Journal of Siberian Federal University. Humanities & Social Sciences 2 (2011 4) 158-164
~ ~ ~

УДК 346.1

Criminal-Legal and Administrative-Legal Means of Ensuring Economic Activity Self-Regulation in Russian Federation

Irina V. Shishko* and Elena V. Demyanenko
Siberian Federal University
79 Svobodny, Krasnoyarsk, 660041 Russia [1]

Received 4.02.2011, received in revised form 11.02.2011, accepted 18.02.2011

Licensing of some kinds of economic activity is replaced by self-regulation. It is being proved, that self-regulation is not only inferior to powers, but surpasses licensing in some cases on a complex of impaired right authorities. Hence, illegal actions (omissions) of SRO bodies interfering with implementation of economic activity represent the same public danger, as well as unreasonable refusal in licensing or evasion from its issue (article 169 of the Russian Federation Criminal code), and economic activity implementation if an obligatory condition of it is membership in a certain SRO without joining it represents the same public harm, as well as torts, provided by articles 14.1 and 19.20 of the Russian Federation Administrative Offences code, or the same public danger as illegal entrepreneurship without the licence (article 171 of the RF Criminal code). It stipulates necessity, firstly, to introduce corresponding amendments to specified administrative-tort and criminal-legal norms of law and secondly, extended interpretation of concept of the official within the norms of chapter 22 of the RF Criminal code.

Keywords: economic activity regulation, licensing, self-regulation, legislation change, hindrance of lawful economic activities, illegal business.

Point of view. In 2007 a new legal institution of self-regulation appeared in Russia which in some cases contains the requirements of obligatory membership in self-regulated organisations. The entire complex of measures limiting the constitutional right to free use of one's abilities and property for entrepreneurial and other economic activity not forbidden by the law is inherent in such self-regulation. Meanwhile neither *the guarding economic* legislation, *nor a criminal-legal science responded* to the specified changes.

Example. With Russian economy transition into the market one licensing became an important tool of economic activity regulation. Not occasionally regulatory legal acts governing relations in connection with licensing of separate kinds of activity have became exclusively dynamical and numerous.

In spite of the fact that there is no common opinion about licensing essence, in the majority of licensing definitions it is noted, that it acts as a way *of state regulation* of economic activity stipulating establishment of a legal regime of

* Corresponding author E-mail address: ir-vic02@yandex.ru

realisation of separate kinds of this activity only in the presence of special permissions (licences) issued by authorised bodies under certain conditions, and control over licence requirements observance. Namely, by means of licensing competent state bodies achieve separate kinds of activity implementation in full conformity with requirements and conditions which set is established by provisions on certain kinds of activity licensing. According to article 4 of the Federal law «On licensing of separate kinds of activity» (further – the Law on licensing) licensed kinds of activity are defined according to two criteria. The first one is that implementation of such kinds of activity *can inflict damage* to the rights, legal interests, health of citizens, defence and safety of the state as well as cultural heritage of peoples of the Russian Federation. The second one is that regulation of these kinds of activity by other methods except licensing is impossible.

Thus, the licensing basic purpose is in establishing special state control over implementation of such kinds of activity which owing to features inherent in them are interfaced to realisation of public interests (Ionova, 1996: 97).

Only acquisition of license certifies that the licensee has real possibilities and preconditions for a certain kind of activity implementation that, in turn, is *the quality assurance* (safety) of this kind of activity implementation.

Taking into account, that licensing is a state-authoritative management method directly or potentially encroaching the constitutional right to free use of abilities and property for entrepreneurial and other economic activity not forbidden by the law with a view of observance of proportionality in this right restriction the legislator has fixed a complex of legal measures on its protection. Their number is also complemented with criminal-legal ones. Article 169 of the RF Criminal code in particular, provides criminal liability for such forms of hindrance of legal entrepreneurial or another activity, as a *wrongful refusal in licensing* for implementation of certain activity or *evasion from its issue*. Criminal-legal liability under the specified article can occur for illegal suspension or licence cancellation[1]. On the other hand, the guarding mechanism providing observance requirements by persons implementing economic activity to receive the licence is created. In particular, article 14.1of the RF Administrative Offences code provides responsibility for entrepreneurial activity implementation without the licence if such a licence is obligatory, or with infringement of the conditions provided by the licence, and article 19.20 of the RF Administrative Offences code for implementation without the licence (if it is obligatory) or with infringement of requirements or conditions of the licence of the activity which has not been connected with extraction of profit.

In turn, article 171 of the Russian Federation Criminal code has established liability for entrepreneurial activity implementation without the licence if this action has inflicted large damage to citizens, organisations or the state or is interfaced to large income extraction.

Over last years there is a stage-by-stage decrease in quantity of licensed kinds of activity in the licensing sphere. It is directly connected with the administrative reform being held in Russia which purposes are: restriction of the state interference in economic activity of subjects of entrepreneurship, including termination of superfluous state regulation. Kinds of activity excluded from the list licensed, conditionally can be divided into three groups:

- activity has lost injuriousness signs, or did not possess them at all, i.e. was not capable of causing damage;
- activity has passed into those ones regulated by technical regulations;

- self-regulation has become a way of activity regulation.

Self-regulation is introduced by the Federal law "On self-regulated organisations" in 2007 (further – the law on SRO) where the beginnings of self-management and autonomy in economic sphere necessary for formation of a civil society are laid down.

The noncommercial organisations based on membership, uniting subjects of entrepreneurial activity, proceeding from unity of branch of manufacture of the goods (works, services) or the market of the made goods (works, services), or uniting subjects of professional work of a certain kind (article 3 of the law on SRO) are recognised self-regulated. The main objective of introduction of self-regulation institution is transfer of a part of the state functions to the self-regulated organisations. Such functions include: control over legislation observance by SRO members, working out and acceptance of rules and standards of a certain kind of activity, maintenance of execution of these rules and standards. The state has reserved control only over activity of self-regulated organisations.

By the general rule, participation in self-regulated organisations is voluntary however federal laws can provide cases *of obligatory membership* of subjects of entrepreneurial or professional work in self-regulated organisations (article 5 of the law on SRO). Now obligatory membership in SRO is recognised for arbitration managing directors, auditors and auditor organisations, appraisers, builders, etc.

Item 7 of article 4 of the law on SRO establishes that standards and rules of self-regulated organisation should establish a prohibition of activity *to the detriment of other subjects* of entrepreneurial or professional work by members of such an organisation as well as requirements preventing from committing actions, inflicting moral harm or damage to consumers of the goods (works, services) and other persons. In separate fields of activity where membership in SRO is obligatory persons implementing it are vested with public-legal status (activity of auditors and arbitration managing directors, in particular are referred to such kinds of activity). In spite of the fact that the legislator directly does not specify possibility of inflicting harm by such kinds of activity attributing a special status to people implementing it is stipulated by the fact that their activity a priori can entail infringement of legal rights and interests of an uncertain circle of persons. As to activity of self-regulated organisations' members in the building sphere its potential ability to inflict damage is so high, that *prevention of a tresspass* to life or to health, property, environment and objects of cultural heritage is considered one of the main objectives of SRO activity in the building sphere (article 55.1of the Architectural code of Russian Federation).

Thus, if self-regulation *can be* a method of regulation of the activity *capable of inflicting damage or other harm to other persons,* self-regulation *with obligatory membership in SRO can be a* way of regulation of *only damaging* activity.

Considering, that all kinds of activity, which exception out of the licensed ones was accompanied by the requirement of obligatory membership in SRO meet the first criterion of licensing, self-regulation is reasonably recognised an alternative mechanism of economic activity regulation.

How do these ways of regulation correlate? Analysing article 4of the law on licensing it is possible to draw a conclusion that licensing is *an extreme*, *exclusive* method of economic activity regulation connected with maximum of rights restrictions.

To establish whether self-regulation with obligatory membership is «equivalent» to

licensing or more sparing way of regulation it is necessary to investigate their content in detail.

There is no doubt, that the relations connected with licence acquisition, and the relations connected with membership in the self-regulated organisation are different by their legal nature: the former are administrative-law, the latter – civil-law. Such a difference stipulates different subject structure of these relations. If one party of both relations is the person carrying out a certain kind of economic activity then another party of licence legal relations is a special representative authorised body on issuing licences (licensing body), and the second party of the relations connected with membership in the self-regulated organisation is a noncommercial organisation. At the same time a number of legal characteristics peculiar to licensing are inherent in self-regulation.

In case of licensing of separate kinds of activity the licence acts *as a special permission* to their implementation at obligatory observance of licence requirements and conditions. Legal bodies and individual entrepreneurs are entitled to perform licensed kinds of activity only from the moment of licence acquisition.

In cases where the legislator has foreseen obligatory membership in SRO the person is not entitled to perform neither entrepreneurial nor professional work either without membership in it.

Thus, without being named a special permission to implement certain activity directly in legislation, membership in the self-regulated organisation if it is obligatory, has *the same purposet as the licence* in essence, that is to confirm the right to implement certain activity. To illustrate this provision let us take article 4 of the Federal law «On appraisal activity in Russian Federation» as an example. Physical persons being members of one of the self-regulated organisations of appraisers and having their liability insured according to requirements of the specified law are recognised subjects of appraisal activity.

It would seem that the legislator connects the right to carry out appraisal activity with two conditions: appraisers' SRO membership and responsibility insurance. However, according to article 24 of the same law insurance is only a condition of the person's admission in SRO appraisers.

The purpose of membership in the self-regulated organisation is defined in the Federal law «On auditor activity» more precisely (both the auditor organisation, and the auditor should be members of one of the self-regulated organisations of auditors). According to item 2 of article 3 of this law the commercial organisation *acquire the right to carry out auditor activity from the date of introducing data about it into the register of auditors and the auditor organisations of the self-regulated organisation of auditors* which member such an organisation is. The physical person is recognised the auditor from the date of his data introduction into the same register.

Both licensing bodies and self-regulated organisations are registrars: the former are registrars of licences, the latter – registrars of the corresponding self-regulated organisation.

The control function is also common for both licensing bodies and self-regulated organisations. However, the licensing body supervises observance of only licence requirements and conditions by licensees while *the subject of SRO control is wider*: the self-regulated organisation carries out control over entrepreneurial or professional work of the members regarding observance of requirements of legislation by them, standards and rules of the self-regulated organisation, membership conditions in SRO, rules of independence and professional etiquette codes.

Besides, licensing bodies carry out control only in the form of check while the self-regulated organizations forms of control along with checks are reports of SRO members. Legislation also provides *different legal reaction* to the infringements revealed during control. Licensing bodies are entitled to initiate suspension of the licensee's activity by court, and in case of administrative suspension of this activity by court − to suspend the licence. If the licensee has not eliminated infringement of licence requirements and conditions, licensing bodies are obliged to resort to court with the statement for licence cancellation, and if it is cancelled- to terminate the licence (i.e. to enter the record on licence cancellation in the licence register from the date of the court decision coming into effect).

The self-regulated organisation in case of revealing infringements in its members' activity is entitled to make a decision:

- on disqualification (it can be cancellation of the qualifying certificate (in SRO auditors); in termination of the certificate on admission to works in capital construction sphere (in building SRO); in decision-making on discrepancy to membership conditions (in SRO arbitration managing directors)).
- on membership suspension in SRO for the term specified in corresponding laws,
- on exclusion from an organisation (the physical person) out of the members of the self-regulated organisation.

Apparently, the spectrum of measures restricting the right to economic activity implementation is wider for self-regulated organisations and they are vested with the right to apply them independently (without resort to the court).

Thus, licensing purpose mainly coincides with self-regulation purpose (under condition of obligatory membership in SRO): both are ways of legal regulation of separate kinds of activity. Thus, licensing is a way of state regulation, and self-regulation – a way of non – state one. However, self-regulation with obligatory membership in SRO is not only inferior to *powers*, but also surpasses licensing in some cases on a complex of impaired right authorities.

Conclusion. Unreasonable refusal in admission to SRO membership and other illegal actions (omissions) of SRO bodies interfering with legal implementation of economic activity, represent *the same public danger*, as well as unreasonable refusal in licensing, evasion from its issue and other forms of hindrance of lawful entrepreneurial or other activity. Implementation of activity without joining the defined SRO if membership in it is obligatory represents *the same harm*, as well as torts provided by items 14.1 and 19.20 of the RF Administrative Offences code or *the same public danger* (under condition of inflicting large damage or large income extraction), as illegal entrepreneurship without the licence (article 171 of the RF Criminal code).

The stated above stipulates corresponding *additional adjustment* of guarding legislation.

On the one hand novelties should protect the persons who are carrying out economic activity from illegal actions of the self-regulated organisations bodies (according to the forecast of many authors, SRO actions can be aimed at elimination of small and medium entrepreneurship form the market, lobbying interests of a narrow group of persons in SRO (Matijashchuk, 2010: 4, Pleskachevsky, 2009), and entire self-management can turn into absolute arbitrariness (Bodrjagina, 2008)).

For this purpose a disposition of part 1 of article 169 of the R F Criminal code after words «evasion from its issue» is necessary to add with words «wrongful refusal in admission in SRO or evasion from it, a wrongful exclusion from SRO or other illegal actions

of SRO bodies interfering with economic activity implementation …». On the other hand, novelties should provide observance of requirements of membership in SRO by persons carrying out economic activity.

To achieve this goal additional criminalisation *of realisation of entrepreneurial activity by the person who is not a member of the self-regulated organisation if membership in it is obligatory,* under condition of inflicting large damage to citizens, organisations or the state or conjugacy with large income extraction is necessary in article 171 of the RF Criminal code.

Moreover, it is necessary to enter a number of amendments to «economic» norms in the RF Administrative Offences code:

- An alternative condition of lawfulness of entrepreneurial activity implementation (along with absence of the licence if it is obligatory) by the person without being a member *the self-regulated organisation if membership in it is obligatory* should be highlighted in item 14.1 of article 2 of the RF Administrative Offence code.
- the same *inclusion* alternative to absence of the licence is necessary to be entered in item 1article 19.20 of the RF Administrative Offence code («Implementation of activity not connected with profit extraction»).

Thus, a circle of the subjects specified in p. 1 of article 169of the Criminal code does notrequire expansion. On the contrary, traditional narrow interpretation of concept of the official in ch. 22 of the RF Criminal code (in article 169 of the RF Criminal code in particular) deserves the most serious reconsideration.

Firstly, it mismatches the legislator's indication that concept of the official containing in the note 1 to article 285 of the RF Criminal code extends only over norms of ch. 30 of the RF Criminal code. Secondly, in federal laws on SRO (article 9 and 14), «On auditor activity» (article 8) and in other regulatory legal acts the SRO heads are referred to officials of these organisations. And determinancy of norms of the criminal legislation by corresponding regulatory norms requires the «language» of the former and the latter to be uniformed.

Thirdly, a part of the state functions transfer to the self-regulated organisations has led to that, where persons performing administrative functions are vested with administrative powers concerning persons being out of their official dependence, i.e. *perform functions of a representative of authority* (at deciding a matter on admission in SRO and cancellation of qualifying auditors' certificates of those who are not a member of any SRO of auditors in particular).

[1] Taking into account that it is the court that cancels the licence, liability for illegal cancellation of the licence should occur under the Criminal code article 305 «Passing an obviously illegal sentence, decision or other judicial ruling».

References

O. Bodrjagina. Auditors are given «manumission» [the Electronic resource] / O.Bodrjagina//the EZH-LAWYER. – 2008. – № 48. Access from ref.-legal system «The consultant plus».

Z.A. Ionova. Legal problems of entrepreneurship licensing [the Electronic resource] /Z.A.Ionova// Jurisprudence. – 1996. – № 3. – P. 97. Access from ref.-legal system «The consultant plus».

S.V. Matijashchuk Legal status of self-regulated organisations in the field of engineering researches, architectural-building designing and construction [the Electronic resource] / S.V.Matijashchuk//the Legislation and economy. – 2010. – № 2. – P.43. Access from ref.-legal system «The consultant plus».

On Concept of administrative reform in Russian Federation over 2006 – 2010: the Russian Federation Government Order on 25.10.2005 № 1789-r (edit. on10.03.2009) [the Electronic resource]// Collection of the Russian Federation legislation. – 2005, – № 46. – article 4720. Access from ref.-legal system «The consultant plus».

Pleskachevsky: SRO will complicate work of builders// [news agency Rosbalt Site] <http://www.rosbalt.ru/2009/09/24/674734.html> (reference date: 06.08.2010).

Уголовно-правовые и административно-правовые средства обеспечения саморегулирования экономической деятельности в РФ

И.В. Шишко, Е.В. Демьяненко
Сибирский федеральный университет
Россия 660041, Красноярск, пр. Свободный, 79

Лицензирование некоторых видов экономической деятельности заменено саморегулированием. Доказывается, что в ряде случаев по комплексу правоущемляющих полномочий саморегулирование не только не уступает, но и превосходит лицензирование. Следовательно, незаконные действия (бездействие) органов СРО, препятствующие осуществлению экономической деятельности, представляют такую же общественную опасность, как и необоснованный отказ в выдаче лицензии либо уклонение от ее выдачи (ст. 169 УК РФ), а осуществление экономической деятельности, если обязательным условием этого является членство в определенной СРО, без вступления в нее, – представляет такую же общественную вредность, как и деликты, предусмотренные ст. 14.1. и 19.20. КоАП РФ, либо такую же общественную опасность как незаконное предпринимательство без лицензии (ст. 171 УК РФ). Это обусловливает необходимость, во-первых, внесения соответствующих дополнений в указанные административно-деликтные и уголовно-правовые нормы, во-вторых, распространительного толкования понятия должностного лица в нормах гл. 22 УК РФ.

Ключевые слова: регулирование экономической деятельности, лицензирование, саморегулирование, изменение законодательства, незаконное предпринимательство.