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Recent Trends in Regulatory Design – Stakeholder Engagement in Regulatory Impact Assessment

Abstract

RESEARCH OBJECTIVE: Justification of stakeholder engagement as a possible pillar of efficient regulatory governance

THE RESEARCH PROBLEM AND METHODS: To visualize the significance of stakeholder engagement to regulation, the OECD data on stakeholder engagement are interpreted. Then, the case studies of the stakeholder engagement within regulatory impact assessment procedures in the European Union, Korea and the United Kingdom are highlighted. The methodology is based on the comparative analysis of the OECD secondary data and case study comparative analysis.

THE PROCESS OF ARGUMENTATION: Starting from a view of regulatory policy as the realization of policy goals with regulation, law, and other instruments through which a higher standard of living of the population can be achieved. Concluding with the reasoning that stakeholder engagement is a crucial component of a check-and-balance mechanism in regulatory governance.

RESEARCH RESULTS: The stakeholder-engagement-driven three-layer division covers: Policy-driven layer (strategy) determined by the contemporary challenges stemmed from emancipation of association consciousness and movements and ICT revolution; Administration-driven layer (operationalization) determined by effectiveness and efficiency as well as public service imperatives;

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Governance-driven layer serving as the exponent of varieties of conflicting and complementing ideas and interest of social groups, check and balance in the process of monitoring, legitimization and accountability of regulators while wide-spreading the essential public services.

CONCLUSIONS, INNOVATIONS, AND RECOMMENDATIONS: Stakeholder engagement as a crucial part of regulatory impact assessment has been the pivotal element of the systemic adjustments reaching out to the behavioral adaptations, and to the institutionalization of evidence-based policy making.

KEYWORDS:

stakeholders' engagement, regulatory impact assessment, regulatory trends

1. INTRODUCTION

Significant increase of data flow caused by ease of access to information, development of new services and applications together with increasing complexity of the markets challenge the traditional process of regulation and call for rethinking of the existing approach to regulation of an economy.

Regulators face such goal conflicts as between investment and competition and between very high-risk investment and universal service. And there are always regulators to match the appropriate mix of the policies calibrating high-price-inducing concentration allowing to make high-cost investment profitable (Genakos et al., 2018, pp. 45–100)², as well as securing such policy objectives as customers rights to access to the high quality through more regulation. The incentives transmitted by regulation of pricing, cross- and direct subsidies, or entry activate only if appropriate regulatory governance has been implemented (Menard, Shirley, 2008). Regulatory governance represents the constraint mechanisms used to hinder regulatory discretion

² And, as regarding such research evidence as provided by Genakos et al. highlight the positive impact of market concentration in the mobile telecommunications industry on prices and investment per operator (more concentration on the market cause the increase of individual bill by more than 16% and the investment per operator by over 19%).

as well as enable to find the solution for the goal conflicts that may arise in relation to the hindrance (Levy, Spiller, 1994, pp. 201–246).

The paper aims to justify and unfold the position of stakeholders in the process of regulating economy.

2. REGULATORY GOVERNANCE – ADJUSTMENT OF REGULATORY DESIGN

2.1. Retrospect outline

Governance as the very objective of government and its administration has been the subject of multitude research debates at least since the beginning of the last century. Firstly, as a politics and administration dichotomy, then as a science of administration ruled by principles, and then as political science with its politics and democracy implications, and as an efficiency-driven, and business-like set of operations, and as the emulation of the sense of distinctiveness – “*public administrationists*” (Henry, 1975), and from the 1990s, as multi-faceted approach of governance encompassing public, private and civil collaboration, networking, participation, and stakeholder matrix.

Recognition of the importance of the stakeholder engagement as the essence of recent governance approach to public regulation is the reaction to the excesses of heavily centralistic, as well as new-public-management approaches. In the evolutionary context, it appears as the moderation of bureaucratic exaggeration in resource wastefulness by prescriptive government, and endeavors toward cost reduction and efficiency increases delivered by market-driven governance. Although the governance of the new type of paradigm of public administration pays tribute to the efficiency prerequisite, its principal justification goes to accepting the immense capacity of civil society networks in enhancing its self-governance in respect to law- and regulation-making, as well as policy formulation (impact assessment instrument for example) and functioning (ex post evaluation). Equal attention is here forwarded toward the Public Value management (Moore, 1995) type of governance, meaning that such values as justice, broadened participation and representation are

not less relevant than efficiency of performance. The coordinative function of governmental administration is not belittled here. It is, however, reconfigured toward the non-governmental actors' participation. Their embeddedness in networks and societal organization³ and their capacity in enriching the processes of producing and delivering public-good-sort of service make them not just consultants but co-creators of central decision-making products. What makes this participatory approach particularly promising and challenging, at the same time, is that the boundaries of responsibilities are not explicit, power inter-dependence is prevalent, and autonomy stemmed from self-governing is critical.

Paradigm of public administration focused on governance is a result of the evolutionary probes to merge the positive potential derivable out of the activity of civil society constrained by judicial oversight (Tocqueville, 1976), and predictability and reliability of Weber's central state administration (Weber, 2002).

The recent concept of Neo-Weberian State emerged unfolding the potential of governance by highlighting such imperatives of nowadays public administration as: more responsibility of the central, regional and local state as the main facilitator of solutions to many contemporary challenges (as responsive democracy, supported by tools for public consultation and representation of citizens' interests and opinions), increased role played by civil servants, more emphasis on efficient service to citizens, the perception of administrative law as a guarantor of fundamental rights and principles of cooperation between the state and the citizen, cultivating the idea of public service with its own status, culture and operating conditions, reorientation from an inward-looking approach of bureaucratic rules to an outward-looking approach prioritizing citizens' needs, increasing role of *ex-post* control in achieving results (Torfing, Andersen, Greve, Klausen, 2020, pp. 74–88; Pollitt, Bouckaert, 2004).

The institutional and administrative innovations were perceived as instruments that could make society's competitive interests more satisfied. The operationalization of the innovations that obviously

3 Networks and/or partnerships of non-government organizations, local communities, regional organizations, private companies, governmental units or levels.

triggers the emergence and/or alteration of relationships, networks, institutional and organizational structures, pictures the evolutionary processes in the administrative sphere of the state even more explicitly. Parallely, the investigation of the processes has revealed the institutional, operational as well as political constraints. And the constraints have been redefining not just the evolutionary process itself, but also reconstructing its factors of impact. Therefore, the immanent features of public sector in the evolutionary process of improvement can act both as stimulating and dissimulating (Kettel, 2015, p. 16).

2.2. Insights into the regulatory governance based on participation

Considering regulatory impact assessment as a developing regulation-making innovation in the times of increasingly complex and dynamic societies, as well as the competitive fight for power, legitimacy and trust is what constitutes governance challenge of our time. Active civic society embedded in its tradition-driven responsibility and intrinsic socio-political virtues is the vital requisite of the social order formation as much as is state administrative apparatus, both with the latent ability to act as drivers as well as impediments.

Etymological basis of the word *governance* provides with its meaning as the manner of steering, governing, directing, controlling a group of people or a state. The point of departure in governance is concentration on stakeholders as groups of society representing competing interests in regulatory-making process (pressure groups).

Relying on Mancur Olson's presumption, pressure-potent groups composed out of arrays of societal interests are mainly economic-interest-driven and composed of self-interest driven agents. Following Earl Latham's assertion that "(...) the structure of society is associational", that "Groups are basic (...)", and that "What is true of society is true of the ... economic community" (Latham, 1952, p. 10) warrants the perception of society as an important ingredient of the analysis on regulatory nature.

Vincent Ostrom underlined "the flexibility that public authorities need in order to deliver public services to the relevant publics in an

efficient manner” (Cole, McGinnis, 2015, p. 267). He emphasized the fundamental aspects of community relations (not the specific levers of power that public administrator can manipulate most easily). Polycentricity as a central issue of Vincent Ostrom’s investigations focused on “delicate balancing act between strategic entrepreneurship and emergent dynamics and weaves an ever-changing web of cooperation and competition among its many components parts” (McGinnis, Ostrom, 2011, p. 15–16).

Olson’s confirmation of the counterbalancing power of pressure groups consecutively sets the grounds to support the influential nature of emerging participatory approach to governance and regulation. Pressure group attitudes analyzed by Olson are treated herein as stakeholders’ engagements in the process of law- and regulation-making. There are, however, significant rights attributed to the order-making/procedure-making role of the state or to any authoritarian entity with legitimate power.

2.3. Interest groups and good governance

The common interest of citizens is good governance, meant as effective and efficient governmental and non-governmental engagements to make people better-off – that is to sense more freedom and social security.

Pluralists appeal for more constitutional power for all kinds of private associations, as well as the limited control of the government over their plurality (Sunstein, 1985, pp. 32–33). The private associations put between two extremes – authoritarian state and anarchic *laissez-faire* individualism appear as “a cushion between the individual and the state (...)” in seeking of proper social order (Olson, 1971, p. 111).

In this spirit, the fundamentals of Commons reasoning are that it’s not free market mechanisms or the collective actions by government that would rise desired effects for the different groups of the economy, but less “disparity in the bargaining power of these different groups” and the strengthening of “pressure groups forced through the necessary reforms”. The reform is prerequisite for the potential of pressure group to be operationalized since the legislature are controlled by politicians and the mighty of this world (Ibidem).

Arthur F. Bentley having said that “when the groups are adequately stated, everything is stated”, pointed to the group interests as being basic for the sustainable social order. Since, as he claimed: “(J)ust as the idea of the individual interest was a fiction, so was the idea of the national interest” (Betley, 1949, pp. 263, 217–222, 271, 422, 443–444), “the existing state of society” is the resultant of the balance of group pressures and government is mere considered as “the adjustment or balance of interests” (Betley, 1949, pp. 258–259, 264).

David Truman complemented Arthur Betley’s by pointing that organized and effective group pressures emerge when necessary (a variant of the sociological theory of voluntary associations). Along with more specialization and social complexity, more associations are needed, as they are to satisfy the needs of society (Truman, 1951, pp. 23–33, 39–43, 52–56, 57). Truman’s approaching from another side, indicates that the “inescapable” increase in the number of associations will inevitably have its impact on government. The associations will acquire connections with the institutions of government whenever government is important to the groups in question (Truman, 1951, pp. 52, 55), what is especially evident in the economic sphere (Olson, 1971, p. 123).

3. STAKEHOLDER-ENGAGEMENT – DRIVEN REGULATORY GOVERNANCE

3.1. Methodology

To visualize the significance of stakeholder engagement to regulation, the OECD data on stakeholder engagement are interpreted. The data shed some light on the stakeholder engagement function in regulatory governance as advocated in *the 2012 Recommendation of the OECD Council on Regulatory Policy and Governance and Reviewing the Stock of Regulation* (2020). Then, the case studies of the stakeholder engagement within regulatory impact assessment procedures in the European Union, Korea and the United Kingdom are highlighted.

The analytical scheme highlights the notion of regulatory policy as a background and exposes the three-layer analysis.

Starting from a view of regulatory policy as the realization of policy goals with regulation, law, and other instruments through which a higher standard of living of the population can be achieved, the importance of stakeholder engagement in the processes of policy making, regulation, or law as tools for raising welfare is pointed out. Stakeholder engagement is an important component of a check-and-balance mechanism in regulatory governance. The stakeholder-engagement-driven three-layer division covers:

Policy-driven layer (strategy) determined by the contemporary challenges stemmed from emancipation of societal / association consciousness and movements and ICT revolution;

Administration-driven layer (operationalization) determined by effectiveness and efficiency as well as public service imperatives;

Governance-driven layer (fine tuning) serving as the exponent of varieties of conflicting and complementing ideas and interest of social groups, check and balance in the process of monitoring, legitimation and accountability of regulators while wide-spreading the essential public services.

The special focus of the paper is on the emerging regulatory trend in some of the most competitive world economies.

The research question indicates a search for justification of stakeholder engagement (the role of pressure groups, interest groups) as a possible pillar of efficient regulatory governance.

The hypothesis boils down to the statement that associations can have more and more to do with the regulatory frameworks of the state parallelly to the development of the systemic, more transparent, and participatory approach to regulation and policy making (Regulatory Impact Assessment). The methodology is based on the comparative analysis of the OECD secondary data and case study comparative analysis.

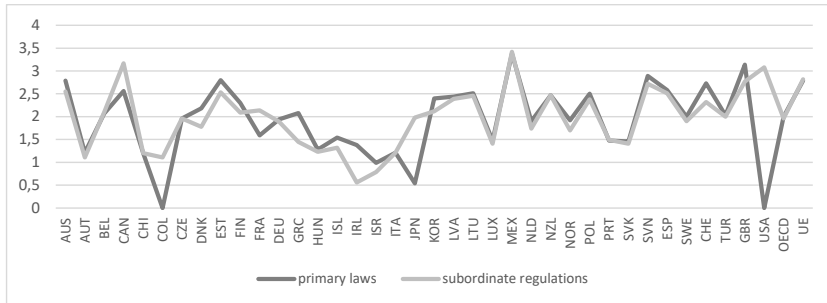
3.2. The outline of stakeholder engagement in the process of regulatory impact assessment in the world

The information crucial to decide if to regulate and/or how to regulate provided by RIA, support the regulatory decisions with the cost and benefits insights. RIA being “*a core regulatory management tool*” helps

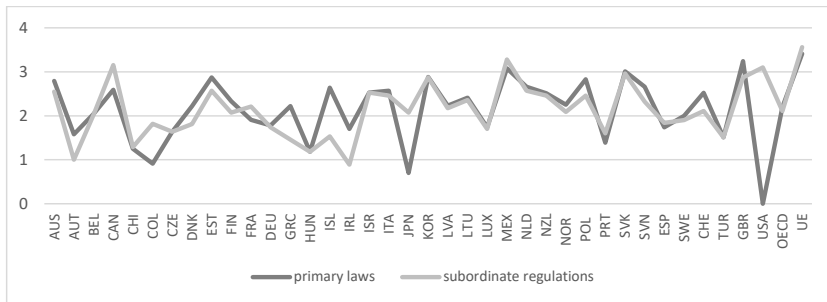
to ground the decision on evidence by considering all alternative solutions, delivering the knowledge on costs and benefits to stakeholders, analyzing impacts of potential solutions.

The maximum score for Regulatory Impact Assessment (RIA) as well as for Stakeholder Engagement is four.

Graph 1. Stakeholder engagement in developing new regulations, 2014



Graph 2. Stakeholder engagement in developing new regulations, 2017



Source: OECD.2019. Government at Glance. Regulatory Governance.

In terms of stakeholder engagement analyzed through its methodology existence, oversight, systemic adoption and transparency, the most active countries were:

- in 2014: Canada (3,17), Mexico (3,42), Great Britain (3,14), the United States (3,08),
- in 2017: Canada (3,15), Mexico (3,28), Great Britain (2,87 in subordinate law, 3,24 in primary law), the United States (3,1), the European Union (3,56 in subordinate regulations, 3,41 in primary laws), Korea (2,87 in subordinate law, 2,88 in primary law).

The cases of the Republic of Korea, Great Britain and the European Union are representative ones as they achieved in 2017 one of the highest levels of RIA indicator as well as stakeholder engagement indicator.

3.3. Korea, European Union, and United Kingdom case studies

Great Britain and the Republic of Korea are the economies in the first twenty of the most competitive countries (Global Competitiveness Report 2019)⁴ in the world as ranked within Global Competitiveness Index 4.0 by World Economic Forum. And the group of first twenty the most competitive economies comprise 7 EU-members (Global Competitiveness Report 2019).

The presentation of all the three jurisdictions concentrates on the main bodies, key activities, and current operations.

The Republic of Korea

The main bodies working to engage stakeholders in regulatory processes are: Regulatory Reform Committee (RRC), Regulatory Reform Office (RRO), the research centers Korea Development Institute and the Korea Institute of Public Administration, e-Legislation Center, Regulatory Information Portal. All the entities engaged in the regulatory assessment process contribute to the quality of the tool and ultimately to the final regulation⁵.

Key actions being taken within greater stakeholder involvement in regulatory processes include: the Public-Private Joint Regulation

4 "National competitiveness defined as the set of institutions, policies and factors that determine the level of productivity".

5 They review regulatory proposal from central administrative agencies by monitoring evaluation and stakeholder engagement processes, administer, oversight, and steer the operations by administrative agencies, support impact analysis, guide, train, conduct evaluations, inform the public in advance of upcoming consultations, and publish feedback on comments made by regulatory agencies.

Advancement Initiative (embedded within RRO's duties and additionally led by non-government organizations) that regularly consults with stakeholders; petition system "Regulatory Reform Sinmungo", designed to alert the government against unnecessary burdens on businesses and citizens; rule "Cost-in, Cost-out" to maintain the stable level of total cost of regulation.

Korea has significantly improved its regulatory policy system in recent years. *Ex-post* evaluation is mandatory for all regulations drafted by the executive, and central ministries are required to outline a planned evaluation plan under each RIA. Korea is making efforts to systematically put this approach into practice. RIAs are conducted for all lower-level (subordinate) regulations in Korea and for primary laws initiated by the executive. To improve the quality of RIAs and reduce the burden of preparing RIA statements, e-RIA was launched in May 2015, providing public officials with the data necessary for cost-benefit analysis. Consultation is carried out for all regulations initiated by the executive branch, and recent efforts are aimed at increasing the transparency of consultation processes. The e-Legislation Center and the Regulatory Information Portal, launched in 2016, inform the public in advance of upcoming consultations, and regulators are required to provide feedback on comments submitted through these portals. The RIA and stakeholder engagement metrics presented for primary laws only include processes led by the executive branch, which initiates about 13% of primary laws in Korea.

Great Britain

The main bodies working to engage stakeholders in regulatory processes are the Regulatory Policy Committee (RPC), the Better Regulation Executive (BRE), the National Audit Office (NAO). The institutional setup in Great Britain is characterized by independent scrutiny of evidence information provided toward building regulatory proposals within RIA system (RPC), but also by the focus on framing changes in regulatory policy (BRE in the Department for Business, Energy and Industrial Strategy), and by the permanent monitoring the effectiveness of the regulatory policy frameworks as a whole, including the conduct of value-for-money analysis, as well

as identifying the areas of policy where the regulation is deemed to be even more effective (NAO).

Key actions being taken within greater stakeholder involvement in regulatory processes include Business Impact Target and Cutting Red Tape programs to lower regulatory costs for business in relation to all regulations in Great Britain.

The UK is investing in the regulatory policy regime, with particular concern for the impact of regulation on business competitiveness. UK government departments regularly conduct *ex-post* reviews, particularly for all measures affecting business following the introduction of the Small Business, Enterprise and Employment Act in 2015. Consultations are being carried out for all regulations in the UK. The Cabinet Office is adapting sets of consultation rules. Examples of innovative approaches to strengthening the regulatory process through the use of RIAs, both as a tool and as a process, such as for example using a 'dialogue app' as an additional form of support to engage stakeholders on modern employment practices. Preliminary and final impact assessments incorporating stakeholder comments are conducted for all regulations except for deregulatory and low-cost acts that qualify for fast-track procedures. Initial review notices have recently been introduced to alert regulators at an early stage if there are concerns about the quality of the RIA to allow sufficient time for improvement.

The European Union

The main bodies working to engage stakeholders in regulatory processes are the European Commission⁶, with its Secretariat General to oversee Better Regulation (providing capacity support, recommending system improvements); the Regulatory Scrutiny Board

6 Preparing since 2015 preliminary impact assessments with alternative regulatory approaches consulted for 4 weeks, followed by a full impact assessment; after the initial feedback period a 12-week public consultation is carried out; after publishing the legislative proposal with the full impact assessment on the internet it waits for 8 weeks for the Commissioners to approve the proposal, and then those pieces of legislation subject to public consultation are consulted for 4 weeks.

with Secretariat General serving also for the entity (monitoring the quality of all RIA and major evaluations); the European Parliament's Directorate for Impact Assessment (reviewing RIA attached to draft legislation, conducting more insightful analysis as well as providing RIA for amendments at the request of EP committees); the European Court of Auditors (audits of regulatory management system concerning the results of its performance).

Key actions being taken within greater stakeholder involvement in regulatory processes include Call for Evidence on Have Your Say portal, a "one in, one out" approach⁷, the Fit for Future Platform⁸, the Have Your Say: Simplify portal⁹, the Regulatory Fitness and Performance (REFIT) programme¹⁰, Annual Burden Survey and REFIT scoreboard¹¹, the Joint Legislative Portal¹².

Better Regulation Package of 2015 (by the EC) made important changes to its Better Regulation policy, refined in 2017. *Ex ante* impact assessments continue to be carried out for key pieces of primary legislation and subordinate legislation. The *ex post* evaluation system (systematic evaluations of individual regulations, comprehensive "Fitness checks" of policy sectors) has been improved by allowing comments on evaluation schedules for 4 weeks and on the main elements of all evaluations for 12 weeks.

7 Offsetting regulatory burdens by removing costs while introducing new ones in the same policy area especially for small and medium enterprises.

8 A high-level expert group (member states, the committee of the Regions, the European Economic and Social Committee, stakeholders representing business and non-governmental organizations).

9 Gathering suggestions on the annual work programme for the simplification of existing EU law by making suggestions for simplification and review of EU legislation by the representatives of the EC, member states, stakeholders from outside of the government.

10 Encompass the activities seeking to identify opportunities to simplify the existing law and reduce the costs of regulation.

11 Dedicated to monitor the effects of activities of simplification and reducing red type.

12 An instrument to help to catalogue and make easier to find all the evidence underpinning a given initiative.

4. POLICY-, ADMINISTRATION-, AND GOVERNANCE – INDUCED ADJUSTMENTS OF REGULATORY FRAMEWORKS

The conclusion drawn from the comparative analysis are included in the Table 1.

Table 1. Summary of case study comparative analysis

Rationale for introducing stakeholder engagement	South Korea	United Kingdom	European Union
Policy-driven layer			
more transparency of consultation processes	e-RIA; e-Legislation Center; Regulatory Information Portal	independence of Regulatory Policy Committee; "dialogue app"; National Audit Office	Call for Evidence on Have Your Say portal; Joint Legislative Portal
Administration-driven layer			
less cost of regulation	Regulatory Reform Sinnungo; Cost-in, Cost-out; e-RIA	Business Impact Target; Cutting Red Type	One-in, One-out, REFIT program and scoreboard
Governance-driven layer			
better quality regulation	a set of strong institutions including research centers that monitor cost-effectiveness and streamlining consultation of regulatory ideas with stakeholders in a systemic mode, especially within Public-Private Joint Regulation Advancement Initiative	strong institutional set up with the particular emphasis on the independence playing a role	the Joint Legislative Portal; Regulatory Scrutiny Board

Source: own elaboration on the basis on OECD data and information

The most pressing problems of contemporary society resonate more, highlighting the issue of transparency of public decision and law making as a core of political challenge. E-RIA, e-Legislation Center,

Regulatory Information Portal in South Korea, independence of Regulatory Policy Committee, “dialogue app”, National Audit Office in the United Kingdom, or Call for Evidence on Have Your Say portal, Joint Legislative Portal in the EU regulatory administration open up the process of public being a part of a regulatory domain. The most short-term effect of modifications in the regulatory decision-making process is the reduction of costs of implementing regulations. These savings can be manifested not only in greater efficiency and lower costs of proceedings aimed at adopting new regulations or adjusting existing ones, but also in lower compliance costs resulting from greater respect to the introduced regulations. Involving citizens, businesses, and stakeholders in the decision-making process can lead to lower compliance costs through better quality of laws and policies. Publicly disclosing draft regulations and allowing for proposals of modifications not only creates significant potential for shaping policies and laws that are more consistent with public preferences and increase responsiveness of the recipients of the introduced norms, but also gives the regulatory system a check-and-balance property. The introduced regulations produce better effects as the system remains more open to a wider range of interests, potentially decreasing the dominance of the strongest pressure groups, contributing to a greater democratization of the public decision-making process, or enabling mutual control and counteractions of various interest groups.

5. CONCLUSION

More transparent, less costly, and more institutionalized and systemic (policy, administration, governance) development of making the regulation is focused on the RIA as a tool and a process. RIA has been embedded as a promising instrument to manage the regulatory process. The core driver of the assessing the draft law by interested parties was the advancement and popularization of electronic tools of distance communication. Stakeholder engagement as a crucial part of regulatory impact assessment has been the pivotal element of the systemic adjustments reaching out to the behavioral adaptations. The e-RIA procedure in Korea is estimated to have contributed to the “behavioral change” observed in government officials in

policy design and development, but also to the institutionalization of evidence-based policy making (OECD, 2017, p. 87).

Justification of stakeholder engagement within RIA arrangements based on its contributing to lower cost of (introducing) regulation, reduced compliance costs, lowered cost of respecting regulation, higher responsiveness of the addressees of the regulation within the framework of the created policies, and the check-and-balance properties of regulatory system unfolds substantial role of the stakeholders to the development of the systemic, more transparent, and participatory approach to regulation and policy making.

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