuals and business entities). It is: Uncertainty Avoidance Index (UAI). It determines the tendency of a society to reduce the uncertainty associated with the future (Boski 2009, 109).

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<sup>2</sup> World Bank, OECD, Polish Agency for Enterprise Development, Ministry of Economy, Confederation “Lewiatan” and others.

G. Hofstede defined UAI as “the degree of risk that members of a cultural society feel in connection with uncertain or unknown situations to them.” (Hofstede 2001, 161). It derived three highly correlated, analyzed factors: the recognition of the robustness of regulation, desire to preserve stability and stress at work. The high level of UAI means a striving for the widest possible coverage of almost all areas of man activity by rules, including the economy<sup>3</sup>. On the other hand we can observe paradoxical phenomenon – circumventing and undermining the established rules. As a result, regulations have considerable excesses, they are unfriendly, opaque, highly restrictive to freedom, posing the possibility of making arbitrary decisions, often changed, forcing to improvise, while they present many gaps, and ultimately resulting in the effect of chaos (Boski 2009, 112). This general description is congruent to the situation in Poland to a very large extent. It is not surprising, therefore, Poland ranks among the top countries with the highest level of uncertainty avoidance index – 93 points on a scale – 23 points (Denmark), 112 points (Greece).<sup>4</sup> So we must not underestimate the importance of this cultural aspect of the functioning of the economy, in which the dominant part consists of small and medium-sized enterprises (Kurkliński 2013).

The owners and managers from the SME sector, as well as their representatives (clubs, associations, trade organizations, consulting companies) are presenting negative opinions about the system of regulation and supervision of their activities. Their arguments include instability of law, problems with adequacy of competitive conditions (e.g. the lack of respect for the principle of proportionality), inconsistency and vagueness of regulation, different interpretations, the sham dialogue in the consultation process. It reveals a huge dissonance between the demands of SMEs, and amazing passive response of the regulatory system. The type of attitude of SMEs to regulation can be called

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<sup>3</sup> An example might be a general proclamation of the need for economic freedom – natural for a market economy, but from other hand it is widespread questioning of the proposal to deregulate certain professions in Poland in 2013 (e.g. tourist guides – is there really need for a city guide to pass the relevant examinations?).

<sup>4</sup> Greece – the leader in this category, the world media does not allow us to forget about this country. Greek experience of the past few years shows that the cultural environment may be connected to the deep crisis – internal chaos and disregard of the rules (both domestic, such as paying taxes and EU, e.g. falsification of state statistics). As a result, the whole country is in the state of social and economic collapse. From this point of view it is interesting position of other countries like Portugal and Spain, also with very high level of UAI.

“dormant perception”. It means that firms deals with illogical and irrational laws every day, but they can’t force the adoption of required rules and finally they are not able to achieve a reasonable and effective compromise between the social objectives and business interests of SMEs. In practice, the “dormant perception” means that a significant part of the companies consider that it is not worth to be active in the process of improving the legislation. Only a small portion takes action, but majority of these initiatives are ineffective. A growing number of firms is trying to take advantage of regulatory arbitrage at the domestic or international level to escape from unfavorable national regulations. The authorities do not recognize and underestimate the phenomenon of “dormant perception”, and perhaps they treat current situation as a natural part of the game between the state and SMEs. The escape from the present trap is impossible without the active role of SME sector and the change in their approach to regulators.

#### **REGULATORY GAP IN THE CONTINUOUS DEVELOPMENT OF SMEs**

In many reports, articles and studies a number of positive trends are underlined that are associated with the development of the SME. These observations include: dominance of SMEs in generating GDP, rapid growth of this sector, the role for national employment etc. SMEs have become the main driving force of the Polish economy. Poles, as a society, have a high level of entrepreneurship. However, comparing to the “old” EU Member States (15), there are numerous weaknesses in the efficiency and competitiveness of the SME sector. It is less productive, based on its competitive cost advantages. It is characterized by low innovation as reflected in the outdated structure of the industry, maintaining a conservative approach to new financing methods and visible delay in the application of modern management style. Particularly we can observe poor risk management and low level of internationalization.

We can ask the question, how is the regulatory system stimulating the effective operations of companies in the SME sector? On this field in Poland there are a quite a broad front of initiatives to support SMEs, e.g. improvement of economic flexibility because of global crisis, measuring administrative burdens of economic legislation (Pomiar obciążeń administracyjnych 2010), and the program “Better Regulation 2015” (Program „Lepsze regulacje 2015” 2013). It must be added that the assistance to companies (particularly for SMEs) is under the framework of the implementation of structural and regional schemes of

the EU (Powałka 2011). Despite these initiatives, a very broad regulatory gap between the expectations and needs of SMEs in front of the functioning of the existing legislation still remains. The overtone of the Leviatan report “Entrepreneurs in Poland, Facts, Figures, Examples” – is significant. It states that “The source of the key barriers (for firms) is an inefficient system of law” (Czarna lista barier 2013, 11). The report formulates three necessary conditions for improving the regulation (Czarna lista barier 2013, 11):

- the obligation for the initiators of new legislations to conduct genuine consultation with stakeholders, provide reliable impact assessment of regulations and monitoring of consequences,
- building a culture of open dialogue to achieve social acceptance for the regulations to increase competitiveness of Polish companies, which is also beneficial to the public and gives long term results,
- withdrawal of the state from the role of entrepreneur and focus on reducing costs and risks of doing business.

We do not believe that this is a sufficient number of conditions that eliminate the weaknesses of the lawmaking process in Poland. But there are no doubts that they will help to improve the current situation.

### SOURCES OF POOR QUALITY LEGISLATION FOR SMES

Existing legislation has been the subject of numerous criticisms from the academic researchers and business entities<sup>5</sup>. It seemed that after Poland’s ascension to the European Union, the quality of implemented regulations would improve significantly. It happened to some extent<sup>6</sup>. In our opinion the system of preparation and implementation of the new law in Poland is still poor. The governmental initiatives “Better regulation”, “Efficient State” or “Second chance”

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<sup>5</sup> Ocena skutków regulacji – poradnik OSR, doświadczenia, perspektywy 2007, W. Szpringer, W. Rogowski (red.), Wydawnictwo C.H. Beck, Warszawa; Kopijkowski-Kożuch A. (2010), Reforma regulacji w Polsce – stan obecny i perspektywy zmian [in:] Ocena skutków regulacji w świetle doświadczeń wybranych krajów UE. Raporty ze staży zagranicznych, M. Sakowicz. (red.), Krajowa Szkoła Administracji Publicznej, Warszawa, 9–15; Rogowski W. (2007). Między deregulacją a lepszą regulacją. Na wakandzie, no. 15; Zubek R. (2007), Jak i dlaczego reformować ocenę skutków regulacji w Polsce, Poczdam.

<sup>6</sup> Moderate or growing Polish position in major international rankings for the legislative system. Por. Program „Lepsze regulacje w latach 2012–2015” (2012). Ministerstwo Gospodarki, Warszawa, 18–19.

are not guaranteeing of a breakthrough. This comment confirms 10 objections about regulations formulated by the Polish Confederation of Private Employers Leviatan (Dlaczego potrzebna jest 2007). Weaknesses of SME regulations have persisted despite the passage of several years since the publication of these concerns. This situation raises the question why, despite having a relatively large regulatory capacity, constant pressure and simultaneous support from the European Union, training more than 3,000 employees of the central administration, the quality of the implemented regulations are far from the expectations of business, the local governments and the public.

We can formulate a working hypothesis that the main cause of regulation drift lies in the institutional and cultural factors and selfish motivations of particular stakeholders. They paralyze the process of improving the legislation procedure.

The institutional framework is unsuitable for proper Regulatory Impact Assessment (RIA). There are no clear and unambiguous criteria for the selection of regulations. The final versions of the legislation are often determined by accidents or lobbying of disclosed or undisclosed stakeholders. Let's try to justify this opinion. The regulatory system in Poland is dominated by the following institutions: the offices of ministries, the Office of the Prime Minister, Government Legislative Center, Council of Ministers, and the Parliament (Sejm and Senate) together with the President. In practice the drafts of the most needed economic legislation (acts) are approved by the Council of Ministers and referred to the Parliament. Usually the Parliament Members (MPs) accept them in different shape and extent than the original documents. It is important that the government plays the role of a petitioner to the MPs. This regulatory process generates a systemic conflict, because the government formulates legislative priorities, but it hasn't a decisive influence on the final shape of the adopted regulations. The MPs feel entitled in front of their electorates. They assume that their activity is dictated by concern for the public interest, therefore they report a number of adjustments. PMs from opposition parties are competing in the reporting of amendments and modifications. They want to prove that the government is incompetent and to hinder the realization of the government objectives. Thus, for enhancing the effectiveness and efficiency of the governmental policy and its responsibility for the results, the regulatory system should be changed. But taking into account the existing risks and economic slowdown in Poland, the present legislation activity of government is a shocking low. The vast majority of regulatory projects submitted to the Parliament Marshal is no-



tified by PMs (not by government). It means that in future years, a broad stream of acts will enter into economic practice without RIA<sup>7</sup>. It could be referred to as the impression that economic and political authorities are satisfied with the legislative impasse. This mess makes difficulties to identify responsibilities, who is liable for the consequences of the adoption of laws that are late, misguided or create unregulated zones ("white spots").

An important reason for legislative failures is a situation when the final act ultimately voted by the Sejm may diverge significantly from the baseline assumptions and original shape. Brought modifications, additions often do not take into account the broader context and internal interdependences, compliance with other laws, sometimes accepted under time pressure, no one analyzes nor undertakes steps to assess the economic – social effects of many proposed amendments. For MPs it is the most important to achieve the acceptance of amendments than long term consequences. This mechanism occurs with almost total degradation of the evaluation of the efficiency and effectiveness of the discussed regulations. How could accepted legislation be judged if sometimes changes are related to the key elements like the initial assumptions, objectives, scope, timing and others. Required search for alternatives to regulation remains in wishful thinking category, presented by the authors of RIA method. Therefore it is not surprising that regulations implemented into practice reflect a low level of quality. Some new legislations are introduced in such a hurry that at the time of their announcement, they are ready for the general correction.

Next important cause of regulatory failures is absence of legislative institution responsible for the overall preparation and implementation of new laws. Formally, this function should be performed by the Governmental Legislative Centre (GLC). Its weak positioning in the structure of the state authorities and limited participation in the evaluation of implemented projects is the "lame solution." The role of this institution is reduced only to supervising the legal correctness of the draft regulations contributed by the governmental units (mainly acts). It has no effect on the shape of the provisions adopted by the Parliament. GCL is also not responsible for the substantive justification and evaluation of the impact of proposed legislation. It is the duty of the various ministries. RIA belongs to the worst part of legislation practice. Practically they are done (better or much more often – weaker) assessments for new regulations,

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<sup>7</sup> In this legislative path (MP's proposals) it has no obligation to prepare RIA. The average activity of MPs is related up to 80% of legislation initiatives. See: *Lepsze regulacje w latach 2012 –2015*, 17.

this procedure is not proceeded in ex post context (evaluation of regulation after some time of functioning), which is quite rightly a key recommendation of the RIA methodology. Rating of ex post assessment in Polish conditions, in majority cases, would be only bureaucratic. The reason is usually poor primary justification of regulations (no numerical measures of objectives and results, differences between original and final versions). That's why we can constantly observe the same legislative mistakes and continuous process of voting a new adjustment legislations, because of the differences between achieved and expected results. In addition, necessity to change big number of failed or malformed regulations consume Parliament time and restricts an introduction of laws that are urgently needed for the economy.

It could be concluded that the system of law-making in Poland is ill. There is some legislative capacity, but without intensive pressure from the maturing Polish civil society, we shouldn't expect significant changes.

#### **DIRECTIONS FOR IMPROVEMENT OF REGULATIONS**

Taking into consideration the above presented descriptions of the law-making system in Poland, the necessity to undertake steps to improve the process of preparing and implementing regulations appears. The recommendations at the national level are the following:

- to strengthen the position of the government in the law-making system,
- implementing restrictions to introduce amendments to legislations in the process of approval in Parliament (at least requirements for RIA of MP's proposals),
- the establishment of an independent body monitoring the quality of adopted regulations,
- the creation of an institution, well equipped in legislative responsibilities, covering the overall process of preparing and implementing regulations.

There are many more other possibilities to support regulatory processes related to the industry -level, non-governmental initiatives and activities directly undertaken by the owners and management of SMEs. Polish companies should keep in mind that modern corporations don't only compete, but cooperate on many levels to achieve successful position on the market. One of the most important fields of cooperation is in the area of regulations. Regulatory risk is very high and many companies failed when their financial results seemed to be

quite good. For this reason, skipping and disregarding of a regulatory factor is not only irrational, but a serious business mistake.

### ■■■ CONCLUSIONS

The current shape of regulations for the SME sector in Poland shows a chronic drift of adopted and implemented legislations. On one hand, there is a strong pressure and organizational, financial and methodological support of the European Union to improve regulatory processes, especially with regard to the reduction of administrative burdens and comprehensive impact assessment. On the other hand, the Polish government has initiated substantively important programs and projects to improve regulatory practice. However, the internal mechanisms and procedures of legislation, as well as “dormant perception” “of companies and passive behavior of the management of the SMEs impinge on the low effectiveness of the undertaken initiatives. It is visible when we compare them with the needs of the modern competition and the importance of the SME sector for more dynamic development of the Polish economy. This kind of enterprises generates 47,3% of Polish GDP (Raport o stanie sektora 2013, 16).

The scale of the regulatory mismatch gap is caused by the lack of a clear national strategy of SME development, the limited impact of government on the regulatory process, skipping the risk assessment and using too simplistic regulatory impact assessments. The lists of legislative barriers faced by SMEs in their businesses are frighteningly high, and many of their problems are affected by imperfect regulations.

This paper presents a brief description of actions (institutional, regulation procedure requirements, and cultural changes), that may lead to the exit of the loop between existing poor legislation and business barriers, and what can give a good impulse to SME development in Poland.

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