DOI: 10.61525/S231243500030173-8 Original Article / Оригинальная статья

COMPARATIVE LEGAL ANALYSIS OF THE POWERS OF COMMODITY EXCHANGES AND REGULATORS OF TRADE ORGANIZERS TO CONTROL THE ETHICAL CONDUCT OF TRADERS (A STUDY OF THE UK, USA, JAPAN, AND INDIA)

Khachaturova K.I.

Head of Legal Support for Commodity and Derivatives Markets, SPIMEX JSC, Post-Graduate Student, Autonomous Non-Commercial Organization V.A. Musin Research Center for the Development of Energy Law and Modern Legal Science

E-mail: k.khachaturova@spimex.com

Abstract. In the current economic and political conditions there is a need to regulate the conduct of exchange traders. Currently, exchanges carry out this regulation directly, but it is not sufficient. Therefore, a comparative legal analysis of approaches to regulating the ethical conduct of traders in foreign jurisdictions is particularly relevant. Foreign experience shows that regulators and exchanges identify trader misconduct, establish criteria for such conduct and measures to punish it. At the same time, to minimize potential consequences for the commodity market, for example, due to erroneous actions by exchanges in qualifying conduct, and maintain its stability, the foreign regulator exercises control over activities of exchanges and trader compliance with local legislation, issues relevant acts and recommendations containing a list of desirable and undesirable market practices. According to the author, when introducing amendments and additions to regulatory legal acts regarding the powers of the Bank of Russia, it may be beneficial to consider foreign experience in regulating misconduct of exchange traders in the commodity market in Russian practice.

Keywords: exchange, unfair practices, ethical (good) conduct.

For citation: Khachaturova K.I. Comparative Legal Analysis of the Powers of Commodity Exchanges and Regulators of Trade Organizers to Control the Ethical Conduct of Traders (a Study of the UK, USA, Japan, and India). Energy Law Forum, 2024, iss. 1, pp. 70–81. DOI: 10.61525/S231243500030173-8

СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ ПОЛНОМОЧИЙ ТОВАРНЫХ БИРЖ И РЕГУЛЯТОРОВ ОРГАНИЗАТОРОВ ТОРГОВЛИ ПО КОНТРОЛЮ ЗА ЭТИЧЕСКИМ ПОВЕДЕНИЕМ УЧАСТНИКОВ ТОРГОВ (НА ПРИМЕРЕ ВЕЛИКОБРИТАНИИ, США, ЯПОНИИ И ИНДИИ)

Хачатурова К.И.

Начальник отдела правового сопровождения товарного и срочного рынков АО “СПбМТСБ”,
аспирант АНО “Научно-исследовательский “Центр развития энергетического права и современной правовой науки имени В.А. Мусина”
E-mail: k.khachaturova@spimex.com

Аннотация. В текущих экономических и политических условиях возникает необходимость регулирования поведения участников биржевых торгов. В настоящее время такое регулирование осуществляет непосредственно биржа, однако оно не является достаточным. В связи с этим особую актуальность представляет сравнительно-правовой анализ подходов к регулированию этического поведения участников торгов в иностранных юрисдикциях. Зарубежный опыт показывает, что и регулятор, и биржа выявляют недобросовестное поведение участников торгов, устанавливают его критерии и определяют меры воздействия за такое поведение. Вместе с тем с целью минимизации возможных последствий для товарного рынка, например, ввиду ошибочных действий биржи при квалификации такого поведения, а также с целью поддержания стабильности товарного рынка иностранный регулятор осуществляет контроль за деятельностью бирж и за соблюдением участниками торгов локального законодательства, издает соответствующие акты и рекомендации, содержащие перечень желательных и нежелательных рыночных практик. Автор считает целесообразным использовать зарубежный опыт регулирования недобросовестного поведения участников биржевых торгов на товарном рынке в российской практике при внесении изменений и дополнений в нормативные правовые акты в части полномочий Банка России.

Ключевые слова: биржа, недобросовестные практики, этическое (добросовестное) поведение.

Для цитирования: Хачатурова К.И. Сравнительно-правовой анализ полномочий товарных бирж и регуляторов организаторов торговли по контролю за этическим поведением участников торгов (на примере Великобритании, США, Японии и Индии) // Правовой энергетический форум. 2024. № 1. С. 70–81. DOI: 10.61525/S231243500030173-8

In today’s politically and economically turbulent era, it is increasingly important for the Bank of Russia to ensure the development and stability of the financial market as its objectives are stated in Art. 3 of Federal Law No. 86-FZ on the Central Bank (Bank of Russia) dated July 10, 2002 (hereinafter referred to as the Law on the Bank of Russia). In 2019, the Bank of Russia published the Code of Good Conduct [1]. The Code contains the basic principles of good conduct in the financial market. It is not a regulatory document, but rather of a recommendation, and is primarily aimed at regulating the financial market. The adoption of the Code contributes to the development of the financial market, identifies practices of misconduct, resolves problems associated with them, increases investor confidence in the market, and forms the discipline of traders. The largest Russian exchanges, such as SPB Exchange PJSC, SPIMEX JSC, and Moscow Exchange MICEX-RTS PJSC, have introduced relevant codes of conduct, taking into account the practice of regulating the ethical conduct of traders formed by the Bank of Russia.

The financial exchange market is the most developed of all exchange markets in terms of regulating trader conduct. Sufficient global and Russian experience has been accumulated to identify and suppress unfair practices. For instance, the Working Group under the Bank for International Settlements has developed the FX Global Code, which the Bank of Russia recommends for use, including by exchanges. The Code contains a list of unfair practices in the foreign exchange market. Additionally, the Bank of Russia's official website provides information on unfair practices employed by exchange traders in the financial market. Furthermore, the Working Group on Regulation of Abuses in the Securities Market of the National Association of Securities Market Participants (NAUFOR) has created a Collection of Typologies of Unfair Practices in the Securities Market, which was approved by NAUFOR's Internal Control Committee and published in May 2021.

However, it is important to note that the commodity exchange market should regulate the ethical conduct of traders as rigorously as the financial market, particularly during times of high price volatility [2] and shortages of certain goods. According to the Bank of Russia's Commodity Exchange Analysis for 2019 [3], the Bank of Russia proposed that SPIMEX JSC develop and approve the Code of Professional Conduct of Commodity Traders to increase transparency in on-exchange trading of oil products. The Code's main objective is to prevent unfair trading practices in commodity exchange trading. At the same time, it is important to note that the Bank of Russia does not have the power to regulate the ethical conduct of commodity exchange traders since the regulation of the commodity market, particularly the exchange market, is not within the objectives defined by the Law on the Bank of Russia. Thus, commodity exchanges are granted the exclusive right to define the concept of unfair trading practices in the commodity market, including an approximate list of unfair practices, criteria for abuses, and abuse detection. It seems that the broad authority of exchanges may pose risks for both traders (if the exchange inadequately assesses the market situation or intervenes erroneously) and exchanges (development and application of an erroneous criterion of misconduct that does not fully reflect the illegal nature of a trader's conduct may subsequently lead to regulatory risks for exchanges and affect the market situation).

In relation to the above, it is proposed to examine the foreign legal regulations on the ethical conduct of traders (this article does not consider manipulation as an unfair practice, as there is no doubt that it is directly prohibited by law and entails liability) in the commodity exchange market (for the purposes of this article, a commodity market refers to the relationships between exchange traders that arise from the conclusion and implementation of an exchange contract, as well as between the exchange and traders that arise during the provision of services for on-exchange trading in commodities or derivatives, where the underlying asset is a commodity), in particular, the regulation of unfair trading practices at the level of regulatory legal acts, the distribution of powers to regulate such practices between regulators and the exchange. The analysis is carried out on the example of the largest commodity exchanges, including the London Metal Exchange (UK), Chicago Mercantile Exchange (USA), Tokyo Commodity Exchange (Japan), and Universal Commodity Exchange (India).

UK. The main UK regulations governing exchange activities are the Financial Services and Markets Act [4] (hereinafter referred to as the Financial Markets Act) and the Investment Exchanges and Clearing Houses Act [5]. The Financial Conduct Authority (hereinafter referred to as the FCA) supervises exchanges in accordance with these acts.

Section 1 of the Financial Markets Act states that the FCA's strategic objective is to ensure the operation of the supervised markets. To fulfill this task, the FCA performs the following functions: developing regulations and technical standards, issuing guidelines and explanations to clarify the provisions of the Financial Markets Act, and determining general policies and principles of the supervised markets.

The Financial Markets Act, as well as the FCA Handbook [6] containing recommendations to exchanges, provide the following requirements for exchanges (under the Financial Markets Act, an exchange is an investment exchange recognized by the relevant order):

— requirements to ensure that exchanges can function properly (e.g. the FCA assesses whether exchange policies comply with the Financial Markets Act);

— requirements for control systems, risk management, and conflict of interest management;

— requirements for algorithmic trading.

In addition, under the Handbook, in order to fulfill its functions of supervising exchanges and protecting the rights of investors, the FCA evaluates exchanges' rules and procedures for:

— compliance with laws, particularly market abuse prohibition laws, exchange procedures, and rules;

— prohibition of unfair trading practices and deliberate reporting or publication of false trading information;

— prohibition of the following actions: entering into transactions that involve improper claims of losses from a party to the contract; entering into transactions with the intent to create a false appearance of trading; cross-trading for improper purposes; entering into transactions that are pre-agreed and improperly negotiated; entering into transactions with the intent to facilitate or conceal potential market abuse; entering into transactions in which a party has no intention to settle or close their positions.

The Handbook specifies that exchanges must comply with requirements promoting and supporting high standards of transparency and integrity in relation to exchange activities. The FCA assesses the degree to which exchanges promote and support these standards by integrating them into rules, practices, and procedures and the compliance of these rules, practices, and procedures with market abuse legislation, other codes of conduct, rules, and principles governing conduct on the exchange market that users of the UK financial system can expect to be applied to regulated activities and the conduct of traders.

The FCA clarifies that exchanges must have effective mechanisms in place which are necessary, inter alia, to monitor transactions concluded at the exchange and the compliance of traders with their rules. This includes preventing trading that violates the exchanges' rules. These mechanisms may include investigations based on complaints received about a person's conduct on the exchange market, as well as procedures for resolving disputes arising from these complaints. To ensure exchanges fulfill this task, the FCA monitors and supervises their services (clearing, etc.), assesses exchanges' ability to assess traders' compliance with exchanges' rules, determine the severity of exchange rule breaches, take appropriate disciplinary action against traders, as well as suspend admission to their services in the event of a trading rule breach and report trader misconduct to the appropriate persons.

The FCA also establishes requirements for exchanges related to the requirements for potential traders. These requirements include, in particular, a positive business reputation and sufficient trading expertise. The Handbook also outlines general safeguards for investors, including the obligation of exchanges to ensure transparency of rules and procedures to promote fair trading in accordance with procedures provided for by law, and to establish objective criteria for executing orders effectively.

In addition, it should be noted that under the Investment Exchanges and Clearing Houses Act, the FCA has the authority to consider proposals by exchanges to adopt statutory provisions in connection with exchange activities. A statutory provision is defined as any rule, guideline, arrangement, policy, or practice. The FCA may reject an exchange's proposal if the requirement is deemed excessive and the statutory provision imposes a requirement on those affected by it.

When determining if the requirement is excessive, the FCA must consider all relevant circumstances, including:

— the impact of existing legal and other requirements;

— the global nature of financial services and markets;

— the desirability of promoting innovation;

— the impact of the proposed regulation on market confidence.

In view of the above, the analysis of UK legislation regarding the regulation of ethical conduct of exchange traders shows that:

1. The ethical conduct of traders is not regulated at the level of normative legal acts, but rather at the level of the regulator's explanations contained in the Handbook. The regulator's tasks include ensuring the operation of exchanges.

2. The regulator's explanations are binding for exchanges. The regulator subsequently assesses whether exchanges fulfill its requirements, including monitoring exchange trading, and assesses whether exchanges fulfill the requirements concerning the identification and prohibition of unfair trading practices.

3. The regulator's explanations do not provide an exhaustive list of unfair practices. Therefore, exchanges must develop additional unfair practice criteria, identify unfair practices, and report material violations of exchange rules by traders, violations of

trading procedures, cases of market abuse, etc. to the regulator.

4. On the one hand, the FCA strictly defines mandatory requirements and provisions for exchanges, including in terms of regulating ethical conduct of traders and requirements for traders. On the other hand, it gives exchanges autonomy to define procedures for identifying unfair practices, conducting investigations, etc. The Handbook defines the functions of exchanges as regulatory, meaning they are related to or arise from the responsibilities imposed on exchanges under the Financial Markets Act.

Considering the aforementioned legal regulation of ethical conduct of exchange traders in the UK, it is suggested that this regulation be reviewed in relation to the activities of the London Metal Exchange, a large exchange located in the UK.

London Metal Exchange. The Rules and Regulations of the London Metal Exchange [7] (hereinafter referred to as the LME) state that the exchange may refuse to admit candidates to trading, for example, if there are reasonable doubts that they can participate in trading according to UK legislation. The same reason may also be used to suspend a trader's membership in admission to trading.

The Exchange requires all traders to act with honesty, fairness, and professionalism in the best interests of their clients. This includes, for example, complying with requirements such as honesty, fairness, professionalism, information disclosure, resolution of conflicts of interest, the principle of best execution for the client. If the above requirements are violated (along with any other requirements), unlawful actions may be considered a violation of the Rules and Regulations. This includes any conduct that has caused or may cause a loss of goodwill for the Exchange or its markets. Additionally, the trader may be subject to investigation and disciplinary proceedings. The fine for a proven violation is approximately GBP 100,000, but the amount may be based on the severity of the violation and the circumstances surrounding it.

In addition, provision 12.6 of the Rules and Regulations requires a trader to observe high standards of transparency and fair dealing and observe high standards of market conduct as reflected in the FCA Principles and Guidance Releases as published from time to time. In the FCA's Principles for Business, one of the principles, Market Conduct, sets out the duty of any organization to observe proper standards of market conduct. This principle applies to activities which might have a negative effect on the stability of the UK financial system.

It seems that the principle of transparency can be supported by the requirement set forth in the Rules and Regulations that a trader must cooperate in an open and active manner and must promptly notify the Exchange of any information regarding themselves that is reasonably expected to be communicated. Failure to fulfill this duty in a timely manner may affect the Exchange's ability to make timely and correct decisions in order to maintain its regulatory functions. At the same time, the liability for breaching the reporting obligation is determined by the degree of breach (minor or serious). The Rules and Regulations provide a detailed description of the difference between the degrees of breach.

In addition to a trader's duty of disclosure, the Rules and Regulations establish a duty for traders to refrain from engaging in the following prohibited practices:

— manipulation or attempted manipulation, as well as creation or attempted creation of an artificial market;

— entering into or attempt to enter into a transaction or series of transactions designed to create an artificial market where prices and turnover do not truly reflect the business transacted;

— undertaking or attempt to undertake wash-trading (an unfair practice which involve buying and selling the same asset within a short period of time to deceive other traders about the price or liquidity of the asset) or bogus transactions;

— demonstrating or attempt to demonstrate that trading activity has taken place when it has not in fact occurred and no person shall mislead or attempt to mislead exchange staff as to the nature of any trading activity.

The Exchange may penalize a trader for these breaches, considering all circumstances of the case and the following factors:

— the nature, frequency, and duration of the breach. If the trader has committed the same offense within 24 months, this should be considered an aggravating factor, and the sanction for such a breach should be tougher;

— committing multiple but different breaches;

— whether the act of misconduct poses a risk of committing a financial criminal offense or other violations of law or regulations;

— the degree of liability for the act of misconduct or the extent to which the trader accepts liability for the act of misconduct;

— the adequacy of systems and controls that the trader should have in place to prevent misconduct;

— any remedial action taken by the trader since the discovery of the misconduct.

The financial penalty imposed should be appropriate and proportionate to the breach(es) that occurred, and it should be reasonable in all circumstances. Traders should bear in mind that the financial penalty serves as a deterrent to other traders and clients from engaging in similar activities.

After analyzing the LME Rules and Regulations, it is important to note that:

1. The Exchange has established requirements for ethical conduct of traders. These requirements can be classified by types, for example, requirements for compliance with business standards and interaction with clients, requirements for necessary disclosures to the LME, etc.

2. The Exchange has defined the composition of some breaches which consist of non-compliance with ethical conduct of traders in sufficient detail. However, it seems that the Rules and Regulations do not provide a complete list of breaches. For instance, a breach of the principle of 'integrity' will be evaluated based on the specific situation and its circumstances. We believe that the consequences for the Exchange/traders play an important role in determining whether a breach occurred or not.

3. Actions for breaches of ethical conduct requirements are determined based on the degree of breaches, as outlined in the Exchange's internal documents, and other factors set forth in these documents.

USA. The Commodity Exchange Act regulates the trading of commodity futures, swaps, and leveraged trading in the United States. The Commodity Futures Trading Commission (CFTC) (hereinafter referred to as the Commission) acts as a regulator of exchanges that trade in commodity futures. An organized exchange, first, allows trading by or on behalf of a person who is not an authorized party to the contract or by persons who are not main parties to the transaction (a contract between intermediaries), and, second, has established rules that govern the conduct of traders, which differ from rules that govern the submission of orders and execution of transactions on the exchange. These rules also contain disciplinary sanctions other than exclusion of traders from trading.

An exchange develops trading rules to facilitate trading in accordance with the rules. When making changes to the trading rules or creating new contracts, it sends a written confirmation to the Commission to ensure compliance of new futures contracts or trading rules with 7 US Code § 7a-2 and may request approval for corresponding changes. The Commission shall approve such changes if they are consistent with 7 US Code [8]. The Commission has the authority to modify or supplement the rules of the exchange through rule, regulation, or order to the extent necessary or appropriate, if, upon written request, the exchange makes the requested changes in its rules and practices on own behalf. The Commission's rules, regulations, or orders may allow for changes regarding such matters as contract execution terms and conditions, conclusion procedures, etc.

The requirements for exchanges [9] imposed by the Commodity Exchange Act include establishing appropriate fitness standards, including for traders, and rules prohibiting market abuse. Exchanges shall only organize trading in contracts that cannot be subject to manipulation. Exchanges shall be able to prevent cases of market manipulation, price distortion or disruptions of the delivery or cash-settlement process through market surveillance, practices and procedures providing for methods of real-time monitoring of trading. Exchanges shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables market participants to use the information:

— to assist in the prevention of customer and market abuses;

— to provide evidence of any violations of the market rules.

Exchanges shall approve and enforce trading rules, first, in order to protect the market and its participants from unfair actions of any party, including those committed by a trader's representative, and, second, to ensure fair and honest trading on the market.

The US Code prohibits various trading practices, including wash trading, false sales, and engaging in trading practices or conduct under exchanges' trading rules that violate the rules for orders to buy or sell; demonstrating a deliberate or reckless disregard for the execution of transactions; and spoofing (canceling an order before fulfillment). The Commodity Futures Trading Commission is authorized by the US Code to publish rules that prohibit unfair trading practices which violate fair and just trading.

Exchanges or the Commission, if exchanges fail to take action, may suspend, exclude, otherwise take disciplinary action against any trader, or deny admission of any person to trading. Any decision shall be based on exchanges' trading rules. If exchanges initiate disciplinary actions, they shall notify the Commission and the person subject to suspension, exclusion, or disciplinary action stating the reasons. The Commission is entitled to disclose information about this case.

The Commission has the discretion to review any decision made by exchanges that results in the suspension or termination of a person's admission or the taking of disciplinary action in accordance with standards and procedures it deems appropriate. Additionally, upon request of any person adversely affected by any other action of exchanges, the Commission may, in its discretion, reconsider such action [10].

In light of the above, it is important to note that:

1. Prohibited practices in the exchange market are formalized not only at the level of acts and other explanations of the regulator, but also at the level of normative legal acts directly.

2. The Commission has, in our opinion, broad powers to regulate exchange activities. In particular, it is determined by the regulator's authority to supplement exchanges' rules in certain cases and enforce measures directly to traders.

Chicago Mercantile Exchange. The rulebook of the Chicago Mercantile Exchange, one of the largest exchanges in the United States, define a list of fair and unfair trading practices. Unfair practices include, in particular, trading opposing client orders, publicly disclosing client orders, wash trading, collusion in relation to transactions on the trading floor, transactions with the intent to mislead traders, transactions with the intent to disrupt or overload the Exchange's systems, canceling orders before fulfillment or changing orders before fulfillment (spoofing), dishonest or non-commercial conduct, conduct inconsistent with fair trading principles, actions that harm the interests or reputation of the exchange, or any conduct that negatively affects the reputation of the Exchange.

The Exchange enforces measures for breaches of trading rules in accordance with its rulebook.

Given the above, we believe that, although exchanges in the U.S. have the right to identify unfair practices and prohibit them in their trading rules, such practices are primarily regulated by law and the regulator.

India. The Securities Contracts (Regulation) Act (hereinafter referred to as the Act) is the act that regulates exchange activities [11]. As published in 1956, this Act stipulates that the Securities and Exchange Board of India is responsible for regulating exchanges. According to this Act, an exchange authorized to trade in securities, including commodity derivatives, means an exchange that should meet the requirements established by the Central Government.

Exchanges were required to provide the Central Government with trading rules that comply with the principles of fair dealing and investor protection. If this and other requirements were satisfied, exchanges were considered recognized by the Central Government for conducting transactions. The Act outlines the responsibilities and prohibitions for traders in relation to the conclusion of exchange contracts. However, it does not include any obligations for traders to adhere to ethical principles of conduct.

In 2018, the Securities Contracts (Regulation) Act was amended to significantly expand the requirements for exchanges. However, the Act still lacks any ethical requirements for traders.

The Securities and Exchange Board of India (SEBI) has issued the Regulations on the Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market in addition to the Securities Contracts (Regulation) Act. Such practices include engaging in actions that create false or misleading information, making transactions without the intent to transfer title but with the intent to change the market price, creating artificial activity, disseminating false information while knowing that it is false, etc. If the regulator suspects that a trader has engaged in unfair practices, exchanges may launch an investigation, issue a warning, suspend the registration of an intermediary, cancel such registration (traders must be registered with the Indian regulator and comply with the trading rules and other internal documents of exchanges), as well as take other appropriate actions.

In light of the above, it is important to note that:

1. One of the objectives of the Indian regulator is to regulate unfair practices, which are described in a separate regulation that covers possible market abuse.

2. If unfair practices are detected, the regulator may take action against the trader bypassing exchanges.

In view of the above, we suggest analyzing the trading rules of India's largest stock exchange, the Universal Commodity Exchange, regulating unfair trading practices.

Universal Commodity Exchange of India. The Exchange's Regulations require potential traders to behave honestly, transparently, and ethically. Persons with convictions related to fraud or dishonesty are prohibited from becoming traders.

The Exchange's internal documents outline several types of unlawful conduct that traders should avoid: conduct that is inconsistent with business principles, unprofessional conduct, and prohibition of fraudulent or unfair practices.

Traders should comply with the objectives and interests of the Exchange and protect the best interests of investors. To achieve this, traders should adhere to the following rules that constitute a code of ethics, which provides examples of good practices:

— traders should warn clients of the risks of exchange trading and may not accept orders from clients until they have signed the warning;

— before executing exchange transactions, a trader should inform their clients of any changes to the exchange's rules and other internal documents;

— traders should not encourage, instigate, or allow their clients to evade margin, maintenance margins, etc. or any other financial or non-financial requirements related to trading on the exchange.

A trader who violates these rules may face liability measures such as suspension, exclusion from the Exchange, or fines.

The Exchange monitors the following unfair practices such as circular trading, price manipulation, price collusion, and other market abuses, and takes action if such practices are identified. Unfair trading practices under the Regulations also include, but are not limited to, the following:

1) abnormal trading, where sale transactions are executed by the same group of participants with an abnormally high price difference, which is not related to the spot/futures price movement for the underlying commodity. The main purpose of such transactions is to transfer profits or losses between the parties involved;

2) cross trading occurs when a trader is involved in both sides of the same contract, submitting orders to buy and sell within a period of time determined by the exchange, at the same price and with a significant number of lots;

3) circular trading refers to trading where a client or trader, or a group of traders and/or their clients, submit an order to buy and their counterparties are one or more persons of the same group or other unrelated entities for the purpose of manipulating prices or creating artificial volumes;

4) structured transactions are similar to cross trading, except that the parties involved are different traders. Such transactions undermine the fair price mechanism;

5) other market abuses.

According to the Regulations, traders are required to have a policy that covers issues such as suspicious or manipulative activities and the procedure for reporting such practices.

Based on the analysis of internal documents of the Universal Commodity Exchange of India, it should be noted that, despite a sufficient number of legislative requirements, including those for the Exchange, related to the ethical conduct of traders, the Exchange has the authority to determine the list and criteria of unfair trading practices by including them in the Exchange's regulations and other documents, subject to approval by the Securities and Exchange Board, in addition to the already established requirements. Therefore, it is possible to argue that exchanges have some autonomy in regulating the ethical conduct of traders. However, this autonomy is restricted by the regulator's discretion. If the regulator disagrees with the prohibition of certain practices, they may not approve exchanges' internal documents.

Japan. In Japan, exchanges are established and regulated by the Commodity Derivatives Act and the Financial Instruments and Exchange Act. Commodity exchanges trade derivatives with commodities as the underlying asset, while financial instruments exchanges trade derivatives based on financial instruments. Under the Acts, both types of exchanges have fairly broad powers of self-regulation to ensure fairness of transactions in the commodity market. In this case, self-regulation refers to the provision of services on the commodity market that involve investigating a trader's actions for compliance with exchange rules, trading rules, and principles of fair transactions. It also includes the possibility of adopting trading rules that contain provisions on admission to trading, trading procedures, powers of investigation, dispute resolution, etc.

The Ministry of Economy, Trade and Industry and the Ministry of Agriculture, Forestry and Fisheries regulate commodity derivatives in addition to self-regulatory powers. The distribution of powers between the Ministries is based on their respective competencies.

Under the Commodity Derivatives Act, which is meant to ensure the integrity of commodity pricing, a commodity exchange is a membership-based association with the primary purpose of opening necessary markets for efficient futures transactions in commodities or commodity indices. A commodity exchange shall have a permit issued by the relevant Minister by virtue of their order. The permit may be subject to additional conditions imposed by the Minister necessary to ensure public interest or fair transactions. The Commodity Derivatives Act does not require traders to comply with ethical principles.

However, Section 116 of the Commodity Derivatives Act lists unfair practices, including the following:

— sales transactions in commodity markets without the intention to transfer title to the listed commodity;

— wash trading in commodity markets or trading in commodity markets under false pretenses without using one's name;

— a series of commodity market transactions that may deceive people into thinking that commodity market transactions are profitable or can influence quotes on that commodity market, either alone or in collaboration with others.

According to Art. 117 of the Commodity Derivatives Act, a person who engages in unfair practices must compensate for any losses resulting from the illegal transaction. This compensation includes the amount of the contract or the amount that one person should pay to another under the terms of the contract.

The Commodity Derivatives Act (Art. 118) stipulates that if an excessive amount of transactions is being or is likely to be made in the commodity market due to buying up commodities (cornering), bear raids, or any other method, or if an unfair amount of remuneration or contract price, etc. is formed, and the Minister is of the opinion that it is necessary to take measures to maintain order in the commodity market and protect public interest, the Minister may issue appropriate orders addressed to the following entities:

1) traders, etc. in terms of imposing restrictions on transactions in the commodity market or on obtaining a power of attorney to conduct transactions;

2) a commodity exchange in terms of taking measures to limit fluctuations in quotes or the volume of unsettled transactions in the commodity market where the commodity exchange operates, changing the amount of clearing margin or performing one of the actions defined by the order of the competent ministry to ensure fair settlement of transactions in the commodity market;

3) a clearing organization in terms of changing the amount of clearing margin or performing one of the actions defined by the order of the competent ministry to ensure fair transactions in the commodity market.

In light of the above, it is important to note:

1. The regulation of commodity exchanges is distributed among the Ministries, which differs from the approach taken in other countries. In those countries, a special independent entity is responsible for regulating exchange activities, separate from functions of a state body.

2. Japanese legislation places emphasis on self-regulation of commodity exchanges. Some exchanges create a special self-regulatory body, a committee to ensure compliance with the principle of self-regulation.

3. A statutory act directly stipulates a list of unfair practices. However, exchanges have an obligation to ensure good faith in conducted transactions. Therefore, exchanges have the right to establish a list of unfair practices in their internal documents.

In view of the above analysis of legal regulation of ethical conduct of traders in Japan, we propose examining the application of Japanese legislation using the Tokyo Commodity Exchange as an example.

Tokyo Commodity Exchange. Article 165 of the Regulations outlines actions that violate the principles of integrity or equality of transactions. These include unfair transactions or brokerage activities, refusal to maintain reliability, involvement in actions that contradict consumer protection, careless or negligent transactions or brokerage activities, and other actions or conduct stipulated by the membership rules [12]. The Exchange's website also provides examples of unfair practices. Such practices include, but are not limited to, the following [13]:

— intentional price manipulation during a call auction;

— intentional price manipulation during continual trading;

— intentional manipulation of settlement price;

— fabricated order or spoofing.

If a trader substantially disrupts the execution of transactions by unreasonably objecting to execution in the commodity market or substantially hinders the execution of transactions by other traders without a valid reason, the Exchange may issue a warning, impose a fine of up to JPY 100,000,000, suspend or restrict such trader from executing transactions or clearing operations in whole or in part for a period of up to 6 months, or cancel such trader's membership.

If a trader believes or engages in conduct that violates the principle of fair or honest dealing, or harms or impairs the reputation of the Exchange and its traders, the Exchange may issue a warning, impose a fine of up to JPY 100,000,000, suspend or restrict the trader from executing transactions or shipping goods for up to 6 months, or cancel such trader's membership.

If the Exchange issues a warning, imposes a fine, suspends, or restricts a trader from participating in trading fully or partially, the Exchange may require the trader to take action to resolve the situation.

If disciplinary measures are taken against a trader who is also trading on another exchange, the exchange where the first violation occurred must inform the other exchange of the trader's name, the type of sanction, reason, etc., and provide any other information about the trader. This information should be received by the other exchange before it applies any sanctions.

Furthermore, as per the Regulations, a person may be barred from the Exchange membership due to improper performance of their activities in the commodity market or inadequate social authority.

Based on the above analysis, it can be concluded that the Japanese commodity exchange has a list of unfair trading practices that are prohibited for on-exchange trading, in addition to those already named in Japanese legislation.

Thus, based on the study of legislation in the UK, India, USA, and Japan, as well as regulations of major exchanges in these jurisdictions, the following conclusion can be made:

1. Unfair trading practices are regulated in all jurisdictions under review. They are formalized either through normative legal acts or by regulators independently establishing a list of unfair practices in recommendations, clarifications, etc.

2. All regulators, without exception, monitor exchanges' compliance with their own regulations and other internal documents, including those regulating unfair trading behavior. In certain jurisdictions (USA), the regulator has the authority to "force" changes if an exchange is found to be non-compl0iant with the regulator's requirements.

3. The description of unfair practices is not limited to general words such as "unfair", "unjust", etc. Instead, most analyzed normative legal acts provide a detailed description of market abuses.

4. To minimize the risk of abuse, most exchanges require potential traders (candidates) to meet certain 'respectability' requirements. Once a candidate is accepted as a trader, the legislation of all relevant jurisdictions requires the exchange to monitor on-exchange trading online, in addition to identifying unfair practices, for the purpose of tracking unethical conduct.

5. The list of abuses outlined in the acts and clarifications of regulators is not exhaustive. Exchanges must not only identify the listed prohibitions but also identify new unfair schemes and include them in internal documents.

6. In almost all countries, regulators have the authority to directly apply measures of influence to an unfair trader, but exchanges' authority to do so is not excluded.

7. In view of the above, it can be concluded that in general, regulators are more responsible for regulating unfair practices than exchanges. The goal of each regulator under the legislation of each jurisdiction reviewed is to ensure stability in the market it supervises. Regulation is carried out by the regulator both directly (e.g. applying measures to traders) and indirectly (e.g. exercising control over exchanges in terms of control over traders and compliance with exchange regulations). However, the analysis shows that exchanges are not excluded from the regulatory process, as they are closer to the primary source of violations (i.e. they are the first to receive information about violations committed during on-exchange trading).

Thus, foreign experience shows that both the regulator and the exchange identify trader misconduct, establish criteria for such conduct, and take measures accordingly. At the same time, to maintain stability in the commodity market and minimize potential consequences resulting from, for example, erroneous actions by the exchange in qualifying conduct, the foreign regulator exercises control over exchange activities and control over trader compliance with local legislation and issues appropriate acts and recommendations containing a list of desirable and undesirable market practices. In our opinion, granting such broad powers of control to the regulator means that the regulator plays a leading role in recognizing trading practices as unfair and creating focus for exchanges in terms of criteria for identifying unfair practices. Considering the above, we believe that it may be beneficial to incorporate foreign experiences for regulating misconduct of commodity exchange traders when introducing amendments and additions to Russian normative legal acts that pertain to the powers of the Bank of Russia.

REFERENCES

1. Basic Principles of Good Conduct in the Financial Market (Code of Good Conduct). URL: https://www.cbr.ru/Content/Document/File/67559/basic_principles_financial%20market.pdf
2. SPIMEX Will Suspend a Buyer from Trading Oil Products for Using a Robot // Interfax. URL: https://www.interfax.ru/business/856602
3. Bank of Russia's 2019 Analysis of the Commodity Exchange Market. URL: https://www.cbr.ru/Collection/Collection/File/32204/reveiw_29052020.pdf
4. Financial Services and Markets Act 2000. URL: https://www.legislation.gov.uk/ukpga/2000/8/contents
5. Investment Exchanges and Clearing Houses Act 2006. URL: https://www.legislation.gov.uk/ukpga/2006/55
6. Recognised Investment Exchanges. URL: https://www.handbook.fca.org.uk/handbook/REC.pdf
7. London Metal Exchange Rules and Regulations approved by the Exchange's Board of Directors on August 22, 2023. URL: https://www.lme.com/about/Regulation/Rules/Rule-book
8. U.S. Code. URL: https://www.law.cornell.edu/uscode/text/7/7a-2
9. U.S. Code. URL: https://www.law.cornell.edu/uscode/text/7/7
10. U.S. Code. URL: https://www.law.cornell.edu/uscode/text/7/12c
11. The Securities Contracts (Regulation) Act 1956. URL: https://www.indiacode.nic.in/bitstream/123456789/1644/1/A195642.pdf
12. Japan Exchange Group URL: https://www.jpx.co.jp/english/rules-participants/rules/regulations/03.html
13. Japan Exchange Group. Examples of Trade Practice Which Might Trigger Action by TOCOM. URL: https://www.jpx.co.jp/english/regulation/tocom/preventing/02.html

Authors' information:
Kseniya I. Khachaturova
Head of Legal Support for Commodity and Derivatives Markets, SPIMEX JSC, Post-Graduate Student, Autonomous Non-Commercial Organization V.A. Musin Research Center for the Development of Energy Law and Modern Legal Science

Сведения об авторе:
Хачатурова Ксения Игоревна
Начальник отдела правового сопровождения товарного и срочного рынков АО “СПбМТСБ”, аспирант АНО “Научно-исследовательский “Центр развития энергетического права и современной правовой науки имени В.А. Мусина”

Received / Поступила в редакцию 09.11.2023
Revised / Поступила после рецензирования и доработки 29.01.2024
Accepted / Принята к публикации 13.02.2024