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SELF-REGULATORY ORGANISATIONS AS MARKET REGULATORS WITH DELEGATED POWERS: COMPARATIVE ANALYSIS OF THE LEGISLATIVE FRAMEWORK

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Abstract. The purpose of this article is to identify exemplary and suboptimal approaches of certain countries to determination of the scope of public powers delegated to self-regulatory organisations as well as of means designed for ensuring efficient execution of these delegated powers in accordance with the norms of administrative law. Relying on comparative and systematic review methods, as well as on techniques of text analysis, the main legal contours of the model of self-regulation regulation of economic activities in particular areas (securities market, advertising and anti-money laundering), established by the legislation of certain countries (Germany, Ontario, the United Kingdom, the USA and Switzerland), are outlined. The authors conclude that self-regulatory organizations may be entrusted with the following delegated powers: (1) to register business entities or issue them permits, including after verifying their compliance with the eligibility criteria stipulated by regulatory legal acts (United Kingdom, USA, Switzerland); (2) to develop binding rules (standards) for the respective type of economic activity (USA, United Kingdom, Ontario, Switzerland); (3) to submit mandatory requests for the provision of information that is necessary for a self-regulatory organization to perform its functions (Lithuania); (4) impose liability measures on business entities that are members of a self-regulatory organization (United Kingdom, USA, Switzerland). Government control (supervision) over activities of self-regulatory organizations is carried out through: (a) approval/approval by regulatory authorities of the constituent documents of self-regulatory organizations, rules and standards for the activities of self-regulatory organizations, initiation of amendments to them, independent decision-making on this matter after consultation with the self-regulatory organization; (b) participation in meetings of executive bodies and disciplinary bodies of the self-regulatory organization on issues of its exercise of its delegated powers; (c) review by regulatory authorities of regulatory acts of self-regulatory organizations and/or their decisions on imposition of liability measures on business entities; (d) sanctioning self-regulatory organizations for violations of legislative requirements (including in connection with the systematic failure to ensure complianc by their members) or due to their failure to meet the performance indicators of their activities.

Keywords: administrative law, delegated powers, regulatory policy, regulation of advertising, regulation of securities market, self-regulatory organisations.

JEL Classification: K23, L51, M37, G18, H83

1. Introduction

Modern economic policy is aimed at achieving the highest feasible degree of deregulation, democratization and decentralization of market regulation while simultaneously ensuring the inevitability of responsibility for unscrupulous business practices that lead to distortion of competition and harm consumers. Entrusting regulatory and control-supervisory power management functions to market self-governance organisations is widely recognized as one of the tools for achieving this goal, which brings the authority to make regulatory decisions closer to the people who are most familiar with the relevant market mechanisms from the point of view of understanding the patterns

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and peculiarities of their functioning. At the same time, the bureaucratic apparatus of government authorities, which often does not have expertise in market processes, is removed from regulatory decision-making, and because of this, it is much less likely that its activities will provide utmost support to the legitimate business activities of market operators. At the same time, the governmental regulatory bodies retain the authority to monitor and take measures to respond to non-fulfillment or improper fulfillment by organisations of market self-governance of their delegated powers. However, as it is known, there are no international treaties or recommendations neither with a list of sectors in which self-regulatory organisations should be formed, nor with the basic principles of their activities, including their recognition and the appropriate scope of their own and delegated powers, nor with the order of control over their activities by governmental regulatory bodies.

2. Theoretical Basis

In the light of the above, in order to ensure the development of administrative-legal dimension of the market self-governance and to construct optimal model of its legislative framework, of particular importance is to carry out comparative review in order to determination of the scope of public powers delegated to self-regulatory organisations as well as of means designed for ensuring efficient execution of these delegated powers. Relying on comparative and systematic review methods, as well as on techniques of text analysis, the main legal contours of the model of involvement of self-regulatory organisations in the administrative regulation of economic activities in some areas, established by the legislation of certain countries, are outlined. In particular, the authors explore legislative provisions of some countries (Lithuania, Ontario, the United Kingdom, the USA and Switzerland) constituting the legal framework for activities of self-regulatory organisations in administrative-law dimension in the securities market, advertising, as well as within the framework of the anti-money laundering system.

3. Results

3.1. Self-Regulation in Securities Markets

Beginning the research of the experience of self-regulation of certain industries, the first matter at hand should be activities of self-regulatory organisations in securities markets.

Having studied the law of the United States and its practical implications it is to be noted that a significant number of self-regulatory organisations operate on the securities market, which are formed on a territorial, organisational or functional basis.

These include several prominent asset exchanges and regulatory bodies, including: the New York Stock Exchange, Financial Industry Regulatory Authority, regional stock exchanges etc. These organisations create rules, which are binding on their members and take disciplinary action against their members with the authorisation of the U.S. Securities and Exchange Commission. They also create and enforce rules that apply to companies listed on their exchanges. The self-regulatory organisation may also help investors understand how their investments work and advise on methods to mitigate potential risks associated with the securities industry (Georgetown Law Library, 2023). Financial self-regulatory organisations are required to file special form with the U.S. Securities and Exchange Commission before making any changes to its rules, specifically with regard to trading rules. In the filing, the self-regulatory organisation must justify the new rules to staff of the U.S. Securities and Exchange Commission, making clear that the rule change supports fair trading markets, and provides investor protections and requisite oversight procedures (Hayes, 2021). The U.S. Securities and Exchange Commission invites comments on filings submitted by self-regulatory organisations during the comment period (U.S. Securities and Exchange Commission, 2023).

As an example, the Financial Industry Regulatory Authority (FINRA) is a private organisation populated by member firms that consist of financial institutions, like broker-dealers and financial professionals, and has the power to license securities dealers. Their authority includes the ability to audit dealers and associated firms and to ensure compliance with the standards currently in place. The rules and regulations promoted and enforced by FINRA are, thus, under the auspices of a self-regulatory framework. Moreover, the Financial Industry Regulatory Authority provides information and allow input on any areas of interest or concern, which may include fraud or other unethical industry activities. The principles and rules that govern the organisation have been formulated and approved by its members, and members agree to adhere to them or face penalties such as fines or expulsion from the organisation. Governmental laws or mandates fall under the control of the U.S. Securities and Exchange Commission. The laws of the federal or state level of government will supersede any FINRA-specific regulations (Hayes, 2021).

Remarkably similar are the rules and regulations on the activities of self-regulatory organisations in the securities market in Canada, which is evidenced by the following statutory provisions of the Canadian province of Ontario.

The Securities Act of the province of Ontario provides the Ontario Securities Commission with the power to recognize self-regulatory organisations and to set out the authority of a self-regulatory organisation to

carry out certain regulatory functions. The recognition orders also set out terms and conditions each self-regulatory organisation must comply with in carrying out their regulatory functions (Securities Act, 1990: Article 21.1 § 2). The terms and conditions of recognition require each self-regulatory organisation to operate on a not-for-profit basis and continue to meet set criteria such as:
– ensuring an effective governance structure;
– regulating to serve the public interest in protecting investors and market integrity;
– effectively identifying and managing conflicts of interest;
– operating on a cost-recovery basis;
– maintaining capacity to effectively (i) perform its regulatory functions and (ii) establish and maintain rules and
– complying with ongoing reporting requirements to the applicable recognizing regulators practices (Ontario Securities Commission, 2023).

A recognized self-regulatory organisation shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices (Securities Act, 1990: Article 21.1 § 3). No such acts, interpretations and practices shall contravene Ontario securities law, but a recognized self-regulatory organisation may impose additional requirements within its jurisdiction (Securities Act, 1990: Article 21.6). Furthermore, the Commission may, on such terms and conditions as it may impose, delegate to a recognized exchange or recognized self-regulatory organisation any of the powers and duties of the Commission related to registration of persons and companies willing to engage in or hold himself, herself or itself out as engaging in the business of trading in securities (Securities Act, 1990: Article 21.5 § 1).

The Ontario Securities Commission's oversight of self-regulatory organisations is coordinated through memoranda of understanding, which set out how the regulatory agency will oversee the performance of self-regulatory activities and services, and to ensure it is acting in accordance with its public interest mandate, specifically by complying with the terms and conditions of recognition. The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organisation (Securities Act, 1990: Article 21.1 § 4). However, it is prescribed that the Chief Executive Officer of the Commission or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange, recognized self-regulatory organisation, recognized quotation and trade reporting system, recognized clearing agency, designated trade repository or designated information processor may apply to the Tribunal for a hearing and review of the direction, decision, order or ruling (Securities Act, 1990: Article 27.1 § 1).

According to the Ontario Securities Commission there is currently one recognized self-regulatory organisation – the Canadian Investment Regulatory Organisation (Ontario Securities Commission, 2023).

3.2. Advertising Self-Regulatory Organisations

Proceeding with the research, it seems necessary to have regard to the fact that systems of self-governance in the advertising industry are considerably widespread in the world, as evidenced by the existence of several global transnational associations of advertisers, dedicating immense amount of their attention to issues of advertising self-regulation (International Council for Advertising Self-Regulation, European Advertising Standards Alliance), issuing and updating consolidated documents on advertising, market communications and activities of internal self-regulatory organisations. These documents became the basis for internal codes of advertising standards and self-regulation in the advertising market in all developed countries of the world. However, in contrast to advertising self-regulatory organisations that can only make advisory decisions regarding advertising standards and their compliance, as well as report violations to government authorities, a certain part of these organisations is assigned regulatory and control powers, as well as functions of serving as a platform for mandatory pre-trial settlement of disputes regarding compliance with the requirements of advertising legislation and industry standards approved at their level.

The Advertising Standards Authority of the United Kingdom is one of the national advertising self-regulatory organisations that have delegated regulatory, control and jurisdictional powers.

The Memorandum of Understanding between Office of Communications and the Advertising Standards Authority Limited of 2021 made under the United Kingdom Deregulation and Contracting Out Act of 1994 provides context for the documents that form the legal basis for the renewed co-regulatory system and sets out the relevant legal duties and obligations of the parties. In particular, as regards specific regulatory powers delegated to the Advertising Standards Authority, the document sets forth provisions according to which Office of Communications of the United Kingdom (Ofcom) contracts out the following of its statutory functions:
– its functions relating to the setting, reviewing and revising of standards codes for broadcast advertising

(first and foremost, the UK Code of Broadcast Advertising);
– its functions relating to the consideration and resolution of complaints about the observance of broadcast advertising standards codes (concerning the content of radio and television advertisements); and
– other supplementary functions, to ensure that competent self-regulatory organisations are invested with the appropriate legal authority they require (United Kingdom Office of Communications, 2021).

The memorandum as well provides that as long as the undertakings, agreed processes and targets contained in the memorandum are met, there is a presumption that the Office of Communications of the United Kingdom and the co-regulatory parties will operate their relationship through agreed liaison and review arrangements, and the regulator undertakes not to interfere in the functioning of the system, except in exceptional circumstances. For instance, provisions of the memorandum outline when Ofcom has a right to be consulted, to approve action (any advertising code changes proposed must be agreed by Ofcom) or to initiate action (Ofcom is able to make advertising code changes) in relation to the delegated functions (United Kingdom Office of Communications, 2021). The arrangement is monitored against clear reporting obligations and key performance indicators (Advertising Standards Authority, 2023).

It is also particularly noteworthy, that in line with section 7.17 of the memorandum:
– if, in the opinion of the Chief Executive of the Advertising Standards Authority, a broadcaster (a) fails to comply fully and promptly with its decision; (b) fails to co-operate fully and promptly with its reasonable request; (c) demonstrates a disregard for its decisions or reasonable requests; (d) commits, in the Advertising Standards Authority opinion, one or more code breaches of sufficient seriousness to warrant a statutory sanction;
– the Chief Executive shall, after the Advertising Standards Authority has reached any relevant decision(s), refer the matter, together with copies of all evidence and submissions required by Ofcom, to Ofcom, for its consideration of further action. Ofcom undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it considers appropriate in the circumstances in support of the Advertising Standards Authority, taking into account any representations from the broadcaster(s) concerned (United Kingdom Office of Communications, 2021).

Another example of a country with legislation that demonstrates its commitment to developing self-regulation in the advertising production and distribution market is Lithuania.

For instance, Article 43 § 4 of the Republic of Lithuania Law on the Provision of Information to the Public states that Lithuania shall encourage the use of self-regulation in the field of the provision of audiovisual media services through application of national- and/or Union-level codes of conduct (ethics) drawn up by, and published on the websites of, providers of audiovisual media services, video-sharing platform providers or organisations representing them, in cooperation, as necessary, with industry, trade or other sectors, professional and consumer associations or organisations. In particular, Lithuanian legislation grants advertising self-regulatory institutions the following powers:
– monitor compliance with the requirements laid down in laws applicable to advertising and audiovisual commercial communications in cooperation with other institutions regulating and self-regulating activities of producers and/or disseminators of public information (Article 39 § 7 of the Republic of Lithuania Law on the Provision of Information to the Public);
– must obtain information free of charge from producers and disseminators of public information, state and municipal institutions and agencies (including the tapes of broadcast programmes) which is necessary for the exercise of their functions (Article 42 § 1 of the Republic of Lithuania Law on the Provision of Information to the Public).

The main form of public control over the activities of self-regulatory organizations in the advertising market, as stipulated by Article 50 § 2 (6) of the Republic of Lithuania Law on the Provision of Information to the Public, is attending by the Inspector of Journalist Ethics of the meetings of self-regulatory bodies governing activities of producers and disseminators of public information when issues related to the implementation of the provisions of the law on the provision of information to the public and expressing his/her opinion on the issues (Republic of Lithuania Law on the Provision of Information to the Public, 1996).

3.3. Self-Regulatory Organisations within the Anti-Money Laundering System

Proceeding with the research, we found reasons to believe that self-regulatory organisations integrated into the institutional component of the anti-money laundering system are allocated broad regulatory powers under Swiss law.

Article 14 of the Swiss Federal Act on Combating Money Laundering and Terrorist Financing states that financial intermediaries must be affiliated to a self-regulatory organisation. However, a financial intermediary is entitled to affiliate to a self-regulatory organisation if:

(a) the financial intermediary guarantees compliance with its duties in accordance with this act by means of its internal regulations and organisation;

(b) the financial intermediary enjoys a good reputation and guarantees compliance with its duties in accordance with this act;

(c) the persons responsible for its administration and management also meet the requirements of letter b; and

(d) its qualified participants enjoy a good reputation and guarantee that their influence is not detrimental to prudent and sound business operations;

(e) in the respective sector self-regulatory organisation (Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, 1997: Article 14 § 2).

As the Swiss Financial Market Supervisory Authority asserts that it recognises an organisation as a self-regulatory organisation if it:

– has a set of regulations which set out the anti-money laundering due diligence requirements in detail for its members;

– monitors compliance with these regulations by affiliated financial intermediaries;

– can give a guarantee of irreproachable business activity and ensures that audit firms and other individuals tasked with implementing these controls meet the requirements in terms of proper business conduct, independence and appropriate qualifications; and

– ensures that the audit firms and lead auditors tasked with implementing these controls meet the authorisation requirements as defined in the anti-money laundering legislation (Swiss Financial Market Supervisory Authority, 2023).

The afore-mentioned set of regulations due to be issued by self-regulatory organisations shall specify the duties of diligence of their affiliated financial intermediaries and stipulate how these duties must be fulfilled, including the requirement to establish the identity of all contractual partners and beneficial owners and the duty to report any suspicion of money laundering. They shall further stipulate:

(a) the requirements for the affiliation and exclusion of financial intermediaries;

(b) how compliance is monitored (e.g., through periodic checks by internal or external auditors);

(c) appropriate penalties, including suspension (Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, 1997: Article 25).

In order to fulfill these duties and preserve professional secrecy self-regulatory organisations shall arrange for anti-money laundering inspections to be carried out on lawyers by lawyers and on notaries by notaries, which, among other requirements, have no conflict of interests, could provide proof of the relevant knowledge of anti-money laundering legislation, practical experience and continuing professional development (Swiss Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, 1997: Article 18 § 3). The self-regulatory organisation grants the audit firms and lead auditors the necessary licence and supervise their activity (Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, 1997: Article 24a § 1).

Regulations of self-regulatory organisations on the above and other matters as well as any amendments to them must be approved by the Swiss Financial Market Supervisory Authority (Swiss Financial Market Supervisory Authority, 2023).

4. Discussion

Summarizing the outcomes of the comparative analysis of legislative framework for self-regulation of securities markets, it is to be noted that the securities statutory acts of the United States set forth provisions on the possibility of the competent governmental regulatory body to delegate to operators of the organized markets (stock exchanges) and associations of securities market professional participants certain regulatory powers, in particular, those related to the introduction and control of compliance with the rules of operation of the securities market (which also applies to issuers and investors in financial instruments) with the application of sanctions to violators, as well as with the licensing of professional securities market participants. Government control activities over the operators of stock markets are comprehensive and, among other matters, include prosecution of securities market professional participants for violations of federal legislation on the securities market, leaving the question of their responsibility for non-compliance with the rules of functioning of the regulated market within the purview of authorised stock exchanges.

For comparison, the legislation on securities and the stock market of the province of Ontario from the point of view of the peculiarities its rules and regulations on the status and activities of organisations of professional securities market participants is worth particular attention owing to it; (1) having high degree of detailing of the criteria for the recognition of self-regulatory organisations at the statutory level (including the need to implement conflict of interest rules and sources of funding of the organisation's activities) and the form of an administrative document about their rights and duties; (2) establishing the possibility of delegating registration powers to them; (3) setting forth a differentiated procedure for challenging legal acts of self-regulatory organisations – normative documents can be appealed against by the regulator within an administrative procedure, while enforcement acts can be contested by interested parties, including the regulator, only withing the administrative proceedings.

Furthermore, having explored the peculiarities of self-regulation in the advertising market, it is noteworthy that this system in the United Kingdom relies on the

official delegation by the governmental regulatory body to self-regulatory organisations of powers to set and review rules (standards) related to the production and distribution of advertising, as well as powers to monitor their compliance and ensure pre-trial settlement of disputes regarding violations of the advertising rules by advertisers. The regulator is bound by the principle of minimal intervention in the activities of self-regulatory organisations and retains only the authority to approve changes to normative legal acts and initiate changes to them only in exceptional cases after consultations with the self-regulatory organisation. The quality of the performance of delegated powers is monitored by studying market participants' feedback on its activities and its evaluation according to key performance indicators. Enforcement of decisions of self-regulatory organisations is ensured after confirmation of their legality by the regulator.

On the contrary, the legal framework for self-regulation in the advertising production and distribution market in Lithuania is fragmentary and reflects the general policy towards the establishment of this vehicle to improve advertising standards, monitor compliance with requirements for its content and methods of distribution. Of particular interest is the authorization of self-regulatory organizations to submit mandatory requests for information necessary for them to perform their functions. Also, it is deserving due attention that the legislation enshrines the powers of government authorities to participate in meetings (with consultative vote) of self-regulatory organizations, during which issues related to the implementation of the provisions of the legislation are resolved.

Another noticable finding is that the peculiarities of the organisation and activities of self-regulatory organisations of financial intermediaries within the Swiss ani-money laundering system, include, granting these self-regulatory organisations a significant amount of authority to clarify the way its members fulfill regulatory requirements relating to risk-management, customer due diligence, reporting of suspicious financial transactions, etc., as well as control and supervision over activities related to the fulfillment of these requirements, with the possibility of imposing sanctions on the members being in violation of these requirements up to the suspension of participation in the respective self-regulatory organisation. Self-regulatory organisations also carry out licensing activities, in particular, allowing their members to be inspected by lawyers and notaries after qualification checks in accordance with criteria prescribed by law. It is, moreover, to be noted that the Swiss law sets out a set of criteria for determination whether the participation of a particular financial institution in anti-money laundering self-regulatory organisations is mandatory, with due regard to ability of the institution and its employees to independently ensure the implementation of relevant legal provisions, their reputation and the economic peculiarities of their activities. Internal normative documents of self-regulatory organisations are approved by the Swiss financial intelligence unit.

5. Conclusions

Summarizing the experience of the afore-mentioned countries in determining the scope of powers delegated to self-regulatory organizations, the procedure for government control over their implementation, and the principles of responsibility of self-regulatory organizations, we note that self-regulatory organizations may be entrusted with the following delegated powers: (1) to register business entities or issue them permits, including after verifying their compliance with the eligibility criteria stipulated by regulatory legal acts (United Kingdom, USA, Switzerland); (2) to develop binding rules (standards) for the respective type of economic activity (USA, United Kingdom, Ontario, Switzerland); (3) to submit mandatory requests for the provision of information that is necessary for a self-regulatory organization to perform its functions (Lithuania); (4) impose liability measures on business entities that are members of a self-regulatory organization (United Kingdom, USA, Switzerland).

Government control (supervision) over activities of self-regulatory organizations is carried out through: (a) approval/approval by regulatory authorities of the constituent documents of self-regulatory organizations, rules and standards for the activities of self-regulatory organizations, initiation of amendments to them, independent decision-making on this matter after consultation with the self-regulatory organization; (b) participation in meetings of executive bodies and disciplinary bodies of the self-regulatory organization on issues of its exercise of its delegated powers; (c) review by regulatory authorities of regulatory acts of self-regulatory organizations and/or their decisions on imposition of liability measures on business entities; (d) sanctioning self-regulatory organizations for violations of legislative requirements (including in connection with the systematic failure to ensure complianc by their members) or due to their failure to meet the performance indicators of their activities.

Additionally, the analysis of the statutory provisions of certain countries laying down the foundations for the place of self-regulatory organisations as institutions with delegated regulatory, supervisory and jurisdictional powers shows that they have gaps of critical significance, due to which they do not provide exhaustive regulatory basis for the activities of self-regulatory organisations in their areas of responsibility. In particular, the legislative acts of some countries set out only framework provisions regarding: (1) the possibility of setting up self-

regulatory organisations without specifying their areas of responsibility, determining whether the membership is mandatory, setting forth the rules of competition between regulatory acts of different self-regulatory organisations within the same market, as well as not setting the conditions for the availability of regulatory mechanisms outside self-regulatory organisations; (2) the possibility of delegating powers to self-regulatory organisations without determining the composition of the relevant powers of the respective governmental regulatory body, the procedure for selecting the organisation to which they are delegated (by tender or otherwise), etc.; (3) the need for control over the exercise of delegated powers without detailing regulations concerning the key substantive and procedural legal aspects of control and liability measures of self-regulatory organisations for violation of legislative requirements or falling short of indicators of the effectiveness of market regulation; (4) possible schemes for financing the activities of self-regulatory organisations; (5) the possibility of the self-regulatory organisation applying sanctions to its members without specifying the types of these sanctions, the procedure for their application and their legal consequences.

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