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Evidence-based Standard for Business Regulation¹

Impact assessment and regulatory policy in Russia

Regulatory Impact Assessment has now become one of the most rapidly developing mechanisms of public administration in Russia. A decade of leisurely discussions by officials and experts was followed by 6 years of RIA strengthening: mainly at the central level (executive power, partly - the Central Bank and the Parliament of the Russian Federation). In the meantime, the use of RIA has expanded to the sub-national and municipal level, as well as to the supranational (Commission of the Eurasian Economic Union, where Russian Federation is the most powerful economy). Moreover,¹ there are de facto no “best practices” of the OECD countries left (from regulatory sandboxes to ex-post evaluation of legislation and nudge) that have not been discussed in Russia by experts and officials.

For analytical purposes, the process of advocating, introduction and implementation of RIA in Russia can be divided into three stages:

Stage 1 (May 2000 – December 2009) began under the sign of the “liberal project” of the first presidential term of Vladimir Putin. New public management laid the conceptual basis of public administration reforms. Performance-based budgeting, targeted program management, agencification, privatization and outsourcing of government functions, private-public partnership, and e-government came to Russia with this “first wave”. Firstly, RIA was inconspicuous part of the policy to reduce administrative burdens and the use of financial feasibility studies of draft laws, but since 2007, with the beginning of the “second wave” of administrative reform, RIA along with anti-corruption expertise and open data, has been viewed as a new mechanism for interaction between business and government aimed at balancing economic decisions. The resistance of the Government’s Executive Office did not allow RIA integrating into the rulemaking procedures, but over these years

¹ This paper for 7th Biennial Conference “Regulation between Effectiveness and Legitimacy” (University of Lausanne, Switzerland, 4-6. July 2018; Panel session 6.5: The role of stakeholders in regulatory governance) contains materials partly collected during the research work of the Center for Fundamental Research of the Higher School of Economics (Moscow) on the topic " Proposals’ elaboration on development’s direction of the regulatory environment and regulatory mechanisms" (2018).

a huge expert capacity has been accumulated in Russia and some ideas have already been tested both at the regional level and in selected industries (for example, in the electric power industry).

Stage 2 (January 2010 – June 2013) is a period of rapid formation of RIA mechanism and separate fragments of regulatory policy when the minimum necessary RIA elements were laid into the basis. The period is characterized by implementing de facto pilot procedures rather than RIA classic design of the OECD countries, as well as moderate expert support and retraining of officials, increasing and expanding contacts with international organizations – OECD and APEC. RIA procedures expanded broad and deep and during the preparation of the electoral program for Vladimir Putin’s third presidential term (the so-called “Strategy-2020” updating) the most advanced experience of smart regulation has being actively discussed (part of the material was reflected in the Executive Order of the President V. Putin of 7 May 2012 № 601 “On main directions of developing public administration system”). During 2012-13 the necessary coordination procedures within the Government Executive Office have been carried out in order to transfer RIA to the “early stage” (= OECD recommended classic mode) and gradually introduce it to the regional and municipal levels. At the same time, the period was characterized by advocating RIA mechanisms introduction into the work of the Eurasian Economic Commission, the Central Bank and the Parliament.

Stage 3 (since July 2013 – 2016) is defined by implementation of “RIA classic mode” at the federal level and virtually unlimited expansion of RIA procedures to all new areas, great number of new initiatives from better regulation portfolio. At the same time, the resistance of the bureaucracy has been growing – RIA procedure is being avoided, documents are emasculated and the introduction of smart regulation instruments is blocked where possible. Officials from federal RIA Department form a coalition with business associations but ignore the comments of the leading academic experts who participated in the administrative reform since 2003. As a result, RIA institute is experiencing ups and downs, but cannot become a tool for generating optimal economic decisions and reducing compliance costs for the regulation end-users. Moreover, the situation with regulatory outcomes in Russia has rather worsened. Regulation burden rises, regulatory acts aren’t evidence-based and don’t hit policy targets, but rather cause negative side-effects for business and citizens. During recent 10 years Russia has been in the bottom half of the

international rankings of regulatory policy quality (e.g.. Regulatory Quality Ranking of the World Bank², Economic Freedom Ranking of the World Fraser Institute³).

Dilemma “principal-agent”: new understanding?

The development of evidence-based regulation should also become a crucial direction of the regulatory policy development in the countries in transit. For that to happen, it is necessary to oblige the Government, in cooperation with the representatives of business community and leading expert organizations, to develop and implement a Standard of proof of the need to introduce regulation based on smart regulation approaches, and establish the mandatory proof of the need to introduce regulation, including proof of legal experiments success and the fact of non-deterioration of the conditions for doing business and investment activities, in accordance with this Standard.

The need to provide evidence for the introduction / amendment / prolongation of government regulation is caused by objective characteristics of participants of the decision-making process and the peculiarities of lawmaking process itself, including the likely opportunistic behavior of regulators and regulation end-users, which may manifest itself in an effort to maximize one's own interests (benefits) without proper consideration of the interests of other parties. In addition, government employees are subject to the so-called cognitive errors because of acting "quickly", "automatically", "unconsciously". The political objective of the Government is to reduce the number of cognitive errors, including "slowing the process down", making it a conscious, reliable, based on facts, quantitative models and arguments, and lowering implementation costs in the future. The implementation of this task is delegated to the principal body on regulatory policy (see below Box 1).

Box 1.

“We can also look at this emerging phenomenon of ‘judicial rationality awakening’ induced by IA from a behavioural research perspective (D. Kahneman, Thinking, Fast and Slow). According to the increasingly popular dual ‘cognitive system model’ of human behaviour, our cognition works with two competing systems. While System 1 operates automatically and quickly, with little cognitive efforts and no sense of voluntary control, System 2 is slower as it deliberates, ponders and calculates upon any course of action. As a result, while System 1 is driven by immediate feelings, intuitions and habits, System 2 is driven by deliberation, calculus and intentions.

² <http://info.worldbank.org/governance/wgi>

³ <https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2017-annual-report>

While we expect policymakers (and courts) to systematically operate through System 2, often – due to their human nature – they enact legislation on the basis of System 1. By paraphrasing Daniel Kahneman, the originator of this model, although System 2 believes itself to be in command of the policy process, the automatic System 1 is the real hero in policy making.

The evidence-based judicial reflex may somehow counter this phenomenon by enabling courts to provide a sort of System 2 check on the operations of System 1 by policymakers (and the judges themselves) during the adjudication process. In other words, this reflex seems potentially capable of preventing policymakers (and judges) from systematically switching from System 2, the rational component of their cognitive system, to System 1, the more intuitive dimension of their brain, when confronted to the most complex analysis.”⁴

Standard elaboration in Russia (2017-2018)

In the process of Standard elaboration, we have taken into account partly Better Regulation Guidelines of the European Commission (Box 2) and Standard on Evaluation for the Government of Canada (Box 3), as well as the approach reflected during the preparation of the UK Evaluation Society Guidelines for good practice in evaluation. This Guidelines review the evaluation process from the different perspectives of its main stakeholders - commissioners, practitioners and participants and helps establish good practice in the process of evaluation.⁵

According to proposed Standard, new norms can be introduced only after providing evidence that conditions for doing business and investment activities do not deteriorate or after proved success with legal experiments on such regulations.

We intend to push all three key actors of the regulatory assessment process - regulators, business, and the lead RIA unit - to interaction of somewhat like civil legal proceedings (with real evidence being provided by the parties) and refusal of administrative bargaining.

The Standard should contain requirements to the procedures (algorithms) of proof that are implemented in the process of justifying the need for introducing / amending / canceling / prolonging regulation. The Standard considers the fact that the parties involved in the process of regulation have conflicting interests and form different opinions during public consultations. The Standard formulates separate requirements for three main groups

⁴ See also: Alemanno, Alberto: Courts and regulatory impact assessment / Handbook of Regulatory Impact Assessment // ed. By Claire A. Dunlop, Claudio M. Radaelli. – 2016. p. 134.

⁵ <https://www.evaluation.org.uk/index.php/news-resources/ukes-publications/46-ukes-guidelines-for-good-practice-in-evaluation>

of participants: regulators, end-users, and the principal body for regulatory policy responsible for making final decisions.

Box 2. Evidence-based regulation - European Commission

The European Commission puts great emphasis on the proof of regulatory intervention need. Corresponding provisions are reflected in the Better Regulation Guidelines (Annex - Better Regulation “Toolbox”, section # 2 “Evidence-based Regulation”).⁶

The guide emphasizes that quality regulation should be based on the best available evidence, including scientific and expert evidence. It recommends applying foresight and other methods of forecasting at the preliminary stage of RIA for determining various alternatives and prospects for their implementation, analyzing developments of foresight organizations or consulting companies, using big data. To ensure data reliability and transparency of evidence, a detailed description of the methodology as well as data sources in the impact assessment reports is recommended, indicating the results of their verification and possible uncertainties. It is desirable to check the data sources using the “triangle” method - by two or more other sources.

During public consultations, it is necessary to ensure the adequacy and reliability of the methods used, and when analyzing the results, carefully describe and analyze the arguments of the participants, including opposite opinions, and reflect how the data from various sources reinforces one another or contradicts each other.

The Guide also provides links to sites containing reliable data sets for key regulatory areas.⁷

Box 3. Evidence-Based Regulation - Canada

Since 2009 Canada uses Standard on Evaluation for the Government of Canada, developed for departments to be used in the evaluation of programs under implementation. In 2016 this document was revised and included as an appendix to the new Directive on Results⁸. The Standard is designed to establish the minimum acceptable level of quality, neutrality and practical value of the assessment. It includes requirements for evaluation planning and organizing, evaluation of project implementation, and the provision of evaluation reporting. For example, according to the requirements of the Standard, the assessment should be planned with due consideration of the needs of its end users, as well as the risks and complexities associated with the analyzed area (program). Evidence base of the evaluation should include several sets of quantitative and qualitative data to support the conclusions drawn. Evaluation participants should be free from conflict of interest. Finally, the reporting formed on the basis of the evaluation results should in a concise and understandable manner present the context of the assessment, methodology, risks, as

⁶ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

⁷ Including Eurostat (<http://ec.europa.eu/eurostat/web/main/home>), Eurobarometer monitoring (http://ec.europa.eu/public_opinion/index_en.htm), Joint Research Center of the European Commission, Portal of Open data of the European Union (<http://data.europa.eu/euodp/en/data/>) and websites of international organizations - the United Nations (<http://data.un.org>), OECD (<http://stats.oecd.org>), The International Energy Agency (www.iea.org), the WTO (www.wto.org), the World Bank (<http://data.worldbank.org>), the IMF (www.imf.org).

⁸ <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=31306>

well as the logical sequence of obtaining evaluation results, conclusions and recommendations.

Conclusions

1) Guidelines only-for-regulators are not appropriate from evidence-based perspective. Smart regulation needs:

- securing to communicate openly and be accountable for regulatory activities and outcomes;
- the search for relevant feedback to make regulation more relevant and efficient.

2) “Russian” RIA was one of the most ambitious projects in terms of innovations in public administration in the emerging economies in the last 10-15 years, which may be comparable to the Mexican or South Korea experiences in the end of 1990s – beginning of 2000s. However, the parent body of RIA, Russian Ministry of Economic Development, has failed to fulfill its potential and take full advantage of the reformist window of opportunity in 2010-12. In particular, the central-based better regulation watchdog has not been established yet. RIA mechanism finally occupied its niche in the modern public administration and mechanisms of interaction between business and government in Russia, where it can exist for a long time, up to the new “political window” (2018-2024) or even after 2024.

3) In the next few years the task of the academic and expert community (involving the private sector) is a thorough study of the basic steps for transition to the integrated regulatory policy, re-building neo-pluralistic cooperation between officials, business and experts, and re-designing the entire regulatory policy in Russia.

4) Should new Russian government adopt evidence-based standard, this standard could serve as a basis for the elaboration and use of other quantitative techniques – Standard cost model, value of life estimates model, method of calculating cost reimbursement to business and citizens arising from illegal actions (inaction) of government authorities, quantitative thresholds for conducting impact assessment, etc.

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