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LEGISLATIVE POWERS AND (X)NGO'S

1. INTRODUCTION

(X)NGOs¹ in nowadays world become more and more important player who not only fulfill the humanitarian goals but also fulfill political goals of it members or even its sponsors. For (X)NGOs late task becomes easier because state uses them as auxiliary legislator. There are diverse reasons for such practice such as:

- modern states wants to promote their economy by omitting expensive and unclear legislation (following OECD proposals for legislative reforms);²
- governing political parties want to pass the political responsibility for tricky political decisions to another body (i.e. collective doubt);³
- (X)NGOs have more accurate information on certain legislative questions than parliament or government.

This article deals with two major problems. In first part it analyzes pro et contra's for delegation of legislative powers to NGOs and possible risks of such processes. Second part takes in consideration different kind of legislative solutions how to use (X)NGOs in legislative procedure.

2. SELF REGULATION

Self regulation is not a big invention of the 20th century. It was present in the middle age in European countries within professional organizations (e.g. guilds in Germany, Austria and Slovenia).⁴ At the begging self regulation was intended to protect certain profession from the outside (incoming of new professionals) and inside (protecting of competition and trade secrets) dangers.⁵ Self regulation had had in those period two main advantages. First advantage was that professional organizations could change the insufficient rules either by changing the articles of professional codes or by changing the interpretation of certain article. Such solutions allowed the use of up to date legislation which covered the main needs of craftsmen. The second advantage was the use of such professional legislation by the professional arbiters. Because of clear professional language in such codes arbiters didn't need deep legal interpretation of written norms and the procedure was short with no lawyers involved.⁶

In the 18th century the state took control over the professional orders and also included some of the self regulation norms in the state laws.⁷ So the state gained the right to control

¹ In this article I'm using term (X)NGO (non-governmental organization) to cover all diverse types of NGOs from real NGOs to QUANGOs (quasi non-governmental organizations) or GONGOs (government organized non-governmental organizations).

² See Regulatory Quality and Public Sector Reform; OECD (<http://www.oecd.org/subject/regreform/quality.htm>) and Council Recommendation; OECD (<http://www.oecd.org/puma/regref/pubs/rco95/rcmmend.htm>).

³ See Mayer Kenneth R.: The Limits of Delegation: The Rise and Fall of BRAC; Regulation; Year 22; No. 3; Washington D.C.; Cato Institute; 1999; pg 89.

⁴ See Vilfan Sergij: Pravna zgodovina Slovencev; Ljubljana; Slovenska matica; 1996, pg 296.

⁵ See ref. supra, pg 297.

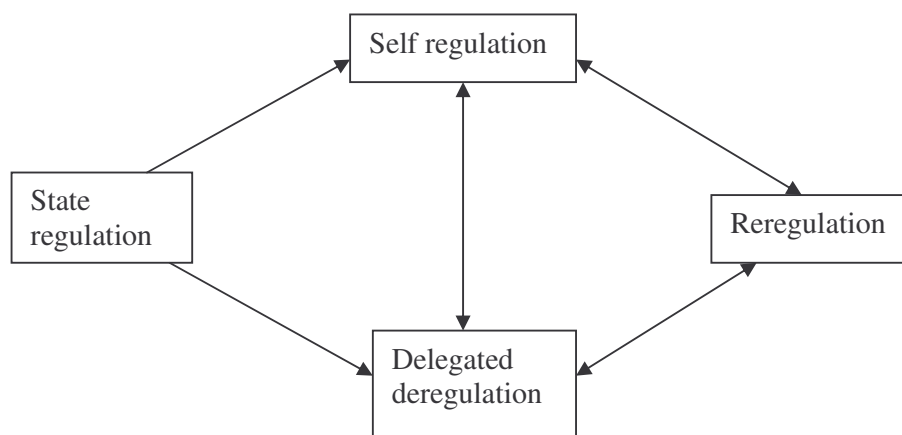
⁶ About these advantages is discussed also in the book Della mercatura et del mercante perfetto di M. Benedetto Cotrugli Raueo, Dubrovnik, 1458, pg.14, where discussed about the right place for the merchant.

⁷ See ref. 4, pg. 391.

professional self regulation and in certain cases intervened with the state legislation when the self regulation's solutions were in contrary with state interest. Such solution we can still find nowadays in certain European legislation (eg. Germany, Austria), where the competent minister has the right to withhold the self regulation which is contrary to the public interest.

New impetus was given to self regulation at the end of 20th century with the process of decentralization, deregulation and appearance of new commercial activities (i.e. advertising, internet etc.). By my opinion especially deregulation⁸ and new technology was the key promoter for the increased self regulation. I can't neglect another very important factor for increased self regulation and that is weak governments.⁹ Last factor has two fact could work in two different ways. Either weak government is non effective because it has to deal with the problem of coalition coordination and so has no time and energy to solve the real life problems. Or the government intentionally leaves the certain field underregulated to maintain peace within the governing coalition. In both cases the certain economic activity is forced to make self regulation to protect its interests.

Cases such were energy breakdown in California, Enron or Parmalat bring out the question of the self regulation's efficacy and the justification of deregulation. On the other hand such cases bring out also a question of market law's efficacy. By the end of the day we are dealing with reregulation of deregulated activity. I think that all the legislative processes in last 100 years could be shown in next figure.



The state is constantly moving from the state regulation towards either delegated deregulation or self regulation and then to reregulation.

After brief discussion about historical development of self regulation I'll focus myself on the advantages and disadvantages of self regulation (or pro et contra).

First advantage of self regulation is the low cost for the state. Low cost effect works in two directions. First the state has no expenses to monitor the certain economic activity for the legislative purposes and for drafting such legislation. Second state has no expenses for

⁸ By this I mean the real deregulation which means that state omits all legislation on the certain field of economic activity and leave such field to the market laws.

⁹ Such cases are states with parliamentary coalitions consisted of more ideological different political parties and with weak majority (less than the majority needed to change the constitution). In Europe such countries are Italy, Germany, Slovenia, etc.

implementation and inspection of needed legislation.¹⁰ Both expenses are on the shoulder of self regulatory organization or its members. A cost of inspection is lower because the set regulations are normally accepted by majority of organization's members (what implicit means that they already comply with such regulations). On the other hand inspection is paid either by self regulative organization (at the end paid by the members) or by the offender. The negative part is that such costs are sooner or later transferred in the cost paid by the consumer. Due to the private nature of self regulative organizations public has no insight to the costs of adaptation and implementation of self regulations and the effect of these costs on the final price of certain good or service.

Self regulation's second benefit is the flexibility of quality and quantity of norms. Self regulatory organization adopts its norms according to the need of its members. We could expect that certain activity will be sufficiently and clearly regulated. The negative part is that members could misuse their rights and over regulate their activity in with such regulations establishing barriers to new entries. On the other hand with the use of professional language and terms self regulation becomes for the consumer unclear and non understandable. Another problem represents publication of self regulation, if is not published in official journal or published only in journal accessible only to the members of (X)NGO.

Another benefit form self regulation is establishing the minimal standards of goods and services provided by members of self regulation organization. Only the providers have all the information about the optimal quality which can be achieved by present knowledge and technology. So by setting minimal quality in self regulation, providers can show consumers what they can expect on market and what can be taken as a reference to judge a quality of provided goods or services. So self regulative organization makes the internal selection between its members and causes the close down of bad quality providers. On the other hand this solution has negative side that minimum quality soon can become also a maximum quality landmark for all the members. This can happen in case that self regulation organization has also authority to set the recommended price for such goods or services. In case that consumers are ready to buy the set minimum quality for the set maximal price and that market has no other mechanisms to reward providers with better quality, then such providers will soon lower their quality to the set quality. So on long run market can loose the diversity of products and services. Right of self regulation organization to set minimal quality can lead also to unjustified elimination of small providers. This can happen in the case that big providers have enough voting rights to set in self regulation such requirements that are for small providers too expensive or technically unattainable. Problem is even bigger, if self regulation organization is the highest professional authority and that competent court (normally constitutional or supreme court) decides that has no competence to judge about the set standards.¹¹

One of the benefits of self regulation is also the possibility to keep a distance between professional questions and political questions. By delegating certain legislative powers to self regulative organizations, politics clearly express their intention not to interfere into professional questions. So the state prevents cases in which the providers could be divided between the opposite requirements form state legislation and professional ethics or standards. Danger of such solution is that the set standards in facto don't cover the real needs and expectations of consumers or public interests. If self regulation organizations don't have strict

¹⁰ About certain advantages and disadvantages see in Benett Roger: *The Handbook of European Advertising Media Planning, Marketing Analysis and Country by Country Profiles*; London; Kogan Page; 1993. pg. 62-65.

¹¹ Such is the case of professional chambers in Europe.

rules to prevent lobbying, than could happen that the lobby interest can prevail over the professional interest or, even worse, over the benefit of citizens.¹² On the other hand such delegation of powers can lead to the problem of franchise state.¹³ Such processes can lead to the solution that lobbies can form, through self (X)NGOS's regulation, the citizen's expectations and landmarks. The final result can be even the unifying of all three powers (legislative, executive and legislative) in only one organ without the possibility that citizens could control the execution of mentioned powers.

As seen self regulation have certain strengths and certain weaknesses. So we can't simply conclude that it is good nor that is bad. We can see self regulation as one of the state's tools how to improve government, to lower budget and how to made administration closer to the citizens. But such as the use of each tool requires certain diligence also the self regulation should be used with high degree of care. In next chapter it'll be discussed about the legislative requirements for the effective use of self regulation.

3. LEGISLATIVE PROPOSALS

Dealing with legislative framework for effective use of self regulation, we talk about the use of different legislative tools. Which legislative tool) or better the combination of them) the state will choose it depends on various factors among them:

- political strength of the governing party(ies);
- lever of political culture;
- level of public interest's development;
- level of providers' development;
- trust between key players in the society.

First question is what legislative questions should be regulated with self regulation. My response to that question is, any professional substance that the legislator doesn't have enough knowledge about it and delegated regulation doesn't influence the citizens' basic rights. In the case that delegated regulation has the influence on citizens' basic rights such delegation could be possible only under circumstances that citizens has the right of juridical control or the control of the independent professional body with the right to stop the execution of certain self regulation.¹⁴ By my opinion the questions in which public interest doesn't exist yet or in which ordinary citizens don't have any knowledge, are not suitable for self regulation. In such cases self regulation could overpass the public interest or even prohibit that public interest could be developed.¹⁵

Second question is to whom delegate the power of self regulation. I think that such power could be delegated only to the highly professional bodies which in the past showed the high degree of independence form daily policy and especially from the capital and members. This independence should be as financial as managerial. Financial independence could be achieved

¹² Such could be the case in which pharmaceutical industry can on the medical professional associations to set the doctrine to increase the sell of certain expensive drugs.

¹³ About the problem of franchise state see in Wood, Geof, 1997: States without Citizens: The Problem of the Franchise State, States and Donors, Too Close for Comfort, New York, St. Martin Press, inc., pg. 79-92.

¹⁴ Such organ could be even the authorized ministry or state department.

¹⁵ Providers can act under the rule "take or leave it". Because of enormous economic power of such providers over the users the state can't make any changes without the consent of providers.

with independent financial sources,¹⁶ managerial with the high statutory requirements to change the members of self regulation organ. The most important thing to which the legislator should pay the highest degree of attention is that self regulation organization should have the appropriate legal mechanisms to prevent the conflict of interests or, in the case of such conflicts, effective mechanisms to solve such conflicts.¹⁷ By my opinion the legislator should, before the choosing the delegated organization, first check:

- degree of professionalism;
- degree of financial and managerial independency;
- degree of protection against the lobbies;
- effective statutory mechanisms to prevent the conflict of interest;
- possibility of external control over the self regulation.

Third question is what degree of self regulation the legislator should permit. The answer is in first place merely political. It depends on the degree of state's and citizens' confidence in self regulation organization. In the cases of organizations with high reputation, the legislator is free to decide the degree of delegation of legislative powers. In the cases of the unknown organizations or organizations with low reputation, the legislator should use so called multiphase delegation. In this process the legislator first delegates only a small task and if the delegated organization acts trustfully, than in the next phase the legislator could delegate more complex tasks. Nevertheless in all cases the legislator should have the effective legislative mechanisms to intervene quickly if the self regulation fails or the state or public interest are damaged with self regulation.¹⁸

Last question is in which form self regulation should be introduced. Should self regulation base on clear formal rules published in official journal or less formal moral codes of conduct (or professional codes) which can be interpreted in different ways in different times? Self regulation organizations usually promote codes of conduct. By my opinion there are more reasons among them:

- little knowledge how to write legislative texts;
- codes of conduct are on first sight less obligate than formal legal rules;
- codes of conduct are more general so there is more space for free interpretation and less time and money needed to write such codes;
- with the codes of conduct are providers more free how to run their activities.

All these factors can by the end cause citizens' low legal protection and different quality of provided goods or services with no justified reason. On the other hand exact formal rules offers high legal protection but slower the development in certain profession. Providers working in strict legal framework aren't encouraged to find different ways to solve the

¹⁶ Such as taxes or imposes.

¹⁷ I think that such was the case of Enron in USA, Parmalat in Italy and Orion in Slovenia, where professionals who should protect the public interest in fact protect the private interest. The problem is not in the mentioned professionals (they act merely economically – they protect the party who maybe paid more) but on self regulation organizations which allowed that such professionals work also for private interest. If such professionals have the majority of voting rights to enact self regulation rules and also to interpret them, than under the cover of public interest, the private interest is protected.

¹⁸ Such as was in the case of black out in California at the beginning of this century.

professional problem or to do more than such framework demands from them.¹⁹ By my opinion the solution lies between the strict formal rules and less formal codes of conduct. The legislator should on one part enact the strict legal rules to defend the basic citizens' rights but on the other part leave the possibility of professions' development to the codes of conduct. As a corrective to the private interests in codes of conduct or better in their interpretation a system should provide more citizens' influence to code's creation interpretation and most important in any dispute resolution procedures run by such self regulation organizations.

4. CONCLUSION

Modern states can use self regulation organizations to reduce legislative costs and to make legislation more kind and adapted for the providers and citizens. The use of self regulation is connected with many dangers especially with the danger that private interest can prevail over the public interests. So the legislator shall first build the legislative mechanisms to protect public interest and than use self regulation in the benefit of all society.

5. LITERATURE

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¹⁹ Such cases are doctors who act accordingly to the exact professional doctrine which isn't always in the patients' interests. The adopted doctrine can work on most cases but not in all cases. If the framework is not so rigid, than the doctors can try also other, not so known, ways to cure the patient.