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LICENSING AND SELF-REGULATION: PROSPECTS OF DEVELOPMENT

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The author speaks about two groups of norms that regulate relations in the sphere of licensing. Here is noted that when licensing not the very activity of controlled entities and its results are under control, but the availability of its properly completed documents (a license), i.e., the control is implemented at the entrance to market, rather than a current control at the market itself, and this fact, according to the author, even more bureaucratizes the licensing system. The article suggests introducing the principle of "free entry and full responsibility for fraudulent conduct in the market".

It is argued that despite the lack of developed mechanisms for out of court settlement of disputes within self-regulatory organizations, the mechanism of compulsory self-regulation has replaced the ineffective in many cases licensing system.

Keywords: licensing, licensing of certain types of activity, self-regulation, SROs, state management of economy.

State regulation of economy is traditionally perceived as a manifestation of (functions) of public administration, the basic meaning and the content of which lies in the establishment and ensuring by the State of general rules of conduct (activities) of the subjects of social relations and their adjustment according to changing

conditions. The content of state regulation of the economy is rather ambiguously interpreted in the literature. This is either mandatory and mainly administrative-legal ways of regulation or establishment and providing by the State of general rules of conduct (activities) of the subjects of social relations and their adjustment. Licensing and self-regulation can be attributed rather to the second group.

The issue of the legal nature of licensing and the place of the institute of licensing, as well as its correlation with the institute of self-regulation in the legal system of the State is closely connected with the issue of the need for and extent of government intervention in economic processes ongoing in society.

Licensing of any kind of activity is due to not an arbitrary choice, but to an objective necessity to ensure state control over the quality of products, provided services, made works, honesty of entities involved in certain activities, and in some cases, to the need to limit the exercising of any activity in connection with its special character, threatening state security, the health of citizens, etc.

Assigning administrative-legal nature to licensing, we can highlight its following signs:

1) direct implementation and regulation of licensing occurs in the presence of an official state-authoritative body (i.e., licensing authority), whose competence includes unilateral imposition of decisions on emerging issues within the framework of regulated managerial relations (for example, a decision to suspend a license);

2) presence of an unilateral expression of will of one of the subjects of legal relations (licensing authority) in relation to another (license applicant or licensee); imperious nature of the expressed will, entailing mandatory execution;

3) presence of juridical inequality between the parties of legal relations, in which one of them (licensing authority) is a manager and another (licensee) is a controlled one;

4) existence of an established general mandatory procedure of actions, which the participants are required to follow (i.e., enshrined in procedural norms licensing procedure).

As for normative regulation, the norms governing relations in the field of licensing can be roughly grouped into general and special part.

General part brings together norms that define the criteria of selecting objects, the legal status of the subjects of licensing legal relations, including the licensing of powers of licensing authorities, the principles of licensing law, the scope of licensing legislation and law-making rights in the licensing sphere of different entities of power, the ratio of federal and regional principles in the regulation of licensing relations, the basic rules of the validity of licenses in space and time, their types and

documents certifying licenses. The general part also includes procedural norms (on the procedure and timing of taking decisions to grant a license, on the procedure of renewal of documents, on the procedure of suspension and revocation of a license).

The norms of preliminary and current monitoring of activities of license applicants and licensees, as well as the norms on the maintenance of registers of licenses and on the procedure for providing the information contained in them are also general ones. In addition, the general part of licensing law includes norms on licensing responsibility, i.e., the norms determining a licensing offense and punishment for its commission.

The norms of the general part are laid down in the Federal Law No. 99-FL from 04.05.2011 "On Licensing Certain Types of Activities" (hereinafter – the Law on Licensing) [3] and the Decree of the Government of the Russian Federation No. 45 from 26.01.2006 "On the Organization of Licensing of Certain Types of Activities" [4]. The norms of the general part for the most part apply to the whole totality of licensing legal relations and also form the basis for norm-formation and application of law norms within the framework of the special part.

Special part is traditionally formed from the rules on licensing of certain types of activities. At that, it includes norms on licensing of those activities that are also regulated by the general norms of licensing legislation, enshrined in the Law on Licensing. The structure of the special part consists of separate institutes of licensing in economic sphere (economic types of activities), in the field of public security and national defense, public health, environmental, industrial, transportation safety, etc.

The Law on Licensing has become a unique result of development of the institute of licensing in Russia. It has retained the structure of the previous Federal Law No. 128-FL from 08.08.2001 "On Licensing of Certain Types of Activities" [1], and introduced some important innovations.

In particular, the Law on Licensing designates the ability to apply a single unified procedure of licensing.

However, taking into account the specificity of licensing activities in separate spheres, as a transitional period, the new law has retained some provisions to ensure a smoother transition to the general procedure of licensing in these spheres.

It appears that the existence in the Russian legislation of the list of activities, in respect of which establish a specific (special) licensing procedure, is a temporary (transient) phenomenon, a consequence of previously formed in the Soviet legal system practices (traditions) of the special state control regarding the most important (strategic) spheres of activity (education, communications, banking activity,

customs activities, activities related to the protection of state secrets, activities in the field of production and turnover of ethyl alcohol and alcohol-containing products, etc.) and taking into account the interests of the national security of the Soviet period. Seems that the improvement of the general licensing legislation in Russia contributes to the gradual "shifting" from the specific (special) procedure for licensing of certain types of activities, and the general procedure for licensing (for all licensed types of activities) is being unified and will become more "transparent" in terms of state control over the legality of supervisory bodies' actions.

Licensing of separate types of activity today covers more than 50 types of activities.

The modern stage of licensing development is characterized by reduction the number of licensed activities. This is due, primarily, to the fact that excessive licensing creates "administrative barriers" that prevent the development of market economy. In our view, the licensing should not be considered as an instrument to restrict business activity. While licensing the State does not put a barrier between an entrepreneur and a licensed activity. Any entrepreneur that meets the requirements and terms of licensing has the right to engage in the relevant activity. At that, the State establishes just certain requirements that must be observed by an entrepreneur.

The adoption of the Law on licensing reduced the scale of administrative impact associated with licensing on entrepreneurial activity.

On the other hand, now we have the following situation: actually not the activity itself and its results are under control, but the availability of its properly executed documents (license). In other words, monitoring is carried out at the entrance to market, rather than the current monitoring at the very market, what even more bureaucratizes licensing system. The modern Russian practice is in need of introducing the principle of "free entry and full responsibility for careless conduct on the market".

Therefore, it is possible to draw the following conclusions:

- monitoring while entering market must give way to the current monitoring on the market;
- the need for availability and validity of the documents necessary for the implementation of this or that activity should be replaced by the monitoring of activity itself, the actual quality of the goods and the real conduct of entrepreneurs on the market.

Due to the fact that the list of licensed activities still contains types of activities, the regulation of which may be carried out by other forms of regulation (for

example, the activities of legal entities, which is directly related to air safety, is subject to obligatory certification), the list is expected to be reduced by eliminating such types of activities.

Cancellation of licensing will be accompanied by a simultaneous transition to other forms of regulation, including notification procedure of the beginning of entrepreneur activity and self-regulation.

In recent years, more frequently discuss the issues of business self-regulation as a way to improve the regulation of markets and to develop national economy. To a large extent state regulation is gradually replaced by self-regulation. While self-regulation is a new phenomenon for our State.

Issues of self-regulation in Russia have obtained great relevance due to the growing trend of reduction of administrative barriers, which originates from the year 2003 and is associated with conducting of administrative reform in Russia.

Following that, development were received by both voluntary and delegated forms of self-regulation requiring compulsory membership (SRO of court-appointed trustees, appraisers, auditors) or optional membership with exclusive rights (SRO of professional participants of securities market, management companies) or weakening of state regulation (SRO that unify non-state pension funds).

Federal Law No. 315-FL from 01.12.2007 "On Self-regulatory Organizations" [2] (hereinafter – the Law on SROs) was adopted at the time when self-regulatory organizations of various kinds were actively functioning in Russia, including SROs of professional participants of securities market, court-appointed trustees, etc.

With the adoption of this law in the Russian Federation was created a legal and economic basis of self-regulation, defined the procedure of creation and implementation of activities of self-regulatory organizations in various areas of entrepreneurial and professional activities.

According to the Law on SROs, self-regulation refers to an independent and initiative activity exercised by the subjects of entrepreneurial or professional activity, the content of which is the development and establishment of standards and regulations for such activity, as well as the monitoring of compliance with established standards and regulations.

The law defines the basic classification signs of self-regulatory organizations:

1. Principle of sufficient representation of the subjects of entrepreneurial (minimum 25) or professional activity (minimum 100).

2. Availability of standards of entrepreneurial and (or) professional activity mandatory for compliance with by the members of a self-regulatory organization,

and supervision over their observance by the members of the self-regulatory organization.

3. Application of the mechanisms of property responsibility for the harm inflicted to third parties.

Apart from the general law on self-regulatory organizations of the Russian Federation legislation contains a number of normative legal acts dealing with the matters of self-regulation in certain areas of entrepreneurial and professional activity. Provisions of the special (sectorial) laws may define certain features of SROs in certain branches, take into account the specifics of such branches, however, the existing experience of normative regulation shows that the norms of special laws sometimes are so specific that come in direct conflict with the norms of the general law.

Branches, for which in some sectorial laws describe specific requirements for self-regulatory organizations, can be grouped as follows:

1. The fields, in which provide for obligatory membership of participants of professional or entrepreneurial activity in a SRO, including:

- activities of court-appointed trustees; audit activities; credit cooperation; appraisal activities;
- activities of inspection unions of agricultural co-operatives;
- engineering surveys;
- architectural and construction design; construction;
- activities in the field of energy survey; heat supply.

2. The fields, in which special laws provide for possibility of creation a SRO, but membership in such organizations is not compulsory, including:

- professional activities of participants of securities market;
- activities of non-state pension funds;
- cadastral activities;
- promotional activities;
- activities of housing savings co-operatives;
- activities of patent attorneys;
- mediation.

In addition, should be separately noted the spheres of professional activity, in which the current legislation provides for compulsory membership of the participants in specialized associations, but these associations do not have the status of self-regulatory organizations (such as notariate and bar association).

Self-regulation by its nature is a kind of regulation that is contrary to state regulation, and is not a part of the latter. Interaction of state regulation and self-regulation can take place as follows:

- self-regulation is always carried out in the framework of the current legislation and is legitimate;
- self-regulation can actually replace state regulation in certain spheres;
- the norms of self-regulation can complement and concretize the current legislation;
- in some cases, the norms of self-regulation can tighten the requirements for market participants as compared with the requirements of legislation [5, 8].

Self-regulatory organizations represent structures that are endowed with similar to public authorities' functionality, however, not duplicating, but replacing or "auxiliary" ones.

The content of self-regulation is a based on the norms of the federal legislation regulation of relations in certain sectors of economic activity, which is carried out on the basis of self-organization, i.e., without direct state intervention. Operative state intervention is replaced by the normative legal regulation and control over the observance of legislation norms created by self-regulatory organizations. This significantly reduces state expenditures on regulation and monitoring in the respective spheres of activities, increases the overall efficiency of public administration through replacing operative monitoring over entrepreneurial or professional activities by legislative regulation, and through reducing the number of managerial ties – one or several self-regulatory organizations become the subject to regulation and control, instead of countless actors of entrepreneurial and professional activities.

At existence of a fairly limited range of different forms of self-regulation, to the issues of creation of self-regulatory organizations devote a separate "general" law that establishes the basic principles of the creation and operation of self-regulatory organizations, as well as numerous norms of special laws regulating the activities of SROs in certain sectors of economy.

The lack of a unified model of regulation can be called one of the major problems in the regulation of self-regulation.

It seems that the basic principles of creation of a self-regulatory organization, recognition of its status by the state, formation of the internal structure, as well as functionality of the self-regulatory organization must be unified, regardless of the branch, in which the SRO appears.

Recently, more and more increases the trend of transition from licensing to self-regulation.

Since January 01, 2006 five types of licensing have been replaced by compulsory membership in self-regulatory organizations.

The start of applying the mechanisms of self-regulation as an alternative to the institute of state licensing shows that in presence of certain improvements expressed, also, in the getting rid from unfair and not enough qualified participants in a number of branches and in increased transparency of admission procedure to the market, there are also a number of objective disadvantages associated, first of all, with the low efficiency of execution by self-regulatory organizations of functions entrusted to them by the legislation. Efficiency of control exercised by self-regulatory organizations in respect of their members is low, adequate state control (supervision) over the activities of self-regulatory organizations is not exercised, and there are also no tried and tested mechanisms for pre-trial settlement of disputes within the framework of self-regulatory organizations.

The mechanisms of self-regulation should be means to reduce the powers of authority of public authorities and administrative barriers to the development of entrepreneurship, but in some cases the requirement of membership in a self-regulatory organization regarding the subjects of entrepreneurial and professional activities of certain sectors of economy creates onerous conditions for businesses and causes a significant increase in expenditures required for admission to the market. This can be due to excessive high regular and one-time contributions of SROs' members (admission, membership and target contributions).

One cannot say that the efficiency of the institute of self-regulation at the present stage of its development is assessed as sufficient. In some cases, the terms of membership in a SRO hinder the development of small and medium-sized businesses in a certain sphere.

All this requires the improvement of both the system of legislative regulation of creation and activities of self-regulatory organizations in various fields of economic and professional activities, and the improvement of the effectiveness of such organizations.

In summary it can be concluded that the mechanism of compulsory self-control replaced inefficient in many cases licensing system. At that, one of the important objectives of the introduction of self-regulation was the elimination of administrative barriers. However, practice has shown that the use of the mechanisms of self-regulation does not always lead to the removal of all administrative barriers, and sometimes it acts as such.

Certainly, it is inadmissible to transfer all types of activities that subject to licensing at the mercy of self-regulation, because in addition to entrepreneurial sphere they affect national security and national defense, public health, environmental, industrial, transport safety, etc., but in general we should recognize

the positive trend of transfer from licensing of certain types of activities to self-regulation. Without minimizing the role of licensing, we would like to express the hope that self-regulation will be a new alternative and effective way of regulating activities in many areas, and will not become another barrier, including as a financial one, to business development.

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