

Technical and Legal Means of Controlling Self-Regulation in Construction

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Abstract: *The article contains the analysis of legal means of self-regulation controlling in the construction industry. The authors have found that self-regulatory organizations have the right to control the activities of their members related to certificates issuing, adhering to all norms of technical regulations in construction, etc. These powers are administrative in nature despite the fact that the subjects are involved in civil law relations. The correlation of self-regulation in construction and state regulation showed that much depends on the type of self-regulation, while “delegated” self-regulation is seen as a type of state regulation of the economy. At the same time, the authors have come to the conclusion that this does not mean that the state renounces its authority to form the legal foundations of the single market and influence the legal rules adopted by the self-regulatory organization.*

Index Terms: *self-regulatory organization (SRO), certificate, work permit, construction organization, contractor, construction works, member of self-regulatory organization.*

I. INTRODUCTION

A. Introduction of the Problem

Currently, self-regulation systems are constantly being introduced into various sectors of the economy, which is caused by the need to reform Russian legislation. Participants of civil transactions regularly create self-regulatory organizations in order to transfer some of their rights to them.

Today, throughout the world, and in the Russian Federation in particular, legislation in the field of regulation of self-regulatory organizations' position and activities is being improved, since the effectiveness of their activities in the field of regulation of relevant business activities is recognized [1]. However, due to the diversity of types of such organizations, the legislation is devoid of integrity – the laws regulate the activities of self-regulatory organizations in

different ways. In particular, there are some legal difficulties in the area of interaction between the state, entrepreneurs and self-regulatory organizations.

B. Importance of the Problem

The problematic issues of the legal status of self-regulatory organizations were raised in the fundamental research of Basova A.V. [2], Grachev D.O. [3], Spektor E.I. [4], etc.

Some issues of regulation of self-regulatory organization activities are discussed in the articles by Dedikov S. [5], Denisov A.A. [6], Ershov O.G. [7], Zinchenko S.A., Galov V.V. [8] and others.

II. PROPOSED METHODOLOGY

A. The Method section describes in

During the research, the authors used general scientific and specific legal methods of cognition, in particular, technical-legal, comparative-legal, sociological, and other research methods. The main approach used in this work was systemic and structural, which made it possible to identify the peculiarities of the controls of self-regulatory organizations in the construction industry. The technical-legal method was applied to analyze a set of legal norms regulating the powers of self-regulatory organizations and the state in the construction sector. The sociological method substantiated the conclusions, proposals, and recommendations for the improvement of legislation establishing both control within self-regulatory organization and the state regulation.

B. Algorithm

The study of technical and legal means of controlling self-regulation in construction was based on a branching algorithm.

In the course of the study, the authors analyzed the norms of civil and town-planning legislation, as well as the authors' positions on the applicable control means in construction, taking into account both legal and technical aspects of construction activities. Analysis and processing of the existing legislative base showed the dual nature of control.

In order to effectively use technical and legal means of controlling self-regulation in construction, ways of improving legislation are proposed.

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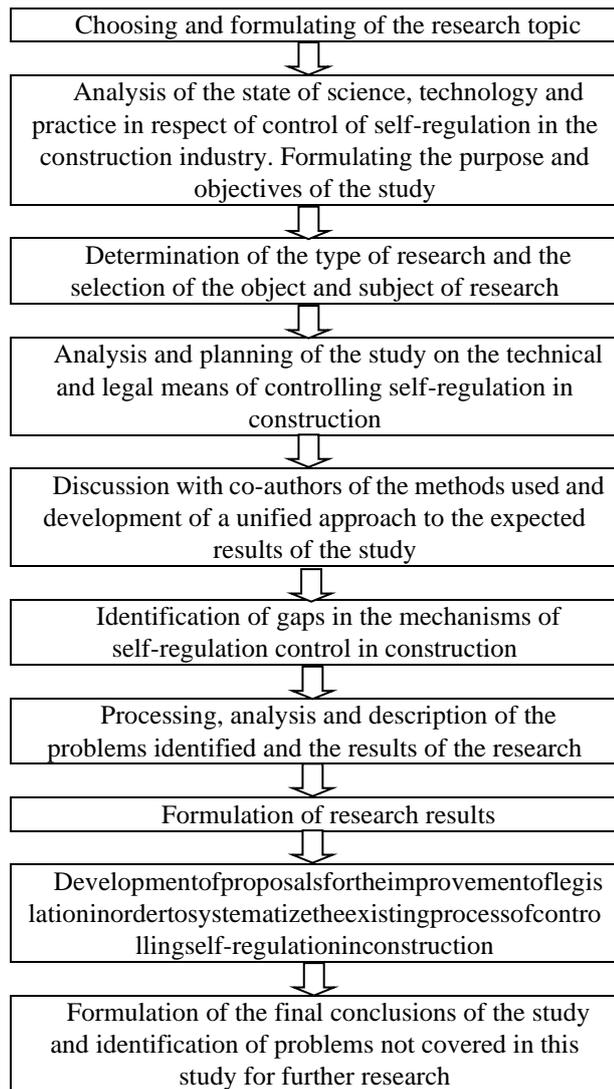
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C. Flow Chart



III. RESULTS

We have found that the forms and degree of self-regulation may differ in various areas of the economy depending on such factors as the level of market relations development, the level of cultural and social processes, etc.

We believe that the participation of the state in the processes of self-regulation is necessary in order to make the nature of the self-regulation standards imperative and compulsory.

We have determined that the formation of self-regulatory organizations is an indicator of the transformation of state regulating activities in corresponding areas of the economy through transferring of certain public-law powers to such organizations in order to control the professional activities of organization members for such members to comply with the requirements of the relevant laws and professional activity rules established by self-regulatory organizations.

We have found that there is no unequivocal solution to the issue of the ratio of self-regulation in construction and state regulation, its solution is determined by the type of self-regulation, while the “delegated” self-regulation is seen as a type of state regulation of the economy.

In order to improve legislation, it is proposed to consolidate the creation of one type of construction

self-regulatory organization in the Town Planning Code of the Russian Federation (the Russian TPC), which will ensure full protection of the interests and rights of legal entities and entrepreneurs as related to introduction of the additional burden of compensation and member contributions payment.

IV. DISCUSSION

Today, the activities of self-regulatory organizations and their members are not fully regulated by the current legislation. The functions, the limits of authority of these organizations and their members are not fully understood, since the laws allow the SROs to establish their own criteria for the exercise of their rights within certain limits.

D.O. Grachev emphasizes that the key aspect of self-regulation is the independence of the individuals (legal entities) in their establishment of rules for a certain sphere of public relations, where the principles of civil law represent a foundation for regulation of the self-regulatory organizations’ activity [3].

E. Talapina, in turn, notes the civil-legal optionality characterizing self-regulation in the sphere of civil law. Within the framework of this optionality, the subject of law participates in the procedures for the exercise of rights and creates rules of conduct, although to a limited extent. All this is defined by the author as civil law self-regulation [9].

Clause 1 of Article 55.13 of the Russian TPC, as well as in internal documents of self-regulatory organizations, states that organizations can control the activities of their members in the latter’s compliance with the requirements for issuing certificates, as well as the requirements of self-regulation rules in accordance with the procedure established by the rules of control in the field of self-regulation. The organization has the right to control the work of its members in the area of compliance with all technical regulations during engineering surveys, verification of design documentation, during construction works, reconstruction, and repair of construction facilities. In addition, this code enshrines the ability to control the activities of members of the self-regulatory organization by the organization itself, when it comes to complying with the requirements for certificates issuing. Control must be exercised at least once a year when joining a member organization.

These provisions suggest that SROs are endowed with their own powers, which subjects of civil legal relations cannot possess. Thus, self-regulated organizations have power to control members of such organizations. The availability of such power is more typical for vertical legal relations [10, 11].

O.S. Sokolova’s point of view is quite interesting; she notes that self-regulation is a mechanism of influence on economic entities (in particular, on their activities). This mechanism combines both administrative and corporate regulation. The key aspect of this mechanism of influence is that market actors are aware of the need for the rules and standards of activity that they approve, which are often more demanding than the officially existing administrative norms [12].

In particular, a self-regulatory organization can independently determine the complaints procedure. The meeting of the body that considers the complaint against a member of self-regulatory organization must be attended by the member of the organization, against whom a complaint has been filed, and the complainant, who has filed the complaint or appeal to the self-regulatory organization.

The Russian TPC says that the self-regulatory organization is obliged to notify the executive authority entitled to supervise construction if a SRO participant is found not to comply with the technical regulations in the process of construction, repair and reconstruction works fulfillment at capital construction sites.

If employees do not comply with the requirements of technical regulations, as well as the requirements for issue of certificates, and other standards in the field of self-regulation, a self-regulatory organization may apply disciplinary measures that are determined by this organization. In particular, these include a warning issued to a member of the self-regulatory organization; the binding demand to eliminate violations committed by the member of self-regulatory organization, within the prescribed period; suspension of the work permit allowing to perform the types of work affecting the safety of construction facilities; complete termination of the work permit allowing to perform certain types of work; member exclusion from the SRO.

Certification and issue of work permit allowing to perform works affecting the safety of construction sites may be a valid measure if a member of the SRO does not comply with the requirements for issuing a certificate, technical regulations, and other requirements established by the self-regulatory organization. The certificate may be suspended for the period necessary to eliminate the violations committed by a member of the self-regulatory organization.

At this time, a member of the self-regulatory organization can only perform those types of work that are aimed at elimination of the violations found. After the elimination of violations, it is obliged to notify the self-regulatory organization. The self-regulating organization must audit the results of work on the elimination of violations and decide whether to renew the certificate allowing to perform certain types of work or to refuse to renew the certificate. It is obligatory to indicate the reasons for the decision.

Not only the control functions of the SROs and their use of certain penalties in relation to members of self-regulatory organizations, but also measures of state coercion applicable to different persons for non-compliance with the established norms regarding self-regulation in the construction sphere are enshrined in law. This provides for criminal liability for conducting business without a license or registration, if such registration or license is mandatory. Criminal liability arises if the corresponding act caused major damage to citizens or the state.

To fully understand the essence of self-regulation, it is necessary to describe the types and forms of self-regulation of business relations. For example, I.V. Peregudov and Yu.V. Tai recognize three main types of self-regulation: voluntary; delegated; and mixed. The first one involves the association of entrepreneurs on their own initiative. The rules and standards established in the organization do not need any state approval and do not have any state protection.

Delegated type is characterized by the fact that part of the state authorities for licensing (as well as control and/or supervision) is transferred to a certain self-regulating organization, which is the object of management. Mixed type applies to all other situations that do not fit either the criteria of voluntary or the criteria of delegated self-regulation. With mixed self-regulation, the state sees compliance with the norms of self-regulation as the observance of the law [13].

Yu.A. Tikhomirov recognizes individual processes that take place in civil society, manifested in the participation in decision-making and, though not always, in setting standards and rules of conduct as the forms of self-regulation. However, it is important to note that initially Yu.A. Tikhomirov also used to include the institute of direct democracy, local self-government, operational self-government, corporate and associative self-regulation in the above forms. Later, he changed the wording, suggesting that norms, rules and decisions that are taken directly by the people themselves (for example, during referendums, meetings and other forms of local self-government), as well as corporate local acts, are forms of self-regulation [14].

We believe that Yu.A. Tikhomirov suggested to recognize self-government as a form of self-regulation. This statement seems to be at least debatable, since self-government is one of the types of management. At the same time, self-regulation is one of the types of regulation, and regulation is only a part of management. Therefore, in the framework of this study, local self-government will not be seen as a form of self-regulation.

Considering the constitutional principles of proportionality of state interference in the rights and freedoms of citizens, the federal legislator has the right to confer autonomous public law subjects with certain rule-making, supervisory and regulatory powers. However, this does not mean that the state renounces its authority to form the legal foundations of a single market and influence the composition of legal norms adopted by SROs.

The Constitutional Court of the Russian Federation indicates making the SRO itself to control the activities of SRO members is the result of certain modification of the control activity of the state. A state can establish mandatory conditions for having a certain status (a member of SRO) for all citizens wishing to conduct public activities.

In particular, in practice, conducting construction activity at the time of regulatory changes in the field of licensing may raise a number of issues, especially within the framework of the responsibility of participants in the activity. It may happen that a construction company that is a member of the self-regulatory organization uses an organization, which is not one of the members of the self-regulatory organization, to perform the work. At the same time, the legislation does not provide for a specific liability for the organization, which acts as a contractor and engages third parties who do not have the necessary work permit. At the same time, the norms of civil legislation on obligations apply.

Paragraph 1 of Art. 706 of the Civil Code of the Russian Federation states that the contractor may engage subcontractors, that is, third parties, to perform the work.

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At the same time, subcontractors should also be members of self-regulatory organizations and have the necessary documents permitting them to conduct certain types of work. According to paragraph 3 of Art. 706 of the Civil Code of the Russian Federation, the contractor is liable for the consequences that may arise if the contractor's obligations are improperly performed or not fulfilled. Looks like the responsibility for losses caused by the third parties lies with the general contractor.

In accordance with Art. 58 of the Russian TPC, persons guilty of violating the laws on town planning activities may suffer property, disciplinary, criminal and administrative liability in full compliance with the law. If a subcontractor constructs or repairs facilities, and such works affect the safety of construction sites, while not having a work permit allowing to perform the corresponding works, then the subcontractor may be liable pursuant to the Administrative Code of the Russian Federation.

If the performance of such works caused major damage to individuals, organizations or the state, the subcontractor will have to reimburse this damage in accordance with the decision of the court, which will establish the amount of damage. Damages will be paid from the own financial resources of the organization, which have been found guilty of causing damage by a court decision. In addition, reimbursement can be paid from the funds of the insurance company that insured the organization found guilty of causing damage. If the available funds are insufficient or there are no funds available, the damage can be compensated at the expense of the self-regulatory organization, of which the organization that caused damage is a member.

The reverse situation can happen if a construction organization that is not a member of a self-regulatory organization engages the organization, which has joined the self-regulatory organization and has a work permit, in works fulfillment. In this case, the organization, which engages subcontractors, must become a member of a self-regulatory organization together with them and receive a work permit allowing to conduct certain types of work.

If the organization performs these functions without a work permit, this will be considered a violation of the town-planning legislation. This will result in appropriate sanctions application to the violator by government agencies.

Hence, each construction organization in each individual case should look for the optimal way out of the situation for itself and independently decide whether to enter into agreements with its own contractors. The construction organization carries out its activities at its own risk, under the threat of liability provided by law.

The provisions on the liability of members of self-regulatory organizations are not very significant, but at the same time are presented in the Russian TPC. This act is virtually devoid of provisions that describe the responsibility of self-regulatory organizations and their officials. Thus, only the provisions of the law "On Self-Regulatory Organizations" can apply.

The fundamental norms of state supervision of the self-regulatory organizations' activity are defined in Art. 55.19 of the Russian TPC. The Federal Service for the Supervision of Environment, Technology and Nuclear Management (Rostekhnadzor) can monitor the activities of

self-regulatory organizations, taking into account all the features of such organizations. Inspections may be conducted to determine whether organizations comply with statutory requirements for self-regulatory organizations.

Paragraph 7 of Art. 55.19 of the Russian TPC clarifies that Rostekhnadzor may apply to the court if a self-regulatory organization does not fulfill the requirements mandatory for acquiring the status of a self-regulatory organization, as well as in other cases provided by law.

We should take into account the fact that paragraph 4 of Art. 55.19 of the Russian TPC does not describe clearly the subject of state supervision over the SROs' work and makes references indicating that the subject matter of control is the organization's compliance with the requirements for self-regulatory organizations and their activities. Therefore, it is appropriate for the regulation on the controlling agency to describe unambiguously the rights, powers and responsibilities of this agency.

We believe that it is necessary to develop and set forth legislatively preventive measures that could prevent self-regulatory organizations from potential abuses, which can be expressed in forms of selling membership in organizations, as well as using the status of such organization as a tool for redistribution of the market shares or monopolization. At the same time it is necessary to:

- 1) clarify the norms of antimonopoly legislation applied to this sphere of relations;
- 2) revise the approach to pricing under construction contracts that are executed to satisfy municipal and state needs;
- 3) allow the all-Russian union of self-regulatory organizations to take disciplinary measures, since now, in accordance with paragraph 9 of the art. 55.20 of the Russian TPC, national associations of self-regulatory organizations do not have the right to interfere in the work of self-regulatory organizations or somehow restrict their activities.

Thus, the conducted analysis allows us to say the following: to protect the rights and interests of members of self-regulatory organizations, it is necessary to consolidate the protectionist and representative functions of SROs through the expansion of Article 1, Clause 1. 55.1 of the Russian TPC with the following sub-clause: "1. The key objectives of the SRO are: ... 3) to represent and protect the interests of SRO members in cooperation with state authorities of the Russian Federation, subjects of the Russian Federation, local governments, courts and arbitration tribunals, SROs associations in the construction industry, and other persons."

Considering that construction activity is associated with an increased level of danger, and improper performance can result in damage to legal entities and individuals, it is proposed to prohibit the re-inclusion into self-regulatory organizations of those members that have been excluded from the organizations due to violation of current legislation or standards and rules of self-regulatory organizations, or due to non-compliance with the procedure for professional activities conducting.

One of the minimum requirements that have to be satisfied to obtain a work permit is the availability of the necessary number of employees with higher education and sufficient work experience in their specialty. However, due to the gap in the legislation, the same employee may be listed to perform several types of work, and this may result in works performing by a person, who does not have the necessary professional skills. Hence, the customers and others persons may incur damage.

V. CONCLUSION

Developing the conceptual provision on reduction of the government's excessive influence on the economy, the legislator should select and enshrine such means for controlling of the self-regulatory organizations' activities that would ensure a balance of public and private interests. This can be achieved by granting broad rights and powers to such organizations, and at the same time establishing strict liability if such organizations violate legislation.

Legal entities that perform work affecting the safety of construction facilities, as well as the third parties, have the right to appeal against any action or inaction of the SROs related to the issuance of a work permit affecting the safety of construction facilities.

In this regard, the article formulates proposals for the improvement of existing civil and town-planning legislation, according to which the relevant decisions of self-regulatory organizations cease to be valid, and instead court decisions that can fully or partially replace decisions of self-regulatory organizations come into effect. Thus, if third parties' complaints are satisfied, work permits for the performance of certain types of work may be deemed invalid.

The article does not cover such issues as the responsibility of the SROs, as well as the members of the SROs, for failure to comply with the current legislation governing the studied area of relations. These issues may be the subject of further research by the authors.

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