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Regulation Impact Assessment (RIA) at Poland and at some EU countries

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Abstract

Regulation Impact Assessment (RIA) is a subject of discipline that is called the Law and Economics. This discipline anticipates the impact of regulations on the state economy and gives suggestions in this regard to legislature. Regulation Impact Assessment (RIA) at Poland is a separate part of the factual and legal justification of an act. It describes the economic impact of a bill. The author describes the process of creating RIA at Poland and compares this procedure with the procedures being in force in the selected EU countries.

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1. Introduction

At Poland, likewise other countries, exists a presumption of so-called 'rational legislator'. According to Stawecki and Winczorek (2003), the predetermination should be taken into account, that aims of legislature process (according to available and reasonable knowledge) should be available for achievement and the costs of its achievement should not surpass its benefits. This is costs and benefits in the economic meaning and also in social, moral and political meaning (p. 157). So called economic costs of new law enforcement play a non-trivial role. At this case it comes to, i.a. a measurable answer to questions: how much would the implementation of a new legal regulation cost? The benefit and loss measurement should be considered generally and with that nowadays all legislators should bear with. Moreover, the assumption should be bore in mind, how the planned aims would have to be achieved at the particular case with possibly low financial costs.

The case of law efficiency is here deliberated. Considerably young discipline touches this problem and this is the Economic Analysis of Law (*Law and economics*). It analyses the law with methods adopted from economic sciences. Szczerbowski (2008), during the analysis of law for economic purposes has stressed the fact, that for most of jurists the law should not be examined in the economic way. The law should be a subject of justness and rightness criteria; those are moral and culture criteria, but not the economic ones (p. 93). But the Economic Analysis of Law is inclined to give answer to following question: Is the implemented law effective, considering the state and its

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economy? The influence of law regulation at financial condition of a society is worth to be stressed too. This is achieved in two ways. The first (predominant at practice) estimates the potential effects of particular law resolution during the initial procedure of a legislative process (so called *ex ante* assessment). The second assesses the influence of an enacted law regulation at some time after its empowerment (so called *ex post* assessment). This assessment, regardless the time of its preparation, is called: Assessment of Regulation Consequences (ARC). According to Jacobs (2004) Assessment of Regulation Consequences (ARC) is a tool, that is nowadays applied at most of developed countries and that allows for better knowledge of economic and social effects of a regulation (p. 283).

2. Impact Assessment of Regulations at Poland

The analysis of Polish literature induces the conclusion, that it is hard to define the RIA precisely. From the one hand, it is recognised as a part of a bill justification (this is what jurists creating a legislative deed say). From the other hand, this Assessment is considered to be an autonomous one and its time of formation is considered before the study on normative act starts (this is what economists say). Osiecka – Chojnacka (2008) has tried to explain this dichotomy. She assumed, that there does not exist one and universal RIA model. What is more, she stated, that by modelling the RIA, the institutional, social, cultural, and law conditions should be considered, including functional customs of administration, and of politics at particular country (p. 1). This duality of RIA (in Polish practice) was accented by Zubek (2007), who stated, that RIA should not be understood as a part of a bill justification, but to be recognised in the broader sense, convergent to OECD recommendation and to *Guideline for Regulation Impact Assessment* (pl. *Wytyczne do Oceny Skutków Regulacji*), approved by the Polish Cabinet at October 2006. In his opinion the RIA methodology for Poland should consider the ways for bill preparation. It should consist of five following steps:

1. Analysis of a problem – assumption, whether the real social or economic problem existed and if it demanded the legal regulation.
2. Analysis of basic scenario – assumption of predictable development of a situation in the case the legal regulation was not undertaken.
3. Analysis of regulatory aim – assumption of the level at what the legal regulation should solve the problem.
4. Analysis of regulatory variants – identification of the best solution for the achievement of stated goal.
5. Analysis of profits and losses – the choice of regulatory solution, that would bring maximal profits with minimal costs (p. 3)

First Polish trials for RIA implementation at government and legal practice are dating back to 1987 year. At this year, by the Resolution of the Council of Ministers No. 160 from the day 23 November 1987, considering the Rules of Procedure of the Council of Ministers and the Sejm Presidium, for the first time it was clearly stated, that the justification for a bill should include a description of social, economic, financial and law effects (the Council Of Ministers, 1987). However, it was not the real RIA. This state of affairs existed until 2001 year, when the Resolution of the Council of Ministers No. 125, from the day 4 September 2001 was enforced, that changed the following resolution – Rules of Procedure of the Council of Ministers. At this regulation we meet the term RIA for the first time, with the special focus on the fact that for the quality of this assessment from the side of government is responsible the Government Legislation Centre (pl. *Rządowe Centrum Legislacji*). In the literature the conclusion may be found out, that these assessments did not represent the high substantial level. As Szpringer and Rogowski (2007) say, the methodology for its conduct was not developed (p.8).

This state of affairs did not last long. At 19 March 2002 the resolution of the Council of Minister No. 49 – Rules of Procedure for the Council of Ministers was taken into force, according to which the body, that inferred a project for a bill, was obliged to elaborate an RIA. This assessment preceded the project for normative act. Terms for RIA were to be elaborated by the Council of Ministers. Methodology for Regulation Impact Assessment was elaborated at first half of 2003 year. The Ministry of Economy and the Council of Ministers adopted it at 1 July

2003. When the project for normative act was developed, the justification was annexed. The separate part was a synthetic presentation of RIA results, which included, i.e.:

- 1) Indication of the bodies, at which the normative act affects
- 2) Results of conducted consultations, particularly when the duty of consultation is pursuant to law
- 3) Presentation of results for a bill influence analysis, particularly at public finance sector, including the state budget and local self-government unit budgets

It may be concluded, that formally these were two separate documents, as Brzęk writes (2013), prepared at different time and with different circumstances and, as it seems, with different volume.

It should be added too, that in the Prime Minister's Regulation from the day 20 June 2002, considering "Principles for Legislation Techniques" there was put an emphasise on the fact, that the decision about the bill project should be preceded by definition of probable social, economic, organisational, law and financial effects for each deliberated solution. However, when the decision about the project preparation was done, the financial consequences for separate and alternative law solutions should be determined and the resources for its coverage defined.

At 2004 year, when Poland entered into EU, the country had to adopt EU standards in terms of RIA. Therefore, at 2006 year the Ministry of Economy formulated new *Guideline for Regulation Impact Assessment* (pl. *Wytyczne do Oceny Skutków Regulacji*). It was adopted by the Council of Ministers at 10 October 2006 and is being in force until today. These vast, counting 69 pages, document consists of the principles for RIA preparation before the formulation of a bill project (p. 7). It has introduced new element into RIA. An aspect of environmental influence broadened the assessment of costs and benefits. It was because of an implementation of sustainable growth principle. It is based, as far as it is known, on integration and equal attempt to three pillars: economic, social and environmental (p.8). From that time on the basic RIA elements at Poland are: identification of a problem, determination of terms for regulation, determination of alternative solutions for a goal achievement, consultations, analysis of benefits and costs for an option, determination of implementation plan and last, comparison of options and recommendation for the best solution (p. 10-11).

It should be stressed, that as it comes to profit and loss analysis, the Guideline recommends quantitative methods and presentation of results as particular expenses or incomes that would be paid or gained, when a particular normative act will be effective. First and foremost, it recommends an analysis of relation between benefits and costs [cost-benefit analysis, CBA] (p. 61) and the analysis for effectiveness of costs [cost-effectiveness analysis, CEA] (p. 63). This document allows for qualitative methods only if quantitative analysis was not available. *Guideline* suggests, that in this situation the choice of an appropriate solution would be hampered.

Announcement of *Guidelines* concurred with published by OECD *Report on the potential of regulatory management at Poland* according to SIGMA (*Support for Improvement in Governance and Management*) at October 2006. In this document the series of postulates were included with regard to the Polish government. The leading recommendations are postulates for further implementation of *Better Regulation* [implementation of politics for better legislation] and for development of more systematic and disciplined regulatory management (p.4).

During trials for fulfilment of these postulates the Council of Ministers, at years 2009 – 2011, changed its Rules of Procedure. Moreover, at 2009 year the Government Legislation Centre published *the Guidelines for development of projects regarding presumptions for act projects*. At this document the procedure for development of presumptions regarding act projects were included. From that time on it would have included three parts. The last part put focus on prediction of social and economic effects (costs and benefits) of a probable law regulation. This part had to be elaborated according to principles included in the Guidelines to Regulatory Impact Assessment from 2006 year.

At 6 December 2011 year the Council of Ministers changed its Rules of Procedure once more, where they adopted a statement, that the separate part of project regarding presumptions for act project are following steps:

”1. Regulatory test, that includes introductory economic, financial and social analysis, with assessment of regulatory burdens and its comparison with solutions adopted at other countries, also indication of a person responsible for the project.

2. Results of consultations, if they were done, particularly when the duty of consultation arises from the law.”

This test is a short form in which the knowledge of a projector regarding the bill is presented in the condensed way, at the starting point of RIA. It is based on the fundamental analysis of costs and benefits. The part, where the projector is obliged to present the ways of solution of a particular problem at other countries, that are part of OECD and UE, is particularly interesting.

Therefore, the legislation process was complicated again and RIA started to be present at different shapes at each step of government legislation process.

The problem of RIA employment at Poland was a subject of various elaborations. This was a matter of economists and jurists in particular. The majority of them were critical to practical employment of RIA, supporting own argumentation by particular examples. Critical visions of Napiontek (2008) (p. 106 – 108) and Urbańska (2011) are worth to be stressed. It is worth to recollect the former proposition of Wierzbicki (2007), who denied the need of employment and RIA in that early form (p. 163).

Rybiński (2012) with the group of authors did recently an assessment of interest group roles in the legislation process at Poland. In his report he related to RIA too. In conclusion he stated, that Polish regulations regarding RIA preparation are proper and there is no need of substantial changes in this scope. But this is a perfunctory instrument in practice. It is prepared only to meet formal requirements (p.4).

Probably because of the critical voices the government has prepared the project of new Rules of Procedure at March 2013. From the justification of this project the conclusion may be done, that changes are focused on government legislation process. In the event of RIA:

1. The duty of data reference and applied methods for calculation was imposed and that would allow for better analysis and possible verification of data included into RIA during its preparation.
2. Requirements regarding update of RIA text during the project preparation as a result of time flow and an access to new information were specified.
3. The need of presentation of consultation results in the RIA was given up. It would be a new document attached to the project.
4. The duty of assessment of functionality of bills that are in force at each time was put on – this is RIA ex post and the results will be shown in the Public Information Bulletin (pl. *Biuletyn Informacji Publicznej*).

3. Regulatory Impact Assessment at various EU countries

At Great Britain the RIA was implemented at 1998 year and from that time on it is improved. At 2007 year a pattern for this assessment was introduced. Its title was also abbreviated. From that time it is referred to as Impact Assessment. At 2010 year the new pattern and the guideline for its filling was introduced. However, at August 2011 the document *Impact Assessment Guidance - When to do an Impact Assessment* was published and this is the guideline, whether this type of assessment should be done or not. British government, according to Cichy (2010), in the event of benefits and costs balance preparation prefers so called Standard Cost Model (SCM) and this is a tool exceptionally useful, but with defects too (p. 105). National Audit Office (NAO) that performs quality assessment regularly verifies the quality of RIA at Great Britain. RIA is not an only goal. It is a part of the government strategy described as Better Regulation, which aim is a better British legislation system. There is a presumption that legislation of a bill would be done only if other methods for solving a problem had failed.

At Germany RIA is known as *Gesetzesfolgenabschätzung* (GFA). This procedure is usually described as a procedure during which the assessment for prepared, eventually enacted bill or regulation is done. Therefore, it is an

equivalent to Polish RIA – ex ante and RIA – ex post. According to Kańtoch and Szuber (2010), the process of RIA preparation consists of five steps: analysis in the scope of regulation, description of an aim for a bill, preparation of alternative solutions, verification of these solutions, and last, documentation of results (p. 46). Each RIA must include many alternative solutions that are comparable to selected solution of a particular problem. Two solutions for a problem are minimal: regulation by bill legislation and so called *Null-Option* and this is an annulment of any legislation. The last one should be explicitly described. At Germany functions the National Council for Regulation Audit (Nationaler Normenkontrollrat NKR) from 2006 year. It is a part of Chancellor's Office. The *ex ante* analysis of a regulation is assigned to it. (p. 51).

The different solution is adopted at Malta government. Malta is an only EU country, despite Cyprus, that did not implement RIA formally. According to Mieszkowski (2010) it is replaced by so called Legal Notice Checklist (LNC) from 2006 year. It is an abbreviated version of RIA. The full version, called the big RIA (*Full RIA*, *Extended RIA*) is done at exceptional circumstances. Decision of its implementation is up to legislator. When this decision is done, the assessment usually fulfils the requirements of EU directives (p. 123). Nevertheless, LNC is a mere form consisting from three pages, where the results of proposed regulation for public administration and private sector are described. It is done only to regulations. LCN is done only after the preparation of the regulation project.

4. Conclusions

The legislation process is often a complicated procedure. This trivial remark is also applicable to RIA procedure. At EU, despite the OECD and the European Commission directives, each participating country adopted its own solution. From the one hand, there were developed complicated systems for regulation assessment, from the other hand the simple ones. Some of countries did not adopt that kind of assessment formally. Poland is placed somewhere in the middle. From the formal point of view RIA regulations meet requirements of OECD and European Commission. But this does not mean, that they are perfect. This considers *ex-ante* analysis, the forecasts. But forecasts would always be burdened with bigger or smaller mistakes. These mistakes are often an effect of imperfect methods. Also quantitative methods that are applied at those cases are not ideal. Therefore, at literature occur some tacit propositions for waiver from RIA in the form implemented now and to search for alternative solutions. It appears, that Poland and other countries should put more emphasise on *ex-post* analysis. Thus, we would know real costs and results of particular bill legislation.

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