



Emerging Markets:

A Review of Business and Legal Issues

VOLUME 4 | No 1 | January 2013

Articles:

- ❖ **Protection on rights and legitimate interests of creditors in transformation of joint stock companies** by Ivan Kovaliov
- ❖ **Legal Limitations of Doing Business in Poland in Period 1989-2009. A Quantitative Approach to Economic Freedom** by Janusz Paczocha and Wojciech Rogowski
- ❖ **LexMercatoria as a law** by Pranav Vyas and Seema Rao

Emerging Markets: A Review of Business and Legal Issues

WWW.KENTLAW.EDU/EMERGINGMARKETS

The purpose of the journal is to provide forum for international, interdisciplinary work on the business and legal issues confronting emerging markets.

The journal combines theoretical soundness and practical relevance. The articles guide policy makers while also advancing theoretical understanding.

Editorial Board

Richard Warner

Editor In Chief
Professor of Law
Faculty Director, Center for Law and Computers
Chicago-Kent College of Law
Visiting Foreign Professor, Director Schools of American Law in Poland (Gdansk, Wroclaw), Ukraine (Kharkiv and Lviv) and Georgia (Batumi)
rwarnr@kentlaw.edu

Agnieszka Cenzartowicz

Senior Associate Editor
Adjunct Professor Chicago-Kent College of Law
Senior Partner, SD&Partners
cenartowicz@emresearchers.org

Dr Tomasz Gulla

Senior Associate Editor
Editor In Chief Printpol.pl (legal-insurance service)

Dr Igor Osyka

Associate Editor
Senior Lecturer, Kharkiv University of Economics and Law

Igor Solodovnik

Associate Editor
Adjunct Professor Chicago-Kent College of Law
Executive Director Schools of American Law, IIT/Chicago-Kent College of Law

Lukasz Grzejdzia

Associate Editor

Dr Michal Milosz

Associate Editor
Assistant Professor at the University of Gdansk
Adjunct Professor at the Chicago-Kent College of Law
Coordinator of the School of American Law in Gdansk
attorney at law

ISSN:



2082 9191 >

Cover design & Photo: Tomasz Gulla

Advisory Board

Edward Carter

Assistant Illinois Attorney General
Supervisor of the Financial Crimes Prosecution Unit
Adjunct Professor of Law
Chicago-Kent College of Law, Chicago

Anna Fornalczyk

Partner - Założyciel
COMPER
Fornalczyk i Wspólnicy

David Gerber

Distinguished Professor of Law
Co-Director of the Program in International and Comparative Law
Chicago-Kent College of Law

Henry Peritt, Jr.

Professor
Director of the Graduate Program in Financial Services Law
Chicago-Kent College of Law

Wojciech Rogowski

Expert, Economic Institute
National Bank of Poland
Assistant Professor
Warsaw School of Economic

Publisher:

Emerging Markets Review

Disclaimer: Statements of fact and opinion in the articles in Emerging Markets Review are those of the respective authors and contributors and not of the Emerging Markets Review. Emerging Markets Review make any representation, express or implied, in respect of the accuracy of the material in this journal and cannot accept any legal responsibility or liability for any errors or omissions that may be made. The reader should make her or his own evaluation as to the appropriateness or otherwise of any experimental technique described. They are put forward to stimulate discussion.

CONTENTS

Articles:

Protection on rights and legitimate interests of creditors in transformation of joint stock companies <i>by Ivan Kovaliov</i>	4
---	---

Legal Limitations of Doing Business in Poland in Period 1989-2009. A Quantitative Approach to Economic Freedom <i>by Janusz Paczocha and Wojciech Rogowski</i>	9
--	---

LexMercatoria as a law <i>by Pranav Vyas and Seema Rao</i>	43
--	----

Author: Ivan Kovaliov

**Protection on rights and legitimate interests of creditors in
transformation of joint stock companies**

***Summary:** The article highlights the peculiarities of protection the rights and legitimate interests of creditors in the process of transformation of joint stock companies. It is suggested to unify the regulation of the abovementioned legal relationship in the Civil Code of Ukraine and the Law of Ukraine “On joint stock companies” (to determine the same terms and order for creditors to lodge a claim) as well as do not apply the rules of law that protect the rights of creditors while the transformation of the legal entities, and particular in case of transformation of the joint stock companies.*

***Key words:** joint stock company, protection of the creditor`s rights, transformation, reorganization.*

Protection on rights and legitimate interests of creditors in transformation of joint stock companies

Existence of any business organization in current circumstances requires constant changes connected with the necessity to increase own competitive ability and with the necessity of adoption to unstable business environment. Particularly it is applicable to the joint stock companies that are the most complicated and amplitudinous form of running business, and therefore more than other business legal structures deal with the requirements of reforming.

Reorganization, and especially one of its types – transformation, is the spread form of such reforming. Although, the current regulation of this process is extremely incomplete and causes essential problems in companies conducting this procedure. It applicable to the issues of creditor's rights defense during the process of joint stock companies' transformation.

A lot of researches of Ukrainian scientist are devoted to the issues of creditor's rights defense in the process of the legal entities, and the joint stock companies in particular, transformation.

Works of Kibenko O.R., Kucherenko I.M., Kravchuk V.M., Sherbina O.V., Spasibo-Fateeva I.V. should be mentioned among the fundamental researches. However, the authors considering questions about creditor's rights defense, do not separate such type of reorganization as transformation. Moreover, the researches do not highlight the latest changes to the legislation, which regulates reorganization of joint stock companies.

This article is devoted to the study of social relations arising between the creditors and the joint stock company in the procedure of transformation of the company. The aim of the study is to determine - whether legal remedies of creditors' rights defense provided by the current legislation of Ukraine, are adequate, namely preserving the balance between the interests of the company and its creditors.

It should be noted that the mechanisms for protection of creditors appeared in Ukraine's legislation relatively recently. The original version of the *Regulation on the order of registration*

of shares` emission during reorganization of companies approved by the decision of the State Commission on Securities and Stock Market on December 30, 1998 # 221, provided that the reorganization of the companies having payables should be in compliance with the requirements of debt transfer under Articles 201, 202 of the Civil Code of the Ukrainian SSR (Section 1.6). However, this requirement was completely inconsistent with the nature of reorganization, because one of the reorganization goals is to grant unimpeded universal succession of obligations without signing of any new contracts and obtaining of creditors' consent.

Later, instead of the reference to the application of the rules on transfer of debt legislator introduces other forms of protection of creditors' interests during the reorganization. Article 105 of the Civil Code of Ukraine (hereinafter - CCU) provides the obligation of liquidation commission of a legal entity to public in the print media, where information on state registration of legal entity is registered, the notice about the termination of the legal entity, the order, and term for declaration of creditors claims thereto. This term shall not be less than two and not more than six months from the date of publication of the notice about the termination of the legal entity. Also the Commission also is entrusted with a duty to take all possible measures to identify creditors and inform them in writing regarding termination of the legal entity. Article 107 of the Civil Code provides that a creditor of the terminating legal entity may require the halting or early execution of obligations, except for the circumstance stipulated by the law. After the deadline for submission of claims by creditors and granting or rejecting these claims the liquidation commission of the legal entity draws up a deed of conveyance (in the case of a merger, affiliation or transformation) or separation balance sheet (in case of division) that shall contain provisions on succession in respect of all obligations of the legal entity that is liquidating concerning all of its creditors and debtors, including the obligations disputed by the parties.

Today the question of protection of the creditors interests are governed by the Law "On Joint Stock Companies" (hereinafter - JSC Law), which establishes more detailed procedure for interaction between reorganizing companies and their creditors (Article 82). Within 30 days from the date of the general meetings` decision on conversion (transformation) the company is obliged to notify in written its creditors and to publish in an official press organ a notification on taken decision. Public company shall also notify each stock exchange where it was listed about the

decision. Such notice shall be published by the Designated Authority on the state registration in a specialized print mass media within ten working days since making the appropriate record into the Unified State Register concerning the decision of the general meeting of shareholders to liquidate the company through conversion (transformation)(Part 1 of article 22 of the Law "On state registration of legal entities and private individuals - entrepreneurs ".

Creditor whose claims to the liquidating legal entity are not secured by pledge or bail agreement, within 20 days after having being sent him a notice on termination (liquidation) of the legal entity may file a written demand to the company regarding performance in its discretion of one of the followings: to ensure the performance of obligations by concluding pledge or bail agreements, early termination or fulfillment of obligations to the creditor and compensation of damages, unless otherwise is specified by any transaction between the company and the creditor. In case a creditor does not appeal within the time prescribed by this part, to the company with a written demand it should be considered that he doesn't require from the company to perform any additional actions regarding its obligations to this creditor. Conversion of the company can not be completed unless all filed by the creditors' demands have been fulfilled.

It should be noted that the rules set by the JSC Law differ in a way from the provisions provided by CCU, however, in our opinion; the provisions of the JSC Law should be applied because JSC Law is a special law versus art. 107 of the Civil Code, which are applicable to all legal entities. Although, in practice, these discrepancies may cause different implementation. For example, according to the Civil Code, two-month period from the date of publication is granted to the creditors to lodge their claims. JSC Law significantly shortens the period: the Company has 30 days from the date when the decision is taken to publish and dispatch the notices, and the creditor has only 20 days after the notification has being sent to lodge claim. We believe that the terms of lodging creditors claims should be unified by means of reduction of this period prescribed by the Civil Code of Ukraine.

The Civil Code and the JSC Law apply the same methods to protect the creditors' interests for all forms of reorganization. But is this proper? Yes, the reorganization, when one JSC is divided into two separate companies, or two companies merge into one, can cause a significant threat for creditors because the correlation of the assets and debts of the company

(especially in the case of liquid assets and actual debt not artificially formed) might change significantly. When converting such risks are almost excluded because proprietary base of the company stays unchanged.

On the other hand, it should be noticed, that the conversion of the JSC into another form of legal entity may lead to certain threats to the creditor, for instance, the property can be deduced from the company due to the member's withdrawal from the company (it is impossible in a joint stock company) or absence of restrictions on the payable dividends are provided by the legislation on joint stock companies. Activities of other forms of the legal entities are less regulated by law, therefore it could be said that conversion arises additional grounds for trespasses by management or majority members of the company. However, in as essential. Moreover, a conversion usually is not followed by changing of companies' management, while in other types of reorganization such change occurs. This is an important factor for creditors. Therefore, to simplify the conversion process the JSC Law and the Civil Code are to include a provision which reads that in the case of conversion of a legal entity the regulations regarding the protection of creditors should not be applied.

Having conducted analysis we propose the following changes to the current Ukrainian legislation governing the reorganization of joint stock companies:

- 1) Unify the CCU and the JSC Law rules on the protection of creditors' rights (defining the same terms and procedures for lodging claims by the creditors, for consideration of those claims and their adjustment);
- 2) Do not apply the mechanisms of remedies of creditors' rights in the process of transformation (to exclude relevant provisions from the Civil Code and the on JSC Law).

Janusz Paczocha, Wojciech Rogowski

Authors: Janusz Paczocha

Economic Institute, The National Bank of Poland

Wojciech Rogowski

Economic Institute, The National Bank of Poland,

Allerhand Institute, Warsaw School of Economics

Legal Limitations of Doing Business in Poland in Period 1989-2009. A Quantitative Approach to Economic Freedom.

Introduction

Economic freedom is the foundation of economic development and the functioning of a democratic state (Balcerowicz, 1998). This freedom is related to, *inter alia*, selection of a type of economic activity, the commencement time, the form of its organization and pursuit, and the selection of an occupation by a citizen. In the European Union, the major rights safeguarded in the Treaties also include the free movement of capital and goods, the freedom to provide services, free movement of people and free movement of labour on the territory of the entire Union (Brodecki, 2003). However, economic freedom is not unconditionally implemented in any country. The legal system of a given country sets limits to the economic freedom through regulations that restrict the right to benefit from the economic freedom even, rather frequently, in the constitutional act. One of the most crucial effects of economic legislation is the restriction of freedom to pursue business activity (Krzyżewski, 1997). The restriction is implemented in order to protect other constitutionally guaranteed values, such as, for instance, the life and health of citizens, security of the state or its citizens. The intervention of the public authorities, restricting the economic freedom, should occur only if the given circumstances make it especially justified, documented and necessary and, simultaneously, the restrictions it brings are not excessively cumbersome in the context of the established objective (Biernat, Wasilewski, 2000). Restrictions imposed by the legislator should be appropriately justified, which, according to the rule of law principle, should make implied restrictions impossible.

This study aims to reveal and document variations and the extent of regulatory restrictions of economic activity in the Polish economy in 1989-2009. The study identifies all regulations restricting the pursuit of economic activity in the Polish law, including such forms as: concessions, business activity permits and licenses, admissions of products, goods or equipment to market, admissions to a profession, limitations of production or sales and notifications of economic activity. The results of the study performed with proprietary methodology indicate an

increase of economic areas subject to restrictions in the period under review and an increased number of restrictions. The assessment of impact of excessive restrictions in economic activity implemented by the state on competitiveness or growth is not our goal in this paper and requires further research.

It is difficult to answer the question to what extent the real effects of such interventions undertaken by public authorities are in line with the objectives declared upon the creation of regulations and to what extent the requirement of social and economic rationality of legal regulations is maintained in practice. In the case of many regulations can be assumed allow to state that they have been introduced not only due to the public interest, but due to a vested interest of a specific professional group, or even of specific enterprises. As a result, the restriction of economic freedom in a given economic branch increases costs for the whole society while the benefits are reaped by a narrow social group (Posner, 1974). Considering the above and the experience positively influencing the economic growth gained by the countries that reduced the excessive burden of regulations, it is postulated to provide as much room for the free business activity (competition) market and as few state regulatory restrictions in the economy as possible (Blanchard, Giavazzi, 2001). It also remains to identify which method of restrictions, if necessary, should be applied in a modern state: administrative decisions or civil law mechanisms. However, the complexity of modern economies, societies and the human nature results in various regulations and restrictions in the economic activity virtually in all countries, although their level and quality vary. There is no unambiguous identification of an optimum regulation level in a given economy. International research and studies show generally that a lower regulation level entails greater efficiency of public institutions, lower corruption and a higher level of institutional development (Djankov (ed.), 2004). A restricted regulation level in such countries is related to a high level of protection from the institutional system of clearly defined property rights shaped historically in the context of a coherent and effective moral (religious) system. There are also countries where regulations are considered as complex and cumbersome for entrepreneurs. Such excessive regulatory restrictions may be seen as the cause of underdevelopment and backwardness, which is accompanied by weak and inefficient institutions and a higher level of corruption as compared with other countries.

The study of legal regulations and their economic effects is justified in the context of the new institutional economics. However, before such a cause-and-effect relation can be specified, first the regulation level of the economy should be examined and its variability should be measured. The identification and documentation of the extent and variability of restrictions in economic activity will enable the specification of economic freedom limits.

Economic freedom is the fundamental principle of the market economy system. After the amendments of December 29, 1989, the Polish constitution identifies economic freedom as a system principle. The currently binding Constitution of the Republic of Poland of April 2, 1997 provides for possible limitations of economic freedom. However, such limitations should be implemented solely due to an important public interest and solely by means of an act.¹ The constitutional regulation is based on the legal construction of economic freedom that includes positive elements (abiding by the principle of freedom in establishing business activity, freedom in its pursuit and negative elements (criteria allowing for the limitations in economic freedom, e.g. state security, citizens' security, etc.) (Sobczak, 1996). Despite difficulties with the legal definition of economic freedom, it is claimed that the relevant provisions of the Polish constitution aim to safeguard the broadest possible protection of freedom of business activity (Beksiak, 2003).

The acts on the business activity (Business Activity Act of 1999 and Economic Freedom Act of 2004) specified the constitutional notion of important public interest in more detail, indicating that the security of the state and its citizens is the priority. However, a possibility was created to expand the definition by referring to "some other important public interest". Thus, a lot of room was left for further discretionary decisions taken by authorities (Wyrzykowski, 1986). When establishing specific statutory limitations of economic freedom, public authorities present various causes in the justification. There are objective (universal) causes that stem from threats to citizens or the state potentially entailed by the pursuit of economic activity, and subjective causes justified by the state economic or social policy (Table 1).

When analysing the causes of economic restrictions presented in the literature on the subject, we have not found a conditional approach, i.e. an approach that would treat regulations

¹ Art. 20, 22 and 31 para 3 of the Constitution of the Republic of Poland.

as a tool to provide security of the state and its citizens on the one hand and as an instrument to guarantee economic development (economic growth) on the other. Although decisions of public authorities should be based on the above-mentioned rational premises, they are usually determined by the interests of politicians, clerks, and entrepreneurs (especially the large ones). Hence the best designed and thought over regulations can bring negative results since they are far from perfect solutions (government failure). Thus, established regulations may adversely influence the economy and its competitiveness and, in turn, the economic and social development. Economic and social effects of specific limitations in business activity vary.

Table 1. Declared and real causes of restrictions in business activity presented in the literature on the subject:

Declared objective (universal) causes¹	Declared subjective causes	Implied real causes
<ul style="list-style-type: none"> • citizens' security, • state security, • protection of human life and health, • protection of other persons' rights, • public morals, • social rest, • state defence, • protection of the environment, • "some other important public interest". 	<ul style="list-style-type: none"> • assumptions of the state economic policy, • international obligations of the state, • social policy, • supervision of the state over market order (protection of market mechanisms and trade participants). 	<ul style="list-style-type: none"> • desire to restrict competition, • interests of a group of manufacturers, • interests of a consumer group, • interests of other social groups, including politicians, clerks (corruption) • protectionism, • state interventions, • egalitarianism.

Source: Waligórski (1998); Biernat, Wasilewski (2000); Kosikowski (2002); Balcerowicz (2003), Walaszek-Pyziół (1994); Beksiak (2001).

Apart from desired regulations, there are also superfluous, or even harmful, regulations, whose total economic or social effects are negative. Regulatory restrictions may be classified as follows

¹ Resulting from threats that could be posed by business activity in certain fields of social life.

- a) necessary — (justified, recommended and effective) in order to protect the public good, human health and life,
- b) superfluous: adversely affecting economic and social processes since:
 - they stem from a natural propensity of bureaucracy to expand and establish excessive regulations,
 - they result from lobbying activities of business entities that try to use the state to help limit competition on the market and, simultaneously, to strengthen their market position,
 - they have been inherited from the previous system,
 - they are outdated due to the fast transformation and changes in the economic reality, but they are still effective since no periodical reviews of entrepreneurs' burdens are performed and, in turn, superfluous, ineffective regulations are not removed.

The classification of existing regulatory restrictions according to the above criteria is not simple. However, as follows from deregulatory experience in other countries, some selection is possible. A decreased level of regulation is favourable to economic growth. On the other hand, a thesis is formulated that administrative restrictions are on the rise in modern countries due to scientific and technological progress in the society that enforces regulations of new areas of activity (Waligórski, 1998).

The situation in transition countries, e.g. Poland, seems especially complex. Some existing restrictions were established when the state withdrew from fields of activity previously reserved to it. In order to satisfy some social needs and due to the lack of confidence in market and competition effectiveness (market discipline), a number of business activity areas were subject to administrative regulation in the subsequent years (Waligórski, 1998). It has not been established to what extent the adjustment of the Polish law to the EU law, performed very intensively after 1998 due to the upcoming accession to the European Union, influenced the increase of economic regulations.

1. Overview of existing related research

The impact of law or, more broadly speaking, of the legal and institutional system on the economy and its growth could be observed already in the times of Adam Smith. However, research of the influence of law variability or the legal system quality on the economy and its performance as a whole and in specific branches was undertaken not long ago (Landreth, Colander, 1998). The economic analysis of the law became an important research trend as late as in the 1980s and soon was applied in the mainstream of modern economics (the Austrian school, institutionalists). Its methodology involves applying economic theories and econometric methods to study legal (legislative) formations, structures and processes and the impact of law and legal institutions on the economy and its development (Mackaay, 1999). Another important field of study is the economic comparative analysis of specific legal formations or institutions, developed especially in the 1990s due to, *inter alia*, the transition of many post-communist countries and their search for development patterns and individual institutional identity. Attempts are made to parameterise and describe the legal framework in specific periods and legal systems. The results of such research are used, for instance, as variables in productivity models of economic sectors, technological progress, employment, remuneration and economic growth (Alesina et al., 2003).

Economic analysis of law focuses mainly on regulations defined as legal restrictions imposed on behaviours of market participants and established by legislatures, courts or government agencies (Ogus, 1994). These regulations may have various forms, such as taxes, customs duty, tariffs, concessions, licenses, permits, certificates, admissions, notifications, statutory prices, off-tariff restrictions (limits), merger controls, or even subsidies.

The literature overview shows that comparative studies focus not so much on the description and enlisting of regulatory forms, as on the analysis of expressions (e.g. procedures) generated by such regulations. Relations between the number of regulations and their economic effects are weakly examined, while the literature overview shows that fiscal policy is the most deeply examined area in comparative studies. Due to variations in legal systems and difficulties in comparing them, the research should focus first of all on specific forms of regulations (e.g. cases of restrictions). They should be enlisted and classified.

The list of references including methodological hints as to the enlisting of regulations and/or restrictions in legislations of individual states includes, first of all, the work by Long and Buscaglia (1996) presenting changes in economic structures and legislations of Latin American states. They identified all changes (amendments) implemented in commercial codes of the countries under review, as well as trade agreements among them in the period of 1850-1990. The authors proved that the most booming economies of the region (Argentina and Brazil) were also the most dynamic systems as regards legal adjustments. For instance, the Brazilian commercial code was amended, on the average, 3.7 times a year in the period under review. Please note that amendments to regulations aimed at keeping up to date with the economic reality do not have to be negative. The problem that arises here is the stability of the law versus the currency of the law.

Early research on the regulation level performed by the World Bank or the OECD included only selected economic areas (network industries, such as telecommunications) and a small number of economies (World Bank, 1996).¹ Similar research, aiming to create economic freedom indicators, used a limited amount of information about legal systems in examined economies (Gwartney, Lawson, 1997).

Recent years have brought the development of economic analysis of specific legal institutions, such as courts, bankruptcy law, proprietary law, labour law and employment, and especially intensive studies on market regulation and financial institutions (Djankov, La Porta, Lopez-De-Silanes, Shleifer, 2002) The research of the new comparative economics may be exemplified by the works of the Harvard team headed by La Porta related to variations in the commercial law, bankruptcy law and accounting law in the context of protection of shareholders' rights (La Porta, Lopez-de-Silanes, Shleifer, Vishny, 1996). The above-mentioned legal acts binding in 49 countries of the world according to 14 legal criteria was analysed by the authors. The results were supplemented with 9 characteristics of the economies of these countries (beginning with the corruption level, through the assessment of financial risk, up to GDP per capita). The analysis resulted in binary characteristics or quality indices (e.g. antirectors index, shareholders' rights index). The econometric analyses showed that common law countries have

¹ .

the best protection of shareholders, unlike French civil code countries. Negative correlations between the concentration of ownership in the largest public enterprises and the protection level of investors' rights were also revealed, which corroborated the hypothesis that small investors exercise their rights to a greater extent in countries with well-developed system of shareholders' rights.

Legal systems of individual countries are very closely examined by financial institutions and consulting companies operating on the global or regional level.¹ The European Bank for Reconstruction and Development (EBRD), the Organization of Economic Cooperation and Development (OECD) and the World Bank are among those institutions that have greatly contributed to the identification of differences among these systems. Pistor and her team (2000) (EBRD) performed an overview of financial legislation related to corporate governance and effectiveness of legal institutions (legality) of transition countries from Central and Eastern Europe and post-Soviet Asia (24 countries). Apart from applying the shareholders' rights index put forward by La Porta et al. (1996) for these countries, she developed her own additional indices for individual countries. The indices are constructed in the following way: the value of 1 is assigned if a given regulation or property included in the list of questions making up the given index is included in the law of a given country. Thus, the index value may be 0 up to, for instance, 16, as in the case of the VOICE index.² The assessment pertained to national law binding as at the end of the year in the period of 1992-1998. As a result, the authors were able to identify the development level of individual national legislations as regards the protection of shareholders' and creditors' rights. Although the analysis of these results is not the aim of the present study, it is worth mentioning that Poland (index 3.0 in 1998) is above average among the transition countries as regards shareholders' rights. To compare, common law countries, which, in accordance to the study, best protect shareholders' rights, have the average index of 4.0.

¹ At least 12 international organisations examine institutional aspects of individual economies, such as the business activity risk index, economic freedom and international competitiveness indicators (e.g. OECD, IMF, World Bank, Babson College, Fraser Institute, Heritage Foundation, AT Kearney, World Economic Forum, International Investor, etc.).

² It analyses the effectiveness of the "voice" option in investor behaviours.

The World Bank team headed by Djankov (2004) set an objective to develop a methodology for measuring microeconomic and institutional factors in 145 national economies worldwide. The study pertained solely to selected administrative regulations. The aim was to measure and parameterise the impact of these regulations on business activity, which boils down to measuring the time and costs of applied procedures and binding customs. Two groups of indices are used. The first one includes measures of regulations binding during the study period. The measures are created by calculating specific expressions of regulations, e.g. all formalities necessary to start a business or limitations imposed on entrepreneurs by the law (the so-called index of employment law rigidity). The other group includes measures of regulatory outcomes, such as the measure of time necessary to complete certain procedures (e.g. registration of a business, bankruptcy or contract enforcement) and their costs borne by entrepreneurs (De Soto et al., 1989). The study was performed as a questionnaire. In order to ensure comparability of results across countries and over time, the questionnaire was structured around a hypothetical case to which respondents (such as business advisers, tax advisers, lawyers, counsels and judges) were asked to refer to. The methodology has its crucial limitations. First, in many cases the collected data pertain to businesses in the most densely populated cities of a given country and may not be representative for practices in its other parts. Second, only one legal form of a company, i.e. a limited liability company, is analysed. Such a legal form may not be representative for the situation and regulations in a given country. Third, the estimation of procedure duration may be subjectively judged, rather than objectively measured. Even the application of a median reported value from the results of expert assessments cannot rule out certain skews. Nevertheless, a unique database was created, including institutional and business characteristics of economies of 183 countries of the world (2010). Such a database facilitates comparisons and problem rating. The study includes 10 areas of economic activity: starting a business, closing a business, hiring and firing workers, property purchasing and registering, protecting investors' rights, enforcing a contract, and getting a loan, characterized by more 30 indicators in total. From the point of view of the analysis of real regulation level, the study by Djankov et al. (2004) does not bring us any necessary methodological recommendations, since it does not register the phenomenon of the number of regulatory restrictions. The study calculates and assesses procedures ("formalities"),

cost and time required by the law and these procedures are limited to those applicable solely in the case of a hypothetical exemplary company established by five partners.¹ However, this does not constitute any ground to draw conclusions about the level of economic activity restrictions in the economy as a whole. Still, the study brings valuable comparative materials for selected areas crucial for practical economics, but this method is criticized (Arruñada, 2008; Kern, 2009,). The research headed by Djankov brings many interesting conclusions indicating a relationship between a country's economic performance and the level of regulations applied in the country. Moreover, more expanded regulations correlate with smaller efficiency of public institutions and poorer quality of both public and private resources. The richest and the fastest developing countries (common law countries) are proven to have the lowest regulation level and the strongest protection of proprietary rights. The combination of the regulation level, currently limited in those countries, with a clear definition of proprietary rights and their protection helps them achieve what other countries are only striving to achieve — development and prosperity (Djankov (ed) 2004.

Research undertaken in the OECD by Nicoletti et al. (2000) aimed to develop a methodology to identify the importance of regulations (« friendliness of regulations ») for market mechanisms in individual economies, both for international and intersectoral comparisons. The authors did not intend to assess the quality of examined regulations or their aptness in achieving their stated social or economic goals. As a result of the research, a database was created including information about regulations in a few selected industries (telecommunications, road transportation, rail transportation, air travel, retail) and problem areas (competition policy, market openness, state ownership). The database includes qualitative information obtained through a questionnaire and from other available sources.

The above-mentioned database is used in further research of relations between various types of regulations and economic growth or productivity. The study performed by a research

¹ The authors list 4 types of formalities:

- always required in the case of each entrepreneur,
- required by principle but possible to avoid in exceptional cases or in the case of some companies,
- obligatory formalities required from all companies in a given industry or from some types of companies,
- voluntary formalities.

The classification is not clear enough to be applied in the enlisting of regulatory restrictions.

team led by Scarpetta and Nicoletti (2003) covered regulations of product markets, barriers of entry, trade liberalisation and ownership. The authors constructed a regulatory restriction indicator in 5 individual legislative areas, 23 industries (statistically classified with two digits) in 18 OECD countries. They used data from the period of 1975-1998. Four regulation indicators were analysed: economy-wide indicator (in 1998), industry-specific indicator (in 1988, 1993, 1996), indicator of regulatory reform (trade liberalisation, administrative facilities, market-oriented changes in regulations) (no data about the period), privatisation indicator (share of the state in individual industries in 1975-1998). The results show that variations increased in the OECD countries in the period under review, which correlated with the varied economic growth in these countries. A correlation with the productivity growth was observed for industries that underwent regulatory reforms resulting in liberalised entry to the industry, increased competition and changes in the ownership structure (privatisation). Strict regulations of the market of products and services combined with the lack of regulatory reforms, identified in some European countries, resulted in relatively lower productivity and worse absorption of new technologies, especially in high-tech industries.

Alesina et al. (2003) used the above-mentioned database on the regulations of product markets in seven industries in 21 OECD economies (Nicoletti et al., 2000) and applied the OLS regression method to prove that the intensity of regulations, especially those that create barriers to entry for specific industries, negatively correlated with the level of investments in these industries.

Paternsen et al. (2003) performed a comparative analysis of regulations for liberal (freelance) professions (auditors, lawyers, architects, engineers, pharmacists) in the European Union countries (EU-15). The assessment pertained to regulations regarding the commencement of activity in such professions and regulations of subsequent practice. As a result, a weighted index of general regulation level was constructed. The results of the analysis indicated huge cross-country and cross-profession variations of regulations. On the European level, regulations applying to pharmacists and lawyers are the most numerous and regulations applying to engineers and architects are the least numerous. Austria, Italy and Luxembourg have the most

restrictive regulations for liberal professions while UK, Ireland and Finland – the least restrictive ones.

As far as Polish literature on the subject is concerned, Waligórski (1998) attempted an initial analysis of the extent of administrative regulations.. However, his research does not present any data on the number of business activity restrictions and the directions of change.

Ligeza (1998) analysed changes in the law of concessions and business activity permits in the 1990s. He concluded that “the number of concessions and permits grew significantly after January 1, 1989”, and especially in 1991, 1995 and 1997, when many acts introducing regulatory restrictions (especially concessions) were enacted (Beksiak, 2001) As far as permits are concerned, the author states their constant growth but does not attempt to specify the periods of intensive increase in their number. Simultaneously, he emphasizes that other types of public and legal restrictions of business activity, other than concessions and permits, appeared in the 1990s, such as quotas, limits, trade registration and professional licences.

To summarise the overview of literature on regulations and studies of their economic effects it may be stated that in the majority of cases the studies involve only a fraction of the legal framework, and not the whole body of law effective at a given moment. The dominant approach is based on the analysis of expressions of selected regulations (procedures, formalities, their cumbersomeness, lengthiness, possibly their costs). There are very few studies aiming to list real “units” of the legal system observed in legislations of many countries. Those real units include regulatory restrictions, analysed in our study, i.e. statutory orders for entrepreneurs (economic agents) that generate (enforce) further specific actions of these entities (expressions — formalities, procedures, proceedings, etc). As a result, both specific positive effects (e.g. increased security) and negative ones (e.g. costs, corruption) for the state and its citizens are generated. The problem is the symmetry and appropriate distribution of these effects. Regulatory restrictions in other legal systems may also take the form of decrees, ordinances, etc. Regardless of the name used in individual legal systems, these natural units have specific characteristics facilitating their identification, which may be used in further comparative research.

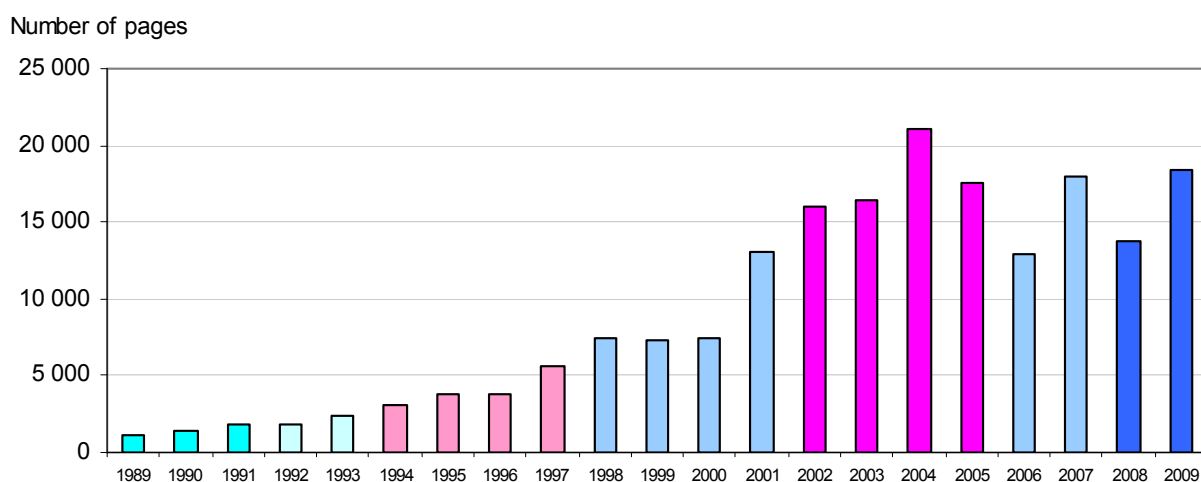
The legal literature is dominated by the approach focusing on differences between legal solutions applied in specific periods or systems (countries) and their detailed descriptions,

frequently without any valuable elements or assessment of their impact on the economy .
(Biernat, Wasilewski, 2000).

2. Aspects and objectives of the study

An attempt has been made to examine regulations restricting business activity in Poland. The study focuses on the Polish economic legislation in the period of 1989-2009.¹ The period under review is the period of transition of the state and the economy – a gradual dismantling of the state monopoly in the economy exercised in the past by means of central control and enforcement of a monopolistic or dominant market position of state-owned enterprises. The deconstruction of the old economic regime was accompanied by the construction of the new system of market economy. The examined period covers five terms of office of the Sejm of the Republic of Poland. Each term of office brings rich legislation including new economic regulations and amendments to existing regulations (see Chart 1). There is no detailed scientific register and analysis of this legislation, both in the context of the above-mentioned restriction criteria and in the context of economic growth.

Figure 1. Volume of *Dziennik Ustaw* published in 1989-2009.



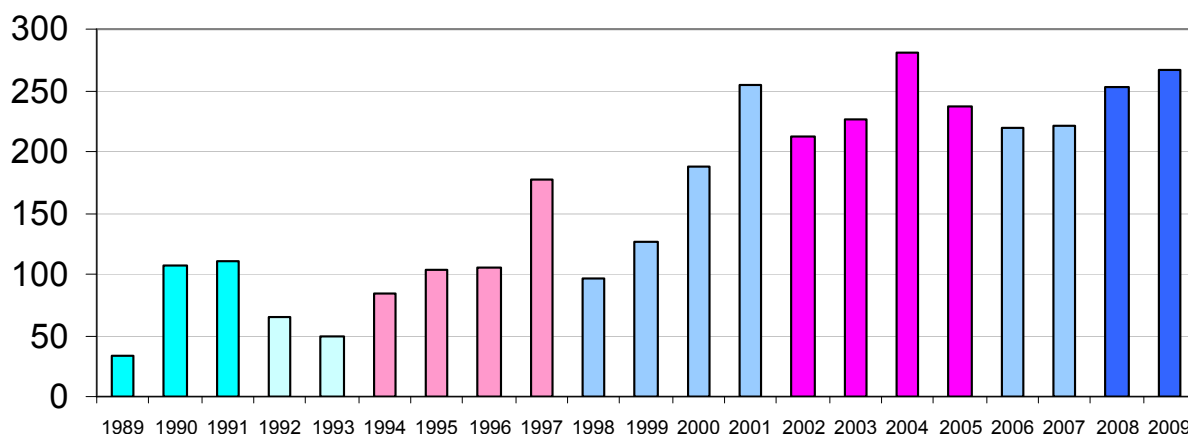
Source: Dziennik Ustaw, authors' calculations. Different colours pertain to different terms of office of the Polish Parliament Sejm.

¹ The study was based on LEX database of legal acts (Polish and European).

However, the study of entrepreneurs' opinions shows that the building of "the new order" is rather bitterly assessed by the business community. Entrepreneurs claim that bureaucracy, rather than economy, gets strengthened.¹ The period of 1991-2003 is also the period of preparation to the membership in the European Union, including adjustments of the Polish law to *acquis communautaire*. Many solutions similar to legal solutions applied in the EU Member States appeared in the Polish law.

Figure 2. Legislation adopted by the Sejm in specific years and terms of office

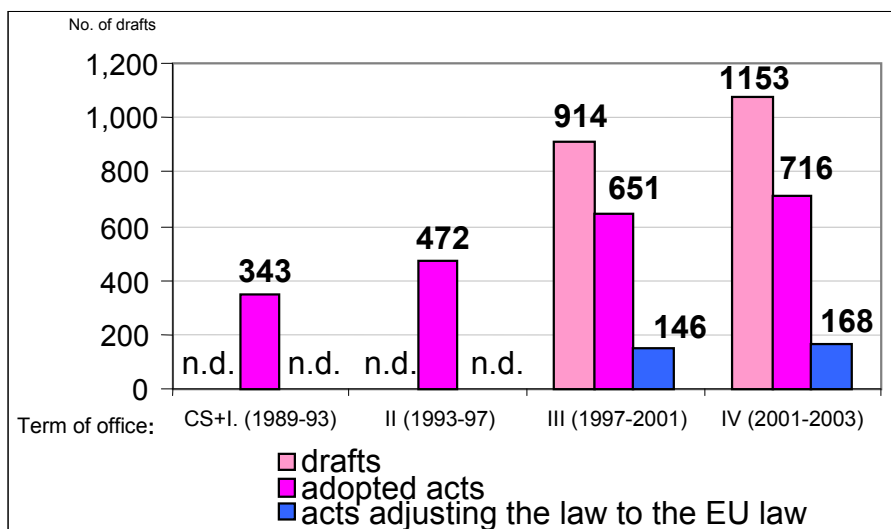
number of acts



Source: Chancellery of the Sejm, authors' calculations.

¹ For instance, results of a survey commissioned by the British-Polish Chamber of Commerce in Warsaw. The survey indicated that weak infrastructure, corruption, tax burdens and bureaucracy are the main obstacles in the pursuit of business activity in Poland. Source: Gazeta Wyborcza, December 2003.

Figure 3. Polish Legislation under Pressure of Adjusting to the EU Law before Poland Accession to European Union (2004).



Source: Chancellery of the Sejm, authors' calculations, data for the 4th term of office of the Sejm of the Republic of Poland as of May 1, 2004 (Poland's accession to the EU). CS means a term of office of the Contract Sejm (Parliament voted 1989).

Varied opinions about the Polish business law, as well as hampered economic growth combined with a poor condition of public finances in 2001 – 2002 are the drivers to a study on the regulatory determinants of economic growth. The following research questions may be posed:

1. Which areas of business activity require administrative authorisations?
2. What is the level of business economic restrictions in individual areas?
3. In which areas does economic freedom increase along with the advancement of transformation and economic development? In which areas does it decrease?

The objective of the first stage of the economic regulations' study was the identification of the range and variability of business activity regulation forms.

3. Methodology of the regulatory restrictions' study

The study examines the economy and its law. Each of these areas has its specific classification methods: the economy is most frequently divided according to functions and statistics (e.g. according to the Polish Classification of Activity, it is divided into sections, areas, etc), while the law is classified according to its various systems (formal and substantive law,

civil and administrative law, public and private law, etc). The classification of legislation is not simple and there is no commonly accepted content-based system of classification of substantive law (Góralczyk, 2004). Moreover, there was no precise register of the legislation, i.e. it was not known how many acts were effective in Poland at a given time and which of them pertained to economic activity restrictions.

3.1. Definitions and typology

The notion of “regulatory restrictions of business activity” is understood as legal regulation of conditions to be met in order to undertake and perform specific types of business activity and professions, resulting from economic legislation (Kosikowski, 2002). Administrative restrictions of business activity involve legal restriction of freedom of entities (entrepreneurs) to commence and pursue business activity. From the legal point of view, regulatory restrictions express the power of government authorities or professional self-governments to interfere, according to legal regulations, in the execution of rights important for the economy, including the right of economic freedom (Banasinski, 1996; It is assumed for the purposes of this study that “regulatory restrictions of the economy” involve various types of statutory regulations resulting in restrictions of the freedom to pursue business activity. The restrictions are usually expressed in the form of concessions or various types of permits.

Neither the principles of legislative procedures nor acts define or classify types of regulatory restrictions. The Supreme Court (1998) defined a concession as a public law authorisation assigned individually through a decision of a competent government authority to an entity that fulfils statutory requirements (referring both to the entity and its activities) pertaining to a given type of business activity.

On the other hand, a permit specifies the admission of an entrepreneur to the pursuit of a specified business activity upon prior statement that the entrepreneur meets all conditions for the performance of such activity specified by law. Upon the fulfilment of formal and legal conditions, an institution is obliged to issue a permit. The permit does not assign any new rights to the entrepreneur. It simply specifies these rights and their contents in greater detail.¹

¹ C. Kosikowski, 2002, *Koncesje i zezwolenia na działalność gospodarczą*, Warszawa, LexisNexis; p. 133.

The following differentiation between concessions and permits seems valid following the analysis of the relevant legislation and literature:

- 1) a concession entails a resignation from the state monopoly for the good of the entrepreneur, who obtains an authorisation to undertake a specific business activity; assignment of concessions is arbitrary; concessions are used only in such areas of economy that are especially important for the security of the state or its citizens, or are implemented only due to an important public interest,
- 2) a business activity permit is a confirmation, by a competent authority, that an entrepreneur meets requirements, specified by law, to commence a restricted activity; permits are not arbitrary and are not limited; a permit is obtained if the requirements specified by law are met.

Table 2. Typology of regulatory restrictions

Regulations	Types of restrictions	Restricted areas (example)	Authorized entities
Restricting regulations	Concession	1. Extraction of minerals	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		2. Energy generation	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		n.	as above
	Permit	1. Manufacturing of pharmaceuticals	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		2. Postage activities	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		N	as above
	Notification	1. Publishing magazines	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		2. Packaging of products	Entrepreneur 1, Entrepreneur 2, Entrepreneur <i>n</i>
		N	as above
Tax regulations			
Other regulations			

Source: Authors' study.

The legislator uses many similar or synonymous “replacements” of the notion of permit, which leads to an unjustified abundance of names. Apart from the permit, the following names are used: licence, admission, authorisation, entitlement, consent, accreditation, etc. In the present paper, all these various names of restrictions are included in one group of business activity permits.

It should be added that Art. 88 of the Business Activity Act (adopted on November 19, 1999 and repealed upon the enactment of the Economic Freedom Act of July 2, 2004) was the first attempt, and the only attempt so far, to put various names in order. Para. 1 of the Act reads as follows: “If such terms as “permission”, “authorisation”, “consent”, “licence” are used in currently binding regulations to specify forms of business activity restrictions, they should be deemed a “permit” for the purposes of the present act.”

It turned out during the analysis of specific legal regulations that the division into concessions and permits was insufficient. Thus, the following types of regulatory restrictions should be recognised:

A. Business activity concessions,

B. Permits – including:

- B1. Business activity permits,
- B2. Admissions of products and goods to market,
- B3. Authorisation for operation of equipment and installations,
- B4. Production limits,
- B5. Business activity licences,
- B6. Admissions to a profession;

C. Notifications of economic activity

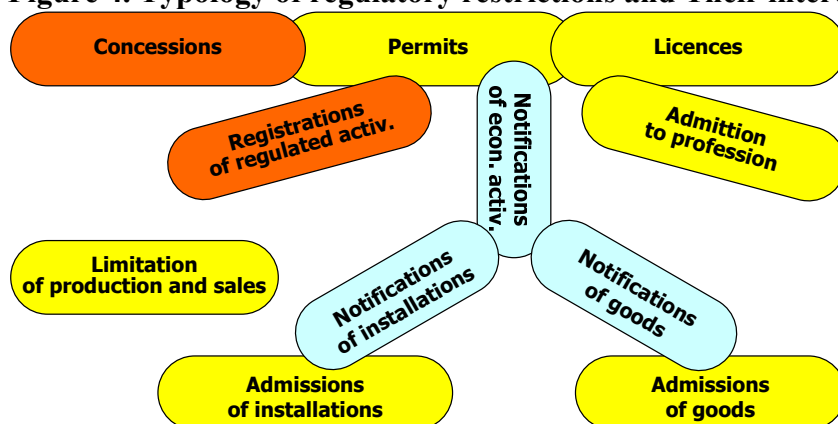
Each type of the restrictions listed above is related to a statutory obligation to perform administrative proceedings leading to a decision of the administrative authority or of an authorised authority of the professional self-government. The only exception is the notification procedure, i.e. notification of the competent supervisory or inspection authority of the

commencement of specific business activity. The procedure should lead to the issuing of a certificate of notification. However, notifications frequently become quasi-permits in practice since some regulations provide an administrative authority with the right to reject the notification. Such legislative practices, along with the multitude of names, blur the differences among specific types of regulatory restrictions.

Regardless of the names used in specific acts (e.g. licence, permit, admission, authorisation, entitlement, consent, accreditation, limit, entry into the register), all forms of restrictions requiring decisions of authorities have been classified as permits.

The number of permits given in the paper should be treated as a minimum, which follows from the fact that the number of permits in some areas of restrictions depends on the type of goods subject to restrictions. In such cases, the paper considers only one type of a permit, regardless of the number of product types subject to the permits (e.g. trading in goods and services specified by the Minister of Economy in an ordinance).

Figure 4. Typology of regulatory restrictions and Their interconnections.



Source: Authors' study.

3.2. Research method

In order to enlist regulatory restrictions of business activity in the Polish law and their variations in the period of 1989-2009, a few time points have been identified. Since legislation results from the works of individual governments during parliamentary terms of office, it was assumed that observations would be summarised at the end/beginning of four-year terms of

office of the Sejm of the Republic of Poland, i.e. as at June 1989, September 1993 (end of two shortened terms of the Sejm), October 1997, September 2001, October 2005, October 2007 at the half-term October 2009 (in the mid of parliamentary period).. The study of changes in the level of economic restrictions in the periods shorter than the parliamentary term of office, or in the periods equal to a half of the term seems little productive. Changes in the legislation are long-term processes and thus the above mentioned sampling and comparison periods seem sufficient in order to draw reliable conclusions.

The study covered all identified statutory regulations in identified economic areas¹ (see Annex). Individual types of regulatory restrictions were examined in the specified acts. The study involved the identification of date of establishment and legal basis for a particular type of restriction and its classification into one of the defined groups. Later, all amendments to the identified regulations were analysed. The analysis aimed to establish if a given type of restriction was still effective in critical moments of particular examination periods, and to identify all cases of transformed or repealed types of restrictions. Various types of concessions, permits, etc. are issued in a given economic area. Thus, the number of concessions and permits significantly exceeds the number of areas subject to restrictions (e.g. separate concessions related to electricity, heating, petrol and gas fuel are issued in the area of energy generation, transmission, distribution and trade).

4. Research results

The overview of the legislation resulted in the unambiguous identification of economic areas (and their number) in which it is necessary to obtain administrative permissions to pursue business activity. A constant increase was observed in the number of areas subject to regulations restricting the economic freedom (from 121 in 1989 up to 175 areas in 2003 and 268 in 2009, an increase by approx. 120% in twenty years) and in the number of basic forms of restrictions under review (from 388 in 1989 up to 765 in 2009, an increase by approx. 90%). Detailed results of the

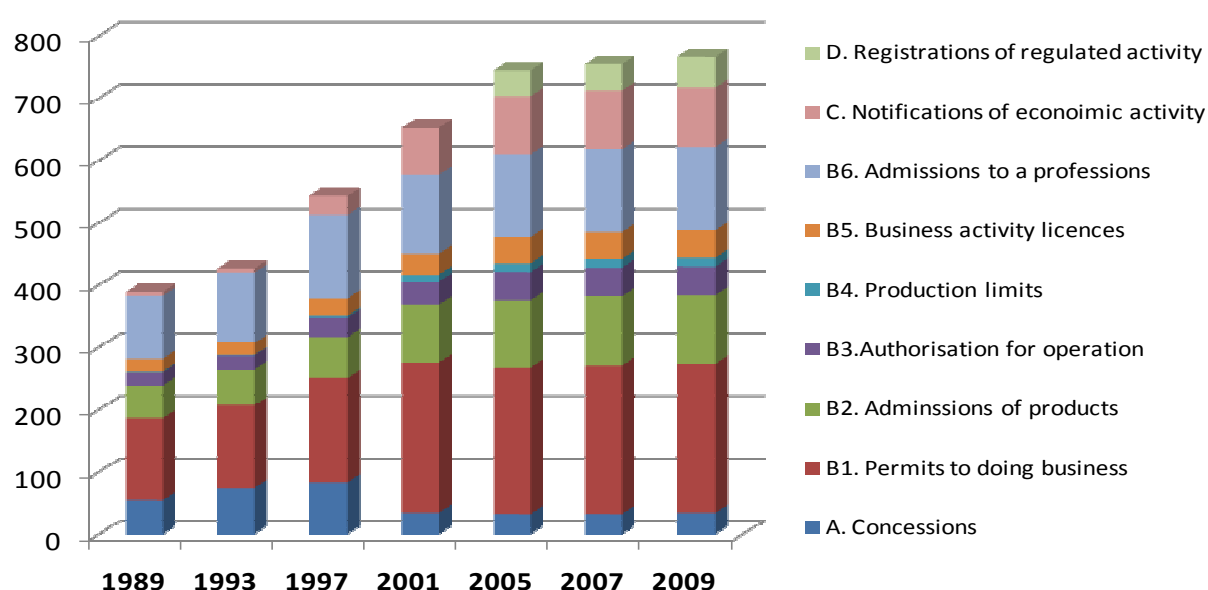
¹ The division into areas is in line with the division of economy used in legal sciences. The identified area is more or less commensurate to a section/area of economy in the classification according to the statistical classification (NACE) PKD – Polish Classification of Activity (a three-digit statistical unit) commonly applied in economic research.

study are presented Fig.5 and 6. The results will be discussed in detail in the order adopted in the applied classification of regulatory restrictions.

4.1. Concessions

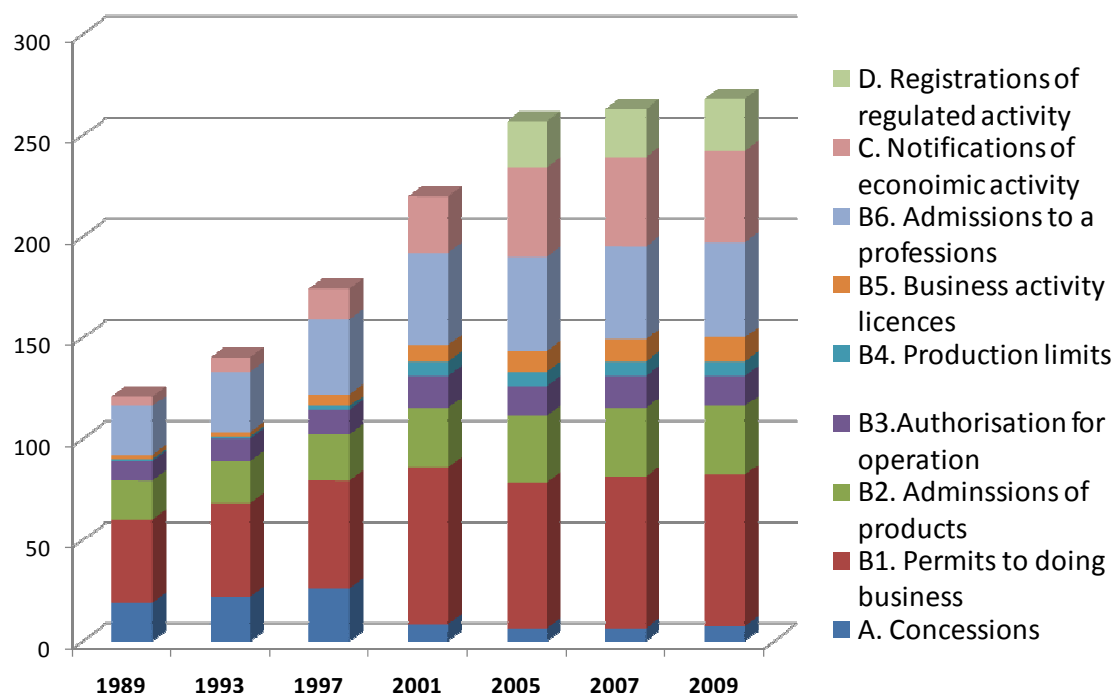
Concessions are not the most frequent forms of regulatory restrictions. As the only group out of 8 analysed groups, concessions were reduced in number in the period under review. The first two periods brought an increase in the significance of this type of regulatory restrictions. In the term of 1997 – 2001, a significant revision of the existing economic restrictions was performed and the new Business Activity Act was adopted, which took effect on January 1, 2001. Art. 14 established only 8 areas subject to concessions and introduced the following principle: “introduction of other concessions in business activity areas of particular importance in terms of security of the state or its citizens or other important public interest shall be permissible solely if such an activity cannot be performed on a freelance basis or upon obtaining a permit and requires this Act to be amended”. As a result, the number of concessions and areas subject to concessions was significantly reduced but many of them were transformed into permits and licences.

Figure 5. Number of cases of regulatory restrictions of business activity in Poland in 1989-2009



Source: authors' calculations.

Figure 6. Economic areas subject to business activity restrictions in Poland in 1989-2009



Source: authors' calculations.

The balance of changes in the regulatory restrictions in 1989 – 2009 as regards business activity concessions is positive — the number of concessions decreased by 49 as compared to its maximum level in 1997, the number of areas subject to business activity concessions decreased by 19 as compared to its maximum level in 1997. In 2009, this type of regulatory restrictions was still applied in 7 areas of economy and pertained to 35 types of business activity.

4.2. Business activity permits

Business activity permits are the most frequent type of regulatory restrictions in Poland applied in the largest number of areas (75 areas in 2009, twice as many as compared with the beginning of the transition period). The study indicated a constant increase in the number of such restrictions, especially intensive in the period of 1997-2001 due to the transformation of 29 concessions into permits. As a result of the enactment of the Business Activity Act, the term of 1997 – 2001 brought a significant increase in the number of permits from 146 to 208 (increase by 62, including 29 permits transformed from concessions). The number of areas subject to

permits increased from 48 up to 69 (increase by 21, including 12 areas subject to permits which were transformed from concession areas). Changes in the regulatory restrictions in 1997 – 2001, including the enactment of the Business Activity Act, resulted in 62 additional permits, including 29 permits transformed from concessions, 26 permits introduced in 11 new areas subject to permits, 13 permits were introduced in existing areas (18 implemented, 5 abolished), 6 permits were abolished together with 2 areas of restrictions. Moreover, the number of areas subject to permits increased by 21, including 11 new such areas,¹ 12 areas subject to permits transformed from concession areas,² 2 abolished areas subject to permits.³

The balance of changes in the regulatory restrictions in 1989 – 2009 as regards business activity permits shows an increase in the number of permits by 107 and expansion of the restrictions to cover 34 new areas subject to business activity permits.

4.3. Admissions of products, goods and services to market

In 1989, 53 types of admissions of products and goods to the market were effective in 19 identified areas of restrictions. In the last year under review (2009), 110 types of restrictions existed in 34 areas.

The balance of changes in regulatory restrictions in 1989 – 2009 as regards admissions of products, goods and services to the market indicates an increase in the number of admissions by

¹ 4. Private psychological practice. 20. Specialist technical examination of vehicles. 22. Training courses for drivers transporting hazardous goods. 32. Purchase, processing, storage, transportation of foodstuffs of animal origin. Other activities subject to the provisions of the act on combating infectious diseases among animals (9 items). 33. Manufacturing of selected feed products. Trading in selected feed products. 37. Trading in forests reproductive material. 39. Running a storage company. 43. Mass water supply or sewerage services. 59. Running payment systems. Running securities settlement systems. 60. Running a commodity exchange. Running a commodity brokerage house. 67. Research on genetically modified organisms (referential laboratory).

² 1. Manufacturing of and trade in pharmaceuticals, medical products. Manufacturing of and trade in pharmaceuticals, medical products applied to animals. Customs and consignment warehouse of pharmaceuticals, medical products. 2. Running a pharmacy. 9. Manufacturing, bottling, purification, contamination, dewatering and generation of spirit. Vodka manufacturing and bottling. Wine products manufacturing and bottling. 12. Pre-processing of tobacco. Manufacturing of tobacco products. 14. Public postage services (Poczta Polska). Postage activities. Courier services. 15. Investigation services. 17. Production of vehicle registration plates. 23. Airport management. 27. Professional sports competition. 30. Organization of tourist events. Intermediation in the provision of tourist services. 38. Packaging of and trading in crop protection products. 53. International trading in goods and services specified by the Minister of Economy.

³ 25. Movie production, editing, distribution. 35. Inland fishing. Breeding.

57 and expansion of the area of restrictions to include 15 new areas subject to admissions of products, goods and services to market.

4.4. Authorisation for operation of equipment and installations

In 1989, 21 authorisations for operation of equipment and installations were effective in 10 identified areas of restrictions. The period of 1989 – 1993 brought an increase in the number of authorisations to 25 and the number of areas subject to authorisations increased to 11. The balance of changes in regulatory restrictions in the period of 1989 – 2009 as regards authorisations for operation of equipment and installations is as follows: the number of authorisations increased by 26, there were 5 new areas of restrictions subject to authorisations for operation of equipment and installations.

4.5. Production and trade limits

In 1989, 1 production limit was in effect. The balance of changes in regulatory restrictions in the period of 1989 – 2009 as regards production and trade limits is as follows: the number of limits grew by 13, there were 6 new areas of restrictions subject to production limits.

4.6. Business activity licences

In 1989, 20 business activity licences were effective in 2 identified areas of restrictions. In the 3rd Term of Office a revision of the existing economic restrictions was performed and the new Business Activity Act was adopted, which took effect on January 1, 2001. The number of licences increased up to 33 (increase by 6 according to the previous terms, including 2 licences transformed from concessions and 2 from permits), while the number of areas subject to licences reached 8. The balance of changes in regulatory restrictions in the period of 1989 – 2009 as regards business activity licences is as follows: the number of licences increased to 18, there were 7 new restricted areas subject to business activity licences. To summarize, 43 licences were in effect in 2009, including 3 licences transformed from concessions and 3 licences transformed from permits.

4.7. Admissions to a profession

In 1989, 101 admissions to a profession in 24 identified restricted areas were in effect. The balance of changes in regulatory restrictions in the period of 1989 – 2009 as regards admissions to a profession is as follows: the number of admissions increased by 34 and there were 23 new restricted areas subject to admissions.

4.8. Economic activity notifications

Regular business activity notifications are not related to administrative proceedings leading to an administrative decision. An entrepreneur is obliged to notify a relevant supervisory or inspection authority of the commencement of business activity. Obviously, the entrepreneur is aware that he/she will be subject to inspections of the authority as regards the compliance of business with legal regulations. Therefore, this is a regulatory restriction that is friendly to entrepreneurs (if it must exist), and simultaneously it provides the government with sufficient knowledge about business activity pursued by entrepreneurs and provides authorised institutions with the right to interfere if irregularities are detected.

In 1989, only 6 types of business activity notifications were effective in 5 areas of restrictions.

After 20 years there are 95 cases (types) of notification of business activity required in 45 areas. Originally, the present study did not include notifications of business activity. A certificate of a competent authority that confirms the entrepreneur's notification is not an administrative decision. However, the scope of the study had to be expanded due to the Economic Freedom Act adopted on July 2, 2004 which established a new type of restrictions, i.e. registered regulated activity. Namely, the Act transforms certain permits and notifications into registered regulated activity. Thus, it would have been impossible to update the results at the end of the present parliamentary term of office if the study had not been expanded to include notifications of business activity. Moreover, one more reason to expand the scope of the study appeared during its supplementation. It turned out that such a specific form of regulatory restrictions, or rather of

registering entrepreneurs pursuing a given type of business activity, applied by competent supervisory or inspection authorities, very frequently becomes a permit in disguise.¹

Conclusions and recommendations

The analysis of the legislative achievements of subsequent terms of office of the Parliament (Sejm) of the Republic of Poland (see Chart 1, Chart 2) shows that the number of adopted acts increased in each subsequent term. Simultaneously, the parliamentary efficiency ratio (the quotient of the number of considered drafts and the number of acts adopted in a given term) was decreasing. In the 2nd and 3rd term, the largest number of acts was adopted in the last (shortened) year of the term. Available data show that acts adjusting the Polish law to the EU law constitute only approx. 22-24% of the legislation of the last parliamentary terms and it is thus difficult to justify the legislative activity of the last parliaments with the process of European integration. The growth of legislation is exceeded by the growth of the volume of *Dziennik Ustaw*. Its 2004 yearly issue reaches almost 20,000 pages. It is worth mentioning that normative acts constitute only 8-14% of the contents (amount of acts).

The revealed regularities may indicate that subsequent government coalitions did not adjust their legislative activity to their election declarations, which should be implemented at the beginning of the term, as was the case with the Contract Sejm (see Chart 2). Excessive legislative activity in the last year of the term is usually related to the approaching elections and, since acts are adopted very quickly, they may include numerous errors. If new governments were well prepared, the largest number of acts would be adopted in the first, or at least in the second year of the term, thus facilitating effective governing in the subsequent years of the term.

Legislators' decisions, especially those regarding the establishment of business activity concessions and permits (including licences), indicate the lack of a coherent programme as regards the state's tasks in the areas subject to monopoly and reveal the lack of coordination and consistency as regards areas of restricted business activity. Frequent legislative changes, such as:

¹ Numerous acts provided supervisory and inspection authorities with the right to voice a dissent to a notification. The dissent initiates explanatory proceedings very similar to proceedings to obtain a permit.

“permit — concession — permit”, “permit — concession — licence”, or “permit — concession — no restrictions”, prove that the legislators’ intervention in individual business activity areas is far from orderly and shows some “bargaining” characteristics.

It should be emphasised that all concession areas introduced in the period of 1989 – 1997 (new or transformed from permits) were abolished or transformed into permits in the term of 1997 – 2001. This might support the thesis about the instability of the business law in Poland and about the inconsistency and unpredictability, or even light-heartedness of the legislators in that respect.

Business activity restrictions measure the willingness of the government and the parliament to increase or decrease regulations in the economy. Since granting of concessions is arbitrary, thus, regardless of the legislators’ intentions and transparency of administrative activities, granting of concessions is associated with an increased corruption risk. In that context, the term of 1997 – 2001 should be positively assessed since it brought a dramatic decrease both in the number of concessions (from 82 to 35) and in the number of areas subject to concessions (from 26 to 8) and stabilized to today. The replacement of 29 arbitrary concessions with permits was perceived by the business community as insufficient to deregulate the economy since binding administrative procedures were cumbersome and time-consuming. It happens very frequently that administrative procedures and the lack of procedure transparency drive the so-called everyday corruption (administrative corruption) and force entrepreneurs to escape into the “grey area”.

The increase in the number of admissions of products and goods to trade and authorisations for operation of equipment and installations, stated in the present study, is related to the inevitable implementation of commonly binding design, manufacturing and operation standards for specific goods and devices. Compliance with these standards is a prerequisite of admitting the products to the market and it also determines the competitiveness of manufacturers and products. However, this area of legislation is far from perfect yet. The same entrepreneur should not be obliged to obtain a permit for a given type of business activity and simultaneously be required to obtain an admission of products generated through such activity to market, as is the case of medical products, pharmaceuticals and many other goods.

We have noticed an increase in the number of areas in which production and trade limitations are introduced. In the period of 1989-2009, 13 limits in 6 new areas were implemented. It results from the implementation of the agricultural policy based on the minimum prices guaranteed for producers and on subsidies to production and exports of certain products. Further research is needed to state to what extent this increase is determined by the adjustment of the Polish law due to the accession to the EU.

The number of business activity licences and admissions to a profession is growing constantly. The period of 1989 – 2009 brought an increase in the number of licences from 20 to 47, and in the number of admissions to a profession from 101 to 135 (stabilized after accession to EU). Only some of these changes result from the appearance of new professions typical for the market economy and significant enough to be potentially subject to restrictions. Unfortunately, some of these changes are related to the creation of professional corporations that frequently establish obstacles for the entry to the profession and apply “monopolist practices.” These corporations are usually professional self-governments created by virtue of the law. Long-term experience shows that certain professional communities are trying to block the entry of new people to the profession, which brings serious social and economic ramifications. Limited competition leads to higher costs of services, nepotism, and, in turn, to corruption as an instrument enabling or facilitating the entry of new people to the profession.

Business activity licensing is an artificial phenomenon that includes typical business activity permits and admissions to a profession. Thus, such a type of restrictions may be “eliminated” by renaming the existing licences into permits and admissions to a profession. Simultaneously, it would be useful to put some order in the names of admissions to a profession by promoting the uniform name of licence. One could bid farewell to the historical name: “prawo jazdy” (“the right to drive”) and replace it with a more suitable “licencja kierowcy” (driver’s licence). Uniformity of names is much desired but its implementation would have to be long-term due to related costs.

A large number of concessions and permits, as well as time-consuming administrative procedures related to them, generate by-products such as excessive bureaucracy and corruption in specific institutional conditions. Excessive restrictions and taxes paralyse the economy. In

order to contain this numbness, a radical deregulation of economy and reduction of bureaucracy should be implemented, along with lowering and simplifying taxes. The process should involve, among other things, elimination of some concessions and permits, and replacement of some of them with notifications¹. The task should not be a one-off action. It should be included in the Polish law as a system solution related to the implementation of regulatory reforms, pursuant to the recommendation of the OECD Council of March 9, 1995 on regulation quality. We call for the establishment of obligatory periodical reviews of regulations. These reviews should involve the following:

- assessment of the functioning and usefulness of all existing types of restrictions,
- identification of specific types of restrictions to be maintained or to be eliminated due to their weakened significance or effectiveness or due to irregularities related to their establishment,
- each type of restrictions to be maintained will be subject to an extended assessment of effects and to related social consultations,
- out of all maintained types of restrictions those that should be simplified should be identified, i.e. concessions to be transformed into permits, as well as concessions and permits to be transformed into notifications,
- each administrative procedure should be reviewed in order to be shortened, simplified and made more cost-effective; each stage of the procedure (each element of the algorithm) leading to necessary agreements, opinions and then to a concession or a permit should be verified,
- notification regulations should be reviewed in order to eliminate irregularities involving the right of the administrative authority to reject a submitted notification and involving the application of the so-called “admission of the notification” procedure,

¹ As mentioned in the previous part, notification means informing a relevant supervisory or inspection authority of the commencement of business activity; it is the weakest form of restriction, or rather of supervision of business activity by relevant supervisory and inspection authorities.

- during the review, the necessity and form of each attachment to the application for a concession, permit or to notification should be justified; attachments to be eliminated or replaced with the applicant's declarations should be identified.

In our opinion, the Prime Minister should order such obligatory reviews. The first two reviews should be ordered at the beginning and in the middle of each parliamentary term of office. Thus, the Council of Ministers should accept and publish a report on the review of regulations twice – in the middle of the term and at the end of it. Later, reviews could be performed every 4 years.¹ The above obligation to perform reviews of regulations and assessments of their effects should also pertain to local government units.

The research results presented here document the legal situation and its variability as regards regulatory restrictions. Additionally, they identify unambiguously areas which require the consent of the government to pursue business activity. The study indicated a constant expansion of restrictions onto new areas of economy. The conclusions show that Poland's current economy has a high level of restrictions as compared with the first years of transformation. Since the study applied new (unique) methodology, we have no comparable data on regulatory restrictions from other countries that would enable a precise comparison. However, our conclusions are supported by ratings obtained by Poland in comparative analyses performed by research units referred to above. However, when analysing a public opinion survey methodological limitations of the above-mentioned research results should be borne in mind.

The obtained research results constitute a good springboard to further studies on the identification of social and economic costs of restrictions (both for entrepreneurs and for the markets), and to the analysis of administrative procedures established through such regulations. The study aiming at further assessment of economic restrictions as at the end of subsequent parliamentary terms of office will be continued. It is also advisable to apply the methodology presented in the paper to analyse legislations of other countries, which will facilitate precise cross-country comparisons and help verify the thesis on the excessive regulatory restrictions of the economy.

¹ As is the case in the USA, see (Rymaszewski et al., 2004).

References

- A. Alesina, S. Ardagna, G. Nicoletti, F. Schiantarelli, 2003, Regulation and Investment, NBER Working Paper 9560, Cambridge;
- B. Arruñada, 2008, Will Doing Business Keep Demaging Business? Journal of Comparative Economics;
- L. Balcerowicz, 1998, Wolność i rozwój (*Freedom and Growth*), Znak, Kraków;
- C. Banasiński, 1996, Koncesjonowanie jako forma reglamentacji działalności gospodarczej (*Concession as a form of regulation of business activity*) [in:] Prawo gospodarcze. Zagadnienia administracyjno prawne, W. Wierzbowski (ed.), Warsaw; p. 119;
- Bank Światowy, 2004, Doing Business 2004. Regulacje i ich znaczenie, Ius et Lex Foundation, Warsaw;
- J. Beksiak (ed.), 2001, Państwo w gospodarce polskiej w latach 90-tych XX wieku (*State in Polish economy in 90s XX*), PWN, Warsaw;
- S. Biernat, A. Wasilewski, 2000, Wolność gospodarcza w Europie (*Economic freedom in Europe*), Zakamycze, Kraków;
- Z. Brodecki Z. (ed), 2003, Wolność gospodarcza (*Economic Freedom*) LexisNexis;
- H. De Soto, 1991, Inny szlak (*The other path*) (trans. S. Makowiecki, M. Wiśniewski), Pol. Tow. Współpracy z Klubem Rzymskim, Warsaw;
- S. Djankov (ed.), 2004, Doing Business 2004, World Bank and Ius et Lex Foundation, Warsaw;
- S. Djankov, 2008, A Response to *Is Doing Business Damaging Business*, The World Bank, mimeo,
- W. Góralczyk jr, 2004, Podstawy prawa (*Principles of Law*), Wyd. WSPiZ, Warsaw;
- J. Gwartney, R. Lawson, 1997, Economic Freedom of the World Annual Report, The Fraser Institute, Vancouver;
- C. A. Kern, 2009, Die Doing-Business-Reports der Weltbank – fragwürdige Quantifizierung rechtlicher Qualitaet? JZ 10/2009
- C. Kosikowski, 1999, Zasady reglamentacji działalności gospodarczej w nowym projekcie ustawy - Prawo działalności gospodarczej (*Principles of business activity regulation*), Przegląd Ustawodawstwa Gospodarczego, No. 5 (611), 1999, pp. 8-12;
- C. Kosikowski, K. Sobczak, 2002, Wolność gospodarcza w prawie europejskim (*Economic Freedom in European Law*), Wydawnictwo SGH, Warsaw;
- C. Kosikowski, 2002, Koncesje i zezwolenia na działalność gospodarczą (*Concessions and permits in Business Law*), Warsaw, LexisNexis;

- J. Krzyżewski, 1997, Reglamentacja i wolność umów na rynku finansowym w Polsce [in:] W. Szpringer (ed.), *Regulacja sektora bankowego, Materiały i Prace SGH, LXXV*, Warsaw;
- W. Kuczyński, 2004, Bez realnego podkładu. Dlaczego Polska tak bardzo spadła w rankingu konkurencyjności (*Without Real Reason, Why Poland go down Competition Ranking*), Rzeczpospolita, October 21;
- H. Landreth, D. C. Colander, 1998, *Historia myśli ekonomicznej (The History of Economic Thought)*, WN PWE, Warsaw;
- L. Ligeża, 1999, Reglamentacja wolności gospodarczej w Polsce w okresie 1.1.1989 – 31.12.1998 (*Reglamentation of Economic Freedom in Poland*), unpublished material;
- M. Lutter, J. Semler (ed.), 1997, *Podstawy gospodarki wolnorynkowej (Foundation of Market Economy)*, Wyd.C.H.Beck, Warsaw;
- P. Murrell (ed.), 2001, *Assessing the Value of Law in Transition Economies*, UoM Press, Ann Arbor;
- G. Nicoletti, S. Scarpetta, O. Boylaud, 2000, Summary Indicators of Product Market Regulation with an Extension to Employment Protection Legislation, Organization for Economic Co-Operation and Development (OECD), Working Paper No.226;
- A. Ogus, 1994, *Regulation – Legal Form and Economic Theory*, Oxford, Clarendon Press, p.1;
- I. Paterson, M. Fink, A. Ogus, 2003, Economic impact of regulation in the field of liberal professions in different Member States, Research Report for the European Commission, DG Competition; IfHS, Vienna;
- K. Pistor, M. Raiser, S. Gelfer, 2000, Law and Finance in Transition Economics, EBRD Working Paper no. 49;
- R.A.Posner, 1974, Theories of Economic Regulation, *The Bell Journal of Economics and Management Science*, vo.5. No.2, pp 335-358.
- W. Roszkowski, 2003, *Najnowsza historia Polski 1980-2002*, Wyd. Świat Książki, Warsaw;
- P. Rymaszewski, P.Kurek, P.Dobrowolski, 2004, *Reforma procesu stanowienia prawa (The Regulatory Reform)*, Zeszyty BRE Bank_CASE, nr 72.
- S. Scarpetta, G. Nicoletti, 2003, Regulation, productivity and growth: OECD evidence, *Economic Policy*, April, pp. 9-72;
- K. Sobczak, 2004, *Działalność gospodarcza – uregulowania prawne (The Law in Business)* Wyd. II stan prawny 2003-10-01, Wydawnictwa Prawnicze LexisNexis, Warsaw;
- K. Sobczak, 1996, Wolność gospodarcza w kręgu problemów konstytucyjnych (*The Economic Freedom as Constitutional Matter*), *Przegląd Ustawodawstwa Gospodarczego*, 3;
- W. Szpringer (ed.), 1997, *Regulacja sektora bankowego (Regulation in Banking Sector)*, Materiały i Prace SGH, LXXV, Warsaw;
- M. Szydło, 2004, *Koncepcja koncesji w ujęciu klasycznym i jej recepcja w prawie polskim (The Concept of Concession and its Reception in Polish Law)*, *Państwo i Prawo*, 1, 46-56;

- L. Tannehill, M. Tannehill, 2004, Rynek i wolność (*The Market and Freedom*) (trans. W. Falkowski), Fijor Publishing, Warsaw;
- A. Walaszek-Pyziół, 1994, Swoboda działalności gospodarczej (*Freedom of Business Activity*), Kraków;
- I. Walencik, 2003, Dziennik Ustaw cztery razy dziennie (*Official Journal four time per day*), Rzeczpospolita, December 27;
- M. Waligórski, 1998, Administracyjna regulacja działalności gospodarczej (*Administrative Regulation of Business Activity*), Ars Boni, Poznań;
- J. Wilkin, M. Iwanek, 1997, Instytucje i instytucjonalizm w ekonomii (*Institutions and Institutionalism in Economics*), Wyd. Uniwersytetu Warszawskiego, Warsaw;
- M. Wołoszyk, 2003, Swoboda przedsiębiorczości i świadczenia usług (*Freedom of Entrepreneurship and Services*), [in:] Brodecki, 2003;
- M. Wyrzykowski, 1986, Pojęcie interesu publicznego w prawie administracyjnym (*Public Interest in Administrative Law*), UW, Warsaw.

Pranav Vyas, Seema Rao

Authors: **Pranav Vyas** has done is Bachelors in Law from India and LLM from National University of Singapore. Assistant Counsel at a prominent arbitration institution of S E Asia- administration of international arbitrations under institutional rules, business development initiatives for institution in South Asia. Advocate in Supreme Court of India with emphasis on legal aid matters & constitutional law. Freelance assignments with private practitioners in arbitration matters involving Construction Contracts. Associate in Arbitration & Litigation team of major full service Indian law firm. Focus on complex international arbitrations across various sectoral disputes involving government and private parties.

Seema Rao has done her Bachelors in Law from India, is pursuing her Masters in Business Laws from National Law School, Bangalore, India and is associated with a Senior Advocate practising in the Supreme Court of India and Delhi High Court

LexMercatoria as a law

INTRODUCTION

LexMercatoria has been aptly described as “a uniform system of law to regulate international commercial transactions, avoiding the vagaries of differing national systems.”¹

LexMercatoria, in so far as it does not place reliance upon the choice of law system, departs from the adoption of a domestic law approach for resolving a transnational commercial dispute and “was conceived as an alternative to the traditional choice of law approach which purports to identify, in international situations, the most closely related body of domestic rules to be applied to the case at hand” has attracted bouquets as well as criticism from the international legal fraternity.²

Whether or not, LexMercatoria qualifies as a law is a question that has divided the jurists all over the world. This short essay attempts to make a few submissions in favour of LexMercatoria being a law.

Lord Mustill has written extensively and often critically about LexMercatoria. In his book, he refers to the work of Professor Lando and states that the supposed sources of the LexMercatoria are as follows-

- Public international law
- Uniform laws
- General principles of law
- The rules of international organisations
- Customs and usages
- Standard form of contracts

¹Messrs. Redfern & Hunter, International Commercial Arbitration 117 (2d ed. 1991) as cited in Selden Barton S. LexMercatoria in European and U.S. Trade Practice: Time to Take a Closer Look- 2 Ann. Surv. Int'l & Comp. L. 111

²Gillard Emmanuel: “Transnational Law: A legal System or a Method of Decision Making?” page 54- The Practice of Transnational Law- P. Berger, 2001

- Reporting of arbitral awards.¹

NATURE OF LEX MERCATORIA

The purists refer to Law as “command of the sovereign”. Can this definition be relied upon in today’s times, especially with respect to cross border transactions and transnational commercial law? If it were to apply strictly, perhaps most cross border transactions and transnational commerce as such would be bound to be declared illegal or in non conformity with the domestic laws.

Law has developed to deal with issues of across-the-border commerce in its various forms that have emerged in the last few decades.

Lexmercatoria as a set of principles governing a particular aspect of a multinational transaction serves the cause of harmonising world trade. Such set of principles would rarely be/ may or may not be a command of the sovereign. Yet at the same time, we see reliance on LexMercatoria in international commercial arbitrations.

RELEVANCE OF LEX MERCATORIA IN INTERNATIONAL COMMERCIAL DISPUTES AND ARBITRATIONS

Transnational commerce gives rise to disputes which cannot be resolved effectively by the application of domestic laws. In such cases, the parties to the dispute have certain options under transnational laws available to them. The parties may unanimously agree to resolve their disputes under a codified transnational law, or incorporate the transnational legal principles into a contract by way of reference or make use of model contracts².

At times, the parties to a dispute do not choose a law at all under which to resolve the issues between them. In such situations, the arbitrator is left to decide between choosing an appropriate law or merely “rules of law”, which can be practicably applied without prejudicing either of the parties. “The choice of arbitration may affect the substantive rights of the parties,

¹Mustill, ‘The New LexMercatoria: The First Twenty-Five years’ (1988) 4 Arbitration International 86 at 109

²Horn, Norbert “The Use of Transnational Law in the Contract Law of International Trade and Finance” page 68 - The Practice of Transnational Law © 2001 (edited by Berger K.P.)

giving the arbitrators the right to act as *amiablescompositeurs*, apply broad equitable considerations, even a *lexmercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.”¹

In the case of **NUCOR CORP. V. U.S.**², the US Tax Court had to inter alia determine the time when the title to the goods passed on to the buyer. The Court observed that “...*under generally accepted principles of commercial law (reflected domestically in, inter alia, the Uniform Commercial Code, as well as in international lexmercatoria), in the absence of an express agreement between the parties as to when title passes, title to goods transfers when the seller completes performance with respect to the physical delivery of the goods.*” The reliance or, to put it more safely, the reference to *lexmercatoria* in the aforesaid decision shows the changing attitude of the Courts towards the concept of transnational law in a positive manner.

In a vague but slowly and positively developing sense of things, the Courts, besides the Arbitral Tribunals have taken a resort to *LexMercatoria* in determining the rights and liabilities of parties, which is an essential characteristic of any law.

ARGUMENTS IN FAVOUR OF LEX MERCATORIA BEING A LAW

In order to qualify as a law, a set of rules must bear certain characteristics- these are completeness, structured character, ability to evolve and predictability.³

Lexmercatoria offers a solution that does not emphasise on reliance of a particular national law, a solution that can address the issues from a truly international perspective, keeping the nature of transactions in mind. Since it adopts an analytical and step by step approach to the “general principles of law, a solution can always be found to any given legal issue raised by the party.”⁴

¹[2007] I.L.Pr. 20 *West Tankers Inc v. RasRiunioneAdriatica di SicurtaSpA and Others* Before the English House of Lords

²612 F.Supp.2d 1264

³*Supra*, at page 59

⁴*Supra* at page 60.

As for structured character of a legal system, there are established canons that constitute the foundation of a law/ legislation or legal system. This is attributable only to a legal system but not to “rules of law”¹.

As an example, the manner in which, the UNIDROIT Principles of International Commercial Contracts (UPICC)

1. liberalise the common law concept of acceptance (Article 2.1.11)
2. harmonise the incorporation of additional terms into a contract in so far as they do not alter the contract materially (Article 2.1.12); and
3. permit material contractual terms to be left open even at the time of conclusion of a contract (Article 2.1.14);

illustrate the binding force which the UPICC seeks to have over the contracting parties.

LAW AND LEX MERCATORIA AS AN EVOLVING CONCEPT

The turn of the 20th century, especially after the Second World War, saw the rise of a new world order in respect of promotion of world trade. What was more of international state trading gave rise to international corporate trading. Carriage of goods by sea witnessed a hitherto unprecedented rise and consequently, a demand for a novel legal system since all the challenges posed by transnational trade could not be settled by application of purely domestic laws. The domestic laws therefore responded by establishing rules of private international laws and ratifying international treaties.

Transnational rules such as UPICC, which are heavily relied upon in International arbitrations reflect the ideologies of common law as well as departures from it.

Since LexMercatoria derives substantially from the general legal principles of domestic legal systems, it is quite natural to witness acclimatisation to the changes brought about in the domestic laws and commercial usages. “The hybrid nature of arbitration and the procedural

¹Gillard says in the article referred to in footnote No. 1 above that the ‘structured character’ is absent from “rules of law”. He identifies these canons in the forms of principles of “binding force of contracts, good faith or need to protect certain important values or fundamental rights which, taken together, form the public policy of that legal system.”

lexmercatoria, which, being non-national, provides the mechanism to evolve with changing needs of international business.”¹

CONCLUSION

In summing up the submissions made in the above essay based on the references relied upon, it may be said that LexMercatoria draws significantly from various sources of law and keeps changing with times as changes are made or happen to domestic laws. By complementing to the needs of parties to a dispute, it assists the Arbitrators and in some latest instances, the Courts in arriving at a meaningful decision, where domestic law might not have served the purpose appropriately.

It would be unsafe to bluntly conclude LexMercatoria as a law, given the fact that the concept is relatively new and continues to be pitted against the annals of commercial jurisprudence. Nevertheless, the reliance attributed to it by the Arbitrators, besides its shades of completeness, structure and evolutionary characteristics give it the colour and to a great extent the characteristics of a law, rather than a mere set of rules.

¹Cher Seat Devey, "Electronic Discovery/Disclosure: From Litigation to International Commercial Arbitration" (2008) 74 Arbitration 369, 381 as cited in Greer, Joel "Practical Considerations Regarding Certain Aspects Of Electronic Discovery" Int. A.L.R. 2009, 12(2), 11



Emerging Markets:

A Review of Business and Legal Issues

