

UACES 38th Annual Conference

Edinburgh, 1-3 September 2008

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Enforcement Tools of Regulatory Agencies: A New Approach Required

Deša Mlikotin Tomić, PhD
Faculty of Economics and Business
University of Zagreb

Mislav Ante Omazić, PhD
Faculty of Economics and Business
University of Zagreb

Abstract:

The enforcement issue has been introduced in Europe by the means of agencies and their regulatory tasks. Regulatory agencies are promoted as a technical advanced social model superior to democratic per definition ignorant and judicial traditional institutions.

With their technical and social legitimacy and attributions of independence they were promising accountability, efficiency, transparency and effectiveness in the larger good governance context. By all means the new areas and politics in which state has entered required new device of regulation. In so far agencies both at European and national level are appropriate mode to accomplish new state tasks. Throughout this process problems did emerge, problems which could not be anticipated in advance (e.g. officers depending on the specialized branch in “independent” agencies after leaving the office etc.)

The paper will be focused on the monitoring and enforcing problems. Since monitoring is the precondition for new enforcement tools there are some indications that this has been accepted. The very new Monitoring Center of Change has been established. The normative model of regulation of changes prevails in agency regulatory activities. In enforcement models novelties such as leniency programme in competition can not offset the frustrating and long dependence on final court decisions on the case and fines. Since the range and scope of the issue the explanation and research will be limited in testing possible new enforcement tools such as are coming from another area: management of change is. Some management analytical tool such as agency problem, stakeholders, and the map/territory relation may be suitable criteria if not to open a new enforcement model than certainly to give useful analytical frame for monitoring agencies regulatory activities and its outcomes.

Key words: European Law, Change Management, Development, Public Leadership

1. INTRODUCTION

During the late 20th century, governments all over the world have been faced with an emerging public conviction that public sector are too large, rigid, resistant to change and inefficient.¹ This paper is intending to follow the perspective of the need for new approach and challenges that these approach is going to cause in the area of implementation of European law. Management is the process for solving problems that emerge because of change.² The very immediate and rather obvious challenge is the legal aspect of enforcement of law and resistance every change cause no matter how need for change is obvious. Many improvement journeys in transitional countries failed because public organisations try to do too much, too fast, without proper or any co-ordination, due to wrong reasons but in almost every case they ignore fact that they have to consider the impact of change process on their employees and other stakeholders. There is no doubt, that many top managers of public organizations and institutions experience severe pressure in these years. Many of them feel like they are caught up in a complex reality constructed of many vicious circles, where the political decision makers demand effective, efficient, quick and visible solutions. Tax-payers demand always better service and value-for-money. The media demand focused action and transparency. Employees demand better wages, challenging jobs, sparring motivation and enthusiasm. Although this modern aspect of law has been initiated and by now consolidated as large field of legal research in Economic analysis of law this paper suggests that enforcement of law issues have their dominant empirical field in European law and legal practice.

The first idea about how the changes are about to be accomplished has its origin much before EC was established by one of its intellectual and spiritual fathers Jean Monnet, who in 1945 said: "...define the objectives, organize discussion, encourage convergence

¹ Vining, A. R., Weimer, D. L. (1999): Inefficiency in Public Organizations, *International Public Management Journal*, 2(1), pp. 1-24

Brown, K., Waterhouse, J. (2003): Change management practices – Is a hybrid model better alternative for public sector agencies?, *The Journal of Public Sector Management*, 16(3), pp. 230

² Adizes, I. (1992): *Mastering Change*, Adizes Institute Publications, Santa Barbara (CA), pp. 231

and finally give democratic institutions the task of administrating the common interest.”³

The process of European policies institutionalisation at present reveals fact that those ideas have been brought in the practice and transplanted to newly accessing and association countries. The examples are the institutions as separate bodies with powers to decide and overseeing or implementing policies. The most advanced and complex by their nature are related to competition policy, consumer protection policy, environment protection policy but also newly established agency network in public utilities and other challenging policy areas.

2. EUROPEAN INNOVATION OR ANTICIPATION OF MANAGEMENT AND CHANGES

The result of accumulated pressure by different stakeholder groups and EU integration processes is that these days public organizations try to find new ways of organizing the public sector with a focus on strategical imperatives bearing on their minds that they need to solve operational tasks. In practice this has resulted in many public organizations having concluded extensive reorientation and development projects on country, regional and/or local level, which have redefined traditional ways of organizing and how they approach to solving problems they do face. In the walk of EC law and institutional development the functional aspect of evolution from free zone to internal market has been strictly projected where the decisive criterion in any reorientation project was how leadership in public organizations approached to change management process.

Each further evolutionary step toward next stage of integration has been carefully described. More than that each next step in the walk to highest levels of European union has been carefully planned and made conditioned upon fulfilment of previous

3

stages of customs union – common market – economic union – single European market – internal market – European union... The phasing out is one of the highest standards of organizational changes as seen from present perspective. In the European law it has been first time applied in EEC Treaty (1957).⁴ The technical and categorical mode of by and large derogates the traditional peace-making and welfare enhancing legal vehicles of UN and GATT. The supranational character of European legislation has not been depending on renewal of the consensus of member states but this does not resolve the automatic movement along the transitional period. One obvious example for this statement is randomly selected Article 33(8) of EEC Treaty (although many other regulations and articles have the same content and message): “If the Commission finds that the application of the provisions of this Article, and in particular of the provisions concerning percentages, makes it impossible to ensure the abolition of quotas provided for in the second paragraph of Article 32 is carried out progressively, the Council may, on proposal from the Commission, acting unanimously during the first stage and by a qualified majority thereafter, amend the procedure laid down in this Article and may, in particular, increase the percentages fixed.”⁵

At this early stage of legal enforcement the European methodology has been very advanced. The novelty in attitudes towards law is in interest and research of law after enactment. The traditional attitudes were focused on drafting phase before enactment. As the proposal of legislation has been approved in the parliament interpretation and explanation about the rules was considered to contribute to enforcement sufficiently enough. The ultimate and legitimate enforcement bodies were courts and administrative bodies. Such innovations are not outdated since on national judicial policy and legislation they still prevail.

⁴ Art. 13 EEC Treaty: “Customs duties on imports in force between Member States shall be progressively abolished by them during transitional period in accordance with Articles 14 and 15.”

Art. 14 (2) EEC Treaty: “The timetable for the reductions shall be determined as follows: (a) during the first stage, the first reduction shall be made one year after the date when this Treaty enters into force; the second reduction, eighteen months later; the third reduction at the end of the fourth year after the date when this Treaty enters into force,, (b).....

⁵

Summing up it could be pointed out that features of European actual standardized enforcement politics and modes are:

- institutionalization of enforcement by creating competent well funded and independent bodies on national and European level which guides the implementation process;
- well prepared implementation of EU legislation papers and drafts which enable and facilitate the transmission of directives into national law and economy;⁶
- monitoring of results of enforcement by reports and publications of research papers (Green paper, White paper , Guidelines, Notice etc.).⁷

In spite of very new and well structured enforcement policy and monitoring the European legislator have not gone outside the legal institutionalism.

3. REGULATORY AGENCIES RESPONSE

The regulatory model of enforcement has been newly only after 90-ties inquired and implemented in EU. The regulatory task of agencies has been grounded on the enforcement issue. Regulatory agencies are promoted as technical advanced social model superior do large democratic institutions which have not enough expertise and judicial institutions which are slow and resistant to changes and novelties.

With their technical and social legitimacy and attributions of independence they were promising accountability, efficiency, transparency and performance in the large good governance context. By all means the new areas and politics in which state has entered required new device of regulation. Consequently, agencies both at European and

⁶ The good example of this is the recent Consultative document and Draft for Implementation of Directive 2005/56/EC on Cross Border Mergers of Limited Liability Company of March 2007 which contains very wide range of statistical data and projections of possible increased expenses for clients of newly established cross border merger.

⁷ Green paper – Liability for defective products, COM(1999)396, White paper on Modernisation of the Rules implementing Articles 85 and 86..(1999/C 132/01, Commission Notice –Guidelines on Vertical Restrain (2000/C 291/010) Commission Notice on horizontal cooperation (2001/C 3/02) end others.

national level are appropriate mode to accomplish new state tasks. That has been common and predominant belief so far. There are recent doubts about their genuine independence, neutrality of technical staff and ultimate efficiency. There are indications that turning away and being at distance from political institutions and people does not per se means independent best governance. Officers in technical branch can be reliable in terms of expertise but can and often do depend on specific branch and industry which can also frustrate good governance in the interest of public good.

4. MANAGEMENT OF CHANGES - MANAGEMENT OF EU?

We live in age when change is no longer episodic but continues and therefore change must be managed in every organization. This is especially true for public organizations. As described previously EU management of legislative process is under serious doubt if the traditional European enforcement models can comply with new demands of 80.000 pages of acquis, 27 member states a whole array of new policies and EU responsibilities.

There are no clear ways to inquire this general problem but it certainly indicates that new doctrine and models should be applied and tested on this burning issue. In response to such pressure and faced with a more complex operating environment public sectors have been reformed by adopting managerial principles grouped under the rubric of new public management (NPM).⁸

One of them is the management of changes theory which originates from business but also psychology, sociology and anthropology. No organization today, large or small, local or global, private or public, is immune to change. To cope with new technological, competitive, integration and demographic forces, leaders in every sector have sought to fundamentally alter the way their organizations achieve their goals. Recently it has been

⁸ Hood, C. (1991): A public management for all seasons?, Public Adiministartion, 69(1), pp. 3-19

successfully developed when applied on new public policy and legislation in social relations.

Organizational change often entails the need for new competences in the organization - and that other competences become condition sine qua non future development. Consequently it is important to analyze the competence gap on all organizational levels and to secure the adequate distribution of competences and qualifications which are necessary for successful change to occur. In the public sector this will typically involve systematic supplementary training and competence building processes. The road toward successful organizational change is absolutely dependent upon the willingness to invest the time necessary and the resources required but it is not only about that. According to John P. Kotter there are eight significant steps to transform every system of relationships:⁹

1. *Establish a sense of urgency* – one of principle tasks of every single public institution is to examine market and competitive realities in order to identify and discuss crises, potential crises, or major opportunities. By their nature or the way they developed throughout history most public organizations are conservative and bound by the laws of inertia when it comes to change. Therefore by establishing a sense of urgency and avoiding declaring premature victory leaders must manage a key strategic resource -- time. Responding quickly while also accepting the long-term nature of the change process sounds like a paradox but modern management is all about managing paradoxes. Effective leaders make it clear right at the begging that meaningful change takes years. At the same time, they create shorter term wins and continuously remind people that the need for change is urgent precisely because it takes so long. When, for example, Konosuke Matsushita started in 1979 the Matsushita Institute of Government

⁹ Kotter, J. P. (1996): *Leading Change*, Harvard Business School Press, Boston (MA)

Kotter, J. P., Rathgeber, H. (2005): *Our Iceberg Is Melting: Changing and Succeeding Under Any Conditions*, St. Martin's Press, New York (NY)

and Management¹⁰ he explained that his vision was to help Japanese politics become less corrupt and more visionary. When a skeptical reporter asked how long that would take, he said, "In my judgment, about 400 years -- which is why it's so important that we start today." The best leaders are those that balance short-term results with long-term vision. Only good short-term results with an effective, aligned vision offer a high probability of sustained success.

2. *Form a powerful guiding coalition* – one in charge should assemble a group with enough power to lead the change effort. That group should also work as a team. Because they are likely to meet resistance from unexpected quarters, building a strong guiding coalition is essential. There are three keys to creating such alliances:
 - I. *Engaging the right talent.* Coalition building is not simply reaching out to whoever happens to be "in charge" of a department, organization, or other constituency. A coalition of 20 people who are decent managers but ineffective leaders is unlikely to create meaningful change or much else that is new. The most effective partners usually have strong position power, broad experience, high credibility, and real leadership skill.
 - II. *Growing the coalition strategically.* Like good governance, an effective guiding coalition needs a diversity of views and voices. It means showing a genuine care for individuals but a toughmindedness about results -- getting results being the best way to recruit allies.
 - III. *Working as a team, not just a collection of individuals.* Leaders often say they have a team when in fact they have a committee or a small hierarchy. Real teams are built by doing real work together, sharing a vision, and commitment to a goal.

¹⁰ The Matsushita Institute of Government and Management (MIGM) was established in 1979 to develop and promote leadership for the coming 21st century. Discouraged and constrained by conventional models and means of political reform, Mr. Matsushita conceived MIGM to combat the vanity and mediocrity of 20th century leadership through a long-term strategy, which entailed an innovative approach to education, designed to foster a more profound change for Japan and her relationship to the world.

3. *Create a vision* – it is extremely important to create a clear vision that is going to direct the change effort and develop strategies for achieving that vision. Prior to launching a major change project in public sector clear objectives and paths to success must be worked out by decision makers. Defining a vision of the future does not happen according to a timetable or flowchart. It is more emotional than rational. It demands a tolerance for messiness, ambiguity, and setbacks, an acceptance of the half-step back that usually accompanies every step forward. Conflict is inevitable. It is necessary to communicate the vision wherever and whenever it is possible in order to anchor it in the value system characterizing the organizational culture. Having a shared vision does not eliminate tension between different advocacy groups but it does help people make appropriate trade-offs
4. *Communicate the vision* – almost all major problems in management have their roots in communication so it is important to use every vehicle possible to communicate the new vision and strategies, and teach new behaviors by setting the example of the guiding coalition. Change for change's sake is not the point. For change to be good, you've got to make it happen, yes, but more important it's got to be in a good direction.
5. *Empower others to act on the vision* – organization in charge should get rid of obstacles to change in most efficient way therefore it should encourage risk taking and nontraditional ideas, activities, and actions. Most frequent cause of that problem are (in)formal systems or structures that seriously undermine the vision for change.
6. *Plan for and create short-term wins* – people/organization in charge should plan for visible performance improvements and formally recognize and reward employees involved in the improvements. A good vision is always focused. People in charge of change management process need to ensure a feeling of progress and at the same time establish measuring points to secure that the process is moving in the right direction with right motivation. The vision literally

has to be something you can see, not some blur and certainly not a list of thousand items. Whenever we have lists of unrelated items, we start to lose focus. The other thing that helps enormously is to pick, very carefully, a couple of short-term items where you can achieve successes and build carefully rest of your vision.

7. *Consolidate improvements and produce still more change* – one should use increased credibility to change systems, structures, and policies that do not fit the new vision. It is important to hire, promote, and develop employees who can implement the vision.
8. *Institutionalize new approaches* – at the very end of change management spiral you should articulate the connections between the new behaviors and organizational success. It is also important to develop the means to ensure public leadership development and succession. Another big problem in European Union is that there are too many people who are skilled at management and not enough people who are skilled at leadership in public organizations. Today, we need more people in positions of leadership who can help groups come up with visions that aren't self-serving -- that are really serving the society. Unfortunately, we have too many people who talk society-sensible vision but don't act that way. It is extremely important to hold on to the new ways of behaving, and make sure they succeed, until they become a part of the very culture of the group.

As many others management branches also this one relies on traditional behaviourist American teaching which has been largely adopted also by L&E research on the issue of enforcement of law process.¹¹

¹¹ Cooter, R. D. (1996): The Theory of Market Modernization of Law, *International Review of Law and Economics*, 16(2), pp. 141-172

Cooter, R. D. (2000): Do Good Laws Make Good Citizens? An Economic Analysis of Internalizing Legal Values, UC Berkeley Law & Economics Research Paper No. 2000-8

It starts with remote models and immediate acting which considers that at the core of enforcement is human perception and human behaviour and without creating the impetus to internalize the rule imposed or suggested by law here less possibilities to talk enforcement based on sanctions, threat. Transaction costs are minimized if voluntary adherence to certain rules and whole systems of law is secured.

In this respect the enforcement of legislation and policies new as well as old one within 27 EU member states requires approach that takes in consideration different experiences and perceptions of a modern market economy. It is exactly the change management that deals with people side of change providing a framework for managing people side of adopting new behaviour social rules and projected change.

Successful change legal or other requires engagement of people involved. The process of changes must be structured in order to enable transition to desired future state which includes also new policies, new legislative outcomes, new stage of the projected changes, and other important aspects.

Another management tool is mapping. It is also called constructionist principle and steams from neuroscience. The working premise is that people do not have absolute knowledge of reality. They have only a set of beliefs developed through their experience and mental disposition. Simplified it would mean that it is the perceptions that rule the world and not the one objectively established knowledge.

Consequently applied to the model of change process it would be necessary to attain a equilibrium of information. In order to attain changes in EU information about changes must be accessible and properly understood by people with different belief, attitudes

In both papers author is revising the beliefs that modernizing the law implies comprehensive reforms directed by state officials. The discussion alternative is called "market modernization" in which state repeals laws by creating obstacles to market.

and histories. Methods that are developed within change management based on Map/Territory relation can help people in their thinking and acquiring common durable perception about law but also the vision of common better future.

The options offered by new research and models of changes could be selected and tested on some areas legislation and change program. Communication in change in EU is necessary in order that within 27 actors a common perception is acquired regardless of different beliefs.

5. CHANGING THE MODELS OF CHANGE

Transforming an organization is the ultimate test of leadership, but understanding the change process in public organization is essential to many aspects of a leader's job. The considerations about the new models of enforcement of European law and managing changes are necessary because of several reasons.

The EU has expanded in number of member states, restructuring and policies planned, legislation to 100.000 cca, negotiating partners for accessions and associations and others. The approach has not evolved in proportion to such dramatic evolution and expansion.

The traditional European approach remains: functional, adaptation focused, institutional, realistic rather than rhetoric but nevertheless, predominantly normativist.

Regarding the supervising policy in EU no changes occurred but the amount and demanding objects of supervision is making it ineffective if possible at all and very costly. Specialized and limited on selected area research are very convincing in putting

serious doubts about possibilities of supervising policies of EU institutions and operations.¹²

6. MONITORING OF CHANGES

Whilst EU is not yet explicitly in research of new views and perceptions on its methodology new monitoring and change institutions emerge. One of them is an independent body like European Monitoring Center on Change (EMCC). It was established with different set of tasks regarding change process. It has been set up in 2001 with a mission to cast spotlight on social and economic developments that drive change in European economy. Nowadays it provides up-to-date news and analysis on company restructuring in Europe. It also publishes quarterly reports summarise restructuring trends and effects on employment. The high targets of such institution have support of both European Commission and European Parliament.

In the further walk of its practice it is expected that they generate new concept of European supervising and enforcement policies.

The EU has so far not yet raised awareness about necessity of changes in change management regarding my inside and understanding the subject. But, since there is no absolute knowledge (constructionist tool) about EU matters as well it might be just another perception and in reality new tools for European management of changes are about to be hammered out.

7. CONCLUSION

In this paper we did not write on how change occurs at all levels of government, but we tried to present some tools that people in charge at public organizations could use

¹² Wymeersch, E. (2005): The future of Financial Regulations and Supervision in Europe, CMLR, 42, pp. 987

quickly and with good perspective. Successful change requires new public management approach where public leaders will take responsibility and hold accountable for results they deliver. They should show the way to change both by their own example and by an active approach to change management. One thing is clear EU strategies makers should revise the normativist approach to change and growth and think in more strategic way.

Research in MOC, L&E tools and research should be more taken in consideration;

The approach should be focused on behaviour, people side of changes, traditional beliefs and different experience that state members bring into EU;

Different levels of understanding and expectations must be able to participate in information i.e. *acquis communautaire* and be managed within the EU;

Public leaders need to have the courage, energy, wisdom and willpower necessary to effect change but they need also solid knowledge of how change evolves.

Starting with academic discussions and research this new page in European managing changes and enforcing European law should be opened.

REFERENCES

- Adizes, I. (1992): *Mastering Change*, Adizes Institute Publications, Santa Barbara (CA)
- Brown, K., Waterhouse, J., Flynn, C. (2003): Change management practices – Is a hybrid model better alternative for public sector agencies?, *The Journal of Public Sector Management*, 16(3), pp. 230-241
- Cooter, R. D. (1996): The Theory of Market Modernization of Law, *International Review of Law and Economics*, 16(2), pp. 141-172

- Cooter, R. D. (2000): Do Good Laws Make Good Citizens? An Economic Analysis of Internalizing Legal Values, UC Berkeley Law & Economics Research Paper No. 2000-8
- Hood, C. (1991): A public management for all seasons?, *Public Administration*, 69(1), pp. 3-19
- Jones, G. R. (2007): *Organizational Theory, Design, and Change*, 5th edition, Pearson Education International, Upper Saddle River (NJ)
- Kotter, J. P. (1996): *Leading Change*, Harvard Business School Press, Boston (MA)
- Kotter, J. P., Rathgeber, H. (2005): *Our Iceberg Is Melting: Changing and Succeeding Under Any Conditions*, St. Martin's Press, New York (NY)
- Oakland, J. S., Tanner, S. J. (2007): A new framework for managing change, *The TQM Magazine*, 19(6), pp. 572-589
- Virtanen, T. (2000): Changing competences of public managers: tensions in commitment, *The Journal of Public Sector Management*, 13(4), pp. 333-341
- Vining, A. R., Weimer, D. L. (1999): Inefficiency in Public Organizations, *International Public Management Journal*, 2(1), pp. 1-24
- Wymeersch, E. (2005): The future of Financial Regulations and Supervision in Europe, *CMLR*, 42, pp. 987-1010