

## Teisės aktualijos

# PREDICTABILITY AS A BASIS FOR EFFECTIVE STATE REGULATORY POLICY

**Viktorija Anatol'evna Malyga**

Head of the Department  
of Theory and History of Law  
at Donetsk National University  
Candidate of Juridical Sciences,  
Associate Professor

Regulatory policy as one of the main courses of state economic policy supposes, firstly, improvement of legal regulation of the economic relations because of appropriate preparation, accountable adoption, strict results tracking and reasonable review of regulatory acts. All mentioned actions should not be spontaneous. Their main feature is predictability which gives the subjects of economic activity an opportunity to fulfill the entrepreneurial initiative fully, choose freely allowed variant of behavior in the economical sphere. It also enables citizens to greatly influence legal regulation of economic relations.

The above mentioned problem is significantly connected with such important scientific tasks as working out and implementation the strategy for realization of state regulatory policy which would allow to gain maximum affectivity.

Law basis of the regulatory effective state policy was often the object of the scientific researches. In particular, Yuldashev O.H. considered the regulatory policy an instrument for improvement of economic legislation<sup>1</sup>, Lyapin D.V. paid more attention to the specific features of regulatory policy of small business development concerning following the principles of this policy.

Besides, the author herself repeatedly dealt with separate elements of the state regulatory policy<sup>2</sup>.

State regulatory policy and its certain areas have already been the subject of research more than once whereas principles of predictability of SRP as the pledge of its efficiency has not been considered by scientists.

The aim of the article is the concretization of the content of predictability principle to gain maximum efficiency of state regulatory policy. To achieve such a purpose it is important to settle the following tasks:

- 1) to determine basic features of the principle of predictability;

<sup>1</sup> ЮЛДАШЕВ, О. Х. Регуляторна політика як інструмент вдосконалення господарського законодавства: Монографія. Київ: МАУП, 2006.

<sup>2</sup> МАЛИГА, В. А. Правові принципи як загальні засади державної регуляторної політикию *Правничий часопис Донецького університету*, 2007, № 2, с. 79–82; МАЛИГА, В. А. Конституційні принципи здійснення господарської діяльності. *Правничий часопис Донецького університету*, 2009, № 1 (21)-№ 2 (22), с. 26–29; МАЛИГА, В. А. Регуляторна політика як напрям вдосконалення правового регулювання господарських відносин. *Наше право*, 2011, № 1, ч. 2, с. 131–137.

- 2) to rate relation between concepts ‘consistency of regulatory policy’ and ‘predictability of SRP’;
- 3) to uncover and classify in some way stages of regulatory activity;
- 4) to define law connection between predictability principle of SRP and policy definition of its development.

The principle of predictability is not mentioned among the general principles of management but it is directly connected with both prohibition of illegal interference of state power bodies and local government and their officials into economic relations and with limitation of the state regulation of the economic processes, since predictability means to some extent strict correspondence to the law principles requirements.

The principle of predictability for the first time was attached to The Law of Ukraine „About the basis of state regulatory policy in the sphere of economic relations“<sup>3</sup>. That is why it is important to pay attention to its contents, which is stated in an article 4. The Law reveals the content of predictability principle through the list of certain characteristics:

- 1) the sequence of regulatory activity that is clearly established relationship and interdependence between the different steps and stages of the SRP, their logical combination;
- 2) compliance with regulatory activities of government policy objectives and plans for RA project preparation;
- 3) the ability of the entity to plan their activities in order to achieve the highest economic effect;
- 4) the law binds this principle only to the concept of “regulatory activity” because the principle of predictability is the principle of SRP but not the principle of its activity.

The most important element of the content is consistency (but it concerns SRP in general), which actually means having a strong logical relationship between the stages and phases allowing all stakeholders to plan and calculate their own economic activity , taking into account the features of SRP.

The law is talking about the “consistency of regulatory activity” which means, in our opinion, the following:

- 1) regulatory activity is the logical result of government policy;
- 2) regulatory activity consists of interrelated steps, the sequence of which cannot be spontaneously changed;
- 3) regulatory activity must be done with accumulative economic effect (total) taking into consideration the real situation;
- 4) each step (stage ) should be completed with a specific decision in the form of a document;
- 5) every decision taken during regulatory activity should be brought to the knowledge of citizens, business entities (and their associations);
- 6) regulatory activity must correspond to a predefined plan (designed for different periodicity);
- 7) regulatory activities should be systematic (a specific set (System) of actions aimed at the proper implementation of the SRP);
- 8) regulatory activities may be carried out only within the law limits;
- 9) methods of regulatory activity conducting act as a precondition for the creation of certain clearly regulated forms;
- 10) the proper order of SRP creates such an atmosphere in which regulatory body, clearly fulfilling its functions, guarantees constant development of law relationships.

Meanwhile, the violation of the principles of State Regulatory Policy is not rare and is found in the practice of management rather often. In many ways, this is a result of a somewhat vague content of each of the aforementioned principles.

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<sup>3</sup> Про засади державної регуляторної політики у сфері господарської діяльності: Закон України від 11.09.2003 р. № 1160-IV. *Відомості Верховної Ради України*, 2004, № 9, ст. 79.

An example of the response of the judicial system on violation of the principle of predictability is the result of the consideration by the Economic Court of Kyiv from of the case at the suit of private enterprises to the National Commission for communications regulation of Ukraine concerning recognition not in force:

- the decision of the National Commission for communications regulation of Ukraine # 212 from 02.03.2006 “On approval of the regulation on granting permits for export from abroad in Ukraine, electronic and emitting devices”, registered in the Ministry of Justice of Ukraine on 05.05.2006 for # 519/12393 and the regulation on granting permits for importation of electronic devices from abroad to Ukraine;
- the decision of the National Commission for communications regulation of Ukraine # 213 from 02.03.2006 “On approval of the regulations on the implementation of the electronic and emitting devices, registered at the Ministry of Justice of Ukraine on 05.05.2006 for # 521/12,395 and the regulations on the implementation of the electronic and emitting devices.

The reason for such a decision of the court was the inobservance by the regulator of the demands of the Article 7 of the Law of Ukraine “On the Principles of State Regulatory Policy in Economic Activity”. The above mentioned regulatory acts were not included into the plan of the preparation regulatory acts and this does not correspond to the principle of predictability of state regulatory policy<sup>4</sup>.

It should be emphasized that the filing a claim to the court should be the last legal means of influencing the regulatory activities of state agencies if other means did not give effective results.

As for the regulatory activity stages, each of them is characterized as a kind of complete (logical and documented) part of a single mechanism.

It deals with the following steps in particular:

1. The preparation of regulatory acts.
2. The adoption of regulatory acts.
3. Monitoring of effectiveness of regulatory acts.
4. Review of regulatory acts including accelerated (optional, if these acts contradict the principles of state regulatory policy).

Predictability of state regulatory policy can be traced during the preparation of regulations, in particular, in the planning of regulatory activities when regulators approve and make public their plans of activities concerning the preparation of draft regulatory acts.

Even if the necessity to create some certain documents which are not included in the aforementioned plan arises later, the regulatory authority shall inform within the prescribed time, but no later than the day of publication of the project of regulatory acts.

This approach provides free access to information for citizens and business entities (individuals and corporations). They, in their turn, being aware of the specific RA which will be adopted this year, can somehow coordinate their actions in the field of management. Besides, this principle allows the mentioned subjects to choose from the published plan (and amendments in it, if there are any) exactly the RA projects that directly affect their interests, and plan ahead to participate in the public discussion of these projects. That is a direct interdependence between the SRP and the level of predictability of public activity on the formation of RA.

But the very need for determination of the effectiveness of RA in preparation of regulatory impact analysis indicates that the legislator has included some mechanisms of principle of predictability realization in to the law. In particular, it can be demonstrated by calculations of costs and benefits of

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<sup>4</sup> Регуляторна діяльність в Україні: планування, обґрунтування, обговорення, відстеження: Посібник / к. п. н. Ващенко К. О., Мірошніченко О. М., Барчук І. Г., Гринчук Т. В., Кемпл Б., Богданова Г. В., Гопцій З. В., Олефірова О. В., Піщевець О. Є., Яйчєна О. П. Київ, 2008.

businesses, citizens and the state as a result of RA (when creating a regulatory impact analysis) during the preparation of necessary documents. Ideally, the above mentioned calculations should find their place after RA are adopted and enacted. At the same time, experience shows that such expectations are not always true. It is closely associated with the implementation of the principle of effectiveness of the SRP.

Predictability should be secured by the information which must be available, maximally full and unambiguous (without a problem with interpretation) to understand and for those people who have to implement it, and for those who will perform it.

Correspondence of the regulatory activities to the government policy objectives could be seen on the basis of such a purpose as preventing the adoption of economically feasible and inefficient regulatory acts. Achievement of this aim is preconditioned by the presence of clear criteria for appropriateness and efficiency of regulatory acts (which do not exist). Their producing directly depends on the sequence of regulatory activity and its stability having the ability to predict (to forebode) future steps in the networks of the SRP.

Moreover, the regulatory activities should be coordinated with the plans of preparation of projects of regulatory acts, which are subject to mandatory disclosure and shall not be arbitrarily changed. This provides a preview of their content, making the necessary and sufficient changes and additions, and therefore, the implementation of SRP through the implementation of specific regulatory activity.

Predictability has a direct connection with the elaboration of the strategy of development of SRP in general. Planning RA has an annual frequency, and the strategy is designed for long-term effect. Clear strategy and its key areas (and its continuous adherence) are able to ensure the confidence of the economic entities in the future steps of the state in regulation of relations in the field of management, creating the conditions of stability, which are essential for the formation of legal economic order.

The formation of such a law and order, according to Professor G. L. Znamensky (the author of this term), is based on its “fundamental strategic character”. “The optimal combination of market self-regulation of economic relationships between economic entities and the state regulation of macroeconomic processes” is a main requirement.

Znamensky L. G. distinguishes a very important feature as the responsibility of the state concerning the individual. From the point of view of the formation of the SRP this feature becomes the major one, particularly in relation to the principle of predictability. This means that the state is liable to the person (in the wide sense) and the results of the SRP in particular if they do not coincide with the planned and inflict damage on the certain subjects of economy (or citizen).

Attention should be focused on the fact that “the state must influence the economy mainly through regulation of macroeconomic processes and not through regulation of entrepreneurs activity and interference into operational business relationships”<sup>5</sup>.

This very approach allows to set the limit after overcoming of which economic entities have the right to state that the principle of predictability of state regulatory policy is violated.

On the other hand we will try to predict what kind of responsibility can be put on the state (represented by a regulatory agency) for not fulfillment of published plans or for the adoption unplanned regulatory acts that impair the position of the economic entities.

Law provides only one type of legal liability for violation of regulatory activities, such as disciplinary liability that is applied only to civil servants and local government officials, and not to the regulatory agencies.

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<sup>5</sup> Науково-практичний коментар Господарського кодексу України / Кол. авт.: Г. Л. Знаменський, В. В. Халун, В. С. Щербина та ін.; За заг. ред. В. К. Мамутова. Київ: Юрінком Інтер, 2004.

Meanwhile, in connection with the principle of predictability, you can talk about forecasting, which can be made by the specific entity concerning regulatory impact against them.

The content of the principle of predictability includes “the possibility for the entity to plan its activities”, but in fact only the forecasting is not enough to achieve the highest economic effect. By itself, the planning process does not need immediate implementation, because there is always the possibility to schedule and not to fulfill (for various reasons, such as lack of funds, lack of independent material base, changes in circumstances etc.).

It is important taking into consideration the above mentioned to enlarge the content of the principle of predictability, pointing “to the possibility for the subject to make a plan for managing the operations and implement it in order to achieve the highest economic benefit”.

Realizing the strategy SRP implementation (for instance, knowing what areas of economic activity the government will reduce its impact on relying on market mechanisms), entities can predict the results of their own actions, for example, the expansion of economic activity in a particular area or on its coagulation due to inefficiency.

A clear realization of the principle of predictability provides high efficiency of the SRP because it provides stability, calculation and prospects. The mentioned principle is to create a harmony between the interests of all stakeholders (the state, businesses, and individuals and associations) by the consistency and predictability of operations of each part.

The above reveals a direct link between efficiency and predictability of SRP. One of the elements of identifying and reviewing the effectiveness of RA (as a separate phase), which can have serious consequences in the form of recognition of RA unconstitutional, suspending its operation or the cancellation of RA as a whole (of certain provisions). However, the regulatory body after reviewing of RA can conclude that the principle of effectiveness is in force and therefore leave RA unchanged, or vice versa, to recognize the need for thorough revision of RA ( even if it were adopted by the very regulatory body.) A special feature of RA reviewing is that the process could begin at the initiative of the regulator, who is the author of the RA and due to the results of the analysis report on evaluation of the impact of RA.

Thus we can talk about some dual control of RA quality (effectiveness): firstly, by the regulator which directly created it and secondly by any other body having appropriate authority according to the legislation. Accordingly, this state has to provide the highest level of effectiveness of the adopted RA. It is important to note that the revision of RA may become necessary in the case when a new RA, the adoption of which seemed reasonable at earlier stages, does not fit into an existing system of RA (colliding with other acts, regulating the regulated relations, duplicating previously adopted RA; has some gaps). Therefore, it is possible to identify such acts already at this stage and decide their necessity in order to optimize the whole system of regulations.

One should also pay attention to the special order of RA examination in relation to its compliance with the principles of SRP by a specially authorized body. Accordingly, if the RA does not include requirements, in particular, the principle of effectiveness, regulatory body , which has accepted it will be forced to remove the mentioned inconsistencies (either by cancellation of certain provisions of RA or by replacement them with new rules or change or some other provisions or recognition of RA invalid as a whole or partially) .

Another thing is that these elements of the mechanism raise some concerns regarding the proper control of the amended RA. If a general procedure in the analysis of the project RA requires serious studying the same thing we have in RA making. Had it not been a special procedure RA author (i.e. regulator which has adopted it) by himself, without any justification could make any changes or additions to those rules, which contradict the principles of SRP on the basis of expert opinion.

To prevent abuses in amending and making additions to the existing PA the law has a special procedure for the coordination of draft act adding amendments to the RA with the authorized body. Accordingly, the mentioned authority has the right to adopt the project (thus removing the violation of SRP principles) or to reject the proposed act (because it does not include remarks and proposals written in the decision of specially authorized body about the necessity to remove violation of SRP principles).

However, the law provides another effective mechanism to monitor the regulator's response concerning decisions on non-compliance with the principles of SRP, which allows the implementation of the decision of specially authorized body even without the regulator's participation. Even if the regulator does not respond properly to this decision, RA stops its action the next day after the expiration term for such a decision.

It should be noted that the regulatory authority which has taken the appropriate RA has the right to appeal the decision of the specially authorized body. The objectivity of the review of such complaints may be provided under several conditions:

- 1) consideration is done by the government committee determined by the Cabinet of Ministers;
- 2) the specially authorized body whose decision is contested must be informed by the regulatory authority which has taken the RA;
- 3) pledge of appeal is required to provide materials that would prove the invalidity of the decision to eliminate violations of the principles of SRP and the importance of its cancellation. In its turn, the specially authorized body submits its documents confirming the correctness of the decision;
- 4) a mutual complaint can be written if we are talking about RA adopted jointly by several regulatory agencies;
- 5) obligatory participation in the proceedings of the head of the specially authorized body as well as of the head (s) of regulator's (s') of the body (ies).

The decision taken by a government committee is final, and the parties to the conflict agree with its contents, taking necessary measures. If the complaint is satisfied, then the authorized body shall promptly (within three working days) cancel its own appeal against the decision.

Otherwise, the responsibility to act lies with the regulators, who took the RA. In the same period, he shall submit to the specially authorized body a draft act on amendments to RA, or recognize it as invalid. Subsequent approval of the project must be also done by the RA regulator.

The efficiency in this case is achieved by continuous monitoring the action of already taken RA and participation in the process of all interested parties (such as regulators and businesses, citizens and the state in represented by its body).

Taking into consideration everything above mentioned one must implement a set of the following measures in order to specify the principle of predictability of regulatory policy:

1. To make changes and amendments to the meaning of the principle of predictability replacing the "sequence of regulatory activities" for "sequence of regulatory policy".
2. Correlation of notions "continuity" and "SRP predictability" is determined by the fact that the first concept is a key element of predictability meaning.
3. Identify clear steps for regulatory activities through the provision of RA training, RA adoption, evaluation of the impact of RA, RA revision including acceleration (as an optional step).
4. Predictability has a direct connection with the SRP development strategy as a whole. RA planning has an annual periodicity, and strategy is aimed at a long-term effect. Clear strategy and choice of main major directions (and their continuous compliance) can show the confidence of subjects of economic activity in the future steps of the state concerning regulation of relations in the economic sphere providing stability conditions necessary to form law economic order.

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