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Regulatory Agencies in Economic Governance.

The Polish Case in a Comparative Perspective

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# I. Conceptual and Historical Background

## I.1 Regulation: Doing Things with Rules

A paradoxical consequence of the debate on privatization and deregulation in Western Europe has been to focus the attention of policymakers and policy analysts on regulation as a distinctive mode of state intervention in the economy and society. According to a legal scholar, regulation has become the new border between the state and the economy, and the battleground for ideas about how the economy should be run (Veljanovski 1991), while at the European level the regulation issue – what, how, and at what level of government to regulate – was the core of the compromise between the European Community and its member states that made the Internal Market program possible. The present consensus on the significance and distinctiveness of regulation is a relatively new phenomenon. While the American deregulation movement was preceded and prepared by decades of intensive research on the law, economics and politics of the regulatory process, in Europe the terms “regulation”, “deregulation,” and “privatization” gained sudden currency without any intellectual preparation – even in Great Britain the terms were scarcely heard of before the late 1970s.

Traditionally, European scholars tended to identify regulation with the whole realm of legislation, governance and social control. Such a broad meaning makes the study of regulation almost coextensive with the study of law, economics, political science and sociology. It is not surprising, therefore, that research on regulation as a distinctive mode of policymaking still suffers from conceptual ambiguities and lack of reliable data. In contrast, academic and political debate in the United States has been greatly facilitated by the fact that the meaning of regulation is fairly clear within the framework of American public policy and administrative law. Following a widely accepted formulation, *regulation refers to sustained and focused control exercised by a public agency over activities that are socially valued*. The reference to focused control by an agency suggests that regulation is not achieved simply by passing a law, but requires detailed knowledge of, and intimate involvement with, the regulated activity. This requirement will necessitate, sooner or later, the establishment of specialized agencies entrusted with rulemaking and/or adjudication, as well as with fact-finding and enforcement. The emphasis on socially valued activities excludes, for example, much of what goes on in the criminal justice system. On the other hand, market activities can be regulated – in the sense just specified – only in societies that consider such activities worthwhile in themselves and hence in need of protection as well as control (Selznick 1985).

## I.2. Rulemaking versus Taxing and Spending

Most structural differences between the regulatory state and the “positive” state – the state as planner, direct producer of goods and services, and employer of last resort – can be traced back to a distinction between two sources of governmental power: Taxing (or borrowing) and spending on the one hand, and rulemaking, on the other. Concretely, this is a distinction between policies that require the direct expenditure of public monies, and regulatory policies, whose costs are largely born by the regulatees. The crucial point is that budgetary constraints have very limited impact on rulemaking, while the size of non-regulatory, direct-expenditure programs is determined by budgetary appro-

priations and thus by the level of government tax revenues. The absence of a tight budget constraint for regulatory policymaking has several important consequences. First, neither parliament nor the government systematically determine the overall level of regulatory activity in a given period. Second, no office is responsible for establishing regulatory priorities across the government. Finally, while spending programs are regularly audited, no such control is exercised over regulatory programs. In an attempt to correct such problems, some analysts have advanced the idea of a “regulatory budget” (Litan and Nordhaus 1983). In its basic outline, the regulatory budget should be established for each agency, starting with a politically determined budget (e.g., the costs of environmental control which political leaders think the national economy can tolerate in a given year), and allocating it among different agencies. In the intention of its advocates, the regulatory budget would clarify the opportunity costs of adopting a regulation, and thus encourage cost effectiveness. The simultaneous consideration of all new regulations would also allow their joint impact on particular industries and on the economy as a whole to be taken into account.

The US Office of Management and Budget (OMB) has tested the regulatory-budget proposal in selected areas of social regulation, apparently with good results. What is important for us, however, is less the success of this or other proposals to improve the regulatory process than what this debate suggests: *in the regulatory state the political contest shifts from the traditional arena of the budgetary process to a new arena where jurisdiction over the review and control of the regulatory process provides the main source of conflict*. According to Seidman and Gilmour (1986), Reagan was the first president to clearly perceive the significance of rulemaking in a government that depends increasingly on agencies operating outside the normal executive branch; and to understand that review of regulations would take its place with the traditional budgetary review as one of the principal management tools available to the chief executive. While in the past the contest between the president and the Congress for power to direct public policies focused mainly on issues related to budgetary allocations and to executive-branch structure, now the major conflict is over rulemaking. Hence the growing importance of the OMB, which is located in the Executive Office, as a sort of “regulatory clearing house”. The role of OMB in the regulatory process has been enhanced by several presidential enactments, such as Executive Order No.12498 of 4 January 1985, which requires each agency to submit “an overview of the agency’s regulatory policies, goals and objectives for the program year and such information concerning all significant regulatory actions of the agency, planning or underway...as the director [of OMB] deems necessary to develop the administration’s regulatory program”. It is important to note that all subsequent administrations – democratic as well as republican – have followed the direction set by President Reagan. That the major conflict today is over control of rulemaking is even more true in the EU, where the contrast between the member states and the European institutions over the scope of European regulation has become increasingly bitter over the years.

### 1.3 Regulation in Comparative Perspective

To understand the relationship between privatization and statutory regulation it is useful to keep in mind that public ownership has been used extensively as a mode of economic regulation in most industrialized countries, the major exception being of course the United States. As a mode of regulation, public ownership became significant in the

nineteenth century with the development of public utilities – gas and water services, electricity, the railways, the telegraph and, later, the telephone. These industries, or parts of them, are natural monopolies, produce necessities, and were often considered to be strategically important. Hence it was assumed that public ownership would give the state the power to impose a planned structure on the economy and at the same time to protect the public interest against powerful private interests. However, experience was to show that public ownership and public control cannot be assumed to be the same thing. The problem of imposing effective public control over the great nationalized enterprises proved so intractable that the main objective for which they had ostensibly been created – regulating the economy in the public interest – was almost forgotten. The failure of regulation by public ownership explains the shift to an alternative mode of regulation whereby the public utilities and other industries deemed to affect the public interest are privatized, but are subject to (secondary) rules developed by agencies operating outside the line of hierarchical control or oversight by the departments of central government.

The fear now, at least in some countries, is that the regulators may have been given too much discretion, creating the possibility that regulation could evolve into the rule of men (the regulators) rather than the rule of law. In the UK, for example, the risks inherent in a broad delegation of powers are said to be compounded by weak political accountability – the Parliament exercises little systematic supervision over the agencies; by weak judicial review – British courts, unlike their American counterparts, generally do not interfere on the merits of agency decisions; and by absence of procedural safeguards comparable to those developed in the United States (see section II.3), (Veljanovski 1991). Such divergent views suggest that in the UK, and *a fortiori* in other European countries with less experience in statutory regulation, a satisfactory equilibrium between new needs and constitutional traditions has not yet been achieved. The case of the Civil Aviation Authority (CAA) is instructive as an indication of the evolution of thinking about agency independence. The Civil Aviation Act 1971 creating the agency gave it considerable powers including economic and safety regulation, air traffic control and the negotiation of traffic rights. In the words of a distinguished administrative lawyer, the CAA's "scope of authority and degree of independence was more redolent of the United States' administrative machinery than English" (Craig 1994: 97). To circumvent the constitutional problems flowing from the creation of an independent agency to control air transport licensing, however, the Act empowered the Secretary of State for trade to give guidance on policy, which he did when the CAA was established. In the 1977 case *Laker Airways Ltd v. Department of Trade*, the Court of Appeals found that the Secretary of State's policy guidance was *ultra vires* because it contradicted the general objectives of the statute. Eventually, the government decided to drop the notion of policy guidance, reasoning that if an area was to be hived off it should be truly independent: both hands should be taken off the wheel. Two decades later, the *Financial Services and Markets Act 2000*, without much controversy, gave the Financial Services Authority sweeping powers, including the power to grant and withdraw permission to undertake regulated activities, impose financial penalties, as well as making general rules applying to the carrying on of regulated activities insofar as "necessary or expedient".

France provides another revealing example of the difficulty of finding a stable institutional equilibrium between the conflicting requirements of independence and political

accountability. The 1958 Constitution is premised on the idea that public administration is hierarchically subordinated to a minister, or to the prime minister. Article 20(2) of the Constitution states that the government “shall have at its disposal the public administration and the armed forces”, while the third paragraph of the same Article states that government is responsible to parliament for its own actions as well as for the acts of the public administration. Again, Article 21 prescribes that the prime minister must direct the activities of the government. In other words, the constitution seems to prohibit the creation of independent regulatory agencies (*Autorités Administratives Indépendantes*). As a matter of fact, the first such bodies were seen by many constitutional lawyers as serious challenges to the basic principles of constitutionalism and of democratic theory. In spite of these concerns, an increasing number of independent authorities have been created since the late 1970s – a clear indication of functional needs that could not be satisfied by traditional public administration. Perhaps even more significant than the number of new authorities, or the accelerating rate of their creation since the early 1990s, is the fact that, despite seemingly insurmountable constitutional barriers, the *Conseil Constitutionnel* has looked at the growth and development of these independent agencies with a remarkably open mind. For example, it held that Article 20(2) was violated only if delegation of powers infringed essential aspects of governmental policy.

In sum, in countries where statutory regulation is still a fairly new development, there is neither a general legal framework, nor a common pattern as to how agencies should function in practice. The limits of the political independence of regulators and the scope of their powers are still, by and large, moot questions. The trend, however, seems clear: in spite of residual constitutional doubts and democratic concerns, independent agencies have become a necessary component of effective governance in all industrialized countries. The developments observed in the UK and in France have their parallels in all OECD countries, and beyond. The debate about the proper role and legitimacy of independent agencies is more advanced in the United States – a country where statutory regulation is more than a century old. Even here many key issues are still being debated, and tend to be resolved pragmatically rather than logically. At any rate, much can be learned from the experience of this country (see section II.3), as long as one keeps firmly in mind that the pragmatic solutions that have been adopted are very context-dependent: they can be heuristically quite useful, but cannot be directly grafted on different constitutional systems.

## 1.4 European Agencies

At European level the first agencies were created in the 1970s, but these were operational or promotional, rather than regulatory, bodies. The 1990s produced a second wave of agencies, now dealing with regulatory issues, including the environment (EEA) and the medicines (EMA) agencies. A third wave of agency creation started at the beginning of the present decade with the creation of the Food Safety Authority (EFSA), the Maritime Safety and the Aviation Safety Agencies, the European Network and Information Security Agency, and the European Railway Agency (see Table I-1). In addition, the Commission has put forward proposals for the creation of additional regulatory bodies: a Community Fisheries Control Agency and a European Chemicals Agency. Most European agencies of the second and third generation give advice to the Commission on the technical or scientific aspects of regulatory problems, but have not been granted authority to take final and binding regulatory decisions. Hence, they are not

“agencies” in the sense, for example, of the US Administrative Procedure Act (see section II.1), and lacking final authority, they cannot be held accountable for the outcomes of regulatory measures. On the other hand, the European Commission, which usually takes the final decisions, is a collegial body – it can be removed from office through a vote of no confidence by the European Parliament (EP), but only in its entirety. The EP is understandably reluctant to dismiss the entire college in order to sanction a single commissioner.

Only recently the Commission has attempted to fit European regulatory agencies in the broader framework of EU governance. Especially significant in this respect is the Communication on *The Framework for European Regulatory Agencies* of 11 December 2002. The Communication contains several innovative proposals, but on the central issue of the delegation of regulatory powers the official position has hardly changed over the years: agencies may not be empowered to make rules, i.e., quasi-legislative measures of general applicability. At most, they may be allowed to adjudicate, i.e., adopt individual decisions in clearly specified areas of Community legislation, “where a single public interest predominates and where they do not have to arbitrate on conflicting public interests, exercise powers of political judgment or make complex economic assessments” (European Commission 2002, p.11). The Office of Harmonization in the Internal Market, the Community Plant Variety Office, and the European Aviation Safety have been deemed to satisfy these conditions and hence allowed to adopt legally binding decisions in the adjudication of particular applications. In these three cases, it is claimed, the task is simply to verify that individual applications satisfy certain conditions precisely defined by the relevant regulations. However, the EMEA and the EFSA seem to satisfy the same conditions: EMEA is exclusively concerned with the safety and efficacy of new medical drugs; EFSA, with the safety of the food we eat. Yet, these agencies have been denied real decision-making powers: the Commission takes the final decisions. The only relevant difference between the two groups of agencies seems to be the greater economic and political significance of EMEA and EFSA, and the consequent reluctance of the Commission to surrender control over these agencies and the corresponding regulated activities. The Commission’s refusal to delegate regulatory powers entails serious costs in terms of the credibility and accountability of European regulators.

We conclude this brief discussion of European agencies with two tables presenting some basic information on their activities and organizational structure. In section II.6 we will come back to the topic of European agencies to discuss their relations with the corresponding national bodies.

Table I-1: European Regulatory Agencies

<b>Agency</b>	<b>Start of activities</b>	<b>Mission</b>	<b>Location</b>	<b>Official website</b>
European Environment Agency (EEA)	1994	To collect and disseminate timely and reliable information on the state and trends of the environment at European level; to cooperate with relevant scientific bodies and international organizations	Copenhagen	<a href="http://www.eea.eu.int/">http://www.eea.eu.int/</a>
Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)	1994	To contribute to the harmonization in the domain of intellectual property, and, in particular, the domain of trade marks	Alicante	<a href="http://oami.eu.int/">http://oami.eu.int/</a>
Community Plant Variety Office (CPVO)	1995	To implement the regime of Community plant variety rights, a specific form of industrial property rights relative to new plant varieties	Angers	<a href="http://www.cpvo.eu.int/">http://www.cpvo.eu.int/</a>
European Agency for Safety and Health at Work (EU-OSHA)	1995	To provide the Community bodies, the member states and stake holders with all relevant technical, scientific, and economic information; to create a network linking up national information networks and facilitate the provision of information in the field of safety and health at work	Bilbao	<a href="http://agency.osha.eu.int/">http://agency.osha.eu.int/</a>
European Medicines Agency (EMA)	1995	To protect and promote public and animal health through the evaluation and supervision of medicinal products for human and veterinary use	London	<a href="http://www.emea.eu.int/">http://www.emea.eu.int/</a>

<b>Agency</b>	<b>Start of activities</b>	<b>Mission</b>	<b>Location</b>	<b>Official website</b>
European Food Safety Authority (EFSA)	2002	To provide independent scientific advice on all matters with a direct or indirect impact on food safety; to carry out assessments of risks to the food chain; to give scientific advice on genetically modified non-food products and feed	Parma	<a href="http://www.efsa.eu.int/">http://www.efsa.eu.int/</a>
European Aviation Safety Agency (EASA)	2003	To assist the Community in establishing and maintaining a high level of civil aviation safety and environmental protection in Europe; to promote cost efficiency in the regulatory and certification processes; to promote world-wide Community views regarding civil aviation safety standards	Cologne	<a href="http://www.easa.eu.int/">http://www.easa.eu.int/</a>
European Maritime Safety Agency (EMSA)	2003	To provide technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution by ships; to contribute to the process of evaluating the effectiveness of Community legislation	Lisbon	<a href="http://www.emsa.eu.int/">http://www.emsa.eu.int/</a>
European Network and Information Security Agency (ENISA)	2004	To assist the Community in ensuring particularly high levels of network and information security; to assist the Commission, the member states and the business community in meeting the requirements of network and information security, including those of present and future Community legislation	Heraklion	<a href="http://www.enisa.eu.int/">http://www.enisa.eu.int/</a>

<b>Agency</b>	<b>Start of activities</b>	<b>Mission</b>	<b>Location</b>	<b>Official website</b>
European Railway Agency (official acronym not yet available)	2006	To provide the member states and the Commission with technical assistance in the fields of railway safety and interoperability, in particular by carrying out continuous monitoring of safety performance, and producing a public report every two years	Lille/ Valenciennes	<a href="http://europa.eu.int/comm/transport/rail/era/index_en.htm">http://europa.eu.int/comm/transport/rail/era/index_en.htm</a>

Source: Official home page of the Agencies: [http://europa.eu.int/agencies/index\\_en.htm](http://europa.eu.int/agencies/index_en.htm)

Table I-2: European Agencies: Organizational Structure

<b>Agency</b>	<b>Management Board: Composition</b>	<b>Management Board: Appointment</b>	<b>Other Organs: Composition</b>	<b>Other Organs: Appointment by</b>
EEA	1 per MS, 2 for EP, 2 for Commission. Plus, 1 representative allowed per country that participates in the agency, in accordance with the relevant provisions (Reg. 933/1999, OJ L177/1)	1 each by MS, 2 by EP, 2 by Commission	Scientific Committee: 26 members qualified in environmental issues	Management Board
OHIM	Administrative Board: 26 members	25 members by MS, 1 member by Commission	Budget Committee: 26 members (1 per MS, 1 for Commission)  Board(s) of Appeal: 3 members (1 chair, 2 other members; at least two legally qualified)	MS, plus Commission member by Commission  President of the Office, on proposal of the Administrative Board

<b>Agency</b>	<b>Management Board: Composition</b>	<b>Management Board: Appointment</b>	<b>Other Organs: Composition</b>	<b>Other Organs: Appointment by</b>
CVPO	Administrative Council: 26 members (1 per MS, 1 for Commission)	MS members by MS, Commission member by Commission	Board(s) of Appeal: 3 members (1 chair, 2 other members)	Chair by Council, following Commission proposal and obtaining Administrative Council opinion; Chair selects other two members from Administrative Council list, on Office proposal
EU-OSHA	Administrative Board: 78 members (1 per MS, 50 from employers' and employees' organisations, 3 for Commission)	25 MS members by MS, 50 from organisations by Council, 3 Commission members by Commission	–	–
EMA	54 members: 2 per MS, 2 for EP, 2 for Commission	MS members by MS, 2 by EP, 2 by Commission	Committee for Medicinal Products for Human Use: 2 per MS, representing MS competent authorities  Committee for Veterinary Medicinal Products: 2 per MS, representing MS competent authorities	MS  MS

<b>Agency</b>	<b>Management Board: Composition</b>	<b>Management Board: Appointment</b>	<b>Other Organs: Composition</b>	<b>Other Organs: Appointment by</b>
EMEA (cont'd.)			Committee for Orphan Medicinal Products: 31 members (1 per MS, 3 for patients' organisations, 3 for Commission)  Committee on Herbal Medicinal Products	25 MS members by MS, 3 for patients' organisations by Commission, 3 Commission members by Commission on Agency recommendation
EFSA	15 members (4 of whom with background in organisations representing consumer and other interests in the food chain, and 1 for Commission)	14 members by Council, in consultation with EP and on Commission proposal, Commission member by Commission	Advisory forum: 25 members representing competent MS authorities  Scientific Committee: 14 members (Chairmen of 8 Scientific Panels, and 6 independent scientific experts)  8 Scientific Panels	MS  Management Board  Management Board
EASA	26 members: 1 per MS, 1 for Commission Where appropriate, participation of third countries	MS members by MS, Commission member by Commission	Board(s) of Appeal: 3 members (1 chair, 2 other members)	Management Board, on Commission proposal

<b>Agency</b>	<b>Management Board: Composition</b>	<b>Management Board: Appointment</b>	<b>Other Organs: Composition</b>	<b>Other Organs: Appointment by</b>
EMSA	Administrative Board: 33 members (1 per MS, 4 for Commission, 4 professionals from most concerned sectors)	MS members by MS, Commission members by Commission, 4 professionals by Commission	–	–
ENISA	15 members (of whom 2 representatives of industry and 1 representative of consumers without the right to vote)	6 members appointed by the Council, 6 members appointed by the Commission; the two representatives of industry and the one of consumers are proposed by the Commission and appointed by the Council	–	–

## II. The Agency Model

### II.1 Agencies

“Agency” is not a technical term, but rather an omnibus label to describe a variety of organizations which perform functions of a governmental nature, and which often exist outside the normal departmental framework of government. The most comprehensive definition is probably provided by the US Administrative Procedure Act (APA). According to this important statute which regulates the decision-making processes of all agencies of the federal government, an agency is a part of government that is generally independent in the exercise of its functions and that by law *has authority to take a final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedures of rulemaking and adjudication*. It should be noted that agency status does not require that an agency exercise its power with complete independence, either vertically (in terms of being subject to administrative review), or horizontally (in terms of being required to act in concert with others). If an authority is in complete charge of a program, it is an agency with regards to that program, despite its subordinate position in other respects.

To exemplify, the American independent regulatory commissions (IRCs), such as the Interstate Commerce Commission and the Securities and Exchange Commission, are certainly agencies in the sense of the APA, but so are the Occupational Safety and Health Administration (located within the department of Labor) and the Environmental Protection Agency (which depends directly from the President). In the EU, most European “agencies” are not, strictly speaking, agencies since, as we saw, the “final and binding action” is usually taken by the European Commission. The European Central Bank, on the other hand, is definitely an independent agency. In the member states the situation varies somewhat from country to country, but by now most national regulatory agencies satisfy the APA criterion. Moreover, regulatory agencies are almost always based on statute, in which case one speaks of *statutory regulation*. In the United Kingdom, for example, the empowering legislation for bodies such as the Civil Aviation Authority, the Monopolies and Mergers Commission or the regulatory offices created to oversee the privatized utilities, state in some detail the composition and powers of such bodies, as well as the role of the Minister within that regulatory area. Any legal action for judicial review will normally be brought against the agency in its own name, unless the applicant is seeking to impugn a particular decision taken by the Minister. In contrast, in the EU legal actions for judicial review have to be taken against the Commission rather than against the agency which did all the work preparatory to the Commission’s decision.

In sum, the term “agency” includes a great variety of activities, objectives, and institutional designs. This report is primarily concerned with regulatory agencies, and even within this group one can observe a great many different types. A first typology will be introduced in the next part of this report, with reference to the existing Polish agencies. Here we wish to call attention to the provision of information as an increasingly important component of the task of a modern regulatory agency. In some cases this particular task is so important that one speaks of *information agencies*. The role of information in the regulatory process is bound to increase in Poland, as in all industrialized countries.

A situation where the provision of information seems more appropriate than binding regulation is when the health risks posed by some new industrial chemicals are not fully understood. In such cases it is difficult to set mandatory exposure standards that strike a reasonable balance between risk and the cost of control. Thus, even if direct regulation is ultimately a preferable solution, it makes sense to use mandatory labels, warnings, and other forms of risk communication as an interim protective measure, pending the completion of more detailed scientific and economic analyses. The effectiveness of this “soft” mode of regulation will depend on several factors such as the credibility of the experts, the persuasiveness of the evidence, the methodology of risk communication, and so on. Such issues face any regulatory strategy based on information, but surely the implementation problems of command-and-control regulation are at least as severe (Breyer 1993).

## II.2 Why agencies?

Rulemaking powers need not be delegated to independent agencies. In fact, as will be seen in the empirical part of this report, none of the presently existing Polish regulatory agencies has been given such powers. A question arises, therefore, about the relative advantages of alternative institutional arrangements. In parliamentary systems, assignment of quasi-legislative functions to government departments is the normal mode of delegation. In the areas of economic and social regulation, however, it is today generally admitted that direct ministerial oversight seldom represents a satisfactory solution. The case in favor of delegation to agencies rather than to existing departments of government usually includes the following elements: the need for expertise and the independence from government which experts require; the need of constant fine-tuning of the rules to adapt them to scientific and technical progress; often ministers cannot justify devoting sufficient time to highly technical tasks; the opportunity for consultations through public hearings is considerably greater for agencies (public hearings are often, in fact, a statutory obligation) than for departments – bureaucratic anonymity being a corollary of ministerial accountability; and the greater possibility of attracting high-level experts without the restrictions of civil service rules. These are important, but not decisive, advantages of the agency model. The really crucial factor is the insulation of the agency from direct political influence, and it is this political independence which needs to be justified.

In sum, the relevant question today is not simply: why agencies?, but: why *independent* agencies? And the answer is: *in order to enhance the credibility of long-term policy commitments*. In an integrating world economy, domestic and foreign investors are extremely sensitive to the risk that changing parliamentary majorities may cause significant and unpredictable changes in public policy. Independent regulatory agencies have been established in order to protect the regulatory process from such political uncertainty. In this perspective, the independent regulator may be viewed as an impartial referee administering a *regulatory contract* in the interest of all the stake holders. Thus, the challenge facing legislators is to design a framework where independence and accountability are complementary and mutually supportive, rather than mutually exclusive, values. As suggested in section II.3, such a framework will have to consist largely of procedural and other indirect means of inducing the desired agency behavior. In countries where statutory regulation is still a relatively new mode of policymaking, legislators do not always appreciate the importance of suitably designed procedures as unobtrusive but

nevertheless powerful instruments for enforcing accountability and disciplining regulatory discretion. In this respect, much can be learned from the history of statutory regulation in the United States.

### II.3 Control and Accountability through Procedures

An outstanding example of the indirect approach to the control of agency discretion and to enforcement of public accountability is the 1946 U.S. Administrative Procedure Act (APA), now widely imitated by most OECD countries. The APA still provides the most important *general* approach to controlling agency discretion. Prior to this act, procedural requirements, usually imposed by the courts, differed across agencies. These included procedures relating to information gathering and disclosure, and to standards of evidence. Important effects of the Act, therefore, were to impose greater uniformity across agencies. Two provisions are especially relevant to the present discussion. First, a general notice of proposed rulemaking, to be published in the Federal Register. The notice must include: a statement of the time, place and nature of rulemaking proceedings; reference to the legal basis for the proposed rule; a description of the subjects and issues involved. Second, the agency must give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation. Additional requirements were introduced in the 1970s, in response to the increasing complexity of rulemaking in such areas as environmental protection and risk regulation. For example, the agency's discussion of the basis and purpose of its rule must detail the steps of the agency's reasoning and its factual basis, and significant comments received during the public comment period must be answered at the time of final promulgation.

The APA was followed by the Freedom of Information Act (FOIA) passed in 1966 and amended several times since; the Government in the Sunshine Act (GITSA) of 1976; and the Federal Advisory Committee Act (FACA), enacted in 1972 and amended in 1976 to incorporate the GITSA standards for open meetings. The FOIA gives citizens the right to inspect all agency records that do not fall within any of ten specified categories, such as trade secrets and those files the disclosure of which could be expected to constitute an invasion of privacy, or compromise a law enforcement investigation. However, even these exceptions are not absolute. To reduce even further the chances that an agency can manipulate the FOIA to its own advantage, the law requires the agency to prove that it need not release the information – rather than requiring the citizen to prove that it should release it. The FOIA was adopted in response to claims that many core documents and other information underlying important agency decisions were not available to the public, thereby impairing the rights of citizens and of the media to monitor government performance.

The Sunshine Act is similarly designed to prevent secrecy in government, but its reach and impact are more limited than FOIA's. The GITSA applies to agencies headed by collegial bodies, such as the independent regulatory commissions. It obliges such agencies to provide advance notice of meetings at which agency business is to be conducted, and to meet in public unless the members, by majority voting, decide that the matter falls within one of the statutory exemptions. Yet, Congress recognizes the legitimacy of protecting oral deliberations on issues whose resolution could be undermined by premature disclosure and thus section 9(B) of the Sunshine Act permits closure if discussion

would “disclose information, the premature disclosure of which would...be likely to significantly frustrate implementation of a proposed agency action...”. The narrow terms of this exception, however, make closure difficult in most cases. Finally, the FACA establishes requirements that agencies must follow when consulting groups of individuals who are not federal employees, and it prescribes how such advisory committees shall proceed in rendering their service to the agency. The main requirements for the creation of an advisory committee are: the existence of a charter, which must be approved by the General Services Administration; selection of members to ensure diverse views on the issues to be considered; and mandatory expiration, or re-chartering after two years. The main obligations of established committees are to publish advance notice of their meetings and to deliberate in public, subject to the GITSA exceptions permitting closure (Mashaw et al. 1998, pp.601–4).

Although no other industrialized country seems to have procedural requirements as rigorous as the American ones, in recent years a number of countries have adopted APA-like legislation, as already noted, and also functional equivalents of the Freedom of Information Act.

## II.4 The Agency In Its Regulatory Space

It is difficult to overemphasize the importance of considering agencies not in isolation, but as being embedded in a complex web of relationships with institutions, organizations, and groups that together form what may be called the *regulatory space*. In fact, the shift from the interventionist to the positive state (see section I.2) entails the emergence of a variety of new actors in the policy arena, or at least a significant reallocation of power among the old actors. Thus, according to Seidman and Gilmour (1986), the growth of regulation has converted the one non-elected branch of government, the Judiciary, from a relatively neutral referee to an active player in the regulatory game. Indeed, the involvement of the courts is one of the most important consequences of the growth of regulation. Once judges accept the appropriateness of their courts as sites for the resolution of disputes between governmental rule-makers and private agents, they become significant, sometimes the most significant, actors in the regulatory process. In the United States the decision-making process of regulatory agencies has been largely shaped by courts, using the APA and the other statutes mentioned in Section II.3. In Europe, too, the growth of regulation is giving the courts an ever-expanding role in the policy process. In some countries, such as Poland and Spain, the importance of this role has been emphasized by the establishment of specialized courts, e.g., in the area of competition law.

Experts and other regulators in functionally related policy areas, are two other important groups of actors in the regulatory space of a given agency. Regulation depends so heavily on scientific, engineering, and economic knowledge that expertise has always been an important source of legitimacy of regulatory agency. Both supporters and opponents of particular regulatory measures usually cast their arguments in the language of “regulatory science” rather than in the more traditional language of interests or class politics. Paradoxically, the very fact that the scientific basis of regulation is often uncertain and contestable tends to increase the role of experts at every stage of the regulatory process. Partly because of this dependence on expertise, regulators enjoy greater discretion, and in some cases also greater power, than other administrators. They also face a different

structure of professional and career incentives. The heads of regulatory agencies have a well-defined agenda and their success is measured by the amount of the agenda they accomplish. The focus on particular regulatory objectives not only favors a higher level of professionalization than is possible for bureaucratic generalists, but also facilitates *accountability by results*.

Just as regulatory agencies focus on a single objective, however broad, so the new pluralist groups and social movements which thrive in the regulatory state are concerned with a single issue: the environment, consumer advocacy, civil rights, or gender issues. It is instructive to compare such non-economic, single-issue groups with the corporatist interest groups which traditionally have played such a key role in economic policymaking in Europe (see table II-1 below). In countries where a single interest group could speak for its sector of society – business trade associations, labor unions, farmers’ groups, etc. – that monopoly has been created or strongly encouraged by the state. Governments reinforced the monopoly of such corporatist groups because they needed their cooperation to support particular types of policy. The help of these groups was particularly needed for economic planning and government-led growth, and for formulating and implementing incomes and welfare policies. Neocorporatist countries such as Sweden and Austria, for example, used to rely heavily on employers’ associations and labor unions to restrain the inflationary potential of their commitment to full employment. On the other hand, in countries like the United States, where economic planning, industrial policy and incomes policy never enjoyed widespread political support, and where political power is fragmented, no corporate interest group entitled to speak for an entire economic sector, could ever exist: the political culture of America, the oldest regulatory state, is pluralist rather than corporatist. But while corporatist interest groups have been considerably weaker in the United States than in Europe, non-economic, single-issue groups have had an extraordinary impact on American regulatory policies. Courts have been very important in making this influence possible. For example, by relaxing the requirements for standing to sue in the 1960s and 1970s, US courts made it far easier for a variety of public-interest groups to challenge policies in the courts, a particularly important development in the politics of regulation. The distinctive features of the political and institutional space in which a regulatory agency is embedded reflect the structural differences between the traditional interventionist (or “positive”) state and the regulatory state, as shown in the following table.

Table II-1: Comparing Two Modes of Governance

	<b>Positive State</b>	<b>Regulatory State</b>
<b>Main Functions</b>	Redistribution, macroeconomic stabilization	Correcting market failures
<b>Instruments</b>	Taxing (or borrowing) and spending	Rulemaking and adjudication
<b>Main Arena of Political Conflict</b>	Budgetary allocations	Review and control of rulemaking
<b>Characteristic Institutions</b>	Parliament, ministerial departments, nationalized industries, welfare-state institutions	Independent agencies, courts, specialized parliamentary committees, regulatory networks

	<b>Positive State</b>	<b>Regulatory State</b>
<b>Key Actors</b>	Political parties, bureaucrats, centralized interest groups	Single-issue movements, regulators, experts, judges
<b>Policy Style</b>	Discretionary	Rule-bound, legalistic
<b>Political Culture</b>	Corporatist	Pluralist
<b>Political Accountability</b>	Direct	Indirect and largely procedural

## II.5 National Agencies and Transnational Networks

According to the Chairman of the British Health and Safety Commission, writing in 1989, “The [Single European] Act in effect paved the way for a shift from national to EC primacy in the area [of occupational health and safety]” (cited in Baldwin 1996, p.96) There is no doubt that EC/EU regulations and regulatory institutions occupy a significant part of the regulatory space in which national agencies are embedded. Yet, with the benefit of hindsight, we can see that the statement of the British regulator was exaggerated or at least not sufficiently qualified. A first, important qualification is based on the distinction between the three basic functions of a regulatory agency: rulemaking, adjudication, and enforcement. The influence of the European level is most significant on rulemaking, and to a much lesser extent on adjudication, but is practically absent in implementation. This means that the actual outcomes of regulatory measures are largely determined by actions taken at the national and subnational levels. Even in the case of rulemaking it is easy to exaggerate the actual impact of the European level. National authorities have a good deal of flexibility in translating European directives into national laws and regulations, especially when EU rules define only minimum standards. The discretion governments enjoy in transposing EU directives allows the national authorities to choose among various methods for achieving a given objective. It also allows them to design specific national solutions for regulated firms operating in the national market. Thus, even in areas subject to EU regulations national agencies enjoy considerable freedom in defining the most appropriate regulatory regime. It should be noted that the broad discretion of the national regulators is often the price that has to be paid in order to get the Council’s approval of the regulations proposed by the Commission. Thus, the liberalization of the electricity industry became politically feasible only after the possibility of nationally differing regulatory regimes was allowed (B.Eberlein and E.Grande 2005). In sum, even in the sphere of rulemaking to speak of a “EC primacy” is an exaggeration: national regulatory agencies will continue to be crucially important even in an integrated Europe.

In section I.4 reference was made to European regulatory agencies. There it was pointed out that such agencies have no real decision-making powers and of course no enforcement powers; we saw, however, that some agencies do enjoy limited powers of adjudication. It should also be noted that European agencies exist only in the field of social regulation – environment, health and safety, risk regulation – while there are no economic regulatory agencies in such areas as telecommunications, public utilities, financial services, and transport. For example, the present regulatory framework for tele-

communications is highly decentralized and relies heavily on the work of committees of national experts, of which the most important is the Open Network Provision (ONP) Committee established in 1990. One of the important functions of this committee, the members of which are drawn from the national regulatory authorities (NRAs), is to arbitrate in disputes between telecommunications operators and NRAs that cannot be resolved at the national level, or that involve operators from more than one member state. The one significant exception to the absence of economic regulatory agencies at European level is of course competition policy. As is well known, competition is the one area where the powers of the EU (more precisely, of the Community) are considerable. Contrary to what is sometimes written, however, the European competition regulator is not the Commission's Directorate General Competition, but the entire Commission acting as a collegial body. This means that in some situations, especially in merger cases, European decisions are highly politicized, rather than being based exclusively on competition principles. At any rate, the new Regulation 1/2003, which replaces Regulation 17, introduces a significant decentralization and sharing of enforcement power with the national anti-trust authorities. Unable to handle the increasing volume of work after the latest enlargement, the Commission has agreed to surrender its monopoly over Article 81(3) of the Treaty, allowing the member state authorities to rule on exemptions to the general prohibition of anti-competitive agreements, such as price fixing, between firms.

Let us consider now the relationship between national and European regulatory agencies. The EU agencies have been designed as networks, relying heavily on technical and scientific inputs provided by the corresponding national agencies. Consider, as an example, the European Medicines Evaluation Agency (EMA). The technical work of the agency is carried out by four committees of national experts, of which the most important ones are the Committee for Medicinal Products for Human Use (CHMP) and the Committee for Veterinary Medicines (CVMP). A network of some 3,500 European experts underpins the scientific work of EMA and its committees and working groups. The CHMP (and similar rules apply to the CVMP) is composed of two members nominated by each member state for a three-year renewable term. These members in fact represent the national regulatory authorities. Although Commission representatives are entitled to attend the meetings of the Committee, the Commission is no longer represented, no doubt to emphasise the independence of the CHMP. In fact, the Committee has become more important, as well as more independent, since the establishment of the EMA. In the new situation, Committee members have greater incentives to establish the agency's, and their own, international reputation than to defend national positions. Using Alvin Gouldner's (1957–58) terminology, we may say that the agency creates a favorable environment for the transformation of national regulators from "locals" – professionals who have primarily a national orientation – to "cosmopolitans," who are likely to adopt an international reference-group orientation. It does this by providing a stable institutional focus at the European level, a forum where different risk philosophies are compared and mutually adjusted, and by establishing strong links to national and to extra-European regulatory bodies.

Transnational regulatory networks are also useful for achieving informal, bottom-up harmonization of methods, procedures, and substantive rules. We know this from the American experience, where for example the professional association of public utility commissioners of the US states and the Canadian provinces has done much to standardize regulatory practices at state/provincial level through biannual conferences, special-

ized seminars, publications and “model regulations”, without any direct intervention of the two federal governments. Something similar is now being attempted in Europe, for example through the *European Forum for Electricity Regulation* (also known as “Florence Process”). The Forum was set up by the Commission’s Directorate General for Energy and Transport in 1998 in order to facilitate and informally coordinate the implementation of Directive 96/92/EC on the opening of the national electricity markets. This informal body, which meets twice a year, includes national regulators and representatives of the relevant ministries, network operators and industry representatives, as well as customers of the industry and electricity traders. The Forum has managed to develop a common understanding of regulatory requirements, concepts, and procedures. To achieve such common understanding the Forum, supported by its specialized working groups, proposes operational solutions for regulatory problems in the European internal market, in particular rules for cross-border trade and the use of transmission networks (Eberlein and Grande 2005). The ONP Committee mentioned above performs somewhat analogous functions in the area of telecommunications, bringing together national regulators and representatives of relevant ministries, permanent representatives of the national governments in Brussels, and Commission members to discuss questions of implementation and licensing. This particular network is playing an increasingly important regulatory role. In connection with the new Framework Directive for electronic communications networks and services of 7 March 2002, the Commission set up an advisory *European Regulators’ Group*, designed as an “interface between national regulatory authorities and the Commission”, and intended to contribute to “the consistent application of the new regulatory framework” (Commission Decision 2002/2874/EC of 29 July 2002). A parallel *Radio Spectrum Policy Group* has been established to coordinate the exploitation of the frequency spectrum in the EU.

Transnational regulatory networks need not be limited to the EU, much less serve as tools of the European Commission. In fact, membership in broader international regulatory networks, such as those operating under the auspices of the Organization for Economic Cooperation and Development (OECD) can be extremely useful to national regulators and governments for the purpose of balancing the eurocentric tendencies of the Brussels authorities. Such tendencies may be seen, for example, in the preference given to European, rather than international, standards, or in the increasing international isolation of the EU in issues related to trade and risk regulation. Also the recent European telecommunications directives have been criticized for being insufficiently aware of the global dimensions of the industry, and for representing “just attempts of the Commission to push Europeanization forward” (Engel 2002, p.15).

National regulators rightly resist too much eurocentricity, since their reputation depends on finding the best technical and economic solutions to concrete problems, rather than in their commitment to the political objective of European integration. This explains why they tend increasingly to organize their transnational (European and extra-European) networks outside the Community framework. An example from the telecommunications sector is the *Independent Regulators’ Group*, which originated from the meetings of presidents of the various national regulatory authorities. This group, which is also internationally active, “rejected, even in the new supranational legal framework for communication networks and services, Commission attempts to incorporate its coordination activities into the Community structure” (Eberlein and Grande 2005, p.102). Also the *Council of European Energy Regulators*, established in 2002,

sees itself as an independent coordinating body of national regulatory authorities. Its main function is the dissemination of “best practice” examples, using for this purpose the European forums for electricity and gas regulation. In sum, it appears that an increasingly important function of national regulators in an integrating world economy will be to provide a useful counterweight to the Commission’s (understandable) European bias. To do this effectively, however, they need to cultivate a truly “cosmopolitan” orientation, and this goal is best achieved through active membership in transnational networks.

An effective transnational regulatory network must satisfy several conditions: independence both from national and from European authorities; a high level of professionalism; a widely shared regulatory philosophy; intense information exchange; and mutual trust. Although these conditions may not be satisfied from the beginning, the very existence of the network provides an environment favorable to the development of the requisite qualities. An agency that sees itself as a member of a group of organizations pursuing similar objectives and facing analogous problems, rather than as part of a large bureaucracy pursuing a variety of objectives, is more motivated to defend its professional standards and policy commitments against external influences, and to cooperate with the other members of the network. This is because the agency executives have an incentive to maintain their reputation in the eyes of their international colleagues. Unprofessional, self-seeking or politically motivated behavior would compromise their international reputation and make cooperation more difficult to achieve in the future (Majone 1997).

### **III. Regulatory Agencies in Poland: An Issue Survey**

#### **III.1. Post-Communist Economic Transformations and the Rise of Regulatory Policies**

The path of postcommunist economic transformations in Poland has followed a logic to a large extent determined by the state of the Polish economy at the end of 1980s. In particular, the domination of state owned companies and high degree of monopolization of domestic industry made indispensable the privatization and deconcentration policies, while the absence of a capital market called for the creation of institutions which would allow the trading in shares and securities. Some of these changes required decisive but, so to speak, “negative” policies of state’s withdrawal and decontrol. The liberalization of prices was a preferred policy choice in order to set right incentives for producers, and the monetary policy was used as the main instrument to rein in inflation. The priority for the liberalization of prices and economic activities excluded the possibility of introducing economic regulation such as price or rate-of-return control, the preferred solution of several Western governments in the 1970s (Viscusi, Harrington, Vernon, 2005). Some forms of economic regulation such as licensing of economic activities and the control of their conduct did persist or were selectively introduced after 1989. For instance the government eventually withdrew from the control of fuel prices, but it did introduce the requirement to build and keep mandatory fuel reserves necessary for the energy security of Poland.

Although in some policy areas the “marketization” of the Polish economy did clearly require the withdrawal of the state, in some other areas the creation of the market required the creation of appropriate regulatory institutions necessary for the functioning of a given market. The creation of a capital market was the clearest case of the need for regulation and regulatory institutions. Thus, without the Law on the Public Trading of Securities passed already in March 1991 and without the creation of the Polish Securities and Exchange Commission (KPWiG) the rapid growth of the Polish capital market and a steady expansion of the Warsaw Stock Exchange would have been impossible. In this case both the regulatory law and the regulatory institution were necessary to assure the minimum quality of the traded securities, and to reduce the information asymmetry between the issuers of securities and their potential buyers. The enhancement of efficiency of the capital market was the strongest rationale for the creation of the KPWiG. In a similar way one can look at the creation of the Banking Supervision Commission which has been developed from the Department of Banking Supervision created in 1988 within the National Bank of Poland. The Banking Supervision Commission in its current form was established in 1998 by the Law on the National Bank of Poland and a new Banking Law of August 1997 as an autonomous commission situated within the organizational structure of the National Bank. Such a choice was preceded by hot public debate when, in 1994, the Minister of Finance proposed to move the Department of Banking Supervision out of the National Bank of Poland, and a year later a group of MPs submitted a proposal to create a state board for banking supervision as an autonomous office subordinated to the Prime Minister. Yet, and this is the point we want to stress, trust in the banking system has characteristics of a public good, and the vulner-

ability of depositors to frauds on the part of bank founders gave a strong rationale for the existence of the autonomous commission created in 1998.

A slightly different pattern can be identified in other economic areas. Thus, there was little reason to create a telecommunications regulator when the telecommunications market was a monopoly of the state-owned land line operator. Only the technological change in the form of the emergence of mobile phone technologies in mid-1990s and the privatization of the state-owned land line operator created the need for the emergence of a telecommunications regulator, which started to function in 2000 as the Office of Telecommunications Regulator. The main rationale for the creation of this body was the control of the dominant operator of land telephony, and the assurance of equal conditions for the third part access to the facilities operated by the monopolist. In the electricity sector the need for regulation arose not from technological changes, but thanks to the advancement of economic theory, which helped to understand that the electricity market can be divided into a competitive (like power generation or electricity distribution) and a monopolistic part (for example the management of the electricity grid). Thus, in some parts of the electricity sector appropriate organizational changes and privatization would have opened the way for competition and brought about efficiency gains. But the Office of Electricity Regulation (URE) was created in 1997 in parallel with, if not in anticipation of, the organizational and ownership changes. Thus, the President of the URE „regulates the activities of the companies operating in the energy sector in accordance with the energy law and *the state energy policy* [emphasis added by the authors] in such a way as to balance the interests of energy companies and the consumers of fuel and energy”. In other words, due to the then state of the sector the URE was conceived not only as regulator and supervisor but also as an instrument of the state’s energy policy.

The examples indicated so far show that the instruments of economic regulation have been evolving in line with the development of the market economy in Poland. The importance of these developments has attracted media attention overshadowing the changes which have been taking place in the area of social regulation. The term social regulation is used with reference to regulations aiming chiefly at the protection of peoples’ health and safety. Although social regulation has originated in the US, it has swiftly taken roots in Europe supported by among others the decision of the Court of First Instance that regulatory choice must “comply with the principle that the protection of public health, safety and environment is to take precedence over economic interests” (Sunstein, 2005, p. 22). But, as various authors, most notably Pietro S. Nivola (Nivola, 1997), point out, social regulations generate significant costs and may be decisive for the international competitiveness of national economies, which makes social regulations an important area of economic research.

What kinds of regulations are usually classified as social regulations? The list starts from occupational health and safety regulations, passes through food safety and environmental regulations and ends with general consumer protection regulations. All these policy areas have their specific regulatory institutions. Thus for instance the Polish food safety system is composed of the following institutions:

- 1) The State Sanitary Inspection (*Państwowa Inspekcja Sanitarna*) created by the Law of 14 March 1985<sup>1</sup>, and responsible for the health quality of food, and the nutritional and health safety of articles of daily use.
- 2) The Veterinary Inspection (*Inspekcja Weterynaryjna*) organized on the basis of the Law of 29 January 2004<sup>2</sup> in order to protect animal health and safety of foodstuffs of animal origin, with the ultimate aim of protecting public health.
- 3) The State Plant Health and Seed Inspection (*Państwowa Inspekcja Ochrony Roślin i Nasiennictwa*) created by the Law of 18 December 2003,<sup>3</sup> whose main tasks include, among others, monitoring plant health conditions; the use of plant protection remedies and their production; verification and trade of seed material.
- 4) The Inspectorate for Commercial Quality of Agri-Food Products (*Inspekcja Jakości Handlowej Artykułów Rolno-Spożywczych*) created by the Law of 21 December 2000<sup>4</sup> to control the trade quality of agri-food products during all stages, from farming through food processing to wholesale trade and reduction of health risks to consumers.
- 5) The State Trade Inspection (*Państwowa Inspekcja Handlowa*), which functions based on the Law of 15 December 2000 on Trade Inspection<sup>5</sup>, and has broad tasks of protecting the interest of consumers and the economic interests of the state. The State Trade Inspection is subordinated to the Office for Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*).
- 6) The General Customs Inspectorate (*Główny Urząd Celny*)<sup>6</sup> which co-manages border veterinary, plant and seed protection and control, and the commercial quality of agri-products.

Although the institutions of the Polish food safety system are functionally diversified, their number creates the problem of coordination in what may be called the food-safety regulatory space. The majority of these institutions were created before the rise of the market economy, but the development of a private market economy with myriads of food producing firms has called for rethinking the traditional regulatory approaches, and possibly for the creation of a food safety regulatory agency (Surdej, 2006).

### III.2 Variety of Organizational Forms

The Polish language offers a large variety of terms that can indicate or hide the presence of regulatory activities and regulatory bodies. Thus, one can encounter the following terms: inspectorates, inspections, centers, funds, offices, agencies, boards, councils and commissions. The reader will remember that earlier we stressed that the term “agency”

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<sup>1</sup> Law of 14 March 1985 on State Sanitary Inspection, Journal of Laws No 90, Item 575, 1998 with later amendments and the Ruling of the Minister of Health modifying competences of the General Sanitary Inspectorate of 30 December 1999, Journal of Laws No 111, Item 1315, 1999.

<sup>2</sup> Law of 29 January 2004 on the Veterinary Inspection, Journal of Laws No 33, Item 287, 2004.

<sup>3</sup> Law of 18 December 2003 on Plan Protection, Journal of Laws No 11, Item 94.

<sup>4</sup> Law of 21 December 2000 on Commercial Quality of Agricultural and Food Products, Journal of Laws No 5, Item 44, 2001.

<sup>5</sup> Law of 15 December 2000 on the Protection of Competition and Consumer, Journal of Law No 86, Item 804, 2003.

<sup>6</sup> Law of 24 July 1999 on Customs Inspection, Journal of Laws No 72, Item 802, 2000.

is an omnibus label used to describe a variety of organizations which perform functions of a governmental nature, and which generally exist outside the normal ministerial framework, see section II.1. Thus, from this point of view the various terms listed above may de facto point to the existence of an agency. According to our calculations at the end of 2005 there were in Poland 35 agencies, that is, central organizations fulfilling delegated tasks of a governmental nature. A useful way to think about these agencies is to identify them with one of the following types of agency identified in the regulatory literature. According to a well known typology one can distinguish:

- *executive agencies*, which fulfill mostly executive functions;
- *regulatory agencies*, which have as their main task the regulation and supervision of specific areas of economic activities;
- *informational agencies*, which are responsible for collecting and/or communicating information related to some policy area;
- *dispute resolution agencies*, court-like bodies having as their main task the resolution of conflicts resulting from the application of complex legislations;
- *agencies responsible for the fulfillment of normative goals* derived from the highest legal act such as the constitution (Majone, 2002).

Applying this typology we find that in the end of 2005 there were in Poland two agencies responsible for the fulfillment of normative goals, that is the National Bank of Poland, which according to art. 227 of the Polish Constitution „has exclusive rights for money emission and for setting and executing monetary policy” and the National Broadcasting Council (KRRiT), which according to the art. 213 of the Polish Constitution “is the guardian of the freedom of speech, right to information, and of the public interest in radio and television”. In turn the National Office of Statistics (GUS) is chiefly an informational agency. The majority of existing agencies are executive agencies (the full list is given in the table on the next page).

Which Polish agencies should be counted as regulatory agencies, and according to which criteria? Our definition requires that if an agency is to be counted as regulatory, it has to have as its main task the regulation and supervision of specific policy areas. By a narrow definition of regulation only those agencies would qualify as regulatory that have the right to issue normative acts. Because of constitutional constraints, in Poland no agency has such a right.. Yet, one can speak about “contributing to regulation”, when an agency drafts executive rulings which are later issued by the relevant minister, or when an agency in its regulatory practice specifies the requirements of broad normative regulatory standards. Although the right to regulate in the narrow sense defined above is almost nonexistent, the obligation to supervise the activities of regulated subjects is a common feature of those Polish agencies that we qualify as regulatory. Based on this broader notion of regulation, and on the presence of the obligation to supervise, we can state that in Poland there were in the end of 2005 the following regulatory agencies: the Commission for the Surveillance of Insurance and Pension Funds (KNUIFE); the Office of Telecommunications and Post Regulation (URTIP); the Office of Energy Regulation (URE); the Polish Securities and Exchange Commission (KPWiG); the Office for the Protection of Competition and Consumers (UOKiK); and the Banking Supervision Commission (KNB). The other existing agencies can be considered as chiefly executive.

Table III-1: Typology of Polish Agencies (as of late 2005)

<b>Name of the Agency</b>	<b>Type of agency</b>
1. Commission for the Surveillance of Insurance and Pension Funds (KNUIFE)	regulatory
2. Office of Telecommunications and Post Regulation (URTIP)	regulatory
3. Office of Energy Regulation (URE)	regulatory
4. Polish Securities and Exchange Commission (KPWiG)	regulatory
5. Office for the Protection of Competition and Consumers (UOKiK)	regulatory
6. Banking Supervision Commission (KNB)	regulatory
7. National Bank of Poland (NBP)	with normative goals
8. National Broadcasting Council (KRRiT)	with normative goals
9. National Office of Statistics	informational
10. Main Pharmaceutical Inspectorate (GiF)	executive
11. Civil Aviation Office (ULC)	executive
12. Office of Railway Transportation (UTK)	executive
13. Office of the Main Inspector of Road Transportation	executive
14. Main Office of Cartography and Geodesy	executive
15. Main Office of Construction Supervision	executive
16. Supreme Directorate of State Archives	executive
17. State Sanitary Inspection	executive/supervisory
18. Veterinary Inspection	executive/supervisory
19. State Plant Health and Seed Inspection	executive/supervisory
20. Inspectorate for Commercial Quality of Agri-Food Products	executive/supervisory
21. State Trade Inspection	executive/supervisory
22. General Customs Inspectorate	executive
23. Office of Repatriates and Foreigners	executive
24. Office for Public Procurement	executive
25. Supreme Office of Mining	executive
26. General Inspectorate for Environment Protection	executive/supervisory
27. National Atomic Energy Agency	executive
28. Office of Civil Service	executive/supervisory
29. Polish Normalization Committee	executive

<b>Name of the Agency</b>	<b>Type of agency</b>
30. Polish Center of Accreditation	executive
31. Agency for the Modernization and Restructuring of Agriculture	executive
32. Agency of Agricultural Market	executive
33. Agricultural Property Agency	executive
34. Patent Office of the Republic of Poland	executive
35. General Inspectorate of Domestic Roads and Highways	executive

Source: Own elaboration from the web page: [www.kprm.gov.pl](http://www.kprm.gov.pl)

Comparison of the data in table III-1 with the data about various types of regulatory offices in the US and in the “old” EU countries shows the conspicuous absence, in Poland, of regulatory agencies in the areas of environment protection, food safety, and occupational health and safety. If one notes that the environmental protection agency (EPA) in the US was created in response to strong pressure of environmental movements, that food safety agencies were created under the pressure of mass media worried by the threat of food-borne diseases, and that occupational health and safety agencies were created in part to satisfy strong trade union demands, the absence of corresponding bodies in contemporary Poland may be explained by insufficient public awareness of the importance of regulation in these and other related areas.

### III. 3 Key Variables Determining the Functioning and Effectiveness of Regulatory Agencies

The mode of operation and the effectiveness of a regulatory agency is determined to a large extent by its institutional structure identified by a certain number of design variables. Aside from the precision with which the enabling legislation defines the main objectives of an agency (see Table III-2 on the next page), the following seem to be the most important design variables, and consequently the ones to which special attention is devoted in this report:

- Independence and other features of the governance structure.
- Procedures which the agency must follow in decisionmaking
- Enforcement methods
- Expertise and resources

Table III-2: Polish Regulatory Agencies and their Mission

<b>Name</b>	<b>Start of activities</b>	<b>Main objective(s)</b>	<b>Official web site</b>
UOKiK	1990	control of monopolistic practices and collusions, consumer protection policy, control of state aid	www.uokik.gov.pl
URE	1997	to implement and supervise the energy markets' liberalization process	www.ure.gov.pl
URTiP	2002 (2000a)	to regulate and supervise telecommunications and postal activities, frequency, orbital and numbering resource management, as well as to monitor compliance with electromagnetic compatibility requirements.	www.uke.gov.pl
KPWiG	1991	to ensure proper operation of the capital market; to exercise supervision over the activities of the regulated entities and their obligations related to their participation in the capital market	www.kpwig.gov.pl
KNB	1998	to supervise the activities of banks	www.nbp.gov.pl
KNUiFE	2002 (1998a)	to supervise insurance and pension systems; to protect the insured and the participants of the pension funds and employees pension schemes	www.knuife.gov.pl

Note a: KNB has as its operational arm the General Inspectorate of Banking Supervision (GINB) situated within the organizational structures of the National Bank of Poland; URTiP was created in 2002 from the Office of Telecommunications Regulation which existed between 2000 and early 2002 and it was transformed at the end of 2005 into the Office of Electronic Communication (UKE functioning from 14 January 2006); KNUiFE was created in 2002 from the merger of the State Office of Insurance Supervision (PUNU was created in 1995) and the Office of Pension Fund Supervision (UNFE was created in 1998 by the law on organization and functioning of pension funds from August 1997).

### III.4 Independence and Other Features of the Governance Structure

In the second section of the report we have stressed the importance of agency independence for the credibility of regulatory policies and the accountability of regulators. It is,

however, one thing to assert the theoretical significance of independence, and another thing to give precise empirical correlates of independence. Below we apply a set of indicators developed by Fabrizio Gilardi (Gilardi, 2002). With some care (cf. the observation at the end of Table III-3), these indicators may be used to evaluate the independence of Polish regulatory agencies. Table III-3 provides a specific application for URTiP.

Table III-3: Gilardi's Agency Independence Index calculated for the Office of Telecommunication and Post Regulation (URTiP)

***I. The agency head***

***1) Term of office***

a) over 8 years	1
b) 6 to 8 years	0.8
<b>c) 5 years</b>	<b>0.6</b>
d) 4 years	0.4
e) fixed term under 4 years or at the discretion of the appointer	0.2
f) no fixed term	0.0

***2) Who appoints the agency head?***

a) the management board members	1
b) a complex mix of the executive and the legislature	0.8
c) the legislature	0.6
<b>d) Prime Minister</b>	<b>0.4</b>
e) the executive collectively	0.2
f) one or two ministers	0.0

***3) Dismissal***

a) dismissal is impossible	1.0
<b>b) only for reasons not related to policy</b>	<b>0.67</b>
c) no specific provisions for dismissal	0.33
d) at the appointer's discretion	0.0

***4) May the agency head hold other offices in government?***

<b>a) no</b>	<b>1.0</b>
b) only with permission of the executive	0.5
c) no specific provisions	0.0

***5) Is the appointment renewable?***

a) no	1.0
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b) yes, once	0.75
c) yes, more than once	0.5
<b>d) no specific provisions</b>	<b>0.25</b>
<b>6) <i>Is independence a formal requirement for the appointment?</i></b>	
<b>a) yes</b>	<b>1.0</b>
b) no	0.0
<b>II. <i>The management board members' status</i></b>	
<b>7) <i>Term of office</i></b>	
a) over 8 years	1.0
b) 6 to 8 years	0.8
<b>c) 5 years</b>	<b>0.6</b>
d) 4 years	0.4
e) fixed term under 4 years or at the discretion of the appointer	0.2
f) no fixed term	0.0
<b>8) <i>Who appoints the management board members?</i></b>	
a) the agency head	1.0
b) a complex mix of the executive and the legislature	0.8
c) the legislature	0.6
<b>d) one or two ministers</b>	<b>0.4</b>
e) the executive collectively	0.2
<b>9) <i>Dismissal</i></b>	
a) dismissal is impossible	1.0
b) only for reasons not related to policy	0.67
<b>c) no specific provisions for dismissal</b>	<b>0.33</b>
d) at the appointer's discretion	0.0
<b>10) <i>May management board members hold other offices in government?</i></b>	
<b>a) no</b>	<b>1.0</b>
b) only with permission of the executive	0.5
c) no specific provisions	0.0
<b>11) <i>Is the appointment renewable?</i></b>	
a) no	1.0
b) yes, once	0.75

c) yes, more than once	0.5
<b>d) no specific provisions</b>	<b>0.25</b>
<i>12) Is independence a formal requirement for the appointment?</i>	
a) yes	1.0
b) no	0.0
<i>III. The general frame of the relationships with the government and the parliament</i>	
<i>13) Is the independence of the agency formally stated?</i>	
a) yes	1.0
<b>b) no</b>	<b>0.0</b>
<i>14) Which are the formal obligations of the agency vis-a-vis the government?</i>	
a) none	1.0
<b>b) presentation of an annual report for information only</b>	<b>0.67</b>
c) presentation of an annual report that must be approved	0.33
d) the agency is fully accountable	0.0
<i>15) Which are the formal obligations of the agency vis a-vis the parliament?</i>	
a) none	1.0
<b>b) presentation of an annual report for information only</b>	<b>0.67</b>
c) presentation of an annual report that must be approved	0.33
d) the agency is fully accountable	0.0
<i>16) Who, other than a court, can overturn the agency's decision where it has exclusive competency?</i>	
<b>a) none</b>	<b>1.0</b>
b) a specialized body	0.67
c) the government, with qualifications	0.33
d) the government, unconditionally	0.0
<i>IV. Financial and organizational autonomy</i>	
<i>17) Which is the source of the agency's budget?</i>	
a) external funding	1.0
b) government and external funding	0.5
<b>c) government</b>	<b>0.0</b>

**18) How is the budget controlled?**

a) by the agency	1.0
b) by the accounting office or court	0.67
c) by both the government and the agency	0.33
<b>d) by the government</b>	<b>0.0</b>

**19) Who decides on the agency's internal organization?**

a) the agency	1.0
b) both the agency and the government	0.5
<b>c) the government</b>	<b>0.0</b>

**20) Who is in charge of the agency's personnel policy?**

<b>a) the agency</b>	<b>1.0</b>
b) both the agency and the government	0.5
c) the government	0.0

**V. The extent of delegated regulatory competencies****21) Who is competent for regulation in the sector?**

a) the agency only	1.0
b) the agency and another independent authority	0.75
c) the agency and the parliament	0.5
<b>d) the agency and the government</b>	<b>0.25</b>
e) the agency has only consultative competencies	0.0

It should be noticed that Gilardi's Agency Independence Index has one methodological flaw: it treats all dimensions as equally significant for independence. This is obviously not true. If an agency has no rulemaking powers, if it is directly supervised by the political principal, then its independence is seriously weakened, even if it has high scores on other dimensions. In addition a relatively short history of regulatory agencies in Poland makes them vulnerable to reorganizations not free from political implications. It is difficult to imagine the reorganization and name change of the US Federal Communications Commission – a telecommunication regulator established in 1934. Yet, in Poland the telecommunication regulator established in 2000 was already reorganized twice: first time in 2002 and second time in the end of 2005 – a clear example showing that public legitimization of young regulators is weak. Taking into account these qualifications, it is worthwhile calculating Gilardi's score for the Polish case. The results are shown in table III-4 on the next page.

Table III-4: Gilardi's Agency Independence Index for Polish Regulatory Agencies

	<b>URTIP</b>	<b>KNUiFE</b>	<b>KPWIG</b>	<b>URE</b>	<b>UOKiK</b>	<b>KNB</b>
Gilardi's Index	11.09	12.18	12.65	10.43	13.56	9.87

Note: Gilardi's Index can take value from 0 to 21.

Whatever the methodological reservations, the numerical values seem to match the general impression of a limited level of independence, but also reveal potentially interesting between-agency variations, which further research could clarify.

In terms of the governance structure, two distinguishing, and correlated, features of the Polish regulatory landscape are, first, the preference for single-headed ("monocratic") agencies, rather than multi-headed commissions, authorities or boards; and, second, the central role of the Prime Minister, rather than the Parliament or perhaps the President, in the appointment of the heads of the agencies.

Table III-5: Polish Regulatory Agencies According to the Type of Management

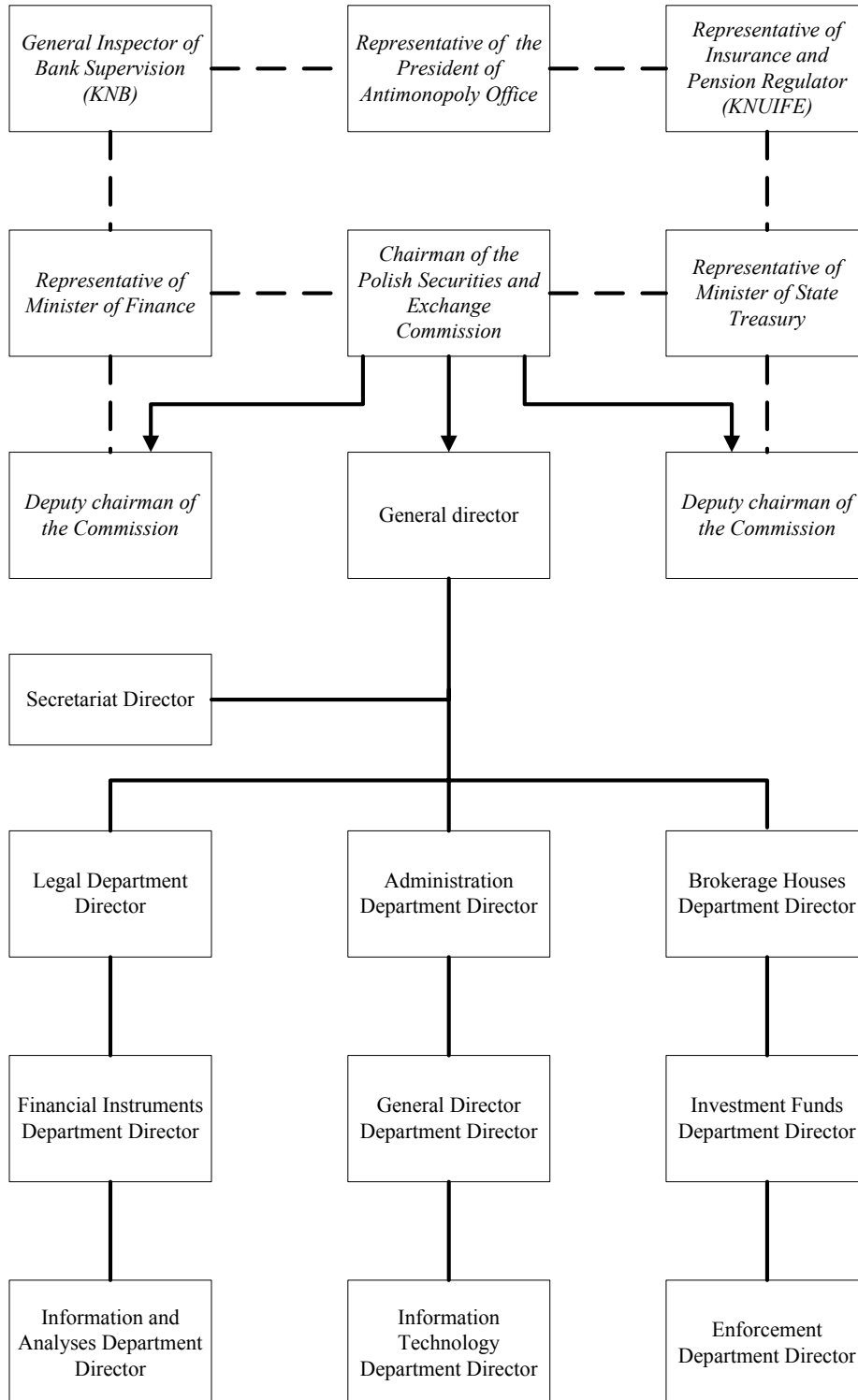
	<b>URTIP</b>	<b>KNUiFE</b>	<b>KPWIG</b>	<b>URE</b>	<b>UOKiK</b>	<b>KNB</b>
Type of management	mono-crat	multi-headed	multi-headed	mono-crat	mono-crat	multi-headed

In the choice of the monocratic form, Poland is closer to the German model than to the approach followed by most other European countries (in particular by France and Italy), and by the United States, where the most sensitive regulatory tasks are assigned to multi-headed bodies rather than to monocratic agencies. A truly independent monocratic agency has some advantages in terms of efficiency in decisionmaking and especially in terms of accountability. Yet, there is general agreement among experts that the commission form strengthens independence and reduces the risk of "capture" by special interests. The decisional autonomy of the American Independent Regulatory Commissions (IRCs), for example, rests on the following elements: a) they are multi-headed, having five or seven members; b) members serve for staggered terms. Thus, in a five-member commission, each serving a five-year term, one member's term will expire each year; c) the membership is bipartisan: no more than a simple majority of the members may be of one political party. In a five-member commission, three commissioners, including the chairperson, are from the President's party, two from the minority. With reference to the situation in Poland, we do not mean to imply that the model of the monocratic agency should be entirely abandoned in favor of multi-headed commissions; we only wish to emphasize that the time may have come to seriously consider the static and dynamic properties of alternative governance structures.

Chart 1 on the next page, which shows the organizational structure of the Polish Securities and Exchanges Commission (KPWiG) allows to grasp the advantages of a multi-headed agency. The commission (positions marked in *italics*) is composed of three representatives of other regulatory offices (antimonopoly office, banking regulator and pension and insurance regulator), two representatives of each incumbent government and three representatives of the office of securities and exchanges commission. Such a composition of the commission seems to guarantee a balance between technical and

political considerations and in addition helps to coordinate the working of multiple financial sector regulators.

Chart 1: Organization Chart of the Polish Securities and Exchanges Commission (KPWiG) and its Office (members of the Commission in *italics*)



Also in Europe, bipartisanship has been found to improve the political acceptability of regulatory authorities. In fact, bipartisanship may be even more important in parliamentary systems, than in separation-of-powers systems. This is because in the pure parliamentary model the same majority necessarily controls both the legislature and the executive branch. Hence in several European countries appointments to the independent regulatory authorities are made, or confirmed, by parliament under a qualified majority (60 per cent or more). As statutory regulation by independent authorities becomes an accepted element of governance, another consideration becomes important, namely that the appointment process is a repeated game. Majority and opposition, assuming they are not discounting the future too heavily, have incentives to avoid paying all the costs of fighting each appointment decision as though it were a one-time affair. It is more sensible to settle on some formula for the peaceful division of the spoils in the long run. The experience of many countries suggest that government and opposition tend to move incrementally toward a set of rules that implicitly recognizes the interests of both sides, and from which neither – given the possibility of retaliation by the opponent – has an incentive to defect. In game theory this is called a Nash equilibrium! Such a bipartisan cooperation becomes far from assured in the context of an unstable party system, which seems to characterize postcommunist countries such as Poland.

### III.5 Operating and Decisionmaking Procedures

The importance of well defined procedural rules as instruments of guidance and control has been emphasized throughout this report. Table III-6 provides information concerning the procedures and practices followed by the Polish regulatory agencies.

Table III-6: Operating Procedures of Regulatory Offices in Poland

Item	UOKiK	URE	URTiP	KNUIFE	KPWiG	KNB
1) Does a regulatory institution undertake comprehensive reviews of regulatory policies?	yes	no	no	yes	yes	yes
2) Does a regulatory agency maintain and publish an open statistical databases that:						
a) reports each case initiated;	no	no	no	no	yes	yes
b) provides the subsequent procedural and decisional history of the case;	no	no	no	no	yes	yes
c) assembles aggregate statistics each year by type of case.	yes	no	no	no	yes	yes

<b>Item</b>	<b>UOKiK</b>	<b>URE</b>	<b>URTiP</b>	<b>KNUIFE</b>	<b>KPWiG</b>	<b>KNB</b>
3) Does a regulatory agency explain why it decided not to intervene following an extensive investigation?	yes	no	no	yes	yes	yes
4) Does a regulatory agency undertake regular evaluation of its human capital?						
a) Has an agency a systematic training regimen?	yes	no	no	yes	yes	yes
b) Has an agency resources to recruit needed expertise in a timely measure?	no	no	no	no	yes	yes
5) Does a regulatory agency spend enough for research and analysis to address the problem that regulatory policy in understanding economic and technological phenomena?	no	no	no	yes	yes	yes
6) Does regulatory policy recognize regulatory policy interdependencies?	yes	no	yes	yes	yes	yes
7) Does a regulatory agency conduct international comparative studies to inform its regulatory policies?	yes	no	no	yes	yes	yes

Note: Analytical dimension elaborated based on: William E. Kovacic, Achieving Better Practices in the Design of Competition Policy Institutions, in *The Antitrust Bulletin*, vol. 50, nr 3/Fall, 2005.

We have indicated earlier that the rationale for independent regulatory offices is based upon the recognition of the need to respond to market developments in timely and competent matter. This is difficult if an agency does not invest in the review of its policies, the expertise of its personnel and the capacity to learn from best practices identified

abroad (Rose, 2005). It seems that Polish regulatory agencies underinvest in the creation of their regulatory capacities.

We have indicated that governing with rules leads to the substantial proceduralization of public policies. Polish regulatory offices as administrative bodies have to act according to the Polish Code of Administrative Procedures, which defines the rights and obligations of the sides of an administrative process. Earlier we have shown how the evolution of an American Procedure Act (APA) has taken account of the need to balance effectiveness and accountability of regulatory policies.

Our general assessment is that not enough attention has been paid in Poland to policy consequences of the Polish Code of Administrative Procedures. The low public awareness of the importance of indirect policy instruments have also resulted in the fact that in the process of designing Polish agencies insufficient attention has been paid so far to the use of procedures as indirect but effective ways of disciplining agency discretion, without restricting its decisional autonomy.

Procedures are also instruments of coordination. In Poland, as elsewhere, the introduction of statutory regulation has given rise to new problems in policy and institutional coordination. It is convenient to distinguish two dimensions of the overall coordination problem: first, coordination between different regulatory policies and institutions, and, second, coordination between specific regulatory policies and the priorities and policies of the government. No European country has yet found fully satisfactory methods for reconciling the specialized concerns of the regulatory agencies with the broad political responsibility of a democratically elected government. In the case of Poland, however, the impression is that political leaders have so far failed to consider seriously such problems, let alone solving them. Let us start with the relation between specific regulatory policies and governmental priorities. It is often thought that this issue concerns only, or primarily, sectoral regulation, but this is incorrect. The conflicts which arise in this area are between specific regulatory principles and objectives, and the broader priorities and objectives of the government. Such conflicts can arise in the case of antitrust regulation (particularly in the regulation of mergers), as well as in sectoral regulation. This point deserves further elaboration, being so crucial for understanding the general criterion to be followed in a rational division of labor between the regulators and the government. The peculiar responsibility of political executives is to trade off (at the margin) different values and objectives; whether or not such tradeoffs are democratically acceptable is something which only the voters can decide. Being electorally unaccountable, regulators cannot (or should not) be allowed to balance potentially conflicting values such as competition and industrial policy objectives, environmental protection and economic development, or economic efficiency and social justice. The legitimacy of regulators does not depend on their ability to balance conflicting objectives, but on the contrary on their one-sided devotion to the particular values which they are supposed to protect and advocate: competitive markets, consumer protection, risk control, environmental quality, and so on.

In this sense, regulatory policies are always “sectoral” since they are concerned, exclusively or primarily, with the advocacy of one particular value, while conflicts between different values can only be settled by electorally accountable leaders. A concrete illustration, taken from the area of competition regulation, may clarify the practical significance of these rather abstract considerations. The tension between competition princi-

ples and the priorities of industrial policy is particularly severe in the case of merger control. Different countries have attempted to deal with this conflict in different ways, with Italy and Germany occupying the opposite ends of the range of possible solutions. In Italy the enabling statute (Law 287/1990) allows the Competition Authority to authorize mergers which may create or strengthen a dominant position “in the general interest of the national economy”. Although the Council of Ministers is supposed to provide the standards to be followed by the Authority in such cases, the discretion thus granted to a technical and politically independent body is clearly excessive – especially in view of the fact that so far the standards have not been provided. The German 1957 law (*Gesetz gegen Wettbewerbsbeschränkungen*) avoids such a broad delegation of powers. According to this law, the Federal Cartel Office is to assess mergers exclusively in terms of competition principles. However, the Minister of Economics can reverse the decision of the Cartel Office if it deems that a given merger may benefit the national economy. To do so, however, it must follow a strict procedure, whose purpose is to increase the political cost of overruling the regulator without valid reasons. If the Cartel Office refuses to authorize a merger on the grounds that the merger is likely to lead to the creation or strengthening of a dominant position, the firms may apply to the Minister of Economics for an authorization. The Minister will evaluate both the advantages and disadvantages of the merger. This evaluation is based on the judgment of the Cartel Office, set against the advantages for the national economy. In addition the Minister must obtain the opinion of another independent body, the Monopoly Commission – an advisory body. Because of these strict requirements, and the resulting bad publicity if the determination of the competition regulator is overturned for party-political reasons, the Minister has opposed the decision of the cartel office only on rare occasions. The logic of the procedure is that considerations of the public interest, as interpreted by the government, have priority over the strict protection of competition; but the government’s interpretation is subject to the control of the political system, as well as of public and expert opinion. The Polish case does not fit either the Italian or the German model. The Office for the Protection of Competition and Consumers (*UOKiK*) does not enjoy the (excessive) discretionary powers of the Italian antitrust authority. On the other hand, despite several amendments of the 1990 law, the President of UOKiK is still dependent on the Prime Minister, who cannot directly overrule the decisions of the Office, but can exert his influence behind the scenes rather than following strict procedures, as in the German case. This lack of transparency implies that the decisions of the regulator can be effectively blocked at no political cost.

The importance of coordination procedures is also relevant to the relation among sectoral regulators and between the competition office and the sectoral regulators. These problems may be called “problems of coordination in the regulatory space”. Thus, for instance, the president of URTiP had to cooperate with the National Broadcasting Council (KRRiT) on frequency management and with the president of the antimonopoly office (UOKiK) on regulatory measures for the telecommunications market and postal services, as well as on product market surveillance. In the case of cooperation between URTiP and KRRiT the law calls for cooperation between regulators but it does not specify procedures for its implementation. As a result the cooperation between the two has been rather chaotic and conflict prone. On the other hand, in the case of the cooperation between URTiP and the antimonopoly office with regard to establishing whether a given market can be characterized as “a market with an effective competition” the law sets precise rules for cooperation requiring the following sequence of actions:

- The minister responsible for telecommunications (art. 22 of the telecommunications law) issues a ruling defining the markets which have to be analyzed with the regard to the effectiveness of competition;
- the President of URTiP initiates the actions aiming at the analysis of the market;
- the actions of the President of URTiP end with a decision regarding the competitiveness of the market – this decision has to be issued in agreement with the president of the antimonopoly office (UOKiK);
- if a given market is said to be non-competitive, that is when there is a dominant player (the dominant player is named by the decision of the president of URTiP issued in agreement with the president of the UOKiK), then the president of URTiP imposes on a given player regulatory obligations. The regulatory obligations are imposed on the dominant player by the decision of the president of URTiP issued in agreement with the president of UOKiK.

Another coordination problem arises in an unregulated situation, when there might exist an overlap of competencies between the antimonopoly office and the sectoral regulator.

At present the Polish legal regulatory doctrine seems to favour a position according to which the antimonopoly office has no right to qualify as an anticompetitive practice actions undertaken in conformity with the decisions of a regulatory office. Thus, in a sentence issued on 20 May 2002 the Antimonopoly Court SOKiK (XVII Ama 92/01) said that the President of the UOKiK has not right to question tariffs approved earlier by the President of the Office of Energy Regulation (URE). The court said that the President of URE has full authority in the matters of evaluating the level and structure of energy tariffs. In addition it stressed that the energy law has the status of *lex specialis* in relation to the competition law and that *lex specialis derogat legi generali* since in a state applying the rule of law there is no possibility that two different bodies issue differing sentences regarding the same matter.

In a different sentence issued on 7 January 2004 the SOKiK established (XVII Ama 24/03) that the energy law is only *partially a lex specialis* with regard to the competition law. This in turn has led legal commentators to interpret this as follows:

- in an unregulated situation the competencies belong both to the competition office and to the sectoral regulator; but,
- once a sectoral regulation is introduced the competition office has no right to issue its decisions since it would lead to the undermining of the trust of citizens in the rule of law.

Recently the OECD has recommended strengthening the competition authority at the expense of the sectoral regulators, while some Polish lawyers suggest subordinating organizationally the sectoral regulators to the Competition Office. This would imply, for instance, that the Competition Office could overrule pricing decisions that had been earlier approved by a public-utility regulator. This would create a good deal of legal uncertainty, which is one reason why, as mentioned above, current Polish legal opinion seems to favor the position that the competition regulator is not entitled to qualify as anticompetitive actions undertaken in conformity with the decisions of a sectoral regulator. The key point, however, is that any tradeoff between different regulatory principles and priorities is a political judgment – preferably expressed in the enabling statute itself – which should be the responsibility of electorally accountable leaders, and should be arrived at through transparent political processes.

### III.6 Enforcement Methods

Regulatory agencies implement the policies entrusted to them by requiring the regulated companies to meet certain norms, standards or criteria. These requirements may regard the scope of permissible action of the companies and/or the outcomes of their activities. Thus, when a regulator issues a license or permission to undertake a certain activity, this is an administrative act confirming that a company has the capacity to run that regulated activity – for instance because it has enough capital and it employs qualified personnel. When a financial regulator prescribes that a pension fund may not invest in shares more than a given percentage of its assets, it controls the activities of the regulated company. When it requires that a pension fund generates a certain minimum rate of return on its investments, it controls the outcomes.

It is quite obvious that in order to verify the compliance with regulatory requirements the regulator has to undertake active supervision of the functioning of regulated companies. The instruments of such supervision differ from the above-mentioned controls (the inspectors of a regulatory agency control “on the spot” the regulated company) by requiring information and documentation to collect complaints from the consumers of the services of regulated companies. Table III-7 lists the most common methods of regulatory enforcement.

Table III-7: Types of Enforcement Methods Applied by Polish Regulatory Agencies

Item	UOKiK	URE	URTiP	KNUIFE	KPWiG	KNB
Administrative approval	no	yes	yes	yes	yes	yes
Administrative ban	yes	yes	yes	yes	yes	yes
Financial penalties	yes	yes	yes	yes	yes	yes
Recommendations and warnings	yes	yes	yes	yes	yes	yes
“Naming and blaming”	no	no	no	yes	no	no

Administrative methods refer to granting or withdrawing permissions for the conduct of certain activities. Once a permission has been granted, its withdrawal would amount to the discontinuation of certain activities and as such it is considered the heaviest penalty, rarely applied in practice. In fact, one may even argue that an administrative ban is contrary to the spirit of regulatory policies, which are meant to alter the behaviour of regulated companies, but not to exclude them from specific activities.

As noted earlier, the regulatory controls are performed at all stages of regulated activities. Thus, for example in the case of the insurance and pension fund regulator (KNUiFE) the regulatory control begins at the stage of the issuance of a license for companies applying to start insurance activities in Poland (from the date of Poland’s entry into the EU companies registered in other EU countries can start insurance activities upon simple notification of the Polish regulator); next it comprises authorizing changes in the insurance companies statutes (including nominations to the company’s board), overseeing the fulfillment of the company’s financial security standards and its

investment policy, and controlling the way insurance companies satisfy their clients' complaint. Further, KNUiFE controls by analyzing the internal statute of the insurance company and the insurance contracts it signs with clients, and by analyzing financial reports submitted by insurance companies. As a rule KNUiFE requires from insurance companies quarterly and yearly financial reports, but if an insurance company is judged in a financial situation threatening the fulfillment of regulatory requirements KNUiFE can ask for monthly or even weekly financial reports. It is worthwhile to add that the financial report has also to be prepared according to KNUiFE-defined standards. The nature of such control activities generates the need for almost permanent interaction between the regulator and the regulated company. This interaction consists, first and foremost, of the flow of information between the two, but it is also an exchange of interpretations, recommendations, promises and threats. It is very important that such interaction be procedure-based, transparent and such as not to cause unnecessary delays and uncertainties.

Financial penalties are another important type of enforcement methods. Their main functions consist in punishing for a certain misconduct, and deterring other regulated companies from similar behaviour. In practice, financial penalties imposed by regulatory agencies have limits in their effectiveness as many companies appeal against the fines imposed on them. Thus, as Table III-8 shows, in the period from 2002 to late 2005 the decisions of KNUiFE imposing financial penalties were appealed against in 60 percent of cases (in the case of KNUiFE the first appeal is examined by the regulator himself and only then the dissatisfied company can go to court).

Table III-8: Appeals against Financial Penalties Imposed By KNUiFE

Total number of imposed financial penalties	No appeal		Internally settled appeal motions		Complaint to the court	
			(decisions maintained/ decisions lifted)		(decisions maintained/ decision lifted/ cases not yet resolved by the court)	
30	12	(40%)	12 (40%)	12/0	6 (20%)	4/0/2

Source: KNUiFE(2005)Polityka penalizacyjna KNUiFE na tle doświadczeń zagranicznych, Warsaw.

The appeal to court is especially effective in delaying the payment of financial penalties since judicial procedures are very lengthy in Poland. Thus, as of January 2006 the anti-monopoly court had not yet examined cases brought to it in the period from the second half of 2004 to the end of 2005. As large companies have enough resources to invest in legal battles, it is not surprising that out of the 8 largest fines imposed by the antimonopoly office (UOKiK) on companies, none has been paid and the TP SA (the company dominating land line telephony), has paid only 2 percent of the amount of financial fines imposed on it. Knowing the limits of the effectiveness of financial penalties Polish regulatory agencies seem to favour milder forms of enforcements (like imposing smaller fines which companies are more willing to pay since they want to save on the costs of judicial proceedings) and some agencies explicitly admit that their "fining policy has to be considered as soft" (KNUiFE, 2005, p. 32).

The role of courts in the enforcement of regulatory policy can also be shown with the help of data regarding the outcome of cases notified by criminal prosecution by the

KPWig in the years 1991–2004. As Table III-9 shows, only 20 percent of cases notified for criminal investigation were later directed by public prosecutors to the courts and only 4 percent ended with a court sentence.

Table III-9: Criminal Cases at the KPWiG in the Period 1991–June 2004

Number of cases notified by KPWiG for public prosecution	Number of court cases brought by prosecutors	Number of court sentences	Share of sentences to the number of cases brought to prosecutor
417	89	17	0.04

Source: Raport o stanie rynku kapitałowego przed przystąpieniem do UE, grudzien, 2004.

Thus, although the European Commission in a Green Paper of 20 December 2005 on “Damages actions for breach of the EC antitrust rules” [EU, COM(2005) 672] calls for more claims filed with the courts – that is for more private enforcement of regulatory standards through the courts – the state of the court system in Poland poses limits to the efficiency of administrative regulations, making very problematic the enforcement of the “private solution” advocated by the EC.

The use of information to “name and shame” is a different soft strategy for enforcing regulatory standards. Its effectiveness might be especially high in the financial sector, where the word spreads fast and a good reputation is highly valued. Thus, in what might be counted as a good example of this strategy, KNUiFE in its yearly Report for 2004 listed the names of companies which apply contracts containing clauses deemed by KNUiFE to be in violation of the general insurance clauses (Rzeczpospolita, 2005). But such “naming and shaming” has been perceived by affected companies as damage to their reputation. Not willing to directly challenge the regulator, affected insurance companies pushed their industry association (the Polish Chamber of Insurance - Polska Izba Ubezpieczen) to threaten the regulator with a civil suite for abuse of its regulatory powers.

Polish legal scholars have called attention to the ambiguity of this informational problem. On the one hand the regulator is obliged to reveal irregularities to the public, if they are proved; on the other hand, it has to abstain from actions which might inflict commercial damages to insurance companies (for instance, when the information is not entirely true). The practical solution to this dilemma depends on deciding where administrative procedure ends since the Polish Code of Administrative Procedures does not allow revealing information during the course of administrative procedure. Since the decision of KNUiFE does not represent the end of an administrative procedure, the regulator cannot publish the names of the companies it wants to “shame”.

### III.7 Experience and Resources

Regulatory policies and regulatory institutions are a new phenomenon in the context of a postcommunist economy. This fact is easily seen if we compare a 15 year Polish experience with more than 100 year experience of regulatory policies in the US. Time is an important factor for building up competencies, developing technical capacities and especially for gaining a widespread understanding of the aims of regulatory policy, and how it relates to the other policies of the government.

In the short run the quality of regulatory work depends on the resources available to regulatory agencies. It is easily imaginable that inadequate financing can undermine the capacity to properly enforce regulatory standards or to work out improved regulatory schemes. Some budget allocation procedures may also facilitate the undermining of the relative independence of the regulatory agency. Thus, if there is a discrepancy between the regulatory strategy of the head of a given agency and the policy orientation of the political body that allocates resources (the overall budget or limits on personnel), then the easiest way for the political principal to manipulate the work of the regulatory agency is to threaten it with budgetary cuts. In fact, the history of regulatory agencies in the US shows that antiregulatory administrations did try to limit the resources available for regulatory purposes. Thus, the level and stability of budgetary resources is of crucial importance to the work of regulatory agencies. The level of financing should be adequate to attract competent personnel and to sustain effective practices of regulatory oversight. Adequately financed regulatory agencies can become vibrant centres of research on regulated markets, and be able to timely develop new regulatory instruments, and to learn from the best international regulatory practices.

Polish regulatory agencies spend little on research. To explain this fact agency executives indicate the lack of available financial resources (see Table III-10). But this situation may be also indicative of the neglect of importance of investment in research for the development of efficient regulations.

Table III-10: Employment and Budget of Polish Regulatory Agencies (2004)

Item	UOKiK	URE	URTiP	KNUIFE	KPWiG	KNB
Employment	264	267	644	210	230	part of Central Bank
Budget (in m PLN)	31	33.4	70	29	22.4	part of Central Bank

The direct costs of regulation are paid by the regulated sector in such forms as fees for registration or fees for assigning telephone numbers. Indirectly however a part of these costs is paid by consumers as the regulated sector, whenever possible, passes them on to consumers in the form of increased prices. Usually the direct costs of regulation might seem miniscule, if calculated in relation to the value of sales in the regulated market. Thus, for instance, in the case of URTiP the ratio of its budget to the sales in the Polish telecommunications market amounted in 2004 to 0.1%. However, the real costs of the functioning of the regulatory agency might be much higher if its inefficient regulation or enforcement methods reduce overall consumer welfare.

For some sectoral regulators like KPWiG the law established a direct link between the fees collected from the participants of the regulated market and the budget of the regulatory agency. Thus, for instance, KPWiG charges 0.06 percent of the value of newly issued shares and up to 0.015 percent of the value of market transactions. Article 21 of the Securities Law states that the costs of the functioning of the Commission “are covered from collected fees”. This might mean that the Commission has the right to retain the collected fees to cover its expenditures. However, art. 21, point 2, of the Law empowers

the Minister of Finance to define the level and details of the Commission's budget, which gives to the political supervisor a powerful instrument to discipline the functioning of the Commission.

Besides charging fees a regulatory agency can impose on the regulated company a financial penalty for the violation of regulatory standards. Usually the highest level of penalty is limited as a maximum value of a company's sales or as a maximum amount (in the case of KPWiG the maximum financial penalty set in the law amounts to 500,000 PLN). Yet, as we already noted, an imposed financial penalty is not the same as the amount effectively collected, since a company can appeal against the fine, which might not be effectively collected until the final confirmatory sentence of the court. In some regulatory regimes the regulator is sometimes allowed to retain a share of effectively paid financial penalties for its discretionary use. Such a rule makes sense since challenging a resourceful regulated company (such as telecommunications companies) is costly in terms of time and money, and no rational regulator would undertake such a challenge if it cannot reward his/her employees. Thus, allowing the regulator to retain a share of effectively collected fines is a sensible way of motivating it to rigorously enforce regulatory standards – as long as a fined company has the right to defence. At present no Polish regulatory agency can retain a share of the effectively collected financial penalties for its own use.

We stressed earlier that the budget of a regulatory agency should not be easily diminished in the budgetary process. Such a threat exists if the budget of the agency is set in the process of defining the budget of the central government. The Polish budgetary law (IBnGR, 2005, p. 26) permits the budgets of statutory agencies (that is, agencies established by law) to be set separately from the state budget (the budgetary law). But this solution has not been used in Poland so far. The budget of the Polish regulatory agencies is approved in the process of creating the state budget. This makes the agencies vulnerable to political pressure. An agency which is unpopular with the current government is easily punished with cuts in the budgetary allocation. If an agency has developed intensive relationships with parliamentary committees, it can seek support in parliament for the satisfaction of its financial needs. But if an agency is perceived as dependent on the ministry, the parliament might not interfere into the government's budgetary plans. Thus, for instance, the draft budget of URTiP was diminished by 8m PLN in the process of defining the state budget for 2005 because the government needed to find money to satisfy an organization important for the mobilization of political support in the year of parliamentary elections.

The size of the agency's budget and the level of salaries paid do influence the ability to attract and to retain high level specialists in law, economics and complex technical issues by offering them attractive salaries. This condition is met if the salaries of the key personnel of regulatory agencies are set with regard to the salaries in the regulated sector (see Table III-11 on the next page). As a rule, salaries in the regulatory agency are of course lower than in the regulated sector, but if this difference is reduced, it can limit the outflow of most qualified personnel from the agencies to the regulated companies.

Table III-11: Salaries in the Polish Regulatory Agencies

<b>Item</b>	<b>UOKiK</b>	<b>URE</b>	<b>URTiP</b>	<b>KNUIFE</b>	<b>KPWiG</b>	<b>KNB</b>
Are salaries set in relation to the regulated sector?	no	yes	no	yes	yes	yes

In sum, on one hand Polish law explicitly recognizes the need for higher salaries in the regulatory agencies, on the other hand it grants their employees the status of civil servants, placing their salaries within ranges set for the various categories of civil servants. This is a somewhat paradoxical development, since it implies that salaries in the regulatory agencies resemble the salaries of other civil service employees, unless there is some special fund, which serves to reduce the gap between the salaries in the regulated agency and the salaries in the regulated sector. But, the existence and operation of such funds depend on the will of the political principal, and this reduces the agency's autonomy. We have also observed that the evolution of employment rules in the Polish regulatory agencies increasingly stresses the competitive process in the selection of employees, including the heads of agencies. No doubt the selection of employees in the regulatory agencies according to the rules of civil service law is meant to increase their employment security. Yet, no amount of competitive selection can attract and retain best talents, if the salaries offered are not adequate. The employment security bias in Polish regulatory agencies might be attractive mostly to people who prefer stable and low risk career path, or those who perceive the work in a regulatory agency as an early step in the professional career.

In concluding this survey of Polish regulatory agencies we would like to call again attention to the growing internationalization of national regulators thanks to their participation in international (sometimes even global) networks of regulatory agencies, see section II.5. In an era of rapid and dense informational flows the cooperation with other national, as well as with international, regulators speeds up the learning process and facilitates the importation and adoption of best regulatory practices.

## IV. Conclusions

The data presented in the third, empirical, part of the present report demonstrate that regulation (as a distinct mode of policymaking) and regulatory agencies (as organizations acting outside the traditional ministerial framework to implement more effectively regulatory policies) are by now significant components of the economic governance of Poland. To be sure, the present regulatory framework still presents a number of gaps and inconsistencies, but this is not too surprising given the short time span within which these developments have taken place. In fact, the evidence collected through interviews and official documentation, as well as international comparisons, support our first, and in a sense most basic, conclusion, namely that regulation and regulatory institutions are already permanent features of economic governance, in Poland as in all other market economies. The point deserves to be emphasized because a number of Polish legal scholars have argued that both regulatory policies and regulatory agencies are foreign to the constitutional, legal, and administrative traditions of the country. The critics point out that such policies and institutions were imposed on Poland, in particular by the requirements of EU membership, rather than being freely chosen by the country's political leaders (see in particular Hoff 2005 and literature cited therein). To some extent this is true, but as we saw in section I.3, the same could be said, *mutatis mutandis*, of the United Kingdom, of Germany, France, Italy, and indeed of all EU member states. In most European countries the possibility of establishing administrative bodies not directly linked to the government or to a minister, seems to be excluded by explicit constitutional provisions – such as Article 21 of the 1958 French Constitution which prescribes that the Prime Minister must direct the activities of the government. In 1986, however, the *Conseil Constitutionnel* ruled that Article 21 did not stand in the way of the Parliament assigning responsibility to another public authority for establishing rules in a specified policy area, so long as this was done within the framework of an act of parliament and for the purpose of implementing the act. Even more revealing is the case of the United Kingdom. The reader of this report may recall (see section I.3) that the 1971 UK Civil Aviation Act empowered the Secretary of State for Trade to give guidance on policy to the Civil Aviation Authority, precisely in order to circumvent the constitutional problems flowing from the creation of an independent agency. After the 1977 *Laker* judgment, however, the British government decided to drop the notion of policy guidance, reasoning that if an area of public policy was to be hived off, it should be truly independent: both hands should be taken off the wheel! Again, in Italy an attempt to remove any remaining constitutional doubts was made in 1997, when a parliamentary commission on constitutional reform proposed, *inter alia*, to revise the constitution so as to explicitly allow the creation of independent authorities. The proposal was not followed up, so doubts concerning the constitutionality of such authorities still remain, at least at the theoretical level, but they have not prevented the independent regulatory authorities from playing an increasingly important role in the governance of the economy.

Even in the oldest regulatory state, the United States, statutory regulation and independent regulatory commissions used to be considered a constitutional and political anomaly. For almost half a century the traditional model of American administrative law was embodied in the judicial “nondelegation doctrine,” which excluded the possibility of delegating to independent bodies some of the legislative powers of Congress. By the

early 1930s, however, the doctrine was thought to have become an empty formalism. It was abandoned, in practice, because of the overwhelming advantage of delegated rule-making in areas of great cognitive complexity and economic significance. At the same time, it is indicative of the permanence of unresolved problems that the doctrine has never been formally repealed. On the contrary, the US Supreme Court's reiteration of the nondelegation principle, coupled with its very sparing use to strike down legislation, illustrates a continuing judicial effort to harmonize the modern regulatory state with traditional notions of separation of powers and the rule of law. Such harmonization has been greatly facilitated by the procedural controls of agency discretion introduced by the 1946 Administrative Procedure Act, and by the other statutes discussed in section II of this report.

In sum, independent regulatory agencies are constitutional anomalies in a democracy – where public policy is supposed to be made by electorally accountable leaders – just as firms, according to Ronald Coase, are anomalies in a pure market economy – where coordination is supposed to be done by the price system, not by managers. In both cases, the exception is explained and justified by the desire to enhance the overall efficiency of the system by reducing certain transaction costs. A modern economy is unthinkable without large firms and without regulatory agencies. In the case of the agencies, the challenge for electorally accountable leaders is to design legal and institutional frameworks such that independence and public accountability become mutually reinforcing, rather than mutually exclusive, values.

Today, the need to upgrade the quality of economic governance is felt everywhere, and this explains the international diffusion of regulation and of the agency model. Outside Europe and North America, statutory regulation has been adopted by countries as diverse as Chile, Argentina, Jamaica, Mexico, the Philippines, India, even China and Vietnam. Regardless of their legal and administrative traditions, all these countries faced the same problem: how to establish a credible and effective regulatory framework so as to encourage private investment and support efficiency in the production and use of services, such as telecommunications. Since credibility requires a certain stability of the regulatory framework, the natural solution was to delegate the writing of detailed rules and the adjudication of particular cases to politically independent regulatory bodies. The importance of policy credibility in a globalizing world economy has been discussed in section II.2. Basically, the same rationale explains both the delegation of rule-making powers to independent agencies and the delegation of monetary policy to independent central banks. In both cases, policy credibility is the central issue. It should not be forgotten, however, that independence is also a necessary, albeit not sufficient, condition of accountability. A decisionmaker cannot be held accountable for his/her decisions unless s(he) has final authority over a certain range of issues. Clear lines of accountability are lacking in the case of many Polish regulatory agencies (see again section III), as they are lacking in the case of the regulatory agencies established at the EU level. As was pointed out in section I.4, also EU agencies have been denied rule-making powers; like most Polish agencies, they only contribute to the regulatory process, and thus cannot be held accountable, either legally or politically, for the actual outcome of the final decision. From an efficiency as well as a normative viewpoint, this arrangement is unsatisfactory, and is unlikely to represent a stable institutional equilibrium – either in the Polish or in the EU case

One reason why the present situation is not sustainable, is the steadily growing internationalization of regulation. As discussed in section II.5, transnational regulatory networks are already playing an important role in the informal, bottom-up, harmonization of methods, procedures, and substantive rules. In an integrating world economy such networks cannot be restricted to the EU: on the contrary, national policymakers and regulators must be aware of the perils of eurocentricity – the willingness of the Brussels authorities to sacrifice the quality of regulation in order to push Europeanization forward. In fact, as was shown in the same section II.5, national regulators now tend to organize their European and extra-European networks outside the rigid Community framework. The internationalization of regulation can significantly assist the national regulators in their efforts to promote high quality regulation. Our interviews have shown that Polish regulators are well aware of this opportunity, and take an active part in many regulatory networks. As already noted, however, an effective transnational network must satisfy certain conditions: a high level of professionalism, mutual trust, and especially a sufficient degree of independence, both at national and European level. This is because unprofessional or politically motivated behavior would compromise the reputation of the regulators in the eyes of their international colleagues, and make cooperation more difficult to achieve in the future. Thus, the need to cooperate effectively at the international level is another reason why agency independence is so important.

Two centuries ago, and in some countries even more recently, the independence of the courts of law was a hotly contested issue. Today, it is taken for granted that judicial independence is an absolutely crucial feature of the rule of law. In the last decades also the value of central bank independence has been accepted by most developed, and many developing, countries. These historical precedents show that a gradual process of social learning must take place before the independence of certain public institutions becomes accepted by the political culture of a country. In business as well as in personal relations, it is a generally acknowledged principle that a decisionmaker must enjoy an adequate level of independence if (s)he is to be held responsible for his or her acts. What appears to be difficult, not only in Poland but generally in Europe, is to convince both political leaders and public opinion that the same principle applies, or ought to apply, also in the field of regulation. This means that the notion that independence is a necessary condition of accountability is not yet part of the political culture of most European countries. Where this insight has become part of the political culture, as in the United States, it is much easier to think of political independence as a continuous, rather than a binary, variable. In turn, this makes it easier to understand that an agency may be independent – in the sense of having final authority over certain matters – while being at the same time part of a larger bureaucratic organization. For example, the Antitrust Division in the US Department of Justice, the Occupational Safety and Health Administration in the Labor Department, and the Food and Drug Administration, in the Department of Health and Human Services, are all, effectively, independent agencies in spite of their being embedded in departmental organizations. This is because Congress has directly assigned to such agencies specific tasks for which they, and not the larger organization, are responsible.

## V. References

- Baldwin, R. (1995). *Rules And Government*. Oxford: Clarendon Press
- Baldwin, R. (1996). "Regulatory legitimacy in the European context: The British Health and Safety Executive", in G.Majone, *Regulating Europe*: London: Routledge, pp.83–105.
- Biuletyn Finansów Publicznych, nr 3(15)/2005, IBnGR, Warszawa.
- Breyer, S. (1993). *Breaking the Vicious Circle*. Cambridge, MA: Harvard University Press
- Commission of the European Communities (2002) *The Operating Framework for the European Regulatory Agencies*. Brussels: COM (2002) 718 final.
- Craig, P.P. (1994) *Administrative Law*, 3rd edition, London: Sweet and Maxwell.
- Eberlein, B. and E. Grande(2005), "Beyond delegation: transnational regulatory regimes and the EU regulatory state", *Journal of European Public Policy*, vol.12, no.1, pp.89–112.
- Edley, C.F. (1990). *Administrative Law*. New Haven, CT.: Yale University Press.
- Engel, C. (2002) "European Telecommunications Law: Unaffected by Globalization?". Working Paper, Bonn: Max-Planck Institute.
- Gilardi, F.(2002) Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis, in *Journal of European Public Policy*, December.
- Gouldner, A. W. (1957–8) "Cosmopolitans and Locals: Towards an Analysis of Latent Social Roles". I and II, *Administrative Science Quarterly*, 2:281–306, and 444–80.
- Hoff, W. (2005) Regulation in Poland. The pains of implementation, Paper to IIAS BERLIN CONFERENCE 20th to 23rd September 2005.
- Informacja gorsza od kary (Information is worse than fine), *Rzeczpospolita*, 4 October 2005.
- KNUIFE(2005) Polityka penalizacyjna KNUIFE na tle doświadczeń zagranicznych, Warszawa.
- Litan, R.E. and W. D. Nordhaus (1983) *Reforming Federal Regulation*. New Haven, CT.: Yale University Press.
- McCraw, T.K. (1984) *Prophets of Regulation*. Cambridge, MA: Belknap Harvard Press.
- Majone, G. (1997) "The new European agencies: regulation by information", *Journal of European Public Policy*, vol. 4, no.2, pp.262–75.
- Majone, G. (2001) "Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach". *Journal of Institutional and Theoretical Economics*, vol.157, no.1, pp.57–78.

- Majone, G.(2002)Functional Interests: European Agencies, in John Peterson, Michael Shackleton (ed.)*The Institutions of the European Union*, Oxford University Press.
- Majone, G. (2005) Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth. Oxford: Oxford University Press.
- Mashaw, J.L., Merrill, R. A., and Shane, P. M. (1998) *Administrative Law*, 4<sup>th</sup> edition. St: Paul, MN.: West Group.
- Nivola, P.S. (ed.)(1997)Comparative Disadvantage. Social Regulations in the Global Economy, Brookings Institution Press, Washington.
- Rose, R.(2005). Gdy wszystkie inne czynniki nie są niezmiennie. O kontekście czerpania wzorów z polityki innych krajów, in *Panstwo i rynek*, nr 2, [www.pir.org.pl](http://www.pir.org.pl).
- Sapir, A. (2003) *An Agenda for a Growing Europe*. Oxford: Oxford University Press.
- Seidman, H. and R. Gilmour (1986) *Politics, Position and Powe*, 4<sup>th</sup> edition. New York: Oxford University Press.
- Selznick, P. (1985) “Focusing organizational research on regulation”, in R. Noll (ed.) *Regulatory Policy and the Social Sciences*. Berkeley and Los Angeles: University of California Press.
- Sidak, J.G. and D.F. Spulber (1998). *Deregulatory Takings and the Regulatory Contract*. Cambridge: Cambridge University Press.
- Sunstein, C.R.(2005) *Laws of Fear*, Cambridge University Press.
- Surdej, A.(2006) Determinanty regulacji administracyjnoprawnych w oddziaływaniu państwa na gospodarkę, AE Kraków.
- Veljanovski, C. (1991) “The Regulation Game”, in C. Veljanovski, (ed.) *Regulators and the Market*. London: Institute of Economic Affairs.
- Viscusi, W. K., Harrington, J. E., Vernon, J.M.(2005)*Economics of Regulation and Antitrust*, MIT Press, 4<sup>th</sup> Edition.



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