



Strasbourg, 10 January 2008

DA/ba/Conf (2007) 11 e

IN PURSUIT OF GOOD ADMINISTRATION

European Conference

*organised by the Council of Europe
in co-operation with the Faculty of Law and Administration
University of Warsaw*

Warsaw, 29-30 November 2007

In pursuit of good administration: from vision to action
The role of the social partners in creating good administration

REPORT PRESENTED BY

Mr Andrzej ARENDARSKI
President of the Polish Chamber of Commerce
Poland

Introduction

The right to good administration means that each citizen can expect that public authorities and institutions will consider his or her case impartially, lawfully, and without undue delay. The right should correspond to the obligation of authorities and institutions, and primarily all their officials, to handle the citizen's case properly and lawfully. If a citizen has suffered harm due to actions of the administration, the citizen should receive compensation. This is the right to good administration as defined in the Charter of Fundamental Rights and the European Code of Good Administrative Behaviour. While this description might seem clear and reasonable, it is too often dead letter in the Polish reality.

From the perspective of enterprises, good administration should first of all implement the principle of subsidiarity and limit its activity only to the areas of reasonable public interest (for example, environmental regulations or state security standards). Good administration should support business by creating the necessary framework of fair competition. Enterprises often complain that public officials, especially those with the power to control, know no limits. There have been spectacular infringements of the principle of proportionality of means and ends which requires the application of means least onerous to the citizen.

On the other hand, there are examples of particularly effective local administration, as demonstrated by the number of municipalities awarded in the Fair Play Municipality competition accredited by the Polish Chamber of Commerce and organised by the Chamber's Institute for Research on Democracy and Private Entrepreneurship. The competition awards and promotes "investor-friendly" municipalities, promotes transparent relations with enterprises and local communities, promotes co-operation between business and investor-friendly municipalities, and encourages municipalities to develop standards of services for enterprises by way of internal reorganisation.

In my opinion, adequate operation of the Polish administration requires first of all improvement of the quality of legislation used by the administration in day-to-day work. The relations between the administration and citizens must be improved through new forms of communication (e-administration). The liability of public officials for erroneous decisions must be effectively enforced.

1. Improved Quality of Legislation

Maladministration by executive authorities and local governments is encouraged by ambiguous norms of the sources of law. Decisions of public officials should be grounded in the sources of law, indicated in the Constitution of the Republic of Poland, and not, for example, the orders of superiors.

Good administration is impossible where the legislation which underlies administrative practice is ambiguous, self-contradictory, or too casuistic. According to surveys, legislation crucial to business is evaluated as poor. Low quality of legislation is one of the key barriers to the growth of enterprises. Consultations with the social partners must be improved; impact analyses of legislation must be performed; the legislative agenda must be verified.

It is now difficult to convince the average Polish enterprise or citizen that Poland is a state ruled by law, as enshrined in the Constitution of the Republic of Poland.

Legislation is one of the barriers which affect enterprises the most. According to surveys carried out by the Institute for Research on Democracy and Private Entrepreneurship of the Polish Chamber of Commerce, legislation crucial to business is evaluated as poor. Surveys carried out by the Polish Chamber of Commerce in 2006 also indicate that low quality of legislation is one of the main barriers to the growth of enterprises.

It is generally believed that the situation is deteriorating rather than improving. According to researchers, one of the reasons for the low quality of legislation is the defective legislative process which results in necessary amendment of legislative errors. Legislative errors are one of the drivers of inflation of legislation. After Poland's accession to the European Union, the *Official Journal* has published over 2 thousand items – legal acts, laws and regulations – comprising several thousand pages. This means that the legislator produces legal norms which by definition cannot reach the addressee as the latter is unable to effectively understand and implement so many new laws. In addition, citizens learn about legal norms from the *Official Journal*, often well after their entry into force, due to too short *vacatio legis*.

The Polish Parliament adopts new laws in full knowledge that they will need to be amended. While proposals and attempts have long been made to simplify the legislation and reduce the red tape in the economy, yet enterprises believe that the situation has not improved. Ambiguous laws allows for too much leeway in interpretation, and consequently public officials who apply the laws in practice issue erroneous decisions, often repealed by the Supreme Administrative Court. In turn, enterprises who have to comply with regulations in everyday practice get lost in the thicket of legislation and are unable to follow amendments; they have to invest more and more time and resources to determine the valid interpretation instead of growing the company. Average citizens are disoriented and helpless in the face of the law, while the assistance of lawyers, who should help to clarify legal issues, is unavailable to most people due to high legal fees. As a result, the Supreme Administrative Court is flooded with complaints of citizens and enterprises about administrative decisions. As the interested parties are given too little time to take a position, consultation of draft laws with the stakeholders is practically limited to impromptu expert opinions. To ensure that the social dialogue fulfils its function and is not just a fiction, it is necessary to consult widely with different groups.

We need determined action to reorganise the legislative process, especially by strengthening the role of social consultations. I believe that enterprises and business associations play too small a role in the legislative process. A participatory approach to the SME policy is encouraged by international development institutions (e.g., the World Bank) and the UN, as it has many advantages. Not only does it match the economic policy to the needs of enterprises, consumers, and the state; in addition, it eliminates the threat of corruption in the development of economic legislation and the SME policy.

According to the Polish Chamber of Commerce, improvement of the effectiveness of the legislative process requires the following steps:

1. The legislative process should be based at least on an annual legislative agenda developed under different principles than today. The legislative agenda should be

developed in combination with the long-term national development strategy and should identify the strategic goals to be implemented in a given period with specific regulatory instruments. The number of legislative drafts on the agenda should be constant, and the addition of new drafts should follow the withdrawal of an equivalent number of drafts from the agenda. New drafts should be accompanied by detailed grounds explaining why they are considered more important than the withdrawn drafts. The withdrawal of drafts should be consulted with the social partners.

2. The implemented new impact analysis system of legislation (IAS) must be extended to include the impact of legislative drafts initiated by Parliament. In our opinion, this could be done by the Government Legislative Centre which should be adequately strengthened. The IAS requires the analysis of the impact of draft regulations, the cost of the implementation of regulations or their non-implementation (status quo scenario), and potential options of implementation. The Parliament Speaker should not accept legislative drafts unless backed up with a reliable analysis.
3. The existing social consultation process should be modified. Consultations should be based on an agenda drafted according to the legislative agenda. The timeline of consultations should allow for sufficient time to participate. The period allowed for written consultations should be at least 12 weeks to enable real consultation with members of organisations giving their opinion. The draft under consultation should be clear, transparent, and comprehensible. The legislation which is not amended should be clearly indicated. The outcome of each consultation process should be published (in paper and electronic form) and widely available. The date (not later than 3 months after the end of consultations) and place of the publication should be known. The publication should specify what has been changed in the consulted draft, to what extent, and by whose request.
4. It is advisable to separate the preparation of assumptions and detailed guidelines of legislation from editorial drafting of legislation through the preparation and implementation of a document concerning policy drafting rules for ministries and Government agencies. Policy assumptions rather than complete legislative drafts should be subject to consultation in order to save resources necessary to draft legislation and to enhance the legislative process.
5. Editing and drafting legislative acts according to the adopted assumptions should be the function of a single specialty unit employing exclusively lawyers prepared and trained for the job, modelled on the Parliamentary Counsel Office, a part of the UK Cabinet Office. In Poland, the Government Legislative Centre could serve this role. Its human resources should be strengthened by legislators employed by individual ministries.
6. Consideration should be given to possibilities of simplification of the structure of legislative acts, for instance drawing upon the experience of Sweden where a legislative act is usually divided into 3 chapters with headings, an article may have up to 3 paragraphs, and each paragraph should contain a logical argument. Subsequent paragraphs should be clearly interrelated logically and linguistically. If a reference must be made to another paragraph in the legislative act, the reference should give the reader a clear picture of what it refers to.
7. Legislative acts should be drafted by experts – legislators specially prepared for the job, preferably lawyers with the co-operation of experts in relevant areas as well as linguists. Government legislative drafts should be edited by a single team of legislators, who should also edit the legislative text after amendments.

8. An individual representative of the administration should be responsible for a draft during the work on a Government legislative proposal, and that person should be liable for any negligence.
9. Only such legislative drafts which can complete the legislative procedure during the current term of Parliament should be tabled to Parliament.
10. Parliament proceeds with legislative drafts under defined timetables. The rapporteur MP should monitor the timeline of proceedings with the draft and notify the Parliament Speaker of any risks to the set deadlines.
11. Parliament and/or its Commissions should follow the principle whereby any legislative amendment tabled by an MP from a party supporting the Government which alters the Government policy must first be approved by the Government.
12. Rules of monitoring and potential amendment of a legislative draft which does not achieve the expected purpose after a lapse of time should be proposed at the time of drafting.
13. During the legislative process, the members of a Parliamentary Commission (or its team) should proceed on the basis of the original draft and propose any amendments in a separate document. Each proposed amendment should be subject to a separate vote.
14. The Government should adopt a *Code of Legislative Best Practice* as a general recommendation for the development of specific legislative practice in the Government administration.

The following areas of legislation should be amended, among others: tax legislation, in particular VAT law, legislation on construction and spatial planning, public private partnerships, and freedom of business.

2. Improved Relations between Citizens and the Administration: e-Administration

In my opinion, good administration includes the application of good and modern means of communication. In today's economy, the growth of an enterprise must rely on electronic communication tools. The goal of e-administration based on state-of-the-art information and communication technologies is to enhance the organisation of work in public administration and to reduce its running cost significantly, resulting in considerable improvement of services for citizens and enterprises.

The barriers to efficient, easy, and friendly relations between enterprises and the public administration and to the use of e-administration include delays and shortcomings in the area of transparent, logical, and effective legislation and regulations concerning digitalisation of the state, implementation of state-of-the-art information and communication technologies, and freedom of business ("one stop shop").

3. Effective Enforcement of Public Officials' Liability for Erroneous Decisions

Good administration means that public officials of all levels are individually liable for errors they make. If top ranking officials face no consequences, this creates a climate of impunity cascaded to the lower ranks. While enforcing the law, the administration too often violates the law. With erroneous decisions and unjustified neglect, officials cause tangible and sometimes serious harm to citizens and enterprises. The most extreme cases involve spectacular bankruptcies and the loss of hundreds of jobs. This inflicts obvious damage on

the reputation of the state and its institutions, and increasingly implies civil liability of the Treasury and local governments which have to redress the harm caused to citizens and enterprises. This should be improved through the adoption of legislation on specific terms of liability of public officials for breach of law.

4. Summary

Building good administration and drafting good legislation requires rules of participation. Contrary to current practice, the policy supporting enterprises should not be developed by individual Ministries; rather, common task forces should be established within Ministries, comprising Government experts and representatives of business associations working to develop solutions, legislative instruments and programmes. Common Government and business teams should report to Parliament. This solution would eliminate major divergences of views at an early stage. Such actions are urged by the European Charter for Small Enterprises adopted by the EU Member States in 2003.

Common actions should create good transparent relations between the administration and enterprises and consequently enable fast economic growth combined with the creation of attractive, well-paid jobs, offering a prospect of professional careers to young people graduating from school and looking for a job.

It is absolutely clear that the relations with the administration must change. We hope that the new Government, in particular the Ministers responsible for economic affairs, begin to implement the Council of Europe Recommendation CM/Rec(2007)7 on good administration