

**Maciej Pichlak**

University of Wrocław

ORCID: 0000-0001-5113-9537

## STRATEGY OF REFLEXIVE REGULATION: THE CONCEPT, COMPONENTS, AND BENEFITS<sup>1</sup>

### СТРАТЕГІЯ РЕФЛЕКСИВНОЇ РЕГУЛЯЦІЇ: КОНЦЕПЦІЯ, КОМПОНЕНТИ ТА ПЕРЕВАГИ

The relevance of reflexive regulation in practice is ever-increasing in contemporary regulatory systems. In numerous fields of state activity, it proves to be an effective regulatory strategy, particularly when compared to a more traditional, “command-and-control” approach to regulation.

In the analysis of the concept of reflexive regulation, the article discusses such features as the recognition of cognitive and operational limitations of regulators, indirect means of regulating the behaviour of regulated entities, or interactive and negotiable relations between regulators and regulatees. The analysed strategy is also based on the assumption of the general reflexivity of both regulatees and regulatory authorities. In other words, the strategy requires, on the one hand, that regulatees actively create and improve their own self-regulatory and risk control mechanisms. On another hand, regulators are expected to act reflexively, i.e., to constantly review the effects of their own activities and adapt their actions to the results of these observations.

In the next step, the paper explores regulatory instruments typically used within the reflexive regulatory strategy. These are, among others, regulatory pyramids, double- and triple-loop learning, meta-regulation, risk management, and tripartism. When applied together, these measures give a chance to take a benefit from reflexive regulation.

Potential benefits of the analysed strategy are numerous. The paper addresses some of these, from the optimisation of effectiveness and costs of regulation, to the increased legitimacy and enhanced motivation of regulated actors to comply with regulatory standards. Achieving these goals is a challenge, and the success of regulation depends on the fulfilment of various institutional, cultural, and normative conditions. The understanding of the concept and components of reflexive regulation, which is the main objective of the paper, may help to adopt this regulatory strategy in more systematic and self-critical manner.

**Key words:** *reflexive regulation, responsive regulation, risk-based regulation, meta-regulation, regulatory pyramids.*

Актуальність рефлексивного регулювання на практиці в сучасних системах регулювання постійно зростає. У багатьох сферах державної діяльності це виявляється ефективною стратегією регулювання, особливо якщо порівнювати її з більш традиційним, «командно-адміністративним» підходом до регулювання.

При аналізі концепції рефлексивного регулювання в статті обговорюються такі ознаки, як визнання когнітивних та оперативних обмежень регуляторів, непрямі засоби регулювання поведінки регульованих суб'єктів або інтерактивні та договірні відносини між регуляторами та суб'єктами регулювання. Проаналізована стратегія також базується на припущенні про загальну рефлексивність як регулюючих, так і регуляторних органів. Іншими словами, стратегія вимагає, з одного боку, щоб регулятори активно створювали та вдосконалювали власні механізми саморегулювання та контролю ризиків. З іншого боку очікується, що регулятори будуть діяти рефлексивно, тобто постійно переглядати наслідки власної діяльності та адаптувати свої дії до результатів цих спостережень.

На наступному етапі в статті досліджуються інструменти регулювання, які зазвичай використовуються в рефлексивній стратегії регулювання. Це, між іншим, регуляторні піраміди, подвійне та потрійне навчання, метарегуляція, управління ризиками та трипартизм. При спільному застосуванні ці заходи дають шанс отримати вигоду від рефлексивного регулювання.

Потенційні переваги аналізованої стратегії численні. У статті розглядаються деякі з них, від оптимізації ефективності та вартості регулювання до підвищення легітимності та посилення мотивації суб'єктів регулювання щодо дотримання регуляторних стандартів. Досягнення цих цілей є викликом і успіх регулювання залежить від виконання різноманітних інституційних, культурних та нормативних умов. Розуміння концепції та компонентів рефлексивного регулювання, що є основною метою статті, може допомогти прийняти цю регуляторну стратегію більш систематично та самокритично.

**Ключові слова:** *рефлексивне регулювання, реактивне регулювання, ризик-орієнтоване регулювання, метарегуляція, регуляторні піраміди.*

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The relevance of reflexive regulation in practice is ever-increasing in contemporary regulatory systems. Its application ranges from occupational health and safety, to personal data protection, to the pharmaceutical, energy, and food industry. In all these and many other fields, reflexive regulation proves to be an effective regulatory strategy, particularly when compared to a more traditional, “command-and-control” approach to regulation. This paper discusses the main features of the strategy of reflexive regulation, practical regulatory instruments building this strategy, and potential benefits that it may bring.

#### 1. The concept and characteristics of reflexive regulation

We can identify several key features that distinguish reflexive regulation from other forms of regulation, particularly from direct „command and control” regulation [1]. The first is the recognition of the limitations of the regulator, both in its cognitive capacities and in a possible impact on regulated activity. These constraints stem from both the complexity of social reality and the limited resources at the regulator’s disposal. The regulator can neither gather and process information in an unlimited way nor intervene freely in the complex matter of regulated activities. In short, the regulator realizes that it is not omnipotent – and hence it must seek such types of conduct that will ensure maximum efficiency with limited resources.

The second feature of reflexive regulation (which is a consequence of the first one) boils down to the use of “indirect” ways of influencing the addressees of regulation. In practice, this primarily means using methods of meta-regulation, that is the regulation of self-regulatory processes that addressees undertake in their activities [2]. Meta-regulation, therefore, means a situation in which a public regulator “provokes” the addressees to self-regulate their activities, while usually setting certain threshold conditions that the self-regulation should meet. This provocation can take an authoritative (imposing duties) or persuasive (incentives) form. The concept of meta-regulation is sometimes associated with such terms as “decentered” regulation or “network” regulation [3].

Thirdly, reflexive regulation assumes reflexivity of the actors involved in regulatory relations: both regulators and regulatees (we leave aside here the question of the reflexivity of other participants in the regulatory system: political patrons, stakeholders etc.). This assumption can be seen in the very idea of meta-regulation, which requires that regulatees actively create and improve their own self-regulatory and risk control mechanisms [4]. Similarly, regulators are expected to act reflexively, i.e., to constantly review the effects of their own activities and adapt their actions to the results of these observations. This expectation is captured in the slogan of “learning regulators” [5]. However, the reflexivity of both regulators and regulatees requires, firstly,

a coherent and predictable regulatory agenda that allows both parties to hone their skills and expand their knowledge; secondly, the embedding of this strategy in a stable and trustworthy political environment.

Fourthly, in reflexive regulation, the regulatory competencies that the regulator has at its disposal (standard setting, monitoring, enforcement) are usually exercised in an interactive and negotiable manner [6]. This often means more intensive (as compared to the command-and-control model) communication between the regulator and regulatees and more horizontal relationships. Adopted standards, forms of control, and potential sanctions are to some extent negotiated. These negotiations may take on a formal or informal character and do not imply the equality of the parties: this is the regulator who acts from a position of power and authority. This notwithstanding, reflexivity changes the nature of the relationship between regulators and regulatees, from asymmetrical and unilateral (in which the actor with power imposes obligations and/or sanctions) to a more symmetrical and bilateral one.

The last property of reflexive regulation is closely related to the previous point. It refers to the instruments and methods of regulation. In the field of standard-setting, open-text principles and goal-oriented policies are common. Regarding monitoring the behaviour of regulatees, the focus is on learning and “observation loops”: The results of the observation serve as feedback for the subject whose activity is being observed. This applies both to the regulatees and to the regulator monitoring its own activity. Finally, reflexive regulation relies essentially on soft enforcement, in such forms as recommendations, warnings etc. This is intended to encourage addressees (who are, let us repeat, reflexive actors) to take action themselves to achieve the public purpose behind the regulation. The need to combine in practice soft and hard enforcement measures is often emphasised in that respect. The latter may be used by the regulator in the case of the lack of will to cooperate or grave violations by regulatees. According to this optics, the possibility of applying more severe measures by the regulator should make addressees more cooperative also at earlier stages – in line with the idea that “regulators will be more able to speak softly when they carry big stick (and crucially, a hierarchy of lesser sanctions)” [7]. We discuss these various regulatory tools in the next section.

#### 2. Reflexive regulation in practice: methods and tools

Reflexive regulation relies on a variety of regulatory methods and tools. None of these taken alone is likely to work and increase the reflexivity and quality of regulation. Only in combination do they offer the hope of achieving the benefits of reflexive regulation which will be discussed in the next section.

2.1. *Principles and policies.* Reflexive regulation is based on those types of legal norms that allow for greater flexibility in their realisation. Most relevant here are principles and policies. They allow for, firstly, focusing on results rather than on formalistic compliance with rules; secondly, better tailoring of how the law is exercised and applied to changing circumstances; and thirdly, shifting part of the responsibility for the proper interpretation and performance of legal obligations to the addressees [8].

It follows that, the formal imposition of the discussed types of legal standards is not enough for a regulation to be considered actually principles- or policies-based. A specific way of applying these standards and shaping the relationship between the regulator and the regulatees is also necessary. Only this combination of formal and substantive aspects of regulation results in a “fully” reflexive regulation [9].

2.2. *Regulatory pyramid.* The basic idea of the ‘regulatory pyramid’ is that a variety of enforcement measures are at the regulator’s disposal, both soft (persuasion, instruction, etc.) and hard (coercion, penalties) [10]. The regulator should use the appropriate means depending on the attitudes of the addressees; the assumption here is that, under standard circumstances, most addressees are willing to cooperate voluntarily with the regulator to comply with the applicable requirements (they have an intrinsic motivation to comply), so in most cases, it is sufficient for the regulator to resort to soft means of influence. The regulator should treat hard measures as a kind of last resort, applied to those addressees who prove unwilling or unable to cooperate.

2.3. *Double- and triple-loop learning.* An essential element of a reflexive regulation regime is the learning capacities of both the regulatees and the regulator [11]. The learning processes should include at least three levels: (a) Single-loop learning: the regulatee can identify individual breaches of regulatory standards and take action to remedy the breaches. (b) Double-loop learning: the regulated actor can identify systemic factors stemming from its governance system, corporate culture and/or established practices that are conducive to breaches of regulatory standards and take action to modify these factors accordingly. (c) Triple-loop learning: the regulator is able to determine the effectiveness of its own system of regulation and supervision, identify those elements of the system that reduce its effectiveness in achieving its regulatory objectives and modify its regulatory regime accordingly.

In a nutshell, the first loop concerns the individual actions of regulatees; the second loop concerns their overall manner of organising and operating; the third loop concerns the activities of a regulator itself.

2.4. *Education (the development of competencies).* Within a proactive approach to regula-

tion, the regulator undertakes activities to educate and nurture the addressees in the full and effective performance of their obligations. Such activities may be optional to the regulator or be defined as its formal duties. Education is not a regulatory activity in a strict sense, but it complements a regulatory system in a relevant way.

2.5. *Promoting good practices and praising regulatory leaders.* An important element of a proactive approach to regulation (and linked to educational activities) is the identification and promotion of good practices among regulatees, as well as the appraisal of regulatory leaders who most fully achieve the objectives set by the regulator. Both activities allow regulatees to perceive compliance as a continuous and gradual process, which implies constant development. Identifying and commending leaders – combined, where possible, with a system of regulatory “rewards” – not only may incentivise them to achieve such status but also provides a positive role model for other regulatees. In this way, it can contribute to the development of both competence and motivation among the group of regulated actors.

The optimal solution for a reflexive regulator is to use a comprehensive pyramid of support and rewards, parallel to the pyramid of sanctions. Consequently, rewards can be both informal and formal.

2.6. *Meta-regulation.* Meta-regulation, as already mentioned, consists in regulating the process of self-regulation, which is most often done by defining procedural requirements (e.g., an obligation for addressees to adopt and implement certain policies or procedures) or setting goals to achieve (an obligation to achieve certain outcomes or to prevent effects from occurring). An example of the former is a duty for a company to regulate the circulation of documents containing classified information, or to define building evacuation procedures; an example of the latter might be an obligation to reduce toxic gas emissions to a certain level.

2.7. *Supervising self-regulation (co-regulation).* In some cases, self-regulatory processes may be subject to oversight by the regulator. In such a case, the regulator has the authority to consult on or approve standards adopted by the regulatees. Such enforced cooperation in the process of self-regulation is called co-regulation. Co-regulation aims to secure increased public scrutiny of private rulemaking. This can contribute not only to the effectiveness of such rules but also to their transparency and legitimacy.

2.8. *Self-monitoring and breach reporting.* As we have already noted, monitoring is one of the definitional components of regulation and a key field of regulatory activity. Consequently, self-control is an important aspect of self-regulation by addressees. For a regime based on self- and meta-regulation to work effectively, addressees must be able to control and evaluate their own actions in terms

of compliance with standards and the achievement of objectives (single- and double-loop learning). In addition, in a meta-regulatory system, they may be required to report identified breaches to the regulator. On the one hand, this ensures effective enforcement of the applicable standards, while on the other hand, it allows the regulator to gather information on the overall effectiveness of the system (triple-loop learning).

2.9. *Risk analysis and risk management.* Additional regulatory tools are provided by a risk-based approach [12]. This includes both the use of risk management methods by the regulator itself (risk-based regulation) and the promotion of the use of such methods by regulatees (risk-based compliance). In the former case, risk analysis is used to decide whether the regulator should intervene with regulatory or enforcement measures. This can be done, for example, with a system of “traffic lights” that allows for assessing the risk posed by the activities of particular industries or actors (low risk – green, medium risk – yellow, high risk – red) and targetting regulatory resources to the greatest risks. In the former case (risk-based compliance), risk becomes an element of meta-regulation. Regulatees are expected to manage specific risks within their operations, and the regulator monitors and evaluates their efforts in that respect.

2.10. *Tripartism.* The idea of tripartism consists in extending the regulatory relationship beyond regulators and regulatees by actively involving external stakeholders (NGOs, industry organisations etc.) [13]. These actors can be involved in a consultative or more formalised participation process at each stage of regulatory activity: standard setting, monitoring and enforcement. Their participation brings several important benefits to the regulatory system: (a) it provides the regulator and the regulatees with access to additional sources of information that might otherwise be difficult or costly to obtain; (b) it increases the transparency and social legitimacy of the entire regulatory system through social oversight of regulation; thereby (c) it also prevents some of the pathologies of regulation, such as the capture of the system by private interest groups; (d) finally, it increases the general awareness of regulatory goals in society.

### 3. Potential advantages of reflexive regulation

Reflexive regulation, if skillfully implemented in a conducive regulatory environment, can bring numerous benefits [14]. Hereby we discuss the most relevant of these.

3.1. *Effectiveness.* The effectiveness of reflexive regulation is still debated [15]. However, as empirical research demonstrates, under certain conditions

reflexive regulation can be more effective in achieving regulatory goals than alternative approaches.

3.2. *Flexibility and adaptability.* Reflexive regulation, by ceding part of the regulatory activity to the level of a particular industry or even an individual company, allows rules to be better tailored to their specific needs and abilities. This makes the rules more precise and effective compared to traditional, “one-size-fits-all” standards, which are often overly general or too complicated.

3.3. *Autonomy.* By transferring some of the regulatory tasks and responsibilities to regulated actors, reflexive regulation recognises and strengthens their autonomy. Therefore, this strategy also has an ethical and political relevance, which may additionally contribute to its greater legitimacy.

3.4. *Costs.* Due to the flexibility and adaptability of self-regulation and meta-regulation, the analysed strategy is cheaper to maintain compared to a traditional command-and-control approach. More precisely, part of the costs of standard setting and monitoring are outsourced to the regulatees.

3.5. *Optimisation.* By making informed decisions on resource allocation (inspections, administrative proceedings, etc.), the regulator can use its resources more efficiently and optimise achieving its regulatory objectives.

3.6. *Education and motivation.* Both by granting regulatees the right to autonomous self-regulation and by using soft enforcement tools, reflexive regulation contributes to increasing the competence and improving the motivation of addressees to meet regulatory requirements. The “external” motivation related to the fear of sanction (deterrence) is partially replaced by the “internal” motivation (compliance). Inducing regulated entities to take self-regulatory activities can contribute to raising their awareness of their responsibilities.

3.7. *Legitimacy.* Thanks to the increased effectiveness of the system and the development of competence and motivation of the regulatees, reflexive regulation may increase trust in the regulator and the legitimacy of the whole regulatory system among the regulatees and the general public.

Needless to say, this list of potential advantages presented is an effect of idealisation, that presents the optimal implementation of the discussed strategy of regulation. The occurrence of the indicated benefits is by no means necessary or obvious, and the success of regulation depends on the fulfilment of various institutional, cultural, and normative conditions. Reflexive regulation is not a regulatory panacea. This notwithstanding, it has the potential to transform regulatory practices on a national and global level [16].

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