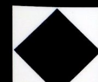
International Association of Legislation (IAL) 17

Luzius Mader/Sergey Kabyshev (eds.)

Regulatory Reforms

Implementation and Compliance

Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28th – 29th, 2012



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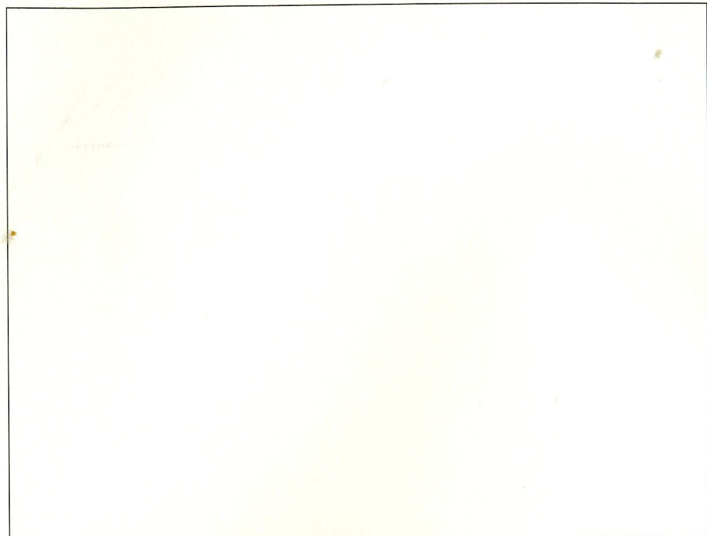

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Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at http://dnb.d-nb.de.

ISBN 978-3-8329-7979-9

1. Auflage 2014
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Preface

In 2008, the European Association of Legislation (EAL) decided to change its name and to become the International Association of Legislation (IAL), taking in this way into account that a considerable number of its members were coming from non European countries. For the same reason, it's only natural that the biannual congresses of the IAL should not be held exclusively in Europe. By deciding to organize its 10th congress in 2012 in Russia, the International Association of Legislation wanted to express its ambition to develop a broader approach to legislative or regulatory questions, an approach that isn't exclusively European any more. Russia is a country deeply rooted in Europe – and also in European legistic traditions – but it is not limited to Europe.

The breakdown of the Soviet Union led to fundamental changes in Russia in various fields and in many respects (institutional, economic, territorial, etc.). All these changes were, of course, important and difficult challenges for far-reaching legislative and regulatory reforms. The topic chosen for the 10th congress of the IAL ("Regulatory Reforms – Implementation and compliance") reflects this particular situation and permitted to address the general issues related to legislative and regulatory reforms with a special view on the specificities and the exceptional circumstances of such reforms in Russia. Special emphasis was given to the problems of implementation and compliance.

After the plenary session outlining the main general aspects of regulatory reforms from different perspectives (Russia, continental legal systems, common law), four panels addressed selected fields or questions: Panel 1 dealt with reforms in the field of social legislation; panel 3 was dedicated to the field of economy; panel 2 highlighted some reforms in the practical working of the administration (e-government); and panel 4 encompassed three different sub-topics concerning the preparation of legislation (regulatory impact assessment, anti-corruption review and public consultation). For all these elements an effort was made to combine Russian views and experiences with views and experiences from other countries.

The congress was organized by the Russian Law-making Society and hosted in particular by the Yaroslav-the-Wise Novgorod State University in Veliky Novgorod. We express our gratitude to the authorities and to the University of Veliky Novgorod who offered the participants a very warm

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ation of principle acknowledging its imperfection and the necessity of an innovative approach to the law-enforcement activities that is inevitably associated with a complex interplay of various sources of law. Reviewing the 100/150 years old perceptions one can discern many of the problems discussed today in connection with the "regulatory impact assessment". It should be noted that the accumulated intellectual experience of the legal science has been only partially used. With this fact in view it is possible to talk not as much about succession of the scientific knowledge as about a gradual development of the tradition of apprehension of one of the problems of the theory of law-making. The ideas of the late XX – early XXI centuries are characterized by a wider definition of the problem of law quality and effectiveness, its conceptualization is going on within the framework of the system of categories of "law-formation", "law-making", "force of law", "conflicts of law", "gaps in law", "errors of law-making", "law effectiveness", "prognostication of consequences of adopting regulatory legal acts", "quality of legislation", "monitoring of legislation", etc. The availability of a comprehensive system of scientific categories attests to the presence of a well-developed and still evolving scientific sub-theory (as part of the general theory of law) that is receptive to the international experience and in its turn can help in international studies of the problems of legislation quality and effectiveness.

Conclusions Panel 4 – Institutional Reforms Regarding Legislative Procedures – The extent of the prevalence of "low-level corruption" in Russia

Yuriy Arzamasov

In 2008 the State Duma of the Federal Assembly took the Federal Law № 273-FZ "On Combating Corruption",[1] which was the "primary" legal framework for preventing and combating corruption.

Exactly two years later, on December 9, the International Anti-Corruption Day, the Centre "Transparency International - R" presented the results of the annual research conducted by the so-called "Corruption Barometer", whose main objectives are to determine the prevalence of low-level corruption (bribery in kindergarten, teachers, low enforcement, etc.).[2]

Analysis showed that the most corrupt areas of Russian citizens consider those bodies whose task is to ensure the safety and quality of life. The question – "how representative office you had to pay a bribe", 27.7% said "law enforcement officials", which in this poll came out on top, ahead of health care workers (20.7%) and land authorities (20.2%). In this case, 44% of respondents believe that the level of corruption on the last three years has increased.[3]

Corruption Perceptions Index in 2010 based on thirty independent surveys and studied carried out from January to September 2010 showed that the "pedestal" to fight corruption occupied Denmark, New Zealand and Singapore. Russia won 154 out of 178 possible places.

If we compare the index of Russia in 2011 with those in 2010 can be noted a small positive trend. Russia ranked 143 out of 182 places.

However, the 143 and the 154 places – it is not performance. On the first place in fighting against corruption in 2011 was New Zealand, followed by Denmark and Finland.

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1 *See:* WG. № 4823. December 30, 2008.
2 Russia were interviewed and a half thousand people, so the accuracy of these results will, of course, is not 100%.
3 *See:* The Centre "Transparency International – R" for 12 months. – M., 2011. C. 22.

These statistics make think seriously about the future of Russia, we will build a democratic state, based on law, modern, progressive legislation, or we will lose the state and turn into a fiefdom of local kings and criminal authorities.

In this regard it should be noted that for the state it is profitable to prevent a crime than to deal with is disclosure and elimination of their consequences. Relevant institutions must not only deal with different types of offenses, but also participate in prevention activities.

1. The definition of Anti-corruption monitoring

Today, the modernization of Russia should cover the economic, social and legal sphere. Legal scholars simply have to address not only the ontological problem of corruption is already done quite a lot,[4] but develop the legal technology for the prevention of corruption. An important role in this matter must play legal monitoring, especially as the theoretical and methodological developments in this direction have already been made as the Council of Federation of the Federal Assembly, namely the Federation Council, headed G.E. Burbulis and Monitoring Centre of the law and the scientific community.

In our view, under the legal monitoring should be understood scientifically and methodologically ground system integrated assessment of content and form of legal acts and enforcement activities carried out by obtaining different types of information, monitoring, analysis, control and prediction in order to create an affective mechanism of legal regulation.[5]

As for the concept of anti-corruption monitoring at the federal level, it is not developed. Meanwhile, the draft Federal Law "Fundamentals of anti-corruption policy", which was submitted to the State Duma of the Federal Assembly of Russia on June 5, 2001 a group of MPs (A. Alexandrov, Chairman of the Advisory Council of the State Duma Anti-Corruption A.

4 *See, for example: Martynenko G. K.* Essence of corruption: the theoretical and legal aspects. Dis. ... Candidate. jurid. Science. – Rostov-on-Done, 2000; *Artemyev A.B.* Anthropology corruption / ed. S.A. Komarov. – St., 2011.

5 The concept of legal monitoring and monitoring of regulations, see: Legal Monitoring: Current theory and practice: Monograph / Ed. NN Montenegro. – M. 2010. Pp. 21-50: *Arzamasov Y.G., Nakonechny YA.E.* The concept of monitoring regulations. – M., 2011. Pp. 5-10.

Aslakhanov, N. Ovchinnikov - the head of the parliamentary group "Law and Order", etc.) in Article 22 was contained a standard-definition, which states that "the anti-corruption monitoring includes monitoring of corruption, corruption-factors and measures implementing anti-corruption policies." More than 10 lawmakers of the Federation have also tried to give the concept of anti-corruption monitoring. For example, Article 1 of the law of the Republic of Moldavia "On Combating Corruption in the Republic of Moldavia" anti-corruption monitoring is considered as "the observation, analysis, evaluation and forecast of corruption-factors, as well as the implementation of anti-corruption policy measures." According to Article 2 of the law, "the tasks of anti-corruption policy in the Republic of Moldavia are:

1. elimination of the causes of corruption, and combating conditions conducive to its manifestation;
2. increase the risk of corruption and the loss of them;
3. enhance the benefits of the actions under the law and for the benefit of the public interest;
4. the involvement of civil society in the implementation of anti-corruption policies;
5. formation of tolerance for corrupt practices".[6]

In our opinion, the most appropriate definition of a CIS model law, which says that, under the monitoring of anti-corruption, should be understood observation, analysis, evaluation and prediction of corruption offenses, corruption-factors as well as the implementation of anti-corruption policy measures. In our view, the definition is quite possible to use by regional lawmakers, while the term will not be attached to the federal legislator.

Speaking about the importance of legal monitoring, it should be noted that in 2009 there was no legal basis for monitoring studies, except for the call from the legal monitoring of the Report of the Federation Council "On the status of legislation in the Russian Federation" and the local papers of Justice, in 2010 the situation has changed radically. President of the Russian Federation, 20 May 2011 adopted the Decree № 657 "About monitoring enforcement of the Russian Federation." According to the document, the Ministry of Justice was obliged to carry out the monitoring of law enforcement in the Russian Federation to implement the decisions of the Constitutional Court and the European Court of Human Rights, that would require

6 *See:* http://old.e-mordovia.ru/kor/zakon.php.

the adoption, modification or Invalidation (cancel) legislative and other normative legal acts of the Russian Federation. In addition, the Ministry of Justice has also been entrusted to coordinate monitoring by the federal authorities and methodological support.[7]

2. Anti-corruption monitoring tools

2.1. Anti-corruption expertise

Meanwhile, the legal monitoring tools are very diverse, they can be used as an "embedded" subjects monitoring (staff legal departments, offices, etc.), and "non-inclusion" (employees of the Ministry of Justice, prosecutors, etc.). With that, legal monitoring here can be divided into two types – it is monitoring of draft normative legal acts and their definitions and monitoring of enforcement.

As the analysis of Russian legislation and legislative activity directly shows, now there are many factors leading to the adoption of regulatory legal acts of corruption. This is not following the rules of normative legal techniques and the lack of administrative procedures, as well as restrictions in the activities of government bodies that may naturally lead to permissiveness, including willful violations of the federal and regional laws.

In this regard, an important tool for the identification of legal monitoring of unconstitutional legislative acts, prevent illegal actions, corruption is anti-corruption expertise,[8] which is carried out as public authorities (prosecutors, employees of the legal department), civil society (public chambers, chambers of commerce, and independent experts accredited to the Ministry of Justice).

However, in our opinion, essential in detecting corruption-factors has a detailed analysis of the content of the law as the draft laws and regulations

7 *See:* WG. № 5486IO May 25, 2011

8 About the anti-corruption expertise of legal acts and their projects, see: *Arzamasov Y.G.* Anticorruption examination as part of the overall monitoring of examination regulations: the legal framework, corruption-factor analysis, ways of improving the techniques // Examination of regulations and their projects subject of the corruption: the value of the technique: a collection of articles / under total. Ed. O.S. Kapinus and A.V. Kudashkina; Acad. Gene. Prosecutor Ros. Federation. – M, 2010. 2010. Pp. 11-22; Anticorruption examination regulation and their projects (federal and regional aspects) / ed. N.A. Lopashenko. –M., 2011.

and already adopted and existing regulations. With a focus, in the implementation of such an examination expert analysts should be given to identify the circumstances in which equal in status as subjects of legal relations are in an unequal social status.

Meanwhile, the developers of the Government of Russian Federation on February 26, 2010 № 96 "On anti-corruption expertise of legal acts and draft normative legal acts" of corruption-factors indicated "definition of powers under a "right", "fill the legislative gaps by-laws in the absence of appropriate legislative delegation of authority".[9] But in almost every textbook on the theory of state and law states that authorized the rules attach certain rights, and, of course, they can begin with the word "right".

As for the gap, they can occur in different ways, in legal modernization – it is mainly due to the emergence of new social relations. In this regard it should be noted that it is necessary to distinguish between a gap in the law and the law of willful silence of the legislator, or as it is called Professor V.M. Baranov "qualified silence legislator".[10] This is quite different things, though at first glance it may seem that the nature of these phenomena is similar.

In addition, the filling legislative gaps by subordinate legislation in the absence of legislative delegation appropriate authority – the establishment of mandatory rules of conduct in a regulation in the absence of law "does a particular blow to the" ukaznoy norm-making "since the Constitutional Court authorized the President to implement forward-looking rule-making."

2.2. Regulatory impact assessment

In this regard, an important tool for the identification of legal monitoring of unconstitutional legislative acts, prevent illegal actions, corruption, extra financial cost, etc. is a regulatory impact assessment (RIA).

It should be noted that the terminology of legal monitoring it is domestic achievement of our scientists and we can be proud of it. It should be noted that our research and development has already been successfully imple-

9 *See*: WG. № 5125. Marsh 5, 2010.

10 For details on qualified silence legislator see *Baranov V.M.* "qualified silence legislator" as a phenomenon common law (to the question of the nature and functioning of legal gaps) // Gaps in Russian legislation. Law Journal. – M., 2008, №1. Pp. 75-78.

mented in the mechanism of legal regulation of the Republic of Belarus and Kazakhstan.

In the West, information on the activities of the Council of Federation of legal monitoring only became known in 2009, when the translation of the report of the Council of Federation "On the status of legislation in the Russian Federation" in 2008 was brought to the Library of Congress by Professor S. Boshno.

However, despite the fact that the phenomenon of domestic legal monitoring, some of its features, such as expert activities used successfully for many years abroad.

Moreover, in the 80's of XX century in European countries appeared a new tool for improving the quality of decision-making - regulatory impact assessment (RIA).

As already was noted, the legal monitoring is very diverse and includes a variety of features, including forward-looking. All the subjects of law-making to ensure the standard-setting process (legislative, departmental, etc.) should provide clear on what social groups and public relations will be affected?

How will social groups respond to this action? Will company with the prohibitions and legal obligations, or will go to rallies and strikes to block the movement of traffic on hunger strike, etc.

Analysts should also answer the question: What could be the positive and negative effects of legal regulation? What corruption-factors may occur and why? How to avoid it? Is it possible an alternative solution to the question? (The shearing forward is, that the Duma began to make alternative draft of the federal laws.)

It is important to answer the question: What will be the financial costs due to the adoption of normative legal act?

However, more important from a social point of view are the questions:

1. What will be social and political consequences of acceptance N P A?
2. Will the result acceptance of this or that certificate in new political performances?

In addition, for practitioners here there is a danger with the usual mix of RIA feasibility study. It is important to emphasize that the RIA provides not only financial, but also the administrative, political, social and legal forecasts, models the development of various social processes that can studied to avoid the "Arab Spring", "Bolotnaya square" and similar statements of the masses.

Thus, the function of the legal model is the most brightly pronounced in the RIA.

Also during the RIA should be considered not only the direct consequences of the adoption of normative legal act, but hidden, which can predict only experienced legal analysts.

In this context, the problem of updated technology development of RIA allowing for the legal regulation of both the supreme bodies of state power, and for the various federal departments and services.

Unfortunately domestic positive experience of the regulatory impact assessment in Russia is not so much full of RIA held in one of the federal authorities, it is Ministry of Economic Development, there is this institution regulated by the norms of the order.[11] And our scientists have not had their say in this regard yet. Successfully engaged in the research center only RIA institute of Public Administration HSE (Director Tsygankov D.B.).

Understanding the importance of the institute for Regulatory impact Assessment in the modernization of public administration 7 May 2012 V. Putin adopted a decree "On the main directions of improving governance". Paragraph 2 is a peremptory instruction to January 1, 2013 to ensure the implementation of measures aimed at further improvement and development of the institution of regulatory impact assessment of draft regulations. While later in the ordinance were analyzed measures at the development of the institution, among which an important and timely proposal to establish requirements for the procedure of regulatory impact assessment in respect of draft regulations on customs and tax legislation.[12]

But immediately raises the question: Why is it only the customs and tax laws?

Obviously because this requires serious calculations of how much money will be collected from companies and from individuals? How much money will go into the budget?

However, ignoring the mandatory regulatory impact assessment in respect of normative legal acts aimed at implementing social rights and may be even more important.

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11 See: Order of the Ministry of Economic Development of the Russian Federation from 31.08.2010. № 398"On Approval of the Procedure for drawing conclusions about the regulatory impact assessment"// Bulletin of normative acts of the federal executive. № 43, 25.10.2010.

12 See: WP – Capital Issue. № 5775. May 9, 2012.

So we would like to say that in Russia, as usual, all the reforms come only from the government, but civil society acts as either passive observers or fiercest critics. Thus, in today's pattern already seen that, in Russia, to reform the state of innovation activities, as a rule, come down "from the top."

Meanwhile, the Russian conference "Development of government in Russia." Present and Perspectives "executive vice-president of the Russian Union of Industrialists and Entrepreneurs (RSPP) Alexander Murychev said that "from August 2010 RSPP has become involved with the Ministry of Economic Development of Russia in the regulatory impact assessment (RIA) developed by the executive branch of draft regulations. It is possible to connect to an examination of the very early stages." However, in practice, and he said A.V. Murychev, "... not all worked out. Not all of the projects we have regulations. Timing of review is so short, it is only 3-5 days, and major conclusions can not be prepared. I would like to receive not only the "naked" design, but the materials for him...".[13]

Indeed the explanatory note contained the concept of the bill, without the financial and economic feasibility, no conclusions of the Government and other stakeholders in the project authorities cannot always be necessary to carry out monitoring of the project and give an objective conclusion with forecasts of legal regulation of a particular act. However, what really RSPP connected to the regulatory impact assessment – this is a clear advantage in the "piggy bank" of Russia's democratization.

What is interesting in this regard, the RSPP last year conducted a comprehensive study on the improvement of regulatory compliance and enforcement and removal of administrative barriers to economic activity. Recommendations were made to extend the mechanism of regulatory impact assessment on all draft normative legal acts in any way affect the relationship with entrepreneurs.

These recommendations are reflected in the analyzed Presidential Decree, where it was said that it was necessary "to submit to the established procedure, proposals for the regulatory impact assessment prepared for consideration by the State Duma of the Federal Assembly of the Russian Federation, the draft laws regulating the relations in the field of business and investment, provided for in this assessment as possible".[14]

13 See: http://rspp.rf/viewpoint/view/18.

14 *See:* WP – Capital Issue. № 5775. May 9, 2012.

Thus, it becomes clear that the opinion of such a powerful institution of civil society, as the Russian Union of Industrialists and Entrepreneurs (RSPP) is left unheard of power.

Meanwhile, there are quite controversial provisions in the sample by Presidential Decree. For example, it contains a mandatory required that follows "establish mandatory for federal executive power order, providing for their regulatory impact assessment of normative legal acts and public debate at all stages of development of these projects."

Of course, legal monitoring should be carried out at all stages of legal regulation, but this claim is controversial for such stages departmental norm-making process, such as: planning, notes and the schedule of the normative legal act, sight and approval of the normative legal act, a presentation of the project signing, state registration normative legal acts.[15]

However, the statement of this institution is not possible without making major changes to the normative legal acts and their projects. For example, at the federal level as quickly as possible should be made changes to the regulations of the Federal Assembly of the Russian Federation. These changes also need to be made in the draft Federal Law "About normative legal acts of the Russian Federation."

2.3. Anti-corruption monitoring tools in law enforcement

As for the legal monitoring tools in law enforcement, they can be classified in a variety of ways. For example, it may be science sectors. This is the sociological tools (interviews, questionnaires, and other types of surveys, etc.), statistics (analysis detected corruption offenses, court statistics, the number of complaints on the telephone "hot line" in the administration of public authorities, in municipalities that is to say that in Europe called "lower corruption barometer", correlation-regression analysis), mathematical methods. It should be noted that our science has to say its word here conducting research at the intersection of law with the economic and mathematical sciences.

15 Stages of departmental norm-making process, see: *Arzamasov Y.G.* departmental norm-making process: structure, content, and prospects // Representative Power, 2007. № 4, 5, 6. C. 13-15, 14-17,3-7; Normografiya: theory and methodology of norm-making / Ed. By Y.G. Arzamasov. – M., 2007. Pp. 359-369.

Practice shows that an effective tool in law enforcement in preventing corruption is to monitor the conduct of public procurement. We believe this type of anti-corruption monitoring shall consist of the following components: monitoring of solicitation activity, monitoring of the conditions of participation in the procurement, monitoring of performance of the contact in accordance with its terms.

1. Monitoring of solicitation activity. At this stage it is necessary to clarify the following points. Was it given access to information about the competition for all potential participants? Was the information given in the tender online? Was it assigned any additional requirements on the contestants? If it was assigned, what was the reason?
2. Monitoring of the conditions of participation in the procurement. We believe that in order to prevent corrupt practices should strengthen the regulatory rules for the uniform requirements for the participants of public procurement.
3. Monitoring of the performance of the contract in accordance with its terms. Researchers must analyze and respond to questions: Were changed the terms of the contract? Why were they changed? How was the reception of the results of the contract?

The analysis showed that the scientific community, given the positive experience of the Ministry of Justice, Ministry of Economic Development and other authorities, as well as the negative practices in the fight against corruption, should pay attention to the establishment of scientifically sound and improved technique for the monitoring of anti-corruption.

However, the most important condition for the prevention of corruption is a comprehensive approach to address the problem, which is not only to use the full range of legal instruments for monitoring, but also the consolidation of a set of political, institutional, economic, educational and other measures. If it will not be formed a negative attitude towards people who abuse power, and giving a bribe taker in society, no application technologies, including legal and do not remedy the situation, which had been mentioned at the beginning of this article.

Congress Conclusions

Luzius Mader

The concept of "regulatory reforms" is not a static, but an open and dynamic concept. It may evolve and change its meaning – or at least the main messages it is supposed to communicate and bring to bear in legislative practice – according to the needs and expectations prevailing at a certain moment in a specific national or international context. For some years, "regulatory reforms" meant in particular less regulation ("deregulation"). The State and the legislator were exhorted to act with restraint and to give more room to private initiative and self-regulation. Later, special emphasis was given to the improvement of regulation and legislation by defining substantial quality standards and setting up adequate legislative procedures ("better regulation"). Nowadays, the discussion focuses more on the use of appropriate modes of action and instruments ("smart regulation").

We have tried, during this congress, to discuss these different meanings and to take into account the various dimensions of regulatory reforms: substantial changes in various policy fields, institutional and procedural aspects, technological innovations regarding the practical functioning of administrations and changes in legislative techniques and drafting styles.

From my point of view, the presentations and discussions in the plenary sessions as well as the four panels highlighted the various aspects and dimensions of the concept and gave us a deeper and more finely distinguished understanding of the topic. I think that the reports made by the panel moderators very accurately sum up the main conclusions regarding the topics addressed in the panels 1-3 and also the three sub-topics addressed in panel 4. Therefore, I am not going now to summarize these reports, but I would like to thank the panel moderators (Marta Tavares de Almeida, Olga Afanasieva, Jean-Pierre Duprat and Yuriy Arzamasov) for their excellent contributions.

We certainly all agree on the fact that it is not enough to enact regulatory reforms. Reforms have to be implemented by the authorities, and the addressees of legislative or regulatory reforms have to comply with them. Without voluntary compliance – presupposing a good knowledge and a high degree of acceptance – the implementation and, ultimately, the enforcement

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ISBN 978-3-8329-7979-9