

Financial Law Review

No. 28 (4)/2022

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVOL JOZEF ŠAFÁRIK UNIVERSITY
<http://www.ejournals.eu/FLR>

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REGULATORY IMPACT ASSESSMENTS (RIA) AS AN INPUT IN TAX LAW INTERPRETATION: ANALYSIS OF THE ADMINISTRATIVE COURTS VERDICTS¹

Abstract

The goal of this paper is to empirically examine the role of Regulatory Impact Assessments (RIAs) accompanying draft laws submitted by the Council of the Ministers as an input in *purpose-oriented interpretation of tax law*, carried out by Polish Administrative Courts. To this end, full-text database of the universe of Administrative Courts verdicts (CBOIS) had been queried in order to uncover all court decisions issued from Jan 1st 2001 to Dec 31st 2022 and mentioning RIAs in their written motives. All in all 14 decisions of SAC and 39 decisions of FIACs had been located – the result that can be interpreted as an evidence of scant use of RIA as an input for statutory interpretation of the tax law. Qualitative analysis reported in the paper illustrates what sort of information had been recovered by justices from RIA. Results suggest that potential offered by RIA's coverage of '*lawmaker's intent*' is still not fully utilized in the process of tax law interpretation. However, any reliance on this sort of documents have to be accompanied with critical analysis of their quality and role in lawmaking process. Conditional forecasts (what impact is reasonably expected) should not be mistaken with statements of the intent (what impact is desired). Moreover, perfunctory RIA, prepared as part of window-dressing exercise, not genuine analysis underpinning the decision-making process, could turned out misleading.

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¹ Presented views and opinions are those of the authors. Research had been financed under Polish National Science Centre grant UMO-2018/29/B/HS5/00260.

Key words: purpose-oriented interpretation of tax law, lawmaker's intent, regulatory impact assessments

JEL Classification: K34

1. Introduction

It has been argued that Central and Eastern European jurisdictions in general – and Poland in particular – suffer from formalistic (or textualist) style of judicial decision-making [see e.g. Cserne 2015; Matczak, Bencze, Kühn 2010; Matczak, Bencze, Kühn 2015]. Formalism can be defined as following ‘the plain meaning of the words of the document in the face of plausible arguments for doing otherwise (...) [that] might produce outcomes inferior to those reached by making the best all-things-considered decisions’ [Schauer 2008: 431], or deciding the case on the basis of ‘the most locally applicable rule’ [Schauer 2010: 36]. It can be contrasted with alternative approaches to statutory interpretation, like Dworkinian, principles-based model of judge Hercules or pragmatist (not to say Law&Economics) approach [Posner 1996].

From the economic point of view, the choice between the abovementioned strategies boils down to a well-known problem of rules versus discretion. In this context textualism represents adherence to the pre-defined rules, while competing approaches (seek more flexibility and responsiveness to the changing realities on the ground. As in any other decision-making problem, both entails costs and benefits. As argued by [Schauer 2008: 434] *‘the task will always be to decide whether (...) there are likely to be more (or more serious) errors when wise and enlightened decision-makers are prohibited by formalist expectations and incentives from reaching wise decisions than there are when misguided or mistaken decision-makers are freed from formalist restrictions to make what seem to them to be the best moral or political or pragmatic decisions’.*

It is reasonable to expect, that excessive reliance on formalist adjudication can be particularly problematic in case of laws governing contemporary complex economic relations – for example tax law. In this case pragmatist approaches aimed at delivering *‘the best decision having in mind present and future needs’* [Posner 1996: 5] seems to offer the highest value. The problem is amplified by the evolution of so called multicentrist legal system [Zirk-Sadowski et al. 2009], where sources of legal rules and principles exceeds beyond the domestic legislation and jurisprudence, to EU legal framework or OECD soft law.

In Polish legal theory, such pragmatist approach towards statutory interpretation will correspond to so called purpose-oriented interpretation (PL: *‘wykładnia celowościowa’*),

contrasted with textualism (PL: *wykładnia językowa*) traditionally assumed to be the default mode of interpretation (on that see for example [Leszczyński 2015]). Among its key input, one could distinguish the 'ratio legis' – set of goals that 'the lawmaker' aimed to achieve by issuing the interpreted legal provisions (see also [Tobor 2013]). Documents and analysis created during the real-life law-making process could constitute important source of information about these goals [Bielska-Brodziak 2017]. One of the most intriguing categories of such documents – directly linked to the economic consequences of the statutory legislation envisioned by the draft-law authors – is so called *Regulatory Impact Assessment* (hereafter *RIA*, Polish abbreviation *OSR*).

The goal of this paper is to empirically review the role of RIAs as an input in *purpose-oriented interpretation of tax law*, carried out by Polish Administrative Courts. To this end, full-text database of the universe of Administrative Courts verdicts (CBOIS)² had been queried in order to uncover all verdicts mentioning RIAs. Then, qualitative analysis had been carried out to determine, what sort of information had been recovered by justices from RIA.

The rest of the paper is organized as follows. Section II introduces the Polish RIAs and places it in the context of tax-related law-making. Section III describes the empirical approach, section IV presents the results while Section V concludes.

2. Regulatory Impact Assessment (RIA, OSR) in Polish Law-Making Process³

The idea of statutory legislation as a (rationally applied) tool for solving the social problems had been present in Polish scientific writings since L. Petrażycki and A. Podgórecki, who developed the notion of 'sociotechnics' - 'scientific legal policy, *Rechtspolitik*' [Kurczewski 1990: 80]. However, it was not until early two-thousands, when so called 'better regulation' agenda (OECD, 1997) spurred the development of specific instruments and procedures aimed at basing the law-making process on scientifically valid grounds (so called '*evidence-based policy making*'). Regulatory Impact Assessment (*RIA*, Polish abbreviation *OSR*) constituted the key component of this effort.

According to the Polish Constitution of 1997, primary legislation (hereafter laws, PL: '*ustawy*') are adopted by two-chamber Parliament and signed into the law by the President of the Republic (who wields veto power). The draft laws can be introduced to the lower

² <http://orzeczenia.nsa.gov.pl>.

³ Authors would like to thank for comments and discussion with dr W. Rogowski, who had run research project 'The Quality and Functioning of Regulatory Impact Assessment (RIA) in the Evidence-based Policy-making Perspective' (2016/23/B/HS5/03542) at SGH Warsaw School of Economics.

chamber of the Parliament by (i) a group of MPs, (ii) the President, (iii) the Council of Ministers and (iv) a group of 100 000 citizens. In line with article 118.3 of the Constitution, those introducing draft laws '*shall indicate the financial consequences of its implementation*'. In practice, the majority of laws (new ones as well as amendments) have been initiated by the Council of Ministers - so called '*government proposals*' [Joński. Rogowski 2022].

A government proposal is typically initiated and drafted inside the respective ministry (in case of tax-related legislation, in the Ministry of Finance), circulated between ministries and government agencies (so called internal consultations) as well as stakeholders (so called public consultations), submitted to the Permanent Committee of the Council of Ministers (so called '*mini-government*') and finally accepted by the Council of Ministers.

In 2001, the constitutional requirement regarding '*financial consequences*' - as far as '*government proposals*' are concerned - had been formalized in Cabinet Bylaw⁴ as a Regulatory Impact Assessment (RIA) - distinct part of the explanatory memorandum accompanying draft law text. However, the scope of RIA exceeded the fiscal impacts, and, in line with OECD (1997) recommendations, addressed wider economic impacts of the proposed law. In particular, RIA was expected to should summarize the likely impacts of proposed law on the:

- i. budget revenues and expenditures,
- ii. labor market,
- iii. internal and external competitiveness of the economy,
- iv. regional development.

As documented by the early empirical studies, RIA adoption was slow and painful process. Goetz and Zubek [2005] found that out of 163 reviewed laws, only one fifth discussed any costs or benefits. Moreover, costs and benefits other than budgetary were identified in a marginal proportion of draft laws, almost exclusively in qualitative terms. Thereby, one can conclude that such RIAs offered limited input for discerning '*the lawmaker's*' intent for *purpose-oriented interpretation*. However, some progress had been recorded by subsequent study of [Kopinska et al. 2014], that found that 89 percent RIAs prepared in 2012 summarized the impact on the central budget, 66 percent on labor market and 72 percent on the competitiveness of the economy.

⁴ Resolution No. 125 of the Council of Ministers of September 4, 2001 amending the resolution - the Rules of Procedure of the Council of Ministers (Journal „Polish Monitor” 2001 No. 33, item 547).

In 2013, so called '*Better Regulations Program*'⁵ had been adopted by the Council of the Ministers led by PM D. Tusk. Among other changes to the RIA process, its implementation involved the adoption of the new Cabinet Bylaw⁶, introducing brief (table-styled) RIA templates (previously RIAs were prepared as a plain text, organized around mandatory points). New templates generally replicated areas of assessment, introduced in 2001 (budget revenue and expenditures, labor market, competitiveness and regional development).

However, it had also introduced new items, rooted in the circular regulatory lifecycle concept (starting with diagnosis of the problem, through adoption of the law, to its evaluation to diagnose problems with its practical functioning, that could be solved by another legislative intervention)⁷. They included explicit identification of the problem (and supporting evidence), explanation of proposed solution (public policy advocated by the RIA authors), and review best practices from the EU and OECD countries. Also, so called ex-post RIA had been introduced as a tool for evaluating legislative interventions. Consequently, another newly added RIA item required specification of the evaluation process and the metrics that will be applied to gauge success or failure of the advocated policy.

Thereby, the new RIA template conveyed important information on the 'the lawmaker's' intents. Assuming correct implementation of the '*Better Regulations Program*' and thoughtful preparation of respective RIAs, they could be expected to become important input for purpose-oriented interpretation. Indeed, according to the OECD (2015), Poland has substantially improved its regulatory policy system over the last years, but still need efforts '*to ensure that RIA and consultation comments are actually used to improve decision making*'.

3. Empirical Approach

To empirically examine the role of RIAs as an input in purpose-oriented interpretation of tax law, the verdicts of the Polish Administrative Courts had been analyzed.

In line with Constitution of 1997, Poland has two-tier Administrative Courts system, composed of 16 First Instance Administrative Courts (hereinafter FIACs) corresponding to NUTS-2 regions called *Voivodship*, and the Supreme Administrative Court (hereafter SAC).

⁵ See resolution of the Council of the Ministers of Jan. 22nd 2013 no 13/2013.

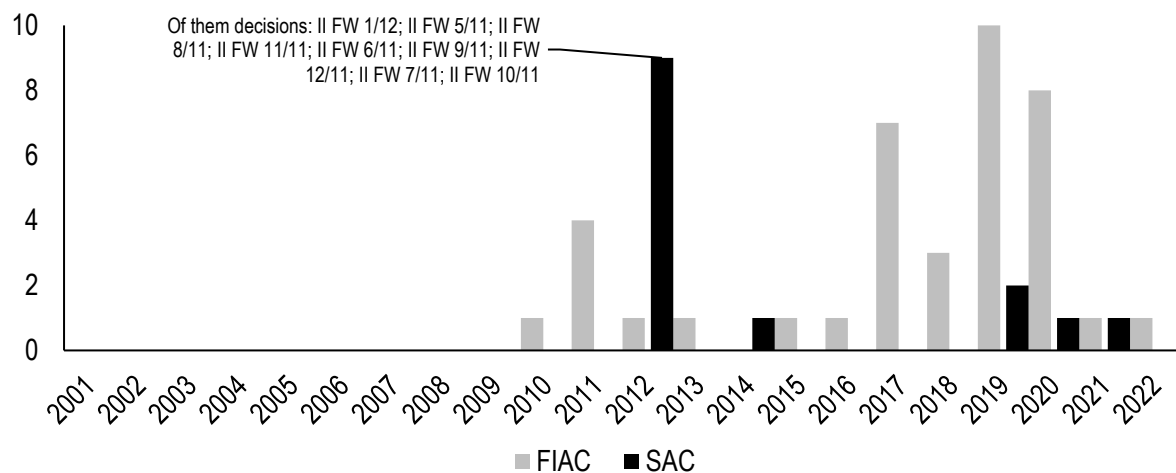
⁶ Resolution No. 190 of the Council of Ministers of 29 October 2013. Rules of Procedure of the Council of Ministers (Journal of Laws 2013, item 979).

⁷ See, [Better Regulations Program: 17].

Full text versions of all verdicts issued by FIACs and SAC (cleared from personal data of parties) are freely and publicly accessible using searchable CBOIS database⁸.

The query had been specified to cover (i) all categories of court decisions (PL: *rodzaj orzeczenia*), (ii) issued from Jan 1st 2001 to Dec 31st 2022, (iii) in tax-related cases (three digit classification no: 611), (iv) that contain phrase “*ocena skutków regulacji*” (Polish term for RIA) in written motives, and (v) are available in the internet. The query returned 53 hits, of them 14 decisions of SAC and 39 decisions of FIACs (see fig. 1) – the result that can be interpreted as an evidence of scant use of RIA as an input for statutory interpretation of the tax law.

Fig. 1. Number of FIACs and SAC decisions mentioning ‘RIA’ in written motives



Source: Own analysis of CBOIS database, updated and adapted from [Gajewski, Joński 2022].

Noteworthy, the first Administrative Court decision referring RIA had been issued in 2010 – nine years after introduction of RIA to the Polish law-making process. This finding resonates with observations on poor quality of the early RIAs [Goetz, Zubek 2005]. On the other hand, the biggest number of verdicts referring to RIAs had been observed over 2017-2020 – after the implementation of ‘*Better Regulation Program*’ and new RIA template (although it dropped substantially over 2021-2022).

Interestingly, the references to the RIA are typically made by First Instance Administrative Courts, not by SAC. In this context it is necessary to explain that nine SAC decisions referring to RIA, issued in 2012, regarded the determination of the local authority appropriate to handle a case.

⁸ <http://orzeczenia.nsa.gov.pl>

4. RIA as an Input in Tax Law Interpretation

The Administrative Courts decisions selected using the abovementioned query had been qualitatively examined in order to uncover what sort of information input for *purpose-oriented interpretation* was provided by RIA (for detailed description of the verdicts see [Gajewski, Joński 2022]).

Information conveyed in pre-reform RIA had been utilized by the Lublin FIAC to carry out the proportional balancing in the context of new gaming regulations, when explanatory memorandum and RIA enabled court to recreate '*lawmaker's preferences towards social (protection from negative consequences of gaming) and fiscal (expected decline in revenues) goals*'⁹.

Another examples of uncovering *lawmaker's intent* using pre-reform RIAs are offered by Warsaw FIAC¹⁰, and SAC¹¹ – also in case of nine abovementioned decisions regarding the determination of the local authority appropriate to handle a case¹².

As of the post-reform RIAs, one could refer Warsaw FIAC effort to determine *ratio legis* of commercial property tax (on construction of this tax see Jankowski, Klimiuk, 2018). Another example is offered by verdicts of Gliwice and Wrocław FIACs¹³, regarding exempts on excise duty on electricity powering metallurgical process. Similar argument had been made by Gliwice FIAC¹⁴, referring to property tax on railroad infrastructure.

While abovementioned verdicts referred directly to the plainly stated goals underpinning the adoption of specific tax law provisions, more sophisticated inferences had also be made. Specifically, in some verdicts Administrative Courts inferred on *lawmaker's intent*, building upon fiscal impacts projections covered in RIA. Such inference had been made by Krakow FIAC¹⁵ (as supplementing another arguments) and Szczecin FIAC (much more directly)¹⁶.

⁹ See courts judgements in cases I SA/Lu 147/11; I SA/Lu 148/11; I SA/Lu 89/11.

¹⁰ Courts judgements in cases III SA/Wa 998/21; III SA/Wa 1038/19.

¹¹ Court judgement in case I FSK 426/17.

¹² Decisions II FW 1/12; II FW 5/11; II FW 8/11; II FW 11/11; II FW 6/11; II FW 9/11; II FW 12/11; II FW 7/11; II FW 10/11.

¹³ Courts judgements in cases III SA/GI 1589/16; III SA/GI 672/16; III SA/GI 1466/16; III SA/GI 745/16; I SA/Wr 86/19.

¹⁴ Court judgement in case I SA/GI 970/17..

¹⁵ Court judgement in case I SA/Kr 902/15.

¹⁶ Court judgement in case I SA/Sz 246/11. Adjudicating the case in second instance, SAC have not responded to this argument (II FSK 2384/11).

Finally, Gliwice FIAC¹⁷ attempted to infer *lawmaker's* intent from expected impact on competitiveness of the economy – the RIA template item typically covered relatively less extensively than fiscal impacts.

5. Conclusions

The implementation of RIA as compulsory part of so called '*government proposals*' – including draft taxation-related laws prepared in the Ministry of Finance – had been expected to improve the quality of statutory law in line with '*evidence-based policymaking*'.

However, it is reasonable to expect that RIAs impact on legal framework will extend beyond the law-making process itself, reaching the implementation phase. As contemporary RIA template follows the '*better regulation*' approach to lawmaking – including explicit description of identified problem, outlining the logic of advocated policy, estimating its impact on various stakeholders and defining specific metrics of policy's success or failure – it conveys highly valuable information on the purpose of the specific regulations. Such first-hand knowledge of *ratio legis* could provide highly valuable input for *purpose-oriented interpretation of tax law*, underpinning *pragmatist* approach advocated by Posner (1996).

It seems particularly important in the context of complex, multicentric taxation laws, when excessive reliance on textualism could deliver results contradicting the very goals that underpinned their adoption.

Noteworthy, Administrative Courts had already issued verdicts referring RIAs. However, one can reasonably argue that they still relatively scant, thereby the potential offered by RIA is not fully utilized.

On the other hand, any reference to the RIA made during statutory law interpretation require careful scrutiny of the quality and purpose served by these documents in law-making process. Correctly prepared and honestly presented RIA could provide detailed and important information allowing uncovering *lawmaker's intent for purpose-oriented interpretation of tax law*. However, conditional forecasts (what is expected) should not be mistaken with statements of the intent (what is desired). Moreover, perfunctory RIA, prepared as part of window-dressing exercise, not genuine analysis underpinning the decision-making process on implemented policies, could mislead the audience.

¹⁷ Court judgement in case I SA/GI 1533/19, wiew shared by SAC I FSK 830/20.

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