

**Waldemar Hoff, *Prawny model regulacji sektorowej*  
[*The Legal Model of Sector-specific Regulation*],  
Difin, Warszawa 2008, 302 p.**

The book under review here deals with one of the most dynamically developing forms of state interventionism – sector-specific regulation. Regulation has been the subject matter of many important and highly scientific works. However, most of them treat it, especially regulation for competition, as a transitory phenomenon. In the opinion of Hoff, the transitory nature of regulation is only hypothetical. Viewing regulation as a form of an imperious influence of the state on the economy, the author claims that there are no significant indicators suggesting the abandonment of regulation. Moreover, drawing attention to the fact that restrictions to competition remerge in new forms, Hoff declares that regulation will become a permanent part of a legal order.

Hoff's book is one of the first publications to primarily deal with the political position of public authorities responsible for the regulation of the telecoms and energy sectors. Special attention is paid to the supposition that the Polish regulatory model is not consistent with EU requirements. The main reason for this discrepancy is found in recent amendments of Polish political laws. The author describes and analyses those legislative changes as they ultimately led to a considerable weakening of the position of the President of the Office of Electronic Communications (UKE) and the President of the Energy Regulatory Office (URE). An interesting and well structured discussion shows the gradual development of the political position of these regulators. Hoff concludes that the weakening of the position of the UKE President and URE Chairman was caused by the fact that their independence was restricted, due to change in political norms, rather than by the limitation of their regulatory competences.

In the first chapter, Hoff conceptualizes the idea of sector-specific regulation. He describes the development of regulation both in the US and EU, paying close attention to earlier regulation of mid-19<sup>th</sup> century Britain. One has to agree with the author that "The concept of regulation should be sought in Community law and its execution in national laws". Indeed, regulation is – similarly to competition protection – an institution simultaneously governed by EU and national legal regimes. Hoff rightly divides regulation for competition from regulation for social obligations, a separation supported by literature. His comments on the distinction between regulation and administration are also valuable.

Hoff notes that regulatory authorities apply the law (i.e. make regulatory decisions) in a different way to the traditional model of public administration because of the considerable scope of discretionary powers which they hold. Significant discretion is justified here by the complexity and variability of the market situations faced by regulators. Acknowledging that sector-specific regulation is characterized by the fact that regulators are given administrative discretion (even though it is never totally free), Hoff explains the latter concept on the basis of the Polish and other EU countries' doctrine. While administrative discretion represents one of the basic concepts of the theory of administrative law, the author's analysis confirms that this notion has not been satisfactorily clarified yet. However, his conclusion, which approves of a "[b]road understanding of discretion which includes all its specific forms, i.e. the conscious legislative policy, interpretative leeway and legislative errors", is not fully convincing. It blurs existing precise views concerning, in particular, the relationship between administrative discretion and factual assessment. The question remains also of whether it is possible to perceive legislative errors as a form of administrative discretion seeing as this would make the concept of administrative discretion lose its operability – it becomes everything and thus nothing.

In the second chapter, the supposition is stressed that regulators have been given considerable discretion and the sources of its restrictions analysed. Hoff perceives regulatory discretion as the first of the two elements indicating *differentia specifica* of sector-specific regulation. He presents in detail the specific factors restricting the discretionary powers of the UKE Presidents and URE Chairman within their respective *ex ante* activities. Considering *ex ante* activities to be a feature of regulatory discretion, he pays special attention to the fact that regulators are obliged to observe the procedure of imposing regulatory obligations specified by EU law as well as relevant guidelines and recommendations of the European Commission. Regulatory authorities are also said to be bound by: the goals and general principles of regulation; agreements concluded between the regulators of EU Member States; the opinions of antitrust authorities; results of consultation processes (if there are bound by a legal duty to hold them) and; a restrictive interpretation of the law.

When analyzing the sources of the restriction of administrative discretion of regulators, Hoff discusses numerous interesting issues such as the binding force of the acts issued by EU institutions (in particular EU soft law, that is, guidelines and recommendations issued by the Commission) and their relationship to Polish legal sources. Taking into account the terminology of the types of legal acts listed in the EC Treaty, Hoff argues that not all Commission recommendations are in fact "recommendations" as stated in Article 249 TEC. Furthermore, he correctly notices the difference between the administrative discretion given to the UKE President and that given to the URE Chairman seeing as it reflects the difference between the concept of "regulated activities" in the telecoms sector and "licensed activities" in the energy sector. Finally, he indicates that the discretion given to regulators is restricted by the scope of the so-called "extraordinary measures" where regulatory obligations, other than those listed in sector-specific directives, are imposed.

In spite of the fact that regulatory discretion in national law is determined by the concept of discretion adopted in EU secondary legislation, the actual scope of discretionary powers of the UKE Presidents and URE Chairman is based on national laws. Focusing on the problem of imposing regulatory obligations in the telecoms sector, Hoff correctly notices that, controversially, Polish law solves this issue differently than the EU legal regime. While the latter orders regulatory obligation to be imposed in specific market situation, Polish law merely authorizes to do so. Hoff compares also the rules affecting the energy sector with those relating to telecoms. On this basis, he points out that the URE President – within the boundaries of his/her discretion – is not bound as strongly by the obligation to analyze the competitiveness of the energy sector as is the case with the UKE President in the telecoms sector.

The last but not least issue considered by Hoff in the second chapter is the issue of sectorial policy. The author raises a question of whether sectorial policy may be considered a source of generally binding law and whether it may be seen as a source of restriction on regulatory discretion. In spite of the statement that the Polish legislator in fact aimed to make sectorial policies binding, the author convincingly emphasizes arguments which speak again the classification of energy or telecoms policy (called “the regulation policy” in the Polish Telecommunications Act) as a source of generally binding law.

According to Hoff, the independence of regulatory authorities constitutes the second element of *differentia specifica* of sector-specific regulation. Regulatory independence and its determinants are analyzed in the third chapter. The assessment is enriched with a presentation of regulatory models applied in other Member States, increasing not only the theoretical but also practical value of this book. One of the most important problems discussed by Hoff in this context is the question of whether Poland has actually fulfilled the EU demand for regulatory independence? The author considers here: 1) the position of the regulator among other authorities of public administration; 2) the appointment and dismissal procedure of the regulator; 3) the principle of tenure; 4) the structure of the regulatory offices; 5) its financial independence and; 6) the functioning of independent advisory bodies associated with the regulator. Hoff analyses all of these factors in great detail, confronting the independence of regulators stressed in EU legislation and case-law with the level of regulatory independence set out in the Polish legal system.

Hoff’s opening observation is particularly remarkable. He emphasises that the very qualification of Polish regulators as a central authority of government administration “cannot be reconciled with the dictate of independence.” Their independence is additionally said to be undermined by: the departure from the principle of tenure; the fact that head of a regulator has no influence over the appointment of his/her deputies and only limited influence over the functioning of the regulatory office; the politisation of civil servants; the rules on the remuneration of the employees of regulatory offices and; the elimination of advisory bodies attached to regulatory authorities. Among the numerous important conclusions drawn by Hoff, special attention should be paid to the finding that the departure from the principle of tenure not only indicates the

weakening of the regulators' independence but also the decline of independent sector-specific regulation in Poland.

Within the assessment of the independence of regulatory authorities, Hoff carries out a detailed analysis of Polish political laws. On the one hand, he emphasises that political law states that regulators hold the position of central authorities of government administration and thus **are supervised** by supreme authorities of government administration. On the other hand however, the provisions of the political system provide that central authorities of government administration **are subordinate** to supreme authorities of government administration. The additional lack of a uniform doctrinal stand concerning the concepts of supervision, direction, control and subordination found by Hoff, leads him to the conclusion that central authorities of government administration **are in fact dependent** on supreme authorities of government administration. Therefore, in the closing pages of the third chapter, he formulates a demand to treat regulators as a separate category of authorities within the Polish political system. In his opinion, they should hold a unique position alongside central and supreme authorities of government administration. In order to emphasize the significance of regulators, he states that their position should be regulated by constitutional norms. Hoff's discussion concerning the independence of regulators should be given special attention. In his opinion, regulatory independence belongs – together with regulatory discretion – to the most important structural elements of the legal model of sector-specific regulation.

In the fourth chapter, Hoff focuses the reader's attention on EU regulatory instruments and the legal forms in which Polish regulator operate. However, these forms, unlike regulatory discretion and independence, do not constitute a *differentia specifica* of sector-specific regulation. Hoff's analysis of the forms in which regulators exercise their imperious influence over the economy does not reveal any particularities. Polish regulators are said to make use of typical forms of operation provided by administrative law. However, the author does point out that it is possible that unique forms of operation of regulatory authorities will develop in the future. Both in the telecoms and energy sector, regulators issue strictly regulatory decisions (that depend on the level of the competitiveness of the market) and typical administrative decisions. They also make use of different auxiliary activities. It's worth stressing that Hoff does not include normative acts relating to regulated sectors in the list of forms of operation of regulators because he does not consider government ministers (competent in the matters of telecoms or the energy sector) to be regulatory authorities.

In the fifth, chapter, Hoff summarises his earlier considerations concerning the model of sector-specific regulation with its two basic elements: the way of authorizing the regulatory authority to act (regulatory discretion) and the independence of the regulator. On this basis, he presents some *de lege ferenda* demands concerning primarily political changes to the position of regulators which would strengthen their currently restricted independence. In particular, Hoff explicitly advocates the constitutionalization of regulatory authorities.

The reviewed work is very valuable and useful to the reader, enriching the achievements of Polish administrative law in the context of sector-specific regulation.

The author creatively constructs an analytical model of sector-specific regulation in line with EU imperatives. At the same time, his work adds many valuable points to the discussion of the independence of regulatory authorities in Poland. These observations are especially important in light of the reservations concerning the independence of the UKE President expressed by the European Commission. They are also relevant in the context of the reform of the model of the organization and cooperation of national regulators prepared by the EU.

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