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The EU Model of Regulatory Authority and the Polish Constitutional System

1. The origin of regulation

Regulation is commonly traced back to the industrial development in the United States. Between 1840 (first state railroad commissions) and World War II there emerged many independent agencies whose members were appointed by the President and who were generally irremovable by him before the end of their term in office. This was due to the concern that the presidential power would grow excessively to the point of threatening the constitutional balance of power.[1]

On the other hand the European continental model of regulation was free of such constitutional concerns. Regulatory authorities were created with a view of independence from political influence be it a president or a prime minister or national ministries. It was basically a matter of impartial, unbiased decision-making. From this point of view the Polish system of regulation definitely belongs to the continental model. Independence is granted to regulators basically to enhance the impartiality in decision-making. Constitutional checks and balances are not even mentioned in the Polish literature of the subject although there is a serious problem of how regulatory authorities and their methods of operation fit into the constitutional system. The Polish Constitution in art. 10 provides for the division and balance of power between the three branches of the government the legislative, the executive branch and judiciary but it does not expect them directly to be balance, however there is

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[1] On development of regulation in Europe: G.Majone, *Regulating Europe*, Routlege (London – NY), p.10.

little concern about it in the decisions of the Supreme Court of the Constitutional Tribunal. Also, the presidency in Poland does not occupy a as prominent place in the governmental system of the country as in the United States or France. If there is a reason to consider regulatory authorities in the context of constitutional division of powers it is rather in connection with the status of the Council of Ministers and ministers which have lost part of their control over some sectors to the new independent regulators.

The European character of regulation in Poland seems to be a natural consequence of the accession to the EU. Prior to it there was practically no debate in the Polish literature on regulation. There were no political or social forces interested in its emergence. It seems that without the accession regulation probably would never have been implemented today as it is foreign to Polish practice and legal and political tradition.

2. The EU model

One of the examples of the Community law mandating national legislative bodies to establish regulation was directive 96/92/EEC on the internal market in electricity[2] the first one to comprehensively regulate the energy market, subsequently replaced by directive 2003/54/EC.

It represented the policy of refraining from detailed interference into organization of sectors at the national level. Community's attitude to problem solving has been well reflected by the choice of the legal form of legislation. Directives, unlike regulations, set the goals to be achieved but they do not determine the ways of achieving them. They are addressed to the member states and not individuals or enterprises. Therefore, the states must transpose them into national legislation according to the local needs.

As of today, the Community law does not impose any particular organizational model of regulation. Instead it creates several crucial requirements such as independence from the market players. In its Report on the state of liberalization of energy markets to the Council and European Parliament[3] the Commission found that the Community cannot impose a stiff system; it should create a framework which the member states may fill with contents best suited for the local conditions. Also, it clearly stated its wish to avoid excessive legislation of the issue at the Community level. In consequence, the Community law does not directly mandate the creation of specifically organized regulatory bodies neither at the national nor

[2] O.J. L 027, 30.01.1997.
[3] COM(1998) 212 final, p.3.

Community level. However, the overall analysis of sectoral legislation contains dispersed references to the need of having such bodies established.

It is reasonable to assume that regulation is a foreign concept to the Polish organizational and legal theory and practice. One can also say that regulation was not anticipated nor wanted by the policy makers. Independent regulators were viewed as a sphere of the economy remaining out of reach of the ministers, policy makers and lobbyists. The injection of regulation into the Polish economic and legal system was forced by the accession to the European Union which took place in May 2004.

One can safely assume that the first sectoral regulatory authority was established in Poland with the adoption the Energy Act of 1997.[4] Soon after the regulator for telecommunications was established, to encompass in later years also the postal sector. After the initial outburst of regulation in Poland there has been a period of stagnation where no new sectoral regulators are being established.

The Energy Act of 1997 was one of the best designed laws of the III Republic. Next five years were witness to a series of attempts to dismantle that success once Poland has passed the EU test of admission.

The implementation of the EU rules on sectoral regulation and regulatory authorities has proved to be painful for tree reasons. One, that regulation is a new concept in the Polish legal system. Two, that regulation, as mentioned above, was not really wanted, however the EU rules are binding and must be implemented. Three, that the EU laws, including the energy and telecommunications sectors, tend to be vague on many occasions. They provide goals, but, in the spirit of subsidiarity, they leave the selection of means mostly to the inventiveness of national legislative bodies. And travelling uncharted waters is not necessarily easier for the national legislators.

3. The constitutional framework

The development of regulation in Poland took place against the backdrop of the 1997 Constitution that was seemingly not prepared to absorb the new model of state intervention. Unlike in the US, the possibly damaging effect of regulation on the balance of powers was never discussed as such damage could hardly ever happen. Polish presidency has been stripped of any major economic or political power it has had under the Interim Constitution of 1992.

Nevertheless, the principle of division of power as expressed in art. 10 of the Constitution has been disturbed. The executive power in Poland is divided between the President and the Council of Ministers. Of these two the latter is

[4] "Journal of Law", No. 158, item 1042.

more important to the economy as it conducts all affairs of the state not reserved to other authorities. The Cabinet is politically responsible to the Parliament and indirectly to voters. Unsatisfying economic results may lead to government's loss in the next parliamentary elections. The problem lies in the fact that the government does not have the necessary instruments to steer the economy. Some of these powers are vested in the independent regulators while political liability still remains with the Council of Ministers. Therefore there is a situation where the government of the country is split into politically accountable and politically unaccountable part. This situation caused enough frustration with some lawmakers to call for the abolishment of regulatory authorities altogether. It however cannot be accomplished as the EU law in telecommunication and energy mandates that there has to be a regulator. Therefore some more subtle tactics were resorted to as explained below to weaken the regulatory authorities.

In reality, regulation cannot be extracted as a pure model. What regulators do have has a serious influence on the overall picture of the sector for which, in the eyes of the general public, the government is held responsible. One of the unsolved dilemmas of regulation is how to reconcile the need for independence with at least the minimum of coordination with the governmental policy. There has to be certain continuity of the state power, particularly that the government is appointed as a result of general election and regulator is not. Without a minimum of continuity of governmental policy the actions of the regulator would go beyond independence, becoming autonomous. This would lead to the split of the state apparatus where part of it would be held responsible politically for the welfare of the economy, including the sectors subjected to regulation, while the other part, the regulators, would not be liable.

One of the dimensions of this problem is who and in what way bears the responsibility for the sector. Mr. L.Juchniewicz, the first energy regulator remarked that cornerstones of his liability are information obligations, relations with a consultative council (not longer existing) and the possibility to sue his decisions to the anti-monopoly court. It can be added that the regulator can also be revoked from his position by the Prime Minister on the grounds of gross negligence of his obligations or commitment of a crime confirmed in a final court decision. Law not say directly about any legal dispute procedure between the revoked regulator and the prime minister. The scope of liability is the scope of powers as determined in the Energy Act. However, it is not clear where lies the vertical division of liability, should the minister use his increasing influence over the regulator. The core of the problem remains that in the light of current law an authority with a substantial

power over a sector remains largely not accountable in political and legal terms. The EU does not seem to provide guidance in how to bridge that gap.

The Energy Act of 1997 attempts to bring the government and the independent regulator closer together by instituting the so called "state energy policy" devised in art. 12. This instrument limits the scope of freedom of choice of the regulator as art. 23 makes it binding on him. It does not remove certain objection as to its legality, particularly when looked at from the perspective of the constitutional hierarchy of the sources of law.

The energy policy" is adopted periodically by the Council of Ministers on advise of the minister of the economy. This solution runs counter to art. 87 of the Constitution which enumerates the acts constituting universally binding law and "policy" and does not list it. It cannot be accepted as an internal act under art. 93 of the Constitution either. When one authority is by definition independent from another, it is difficult to call such relations "internal". Then art. 93 does not apply. From the constitutional point of view "sectoral policy" is not enforceable then, and the problem of providing junction for the split apparatus of state remains unsolved.

The Energy Act determines the scope and procedure of shaping the energy policy. Even though the entire Chapter 3 is devoted to it, the statutory framework seems unfinished as it ends at providing rules for forming the "principles" of sectoral policy and does not go further into details, thereby creating several question marks.

Preparation of the proposal for the principles of the state energy policy is the responsibility of the minister of the economy. It has no specific scope. For example, should it deal mostly or only with energy safety, international trade, consumer issues, monopolies, balancing the market dominated by former monopolists? The only indication may be the tasks of the minister (and not regulator) towards that policy. These include providing the content, procedural elements (planning procedure, supervision of and operation of energy systems). The presence of practically all aspects of operations of the sector does not make it easier to define the legal character of energy policy.

The very high level of generalization points to the helplessness of the Parliament in confronting the issue of bridging the constitutional gap. To go a step further would cause a domino effect by the need to challenge and change many other provisions of the Constitution. As a result it is not known whether the state energy policy is a normative act or an individual act. Option for either would lead to the necessity of resorting to different procedures in case of a legal dispute. If policy were a normative act perhaps it could be challenged before the Constitutional Tribunal. If not, could the regulator go to the court of law against the minister of the economy? There is no convincing answer to questions like this on the grounds of the existing law. One can

hardly blame the legislators as at the time of creating the Energy Act Poland did not have a comprehensive definition of regulation or a comprehensive policy towards it on the political and conceptual level. Also, regulation and its consequences seldom become the subject of interest in scholarly papers.

State policy is not consistently treated from one regulated sector to another. It is formulated differently in the Telecommunication Act of 2004.[5] The statutory definition is incomplete but it points, in a way of example, to the purposes of sectoral policy which may include the promotion of competition (by development of trans-European networks, removal of the existing barriers to the market, *etc.*), consumer protection, pluralism of the media and cultural variety.

Unlike in energy sector the regulator is not only a subject by also a co-author of that policy along with the minister.[6] There is no clear division line between these two authorities, however. And there is no specific procedure of cooperation between them. One cannot assume that this is a coordinated state policy created jointly but rather two separate policies established at two different levels within the specific scopes granted to them by a statute and implemented by instruments available to them. There is no doubt that the policy line set forth by the minister, should the scopes of action of the two authorities overlap, takes precedence before regulatory policy due to the natural supremacy of a minister in the Polish constitutional system.

Like in the energy law a characteristic feature is the openness of goals and instruments of operation. The only known factor are the limits of the subject matter which is the overall scope of powers granted by statute to the minister and the regulator. Only in the energy sector the policy is to provide a bridge between the independent regulator and politically motivated government. In the telecommunications sector the word policy can be understood in a more traditional way as managing the matters of the sector. Certain elements of such policy in case of energy regulator are embedded in the licensing process anyway. Polish concept of a license assumes that the regulator may impose additional obligations on energy enterprises *e.g.* referring to environmental protection. He does not have a complete discretionary power in this respect, as he is bound by the statutory goals of regulation.

The most difficult of question regarding sectoral policy is how it fits in the constitutional system of the sources of law as the Constitution is an obstacle

[5] "Journal of Law", No. 171, item 1800.

[6] Sharing of regulatory functions was criticized by the EU Commission in its Eight Report, see: A.Krasuski, *Prawo telekomunikacyjne. Komentarz (Telecommunication law. A commentary),* Wydawnictwo Prawnicze, Warszawa 2005, p.506.

to recognizing state sectoral policy as a valid instrument. Before the transformation of 1989 it would be quite easy to prove that sectoral policy is universally binding. The jurisprudence of those years had no problem recognizing various acts without a specific normative approval, particularly that the Constitution of 1952 was not binding directly but only through statutes. In case of legal disputes one could not invoke it directly.

The current system of the sources of law is being criticized as overly rigid when used as an instrument of steering the economy. Unlike in France there are no framework statutes allowing the government to flexibly use various legal instruments within the parliamentary authorization to reach goals set in general terms. In the Polish system a statute has to specifically authorize the government to pass sub-statutory rules. The authorization cannot be assumed and must contain guidelines for the content of future sub-statutory acts. It means that at the time of passing of the law its promoter and the Parliament have to anticipate and define well in advance various circumstances that in the normal course of economic development (or sheer business) may be yet unknown. Participants in the legislative process have to act as if the economic developments were fully predictable. It also means that the government, unless it has pushed a statute through the parliamentary machinery, does not have much freedom neither in the choice of direction for the economy, should the circumstances change rapidly, nor the choice of instruments.

Under the rule of law established in art. 7 all public authorities my act "only on the basis and within the limits of, the law". This provision does not contain any substantive norm indicating in which direction state economic policy should go, nevertheless it is of equal importance to an investor as it is to a regulatory authority. Its importance becomes evident particularly where the post-transformation rule of law is confronted with the period before the transformation of 1989. In contrast to the past, state authorities may not impose any limitations not contained in or derived from a statute. Therefore instructions, guidelines and any other internal acts of government may no longer serve as a legal basis for administrative decisions. Additionally, the scope of discretionary power has been limited. In issuing licenses and regulations the authorities are never truly free and able to make arbitrary decisions because, even if technically they are given discretionary powers, it is up to the courts to verify whether such leeway has been used in conformity with general principles contained in the Constitution (*e.g.* the principle of equality) and in statutes.

The above system was devised as a way of counteracting the abuses of power prominent in the socialistic system of governance. In the past abuses consisted frequently of the repetitious use of "independent resolutions" of the Council of Ministers. These were "executive" regulations which in their

essence were not executive but "statutory" as they did substituted for statutes instead of being authorized by them. Unwittingly, the reformers preserved the relic of socialism in the legal system responding retroactively to the problems of the past and imposing solutions fit for the extinct model of the economy. However, even if the government today does not own the entire economy as it used to and it does not command it in its entirety by instruments of state intervention, the modern economy is a lot more complicated than the old one. In effect we have a system of sources of law tailored to the needs of a tamed socialism.

4. Pursuit to weaken regulatory independence

The flaws of regulations made subsequent Polish governments seek a way around the provisions of the EU requirement of an independent regulatory authority. A good example constitute the amendments introduced over the years to the Energy Act, aimed at weakening its position *vis-à-vis* the government. Listed below are the following initiatives to accomplish that goal.

4.1. Amendments concerning appointment, supervision and structure of a regulatory authority

In the first version of the Energy Act the regulator was appointed by the Prime Minister and only to him provided information. The amendment of 2001 was one of several manifestations of lowering the rank of the regulator by trusting more regulation-related powers with the minister in lieu of the Prime Minister. Now the regulator is appointed by the Prime Minister but on a motion from the minister. Then, for the first time the minister was trusted with supervising the regulator.

The notion of supervision is not defined in a statute. Traditionally it includes the power of a superior authority to step in and review the decisions of the lower-ranking authority. It is not synonymous with managing or directing as these two mean strict hierarchical dependence from a superior authority. Still, it is clear that the above amendment allowed the minister to intervene in the substance of regulation, in obvious violation of regulatory independence. However, its illegality would be difficult to prove as it does not violate the Constitution silent on the issue.

Supervisory ambitions of the minister are supported by the status of a central administrative authority of regulators. The notion of central administrative authority is reserved for bodies whose territorial scope of action encompasses the entire country but whose heads are not members of the

Council of Ministers. They report to the Prime Minister or to the ministers.[7] This status constitutes a real peril to regulatory independence as the Act on the organization and functioning of the Council of Ministers of 1996[8] in its art. 34 allows ministers to issue binding instructions and orders to the central administrative authorities to insure implementation of governmental policy. There is a substantial contradiction between these provisions and provisions of the Energy Act or Telecommunications Act aimed at granting independence to the regulator. The only safeguard from ministerial interference is a fixed 5-year term in office. In order to preserve the Community principles it is necessary to exclude regulators from the category of central administrative authorities and create for them a separate category, preferably mentioned in the Constitution.

Since 2001 the Prime Minister makes the appointment not on his own initiative but on the advise from the minister. This shift may be interpreted as bringing the regulatory authority closer to the everyday operations of the ministry and to various interests groups revolving around it. It is different from his previous status where relations with the government (in appointing, transmission of information and supervision) rested above the ministerial level, that is with the Prime Minister. The very position of the Prime Minister allowed only for less frequent and more general relations with the regulatory authority. Also, now it is the minister and not the Prime Minister who is appointing the deputies of the regulator. This creates an unhealthy situation when the authority does not have a direct say on how and by whom its decisions will be realised, even if deputies are appointed on a motion from the regulatory authority. It would be a grotesque attempt at preserving independence by the regulator if he had to keep his deputies idle as in fact emissaries of the minister.

The structure of energy regulator was stripped in the course of time of the Advisory Council appointed for a term and intended to represent the various energy interest groups. It never really took off the ground, however, it could be used as an independent platform for voicing independent ideas about the problems of the sector.

The independent council was composed of nine members. They were proposed by energy professional groups, local government associations and national consumer organizations. In fact only six of them were appointed, all of whom were representatives of the sector. Withdrawal of recommendation could lead to their dismissal. That indicates that their mandate in fact was not

[7] C.Kosikowski, *Polskie Publiczne Prawo Gospodarcze (Polish public economic law),* Wydawnictwo Prawnicze LexisNexis, Warszawa 2002, pp.129-131.

[8] "Journal of Law", No. 82, item 929 as amended.

free and apart from monitoring and mentoring function they could play a certain role as lobbyists. The failure of the Advisory Council was not to be blamed on the regulator but on the Prime Minister whose responsibility was to fully appoint it and its chairman.

There were two characteristic features of that body. First, that its members were appointed for a specific term in office (five years) like regulators. It should be understood as irrevocability even though the Energy Act of 1997 did not provide any specific conditions for their removal as it had in the case of regulator. A second feature was that it could come forward with motions and opinions on various issues also on its own initiative and not only on the initiative of the regulator. This made it not only advisory but also an alarming body. One author called it an "external reviewer" to the regulator[9] who had no influence on its appointment, mode of operation or the contents of its motions and opinions. By its relative independence the council could become both an extension of and a counterbalance to the regulator. It could contradict his action but also it could serve as an additional independent authority should the regulator seek an alliance in dispute with the government. It was never given a chance to play this role as eventually it was abolished in a 2001 amendment of the Energy Act.

4.2. Amendments concerning financial independence

Under the 1997 version of the Energy Act the employees of energy regulatory authority were granted salaries substantially higher than in the government departments, to match with average salaries in the energy sector measured by the standard of the last quarter of a previous year. That move was intended as an anti-corruption measure and one to guarantee employees of the Energy Regulatory Office the necessary financial independence and to attract highly qualified employees who otherwise might seek employment with the enterprises subjected to regulation.[10] Employees were to receive salaries increased by a "regulatory bonus". In the course of time the financial privilege was maintained but its mechanism has been changed into more dependent on the politically motivated government. The law of 23 December 1999 on salaries in the public sector[11] stripped the employees of the regulatory authority of the exemption granted to them under art. 29 and placed them under the general principles of the public sector. The new law authorized the Prime Minister to issue a regulation governing their salaries.

[9] I.Muszyński, *Prawo energetyczne. Komentarz (Energy law. A commentary),* Dom Wydawniczy ABC, Warszawa 2000, p.80.

[10] Art. 29.1 dealt directly only with the issue of qualifications.

[11] "Journal of Law", No. 110, item 1255.

Thus the independence of the energy regulator has been substantially weakened and constitutes a step back, even if the above remarks referred directly to the employees and not to the regulator (chairman) himself and his deputies.[12]

4.3. The use of excessively detailed legislation

A way of circumventing the concept of regulatory independence in an inconspicuous way is, instead of granting a minister the right to intervene directly, which is likely to cause an outcry from the regulator and his allies, to pass laws so detailed that they do not give the regulator much room for their own initiative. This was the case with a 2000 regulation issued by the Minister of the economy on calculation of tariffs and settlement of the accounts in energy trade.[13] The tariff should be calculated on the basis of mathematical equation so detailed, that neither the enterprise nor the regulator had a choice but to follow the equation. Such method of "regulation by legislation" is difficult to separate from typical legislation. It does not violate any constitutional nor procedural rules. Therefore if such practices became more widespread it would be to the detriment of regulation. In the extreme model it could lead effectively to the extinction of regulation. In a statutorily dominated model a regulatory body would be reduced to rubberstamping the only decision possible to make according to a given mathematical formula. By excessive legislation they would become administrative authority like any other governmental agency.

5. National features of regulation

5.1. One person or a commission?

EU directives do not require a regulatory body to be a one-person or collegiate body. Therefore one cannot say the new regulators (energy and telecommunication) are in any way superior to other organizational models. As Polish legal culture definitely stems from the continental tradition, one should expect certain uniformity of administrative authorities including the regulators. Collegiality in administration does not seem to be the essence of Polish tradition. Polish administrative culture favours monocratic authorities.

Regulatory powers in Poland are vested in one person and not a commission. This is true for at least strictly sectoral regulation. As they are

[12] A.Walaszek-Pyzioł, W.Pyzioł, *Prawo energetyczne. Komentarz (Energy law. A commentary),* Warszawa 1999, p.91.

[13] Dz. U., Nr 1/2001, poz. 7, par. 29-46.

in operation only for several years it is difficult to make a judgment whether this was a definitely a better option than a collegiate body. There is no evidence that a commission is less susceptible to corruption or political manipulation. Actually, it may be the contrary: it is easier to manipulate where the lines of responsibility are blurred because decisions are reached by a group of persons. The case in point may be the Council for Radio and Television whose members, as revealed by the media, were realizing goals having little to do with political independence. Even if it seemed impossible to politically influence a body whose members were appointed independently by the Parliament, the Senate and the President of the Republic, life proved to the contrary. In the light of this experience it is reasonable to believe that in a parliamentary democracy a one-person authority is better protected in its independence than a commission.

It seems that the existing collegiate regulators (at least for radio and television) should be stripped of their non-regulatory powers and transformed into monocratic authorities. There should be shaped similarly to the new regulators for energy and telecommunications.

5.2. Term in office

In the USA most regulatory commissions were granted longer term in the office than the president with a view of avoiding political influence. Similarly, the Polish 5 year term seems to avoid overlapping both with the government and the Parliament. In this respect it remains close to the American roots of regulation.

A characteristic feature of the Polish sectoral model is to trust appointing of the regulator with the Prime Minister and not President or the Parliament. In the light of deep influence of politics in all aspects of public life it is practically immaterial who appoints the regulator (with the exception of professional qualifications). What matters is what happens next, to what degree are the regulators immune from political influences and whether the regulator's impartiality is protected in making its decisions concerning market players.

For regulators whose powers go beyond what is typically considered regulation, to include passing national sub-statutory regulation, there seems to be a different organizational pattern. Here a collegiate body is a rule such as the Council for Radio and Television and the Council for Monetary Policy. Both perform regulatory functions for their respective sectors (radio and television and banking).

This duality of organizational pattern of regulation is justified only by the fact that the latter two councils were established in the eighties not with

a view of the EU integration, while monocratic regulators were deliberately founded to comply with specific EU requirements.

5.3. Professionalism of the regulator

One of the disquieting features of the Polish model is leniency of the formal requirements for the position of a regulatory authority. The EU law does not specifically require any specific education or a mandatory period of professional experience. These expectation seem to be inherently part of the position where a narrow, specialized knowledge is necessary to perform regulatory duties. Unlike the antimonopoly authority the rules on qualifications are very skimpy. The Energy Act does not invoke any requirements at all while Telecommunications Act calls for "university level education and experience in the functioning of telecommunications or post". It can be then someone who has education in history and whose presence in the telecommunications administration was a matter of political trust and not of merit. As of today at the helm of these two regulatory bodies are persons whose expertise cannot be questioned. One has to look at the future of these knowledge-sensitive industries not only from the point of view of professional level but also independence. Stricter educational and procedural (competition) requirements might protect the regulatory bodies from being "seized" at some point by politicians. This deficiency would be easier to compensate in a collegiate authority like in the USA by including professionals such as energy and telecommunications lawyers, judges *etc.* particularly that Polish sectoral regulators have powers in adjudicating legal disputes between the undertakings and between them and consumers.

5.4. The lack of legislative powers

Regulatory authorities both in the US and in Europe wield a wide array of instruments to attain their statutory goals. They include all forms known by administration and go beyond to include issuing laws (normative acts) and performing certain judicial functions. In Poland the powers of sectoral regulatory authorities remain strictly executive, as opposed to legislative, however, like in the case of telecommunication in Poland it is possible to participate, in a limited way, in creating a regulatory policy. In the latter case it should not be understood as an expansion of regulatory powers to include additional forms of action, but rather as interference of the ministry into regulation.

The absence of normative regulation is not necessarily the result of a consciously introduced model of regulation. More likely it is the effect of the "constitutional cage" proscribing a closed list of legal instruments.

Even if the lawmakers wanted to vest such powers on the energy or telecommunication regulator they could not do so.

In some countries regulatory authorities perform certain judiciary functions. It is difficult to unequivocally determine whether Polish regulators do it as it is not clear what judiciary function means and where it ends. The Constitution does not recognize the Constitutional Tribunal and Tribunal of State in its chapter on judiciary branch, however in practice they meet the requirements of a judiciary authority. Similarly, the problem of definition affects *e.g.* energy regulator who may resolve disputes concerning conditions attached to the services, refusal of access to the network, refusals to conclude an energy supply agreement and unjustified withdrawal of supply. Law distinguishes between administrative proceeding and judicial proceeding, therefore what the regulator is doing should be looked at as administrative proceeding. Therefore one can define the Polish model of regulation as one where the regulator is limited in the selection of legal instruments only to administrative-type decision, where, in a way of example, the approval of a tariff would also constitute such a decision.

5.5. Sectoral specialization

Sectoral specialization constitutes a guarantee of professional decision-making. This is not a matter of compliance with the EU standards as organizational pattern is left to the discretion of national legislation. In some European countries regulatory authorities are merged for more efficient use of the resources. The only examples are small economies where multiplying different regulators would not be feasible. Poland, being a mid-size country (by European standards) with many natural monopolists in the energy sector alone can and should afford a sector-specific regulation. The reason for a proposed reform aimed at merging regulatory authorities was not related to regulation but to parliamentary politics. Victorious political parties tend to prepare ground for the replacement of the existing regulators with new ones acting along the lines of partisan loyalty. As regulators are practically irremovable before the expiration of their term in office a massive "reorganization" seems to be the only solution – effectively only a cover up for a political change of guards. However, placing the matters of telecommunications and postal services under one authority is not part of the above trend. Postal services are basically not a regulated area of business activity. The merger of post and telecommunications is largely artificial and driven by the economies of scale rather than a conscious reform of regulation.

5.6. Regulation in public service

In search of national features of regulation one should take a more general look at the systemic requirements, as preserved in the Constitution that a regulator is expected to meet. As regulators are placed in the middle of the difficult task of balancing the market and non-market forces one should have a picture of a broader context in which they act. From the EU perspective one of the most difficult to implement guiding lines comes from art.16 of the Treaty Establishing the European Union. It creates an exemption from the market mechanism where goals of higher importance in the economic interest of the Community are to be achieved. These exemptions are granted to the "services of general economic interest in the shared values of the Union". Also, on a different level, the exemption may be intended for "promoting territorial and social cohesion". Art. 16 creates an island in the internal market where competition forces may be sacrificed for the higher good. One might expect that in countries in transition like Poland, where there is a tendency to break with the socialistic path, the implementation of such semi-socialistic provision might face a fierce resistance. Indeed the tone of political and academic declarations, as well as what one can see in the media, seems to confirm such observation. Despite the right-wing tone of the public debate some provisions of the Constitution prove to the contrary. They include a patchwork of exceptions from the market economy which, taken together, seem to correspond well with art. 16.

Art. 20 of the Constitution defines the Polish economic system as "social-market economy" based on private property, freedom of entrepreneurship, solidarity, dialogue and cooperation of social partners". This general declaration is further developed in a more specific provision, for example there is a limitation on the free market in agriculture as the Constitution supports small family farms and there are many statutory limitations in buying land also by Polish nationals. Also the Constitution guarantees "ecological security", protects labour and labour unions. This amounts to "moral" guidelines for the regulator. Regulatory authorities should protect the market particularly from monopolistic behaviours as it is their basic job but, at the same time, they should be socially oriented and guardians of various causes brought up by the Constitution.

Thus in the Polish model a regulator is not supposed to be socially neutral, or so to speak technically oriented. This is very explicit in the telecommunication law replete with public service obligations. In the energy law they are not as visible on the statutory level but appear in profusion as one of the conditions demanded from the energy investor in a license absent recently from telecommunications law.

The difference from what other countries practice remains to be seen in the future. In the short period of time from the creation of the first regulatory authority national efforts were concentrated on the strict implementation of the rules contained in sectoral directives. Therefore, at least as of today, public service obligations are rather the result of copying than recognition of the needs of one's own society. This relatively modest role may be a reflection of stepping onto the European regulatory scene very late compared to other EU countries.

In sum, regulatory authorities (for energy and telecommunications) that indeed meet the EU criteria established in sectoral directives, display certain common features that provide a specific climate of regulation. These feature are: the regulator is a monocratic authority as opposed to a commission (like most US regulators, Italy). Also it is appointed by the Prime Minister for a period of five years. During the term the regulator cannot be revoked by the head of government, unless certain restrictively interpreted requirements are met. It is manifest that Polish reformers did not draw from the German model of regulation where regulatory functions were integrated in the ministry of the economy, despite the fact that in other areas of business and law borrowing from the German tradition was common.

6. Is regulatory law a distinct branch of law?

Regulatory solutions to market problems have reached the point where it is reasonable to ask whether we have a separate body of regulatory law, or is it still just a loose collection of sectoral regulations? Some authorities say that our legal system has such a body of law *in statu nascendi*[14] With the assumption that we have only two undisputable regulatory bodies – one for the energy sector and one for electronic communications, the similarities of concepts behind the statutes founding them are clear. They create a substantial body of law covering the status of the regulator, his obligations, the market, market players, consumers, procedures for setling dispute, qualifications and many other highly specialized issues.

Little is said about regulation in the Constitution unless The Council for Radio and Television and the Council for Monetary Policy are included as regulatory bodies. This would confirm the coexistence of two different models of regulatory authorities. However, indirectly the Constitution does shape regulation. It is much more important in describing the environment in

[14] T.Skoczny, *Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce (The state and development tendencies of administrative regulations law in Poland)* in: *Ius Publicum Europeum*, Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa 2003, p.119.

which regulators work than for their status in the state apparatus. The Constitution can be taken into account with its many interferences in the market where its provides a definition of the Polish economic system saturated with social concerns.

In defining legal grounds for a more general concept of regulation one must remember that by accession to the EU (and earlier by 1991 Treaty) Poland took upon itself the incorporation of *acquis communautaire* in its entirety from the first day of her membership in the Community. Not only it contains the requirements relating directly to regulatory authorities but also constitutes a point of reference and a framework in issues as important as the organization of the market to include *i.a.* four business freedoms and competition law. That means that, to a certain degree, the EU regulatory law and Polish law are, at least functionally, inseparable.

Without a comprehensive approach on the part of Parliament any further development of regulation in Poland is doomed to be limited only to adding new regulators (if any). The crucial problems of regulation are of systemic nature and can be overcome only by reforming the overall constitutional and statutory framework, above any specific sector. For example the negative consequences of the status of regulators as "central administrative authorities" or the lack of constitutional grounds for a true sectoral policy cannot be cured by manipulation with intra-sectoral rules.

7. The future of regulation

Regulation is often perceived as a transitory concept between the phase of natural monopoly and until the competition forces have been put in operation. But competition or its artificial resemblance created by regulators will always have to rely on administrative coercion so long as there are natural monopolists owning and controlling the infrastructure. Also, the need for monitoring of public service obligations will continue to make regulation indispensable. Particularly that the Constitution, in step with art. 16 of TEU, provides a long-lasting foundation for public service obligations.

Polish law concerning sectoral regulation, fragmented as it is, entered into a phase of structural stagnation. One can say that despite setbacks and attempts to turn back the clock of time and weaken the independence of regulators particularly in energy there is little danger that the process of deterioration would go much further and there is little hope the position of regulators would become stronger or that they would be more numerous. Nothing indicates that one should expect a truly independent regulatory authority for example for the

railway sector. It was invoked in literature[15] but it is lacking independence to a degree that it disqualifies it as a regulator. The same can be said of any other existing sector, *e.g.* commercial aviation.

Instead of dissolution of regulation for competition (based on the assumption that eventually a mature competitive market will be established[16]), the opposite process may occur in the EU and in Poland: regulation will overcome the national boundaries to acquire a Pan-European dimension. Authorities of this magnitude already exist, *e.g.* European Agency for the Evaluation of Medicinal Products. Undoubtedly the European Commission plays, inter alia, the role of a regulatory body. As a whole, however, it would be risky to classify it as a regulatory authority for its multi-sectoral character and its ability to play an important role in the Community legislation. More important is it role as an antimonopoly authority watching over the implementation of the rules of internal market, a role in which it has been paralleled by the Polish Office for Competition and Consumer Protection.

The creation of Community-wide regulators seems inevitable. As national markets merge and capital is allowed to flow freely between the national markets so the consumers will be, and very much so already are, allowed to purchase electric energy produced outside of their native country and view programs broadcast directly from other countries. The Polish energy sector is in the process of privatization at the end of which Polish energy companies will change hands from the Treasury to foreign investors. Protecting local interest will no longer mean protecting local entrepreneurs. The shift of regulatory interest will be toward consumer protection. Also disputes between the market players themselves and between them and consumers can easily gain international dimension where local regulator will have neither powers nor physical ability to handle disputes. More uniform standards of energy security or consumer protection will have to be established throughout Europe.

The increasing number of legal provisions requiring communication with or notification to the European Commission, and similarly among national regulators, heralds the beginning of bringing national regulatory authorities closer together. This process is not limited to regulation. Looked at from the perspective of the tremendous influence of the European Commission, it can be viewed as an indication of gradual transmission of power from national to the EU institutions. However recent developments in the competition law,

[15] T.Skoczny, ibidem, pp.147-148.

[16] S.Piątek, *Prawo telekomunikacyjne Wspólnoty Europejskiej (European Communities' telecommunication law),* C.H.BECK, Warszawa 2003, p.55.

delegating more power to the national regulatory bodies, indicate that this process may be significantly reversed by political consensus.

A gradual shift of balance in favour of Pan-European regulation may face one seemingly old-fashioned obstacle: the national character of regulation advocated by some writers and politicians.[17] Despite the need for supranational solutions, regulatory authorities do not operate in a vacuum but in a specific local political and economic context, entangled in local politics, practices and national legislation. Those differences, particularly in infrastructural industries are doomed to dissipate with the progress of privatization, liberalization and internationalization of entrepreneurship and ownership.

[17] P.Jasiński, T.Skoczny, G.Yarrow, *Konkurencja a regulacja w energetyce (Competition and regulations in the energy sektor)*, C.H.BECK, Warszawa 1995, pp.17-18.