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The Guardians of Market Equality

INTRODUCTORY REMARKS

Regulatory authorities are relatively new in the European Community law. There is a tendency to regard any specialized authority as a "regulatory authority" or an "agency". There is also a tendency to view the so called "agentification" of the administrative apparatus as one of the manifestations of regulatory governance. To some degree these various notion do overlap. Some agencies perform regulatory functions. Almost all regulators across Europe are specialized authorities. Many specialized authorities or agencies of the government are independent, however, not necessarily do they carry regulatory functions.

In the English-speaking countries where typical "regulation" appeared first regulation was associated with the emergence of the new industries in the mid-nineteenth century to reach an apex after World War I. These industries were railways, energy and telecommunications. The task of a regulator was to balance the interests of the infrastructure owner with other industries depending on that infrastructure and consumer interests. The novelty was not only in the apparatus but also in the specific way of decision making that is preserved in the modern European railway, energy and telecommunication directives[1]. In performing their balancing act, they have the right to impose regulatory obligations on the dominant companies on a relevant market. Dominance is usually attributed to exercising control over the infrastructure. It is worth noting that their powers although similar to the powers of antimonopoly authorities are different as to their

[1] This mode of decision making is called "regulatory discretion" by W. Hoff, *Prawny model regulacji sektorowej*, Difin, Warsaw 2008, pp. 126–140.

legal basis and procedure. Decisions issued by regulatory authorities are "weighted" against the situation on a relevant market. Just as lack or deficiency of competitions justifies imposing regulatory obligations, the restoration of market forces mandates to withdraw such decisions. They are also, with very few exceptions, issued by authorities different from antimonopoly authorities. All regulatory authorities are independent under the respective EC directives.

The paper refers only to such regulatory authorities which combine the following two features: 1) they issue decisions based on market situations in order to provide the missing balance between the market players one whom is the owner of the infrastructure and 2) they are independent from politically motivated national governments as required by directives and confirmed by the European Court of Justice Decisions.

Independent regulatory authorities exist only at the national level. The European Commission, commonly referred to as a regulator, combines many functions other then regulatory. However, on November 13, 2008 the Commission proposed a reform package calling for the establishment of a new pan-European "regulatory" authority and trusting more powers to the Commission itself. The proposed European Telecom Market Authority would be an independent agency formally unable to impose binding decisions[2]. It would be a consulting body to the Commission, only preparing its positions. The package also calls for further strengthening of the Commission in its relations with national regulatory authorities. They are going to be substantially more dependent on the Commission, but more independent from their own governments.

Regulatory authorities, mandatory under the telecommunications and energy directives, were unknown in Poland until 1997 when the Office for Regulation of Energy was established[3]. Administration established for supervising the infrastructure is considered not only the realm of business but also of public service and national security. It has traditionally been under the control of national governments. However, the EC law clearly demands independence of national regulators. Therefore Poland's acceptance of *acquis communataire* has removed vast areas of influence

[2] H. Schulze-Fielitz, *Administracja w Konstytucji Europejskiej*, in: Administracja pod wpływem prawa europejskiego, Oficyna Wydawnicza Branta, Bydgoszcz–Katowice 2006, p.106.

[3] The first mention in an academic textbook about regulatory authorities was by M. Wierzbowski, *Niezależne organy regulacyjne*, in: Prawo gospodarcze. Zagadnienia administracyjnoprawne, Lexis Nexis, Warsaw 2005, pp. 102–106.

from the politically motivated government into the hands of independent agencies. The idea of an independent authority within the administrative apparatus, despite initial success, has been dismantled over the recent years by consistent removing of the various attributes of independence by the Parliament.

This paper examines the ways of bridging the gap between the imperative of regulatory independence as envisioned in the Community law and of the government's constitutional prerogative to control the economy in Poland. The paper presents the background of regulatory independence and the role of government in formulating the economic policy. One might dismiss the issue by the assumption that under the Van Gend en Loos[4] the Polish law will have to be adjusted forcibly – by a decision of the European Court of Justice. This probably will happen anyway, but it will not resolve the contradiction outlined above. The point is to find a gentler solution. It seems that the solution would be to expand the Polish system of the sources of law envisioned in the Constitution of 1997 by introducing an act resembling directives as defined in art. 249 of the Treat Establishing the European Community. Thus, the main field of analysis is the Polish system of sources of law as one of the barriers preventing the co-existence of the EC law and Constitutional demands.

2. CONFLICTING LEGAL REQUIREMENTS

2.1. The imperative of regulatory independence

The benefits of regulatory independence had been obvious to the British law makers of a century and a half ago. Under the 1844 Railways Act "regulators" were recruited from among royal engineers and were independent from the supervised enterprises. Thus they could limit the economic freedom of the railway owner without an outside pressure.[5]

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[4] Van Gend en Loos v. Nderlandse Administratie der Belastingen, case 26/62 [1963] ECR 1. It is considered to be the most important case decision in Community Law, S. Weatherhill, *EU Law. Cases & Materials on EU Law*, Penguin Books, Oxford 2003, p. 109.

[5] I. McLean, *The history of regulation in the United Kingdom: Three Case Studies in Search of a Theory,* in: J. Jordana and D. Levi-Faur (eds.), The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Regulation, Edward Elgar Publishing, p. 47.

The concept of independence within the administrative apparatus is foreign to the Polish legal and political thought, which remains close to the French tradition of centralism. It has been advanced the most in the energy and telecommunications sectors and, to a lesser degree, in the railways sector .

In the energy sector the requirement of independence had been formulated in directives 2003/54/EC (electricity directive) and 2003/55/WE (gas directive) while for the telecommunications sector in the so called framework directive 2002/21/EC (framework directive). The directives currently in force express the organizational requirements in the most general terms, in contrast to the requirements concerning substantive and procedural rules. The EU concept[6] of a regulatory authority can be traced back to the Directive 88/301/EWG from 1988 concerning competition in the market of terminal equipment[7]. The requirement of independence was confirmed several times by the European Court of Justice in cases France v. Commission, 1991[8], RTT[9], Decoster[10] and Lagauche/Evrard[11]. The Court had raised the standards of independence in comparison to directives adopted in the 90-ties[12]. The concept adopted in the Community directives remains in line with the GATS agreements[13]. It contains the seed of uncertainty by using the term "authority" which by the Polish doctrinal standards indicates that the regulator should be part of state apparatus. That wording is not to be taken too literally in the scale of the EU as in the UK a regulator does not have a clear status of a state authority, but rather something resembling a corporation. It indicates that the regulatory functions (and powers) may be trusted to any entity, even outside of the state apparatus as long as it can guarantee independent decision-making. Such elasticity allows to adapt a generally phrased requirement to the various national traditions of law and statehood. Within such a sweeping formula national legislation could, until recently, provide more than one regulator

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[6] For comparison with the American concept of regulation see G. Majone, *The Rise of Statutory Regulation in Europe*, in: G. Majone (ed.), *Regulating Europe*, Routledge, London–New York 1996, pp. 47–50.

[7] OJ L 131/1988.

[8] Case C-202/88, *France v. Commission* [1991] ECR, s. I–1223. This case concerned terminal equipment.

[9] Case C-18/88, *RTT v. GB-Inno-BM SA* 1991 ECR, s. I–05941.

[10] For example in the case *F. Gillon nee Decoster* of 27 October 1993 C-69/91 [1993] ECR, s. I–5335

[11] CasesC-46/90 i C-93/91 Lagauche i Evrard [1993] ECR, s. I–5267.

[12] J.J. Chérot, *Wspólnotowa regulacja sfery użyteczności publicznej w Europie*, in: Wpływ prawa wspólnotowego (Unii Europejskiej) na prawo wewnętrzne, Difin, Warsaw 2003, p. 144.

[13] Item 5 of the Annex to the Fourth Protocol To the General GATS Agreement concerning trade in services, Geneva, 15 April 1997.

for one sector. Directive 2009/72/EC put an end to this policy in Art. 35 par. 1. The states are only mandated to make the scope of powers of such an authority public and easily accessible. Regulators may also combine several sectors under one regulatory authority (as embodied by the European Commission itself)[14]. This leeway[15] may be tempting for the governments to manipulate regulatory structures in order to accomplish a politically favorable personal composition in step with the current parliamentary distribution of power. This has been the fate of Polish regulators. Structural changes have been a smoke screen to uninstall the members of a previously ruling political party, only to be replaced by representatives of a new parliamentary majority. Reshuffling structures is not *per se* illegal from the point of view of EC directives, unless done purely for the reasons of political manipulation. However, in practical terms it would be difficult to prove the intentions of a "creative" ruling party. The structural changes can always be justified by "improvements" , grater "effectiveness" and "cost saving".

The relations between national regulators and the European Commission remain outside of the issue of independence. Their asymmetrical interdependence constitutes part of the concept of regulation. The same can be said of their relations with national antimonopoly authorities. The purpose of independence was always to insulate regulators from political pressure frequently inspired by the natural monopolists subjected to regulation.

The essence of regulation – to balance the interests of infrastructure owners, infrastructure users and consumers is to be achieved by resorting to the basic notions of competition law such as relevant market, dominant position and a formally structured analysis of the market. In general, the tendency to borrow concepts from economy and competition law and to co-operate between the authorities is growing[16]. Additionally, the Commission, by interfering into the content of regulation, provides cohesion in the decision-making process and outcomes.

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[14] The vagueness of the EC organizational standards gave rise to the theory that administration, including regulatory authorities, is organized into networks which *per se* are a new form of administration. More J. Supernat, *Relacje między podmiotami administracyjnymi*, in: J. Zimmerman (ed.), Koncepcja systemu prawa administracyjnego, Wolters Kluwer Polska, Warsaw 2007, pp. 207–229.

[15] The level of "penetration" of the national administrative systems by the EC law is very uneven from issue to issue as pointed out by G. Majone, A. Surdej *Regulatory Agencies In Economic Governance*. *The Polish case in a comparative perspective*, KICES working papers, Koszalin Institute of Comparative Administrative Studies 5/2006, p. 20. According to them the EC law creates mostly general principles rather than detailed rules.

[16] N. Petit, *The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion*, The Global Competition Law Centre Working Papers Series GCLC, Working Paper 02/2004, pp. 3–5.

In the light the EC directives it is not obvious that regulatory authorities have to be independent from the political centre of the state. Recital 11 of the preamble to the framework directive merely provides a division between the regulatory and operational functions. Operational functions mean actions taken by enterprises in the specific market subjected to regulation. As a bottom line regulators should be separated and have their own competencies. In specifying from whom a regulator is independent, the directive enumerates organizations providing the networks (infrastructure), the installations and the telecommunications services (currently called electronic services). States are mandated to guarantee regulatory independence in order to provide impartiality of the decision-making process. In addition, the directive requires that regulatory authorities are to be equipped in human and financial resources as well as specialized knowledge. The former two certainly constitute some of the pillars of independence.

In the electric energy sector the issue of independence is substantially enhanced in a new Directive 2009/72/EC replacing Directive 2003/54/WE. It must be implemented by the member states by March 3, 2011. In the latter electricity directive the description of independence is general but takes a different point of reference than in telecommunications. It is not the "who" but the "what" of regulation. The points of reference constitute the interests of the energy industry. It is more practical than in the telecommunications sector as it formally encompasses all forms of influence, direct and indirect, that might possibly be in the way of independent regulatory judgment. Constructed in such a way it leaves no doubt that separation of the new type of administration from politics must not only be structural but also functional. The directive states that independence should be complete. This calls for a restrictive interpretation on all powers of other authorities whenever exercised towards a regulator. It is particularly important in Poland where the process of privatization has not been completed and the state may still exercise dual influence on the sector, as a state (imperium) and as the owner of the infrastructure (dominium). The new electricity directive has reinforced the demand of regulatory independence in Art. 35 par. 4. While previously it was not clear of whom the regulator should be independent the new directive specifies independence of any public or private entity. It specifically prohibits taking or asking for any instructions from the government which does not preclude cooperation. The term in office must be no less than 5 years and no more than 7 years subject to renewal only once.

Very rarely Community law expressly allows other authorities to interfere with regulatory matters. An example provides art. 23 par. 3 of the electricity directive. It allows (but not mandates) subjecting of tariffs and their methodologies to supervision by other non-regulatory authorities[17]. These provisions, however, do not allow for any direct influence on the authority itself e.g. by instructions or guidelines.

2.2. Regulatory hierarchy under the Constitution of 1997

Regulatory authorities, defined as independent by the EC law, were placed within the system of governmental administration which by definition is hierarchically structured. Positioning regulators where they seemingly don't belong seemed to be the only option as the Polish Constitution of 1997 knows only two types of administration, either governmental or local, where there is no room for a third pillar of governance.

The Constitution provides in Art. 146 par. 1 that foreign and domestic policy is trusted with the Council of Ministers. Domestic policy includes economic policy and its constituent elements, among them the energy, telecommunications policy and other sectoral policies. In par. 3 the same Article makes the Council of Ministers responsible for "managing" the administrative apparatus of the state. This provision includes only central administration to the exclusion of local government which has its own scope of powers. As the regulatory authorities were made part of the central government in their respective founding statutes[18], they must observe many legislative acts that issued by the Council of Ministers, the Prime Minister and the ministers.

Further curtailment of regulatory independence stems from the provisions concerning the Prime Minister. Under Art. 148 item 7 of the Constitution, he is the "the official superior of employees of the government administration". As regulatory authorities are not excluded from the scope of this article, they become subordinate to the Prime Minister.

Then, in Art. 149 the Constitution empowers the ministers to "manage" their respective areas of administration. Thus the minister for energy

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[17] The same in article 25 par. 3 of the directive 2003/55/WE (gas directive).

[18] Art. 21 par. 2 of the Energy Act of 1997, OJ of 2006 No 89, item 625 as amended ; Art. 193 par. 3 of the Telecommunications Act of 2004, OJ of 2004 No 171, item 1800 as amended; Art. 10 par. 1 of the Railway Transportation Act of 2003, OJ 2007 No 16, item 94 as amended.

would "manage" the energy regulator. Similarly, ministers would control regulators in telecommunications and railways.

The legally blurred terms "manage", "supervise" and "supervision" may give rise to abuses in relations between the higher and lower entities of the administrative apparatus . Despite many decades of academic discussions their meaning remain unclear. There is a purely academic assumption that supervision implies a limited interference by a higher authority, however, the law is not specific as to what are the limits. In contrast, it is commonly accepted in the Polish legal writing that the statutory expression "managing" implies the unlimited scope of interference by a higher ranking authority[19]. In practice the right to interfere by "supervising" is asserted at least by demanding information, but more likely by issuing instructions and orders. In a political and legal system where a regulator is secure within the five years terms in office he or she can afford to rebut the overstepping the supervisory powers and refuse taking orders. In the absence of a term in office, as is presently the case in the energy sector, the subject of supervision remaining at the mercy of the supervising authority. In telecommunications sector independence has been restored in 2009 by the so called EU amendment[20].

The enormous empowerment of the Council of Ministers and of the Prime Minister vis-à-vis the state apparatus should be viewed as a precise formula and not as a vague political statement. The Constitution, when it wants to grant independence, it does so in unambiguous terms. For example in Art. 171 it grants independence to the local government. The absence of a similar formula means the subjection of the apparatus to the hierarchical relations was intentional.

In deference to the constitutional position of the governmental administration the law referring to the status of regulators, the Energy Act, the Telecommunications Act and the Railway Act classify regulators as "central authorities". It is important to outline the concept of "central authorities" as its statutory meaning is clearly inconsistent the principle of regulatory independence. The term was included in the Constitution of 1952 but was dropped from the current constitution. The legal definition of a "central authority" is contained in the law on district (*województwo*) administration

[19] Polish legal doctrine favors the notion that supervision implies limitation of the powers of the superior authority. A summary of these ideas gave S. Jędrzejewski, *Zakres pojęcia "nadzór" w doktrynie prawa administracyjnego – kolejna próba przybliżania poglądów*, in: Administracja publiczna u progu XXI wieku, Wydawnictwo Wyższej Szkoły Administracji i Zarządzania w Przemyślu, Przemyśl 2000, pp. 274–294.

[20] Journal of Laws No. in: 85, item 716 of 2009.

of 1998[21]. The concept contained therein is repeated in the Government Departments Act of 1997[22]. Theoretically it is a concession towards regulatory independence. The Act subjects the regulators to ministerial "supervision", a term traditionally interpreted as a synonym of limited interference. However, a limited interference is not as good as independence, particularly that the above statute has to be read in a wider context of powers set by Art. 146, where the term "managing" is used suggesting unlimited control. Another consequence of the status of regulators as "central authorities" lies in the application of the Council of Ministers Act of 1996[23]. Its Art. 34a par. 1 allows ministers to direct binding guidelines and orders to all central authorities. In an effort to create at least a resemblance of limitation to the ministerial powers, the Act makes a reservation that the ministerial interference must not cover individual decisions. This might provide a partial answer to the central question of this paper if ministerial acts affecting regulators could only be general. If they adhered to general instruments the ministers could not step in the details of regulatory decision-making. However, as indicated above, ministers can issue not only guidelines but also orders. There latter are undoubtedly individual acts and their use excludes the limitation of ministerial competence to just general policy issues. Thus the distinction between the various acts of ministers seems fictitious if looked at form the point of view of regulatory independence.

Theoretical possibilities are substantially weakened by lack of a dispute resolution mechanism, should overstepping of powers occur. Regulators are left defenseless as Art. 189 of the Constitution governing competence disputes between authorities covers only "central constitutional authorities", whereas regulators are not "constitutional" but statutory authorities. Their founding acts are ordinary statutes. This places them in a much worse position than the local government authorities which may seek judicial support of their independence from governmental interference[24]. Despite the fact that regulatory authorities were created independently of one another since their inception in 1997, a mechanism of dispute settlement was conveniently omitted in the administrative reforms of the last decade.

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21 Art. 9 para 2. OJ of 1998 No. 91, item 577 as amended.

22 OJ of 1997 No. 141, item 943 as amended.

23 OJ of 2003 No. 24, item 199.

24 J. Lang, *Inne postępowania regulowane w kodeksie postępowania administracyjnego*, in: J. Lang (ed.), Postępowanie administracyjne i postępowanie przed sądami administracyjnymi, Lexis Nexis, Warsaw 2003, p. 88.

At present in order to adopt the European model of regulatory administration one has to violate the Constitution which does not allow for any other state administration than centralized and governmental. The alternative option is to satisfy the constitutional requirements by subjugating regulators to the government only to draw criticism from the European Commission. The steps already taken by the Commission in the Court will certainly force Poland to fully implement the new model of administration[25].

DETERIORATION OF REGULATORY INDEPENDENCE IN POLAND

The process of diminishing of the role of regulators in Poland, the seeds of which could be seen in the Constitution and "systemic laws", as outlined above, had started several years after the successful implementation of the energy and telecommunication directives to reach apex in 2006 by the exclusion of any vestiges of regulatory independence. The dismantling of the original idea was done in a piecemeal manner.

First, there was a series of parliamentary statutes strengthening the role of the economy minister. The minister acquired the right to recommend a candidate for a the position of a regulator. The regulators were appointed at first for a five years term, initially by the prime minister on his own initiative, and later on the motion from the minister. The change was seemingly insignificant and even reasonable. The minister has a more intimate knowledge of the sector than the prime minister, which includes the human resources. However, the move was designed to keep a closer eye on the regulators. Then, step by step, still new powers had been bestowed on the minister under a general formula of supervision.

Second was the removal of financial independence. Financial independence has two dimensions: one refers to employees and another – to an authority as such. The employee's independence was substantially weakened in 1999. Members of the administrative staff were still paid the average of the industry they supervised (which is substantially higher than for the

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[25] This problem is very sector-specific as Poland's "transposition deficit" of directives is rather insignificant compared with other member states as shows a study by B. Nowak, *Implementation of Directives into Domestic Legal System. The Case of Poland*, Yearbook of Polish European Studies 2005, No. 9, pp. 75–80.

non-regulatory administrative staff), however their additional income was not drawn anymore from license fees. The employees became dependent on the prime minister who determined their salaries and bonuses. When regulatory governance was first introduced in 1997 license fees reflected the cost of regulation[26]. The relationship with the cost factor was eventually severed. Currently the license fees are merely a hidden taxation rather than part of the concept of regulation.

The third step in dismantling regulatory independence was the removal of advisory councils. The panels did not make any legally binding decisions and were only a representation of independent specialists. They could voice their concerns should the law or its practice stray in an unwanted direction. The councils were to be made of the representatives of the sector, activists and scholars. They materialized only in the telecommunications sector. In the energy sector an advisory panel was never appointed to the detriment of the energy policy. An advisory council could indirectly insulate the regulator from any outside pressure by providing an independent and authoritative opinion – the voice of the community, particularly that under the Energy Act of 1997 it could also act on its own initiative.

The most powerful guarantee of freedom from governmental intervention in the regulated sectors was a fixed term in office during which a regulator was difficult to be removed. A fixed term in office constitutes the cornerstone of regulatory governance. Until 2006 a regulator was irremovable from office on the grounds of policy. He could be removed only for: 1) gross violation of law (This provision has never been applied in practice). However, it could potentially be damaging as in the infrastructural businesses even single decisions can entail incalculable financial consequences. Also, without being defined by law, the term "gross violation" was a general clause amounting to discretionary power. That discretion has not been used probably because of the historic period Poland had entered. Applying for the admission to the EU certainly enhanced the zeal of the Polish government to play by the rules. That zeal substantially decreased once the goal had been was achieved) and following 2) a judicial ban on performing public functions, 3) being sentenced for a premeditated crime (but not misdemeanor), 4) permanently disabling sickness.

[26] Art. 34 par. 2 of the Energy Act, original 1997 version.

Regulators had lost the strongest guarantee of their independence: the five year term in office during which they were practically irremovable. The abolition of a statutory term in office was effected by the State Cadres Reserve Act of 2006. It meant that regulators could be removed and replaced at a whim by the prime minister, or more likely, of the economy minister. Now they could be easily manipulated by the political circles.

In relation to the telecommunications sector the 2006 reform brought a decisive opposition from the European Commission which presented its objections in a *reasoned opinion* based on art. 226 of the Treaty Establishing the European Community. It is the last phase of proceedings before bringing the case to the Community justice system[27]. The 2006 legislation was a grave step back from the original concept.

The forth symptom of dismantling regulatory independence was the increase of the so called "regulation through legislation". This way of avoiding the burdens of regulatory governance is manifest equally in the telecommunications and the energy sectors. Both energy law and telecommunications law contain more than 20 authorizations for the ministers to legislate. It boils down to creating patterns of decision-making for a regulator in statutory or sub-statutory legislation. Legislation sets detailed conditions for regulators, sometimes expressed in the form of mathematical formulas, using which a regulator is being reduced to a calculating machine with little to do but rubber stamp the outcome of calculation. Such detailed rules were created for electricity tariffs contained in sub-statutory legislation of the economy minister, under Article 46 par. 1 of the Energy Act. Preserving the façade of independent regulation the minister is elevated as an actual regulator almost in absolute control over the tariff[28]. Similar effect have the ministerial and governmental acts concerning the mandatory use of green energy. In the telecommunications sector an example of regulation through legislation are ministerial decisions naming the 18 relevant markets[29]. One wonders who knows more about the functioning about these market, a specialized and impartial regulatory authority, or an all-purpose and politically dependent ministry? The trouble with legislative intrusion is that it is hard to deny that a sovereign state has

[27] MEMO/07/255 of 27 June 2007. For the first time the Commission pointed to the improper implementation of the independence principle in regulatory administration in MEMO 06/487 of 12 December 2006.

[28] T. Skoczny, *Stan i tendencje rozwojowe administracji regulacyjnej w Polsce*, Ius Publicum Europeum, Wydawnictwo Prawo i Praktyka Gospodarcza, Warsaw 2003, p. 150.

[29] It is seven retail markets and eleven markets in services and goods necessary for the final consumers under § 1 i 2 of the Minister of Infrastructure regulation of 25 October 2004, Journal of Laws Nr 242, item 2420.

the right to legislate its own economy. It is very difficult to delineate the cases where legislation remains within its traditional bounds and where it is being used instrumentally, to avoid regulatory governance.

It seems rather unlikely that the EC would take a step back and defer to the national law. After all, in Van Gend en Loos the Court had stated clearly that the Community law takes precedence over any national laws including, impliedly, also national constitutions. All signs point to the imminent change of the Constitution by making adjustment to the EC law. Not the first one, as indicates the case of the European arrest warrant previously unenforceable in Poland.

The European Commission was able to expose such practices as demonstrated in a 2007 case against Poland where the Commission rejected legislating access to the infrastructure. Instead of being pre-determined by law, the relevant markets for the purpose of access to the infrastructure should be defined by the regulatory authority on a case-by-case basis[30].

4
THE SOLUTION: ACCOMMODATING SECTORAL POLICY INTO THE POLISH LEGAL SYSTEM

Depriving regulators of their independence was fostered by the constitutional responsibility of the Council of Ministers for the economy, combined with the lack of a binding tools of coordination with the independent part of the apparatus. Such a tool would be imaginable if the Constitution allowed for a more diverse array of sources of law[31]. Coordination could be effected by an act similar to a directive already established in European law. It would align the economic policies at the macro-economic level without substantially infringing on regulatory independence. Such acts do not exist under the Polish Constitution which operates only between the extremes – abstract norms (statutes) and individual decisions, all fully binding.

The problem is also inscribed into the relations between European law and national laws. There is no conceptual coordination between the EU sources of law and national ones. The EU law operates with broad

[30] C-227/07, OJ EC C 199 of 25.08.2007, Kolonia Limited, p. 16

[31] Defined and described by W. Skrzydło, *Polityka administracyjna. Zagadnienia podstawowe*, in: Administracja publiczna, Wrocław 2003, pp. 82–84.

formulas that ignore the national constitutional systems. It applies to all aspects of regulation. For example, in providing that national regulators should be independent the directives do not predetermine what would be the legal status of regulatory authorities the member states. In establishing the right to impose regulatory obligation on enterprises it does not predetermine what is the status of such decisions under the national law, and under what circumstances the right of appeal can be exercised; it is unclear what authority should be trusted with reviewing regulatory decisions. Should it be, for example, an antimonopoly court or an administrative court.

An unsuccessful effort to provide a general instrument of control were the "energy policy" and "telecommunications policy" known from the the 1997 Energy Act and the 2004 Telecommunications Act.

Administrative policy is part of state policy [32] but its place in the system of the sources of law is questionable. Particularly, it is no clear in light of the hierarchy of the legal system that regulatory authorities in Poland are bound by it. Without binding power the policy cannot play its role.

Chapter 3 of the Energy Act defines the purpose of energy policy, its subject-matter, procedure and policy makers[33]. Energy policy takes the form of a Council of Ministers resolution adopted under Article 15a par. 1. The Energy Act states that such a policy should be "taken into account" by the regulator in setting forth the criteria for building new electric energy capacity. Article 23 par. 1 states that the regulator should act in compliance with that policy. Also the economy minister should "take into account" the energy policy in adopting regulations on tariffs. However, theoretical response was that energy policy: 1) is not a source of law, and that 2) it is neither superior to the Energy Act, nor it implements the Act and therefore cannot be the basis for any administrative decisions.

In my view energy policy is a hybrid having the characteristics of a normative act and of a fact to which law attaches certain legal meaning. Mandatory elements of that policy required by Article 14 par. 1 of the Act are very general, resembling planning acts in a macro scale (for example "to take action for the natural environment protection" or "develop a more efficient use of energy sources") as well as specific data such as

[32] The state of Polish legal theory characterized by J. Jeżewski, *Polityka administracyjna. Zagadnienia podstawowe*, in: Administracja publiczna, Wrocław 2003, p. 308–310.

[33] M. Giera, *Prawo energetyczne z komentarzem*, Polcon, Warsaw 2006, pp. 156–163.

the capacity of the energy installations in a given year. They do not contain, however, rules that are or can be transposed into the language of law.

The notion of state policy appears also in the Telecommunication Act in Article 189. In telecommunications, unlike in the energy law, the regulator is not only the addressee of the sectoral policy but also its co-maker. After the reform of 2006 which stripped regulators of independence the co-making of the policy has become a formality.

Within the inflexible system of the sources of law under the Constitution, the catalogue of what can be recognized as law is closed. This stiffness has been upheld by the Constitutional Tribunal in a landmark decision of 2000[34]. It was the reaction to the abuses under the previous Constitution of 1952 which created a structure of law perceived as chaotic[35]. The new structure in turn is criticized for limiting the array of tools available to the government, including that "it may paralyze the functions of the state and of public administration"[36]. It was also noted that governments in other member-states, e.g. in France, enjoy much wider discretion in resorting to sub-statutory acts[37].

In pursuit of arguments for including sectoral policy in the system of binding norms a source of law one can examine Article 91 par. 1 of the Constitution referring to internal acts of administration. However, even if a "policy" can be recognized as an internal act of administration, it would be binding only in that part of the administrative apparatus which is subordinate to the Council of Ministers. Then, if regulatory independence were restored to its pre-2006 state, regulatory authorities would not be subordinate authorities and policy contained in a Council of Ministers resolution would not be able to affect them.

Also, it is an established view that the scope of internal acts provided for in Article 91 of the Constitution cannot be expanded or receive a broadening interpretation for it was the intention of the Parliament to keep the system of the sources of law closed. In conclusion, under the Polish Constitution neither energy nor telecommunication policy can

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[34] Decision K 25/99, OTK of 2000, No 5, item 141.

[35] *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego. Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, Wydawnictwa Trybunału Konstytucyjnego, Warsaw 2009, p. 30.

[36] M. Kulesza, *Źródła Prawa i Przepisy Nowej Konstytucji*, Państwo i Prawo 1998, nr 2, p. 13.

[37] K. Kubuj, *Implementacja prawa wspólnotowego na tle doświadczeń Francji*, in: M. Kruk, J. Wawrzyniak (eds.), Polska w Unii Europejskiej, Wolters Kluwer Polska, Warsaw 2005, p. 123.

provide a "legal basis" for binding obligations imposed by the government on a regulator. As a result the respective provisions of both the Energy Act and the Teleceommunications Act are unconstitutional insofar as they define sectoral policy as a binding instrument. It petrifies the contradiction between the need to preserve regulatory independence and a government's right to adopt a cohesive and all-encompassing economic policy. It needs to be emphasized that the above statement refers only to a model situation, where regulatory independence is respected in law and in practice.

CONCLUSIONS

The constitutional place of regulatory authorities and the rigid structure of the Polish sources of law constitute obstacles to the successful implementation of regulatory independence. It transpires that at least two reforms are needed: one to make the structure of the administrative apparatus more flexible in order to accommodate new types of authorities such as independent sectoral regulators. The other is the reform of the so called "sources of law". The view on the first reform is rather isolated. The constitutional framework of administration is debated in the theory of law and administration but a single voice demanding a major reform hard to come by. The second of the suggested reform is more likely to happen as the legal system as such is perceived as an obstacle to effective governance.

The flaws of the legal system, as demonstrated above, prevent the accommodation of an independent regulator in our administrative apparatus. If the economic policy, including sectoral (telecommunications, energy, etc.) policies could be recognized as binding instruments, the government could have preserved its constitutional position without contesting the independence of regulators. The simple submission to the Van Gend en Loos doctrine is not the solution as it still leaves unanswered the question of government's constitutional prerogative. Poland needs to look afresh at its system of the sources of law confined in the constitutional cage of Article 87. The missing element in this system is an instrument similar to directives as defined in Article 249 of the Treaty

Establishing the European Community, not reformed by the Treaty of the Functioning of the UE. Such a binding act should provide a degree of independence of their addressees by leaving to them the selection of the ways of achieving their goals and tasks set forth in the directives and in respective Polish statutes. The reform is also inevitable as the structure of law is being under constant pressure of growing multi-centricity[38] exposing national law to legal constructs originating in different legal cultures.

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[38] Multi-centricity otherwise called the structured co-existence by M. Golecki and B. Wojciechowski, *Ekonomiczna analiza stosowania prawa wspólnotowego*, in: J. Stelmach and M. Soniewiecka (eds.), Analiza ekonomiczna w zastosowaniach prawniczych, Wolters Kluwer Polska, Warsaw 2007, pp. 115–143.