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Contact Us :
Editorial Council:

(+7)(343) 245 9398;
e-mail: belykhvs@mail.ru

Editorial Board:
(+7)(495) 953 9108;

e-mail: avtor@lawinfo.ru

Publisher's Address for Correspondence:

RAUN, Kosmodamianskaya Quay, 26/55 Building 7, Moscow 125057, Russia
e-mail: avtor@lawinfo.ru
(+7)(495) 951 6069 (Russia)

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TABLE OF CONTENTS

Insolvency Law

Criminal Law

DEAR READERS!

By the Oriental Calendar, the 2018 year is the year of the Yellow Dog which promises to make the year successful and full of unforgettable events. The Yellow Dog is a wise and well-balanced creature which will keep whatever happens during the year under its control. The Dog is benevolent and generous without longing for comfort and fame. Therefore, you should be purposeful, resolute and firm in achieving the goals because these are the most important features for this year.

Yet, the 2018 year is expected to be rather difficult for many countries in the world, including Russia. What awaits Russia? Predictions are various and even contradictory. Even most experienced experts fail to give a unanimous assessment.

First of all, Russia will hold elections of the RF President on 18 March 2018. I cannot but agree to the statement that Russia needs a strong president. But the President needs not only strength but justice in making and enforcing decisions.

Russia needs a new concept of managing the state and economy fully oriented towards the society. The 'achievement' of Putin and his team is that they have managed to build and effectively use the so-called 'manageable democracy' when the actual participation of civil society in the state management and the influence of the society on the authorities (the back response) is little or minimum.

An example for Russia is the People's Republic of China which in 1978 began pursuing the policy of reforms and transparency. Within 40 years China has made an immense progress in modernizing its economy and society and making transition from the planned economy to the market economy. By 2020, China wants to create 'the society of average prosperity'.

This year Russia will see the 100th anniversary since the date when the last Russian Emperor Nikolai II and his wife and children were killed at night on 16-17 July 1918. Some historians consider that the tsar family were not shot. There are different reasons for such an opinion, including

the tsar's money. The rumor is that we will learn the truth about the death of the tsar's family on the eve of the 100th anniversary. Each opinion deserves to be heard. Let us wait and we will see!

In September 2018, the Ural State Law University will celebrate its 100th anniversary since the date of its foundation, a landmark event in the life of *Alma Mater*!

On 13-14 September 2018, Yekaterinburg will witness the XII session of the European-Asian Law Congress "Law and Justice: Global and Societal Challenges". The session will be held in the format of the plenary meeting, expert groups and round-table discussions.

Dear readers! Take care of yourselves and your family. Love your neighbors as yourselves. Not to lose yourself in this raging world is very important.

Editor-in-Chief, Doctor of Law, Professor **V.S. Belykh**

ON CERTAIN MODIFICATIONS OF THE COMPETENCE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Aleksandr N. Kokotov
Professor, Doctor of Law, Honored Lawyer of the Russian Federation,
Judge of the Constitutional Court of the Russian Federation,
St. Petersburg, Russia

Abstract
The article analyzes a range of different alterations of legislation on the Constitutional Court of the Russian Federation, which have been carried out since 2010 and affect its competence. The author discloses new powers of the Constitutional Court to decide whether the decisions of international institutions for the protection of human rights and freedoms can be executed in the Russian Federation and also to review the constitutionality of issues proposed for the All-Russian referendum. The author describes perspectives of further development of competence of the Constitutional Court.

Keywords: constitutional justice, the Constitutional Court, constitutional courts of federal entities, legislative alterations, competence, authorities, amendment of the Constitution, decisions of international institutions, to check the constitutionality of judicial practice.

Constitutional justice as an element of a constitutional-state system of a country requires modifications on the assumption of its substantial alteration, the emergence of serious foreign and interior challenges, and also by the reason of its own logic of development. In the Russian Federation, the listed conditions predetermine a number of non-uniformly scaled legislative alterations of the competence of the Constitutional Court of the Russian Federation (hereinafter - the Constitutional Court) which have been carried out since 2010 till present. We will focus on the fundamental ones and will also consider some prospects for further improvement of this field.

Firstly. Above all, it is the investment of the Constitutional Court with the authority to check the questions, put to an All-Russian referendum but

not related to the amendment of the Constitution itself, on conformity with the Constitution (the Federal Constitutional Law, hereinafter the FCL, of 4 June 2014)[1]. Previously, this authority was assigned to the Central Elections Committee of the Russian Federation, however, the Constitutional Court pointed out that, according to the Constitution, the check of acts or actions on conformity with the Constitution is the exceptional prerogative of the Constitutional Court (Judgment of 21 March 2007)[2], which predetermines its lodgment with this authority.

As for changing the Constitution of the Russian Federation at a referendum, FCL of June 28, 2004 No.5-FKZ "On a Referendum of the Russian Federation"[3] according to the Constitution of 1993 provides for a possibility to use a referendum only for accepting a new Constitution of the Russian Federation in the country in general, if the special supreme constituent body of the country, the Constitutional Meeting, submits the draft of the new Constitution elaborated by this body for a referendum. Also, after its convocation the Constitutional Meeting has the right to confirm the invariance of the existing Constitution or to adopt the new Constitution of the Russian Federation independently, without appointing national vote of citizens.

The order of acceptance of one of the said decisions by the Constitutional Meeting is defined by the federal constitutional law which has to be adopted according to Article 135 of the RF Constitution. However, such law has not been adopted in the country yet. The draft of the specified law was introduced to the State Duma several times, but every time it was declined.

[1] Federal'nyj konstitutsionnyj zakon ot 04.06.2014g. No.9-FKZ "O vnesenii izmenenij v Federal'nyj konstitutsionnyj zakon "O Konstitutsionnom Sude Rossijskoj Federatsii", Sobranie zakonodatel'stva RF, 2014 No.23, St.2922 [Federal Constitutional Law No.9-FKZ of 4 June 2014 "On Amending the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", Collection of Legislation of the Russian Federation, 2014, No.23, Art.2922]

[2] Postanovlenie Konstitutsionnogo Suda RF ot 21.03.2007 No.3-P, Sobranie zakonodatel'stva RF, 2007, No.14, St.1741 [Judgment of the Constitutional Court of the Russian Federation No.3-P of 21 March 2007, Collection of Legislation of the Russian Federation, 2007, No.14, Art.1741], available at http://doc.ksrf.ru/decision/KSRFDecision19705.pdf

[3] Federal'nyj konstitutsionnyj zakon ot 28.06.2004g. No.5-FKZ "O referendume Rossijskoj Federatsii", Sobranie zakonodatel'stva RF, 2004, No.27, St.2710 [Federal Constitutional Law No. 5-FKZ of 28 June 2004 "On a Referendum in the Russian Federation", Collection of Legislation of the Russian Federation, 2004, No.27, Art.2710]

The leading motive of this guarding reaction of parliamentary majority is that the adoption of this law can entail an unjustified resolute change of the constitutional basics of the Russian statehood that is fraught with undermining stability of the state and society and even disintegration of the country. This is despite the fact that the operating regulation allows entering separate amendments into the Constitution of the Russian Federation of 1993 also today (in its Chapters from 3 to 8). A number of punctate amendments have already been introduced in the Constitution.

If in the future the parliamentary majority nevertheless agrees to accept the project of FCL "On the Constitutional Meeting of the Russian Federation" for its consideration, the order of adopting the new Constitution fixed by this act, whether by the Constitutional Meeting or whether by carrying out national vote, will obviously demand correlation of the new draft Constitution with the existing Constitution. Such a correlation is necessary in order to provide the continuity of the constitutional system in the country and the enforcement of the new Constitution without rupture of the constitutional traditions. It appears that such restriction of law-making activity during the development of the new draft of the constitution is defined by the Constitution of 1993 proceeding from the concept of invariable (eternal) character of the fundamental legal values fixed by it.

Constitutions (basic laws) may contain special reservations on the invariance (a clause about eternity) meaning that the constitution or its separate provisions cannot be changed in future. Eternity clauses are a type of entrenched clauses that exist in the constitutions of such countries, as the Czech Republic, Germany, Greece, Italy, the Federative Republic of Brazil. The Constitution of India and the Constitution of Colombia contain similar provisions aimed at making it difficult, but not impossible, to change their basic structure. The Constitution of the Russian Federation of 1993 does not speak about the invariance of the regulatory legal act directly. Moreover, it contains procedures for change. However, it implies that in case of the acceptance of the new Constitution, the provisions of the

preamble and Chapter 1 of the Constitution of 1993 have to be transferred to the new Constitution even in another redaction.

Taking into account the foresaid, apparently the assessment of continuity between the new draft constitution and the existing Constitution by the Constitutional Court will be required as an obligatory validation phase of this project before its delivery at vote. Therefore, FCL "On the Constitutional Meeting of the Russian Federation" has to provide appropriate authority to the Constitutional Court and a certain normative-doctrinal basis of correlation of the new draft constitution with the text of the existing Constitution.

It may be found that identification by the Constitutional Court of existence or lack of continuity between the existing and new Constitution assumes assessment of the new draft constitution from the point of view of appropriate representation of provisions of the preamble and Chapter 1 of the existing Constitution in it in one form or another. The fragments of constitutions devoted to the rights and freedoms of citizens will also demand establishing continuity, however, less strictly. In this part it is enough to state that the new Constitution contains a set of rights and freedoms of citizens, the mechanisms of their action and restrictions comparable to those that the existing Constitution contains taking into account the latest achievements of the constitutional doctrine and practice, without decrease in the constitutional guarantees of the rights and freedoms of the citizens put in the existing Constitution. One more aspect is normative consolidation of the criteria on the basis of which the Constitutional Court will be able to establish existence or lack of continuity between two constitutions from the point of view of their action in time, in space and around persons. It may be found that FCL "On the Constitutional Meeting of the Russian Federation" should include some provision stipulating that the regulations which were adopted in the country earlier, the international treaties which were signed earlier remain effective if the opposite does not follow from the text of the adopted Constitution. It is specifically necessary to underline that legal positions of the Constitutional

Court based on the text of the former Constitution keep their force if they have not lost relevance in the system of the operating legal regulation.

Investment of the Constitutional Court with the designated powers apparently exempts possible inclusion of its judges in the structure of the Constitutional Meeting as its members.

The power to decide is also attributed to the authorities of the Constitutional Court, if the decisions of international institutions for the protection of human rights and freedoms can be executed in the Russian Federation (FCL of 14 December 2015)[4]. This action aimed at assuring the supremacy of the Constitution in the legal system of the state also over the decisions of the international institutions for the protection of human rights and freedoms (European Court of Human Rights, hereinafter – ECHR, The Office of the United Nations High Commissioner for Human Rights) met mixed response in the world. Meanwhile, the point is certainly not about the check of the ECHR decisions on conformity with the Constitution, determined on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms[5], but it is about the evaluation of a possibility of their execution without infringing the Constitution and about the ways of this execution (complete or partial).

The necessity of the described step is considerably predetermined by the transition of the ECHR to expanded application of the so-called measures of the general character, often demanding cancellation of standards of the national legislation as violating the conventional rights of citizens. Using this practice, the ECHR, in fact, has transformed itself into a full-fledged normative verification body that is quite a natural direction of evolution of its powers and does not contradict the spirit of the European

[4] Federal'nyj konstitutsionnyj zakon ot 14.12.2015g. No.7-FKZ "O vnesenii izmenenij v Federal'nyj konstitutsionnyj zakon "O Konstitutsionnom Sude Rossijskoj Federatsii", Sobranie zakonodatel'stva RF, 2015 No.51 (chast' I), St.7229 [Federal Constitutional Law No.7-FKZ of December 14, 2015 "On Amending the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", Collection of Legislation of the Russian Federation, 2015 No.51 (part I), Art. 7229]

[5] Konventsiia o zashchite prav cheloveka i osnovnykh svobod (Rome, 4 November 1950), Sobranie zakonodatel'stva RF, 2001, No.2, St.163 [Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4, 1950), Collection of Legislation of the Russian Federation, 2001, No.2, Art. 163]

Convention on the Protection of Human Rights and Fundamental Freedoms.

However, it is not provided directly by its provisions and it was not a condition for its ratification by the Russian Federation. As a result, there is an emergence of collisions in assessment of standards of the Russian legislation between decisions of the RF Constitutional Court and the ECHR decisions taking into account that it is the Constitution in the legal system of our country that has supremacy, but not the European convention, and ensuring its supremacy by means of normative inspection is within the exclusive competence of the Constitutional Court of the Russian Federation.

At the same time, the Constitutional Court, even making a decision on impossibility of executing an ECHR decision in Russia, is capable to establish what is acceptable in such a decision from the constitutional point of view and can or even has to be carried out by authorized bodies. It is confirmed by existing practice.

In this manner, in its judgment of 18 April 2016 on the issue of a possibility of executing the ECHR decision of 4 July 2013[6] in *Anchugov and Gladkov v. Russia*, the Constitutional Court found the execution of this decision impossible in part of the legislative accordance of the right to be elected to the persons kept in detention by the sentence of a court, because it directly contradicts Article 32 (part 3) of the Constitution of Russian Federation[7]. At the same time, it pointed out, that the legislator, sequentially implementing the principle of humanity in criminal law, has an opportunity to optimize the system of criminal penalty also by transferring of particular serving a prison sentence regimes in alternative kinds of penalties, although

[6] Postanovlenie Evropejskogo Suda po pravam cheloveka ot 04.07.2013g., Delo Anchugov and Gladkov protivRossijskoj Federatsii" (zhaloba N 11157/04, 15162/05), Biuleten' Evropejskogo Suda po pravam cheloveka, 2014, No.2 [Judgment of the European Court of Human Rights of July 4, 2013, *Anchugov and Gladkov v. Russia* (Application No.11157/04, 15162/05), Bulletin of the European Court of Human Rights, 2014, No. 2]

[7] Konstitutsiia Rossijskoj Federatssii (priniata vsenarodnym golosovaniem 12 dekabria 1993g.), Sobranie zakonodatel'stva RF, 2014, No.31, St.4398 [Constitution of the Russian Federation (passed by national vote on December 12, 1993), Collection of Legislation of the Russian Federation, 2014, No. 31, Art. 4398]

connected with the imperative restriction of liberty of convicted persons but not entailing the restriction of their right to be elected.

Thereby, the Constitutional Court has shown how the approach of the ECHR to a question of electoral rights of the persons sentenced to imprisonment can be partially exercised without violating the Constitution[8].

The resolution of the issue of a possibility of executing decisions of international institutions for the protection of human rights and freedoms in the Russian Federation is provided in three different procedures. **Firstly**, there is a special procedure of considering this question by the Constitutional Court in a public session upon the request of the Ministry of Justice that is responsible for executing decisions of the international institutions in the Russian Federation. At the time of writing the Constitutional Court considered two appeals like that[9].

Secondly, there is a procedure of interpretation of the Constitution by the Constitutional Court upon the request of the President or the Government with the purpose of eliminating uncertainty of its understanding, taking into account the detected collision between the interpretation of the international treaty of Russia given by the international institution for the protection of human rights and freedoms and the provisions of the Constitution concerning a possibility of executing decisions of international institutions. This procedure has not been used yet.

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[8] Such an approach reflects a doctrinal position according to which it is natural for the Constitutional Court to determine by inquiries of authorized subjects a need of measures of the general character directed at executing ECHR decisions and their concrete contents in Russia.
See: *Zor'kin V. D.* Vzaimodejstvie natsional'nogo i nadnatsional'nogo pravosudiia na sovremennom etape: novye perspektivy // Sravnitel'noe konstitutsionnoe obozrenie. 2012. No. 5. S. 51. [Zor'kin V.D. Interaction of National and Supranational Justice at the Present Stage: New Prospects // Comparative Constitutional Review. 2012. No. 5. P. 51]

[9] Apart from Resolution of the Constitutional Court of the Russian Federation of April 19, 2016 No.12-P, there is Resolution No. 1-P of January 19, 2017 on the case of permitting a question of a possibility of execution under the Constitution of the judgment of the European Court of Human Rights of July 31, 2014 in *JSC Yukos Oil Company v. Russia*.

See: Judgment of the European Court of Human Rights of July 31, 2014, *JSC Yukos Oil Company v. Russia* (Application No.14902/04), Precedents of the European Court of Human Rights: Electronic periodical / founder of *LLC Razvitie pravovykh sistem*. 2014, September. No. 4 (04), pp. 74–96.

Thirdly, there is a procedure of considering the request of a court for the check on conformity with the Constitution of the act by the Constitutional Court, which is to be applied by this court in a particular case and when this act was found violating conventional human rights, for example, by the ECHR. On this occasion, a court applies to the Constitutional Court for approval or disproof of constitutionality of the act.

However, the approval of the constitutionality of the act does not prove by itself that the working model of the legal regulation is optimal, and that means the decision of the Constitutional Court does not excuse the legislator from the alteration of the act in connection with the ECHR decision. Conventional rights of citizens can be violated not by an act itself but by acts specifying it or by the practice of its execution. All this is meaningful for choosing a strategy of executing ECHR decisions by the authorized institutions of the Russian Federation. Therefore, the Constitutional Court in its decision on request of another court must show the ways to eliminate the legislative imperfection that was detected by the ECHR.

Speaking about the perspectives for further development of the Constitutional Court's competence, we can mark ***four possible trends***.

To start with, in its ruling of 17 July 2014[10] the Constitutional Court brought up with a legislator an issue of investing the Constitutional Court with the authority to check the Constitution amendment acts (which can move amendments to Chapters 3 - 8 of the Constitution) in the preliminary normative verification regime. The Constitution amendment act, according to the Constitution (Articles: 15, 16, 134–136), cannot conflict with provisions of its Chapters 1, 2 and 9 over both the content and the decision-making procedure. These chapters allocate the basics of the constitutional system, fundamental human rights and freedoms, and the procedure of amendments and revision of the Constitution.

[10] Opredelenie Konstitutsionnogo Suda RF ot 17.07.2014g. No.1567-O, Sobranie zakonodatel'stva RF, 2014, No.30 (chast' II), Art. 4397 [Ruling of the Constitutional Court of the Russian Federation No.1567-O of July 17, 2014, Collection of Legislation of the Russian Federation, 2014, No.30 (part II), Art.4397], available at http://doc.ksrf.ru/decision/KSRFDecision168181.pdf

Thereby it is possible to make alterations in the Constitution, the FCL on the Constitutional Court of the Russian Federation, related to the ability of the Constitutional Court to check the Constitution amendment act on conformity with the Constitution's Chapters 1, 2 and 9 before its entry into force (before the moment when the amendments caused by this act become an integral part of the Constitution). So far, the Constitutional Court decides on conformity with the Constitution of international agreements, pending their entry into force, in the preliminary normative verification regime. Its other powers are carried out within the framework of subsequent normative verification.

For another thing, it is not out of question to invest the Constitutional Court with the right to initiate a prejudicial request to the Court of the Eurasian Economic Union on the subject of clarification of the provisions of the Treaty on the Eurasian Economic Union of 29 May 2014[11], international agreements concluded for its purposes, and decisions of EU bodies. In the meantime, only the Ministry of Justice of the Russian Federation has this right (the decree of the President of the Russian Federation of 21 May 2015[12]), though the Constitutional Court was also mentioned in the draft of this decree.

Thirdly, with the lapse of time the extension of possibilities of the protection of citizens' rights by the Constitutional Court can lead to its authorization with the right to check the constitutionality of judicial practice and the determination of its status as the superior judicial institution, inspecting for the reason of citizens' complaints the decisions

[11] Dogovor o Evrazijskom ekonomicheskom soiuze (Podpisan v g.Astana 29.05.2014) [Treaty on the Eurasian Economic Union (signed in Astana on 29 May 2014)], available at http://www.eurasiancommission.org/ru/act/texnreg/depsanmer/Documents/%D0%94%D0%BE%D0%B3%D0%BE%D0%B2%D0%BE%D1%80%20%D0%BE%20%D0%95%D0%B2%D1%80%D0%B0%D0%B7%D0%B8%D0%B9%D1%81%D0%BA%D0%BE%D0%BC%20%D1%8D%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%D0%B8%D1%87%D0%B5%D1%81%D0%BA%D0%BE%D0%BC%20%D1%81%D0%BE%D1%8E%D0%B7%D0%B5.pdf

[12] Ukaz Presidenta RF ot 21.05.2015g. No.252 "O federal'nom organe ispolnitel'noj vlasti, upolnomochennom na obrashchenie v Sud Evrazijskogo ekonomicheskogo soiuza", Sobranie zakonodatel'stva RF, 2015 No.21 [Decree of the President of the Russian Federation of 21 May 2015 No.252 "On the Federal Executive Body Authorized to Apply to the Court of the Eurasian Economic Union", Collection of Legislation of the Russian Federation, 2015, No. 21]

of the other courts in part of the protection of citizens' constitutional rights and freedoms. The model allocating body of constitutional control with the status of a higher judicial instance in relation to other judicial instances in the sphere of protecting rights and freedoms is used, for example, in Bosnia and Herzegovina, Germany, Peru (the procedure *amparo*) and some other countries.

This alteration is not on the agenda today, but we cannot totally exclude it. So far, the Constitutional Court inspects the decisions of other courts indirectly, because it checks the constitutionality not only of the acts themselves but also in connection with their judicial practice sense. And for the present such regulation is optimum, setting the status of the Constitutional Court as the body resolving only matters of law and which is not aimed as a general rule on check of constitutionality of the facts of law enforcement itself. However, if Russia is forced to leave from under jurisdiction of the ECHR (what is extremely undesirable), the country will have to look for a replacement to this platform at which as a control subject on the basis of the fundamental principles of law the law enforcement facts speak first of all. In this case the investment of the Constitutional Court with the status of the highest judicial authority concerning the protection of constitutional rights and freedoms of citizens given the right to revise solutions of other courts, including decisions of the Supreme Court of the Russian Federation on concrete affairs can be essential[13].

The issue of alternatives to the ECHR in Russia is also discussed in literature, among them, for example, an idea to create a supranational court similar to the ECHR within the CIS along with the Constitutional Court. One more option is to create an Asian court on human rights and include Russia in its activity[14]. These options cannot be excluded, but they

[13] For example, see: Kravchenko D. Nam nuzhen "Rossijskij Evropejskij sud" // Novaia Advokatskaia Gazeta. 2015. 23 dekabria [Kravchenko D. We Need a "Russian European Court"// Novaia Advokatskaia Gazeta. 2015. December 23] available at: http://www.advgazeta.ru/mneniya/nam-nuzhen-rossiyskiy-evropeyskiy-sud/

[14] *Bushev E.A., Kuznetsov D.A.* Na puti k edinoj sisteme zashchity prav cheloveka v Azii (rassuzhdeniia o perspektivakh sozdaniia Aziatskogo suda po pravam cheloveka)// Zhurnal konstitutsionnogo pravosudiia. 2017. No.5. S.20–30. [On the Way to the Unified System of Protection

are hardly perspective if they imply extending jurisdiction of the relevant supranational courts over Russia. As they say, let well alone. It is also necessary to see that in the field of protecting constitutional rights and freedoms of citizens in our country, the potential of regular courts and arbitration courts is yet not unleashed up to the end. Expansion of their opportunities in this field can make it unnecessary to transform the Constitutional Court into the highest judicial authority concerned with the protection of constitutional rights and freedoms of citizens within consideration and solution of concrete legal cases.

A less radical step in this direction is expanding opportunities for citizens to use the institute of direct constitutional complaint. And this step can be made already now. One of the options for moving in this direction is the direct legislative assumption of a possibility of citizens to apply to the Constitutional Court with the requirement to check constitutionality of the law which they challenged earlier in other courts in the normative verification order. Now the Constitutional Court presupposes that the judgments which have come into force based on citizens' applications passed by other courts in the normative verification order cannot be considered as confirming judicial law enforcement that is necessary for accepting citizens' complaints for consideration by the Constitutional Court in the order stated in part 4 of Article 125 of the Constitution.

Fourthly, Russia is a federative state; so apart from the Constitutional Court of the Russian Federation there are constitutional courts in several federal entities. This is a reason for regular discussion of the proposal to regulate their relationship with the Constitutional Court of the Russian Federation. In such a way, the legislative institution of St. Petersburg introduced to the State Duma a draft law authorizing the Constitutional Court to review the final decisions of constitutional courts of federal entities, which are made on the issues of their competence.

of Human Rights in Asia (Speculations on the Prospects of Creating an Asian Court of Human Rights)// Zhurnal konstitutsionnogo pravosudiia. 2017. No.5, pp. 20–30.]

In fact, the draft suggested connecting the Constitutional Court and constitutional courts of federal entities into the instances system. However, this draft law was rejected also because of different objects of direct protection of these courts. For the Constitutional Court it is the Constitution of the Russian Federation and for constitutional courts - constitutions of federal entities. Besides, existing legislation provides for the opportunity of the Constitutional Court to check the constitutionality of the founding acts of federal entities as well as their current acts on the issues of cooperative management, even if these acts were inspected on the conformity with constitutions by constitutional courts of federal entities before.

In conclusion, it should be noted that the legislative alterations of powers of the Constitutional Court analyzed in the present article as well as other changes of its status made during the period since 2010 till present nevertheless have not changed the basic model of specialized constitutional control at the federal level. It is still primarily focused on the subsequent constitutional normative verification which is carried out by the Constitutional Court of the Russian Federation in the abstract and concrete mode.

CONSTITUTION OF THE RUSSIAN FEDERATION AND LEGAL FRAMEWORK OF ENTREPRENEURIAL ACTIVITY

Vladimir S. Belykh
Professor, Doctor of Law, Head of the Entrepreneurial Law Department,
Ural State Law University, Yekaterinburg, Russia

Sergey V. Belykh
Assistant Professor of the Constitutional Law Department,
Candidate of Law,
Ural State Law University, Yekaterinburg, Russia

Abstract
The article considers basic foundations and principles of the market economy that underpin the economic organization of the most countries, including Russia. Many European states are known not to regulate and fix the said principles into their basic laws. These principles are presumed without any constitutional "recording".

Keywords: legal principles, constitutional economy, freedom of entrepreneurial activity, freedom of contract, free movement of entrepreneurial activity objects, freedom of competition.

Legal principles are basic guidelines expressed in law that characterize its content (foundations), and laws of social life incorporated into it[1]. Principles have a range of characteristics. This fact places them on the same level with systemically important factors such as the subject, the method of legal regulation of social relations, and legal presumptions. A distinction is drawn between the notions of "legal principles" and "basic foundations of legislation". They are neither opposed to each other nor considered as one cancelling the other[2].

[1] Alekseev S.S., Problemy teorii prava. Kurs lektsij v dvukh tomakh. [Problems of Theory of Law. Lecture Course in two volumes]. Vol. 1. Sverdlovsk, 1972, pp. 102–112.

[2] *See*: Komissarova E.G., Printsypy v prave i osnovnye nachala grazhdanskogo zakonodatel'stva [Principles in Law and Basic Foundations of Civil Legislation]. Dissertation Abstract…Doctor of Law. Yekaterinburg, 2002, pp. 8–9.

Civil law science and academic books contain a wide-spread perception that contemporary Civil Code is a code of the market economy and a code of the civilized market. This assertion is hard to argue with. However, the RF Constitution is the basic law of the market economy. It is not by chance that a group of researchers prepared and published the textbook "Constitutional Economy" for high schools of law and economics[3].

The RF Constitution contains fundamental principles of the market economy that can successfully be applied in the spheres of entrepreneurial activity[4]. The said fact was also noticed by the representatives of constitutional law science, of the concept of business (entrepreneurial) law, and by the supporters of other theoretical views.

Further consideration and support should be given to authors' finding that the principles are specific to law and economy, including the market economy. The principles of the market economy that were deeply examined in the legal literature are very important for entrepreneurial law[5].

Very fruitful was the attempt to identify legal principles that are not directly formulated in the RF Constitution but may be identified from the rulings of the RF Constitutional Court. So, we propose to classify the principles of entrepreneurial law into express (direct) and implied by law, and legal positions of the RF Constitutional Court[6]. For example, the principle of freedom of entrepreneurship is directly enshrined in Art.34 of the RF Constitution. The same can be said about other principles of entrepreneurial law that are directly or indirectly formulated by the Fundamental Law of the Russian Federation.

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[3] *See*: Barenboim P.D., Gadzhiev G.A., Lafitskiy V.I., Mau V.A., Konstitutsionnaia ekonomika [Constitutional Economics]. Moscow, 2006, 528 p.

[4] *See*: Gadzhiev G.A., Konstitutsionnye printsipy rynochnoi ekonomiki (Razvitie osnov grazhdanskogo prava v resheniiakh Konstitutsionnogo Suda Rossijskoj Federatsii) [Constitutional Principles of the Market Economy (Development of the Foundations of Civil Law in the Decisions of the RF Constitutional Court)]. Moscow, 2002, 286 p.

[5] *See*: Ppredprinimatel'skoe pravo Rossijskoj Federatsii [Entrepreneurial Law of the Russian Federation] /ed. by E.P. Gubin, P.B. Lakhno, 3rd edition updated and revised. Moscow, 2017, pp. 48–58.

[6] *See*: Belykh V.S., Vinnitskiy D.V., Nalogovoe pravo Rossii: Kratkij uchebnyj kurs [Tax Law: Crash Course]. Moscow, 2004, pp. 139–140.

Considering a complex (public and private) nature of entrepreneurial law, we cannot ignore those principles that are specific to the branches of public and private law (e.g. constitutional law, administrative law, tax law, civil law, land law, environmental law, etc.). For example, the principle of freedom of contract enshrined in Article 1 of the RF Civil Code cannot be limited within the frames of the civil law application. The said principle also arises from some norms of the RF Constitution (para.2 of Art.35, Art.74, para.4 of Art.75). Therefore, legal principles formulated in the norms of public and private law must be regarded as principles of entrepreneurial law if the latter (norms-principles) regulate entrepreneurial relations.

Now, let us examine in detail the basic principles of the market economy in general and entrepreneurial law in particular.

Freedom of entrepreneurial activity is the fundamental principle of entrepreneurial law. This principle is enshrined in Article 8 of the RF Constitution that assures freedom of economic activity. Article 34 of the Fundamental Law specifically addresses this principle: "Everyone shall have the right to a free use of his abilities and property for entrepreneurial and economic activities not prohibited by law". At the same time, freedom of entrepreneurship is not absolute; it can be limited in the public interest. One of the forms of such limitation is licensing certain types of entrepreneurial activities. On the other hand, certain types of activities cannot be exercised without a license.

In our view, the freedom of entrepreneurship is *a universal (integrated) principle* of entrepreneurial law. It combines several distinct principles of legal regulation of relations in the sphere of entrepreneurial activity (e.g. the principle of freedom of contract, of permissibility, of freedom of competition, etc.)[7]. Professor G.A. Gadzhiev thinks that the freedom of entrepreneurship includes the following constituent elements:

— the right to freely use labor capabilities, to choose the type of activity and profession, to be the lender-entrepreneur or employer (Art.37 of the RF Constitution);

[7] Belykh S.V., Svoboda predprinimatel'skoj deiatel'nosti kak konstitutsionno-pravovaia kategoriia [Freedom of Entrepreneurship as a Constitutional-Legal Principle]. Dissertation…Candidate of Law. Yekaterinburg, 2004, pp. 8, 72 and others.

— the right to freely travel, choose the place of stay or residence – freedom of labor market (Art.27);

— the right to unite for joint economic activity – choice of organizational and legal form of entrepreneurship, and to establish various entrepreneurial structures in the notifying order (Art.34);

— freedom to have private property, possess, use and dispose of it both personally and jointly with other people, the freedom to possess, use and dispose of land and other natural resources (Art.35, 36);

— freedom of contract – to conclude civil law and other transactions (para.2 of Art.35, Art.74, para.4 of Art.75);

— freedom from unfair competition (para.2 of Art.34);

— the right to entrepreneurial and economic activities not prohibited by law in accordance with "the principle everything is permissible that is not prohibited" (para.1 of Art.34)[8].

The complex character of the principle regarding the freedom of entrepreneurship is reflected in the decisions of the European Court of Justice in Luxembourg in specific cases[9]. The European Court regards the freedom of entrepreneurship as: 1) freedom to choose the type of activity or profession; 2) freedom from unfair competition; 3) general freedom to do everything that is not prohibited. In any case, such a character of the said principle needs further explanation. Otherwise, it could be transformed into all-absorbing institution.

In comparison, Article 3 of the Entrepreneurial Code of the Republic of Kazakhstan is devoted to the objectives and principles of interaction between the subjects of entrepreneurship and the state. Basic principles of this interaction include: the principle of freedom of entrepreneurship, the principle of equality between the subjects of entrepreneurship, the principle of inviolability of property, the principle of legality, the principle

[8] Gadzhiev G.A., Zashchita osnovnykh ekonomicheskikh prav i svobod predprinimatelej za rubezhom i v Rossijskoj Federatsii (opyt sravnitel'nogo issledovaniia) [Protection of Fundamental Economic Rights and Freedoms of Entrepreneurs Abroad and in the Russian Federation (on the Experience of Comparative Research)]. Moscow, 1995, p. 137.

[9] *See*: Newill Brown L., The Court of Justice of the European Communities. London, 1989, pp. 298–299.

of promoting entrepreneurship, the principle of private entrepreneurship participation in the law-making process, etc. At the same time, it should be mentioned that the Code sets the principles regarding state regulation of entrepreneurship in the Republic of Kazakhstan[10].

Thus, the principle of freedom of entrepreneurship is understood like a basic idea allowing and guaranteeing natural persons and their entities to make decisions on the use of property, capital and productive assets for starting their own business and freely participate in the entrepreneurial activities in any sphere of economy in accordance with the acts of the RF legislation.

Freedom of contract is the next principle of entrepreneurial law[11]. This principle is enshrined in the RF Constitution (para.2 of Art.35, Art.74, para.4 of Art.75) and in the RF Civil Code (Art.1, 421). The principle is evident from the following. **First**, citizens and legal persons are free to enter into a contract or to refuse from entering into a contract. According to the general rule, coercion to enter into a contract is not permitted unless this obligation is stipulated by the Code, the law, or is assumed voluntarily. The said may be exemplified by para.3 of Art.426 of the RF Civil Code which provides that refusal on the part of the commercial organization to conclude a public contract, if it can provide to the consumer the

[10] *See*: V.S. Belykh. O kontseptsii i primernoj strukture predprinimatel'skogo kodeksa Respubliki Kazakhstan (v poriadke obsuzhedeniia). V sb. "Tvorcheskoe nasledie akademika V.V. Lapteva i sovremennost'" [On the Concept and Model Structure of the Entrepreneurial Code of the Republic of Kazakhstan (in a Manner of Discussion). In the compilation "Creative Heritage of Academician V.V. Laptev and Modernity"]/ ed. by A.G. Lisitsin-Svetlanov, N.I. Mikhailov. Moscow, 2014, pp. 111–142.

[11] *See*: Markelov D.S., Printsyp svobody dogovora i osobennosti ego realizatsii v dogovorakh s uchastiem organov vnutrennikh del [Principle of Freedom of Contract and Specific Features of its Implementation in Contracts with the Participation of Internal Affairs Agencies]. Dissertation Abstract…. Candidate of Law. St. Petersburg, 2008; Grigoryeva M.A., Poniatie svobody v rossijskom grazhdanskom prave [Notion of Freedom in the Russian Civil Law]. Dissertation Abstract… Candidate of Law. Krasnodar, 2004; Zaboev K.I., Printsyp svobody dogovora v rossijskom grazhdanskom prave [Principle of Freedom of Contract in the Russian Civil Law]. Dissertation Abstract…Candidate of Law. Yekaterinburg, 2002; Ershov Yu. L., Printsyp svobody dogovora i ego realizatsiia v Rossijskom grazhdanskom prave [Principle of Freedom of Contract and its Implementation in the Russian Civil Law]. Dissertation Abstract…Candidate of Law. Yekaterinburg, 2001; Osakwe C., Svoboda dogovora v anglo-amerikanskom prave: poniatie, sushchnost' i ogranicheniia [Freedom of Contract in Anglo-American Law: Nature, Essence and Restrictions]// Journal of Russian Law. 2006. No. 7.

corresponding commodities and services and to perform for him the corresponding works shall not be admitted. Having concluded the preliminary contract, the party cannot refuse to conclude the basic contract (Art.429 of the RF Civil Code). Credit bank organizations are not entitled to deny the customer opening the account without sufficient reasons (Art.845, 846 of the RF Civil Code). The conclusion of a state or municipal contract shall be compulsory for the monopoly enterprise only in cases established by law and provided that the state or municipal customer should compensate all the losses which can be caused to the supplier (executor) in connection with the fulfillment of the state or municipal contract (para.2 of Art.527 of the RF Civil Code). The list of such cases can be continued.

Second, freedom to choose the type of contract to be concluded. The parties can enter into a contract both provided and not provided by the law or other legal acts (non-defined contract). Art.8 of the RF Civil Code considers these contracts as a ground for arising, changing and terminating civil law relations. Freedom of contract allows counterparties to conclude a mixed contract that includes (according to para.3 of Art.421 of the RF Civil Code) the elements of different contracts, stipulated by the law or by the other legal acts. We think that Articles 8 and 421 of the RF Civil Code allow the parties to conclude the so-called complex (inter-branch) agreement.

Third, freedom to define the contractors to the contract. In the market economy parties are free to choose partners – participants of contractual relations excluding the cases of obligatory conclusion of the contract (Art.445 of the RF Civil Code), of conclusion of a basic contract on terms stipulated in the preliminary contract (Art.429 of the RF Civil Code), and conclusion of the contract by tender (Art.447 of the RF Civil Code). We agree with the view that "civil legislation links the choice of partners with actions undertaken to conclude the contract and with the competent refusal from such actions for an applicant"[12]. Judicial practice makes it possible to make the same conclusion about freedom to choose a partner.

[12] See: R.O. Telgarin. O svobode zakliucheniia grazhdansko-pravovyh dogovorov v sfere predprinimatelstva [On Freedom to Conclude Civil-law Contracts in the Sphere of Entrepreneurship] //

Fourth, parties are independent to define the conditions of a contract to be concluded. They mainly choose non-essential conditions as the essential ones are defined by law or arise from the type of a contract. However, essential conditions may be defined by the contractors. Although, the contract shall correspond to the rules, obligatory for the parties, which have been laid down by law and by other legal acts (Art 422 of the RF Civil Code), as mentioned above, the parties can conclude a contract that contains the elements of different contracts (a mixed contract).

Freedom of contract does not have an absolute character. "Freedom of contract could become absolute only if the Code and all legal acts issued under it contained only dispositive and optional norms". However, as M.I. Braginsky and V.V. Vitryansky correctly note, such a way would entail the immediate destruction of the country's economy, its social and other programs[13].

Freedom of contract (as well as freedom of entrepreneurship) can be limited by law and other legislative acts or due to economic (financial) disparities of business entities in specific market segments. So, freedom of contract can be examined from both legal and economic perspectives.

The principle of "free flow" of entrepreneurial activity objects (goods, services and financial resources) is enshrined in Art.8 of the RF Constitution and Art.1 of the RF Civil Code. Art.8 of the RF Constitution states that "In the Russian Federation guarantees shall be provided for the integrity of economic space, a free flow of goods, services and financial resources…" The RF Civil Code (para.5 of Art.1) states that any restrictions on the movement of commodities and services shall be imposed in conformity with the Federal Law, if this is necessary to provide security, and to protect the human life and health, the environment and the cultural benefits.

The principle of inviolability and legal equality of all property forms used for entrepreneurial activities is derived from the provisions of the Fundamental Law (Articles 8, 9, 34, 35). Thus, according to para.2 of Art.8

Rossiiskaia iustitsiia [Russian Justice]. 1997. No. 10.

[13] M.I. Braginsky, V.V. Vitryansky. Dogovornoe pravo: Obshchie polozheniia [Contract Law: General Provisions]. Moscow, 1997, p. 126.

"In the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership". In the context of land, this principle is formulated in para.2 of Art.9 of the RF Constitution. The list of property forms starts with private property both in the RF Constitution and the RF Civil Code (para.1 of Art.212). Though, the said does not mean that just private property experience benefits over other forms of property. Private property is not a sacred cow.

We think that property can be divided into two big groups: public property and private property. *Public property* is state (federal and property of the RF subjects) and municipal property[14]. *The category of "private property"* covers all other forms of property. From this view, private property includes property of individuals and major legal forms of commercial organizations and property of public and religious organizations (associations). Art.2 of the Entrepreneurial Code of the Republic of Kazakhstan states that the basic forms of entrepreneurship in the Republic of Kazakhstan are private and state entrepreneurship.

Neither the RF Constitution nor the RF Civil Code reveals the meaning of the word combination "other forms of property". This has caused different assumptions in the legal literature. The authors often write about a mixed form of property. Though, some others write about political economy formations such as "collective", "leasehold" or "community" property. Thus, V.V. Laptev writes: "It can be assumed that other forms of property include mixed forms where the property belongs both to the state and municipal entities, private persons, and organizations"[15]. We think that the category "a mixed form of property" has the right to exist. But it can hardly be applied to situations connected with the creation of legal entities. For example, there is no mixed form of property when a joint stock company is established by a public entity and private persons. According to para.3 of Art.48 of the RF Civil Code,

[14] See: A.V. Vinnitsky. Publichnaia sobstvennost': monographiia [Public Property: Monograph]. Moscow, 2013, 732 p.

[15] V.V. Laptev. Predprinimatel'skoe pravo: poniatie i sub'ekty [Entrepreneurial Law: Notion and Subjects], p. 10.

corporate relations arise between the legal entity (a joint stock company in our case) and its participants, so the property of the joint stock company under the ownership right. Setting up commercial entities with foreign capital does not give rise to a mixed form of property. According to the legislation on foreign investment, such entities may be registered only in the form of a limited liability company or a joint stock company. It is not accurate to speak about a mixed form of property regarding unitary enterprises including state enterprises. Articles 114 and 294 of the RF Civil Code state that the unitary enterprise, based on the right of economic management, shall be set up by the decision of the state or the local self-government body, authorized for this purpose. The legal model of the unitary enterprise excludes every possibility to form mixed property.

There are practically no grounds to have the mixed form by non-commercial entities. For example, the entity created by the owner for exercising administrative, social and cultural, and other functions of non-commercial character being fully or partly financed by him may exist both as a public (state or municipal) or private (social) agency. According to para.3 of Art.48 of the RF Civil Code (in the version of Federal Law No.99-FZ of 5 May 2014), agencies with respect to which their founders shall have the property rights shall be considered as legal entities. Moreover, according to Art.123.21 of the RF Civil Code, establishing the agency prohibits *co-ownership* of several persons. The agency created before Federal Law No.99-FZ of 5 May 2014 came into force is not liquidated on the above ground. Such an agency (excluding state or municipal agencies) by resolution of its founders can be transformed into an autonomous non-commercial organization or a fund.

Freedom of competition and restrictions on monopolistic activities is the next principle of entrepreneurial law. It is reflected in the RF Constitution. Para.2 of Art.34 states: "The economic activity aimed at monopolization and unfair competition shall not be allowed". The same norm (legal principle) is contained in para.1 of Art.10 of the RF Civil Code; it defines

the limits of civil rights by citizens and legal persons. Both the RF Constitution and the RF Civil Code prohibit the subjects of entrepreneurial activities to abuse their rights (e.g. abuse of market dominance). Para.2 of Art.10 of the RF Civil Code provides for legal implications for a failure to comply with the corresponding requirements: the court of law, the arbitration court or the arbitration tribunal can reject this person's claim for the protection of the right he possesses fully or partially and to apply other measures provided for by law[16].

The Plenum of the RF Supreme Court in its Resolution No.25 of 23 June 2015 "On Application of Section I, Part I of the RF Civil Code by the Court" added clarifications. Thus, para.1 of the Resolution says that the court has the right on its own initiative to recognize the behavior of one of the parties fraudulent and reject to protect the right based on Art.10 of the RF Civil Code[17]. The need for granting such a right to court is questionable. It cannot be excluded in practice that the court will abuse procedural rights.

The principle of regulating entrepreneurial activity by the state and inadmissibility of arbitrary interference in private matters plays an important role in the conditions of market economy. We think that it means: **first**, that the state through the relevant authorities uses all possible forms and means of state legal impact on economic relations. **Second,** state regulation of entrepreneurial activities does not undermine basic foundations of the civil legislation. The principle of inadmissibility of arbitrary interference in private matters means that the legislator generally allows state interference in the economy. Allowable (involuntary) interference is based upon the law – state regulation of entrepreneurship. Voluntary interference is unlawful. These two things differ[18].

[16] See: Koordinatsiia ekonomicheskoj deiatel'nosti v Rossiiskom pravovom prostranstve: monografiia [Coordination of Economic Activity in the Russian Legal Space: Monograph]/ ed. by M.A. Egorova. Moscow, 2015, pp. 521-634 (Chapter 5 – authors M.A. Egorova, O.A. Gorodov).

[17] Legal Reference System *ConsultantPlus*.

[18] See: V.S. Belykh. Pravovoe regulirovanie predprinimatel'skoj deiatel'nosti v Rossii: monografiia [Legal Regulation of Entrepreneurial Activity in Russia: Monograph]. Moscow, 2011; V.S. Belykh, S.I. Vinnichenko. Pravovoe regulirovanie tsen i tsenoobrazovaniia v Rossijskoj Federatsii [Legal Regulation of Prices and Price Formation in the Russian Federation]. Educational and practical guide. Moscow, 2002, p. 172.

Literature on entrepreneurial law examines this principle without the second element (constituent part) – without mentioning the inadmissibility of arbitrary interference in private matters, leaving it to the civil law. On the contrary, its public-law origin is given priority to, namely state regulation of the market economy. At the same time, entrepreneurial law is a complex (interbranch) formation that harmoniously combines public-law and private-law elements of legal regulation of social relationships.

The principle of legality is also mentioned in the system of entrepreneurial law. However, it (along with the principles of justice, respect for human rights, the primacy of Constitution of the Russian Federation, equality, etc.) is the general sectoral and comprehensive principle. The nature of legislation as a principle is not only in requirements of strict and faithful compliance of the laws and by-laws by all the subjects of law[19]. Modern literature on the theory of law correctly states that legality must be regarded from the point of requiring explicit protection and true protection of rights and interests of citizens and legal entities as well as the protection of the law order in general from any arbitrary actions[20]. Such treatment of legality meets the needs of the society and ensures its normal functioning in conditions of democracy and globalization. In the sphere of entrepreneurial activity the principle of legality is extended to entrepreneurs as well as to national and local authorities.

The content of the principle of legality is enshrined in Art.15 of the RF Constitution: "The Constitution of the Russian Federation shall have the supreme juridical force, direct action and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation. The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws".

[19] S.S. Alekseev. Problemy teorii prava [Problems of Theory of Law]. Course of lectures in two volumes. Vol. 1, p. 113.

[20] Teoriia gosudarstva i prava [Theory of State and Law]. Textbook/ ed. by V.M. Korelsky, V.D. Perevalov, pp. 436–437.

The principle of legality should be examined within the context of such category as "law order". From general theoretical positions, "*law order*" is a condition of organizing social relations (public life) based upon the law and order. A widely held opinion that law order is a realized legality can hardly be regarded correct. The main characteristic of law order is the condition of order due to the activities of all the legal requirements in accordance with the principle of legality[21]. The foundation for the rule of law is legality but not the law. Legality is a prerequisite for law order[22]. Law order is a variation of the public order. In its turn, law order may be divided into certain types. Thus, considering the division of law into public and private, it is worth differentiating between public-law and private-law order. Depending on the sphere of application of the legal rules and individual prescriptions, the emphasis should be placed on the business (economic) law order. Application of legal prescriptions in the discussed sphere is primarily aimed at creating organized (coordinated and harmonious), steady and sustained law order. To put it short, this topic deserves renewed attention and comprehensive academic study.

[21] A.M. Vasilyev. Pravovye kategorii [Legal Categories]. Moscow, 1976, p. 180.

[22] Teoriia gosudarstva i prava [Theory of State and Law]. Textbook/ ed. by V.M. Korelsky, V.D. Perevalov, p. 456.

THE AMERICAN CONSTITUTION, CONGRESS, THE PRESIDENT AND THE IMPOSITION OF SANCTIONS AGAINST THE RUSSIAN FEDERATION

Robert Allen Sedler
Distinguished Professor of Law, Wayne State University
Detroit, Michigan, U.S.A.

Abstract
This article is in part an update of an earlier article in this Journal, "The Constitutional Framework of National Interests Ensurance in the United States: A Russian Comparison, RUSSIAN LAW: THEORY AND PRACTICE 7 (2017). However, the primary focus of the article is on the imposition of sanctions against the Russian Federation in both the Obama and Trump Administrations. The article discusses the power of Congress to legislate sanctions and the power of the President both to impose sanctions and to implement the sanctions imposed by Congress. It explains that for a number of reasons relating to the structure of the American constitutional system, the President has the final authority to determine whether new sanctions will be imposed and whether existing sanctions will be strongly enforced. With the transfer of power from the Obama Administration to the Trump Administration, the role of sanctions in American relations with Russia has changed significantly. While Congress is strongly disposed to enact sanctions against Russia, as reflected in the enactment of the Countering America's Adversaries through Sanctions Act (CAATSA) in August 2017, the President is not disposed to use sanctions against Russia and is seeking to improve relations between the United States and Russia. It is thus fair to say that the development of future relations between the United States and Russia will take place without a regime of American sanctions against Russia.

Keywords: 18th century American Constitution, Presidential power over foreign affairs, broad authorization of Presidential power to administer and enforce legislation in the area of foreign affairs, Presidential disapproval of legislation, the "political question" doctrine and foreign affairs, sanctions against Russia during the Obama Administration, agreement between Congress and the President on sanctions against Russia during the Obama Administration, sanctions against Russia during the Trump Administration, Countering America's Adversaries Through Sanctions Act (CAATSA), signing statement of President Trump, report on Russian officials and "oligarchs" by the United States Department of Treasury, position of President Trump on sanctions against Russia.

Ever since early 2014, when the Russian Federation annexed Crimea and allegedly undertook military action to support the separatists in eastern Ukraine, relations between the United States and the Russian Federation have been characterized by the imposition of sanctions by the United States against the Russian Federation and against Russian citizens. The imposition of these sanctions was intensified when it was widely believed in the United States that the Russian Federation attempted to interfere in the 2016 Presidential election in order to help bring about the election of President Donald J. Trump. For the most part, the Russian Federation did not respond with significant counter-sanctions against the United States and its citizens, and the sanctions appeared to have little economic impact in Russia. And to a large extent, the United States and Russia continued to engage each other in the international arena, usually in a conflicting, but sometimes in a cooperative relationship. In the present writing, I will discuss the process of the imposition of sanctions in the American constitutional system and the differing roles of Congress and of the President in that process. The matter is complicated by political considerations, interacting with the constitutional structure. President Trump clearly favors restraint and efforts to improve relations with Russia while Congress is not supportive of those efforts. Moreover, there are sharp political differences with respect to this matter and most other matters between the Republican Party, which would be expected to be supportive of President Trump, and the Democratic Party, which is strongly opposed to the President and to most everything that he does[1].

I. Introduction: The Constitutional Framework of Interests Ensurance under the 18th Century American Constitution

In an earlier article in this Journal, I discussed at length the constitutional framework of interests ensurance in the United States, and made some comparisons between that constitutional framework and the constitutional framework of interests ensurance under the Constitution of the Russian

[1] During the administration of President Obama, a Democrat, the Republican Party likewise was strongly opposed to the President and to most everything that he did.

Federation.[2] Under the Russian Constitution, the President directs the foreign policy of the Russian Federation and has very extensive powers over foreign affairs and military matters. In the area of foreign affairs, the General Assembly has only specific and limited powers.[3] The American Constitution, by contrast, gives both the President, in the exercise of the executive power, and Congress, in the exercise of the legislative power, broad powers over foreign affairs, and if there is a conflict between the exercise of power by the President and the exercise of power by Congress over a matter that comes within the powers of Congress, the law of Congress controls.[4]

However, as I explained in the earlier article, while the American Constitution does not give the American President the same degree of formal power over foreign affairs as the Russian Constitution gives to the Russian President, the way that the constitutional framework of national interests ensurance operates in practice in the United States gives the President the primary responsibility for national interests ensurance, and in this respect, the American President has almost as much power as the Russian President.

There are five reasons why this is so. **First**, the American President has the power to disapprove legislation, and his disapproval of legislation can be overcome only by a two-thirds vote of both Houses of Congress. Since it will be very rare that both Houses can obtain the requisite two- thirds vote to override the President's disapproval, this means that although the President cannot act contrary to a law of Congress, as a practical matter,

[2] Robert A. Sedler, "The Constitutional Framework of National Interests Ensurance in the United States: A Russian Comparison, "1 RUSSIAN LAW: THEORY AND PRACTICE 7 (2017). (hereafter cited as Sedler, "The Constitutional Framework").

[3] *See* the discussion in Sedler, "The Constitutional Framework" at 13.

[4] *Id.* It must be remembered that the American Constitution was promulgated in 1787 and reflects 18th century notions of checks and balances and separation of powers. Moreover, in 1787, the United States had limited involvement with the international world. The main involvement would be with Great Britain and its Canadian colony on the northern border, and the major foreign policy concern of the Framers of the Constitution would be a war with Great Britain, which indeed occurred in 1812. And since international law was not very developed in 1787, it is not surprising that international law was not a part of the American Constitution, let alone operating as a superseding norm, as it does under the Russian Constitution. *See* the discussion, *Id*. at 9–12.

the only laws of Congress that could restrict Presidential power are laws that were enacted at an earlier time.[5]

Second, since the Constitution vests the entire executive power in the President and does not provide for a separate "government" to administer the laws, Congress can and must grant broad discretion to the President to administer and enforce legislation that Congress has enacted, and Congressional authorization in the area of foreign affairs will be broadly construed.[6]

Third, the power to recognize foreign governments belongs exclusively to the President, and it is a very important power.[7] **Four**, under the "political question" doctrine, the federal courts will not entertain direct suits between the President and Congress, so most Presidential action or inaction will not be reviewed by the courts. This means as a practical matter, that when the President allegedly failed to carry out a directive of Congress, the President's failure to do so cannot be challenged in court. **Five**, the President has the power to enter into executive agreements with foreign nations, thereby avoiding the constitutional requirement of the Senate approval of a treaty by a two-thirds vote, and the overwhelming majority of agreements between the United States and foreign nations take the form of executive agreements.[8]

II. Sanctions against Russia during the Obama Administration

In the earlier article, I discussed at length the imposition of American sanctions against Russia over the "situation in Ukraine" during the Obama

[5] *See* the discussion of the President's power to disapprove legislation in Sedler, "The Constitutional Framework" at 11-12. But see the discussion of the Countering of America's Adversaries Through Sanctions, *infra*, notes 16–20, and accompanying text.

[6] *See* the discussion Id. at 12.

[7] *See* the discussion Id. at 14–15. The American Presidents refused to recognize the communist government of the former Soviet Union until 1933, although the government came into power and was entitled to recognition no later than November, 1917. Likewise, American Presidents refused to recognize the communist government of the Peoples Republic of China until 1978, although it came into power in 1949. In 1961, following the American conflict with the Castro government in Cuba, the President broke off diplomatic relations with Cuba. President Obama had acted to restore diplomatic relations with Cuba, but the process of resuming relations has slowed considerably under President Trump.

[8] *See* the discussion Id. at 20–22, which includes the listing of a number of executive agreements entered into between the United States and the Russian Federation.

Administration.[9] I pointed out that here the American President and Congress acted together in imposing sanctions on Russia for its annexation of Crimea and its alleged military support of separatists in eastern Ukraine. President Obama acted first in accordance with legislation giving the President broad powers to act in foreign affairs by declaring a "national emergency". He issued the first executive order on 6 March 2014, when Russia was in the process of recognizing Crimea as an "independent state", laying the ground work for its annexation by Russia. The order imposed a travel ban and froze the American assets of Russian nationals who were determined by the American Secretary of the Treasury to have "asserted governmental authority in the Crimean region without the authorization of the Government of Ukraine", and whose actions were found to "undermine democratic processes and institutions in Ukraine". The President issued additional executive orders on March 16, March 17, and March 20 that designated a number of Russian entities and individuals, including defense companies, banks and energy companies and blocked their use of property in the United States. The orders also suspended credit finance that encouraged exports to Russia and financing for economic development in Russia. At the same time, the European Union was imposing similar sanctions on Russia.

President Obama continued to issue executive orders imposing additional sanctions on Russia. These sanctions included bans on business transactions in the United States by seven Russian officials, including the executive chairman of the state oil company, *Rosneft*, and 17 other Russian companies. The sanctions were later extended to *Rosneft* itself and another energy firm, *Novatek*, and two banks, *Gazprombank* and *Vnesheconombank*, and still later to Russia's largest bank, *Sberbank*, and a major arms maker, *Rostec*. On December 19, 2014, after the Russian Federation had annexed Crimea, President Obama issued another executive order, prohibiting American investment in what the executive order referred to as "the Crimea region of Ukraine", the importation and exportation of goods from

[9] *See* Sedler, "The Constitutional Framework" at 26–29.

Crimea, any American financing of a prohibited Crimean transaction, and blocking the access to property in the United States of "certain Crimean persons and entities". Congress weighed in with the Ukraine Freedom Support Act in December, 2014, but all the Act did was to authorize, but not require, the President to impose additional sanctions and take other actions against Russia in connection with the "situation in the Ukraine".

As the above discussion makes clear, during the Obama Administration there was no disagreement between Congress and the President over sanctions against Russia over Russian actions in Ukraine. In the earlier article, I pointed out that, "the American President will have the responsibility for resolving on the American side, the seeming conflict between the national interest of the United States and the national interest of Russia with respect to "the situation in the Ukraine". But it is clear in retrospect that the sanctions against Russia will not change anything with respect to Crimea. Crimea has now been annexed by Russia - from the Russian perspective, Crimea has been returned to Russia - and no amount of sanctions will cause Russia to turn around and return Crimea to Ukraine. Again, in retrospect, it is clear that the sanctions against Russia were adopted to satisfy American domestic political concerns, and it is doubtful if President Obama or Congress really believed that Russia would reverse course on Crimea. It may be that the sanctions will be a "bargaining chip" in resolving the conflict between the Russian separatists and the Ukrainian nationalists in the eastern portion of Ukraine, but even that is doubtful.[10] Another way of looking at it is that since today Russia and the United States are both "great powers", any conflict between them will have to be resolved by means other than the United States imposing sanctions on Russia.

However, the imposition of sanctions against Russia continues to be an American way of responding to what are perceived to be hostile actions by

[10] Although the fighting continues, the conflict has stabilized in the sense that neither side appears likely to prevail in the conflict. Diplomatic efforts seem to have stalled since the Minsk accords were adopted in 2015. *See* "Samantha Raphelson, "'Simmering Conflict' in Eastern Ukraine remains at an impasse", NPR 24 Hour Program Stream, Jan. 10, 2018; Alessandra Prentice, Oleksandr Klymenko, "Fighting in eastern Ukraine worst since February," Reuters World News, December 19, 2017.

Russia against the United States. In this connection, it should be noted that American policymakers and the American public assume that these hostile actions are directed or at least encouraged by the Russian government. At the present time, there is a strong belief in the United States, supported by findings of American intelligence agencies that the Russian government interfered in the 2016 American Presidential election for the purpose of securing the election of President Trump over the Democratic Party candidate, former Secretary of State Hillary Clinton. These actions included the cyber-hacking of the Democratic Party's computer networks and the stealing of more than 19,000 e-mails from Democratic Party officials. Shortly before the 2016 election, the Office of the Director of National Intelligence and the Department of Homeland Security issued a joint statement, saying "We believe, based on the scope and sensitivity of these efforts, that only Russia's senior-most officials could have authorized these activities". The Russian Foreign Ministry denied that Russia was behind the hackings, saying that the United States lacked any evidence for its accusations.[11] At the end of December, 2016, the Department of Homeland Security and the Federal Bureau of Investigation (FBI) issued a report stating that, "The activity by [Russian intelligence services] is part of an ongoing campaign of cyber-enabled operations directed at the US government and its citizens".[12] At the same time, President Obama issued an executive order that authorized sanctions against certain Russian entities and individuals. The entities covered by the executive order were the Main Intelligence Directorate, also known as the GRU; the Federal Security Service; the Special Technology Center; Zerosecurity, also known as Esage Lab; and the Professional Association of Designers of Data, also known as ANO PO KSI.[13]

[11] *See* Spencer Ackerman & Sam Thielman, "US officially accuses Russia of hacking DNC and interfering with election", The Guardian, Oct.8, 2016; Eric Lichtblau & Eric Schmidt, "Hack of Democrats' Accounts Was Wider Than Believed, Officials Say," New York Times, Aug.10, 2016.

[12] *See* Sam Thielman, "FBI and Homeland Security detail Russian hacking campaign in new report", The Guardian, December 29, 2016.

[13] Annex to Executive Order 13694, April 1, 2015, relating to blocking the property of certain persons engaging in significant malicious cyber-enabled activities.

III. Sanctions against Russia during the Trump Administration

At this point in time, with the advent of the Trump Administration, the matter of alleged activity by Russia to interfere with the 2016 Presidential election in the United States gets got up in American politics as well as in the respective powers of the President and Congress. In the United States, we have a strong two-party system, with the Republican Party and the Democratic Party frequently alternating in electing the President and in controlling one or both Houses of Congress, the House of Representatives and the Senate. With the election of President Donald Trump, the Republican Party now controls the Presidency and both Houses of Congress. However, as the minority party, the Democratic Party has a degree of power in both Houses, most particularly in representation on Congressional committees. Since American intelligence agencies have determined that the Russian government tried to influence the outcome of the 2016 Presidential election, Congress and the President must proceed on the assumption that the Russian government did in fact do so.[14] Congressional committees in both the House and in the Senate are engaged in ongoing investigations of the matter of Russian interference in the 2016 Presidential election.[15] In addition, a special prosecutor has been appointed to investigate allegations that members of the Trump campaign team colluded with Russian officials in an effort to influence the 2016 Presidential election.[16]

In these circumstances, President Trump is hardly disposed to impose any sanctions against Russia in connection with the alleged Russian interference in the 2016 Presidential election. The claim of Russian interference casts doubt on the legitimacy of his election, and he would like to have this issue removed completely from the American political scene.[17]

[14] While the President does not officially dispute this assumption, he does not indicate his agreement with it either. And he strongly asserts that even if there was an attempt by Russia to interfere in the 2016 election, it did not influence the outcome of the election.

[15] *See* Tom LoBianco, "The 4 Russia investigations in Congress, explained," CNN, April 25, 2017.

[16] *See* Ryan J. Reilly & Lydia O'Connor, "DOJ appoints special prosecutor to investigate Trump campaign's Russia ties," Politics, May 15, 2017.

[17] *See* Jonathan Martin, Maggie Haberman & Alexander Burns, "Trump pressed top Republicans to end Senate Russia Inquiry," New York Times, Nov. 30, 2017.

Moreover, President Trump believes that he and President Putin - whom he sees as a very strong leader like himself - can work together to improve relations between the two nations and can work together on common foreign policy interests. However, it is fair to say that most members of Congress, including the Republican leaders in both Houses, do not share the President's view about improved relations with Russia. They tend to see Russia as a rival world power and adversary with interests antagonistic to those of the United States. And they share a genuine concern that Russia is trying to influence the outcome of American elections and that Russia is engaged in cyber-hacking of American computer networks. Thus, unlike the President, Congress is readily disposed to impose sanctions against Russia. The time has become ripe for a constitutional conflict between Congress and the President over American sanctions against Russia.

The constitutional conflict came to a head with the enactment by Congress of the Countering America's Adversaries Through Sanctions Act (CAATSA) in August, 2017.[18] The law was passed by both Houses with very few negative votes, and it was clear that if the President disapproved the law, there would be two-thirds votes in both Houses to override his disapproval. So, the President reluctantly signed the law, but issued a signing statement, explaining why he considered certain provisions of the law to be an unconstitutional interference with the President's constitutional power.[19]

First, the Act enacts into law the sanctions against Russia imposed by President Obama in response to actions taken by Russia with respect to Ukraine, including the annexation of Crimea.[20] By enacting these sanctions into law, Congress has prevented the President from removing these sanctions by executive order. They can only be removed by legislation.

[18] H.R. 3364, Aug. 2, 2017. The Act also imposes sanctions on Iran and North Korea, but the major part of the Act deals with sanctions against Russia… The provisions are explained in great deal in a publication issued by Steptoe and Johnson, a major American law firm. *See* Steptoe International Compliance Blog, Aug. 10, 2017.

[19] Statement of President Donald J. Trump on Signing the Countering America's Adversaries Through Sanctions Act, Aug. 2, 2017.

[20] These executive orders are discussed in "The Constitutional Framework" at 26–29.

However, the President has the authority under existing law to terminate sanctions against certain persons and to waive some sanctions. **Second**, the law directs that the President impose mandatory sanctions in certain circumstances relating to activities of the Russian Federation undermining cyber security, with respect to special Russian crude oil projects, with respect to Russian and other foreign financial institutions, with respect to significant corruption in the Russian Federation, with respect to persons evading sanctions, with respect to persons responsible for human rights abuses, with respect to persons engaging in transactions with the intelligence or defense sectors of the government of the Russian Federation, with respect to the development of pipelines in the Russian Federation, with respect to investment or facilitation of privatization of state-owned assets by the Russian Federation, and with respect to the transfer of arms and related materials to Syria.[21] Sanctions include asset blocking, prohibitions on American entities engaging in business activities with sanctioned individuals and exclusion from the United States and revocation of visas. But again, the President must make the necessary determination for the invocation of these sanctions, so the law simply expands the President's power to impose sanctions. The law does not require the President to impose any sanctions and the absence of a Presidential determination that sanctions are necessary and appropriate.

Third, and most importantly, Congress wants to be involved in the President's exercise of his authority to terminate and waive sanctions. It has done so in the Act by mandating Congressional review and a waiting period before the President's actions terminating or waiving sanctions take effect. The President is directed to submit a report to Congress, after which Congress has 30 days to hold hearings on the matter. During this 30 day period, the President is prohibited from proceeding with the proposed action unless Congress passes a joint resolution of approval. The objective here is to enable Congress to pass legislation, presumably over the President's disapproval by a two-thirds vote of both Houses that would

[21] CAATSA, secs. 224–235

keep the sanctions in place. In the President's signing statement, he has stated that this provision for a review period is unconstitutional, because it operates like legislation, and legislation cannot be enacted without Presidential approval.[22]

There are other provisions requiring action by the President and by executive officials that the President has questioned as unconstitutional. Nonetheless, the President has indicated that he will comply with those provisions, such as a number of reporting provisions that do not impinge on his constitutional authority. One of these provisions required the U.S. Department of the Treasury to report on senior Russian political figures and Russian "oligarchs", defined as Russian individuals with an estimated net worth of one billion dollars or more. On 29 January 2018, the Treasury Department filed the report listing 210 Russian top officials and billionaires, but noted that the listing of these individuals did not mean that they would be subject to sanctions. And at the same time the U.S. State Department released a statement saying that no new sanctions were needed, because the CAATS itself had the desired effect of deterring Russian interference in American elections. This statement is contrary to the reports of the Central Intelligence Agency and other federal intelligence agencies that maintain that the danger of Russian interference in future American elections remains very strong.[23] Stated simply, the Trump administration will not be imposing any new sanctions on Russia. It is not lifting any of the sanctions imposed by the Obama Administration either, and some of these sanctions have now been codified into law.

IV. Conclusion

In the earlier article I said that the future of relations between the United States and Russia will be determined in large measure by the actions of the

[22] *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (Congress cannot provide that one House of Congress can overrule Presidential action; Presidential action can only be overruled by legislation).

[23] *See* Henry Meyer & Stepan Kravchenko, "U.S. Names Oligarchs, Kremlin Elite But Avoids New Sanctions, "https://bloomberg.com/news, Jan. 30, 2018; David Emery, "Trump Administration Says No New Russia Sanctions Needed," https://www.snopes.com, Jan. 29, 2018. *See also* Matthew Rosenberg, Charlie Savage & Michael Wines, "Russia Sees Midterm Elections as Chance to Sow Fresh Discord, Intelligence Chiefs Warn," New York Times, Feb. 14, 2018, p. A1.

American President and the President of the Russian Federation. This conclusion has not changed with the election of President Trump and the seeming conflict between Congress and the President over sanctions against Russia. As a practical matter, the American President has the final authority to determine whether new sanctions will be imposed and, to a large extent, the discretion to enforce the existing sanctions that have been imposed against Russia. Since President Trump is strongly disposed not to impose any additional sanctions against the other, and since existing sanctions appear to have had only a limited effect on Russia, it is fair to say that the development of future relations between the United States and Russia will take place without a regime of American sanctions against Russia.

DELINEATION BETWEEN SIMULATION AND AVOIDANCE OF THE LAW IN TAX LAW THEORY AND PRACTICE

Marko Ravljen
Master of Law, PhD Student at the Law Faculty,
University of Maribor, Slovenia
Senior Tax Inspector at Special Financial Office (Posebni finančni urad) of the Slovenian Tax Administration
(Finančna uprava Republike Slovenije)

Abstract
The article focuses on delineation between simulation and avoidance of the law in tax law theory and practice. Defining a sham transaction is central to civil law. Avoidance of the law must be strictly distinguished from the violation of the law (agere contra legem), although both practices release the same effects.

Keywords: sham transactions, tax law, covered transactions (verdecktes Rechtsgeschäft), "abus de droit" (abuse of the law), avoidance of the law, Roman law (fraus legis), violation of the law (agere contra legem).

1. Introduction

In principle, the parties are basically free to formulate their legal transactions, whereby they shall comply with the legal framework, provided in the national civil code. When judging the conduct of the contracting parties, it is especially important (but not easy) to recognize the characters which are specific for detecting simulation and avoidance of the law. Defining a sham transaction and (its comparable) avoidance transaction is not a peripheral, but central area of civil law, which results in direct correlation with the essence of the legal transaction and the abuse of the autonomy of the parties in the creation of legal transactions, when it results in unfit forms of transactions.

2. Sham Transactions (Simulation) in Tax Law

A sham transaction is a transaction in which the statement given to the opposite business party should by mutual agreement (i.e. in accordance

with addressee of the statement) have no effect in changing the actual state. With the sham transaction, indeed, there is a conflict between what is possible to identify from the transaction (or event) and between what really happens. The contradiction between a presented transaction (i.e. "on paper"), on the one hand, and the actually identified state (i.e. reality), on the other hand, is a cornerstone of existence of a sham transaction. What is declared does not correspond to actual events.

A sham transaction (simulation) is designated by the contracting parties as a legal transaction, which is not really meant to exist, and which is also not being carried out. As a rule, in fact, the parties are hiding the real deal. In the process of e.g. taxation or granting subsidies by the state, a sham transaction is ignored, while a hidden transaction is always decisive.

Tax law is not about distinguishing between the simulated and the real desired (business) will, but about distinguishing between the staged (fictitious) and real economic outcomes[1]. Since sham transactions do not cause any economic or actual effects, they are insignificant for tax purposes[2]. If another transaction is apparent through a hidden (i.e. sham) transaction, that transaction is important for taxation. This also corresponds to civil law; civil law does not intend to "have a deal" with only a shell (without content)[3].

Since tax law just wants to capture concrete economic facts, the application of tax law is often different from civil law[4]. It is necessary to distinguish the different contents of a civil concept (i.e. economic success is not aimed and therefore not being achieved) and a tax law concept (i.e. deviation of the economic desired from the civil dressed transaction). A sham transaction in the tax law system is not defined by a distinction between what is factually said and what is actually wanted, but through the

[1] Lang J., in: Tipke K. et al. (eds.). Steuerrecht (20th ed.). Cologne: Verlag Dr. Otto Schmidt, 2010, pp. 160–161.

[2] Hahn H. Das Scheingeschäft im steuerrechtlichen Sinne, Zur Dogmatik des § 41 Abs. 2 AO. Deutsche Steuer-Zeitung (DStZ) 2000 (88), No.12, p.433; Lang J., in: Tipke K. et al. (eds.). Steuerrecht (20th ed.), p. 160.

[3] Lang J., in: Tipke K. et al. (eds.). Steuerrecht (20th ed.), p. 160.

[4] Trüter S. Steuerlich motivierte Scheingeschäfte – Ihre Behandlung in Zivilrecht. Hamburg: Universität Hamburg, 1987, p. 81.

intentionally caused (inappropriate) difference between the external form and economic substance[5]. A legal transaction, that is based only on the law (i.e. fulfilling formal conditions), but not on (at least) minimum actual (i.e. economic) success, is like an empty shell casing[6].

On the other hand, a sham transaction does not occur if the parties really want a transaction, but it is incorrectly legally classified[7]. Also, some legal transaction is not identified as a sham transaction just because parties have selected an atypical form. A transaction that is invalid by its design is not immediately identified as fictitious, but, on the other hand, the mistakes in the form of the transaction may indicate the existence of a sham transaction[8]. A sham transaction has no impact on taxation, as only a truly desired transaction forms the basis for taxation, even if it is disguised (i.e. by a sham transaction)[9].

In the German tax law system, a sham transaction is addressed in the provisions of the second paragraph of § 41 AO[10], where it (in its first sentence) states that a sham transaction is irrelevant for taxation, while the second sentence establishes that the so-called covered transaction (*verdecktes Rechtsgeschäft*) is decisive for taxation. Basically, the tax law formulations of sham transactions of other European countries are similar to the above presented German legal text (e.g. in Slovenia, the third paragraph of Article 74 of ZDavP-2[11] or in Austria the first paragraph of § 23 BAO[12]). Probably, it is important to mention the French solution written in Article L. 64 LPF[13] which under term "*abus de droit*" (abuse of the law) covers a simulation or a fraud (only one of those).

[5] Hahn H. Das Scheingeschäft im steuerrechtlichen Sinne, Zur Dogmatik des § 41 Abs. 2 AO, p. 433.

[6] Trüter S. Steuerlich motivierte Scheingeschäfte – Ihre Behandlung in Zivilrecht, p. 49.

[7] Larenz, K., Wolf M. Allgemainer Teil des bürgerlichen Rechts (9th ed.). Munich: Verlag C.H.Beck, 2004, p. 648.

[8] Lang J., in: Tipke K. et al. (eds.). Steuerrecht (20th ed.), p. 160.

[9] Linn A. Missbrauchverhinderungsnormen und Standortwahl. Wiesbaden: Deutscher Universitäts-Verlag, 2007, pp. 37–38.

[10] *Abgabenordnung* – AO (Tax Code; Germany).

[11] *Zakon o davčnem postopku* – ZDavP-2 (Tax Procedure Act (2); Slovenia).

[12] *Bundesabgabenordnung* – BAO (Federal Tax Code; Austria).

[13] *Livre des procédures fiscales* – LPF (Book of the Tax Procedures; France).

3. Avoidance of the Law in Tax Law

In contrast, avoidance of the law is defined as behaviour that is not directed against strict meaning (i.e. the "letter") of the law, but it violates the purpose and sense of the legal norm (i.e. what the legislator actually wanted to "say" but was unsuccessful with the legal formulation that was incorporated into a law). The multitude of forms of avoidance transactions, known in different areas of law, gives out repeated variants of design strategies of avoidance of the law. In case of avoidance of the law, the law is not violated in its text, but it is certainly bypassed by its content (*sententia*) and the legislator's will (*voluntas*). Avoidance of the law should be consequently strictly distinguished from simulation, although both practices basically release the same effects.

The roots of common European understanding of avoidance of the law (abuse of the law) derive from the Roman law (*fraus legis*). The modern doctrine of avoidance of the law (also known as abuse of rights; in German: *Gesetzesumgehung;* in French: *fraude à la loi*, also *abus de droit*; in Spanish: *abuso de derecho* or *fraude de ley*) in many European countries has its origin in the Roman civil jurisprudence[14].

A case of avoidance of the law is present if someone, by selecting a particular form of transaction, wants to achieve an illicit success and by doing that is being careful not to come into a conflict with the literal meaning of the norm which does not allow such a success. If the transaction does not violate the literal interpretation of a statutory prohibition, but it is constituted in such a way that achieves success, which is contrary to the purpose of the legal norm, in this case it is the avoidance transaction. Avoidance of the law is therefore defined as a conduct that is not directed against the strict meaning of the law, but it violates its purpose and sense. This view, according to which the legal prohibition and avoidance of the

[14] Behrends O. Die Fraus legis: Zum Gegensatz von Wortlaut- und Sinngeltung in der römischen Gesetzesinterpretation. Göttingen: Otto Schwarz Verlag, 1982, p.3; Teichmann A. Die Gesetzesumgehung. Göttingen: Verlag Otto Schwartz, 1962, p. 1; Böing C. Steuerlicher Gestaltungsmissbrauch in Europa. Hamburg: Verlag dr. Kovač, 2006, p. 28.

law are to be distinguished, was formed by the Roman law[15]. German legal theory[16] has different names for avoidance transactions like "disguised transactions" (*verkleidete Geschäfte*), "veiled (hidden) transactions" (*verschleierte Geschäfte*) and "hidden paths of life" (*Schleichwege des Lebens*).

Nowadays, there is a number of prohibitions in the social and economic-political motivated laws in the field of labor, competition, corporate, banking laws and especially tax law. Tax avoidance involves creating transactions in order to achieve a tax benefit or reduction in tax liability in a way that is not intended by tax law. It is an unacceptable manipulation of the law, which is not the same as legitimate tax planning.

It may be noted that the German tax law authors use a variety of adjectives and striking remarks to the problem of the avoidance transaction. German legal theoreticians[17] state that the provision of § 42 AO deals with "*one of the most unusual and strange forms on the outskirts of tax law, namely tax avoidance*" and describes it as a "*rubber clause against tax abuse*", while they define the term of tax avoidance as "*a secular and global problem*" and "*institutionalised abuse of the law*". Historically, the German provision against tax avoidance goes back to the year of 1919 when the provision of § 5 RAO (*Reichsabgabenordnung*) was applied and later replaced with § 10 RAO (1931) and § 6 StAnpG (*Steueranpassungsgesetz*; 1934).

[15] Armbrüster C., in: Säcker F. J. Münchener Kommentar zum Bürgerlichen Gesetzbuch (5th ed.). Munich: Verlag C.H.Beck, 2006, p. 1572.

[16] Sieker S. Umgehungsgeschäfte: typische Strukturen und Mechanismen ihrer Bekämpfung. Tübingen: Mohr Siebeck, 2001, p. 104; Benecke M. Gesetzesumgehung im Zivilrecht: Lehre und praktischer Fall im allgemeinen und Internationalen Privatrecht. Tübingen: Mohr Siebeck, 2004, p.134; Jhering R. Geist des römischen Rechts auf den verschiedenen Stufen siner Entwicklung (part 3). Leipzig, 1865, p. 247.

[17] Böckli P. *Steuerumgehung: Qualifikation gegenläufiger Rechtsgeschäfte und normative Gegenprobe* (In: Höhn E., Vallender K. A. Steuerrecht in Rechtsstaat, Festschrift für Francis Cagianut zum 65. Geburtstag. Bern – Stuttgart: Verlag Paul Haupt AG, 1990), p. 289; Kottke K. Steuerersparung, Steuerumgehung, Steuerhinterziehung (9th ed.). Freiburg: Rudolf Haufe Verlag, 1991, p. 199; Fischer P. Die Umgehung des Steuergesetzes – Zu den Bindungen einer gewährung der Steuerrechtsordnung "aus eigener Kraft". *Der Betrieb* 1996 (49), No. 13, p. 644; Linn A. Missbrauchverhinderungsnormen und Standortwahl, p. 36.

The French tax administration has at its disposal Article L. 64 of LPF, which was adopted in 1941 and has been amended several times. In 2008, the French legislature in its tax reform improved the legal definition of abuse of rights (*abus de droit*), covering a wider range of taxes.

Slovenia, as a country of the so-called continental law, has in its fight against tax avoidance, on the one hand, enacted specific anti-avoidance rules (SAARs)[18], while at the same time, on the other hand, even greater emphasis has been given to the fourth paragraph of Article 74 of the ZDavP-2, which represents a genuine general anti-avoidance rule (GAAR) for tax purposes. Measure against avoidance of the law has been introduced in the Slovenian tax law only recently (2005), when the Slovenian legislature introduced the definition that "with the avoidance or misuse of other regulations it is not possible to avoid the application of taxation regulations"[19].

From the point of view of comparison between the Slovenian civil and tax law system, it is a fact that the general anti-avoidance rule is contained only in the tax law. Slovenia - like other countries of the former Yugoslavia - has no strong tradition regarding the teaching of avoidance of the law. In this context, the Slovenian civil law uses the Roman concept of *fraus legis* (also known as *in fraudem legis agere*) only as a theoretical item, and consequently the parties in civil disputes rarely use this acclaimed legal institute.

Avoidance of the law (*fraus legis*) is not the subject of a definition in obligation, labor, corporation and other fields of law, but its incidence derives from the literature and is being used indirectly (by reference to the literature) in the court practice of the Slovenian courts. As already mentioned, the legislative breakthrough was achieved in tax law, when the Slovenian parliament introduced the definition of GAAR 13 years ago (ZDavP-1).

[18] Specific anti-avoidance measures were introduced only to a lesser extent, which are most visible in the form of measures in the field of transfer prices, thin capitalization and fight against tax havens. But on the other hand, Slovenia does not have the CFC rules or so-called exit tax on the transfer of the seat of the company or the residence of a natural person to another country.

[19] Avoidance of the law was introduced in Slovenian tax legislation on 1 January 2005 in the sixth paragraph of Article 7 of the Tax Procedure Act (1) (*Zakon o davčnem postopku* – ZDavP-1). The same formulation of avoidance of the law is nowadays written in the fourth paragraph of Article 74 of ZDavP-2 which is being used since 1 January 2007.

4. Delimitation between Sham and Avoidance Transactions in Theory

The analysis of literature shows that an avoidance transaction is certainly not a simulated transaction. The avoidance transaction is truly intended by the parties to be implemented, as this is the only way to reach the intended consequences[20]. In any case, the participants are not bound, in order to achieve their goals, to choose the shortest and the least complicated path. However, even when choosing (and practising) a time consuming and many-stepped legal structure, the validity of this transaction cannot be denied, unless there is a breach of statutory provisions[21]. The assumption of identifying the existence of the avoidance transaction is that this complicated transaction is actually implemented.

The difference between avoidance and sham transactions is that: in the first case, the participants want to – under any conditions (i.e. against the spirit of the law) – achieve the purpose which is prohibited by the law, while in the case of simulation they do not want to realize the transaction[22]. In the case of the avoidance transaction, they conclude (instead of a forbidden one) such a contract, which is based on a different legal route, which would lead as close as possible to the contractual form that the law approves[23]. On the contrary, a sham transaction is present when the parties agree on conduct or its consequences derogating from the law[24].

5. Cases from the Author's Tax Practice on Sham and Avoidance Transactions

It is clear that there are specific (and significant) differences between sham and avoidance transactions that have to be taken into account when analyzing the substance of a transaction. This, of course, raises the question

[20] Trüter S. Steuerlich motivierte Scheingeschäfte – Ihre Behandlung in Zivilrecht, p. 74; Kramer E. A., in Säcker F. J. Münchener Kommentar zum Bürgerlichen Gesetzbuch (5th ed). Munich : Verlag C. H. Beck 2006, p.1319; Römer G. Gesetzesumgehung im deutschen Internationalen Privatrecht. Berlin: Walter de Gruyter, 1955, pp. 22–23.

[21] Trüter S. Steuerlich motivierte Scheingeschäfte – Ihre Behandlung in Zivilrecht, p. 74.

[22] Oguz A. Probleme der Simulation in rechtshistorischer und rechtsvergleichender Sicht. Munich: Hohe Juristische Fakultät der Ludwig-Maximilians-Universität München, 1996, p. 107.

[23] Ibid., p. 106.

[24] Trüter S. Steuerlich motivierte Scheingeschäfte – Ihre Behandlung in Zivilrecht, p. 77.

of demarcation between avoidance and sham transactions. It is noted that the avoidance transaction is not a sham transaction, but is – like straw and fiduciary transactions – truly desired, since only in this way it is possible to achieve intended consequences. Thus, the sharp distinction (delineation) between the two forms is required, but it should be noted that despite the above mentioned theoretical delimitation in practice, there are problems of recognizing these transactions and their differentiation.

The first case relates to the case of the construction company (A) which in the year of 2009 built a semi-detached house (with 2 units - apartments). The director of the company was its sole owner (B). The buyer of those two units was his 80-year-old mother-in-law (C) who paid purchase price in amount of 120,000 EUR per unit (plus 8.5% VAT, i.e. 10,200 EUR per unit). In the tax inspection procedure, it was found out that the cost of construction per unit was 130,000 EUR. In the next phase, C donated property to her daughter (D), i.e. the wife of the director and 100% owner of the construction company. In the tax procedure (for assessment of tax on inheritance and gifts), the person D declared the value of the received gift in the amount of 300,000 EUR (i.e. 150,000 EUR per unit). In the next stage, D immediately sold both units in the market at the sale price of 153,000 EUR per unit.

The tax authority raised the question of which individual tax law comes into account. The dilemma was to choose between the provisions of the Slovenian Corporate Income Tax Act[25] and the Personal Income Tax Act[26]. In the above mentioned case, it was clear that the market value of the property (i.e. the value that the market "recognised") of 153,000 EUR was the gross sale price of each unit (i.e. 150,000 EUR + 2% tax on traffic with the so-called used real estate). However, it was concluded that the company in the context of that construction project did not cover the production costs of the semi-detached house, which reached negative difference (i.e. loss of 10,000 EUR per unit as the difference between its production cost in the amount of 130,000 EUR and net sale price in the amount of 120,000

[25] *Zakon o davku od dohodkov pravnih oseb* – ZDDPO-2.
[26] *Zakon o dohodnini* – ZDoh-2.

EUR). In the presented case, consequently, the question was whether the given form of the transaction actually corresponded to its content.

The second case relates to the lease agreement concluded in the year of 2008 between a company as the lessor (X) and the tenant (Y), who was also an employee, director and sole owner of that company. The lease agreement between X and Y concerned the rent of a luxury passenger car for a monthly contract value of 1,200 EUR (with included VAT in value of 200 EUR). The significant fact was also that the company was formally registered for the rent-a-car activity, but had only one vehicle, which was given exclusively in private use to its owner and director. The company upon the purchase of passenger vehicles also claimed the return of VAT for the bought vehicle (i.e. 20,000 EUR).

In doing so, the tax authority (in the context of asking other companies that were dealing with rent-a-car activity) found out that a monthly rental of such vehicles is usually 3,000 EUR. On the other hand, in the Personal Income Tax Act (i.e. Articles 39 and 43 of ZDoh-2) there is an obligation for charging tax and social security contributions on the bonus of the employee who uses a company car for private purposes. The tax authority calculated that the bonus, which was provided to Y (as an employee of the company), was in amount 1,800 EUR per month (which represented 1.5% of the depreciated value of the vehicle, which was 120,000 EUR).

In both cases, the question was whether the presented transaction was a case of normal contractual relationship, which would be formed between any unrelated parties. And the second question was whether that was the case of a sham or avoidance transaction. The answer to the first question was relatively simple, while the answer to the second question required some legal expertise.

In the *first case*, the buyer of both units of the semi-detached house was mother-in-law of the director and owner of the company (for a gross sale price of 130,200 EUR per unit). Shortly after, she donated both properties to her daughter (within the tax procedure declared value of 150,000 EUR per unit). The daughter immediately sold both properties to the third parties (i.e. buyers in the real estate market) for the gross sale price of

153,000 EUR per unit. The daughter did not need to pay a tax on gifts and inheritance (because gifts to the persons of the so-called first inheritance order are tax free) and a tax on capital gains (there was no tax base from the difference between donated value of both properties and their net sale prices), but only a tax on real estate traffic (2% on the net sale price, i.e. tax in amount of 3,000 EUR per unit).

The main question in the tax procedure was whether the transaction of company A with its owner's mother-in-law represents a transaction with the so-called related person. The answer to that question was positive (the second sentence of the third paragraph of Article 16 of ZDoh-2, according to which an ancestor of the taxpayer or his/her spouse is also considered as a member of the family and therefore as the so-called related person). Based on this fact of the existence of related persons in the transactions, the tax authority had to determine whether generated profit (which was realized outside business books of company A) represents:

— a bonus for Y as an employee of the company (according to the first paragraph of Articles 39 ZDoh-2, a benefit that is given to a family member of an employee in the form of a product, service or other kind of benefit is considered to be employee's bonus) or

— a so-called hidden profit distribution for Y as the owner of the company (according to the fourth paragraph of Article 90 and the second paragraph of Article 91 of ZDoh-2) or

— an income of the company A which should be on the basis of a general rule (according to the second paragraph of Article 12 of ZDDPO-2, the tax base represents a surplus of revenues over expenditures) included in the Income Statement of company A (in connection with the anti-avoidance provision stated in the fourth paragraph of Article 74 of ZDavP-2).

In the context of that case, the question was how to define the conduct of those persons whose obvious purpose was to achieve benefits in terms of reducing tax liability. From the manner in which a legal transaction was carried out (when persons plotted in an unusual way through the activity of the owner's mother-in-law, which obvious purpose was to sell the

property to the end-customer with a minimum tax liability for all parties involved), the question arises whether it was a case of a sham or avoidance transaction.

Searching for an answer, it became clear that it was a case of the avoidance transaction in the form of the sale of property to the final buyer by abusing rules of the inheritance law. By introducing the mother-in-law and her daughter (the director's wife) in that selling process, the company (A) and its director created a situation where there was almost no tax liability for all the parties involved. The tax authority realised the existence of *fraus legis* in accordance with the fourth paragraph of Article 74 of ZDavP-2. The tax authority therefore imposed a tax obligation for company A for a corporate income tax for profits that were not shown in the books (but were excluded through movement of goods in the hands of related persons C and D). The tax authority also imposed a VAT liability for the difference between the final sale price and the price it was realised in selling goods to C.

Now, let us look at the solution of the second case. It is a case of the conclusion of the lease agreement between the company (X), which was registered to perform a rent-a-car activity and had in its possession only one (luxury) vehicle, and the tenant (Y), who was also the employee, director and sole owner of company X. Because Y acted in multiple roles in relation to Y, the question was which legal provision should be applied. It had to be determined whether generated profit represents:

— a bonus for Y as the employee of company X (according to the first point of the second paragraph of Articles 39 ZDoh-2, the use of a company car for private purposes of an employee is considered to be his/her bonus) or

— a hidden profit distribution for Y as the owner of the company (Articles 90 and 91 of ZDoh-2).

The tax authority also questioned whether the presented lease contract with the so-called related person Y was concluded in such a way as if otherwise it would have been concluded with an unrelated person. It was found out that the conditions of the lease contract did not reflect the market relationships (i.e. the market price). The director got a bonus in the

form of an advantageous (i.e. cheaper) use of a company car (by paying only 1,200 EUR while a bonus was worth 1,800 EUR). On the other hand, it would be even a bigger value difference if to consider a price of the usual monthly rent of a luxury car (i.e. 3,000 EUR).

Again, the question was whether there was a case of a sham or avoidance transaction. Following the intention of the parties, the tax authority found out that the conclusion of the (civil valid) lease contract was not desired by the parties but it was solely included in this tax scheme as a means to achieve their goal (i.e. to pay fewer taxes). As the result of this sham transaction, the tax authority charged income tax and social security contributions from the established annual bonuses in the amount of 7,200 EUR (or 600 EUR monthly). In the area of VAT, the tax authority also found out that company X was not entitled to deduct input VAT on purchases of passenger service vehicles (i.e. 20,000 EUR).

6. Conclusion

Avoidance of the law (*fraus legis*) is defined as behavior that is not directed against strict meaning (i.e. the "letter") of the law, but it violates the purpose and sense of the legal norm. Consequently, avoidance of the law must be strictly distinguished from the violation of the law (*agere contra legem*), although both practices release the same effects. Avoidance of the law also differentiates itself from simulation (i.e. sham), which represents violation of the law. In the case of simulation, a transaction concerns only the bare legal appearance and not the actual (economic) success. Unlike a sham transaction, *fraus legis* is not based on "lies". *Fraus legis* embodies a transaction implemented in reality, but in a manner, which is contrary to the spirit of the law.

TAX CLAIMS SECURED BY A PLEDGE OF PROPERTY OF THE TAXPAYER IN BANKRUPTCY

Stanislav S. Izvekov
Lecturer, Financial Law Department,
Ural State Law University, Yekaterinburg, Russia

Abstract
The subject of study is the relation between legislation on taxes and fees with bankruptcy legislation. The chosen theme is seen sporadically in the analysis of certain problems in the framework of regulation of legal relations arising in bankruptcy cases, with virtually no comprehensive work devoted to the peculiarities of fulfillment of tax obligations in bankruptcy cases by the debtor's property provided as collateral in the manner prescribed by Article 73 of the Tax Code of the Russian Federation. Our study will focus on public relations arising in the performance of the organization by the bankrupt's tax obligations at the expense of the property provided as collateral. The author examines such aspects of the topic as the development of legal thought on the pledge of property as a way of ensuring the fulfillment of tax obligations and the application of collateral property of a debtor's bankruptcy in the provision of public requirements under the laws of other states.
Special attention is paid to the need to ensure equal rights of parties to the bankruptcy proceedings, whose rights are secured by property of the debtor. The author makes an attempt to overcome the existing gap in the legal regulation of the status of the tax authority as a mortgage lender.
The relevance of the study lies in the need for understanding changes in the bankruptcy legislation. On the one hand, the 2002 Bankruptcy Law places claims for payment of mandatory payments in a common queue with creditors on private law grounds. Thus, the previously existing preference for government claims was eliminated. On the other hand, the equality of the rights of creditors and the tax authority is incomplete, since the possibility of establishing the requirements of the tax authority in the registry as secured property is formally excluded.
The author expresses recommendations on improving tax legislation and bankruptcy legislation providing fiscal interest of the state.

Keywords*:* tax, bankruptcy, insolvency, authorized agency, the lender, the security of property, the register of creditors, priority of claims.

Tax authorities represent public interest in bankruptcy cases on the basis of Federal Law (No.127-FZ of 26 October 2002) "On Insolvency (Bankruptcy)" and Regulation No.257 by the Russian Government of 29 May 2004 "On Ensuring Interest of the Russian Federation as a Creditor in Bankruptcy Cases and Bankruptcy Procedures"[1] and Regulation No.351 of the Ministry of Economic Development and Trade of 19 October 2007 "On the Proceeding of Selection of the Arbitration Manager by the Authorized Organ" and Regulation No.219 of the Ministry of Economic Development and Trade of 3 August 2004 "On the Procedure of Voting in Bankruptcy Cases and Bankruptcy Procedures for the Participation in Creditors' Meetings"[2].

But neither the Insolvency (Bankruptcy) Law, nor any of regulations mention the situation where a state organ could have assurance of claims in the form of a deposit.

S.A.Yadrichinskiy was the first scholar to speak about the possibility of the deposit status of an authorized organ in bankruptcy cases[3]. Till the present moment there was no example in courts practice of such assurance of claims for the part of obligatory payments. But it does not mean the impossibility of such assurance. Under Ruling No.A36-3505/2012[4] of the Arbitration Court of the Lipetskaya oblast of 12 December 2012, claims of the Federal Fiscal Service (based on the state guarantee) are included into the list of creditors' claims as assured by the property of a debtor.

The establishment of the deposit as a method of assuring tax payment is in accordance with the specific connection, which has the additional character to the main tax relation – subordinate relation. The pledge as a

[1] Russian Government Regulation of 29 May 2004 No.257 "On Ensuring Interest of the Russian Federation as a Creditor in Bankruptcy Cases and Bankruptcy Procedures".

[2] Regulation of the Ministry of Economic Development and Trade of 3 August 2004 No. 219 "On the Procedure of Voting in Bankruptcy Cases and Bankruptcy Procedures for the Participation in Creditors' Meetings".

[3] Yadrikhinskiy S.A. Mekhanizm obespecheniia ispolneniia obiazannosti po uplate nalogov: problem teorii i praktiki/ otv.red.E.Y.Gracheva [Mechanism of Ensuring the Fulfillment of Tax Obligations: Problems of Theory and Practice/ ed. by E.Y.Gracheva] M. : NORMA, INFRA-M, 2015, 144 p. (in Russ.).

[4] Ruling No.A36-3505/2012 of the Arbitration Court of the Lipetskaya oblast 12 December 2012

way of ensuring payment of the tax is mediated within special legal connection, additional in relation to the main tax legal relationship[5]. As T.A. Savelieva says, the coordination of such obligations does not lead to the full dependency, the deposit has relative independence[6].

Article 73.3 of the Tax Code of the Russian Federation contains the definition of a tax deposit: "In the situation of the absence of fulfillment of obligations for the payment of tax or other fees by a taxpayer, a tax organ can fulfill this obligation by the value of deposited property in accordance with the civil laws of the Russian Federation". The independence of the institute of a tax deposit can be proved by the legally established tax liability and sanction in the form of fine (Article 125 of the Tax Code).

However, the legislator does not mention the term "priority right" of claims compared to other creditors. Although the creation of the institute of a tax deposit by itself gives tax organs insurance in the future covering tax payments obligations by the deposited property of a debtor or another person prior to other creditors. In another case, there could be a nonsense situation, because Article 47 of the Tax Code generally establishes the right of tax organs to withhold a tax by a taxpayer property without any deposit in case of non-payment.

It is possible to agree with E.Y. Latypova, who says that the nature of the deposit is a priority right of tax organs comparing to other creditors to receive coverage by the debtor's property.

The rule establishing the privileged position of the tax authority, the pledgee, acquires special importance in bankruptcy of the taxpayer, for example, in bankruptcy proceedings, the purpose of which is proportionate satisfaction of creditors' claims. In case of insolvency and decrease of the property during the deferral time, coercive recovery measures might be ineffective. In case of bankruptcy of such a taxpayer, under Article 134.4 of

[5] Imykshenova E.A. Sposoby obespecheniia nalogovykh obiazannostej po nalogovomu kodeksu Rossijskoj Federatsii [Measures of Ensuring the Fulfillment of Tax Obligations under the Tax Code of the Russian Federation] M. : *Yurlitinform* Publishing House, 2005. p. 81.

[6] Savelieva T.A. Zalogovye pravootnosheniia i ikh dejstvie po zakonodatel'stvu Rossijskoj Fedratsii: dis…kand.iurid.nauk [Depositing Relations and Their Operation under the Russian Legislation: Diss…Candidate of Law] Tomsk, 1998, pp. 12–13. (in Russ.).

the Insolvency (Bankruptcy) Law, tax organs are included in the third stage of priority and, in the majority of cases in the absence of a deposit debts are just being written off because of insufficient amount of the debtor's property.

The existence of a deposit gives the tax organ the status of a secured creditor. At the same time the beginning of bankruptcy proceedings does not automatically lead to transformation of the claims of a secured creditor to the unsecured financial claim – the security holder still has the right to cover his claims from the value of the deposit, but now by the bankruptcy rules.

The priority of the secured creditor in comparison with other creditors means that the secured creditor has the right to at least 70% of the value of the realized deposit.

However, this sum cannot exceed the sum of the main obligation together with interest (Art.138.1 of the Insolvency (Bankruptcy) Law, para.15 of Resolution No.58 of the Presidium of the Supreme Commercial Court of 23 July 2009 "On Some Issues Concerning Fulfillment of Claims of a Security Holder in Cases of Bankruptcy of a Depositor"[7]. The institute of a tax deposit plays a role of a guarantee for a taxpayer obligation.

In the *first redaction* of the Tax Code the sphere of the secured deposit was limited only by situations of changing a period for payments of taxes. However, in 2010 the wording of Article 73.1 was changed and now a tax deposit can be applied in all other situations of tax obligations described by the Tax Code.

Since 2013, Article 77.12.2 of the Tax Code[8] contains a rule that at the request of an entity, the taxpayer seizure of property can be replaced by the deposit of property. The decision of seizure is being abolished (Article 77.13 of the Tax Code).

Consequently, apart from the powers granted by the Insolvency (Bankruptcy) Law and Regulation No.257 of the Russian Government of

[7] Resolution No.58 of the Presidium of the Supreme Arbitration Court of 23 July 2009 "On Some Issues Concerning Fulfillment of Claims of a Security Holder in Cases of Bankruptcy of a Depositor"

[8] Federal Law of the Russian Federation No.229-FZ of 23 July 2013 (redacted on 3 July 2016) "On Changes to the Tax Code (Part 1 and 2)...".

29 May 2004 "On Ensuring Interest of the Russian Federation as a Creditor in Bankruptcy Cases and Bankruptcy Procedures", a tax organ acquires additional powers for the determination of the procedure, requirements and a period of selling deposited property, the right to make motions before the Court at the minimal selling price of the property and the right to hold the object of deposit on its own balance in case of failure to fulfill the obligations by a taxpayer.

However, neither the Insolvency (Bankruptcy) Law, nor the Tax Code mention a tax deposit in cases of legal entities bankruptcies and are supposed to grant the tax organ the same rights as a deposit creditor with private claims.

Furthermore, the only fact of initiating the procedure by a debtor can be the basis for the obligatory preliminary conclusion of a deposit contract with a debtor.

The evident insufficiency of legal regulation of this aspect requires improvements of legislation. However, it seems to be logical to refer to the international practice as the first step.

Priorities that are given for tax claims in other countries usually become evident because of the special regime of debts coverage. Particular requirements for the priority widely vary in other countries and usually depend on a type of a tax and a tax period.

Even if national bankruptcy legislation does not give preferences for tax claims, these preferences can be regulated by the general taxation legislation. For example, if the taxation legislation has provisions of deposit of the property for the tax payment, taxation claims in bankruptcy cases will have priority in comparison with other non-secured creditors.

For example, state and local taxes in Canada are usually in the same stage of priorities with non-secured creditors in bankruptcy cases. However, there are some exclusions, among them the possibility to register deposit claims of the state before the bankruptcy procedure and to equate rights with claims of other deposit creditors[9].

[9] Jacob S. Ziegel, Canada's Phased-In Bankruptcy Law Reform, 70 AM. BANKR. L.J. 383, 409 (1996)., at 14 n. 102.

Under the U.S. legislation, there is a priority defense of federal and regional taxes secured by deposits. Priority shall be accorded in the performance of the formalized procedure with the approval of the court. In other cases, the state loses the right to pledge property if the property is held by a *bona fide* purchaser[10]. A tax deposit usually has to be registered; for example, by the Virginia state legislation, the confirmation of pledge is registered in the registry of the district court[11]. Priority of the crossing tax deposits usually identified by a rule "the first by time - the first by law"[12]. By the common law, federal tax deposits are considered as prioritized in comparison with other claims[13]. Secured tax claims have to be covered at the full amount with interest at a date of confirmation of a restructuring debt plan[14].

In 1994, the Federal Republic of Germany enacted Law on Insolvency (*Insolvenzordnung* - InsO) that came into force in 1999[15]. Before that, there was no effective procedure for tax claims. Mostly probably, German legislators took into account the U.S. experience as a model for problem solving. Significant influence of Prof. Thomas Jackson[16] is generally acknowledged. One of the draftsmen of *Insolvenzordnung* Dr. Manfred Baltz said that *Insolvenzordnung* was a codification of bankruptcy theories of Prof. Thomas Jackson. It was the first time in the German history when legislative power consulted and based its act on the analysis of existing regimes of insolvency and accomplishments of institutional economics[17].

[10] In re Lyons, 148 B.R. 88, 94 (Bankr. D. D.C. 1992), contra In re Street, 165 B.R. 408, 409-10 (Bankr. D. Md. 1994).

[11] VA. Code § 55-142.1 (Michie 1995).

[12] McDermott v. United States, 507 U.S. 447, 449 (1993) (quoting United States v. New Britain, 347 U.S. 81, 85 (1954)).

[13] Lawrence P. King ET AL., Collier On Bankruptcy TX1.10[5], at TX1-72 n.46 (15th ed. rev. 2000).

[14] United States v. Haas (In re Haas), 162 F.3d 1087 (11th Cir. 1998).

[15] Insolvenzordnung, v. 5.10.1994 (BGBl. I S.2866) (translated by Charles E Sewart, Insolvency Code, Act Introducing the Insolvency Code (1997)) (F.R.G.).

[16] Klaus Kamlah, *The New German Insolvency Act: Insolvenzordnung,* 70 AM. BANKR. L.J. 417, 420 (1996) at 421 n. 35.

[17] Manfred Balz, *The European Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 491 n. 23 (1996).

Tax organs may register an obligatory deposit of the immovable property omitting the court stage in bankruptcy proceedings.

The French system of bankruptcy was changed in the period of 1984-1985[18]. Legislative changes were aimed not only at establishing set-off debt rules, but also at active encouragement of effective settlements considering business entities obligations[19]. New rules included a tax deposit, which had to be obligatorily registered before as well as after the beginning of bankruptcy proceedings[20]. All priorities as exceptions from the equality rule were criticized[21].

In Spain, the Insolvency Act was adopted in 2003, came into force in 2004 and is now effective in its 2011 redaction[22]. Before the adoption of the Act, tax claims were in priority to the claims of private creditors[23]. After abolishing the priority rule, the government decided to make tax deposits ordinary practice in liquidation procedures.

Since 2004, there is bankruptcy legislation in Portugal[24]. Before adopting the Code, there was absolute priority of tax claims before private ones. One of the features of Portuguese regulations is a priority of tax claims that were created during 12 months before bankruptcy. As for a bankruptcy deposit, it has to be created at least 2 months before the bankruptcy.

To conclude, in developed states and in countries with a long history of bankruptcy regulations, on the one hand, there are measures against unreasonable public dominancy in bankruptcy cases, and, on the other

[18] Law No.84-148 of March 1, 1984, effective March 1, 1985; and Law No.85-89, subject to Decree No. 85-1388 and 85-1389 of December 27, 1985. Amendments were enacted in 1994. Law No. 94–475 of June 10, 1994.

[19] Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 437 (1996).

[20] Code General Des Impots, Art.1929 ter.

[21] David Lacey, *Preferential Claims of Government in English Insolvency Proceedings, in Corporate Insolvency and Rescue: the International Dimension*.

[22] Act 38/2011, of 10 October, reforming the Spanish Insolvency Act 22/2003, of 9 July (Ley 22/2003, de 9 de julio, Concursal) was published in the Spanish Official State Gazette (Boletín Oficial del Estado) last 11 October 2011.

[23] Herbert Smith, *Reform of the Spanish Insolvency Act*, available at http://www.herbertsmithfreehills.com/-/media/HS/MA-031011-4%20(3).pdf

[24] Insolvency and Companies Recover Portuguese Code, effective September 2004 (the 2004 Insolvency Code).

hand, there are institutes being created to secure public claims by the analogy with private claims. During the fair equation of public and private interests, public claims should not be less secured than private ones. For this reason, prospective application of the institute of a tax deposit for tax claims seems to be a reasonable and logical step of the legislator in Russia.

The juridical technique of the Insolvency (Bankruptcy) Law is based on the delimitation of rights and obligations of bankruptcy creditors and an authorized organ, and all rules considering a deposit of a debtor and the deposit status of a creditor are formulated the way that due to the interpretation of the deposit can be applied only in private claims situations.

What rights and obligations should an organ with the status of a deposit creditor have? Following the common logic of the Law, in this situation an authorized organ has several restrictions, for example, to lose its right to vote at creditors' meetings (except for the first meeting and those where there is an agenda of the first meeting, and also in the process of bankruptcy supervision; during financial rehabilitation and external management in case of refusal of the deposit realization or the court's refusal for the realization of the deposit; for the question of choosing an arbitration manager or self-regulatory organization, from where an arbitration manager is appointed; for the question of applying to the arbitration court with the motion to dismiss the arbitration manager; for the question of applying to the arbitration court with a motion to terminate the proceedings and shift to the external management; during the restructurization of debts of a person; during the realization of property of a person).

Undoubtedly, that organ whose rights are secured with a deposit does not lose its right to participate in the meetings with the right to speak on the agenda.

An authorized organ for the obligations, secured by a debtor's deposit, during the financial rehabilitation and external management, saves the right to seize the deposited property if it does not lead to the impossibility to recover the financial solvency of the debtor or there is a risk that as a

result of realization property would be damaged, destroyed or its price would be lower.

The realization of a deposited object, in accordance with the Insolvency Law, is carried by an organizer of the auction. By the general rule of Article 18.1 of the Insolvency Law, in cases of a twice failed auction, the bankruptcy manager for the obligations secured by the deposit has the right to take the object of an auction with the estimation not lower than 10% lower from the initial price to the second auction. Determining equal rights for the authorized organ in case of deposited property, it is necessary to create a rule that the authorized organ can hold the deposited auction in case of failed auction.

The proposition goes beyond the financial fulfillment of tax obligations. According to Article 8.1 of the Tax Code, a tax is an obligatory, individually non-repayable payment withheld from organizations and individuals in the form of the transfer of monetary funds which they have based on the right of ownership, economic or operational control for the purpose of financial maintenance of the state and municipalities. A tax obligation is a special property (monetary) obligation, the object of which is money. There is no difference whether money is in cash or non-cash (at the accounts of credit organizations)[25]. Therefore, the fulfillment of a tax obligation by other types of property requires another regulation of Article 47 of the Law on Insolvency and Federal Law on the Enforcement Proceedings[26]. In case of insufficiency of monetary funds at the account of a debtor, a tax organ makes a decision of covering the obligation by means of other types of property of the debtor and sends a request to the Federal Enforcement Service.

Article 73 of the Tax Code does not refer us to Article 47, but directly states that a tax organ covers tax obligations of the taxpayer by the value of deposited property in accordance with the civil legislation of the Russian

[25] Vinnitskij D.V., Rossijskoe nalogovoe pravo: uchebnik dlia bakalavrov [Russian Tax Law: Course Book for Bachelors. – M.: Izdatel'stvo Iurajt]. M. : Iurajt Publishing House. 2013. pp. 143–144 (in Russ.).

[26] Federal Law of the Russian Federation No. 229-FZ of 2 October 2007 (redaction of 3 July 2016) "On Enforcement Procedure".

Federation (Articles 249-350.2 of the Russian Civil Code[27]). In a bankruptcy situation, the Insolvency Law takes the leading role in the legal regulation of the circulation of the collateral in favor of the pledgee. Let us analyze the existing rules as if they already regulate the legal status of the authorized organ with a deposit.

In accordance with Article 138.4.1 of the Insolvency Law, in the situation of a twice failed auction the authorized organ has the right to hold the object of the deposit in the amount of 10% below the initial selling price for repeated trades. The authorized organ for the obligations, secured by the deposit, in case of holding an object of the deposit must transfer money funds in the amount that is in excess of the size of the obligation, but not less than 20% of the realization price, to the special bank account.

Moreover, the authorized organ for obligatory payments secured by the deposit, in accordance with Article 138.4.2 of the Insolvency Law, has the right to hold the object of the deposit in the way of auction for realizing the debtor's property by a public proposal at each stage of lowering the price. In case of the exceeded price, the organ must transfer money to the special account but not less than 20% of the buying price.

Earlier academic works used to express a similar idea of a possibility of holding the object of the deposit by the government but considering a special regime of mortgage (the Federal Law on Mortgage)[28].

On the contrary, S.A. Yadrikhinskiy wrote that: "… the Tax Code of the Russian Federation does not give the opportunity to tax organs to hold objects of deposit for the coverage of tax obligations. The payment could be only in the monetary form, within the meaning of Article 8. According to Articles 47.6 and 48.6 of the Tax Code, a tax obligation is deemed to be

[27] Civil Code of the Russian Federation (Part 1), of 30 November 1994 No.51-FZ (redaction of 3 July 2016).

[28] Verstova M.E. Kontseptual'nye osnovy obespecheniia nalogovymi i pravookhranitel'nymi organami ispolneniia nalogoplatel'shchikami svoikh obiazannostej: Diss…dok..iurid.nauk. Akademiia upravleniia MVD Rossii [Conceptual Basics of Tax and Law Enforcement Organs Control Over the Taxpayers' Obligations Fulfillment: Dissertation for the Doctor of Law Degree, Academy of the RF Ministry of Internal Affairs, 2008, pp. 202–203 (in Russ.).

fulfilled from the moment of factual receipt of monetary funds from bankruptcy property realization by the public entity[29].

In our view, the Insolvency Law can become an exception in the general rule of the monetary form of tax coverage. This outcome does not transform the rule, because the system analysis of current Article 73 of the Tax Code and Articles 349-350.2 of the Civil Code shows the possibility of such application.

The covered international practice of agreements on the deposit of taxpayers' property speaks about a possibility to create the institute of a preliminary deposit for bankruptcy cases. The conclusion of a deposit contract in this situation meets the interests of the controlling taxpayer-debtor persons, protecting them from subsequent subsidiary liability for debts to creditors and the tax authority due to unfair behavior in anticipation of bankruptcy.

In conclusion, it is necessary to mention that legal regulation of a tax deposit in bankruptcy cases of entities by the Russian legislation needs developing and improving, however, the current legislation already contains certain necessary basis for such a legal institute.

[29] Yadrikhinskiy S.A. Mekhanizm obespecheniia ispolneniia obiazannosti po uplate nalogov: problem teorii i praktiki/ otv.red. E.Y. Gracheva [Mechanism of Ensuring the Fulfillment of Tax Obligations: Problems of Theory and Practice/ ed. by E.Y. Gracheva] M. : NORMA, INFRA-M, 2015, 144 p. (in Russ.).

PECULIARITIES OF LEGAL REGULATION OF ENTREPRENEURIAL ACTIVITY IN THE CONTEXT OF MODERNIZATION OF THE RUSSIAN ECONOMY

Natalia V. Rubtsova
Associate Professor, Candidate Law,
Deputy Dean, Faculty of Law,
Novosibirsk State University of Economics and Management,
Associate Professor of the Department Civil Law and Procedure,
Novosibirsk State Technical University

Abstract
The article analyzes some features of legal regulation of entrepreneurial activity in the conditions of Russian economy modernization and main elements of modernization. **The purpose** is to define the features and prospects of entrepreneurial activity regulation. **Research methods:** there were applied the general scientific dialectical method of cognition and the private-science methods following from it: sociological, logical, system-structural, technical-legal and the method of legal modelling. **Results:** in the conditions of the development of the Crowd Economy, the available legal means are quite capable of providing the legal regulation of this phenomenon. **Conclusions:** on the basis of the study, there were drawn the conclusions on the impossibility of modernizing the Russian economy without effective regulation of entrepreneurial activity, taking into account the new development paradigm.

Keywords: entrepreneurial activity, modernization, the Crowd Economy, paradigm.

Introduction

The role of entrepreneurial activity in the effective development of the Russian economy is very great. As noted in Ruling No.48 of the Plenum of the Supreme Court of the Russian Federation of November 15, 2016 "On the Practice of the Courts Applying Legislation Regulating the Specifics of Criminal Liability for Crimes in the Sphere of Entrepreneurial and Other Economic Activities," the effective solution of the tasks of state economic

policy involves the creation and maintenance in the Russian Federation of a favourable business, entrepreneurial and investment climate and conditions for doing business by encouraging legitimate entrepreneur activities carried out by its subjects on their own, at their own risk and based on the principles of legal equality and good faith of the parties, freedom of contract and competition[1].

Results. The necessity for a cardinal modernization of the Russian economy on an innovative basis does not raise any doubts today. As V.D. Zorkin, one of the main features of the current "era of change" is the global process of political and legal modernization that is expanding under the pressure of globalization. At the same time, one of the conditions for modernization is democratization, which includes the maximum weakening of state and legal regulation of all spheres of society[2].

In the field of entrepreneurial activity within the framework of this concept some institutions that require minimal state intervention should be used to a greater extent. However, it is impossible to exclude completely the state regulation in the sphere of entrepreneurial activity, since the purpose of such regulation is to protect public interests, which the entrepreneur himself is not always able to provide independently, taking into account the main objective of entrepreneurial activity - profit making. According to V.D. Zorkin, democratization and weakening of the rigidity of the regulatory functions of state and legal institutions arise and are consolidated only in the course and as a result of successful modernization, but not as its prerequisite[3]. Indeed, in itself, the decrease of the limits of government intervention in the activities of business entities must go through an evolutionary path.

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1 Rossiiskaia Gazeta, November 24, 2016, No. 266.

2 See: V.D. Zorkin. Pravo sily i sila prava [The Right of Power and the Power of Law] (Lektsiia na V Mezhdunarodnom iuridicheskom forume v g. Sankt-Peterburge v 2015 godu) [(Lecture at the 5th International Legal Forum in St. Petersburg in 2015)] // Teoriia gosudarstva i prava [Theory of State and Law]. 2016, No. 1, p. 14.

3 V.D. Zorkin. Ibid, p. 15.

The term "modernization" is polysemantic. As correctly noted by V.S. Belykh, modernization is a complex category. It can be viewed from various aspects: organizational, political, economic, legal, etc.[4]

In the most general form, modernization is a complete update of the object and the bringing of it into line with new requirements and norms. Modernization of the economy means its improvement, development and overcoming the economic backwardness. However, modernization concerns not only technical facilities, since it means, first of all, a qualitative change and the development of certain spheres of social life and society as a whole. The ultimate goal of modernization of the economy should be not just the development to the level of economically developed countries, but an increase in the level of satisfaction of society's needs in accordance with the level of scientific and technological progress, as well as with the goals and tasks facing the state at this stage of advance. A special role in modernization is taken by entrepreneurial activity, since it is the implementation of such activities that contributes to the qualitative achievement of the goals and objectives of modernization as a whole.

The objectives of economic modernization can be achieved through a variety of legal means. First of all, it is necessary to improve the legal and regulatory framework, since the streamlining of business relations is possible only in the case of clear statutory regulation. The presence of gaps and inconsistencies in the legislation, of course, makes it difficult to implement such modernization. Especially important is the support of individual entrepreneurs, particularly in the case of state programs adoption.

Public-private partnerships can be an important development direction in the transition from a raw material economy to an innovation-type economy. In this case, the normal functioning of the national economy

[4] V.S. Belykh. Modernizatsiia rossijskoj ekonomiki i predprinimatelskogo zakonodatel'stva: voprosy teorii i praktiki: monografiia [Modernization of the Russian Economy and Business Legislation: Theory and Practice Issues: Monograph]. Yekaterinburg: Institut ekonomiki UrO RAN [Institute of Economics, Ural Branch of RAS], 2011, pp. 8–9.

should be based on a constructive interaction of state and business institutions in various areas of innovation activity. At the same time, the state should exercise the functions not only of the partner, but also of the organizer, the coordinator and the customer of innovative interactions[5].

The most important element of modernization is the forecasting in the implementation of entrepreneurial activities, since it allows the formation of a modern concept of law within the framework of an integrated approach among other things including the economic analysis of rights[6]. But for this it is necessary to develop new means of stimulating entrepreneurial activity, which is especially important for the development of social entrepreneurship. Ultimately, the goal of modernization is not only to eliminate or reduce the gap between the more successful countries at the economic level of development (this is an important factor within the framework of the existing globalization), but also to increase production efficiency and improve prosperity of the population, that is in general, the main task is to achieve both private and public interests.

Discussion. As a rule, the implementation of modernization is associated with the weakening of state influence on the economy. Undoubtedly, the state intervention in entrepreneurial activity through the legal regulation of certain economic relations with the aim of establishing the common "rules of the game" for all is necessary. This is especially important in the field of antimonopoly, and technical regulation. In addition, the state can use the special means of the influence on business entities to actively intervene in production processes in order to solve, for example, political tasks. Such interference should be extremely limited. As V.A. Vaipan notes, the market economy and economic freedom are

[5] Yu.S. Emelianov. Gosudarstvenno-chastnoe partnerstvo v innovatsionnom razvitii ekonomiki Rossii: Avtoref. dis. … d-ra ekon. nauk [Public-Private Partnership in the Innovative Development of the Russian Economy: Author's Abstract of dis. ... Dr. of Economic Sciences]. Moscow, 2012, p. 55.

[6] See: Yu.A. Tikhomirov. Optimizatsiia pravovykh reguliatorov v sotsialnoj sfere [Optimization of Legal Regulators in the Social Sphere] // Pravo i sotsialnoe razvitie: novaia gumanisticheskaia ierarkhiia tsennostej: monografiia [Law and Social Development: a New Humanistic Hierarchy of Values: Monograph] // edited by A.V. Gabov, N.V. Putilo. - Institute of Legislation and Comparative Jurisprudence under the Government of the Russian Federation: INFRA-M. Moscow, 2015, p. 48.

better than other social instruments at the current stage of the human civilization development, they are able to coordinate and balance the people activities in the field of production, distribution, exchange and consumption of material goods, and to ensure the technical progress of civilization[7].

A.E. Molotnikov calls for greater control over the companies activities as one of the world's trends affecting the scope of legal regulation of entrepreneurial activity[8]. However, this can be not only the state intervention. Such impact can also be provided by shareholders, consumers, investors (within the framework of the development of the Crowd Economy).

A special view on the weakening of the state impact on entrepreneurial activity is related to the development of the Crowd Economy - the economy of the crowd. As noted by M.S. Maramygin, this economic model is based on a system of decentralized distribution of labor, material wealth, financial and intellectual resources. Moreover, the role of the state as the main regulator of the economy, the organizer and moderator of many redistribution processes is significantly reduced. Simultaneously, the importance of the individual (either an individual or an insignificant association of citizens) increases significantly, independently determining the volume of their own needs both in production matters and in terms of the intensity of labor activity[9].

The Crowd Economy model can be considered as one of the directions of modernization. Concurrently, many projects within the framework of the Crowd Economy have an obvious social orientation, thereby realizing the ideas of social entrepreneurship.

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[7] V.A. Vaipan. Teoriia spravedlivosti: pravo i ekonomika: monografiia [Theory of Justice: Law and Economy: Monograph]. Yustitsinform, Moscow, 2017, p. 138–139.

[8] See: A.E. Molotnikov. Chetvertaia promyshlennaia revoliutsiia i sovremennoe osmyslenie korporativnoj formy vedeniia biznesa [The Fourth Industrial Revolution and Modern Understanding of the Corporate Form of Doing Business] // Predprinimatel'skoe pravo [Business Law]. 2017, No. 2, p. 11.

[9] M.S. Maramygin. Financial Instruments of the New Industrialization in the Realities of the Crowd Economy // Available at: http://www.usue.ru/nevidimaya/finansovye-instrumenty-novoj-industrializacii-v-realiyah-kraudekonomiki/ (accessed on 15 January 2018).

Crowdfunding (national funding, literally from the English - *the crowdfunding* - the financing of the crowd) is a collective cooperation of people who pool their financial resources for the implementation of certain projects, including business entities. To collect resources and promote certain projects, special Internet sites are created[10]. In the world a number of well-known projects have been implemented through crowdfunding, in particular, Skype was originally considered as a non-commercial project[11]. One of the directions of crowdfunding is the crowdinvesting, which involves the collective projects co-financing in the field of entrepreneurial activity by a significant number of small private investors. In contrast to a number of charity projects in crowdfunding, investment involves the obligatory receipt by all investors of financial benefits from the ongoing project[12]. In substance, crowdinvesting is an alternative form of financing projects of business entities at the stage of their formation (start-up).

Concomitantly, crowdfunding is aimed at solving social and economic problems without the use of budgetary funds.

According to M.S. Maramygin, the Crowd Economy is an exertion of the revolutionary change in the paradigm of social development[13]. Simultaneously, the model of the Crowd Economy cannot fully become an alternative to the traditional economy with its significant state influence, including entrepreneurial activity. Firstly, it is impossible to completely exclude the state influence on economic development in the contemporary world; it can only be reduced while using alternative methods. In addition, within the framework of the Crowd Economy public relations should also be regulated by the law in the sphere of entrepreneurship development.

[10] See for example: http://svoedelo-kak.ru/finansy/kraudfanding.html#i-7

[11] See for example: http://law03.ru/finance/article/kraudinvesting-i-kraudfanding

[12] See: M.S. Maramygin. Finansovye instrumenty novoj industrializatsii v realiiakh kraudekonomiki [Financial Instruments of the New Industrialization in the Realities of the Crowd Economy] // Available at: http://www.usue.ru/nevidimaya/finansovye-instrumenty-novoj-industrializacii-v-realiyah-kraudekonomiki/;
M·K· Sanin. Istoriia razvitiia kraudfandinga. Klassifikatsiia vidov. Analiz perspektiv razvitiia i preimushchestv [The History of Crowdfunding Development. Classification of Types. Analysis of Development Prospects and Advantages] // Scientific Journal ITMO. Series "Economics and Environmental Management". 2015, No. 4, p. 59.

[13] M.S. Maramygin. Ibid.

What are the norms that should be? Are there enough legal regulation tools available for the regulation of newly emerging social relations?

Generally, the emergence of a new paradigm requires its legal regulation, and hence, the consolidation in the legal field. It seems that in the conditions of crowdfunding existing legal means are quite capable of providing legal regulation of this phenomenon. In the case of a gratuitous nature, crowdfunding can be regulated by the model of the gift agreement. If the project financing is based on a counter grant, it can be built on the basis of onerous contracts, for example, a simple partnership, purchase and sale agreement with the condition of prepayment of the goods[14].

Conclusion. In the context of the Crowd Economy, entrepreneurial activity is further developed, while regulation of business activities can be carried out with the help of available legal means, first of all, such as the civil-law contracts. Simultaneously, the development of the Crowd Economy does not exclude the state impact on entrepreneurial activity. Russian economy modernization is impossible without effective regulation of entrepreneurial activity taking into account the new development paradigm.

[14] See: E. Arkhipov. Ponyatie i pravovaia priroda kraudfandinga [The Concept and Legal Nature of Crowdfinding] // Aktualnye problemy predprinimatel'skogo prava: Vypusk 4 [Topical Problems of Entrepreneurial Law: Issue 4] /edited by A.E. Molotnikov. Moscow : Startup, 2015, p. 20.

THE CONCEPT AND FEATURES OF LEGAL REGULATION OF FINANCIAL ORGANIZATIONS AS CORPORATIONS

Anna V. Belitskaya
Associate Professor of Business Law Chamber, Candidate of Law,
Law Faculty of Lomonosov Moscow State University,
Moscow, Russia

Elizaveta B. Lauts
Associate Professor of Business Law Chamber, Candidate of Law,
Law Faculty of Lomonosov Moscow State University,
Moscow, Russia

Abstract
The article deals with the concept of a financial organization and a financial corporation in Russian legislation. The authors compare legal norms of the Civil Code of the Russian Federation with the legal norms of the federal laws in order to outline the reasons for special regulation of financial organizations and financial corporations as well as to build uniform understanding of the financial organization.

Keywords: financial organization, financial corporation, credit organization, bank, microfinance organization, the Bank of Russia, investment funds, special purpose vehicles.

As a result of the civil law reform, which has been going on for several years, many basic institutions and categories, traditional common rules and approaches to the legal status of an increasing number of corporations have been changed significantly. Before the civil legislation reform in 2014, it was possible to state the existence of several business lines where corporations had a particular legal status; at current financial organizations have their own specific legal position.

According to paragraph 7 of Article 66 of the Civil Code of the Russian Federation, the specific features of the legal status of credit institutions, insurance organizations, clearing organizations, specialized financial

companies, specialized project finance companies, professional participants in the securities market, joint-stock investment funds, investment fund management companies, mutual funds and private pension funds, and other non-credit financial organizations, joint stock companies of workers (people's enterprises), as well as the rights and duties of their participants are determined by laws governing the activities of such organizations. ***Thus,*** *the Civil Code of the Russian Federation sets a priority in legal regulation in favor of the special laws not only in terms of the creation, reorganization, liquidation and legal status of financial organizations, but also in relation to specific features of the rights and obligations of participants and shareholders of such organizations.*

This provision, which was included in Russian civil legislation by Federal Law No.99-FZ of May 5, 2014 "On Amendments to Chapter 4 of Part One of the Civil Code of the Russian Federation and on the Repeal of Certain Provisions of the Legislative Acts of the Russian Federation"[1], had a significant impact on the concept and, most importantly, the types of corporations regulated by special legislation. In relation to such corporations, special legislation takes precedence over civil and corporate laws in terms of the specific features of their legal status, as well as the rights and obligations of their participants. If before the reform such corporations included only corporations in the fields of banking, investment and insurance activities, now their list has expanded to include almost all financial organizations.

Following the amendments to the Civil Code of the Russian Federation, the amendments were made to the legal norms stipulated in paragraph 3 of Article 1 of Federal Law No.208-FZ of December 26, 1995 "On Joint Stock Companies"[2], although the same provisions of Federal Law No.14-FZ of February 8, 1998 "On Limited Liability Companies"[3] have not been changed. Paragraph 2 of Article 1 of abovementioned Law has been amended several times in relation to the list of corporations having a special legal status. However, this list still does not coincide with the broad

[1] Rossijskaia Gazeta, No.101, May 7, 2014.
[2] Rossijskaia Gazeta. No.248, December 29, 1995.
[3] Rossijskaia Gazeta. No.30, February 17, 1998.

interpretation enshrined in the Civil Code of the Russian Federation, which apparently can be attributed to imperfection of legal technique.

It should be noted that the indicated areas of entrepreneurial activity are characterized by the existence of several federal laws that establish special rules for the creation, reorganization, liquidation and legal status of financial corporations. *However, the Russian legal doctrine and legislation lack a common definition or even a unified list of financial organizations.*

According to Federal Law No.251-FZ of July 23, 2013 "On Amending Certain Laws of the Russian Federation Due to the Transfer of Some on Regulation, Control and Supervision in the Field of Financial Markets to the Central Bank of the Russian Federation"[4] (hereinafter referred to as the Law on the Mega-regulator), the powers to regulate the activities of participants in the financial markets which previously belonged to the Federal Service for Financial Markets of the Russian Federation were transferred to the Bank of Russia. Accordingly, the functions of the Bank of Russia were adjusted. The Bank of Russia, in cooperation with the Government of the Russian Federation, forms and pursues a policy of development of the Russian financial market at the same time ensuring its stability. Finally, the Bank of Russia acquired such an important authority as exercising regulation, control and supervision of the activities of non-credit financial organizations in accordance with federal laws. Due to the new authority obtained by the Bank of Russia, Federal Law No.86-FZ of July 10, 2002 "On the Central Bank of the Russian Federation (Bank of Russia)"[5] (hereinafter referred to as Law on the Bank of Russia) was supplemented by chapter X.1 "Regulation, Control and Supervision in the Sphere of Financial Markets".

According to Article 76.1 of the abovementioned Law on the Bank of Russia, non-credit financial organizations include legal entities carrying out the following activities:

1) professional participants of the securities market;

2) management companies of investment funds, unit investment funds and non-government pension funds;

[4] Rossijskaia Gazeta. No.166, July 31. 2013.

[5] Rossijskaia Gazeta. No.127, July 13, 2002.

3) specialized depositories of investment funds, unit investment funds and non-government pension funds;

4) joint-stock investment funds;

5) clearing activities;

6) activities to implement the functions of the central counterparty;

7) the activities of the trade arranger;

8) activities of the central depository;

9) repository activity;

10) activities of the legal entities in the field of insurance;

11) non-state pension funds;

12) microfinance organizations;

13) credit consumer cooperatives;

14) housing funded cooperatives;

15) bureau of credit histories;

16) actuarial activity;

17) credit rating agencies;

18) agricultural consumer credit cooperatives;

19) pawnshops.

The mega-regulator law brought changes not only directly to banking legislation, but also to Federal Law No.135-FZ of July 26, 2006 "On Protection of Competition"[6] (hereinafter referred to as the Law on Protection of Competition), Federal Law No.127-FZ of October 26, 2002 "On Insolvency (Bankruptcy)"[7]. The abovementioned Law on the Protection of Competition was amended in terms of the definition of the financial organization.

According to Article 4 of the Law on Protection of Competition, a legal entity providing financial services is a credit organization, a professional participant in the securities market, a trade organizer, a clearing organization, a microfinance organization, a credit consumer cooperative, an insurance organization, an insurance broker, a mutual insurance company, a non-state pension fund, company of investment funds, unit

[6] Rossijskaia Gazeta. No. 162. July 27, 2006.

[7] Rossijskaia Gazeta. No. 209–210, November 2, 2002.

investment funds, non-state pension funds, specialized depository of investment funds, mutual funds, private pension funds, pawnshops (a financial institution supervised by the Bank of Russia), a leasing company (another financial institution, a financial institution not supervised by the Bank of Russia).

A simple comparison of the lists of financial organizations of the Law on the Bank of Russia and the Law on the Protection of Competition already leads to a divergence in the classification of certain organizations as financial. On the one hand, the Law on the Protection of Competition does not consider the following non-financial financial institutions to be financial in the terminology of the Law on the Bank of Russia: joint-stock investment funds; companies that perform the functions of a central counterparty; activities of the central depository; actuarial activity, as well as housing funded cooperatives and agricultural credit consumer cooperatives; credit history bureau and credit rating agencies. On the other hand, the Law on Protection of Competition introduces the category of financial organizations that are not supervised by the Bank of Russia, for example, pawnshops[8] and leasing companies. It turns out as a paradox: the mega-regulator regulates the activities of financial organizations that do not render financial services at all: joint-stock investment funds, credit history bureaus, etc. At the same time, there are financial organizations which provide financial services but are withdrawn from under the supervision of the mega-regulator. It is also obvious, that the list of financial organizations does not correspond even to the concept of financial services. The Law on Protection of Competition stipulates that the financial services are exclusively related to the provision and (or) placement of funds.

Thus**,** *the entity that provides the financial service is not synonymous with the financial organization, as the latter includes organizations that perform infrastructure tasks, provide services in the financial services*

[8] Pawnshops originally were withdrawn from the category of the entities supervised by the Bank of Russia, since 22 June 2014 they are classified as non-credit financial organizations. Federal Law No.375-FZ of 21 December 2013 "On Amendments to Certain Legislative Acts of the Russian Federation" authorized the Bank of Russia to regulate activities and supervise pawnshops' activities and classify them as non-credit organizations supervised by the Bank of Russia.

market, the actors of this market and their customers. They do not directly provide or attract funds from clients, but they provide different information, consulting and other services, often fulfilling the task of compliance with the law and guaranteeing the observance of the rights of clients by financial institutions that provide financial services.

For example, a specialized depository does not attract or allocate clients' funds, but it is a financial organization that constitutes the most important part of the financial services market infrastructure. It exercises control powers with respect to the joint stock investment funds and the management companies of investment funds in the interests of their shareholders and holders of investment units. Credit history bureaus, credit rating agencies also do not attract or place clients' funds as well, but they perform important informational and analytical tasks for the banking services market.

There are also lists of financial organizations in other laws, the number of which is growing steadily.

Finally, as it was noted, paragraph 7, Article 66 of the Civil Code of the Russian Federation establishes its own open list of financial organizations. At the same time, the Civil Code does not directly refer to any of the federal laws mentioning similar lists. Only based on the terminology suggested by the Code it is possible to come to the conclusion that since the category "***other non-credit financial organizations***" is used, it means that the legal norm leads to the list established by the Law on the Bank of Russia. Given that lists of financial organizations are stipulated in at least eight federal laws, it can hardly be considered an optimal solution to mention the special laws without specifying any of them.

For example, the Civil Code of the Russian Federation lists insurance organizations as such "special financial organizations" for which special legislation will have priority in regulating their legal status, as well as the rights and obligations of their participants. At the same time, based on the referential norm, insurance societies should also include joint insurance companies, as well as insurance brokers who are subjects of insurance business, and which the Law on the Bank of Russia considers as non-credit

financial organizations. The question arises as to whether, in relation to such organizations, insurance legislation should take precedence over civil legislation when deciding on the application of provisions regulating the rights and duties of their participants or regulating questions of their legal status. It seems that in each specific situation of the emergence of a legal conflict, the issue will require an individual solution, because the legislation does not provide a unified regulatory procedure.

Obviously, the provision of harmonious regulation in this area is complicated by the absence of a single concept of a financial organization and the subject of the financial market, their types, concepts and types of financial services. Confusion can lead not only to problems in setting priorities for the application of special and corporate legislation, but also in general to the eclectic nature of legal regulation, the confusion of regulatory and supervisory instruments, and ultimately to the lack of adequate satisfaction of clients' needs for financial and banking services and reduced general financial stability of financial corporations.

In the current situation of legislative uncertainty, nevertheless, it is necessary to draw a number of conclusions:

1. There is no unified concept of a financial organization and the list of types of such organizations in the Russian legislation. Various definitions and lists are stipulated in specific federal laws and being used for the purposes of such laws while applying them. For example, financial organizations listed in the Law on Protection of Competition are mainly allocated on the basis of their provision of financial services as attraction and (or) placement of customer funds. Financial organizations (credit and non-credit) in the Law on the Bank of Russia have been singled out for the purpose to determine the Bank of Russia's authority to regulate and supervise them.

2. For the purposes of identifying financial institutions that are subject to special legislation as compared to corporate legislation, it is necessary to define the concept of the financial organization and their list. Given the lack of uniformity, it is optimal to be guided by the norms of Article 66 of

the Civil Code of the Russian Federation and a list of non-credit financial organizations set out in Article 76.1 of the Law on the Bank of Russia.

The question arises as to why the legislator, among all types of entrepreneurial activity, has united for the purposes of applying special regulation the corporations that function precisely in this financial sphere. It seems that this is a general trend in the development of the Russian legislation, within which the financial market has only recently become recognized as an important component of the economic development of the Russian Federation. Only at the end of the 20th century did the Russian legislator pay due attention to the development of the financial market infrastructure and the regulation of the legal status of its actors. The improvement of the legislation on financial markets is still going on. In particular, along with Federal Law No.315-FZ of December 1, 2007 "On Self-Regulating Organizations"[9], recently Federal Law No.223-FZ of July 13, 2015 "On Self-Regulating Organizations in the Sphere of the Financial Market"[10] has been adopted.

Due to the reform of civil legislation, the concept of special corporations has been expanded by including not only business entities, but also other corporate organizations which carry out activities in the financial services market in the terminology of the Civil Code of the Russian Federation.

Thus, *the financial corporation is a corporate organization that provides financial services for attracting and (or) placing funds of legal entities and individuals as a mandatory financial intermediary in the financial services market or an infrastructure organization that is an obligatory participant in the financial services market.*

Application of special requirements to financial corporations is due not to the organizational and legal form of the corporate organization, but due precisely to the specifics of the activities of such corporations:

all of them are associated with the accumulation of significant liquid resources, often attracted not only from professional entrepreneurs, but also from ordinary citizens-consumers;

[9] Rossijskaia Gazeta. No. 273. December 6, 2007.
[10] Rossijskaia Gazeta. No. 157. July 20, 2015.

they function in the financial market, providing the relevant financial services, the subject of which are assets possessing the properties of high mobility[11];

their activities are highly risky and therefore, such corporations are more exposed to the risk of sustainability loss;

as a rule, they are professional entrepreneurs - commercial corporate organizations, most often business companies.

As for financial organizations that are infrastructure organizations, it will be fair to state that they also carry out entrepreneurial activities. The stable functioning of the financial services market can depend on their normal functioning and organization which show their importance for the economy of the Russian Federation. Special requirements in this case are more dictated by the fact that for the most part they exist to protect the rights of clients of those financial corporations that actually provide financial services for attracting and placing clients' funds.

These properties predetermine the presence of peculiarities in the legal regulation of their activities, manifested in the establishment by the state of special requirements in terms of:

- creation, termination and legal status of financial corporations;
- their activities in the banking, insurance and investment field as well as other professional entrepreneurial activities carried out by them.

Thus, *the requirements for these organizations arise from the specifics of their high-risk financial activities and are aimed at minimizing these risks, ensuring their sustainability and, as a consequence, protecting the interests of their clients - legal entities and individuals.*

Let us consider some examples.

Recently there has been a process of activating the activities of microfinance organizations (hereinafter referred to as MFIs) as the attempt to deal with the financial crisis. They were established by Federal Law

[11] According to N.G. Semilyutina "...financial services are connected with the movement of money. In this case, the flow of money does not mean making settlements (for example, paying to the buyer of goods or services), but means transforming money into money-making capital"// Semilyutina N.G. Investments and the Financial Services Market: Problems of Legislative Regulation. Journal of Russian Law. 2003. No. 2.

No.151-FZ of July 2, 2010 "On Microfinance Activities and Microfinance Organizations"[12]. Currently, MFIs are not deemed as credit institutions or legally defined elements of the banking system. Nevertheless, they are deemed as actors on the financial market and financial institutions, supervised by the mega-regulator. Moreover, there is a trend to expand the permissible areas of banking activities for MFIs. If initially they were dealing only with lending, at current they are also given the opportunity to raise funds. As a result of these changes, regulatory instruments for MFIs have also been strengthened. Thus, gradually the MFIs and credit institutions begin to converge, taking on some of the risks of banking activities, providing a certain layer of consumers of their services - small and business entities and consumer citizens - with banking services. The convergence of MFIs with lending institutions as a result of combining activities to attract deposits and subsequent placement of funds as loans resulted in tightening regulation by the Bank of Russia, convergence with rigid prudential banking instruments. This is also confirmed by recent trends in changing the legislation on MFIs.

The main novels introduced by Federal Law No. 407-FZ of December 29, 2015 "On Amending Certain Legislative Acts of the Russian Federation and Recognizing the Invalidation of Certain Provisions of the Legislative Acts of the Russian Federation"[13] relate to limiting possible misuse of MFIs in relation to borrowers, and strengthening the supervisory burden, bringing together MFIs with credit institutions. The main amendment was made in relation to the allocation of two types of MFIs: microfinance companies and microcredit companies. Microfinance companies have the right to carry out a wider range of activities, work with any individuals, more actively attract and allocate their funds. But they are imposed more stringent requirements on, including the size of their own funds. However, as before, no varieties of MFIs can be deemed as credit institutions.

As an example of a financial corporation with a specific activity we can name investment funds which are deemed as collective institutional

[12] Rossijskaia Gazeta. No. 147. July 7, 2010.
[13] Rossijskaia Gazeta. No. 297. December 31, 2015.

investors and are defined as financial institutions that raise funds to gather it in a single pool and place them in the securities market and (or) invest in real estate. The activity of the organizers of investment in the framework of investment funds is entrepreneurial; the management companies make a profit from providing investment services on a professional basis. At the same time, the activity of participants in collective investment schemes using institutional investors is not always entrepreneurial, since along with legal entities, citizens can invest their savings in investment funds. In this sense, investing in investment funds serves as an alternative to bank deposits. According to A.V. Gabov, the legal regulation of institutional investment should be based on the balance between two goals - social and macroeconomic, which is achieved through the establishment of mandatory investment, opportunities and restrictions in terms of the tools used for it, as well as measures to ensure the safety of investments. In this case, the mandatory investment is an extreme measure to achieve significant indicators, in connection with which the rule is introduced to eliminate the main risk - the loss of funds[14].

Significant specific features can be outlined in relation to the activity of specialized companies which include specialized financial companies and specialized project finance companies (the analogue of special purpose vehicles). These legal entities appeared in the Russian legislation in 2014 for the purposes of the securitization and development of project finance in the Russian Federation. The main feature is that a specialized company is more like a property complex or an investment pool rather than a legal entity, which as a characteristic of the financial corporation relate to all collective investors whose goal is to separate the investor's assets and the assets of the project. From a formal point of view, of course, a specialized society has rights and obligations and is responsible; therefore it can be recognized as a subject of entrepreneurial activity, but in its essence it is a technical entity created for the sole purpose - to ensure the functioning of an investment project or securitization of assets.

[14] Gabov A.V. Securities: Issues of Theory and Legal Regulation of the Market. M. : Statute, 2011, 1104 p.

These examples clearly demonstrate that each financial corporation has its own individual "face", its own characteristics, which makes it unique and predetermines the reasons for its existence in the financial services market as a mandatory intermediary. At the same time, they are characterized by features common to all special financial corporations, which, in our opinion, could distinguish such corporations from other financial organizations, which, being intermediaries in the financial services market, however require neither such detailed attention from the legislator nor interference in their corporate nature.

ON THE INFLUENCE OF NATIONAL STANDARDIZATION IN RUSSIA ON THE SPHERE OF LEGAL PROVISION OF GOODS QUALITY

Albina S. Panova
Associate Professor, Candidate of Law, Head of the Civil and Entrepreneurial Law Department, Kazan Innovative University named after V.G. Timiryasov (IEML), Kazan, Russia

Abstract
The article dwells upon the national standardization in Russia, showing its role in legal provision of goods quality. The author reviews changes in the documentation system of the national standardization system in Russia.

Keywords: goods quality, national standardization, objectives and tasks of standardization, principles of standardization, documents on standardization.

Federal Law of 29 June 2015 No. 162-FZ "On Standardization in the Russian Federation" (further – Law on Standardization)[1] defines standardization as activity on elaboration (administration), approval, alteration (actualization), disaffirmation, publishing and implementation of documents on standardization, and other activities aimed at achieving order with regard to the objects of standardization. This definition implies that standardization is a specific kind of managerial activity, the content of which is actions aimed at creating unified norms, rules and requirements to the objects of standardization – goods, processes, works, and services – with the said norms, rules and requirements being intended for voluntary reiterate use. Article 2 of the Law on Standardization lists practicable objects of standardization. These are products (works, services), processes, management systems, terminology, notation conventions, examinations (tests), measurements (including sample selection) and testing techniques,

[1] Federal Law of 29 June 2015 No. 162-FZ "On Standardization in the Russian Federation" (changed on 3 July 2016) // Collection of Legislation of the Russian Federation, 2015. No. 27. Art. 3953; 2016. No. 27 (Part 1). Art. 4229.

marking, procedures of compliance assessment and other objects. Literally, goods, processes, works, and services are not objects of standardization. It is the information about them that is standardized, which refers to their essential features and properties. The unified norms, rules and requirements are the content of standards. In some cases the problem of correct determination of standardization objects, which existed in the Soviet times, persists[2]. Specialists rightly mark such a negative phenomenon in the standardization practice as the cases of confusing the objects of standardization and the content of normative documents on standardization[3].

Standardization can be viewed in different aspects: organizational-technical, economic, and juridical[4]. Law plays an important role in successfully solving the tasks and goals of standardization[5]. The legal aspect of standardization consists of the following: first, law regulates organization and implementation of works on standardization, and, second, standardization is not only technical-economic but also juridical activity carried out in appropriate legal forms. Currently, a special legal mechanism is functioning, which sets the frameworks for carrying out this activity[6].

As it is known, every activity has a certain objective. "Activity deprived of the objective is an aimless, senseless activity"[7]. National standardization

[2] Khalap I.A. Pravovye problem standartizatsii v SSSR: avtoref…kand.iurid.nauk [Legal Problems of Standardization in the USSR: Abstract …Candidate of Law thesis]. Moscow, 1969. p. 9.

[3] Belykh V.S. Grazhdansko-pravovoe obespechenie kachestva produktsii, rabot i uslug. Sb. Nauch. Tr. [Civil Law Provision of the Quality of Goods, Works and Services. Collection of Scientific Works] Editor-in-Chief, compiler, Candidate of Law O.A. Gerasimov. Yekaterinburg : Business, Management and Law, 2007. p. 90.

[4] Predprinimatel'skoe pravo Rossii: uchebnik [Entrepreneurial Law of Russia: Course Book/ Editor-in-Chief V.S. Belykh. M. : Prospekt, 2009. p. 381 (the author of the relevant chapter – V.S. Belykh).

[5] Lakhno P.G. Pravovoe regulirovanie standartizatsii v Sovete ekonomicheskoj pomoshchi: avtoref…kand.iurid.nauk [Legal Regulation of Standardization in the Council for Mutual Economic Assistance: Abstract …Candidate of Law thesis]. Moscow, 1978. p. 7.

[6] Predprinimatel'skoe pravo Rossii: uchebnik [Entrepreneurial Law of Russia: Course Book/ Editor-in-Chief V.S. Belykh. M.: Prospekt, 2009. p. 382 (the author of the relevant chapter – V.S. Belykh).

[7] Kerimov D.A. Metodologiia prava: predmet, funktsii, problem filosofii prava. 5-e izd. [Methodology of Law: Object, Functions, Issues of Philosophy of Law. 5th ed.] Moscow : SGU Publishers, 2009. p. 272.

is aimed at achieving the objectives stipulated in Article 3 of the Law on Standardization. The objectives of standardization are achieved by solving the tasks of standardization (Article 3 of the same Law).

With regard to the objectives and tasks of standardization, we ought to highlight that neither reference literature, including thesauri and encyclopedias, nor theoretical works in various spheres of knowledge set a clear distinction between the notions of "objective" and "task". An "objective" is defined as something strived for, something desired to achieve, the limit, the intention to be implemented[8]. A "task" is perceived as a problem to be solved, something set for solving. A task can be understood also as an objective, i.e. something to be implemented, to be achieved; as an assignment, an aim set for somebody to achieve[9]. Philosophical literature only dwells upon an objective as an ideal or real object of conscious or unconscious aspiration of a subject; an ultimate result at which the process is voluntarily aimed[10]. Notably, the Dictionary of Synonyms of the Russian language lists the categories of "objective" and "task" as synonymous[11]. Relying upon the provisions of the Russian psychological theory of activity[12], one should agree that, in the process of activity implementation, its objective "unfolds into a system of specific tasks, each of them implemented by performing a separate action"[13]. An objective may transform, "every time acting as a specific task"[14]. Thus,

[8] Thesaurus of the Russian Language: in 4 vol. Ed. D.N. Ushakov. Moscow: Sov. Entsikl.: OGIZ, 1935-1940. / http://dic.academic.ru/dic.nsf/ushakov/1084690

[9] Ibid. http://dic.academic.ru/dic.nsf/ushakov/804042

[10] New Philosophic Encyclopedia: in 4 vol. 2nd ed., amended and compl. Moscow: Mysl', 2010. / http://iph.ras.ru/elib/3339.html

[11] Dictionary of Synonyms of the Russian Language. Author-compiler Sitnikova M.A. 5th ed. Rostov-on-Don: Feniks, 2008. p. 332.

[12] More detail on the use of the terms "objective" and "task" in psychology, *see*: Mezinov D.A. O sootnoshenii poniatij 'tsel' i 'zadacha' v nauke ugolovnogo protsessa // Vestnik Tomskogo gosudarstvennogo universiteta [On Correlation between the Notions of 'Objective' and 'Task' in Criminal Procedure. Bulletin of Tomsk State University]. 2010. No. 340. p. 130.

[13] Lomov B.F. Voprosy obshchej, pedagogicheskoj i inzhenernoj psikhologii [Issues of General, Pedagogical and Engineering Psychology]. Moscow : Pedagogika, 1991. p. 254.

[14] Idem. Metodologicheskie i teoreticheskie problem psikhologii [Methodological and Theoretical Problems of Psychology]. Moscow : Nauka, 1984. p. 209.

the correlation between "objective" and "task" is that a task is actually an objective set under certain conditions[15].

Taking the above into account, we come to the following conclusions. **First**, the legislator's formulation of objectives and tasks within a single act must be highly correlative to each other. **Second**, with regard to the Law on Standardization one can imply that clause 1 of Article 3 of the Law stipulates the fundamental, program objectives of the national standardization, which can be achieved by solving the tasks stipulated in clause 2 of Article 3 of the Law. **Third**, we believe that the national standardization in Russia today should be aimed at providing the compatibility of the standards with other technical regulators (first of all, technical regulations), as well as at promoting the exclusion of the obsolete calculation techniques, and ensuring interaction with the intergovernmental standardization systems.

Functioning of the national standardization is arranged in compliance with the principles stipulated in Article 4 of the Law on Standardization. The principles listed in the Law are legal principles of standardization, proceeding from the assumption that the legal principles should be viewed, at the same time, as the principles of law vested in legal norms[16]; the legal principles can be at the same time economic, technical, social, but obligatorily with a legal form attributed to them.

The ***principles of standardization***, listed in the Law on Standardization, should be aimed, first of all, at stabilization (conferring steady state) of the whole Russian national system of standardization, at uniting all elements of its structure into a single functioning mechanism: participants of the works on standardization, links and relations between them with regard to elaboration and implementation of the documents in the sphere of standardization. We can assert that the principles of standardization are to serve as a guide for action within the system.

[15] Leontiev A.N. Deiatel'nost'. Soznanie. Lichnost'. [Activity. Consciousness. Personality.] Moscow : Politizdat, 1975. p. 107.

[16] Gubin E.P. Gosudarstvennoe regulirovanie rynochnoj ekonomiki i predprinimatel'stva: pravovye problem [State Regulation of Market Economy and Entrepreneurship: Legal Issues.] Moscow : Yurist, 2006. p. 52.

The immediate result of standardization is documents on standardization adopted in the Russian Federation. According to Article 14 of the Law on Standardization, the documents on standardization in Russia include:

— the documents of the national system of standardization;

— All-Russia classifiers of technical-economic and social information;

— standards of organizations (further – SO), including technical conditions (further – TC);

— codes of rules;

— the documents on standardization, stipulating the mandatory requirements to the objects of standardization, the latter listed in Article 6 of the Law on Standardization (defense products (goods, works, services) by the state defense order, products used for state secret protection, etc.).

It should be highlighted that, in compliance with Article 2 of the Law on Standardization, the national standard of the Russian Federation (further – national standard), including the mainframe national standard of the Russian Federation (further – mainframe national standard), and preliminary national standard of the Russian Federation (further – preliminary national standard), as well as the rules of standardization, recommendations on standardization, information-technical reference books (further – ITRB) are the documents of the national system of standardization. In turn, the national system of standardization is a mechanism of providing the coordinated interaction of the participants of standardization works, based on the standardization principles for elaboration (administration), approval, alteration (actualization), disaffirmation, publishing and implementation of documents on standardization, using the normative-legal, informational, scientific-methodological, financial and other resource support. The participants of standardization works include: the federal executive body implementing the functions of elaborating the state policy and normative-legal regulation in the sphere of standardization; the federal executive body in the sphere of standardization; other federal executive bodies; the State Corporation on Atomic Energy *Rosatom* and other state corporations in compliance

with the established authorities in the sphere of standardization. They also include technical committees on standardization, project committees, commissions on appeals, juridical persons, including public associations registered in the territory of the Russian Federation, and physical persons – citizens of the Russian Federation (Article 2 of the Law on Standardization).

A ***standard***, by virtue of the Law on Standardization (Art. 2), is a document on standardization, which, for the voluntary reiterated implementation, stipulates the general characteristics of the object of standardization, as well as the rules and general principles with regard to the object of standardization, excluding the cases when the mandatory application of the documents on standardization is stipulated by the Law on Standardization. Thus, a standard is a document applied on a voluntary basis. In this regard it should be noted that implementing the reference to a national standard (and/or ITRB) does not turn a standard from a document applied on a voluntary basis into a legally binding act. A reference to a standard is a specific juridical technique aimed at providing (increasing) the efficiency of the regulating impact of the normative-legal act containing the above reference. In respect to the normative-legal act containing the reference, the standard, or its relevant items (sections) acquire the character of norms, which necessarily should be implemented to meet the technical and functional requirements of such normative-legal act. For example, the possibility to use references to standards in the Russian legislation on state purchases may help improve the discipline of state purchases. It is supposed that "henceforward, a buyer shall refer to the specific state standard (GOST) when describing the parameters of the purchased goods. If that is impossible, the reason should be explained in a written form. Thus, standards may be considered to be an interface for providing purchases"[17]. Besides, if the parties had stated in the contract that the quality of the goods delivered under that contract must comply with a certain standard or its specific

[17] Alyasev A. Tost za GOST// Rossijskie vesti. Federal'nyj ezhenedel'nik [Toast to GOST. Russian News. Federal Weekly.] 18–24 August 2015 No. 16.

sections, then the rules of the standard or its specific sections become mandatory for the participants of the contract.

Within the meaning of the Law on Standardization, the notion of "standard" covers the following types of documents: national standards, including mainframe national standards, preliminary national standards, codes of rules, standards of organizations, international standards, regional standards, regional codes of rules, standards of foreign states and codes of rules of foreign states, all registered in the Federal Information Fund of Technical Regulations and Standards.

Standards may be classified on various grounds. Depending on the level of standardization, standards are classified into international, regional (intergovernmental), national standards, and standards of organizations. In terms of the object of standardization, one can distinguish between standards of production, processes (works), services, terms and definitions, methods of control, etc. Standards of production can, in turn, be subdivided into standards of general technical conditions and standards of technical conditions. Depending on the groups of homogeneous products, there can be standards of acceptance rules, standards of marking, packing, transportation, storage rules, etc.

For the *first time* the Law on Standardization has referred ITRBs to the documents of the Russian national system of standardization. With this regard, we will consider them in more detail. The effect of these documents is aimed at minimizing the negative influence of economic subjects on the environment. According to Article 2 of the Law on Standardization, ITRBs contain systematized data in the specific sphere of economic activity and include the descriptions of techniques, processes, methods, means, equipment, and other information connected with production of certain types of goods (works, services). The techniques, processes and other objects, for which ITRBs can be elaborated and adopted, must belong to the category of the "best available technique" (further – BAT). Pursuant to Federal Law No.7-FZ of 10 January 2002 "On Environment Protection"[18]

[18] Federal Law No. 7-FZ of 10 January 2002 "On Environment Protection" (with amendments of 31 December 2017). Collection of Legislation of the Russian Federation. 2002. No. 2. Art. 133; 2018. No. 1 (part 1). Art. 87.

(Art.1), BAT is a technique of producing goods, works, rendering services, defined on the basis of modern scientific and technical achievements and the best possible combination of criteria for the purposes of environment protection, on the assumption of technical possibility of its implementation. To comprehend the essence of the BAT legal category, it is necessary to pay attention to the following. First, this category, as well as ITRB, originated from abroad (in the USA, later in the European Union)[19]. The European concept of BAT implies that the BATs elaborated for various industrial sectors use the ecologically justified means and methods of entrepreneurship (economic) activity; at the same time, the said means and methods must not cause economic damage to the subjects of entrepreneurship. Second, the notion of BAT is related to such a meaning of the word "technology" (from Greek *techne* "art, craft, skill" and *logos* "word") as a set of means and methods of obtaining, processing or treatment of materials, raw materials, half-finished products or products, implemented in various sectors of industry, construction, etc.[20] In other words, technology in terms of BAT is a means of transforming substances, materials, raw materials, half-finished products, etc. into the finished products, or consumer goods. Technology is usually viewed in relation to the specific sector of industry (technology of mining, machine building, construction), or to the methods of obtaining or processing certain materials (technology of metals, fiber substances, cloths, etc.). The result of technology implementation is quality transformation of the processed object. Third, in the Soviet period in our country special attention was paid to the indicators of technical-economic efficiency of technological processes. These included: discharge intensity of raw materials, half-finished products and energy by a product unit; outcome (quantity) and

[19] *See*: Averochkin E.M. Instrumenty ekologicheskogo normirovaniia predpriiatij po proizvodstvu keramicheskikh izdelij (na primere natsional'nykh standartov po nailuchshim dostupnym tekhnologiiam): diss…kand.tekhnich.nauk [Tools of Ecological Rate Setting at Enterprises Producing Ceramics (by the Example of National Standards on the Best Available Techniques): Dissertation …for Candidate of Technical Sciences Degree. Moscow, 2014. p. 14.

[20] The Great Soviet Encyclopedia. Moscow: Soviet Encyclopedia, 1969-1978. // http://encdic.com/enc_sovet/Tehnologija-88739.html (the authors of the article on technology – Vladimirov O.A., Parkhomenko A.A.).

quality of the finished products (goods); labor productivity rate; process intensity; production costs; production price[21]. Under modern conditions, the Russian legislation and practice are developing such an approach under which the technological processes efficiency must be combined with the measures of comprehensive prevention and control of environmental pollution. In other words, the economic subjects must contribute to the reduction of technogenic influence on the environment. The criteria which BAT must comply with are normatively stipulated[22]. Fourth, the term "best" in BAT implies the production technology which is the most effective in achieving a high level of environment protection; the term "available" implies that the choice of technology is based on its financial affordability. Fifth, carriers of information on BAT are ITRBs. At the level of preliminary national standards, the terms and definitions concerning BAT, as well as the format of BAT description and the structure of ITRB are established. Thus, the methodological support of the reference books' elaborators and users must be rendered by national standards[23].

The *general management of the activity* in the sphere of defining techniques as BAT and elaborating ITRBs is carried out by the Russian Standardization Agency. Preparing proposals concerning defining techniques as BAT, as well as ITRB projects, is entrusted to technical working groups, which direct their activities not only according to normative-legal acts, but also "the experience accumulated by the leading experts practicing in the field"[24]. The management of these working groups, as well as the public discussion of the ITRB projects is performed by the Bureau on the Best

[21] Ibid.

[22] Art. 28.1 (clause 4) of Federal Law No.7-FZ of 10 January 2002 "On Environment Protection"; clause 12 of the "Rules for Defining a Technique as the Best Available Technique, and for Elaboration, Actualization and Publishing of the Informational-Technical Reference Books on Best Available Techniques" (adopted by Order No.1458 of the Government of the Russian Federation of 23 December 2014) (with amendments of 28 December 2016). Collection of Legislation of the Russian Federation. 2015. No. 1 (part 2). Art. 253; 2017. No. 2 (part 1). Art. 340.

[23] Guseva T.V., Begak M.V., Molchanova Ya.P. Printsipy sozdaniia i prespektivy primeneniia informatsionno-tekhnicheskikh spravochnikov NDT// Kompetentnost' [Principles of Creating and Prospects for Implementing the Informational-Technical Reference Books for Best Available Techniques //Competence]. 5/126/2015. p. 9.

[24] Ibid. p. 8.

Available Techniques (further – the Bureau), whose functions, in compliance with Order No.707[25] of the Russian Standardization Agency of 11 June 2015, are executed by the Federal State Unitary Enterprise "All-Russian Scientific-Research Institute for Standardization of Materials and Technologies". In general, the process of elaborating a project of ITRB for BAT has a deliberative and public character; the members of a working group have to achieve consensus as for the project of ITRB. At the final stage, after the differences on the ITRB project are settled, the Bureau transmits the ITRB project to the Russian Standardization Agency, which must adopt (within a month after application) and publish it (within ten days after adoption). Actualization of ITRB is performed not less than once in ten years. Besides, the analysis of legislation, special literature and the available experience of ITRB elaboration allow classifying these reference books. Thus, by the level of elaboration, ITRBs can be international, regional and national. Depending on the industry sector to which ITRBs are addressed, the reference books can be classified into "vertical" (sectoral) and "horizontal" (intersectoral) ones. The "vertical" ITRBs are meant to be used in a specific sector or sectors of industry (they are to constitute the main part of the Russian fund of ITRBs); the "horizontal" reference books are open-end, they are addressed to all sectors of industry. Currently, there is a group of heterogeneous legal means intended for promoting the use of ITRB for BAT in the economic functioning of enterprises. These are: comprehensive ecological permissions[26], the technique of referencing to ITRBs in normative-legal acts, a complex of measures aimed at disaffirming the use of obsolete and inefficient technologies and transition to BAT principles[27], and voluntary certification of production for compliance with BAT.

[25] Order No.707 of the Russian Standardization Agency of 11 June 2015 "On Establishing the Organization Implementing the Functions of the Bureau of Best Available Techniques". Bulletin of the Federal Agency on Technical Regulation and Metrology. 2015. No. 7.

[26] Federal Law No.219-FZ of 21 July 2014 "On Amendments to Federal Law "On Environment Protection" and Individual Legislative Acts of the Russian Federation" (with amendments of 28 December 2017). Collection of Legislation of the Russian Federation. 2014. No. 30 (part 1). Art. 4220; 2018. No. 1 (part 1). Art. 6.

[27] Order No. 398-r of the Government of the Russian Federation of 19 March 2014 "On Adopting a Complex of Measures Aimed at Disaffirming the Use of Obsolete and Inefficient Technolo-

Taking the above into account, we assert that ITRBs for BAT are voluntary legal acts, as they are not prescriptive by their character and are not intended for establishing the limiting values of emission or dumping of some substances, etc. Rather, they typify (standardize) the best, from the viewpoint of environment protection, means (methods) of economic activity in a certain sector of industrial production. The contract parties may stipulate in the delivery contract that the production of goods to be delivered shall be performed in compliance with the ITRBs adopted in the sector. This will mean that the production of goods to be delivered under the contract shall be performed with the safest technologies in terms of environment and consumers protection. Evidence of using ITRBs in goods production must be taken into account by the consumer accepting the goods, as well as when assessing the compliance to the quality management system of a producer, when certifying the finished products, and when performing the control-supervision activities. We consider it admissible to use references to ITRBs in technical regulations. This is due to the fact that both the Treaty on the Eurasian Economic Union (signed in Astana on 29 May 2014) (Art. 52)[28] and Federal Law No.184-FZ of 27 December 2002 "On Technical Regulation" (clause 1 of Art. 6)[29] state the following objectives of technical regulations' adoption: environment protection, ensuring energy efficiency and resource saving. Due to the perpetual technological development, the key problems which may arise when elaborating and introducing ITRB for BAT are: methodology of BAT parameters calculation, validity of BAT criteria, and referring the technology to the BAT category.

In conclusion, it should be noted that the current standardization in Russia is still characterized as standardization of a transitional period. One of the main objectives of the Law on Standardization is to distinguish

gies" (with amendments of 29 August 2015). Collection of Legilsation of the Russian Federation. 2014. No. 13. Art. 1494; 2015. No. 36. Art. 5094.

[28] Treaty on the Eurasian Economic Union (signed in Astana on 29 May 2014) (with amendments of 08 May 2015). Official web-site of Eurasian Economic Union http://www.eaeunion.org/, 12 May 2015.

[29] Federal Law No.184-FZ of 27 December 2002 "On Technical Regulation" (with amendments of 29 July 2017). Collection of Legislation of the Russian Federation. 2002. No. 52 (part 1). Art. 5140; 2017. No. 31 (part 1). Art. 4765.

between the spheres of technical regulation and standardization. Technical regulation must cover the issues of state regulation of production safety (as well as the processes connected with production), by using the technical regulations and mechanisms of control over their observance. Standardization must be the sphere of national business activity, providing the production of goods with a high consumer value and preserving the function of supporting a part of documents on standardization in meeting the requirements of technical regulations.

CONTROVERSIAL ASPECTS OF STATE ENVIRONMENTAL CONTROL IN THE SPHERE OF AIR PROTECTION

Ekaterina Yu. Gaevskaya
Associate Professor of Land Law and Environmental Law Department, Ural State Law University, Yekaterinburg, Russia

Legal bases for state environmental control over air protection in the Russian Federation are Federal Act No.7-FZ "On Environmental Protection" of 10 January 2002 (updated 31 December 2017)[1], Federal Act No.96-FZ "On Air Protection" of 4 May 1999 (updated 13 July 2015)[2], the RF Government Decree No.183 "On Emissions into the Air and Harmful Physical Impact" of 2 March 2000 (updated 14 July 2017)[3], and other normative legal acts.

According to Article 27 of Federal Act No.7-FZ "On Environmental Protection", the release of harmful substances into the atmosphere is subject to the permit granted by the government authorities performing state management functions in the sphere of environmental protection (Federal Service for Environmental Supervision and Federal Service for Ecological, Technological and Nuclear Supervision in connection with radioactive substances).

A similar norm is stipulated in para.1 of Article 14 of Federal Act No.96-FZ "On Air Protection": the release of harmful (polluting) substances into the atmosphere by the stationary source is permitted only upon the authorization. So, business entities that perform activities in the territory of the Russian Federation are required to obtain authorization to release harmful (polluting) substances into the atmosphere.

In practice, there is often a question if there are any circumstances for partial suspension of a permit to emissions from all the sources which the

[1] Collection of Legislation of the Russian Federation, 2002, No. 2, Entry 133.
[2] Collection of Legislation of the Russian Federation, 1999, No. 18. Entry 2222.
[3] Collection of Legislation of the Russian Federation, 2000, No. 11. Entry 1180.

enterprise has when it is found out that the quantity of emissions only from several sources is higher than prescribed in the standards, and the said violates the permit.

To answer this question, we should address para.6 of the RF Government Decree No.6 of 2 March 2000. It says that the maximum permitted emissions are set for a given stationary source of harmful (polluting) emissions released in the atmosphere, a legal entity as a whole or its separate industrial areas in view of all the sources of harmful (polluting) emissions.

In the light of the preceding considerations, it seems clear that the standards for maximum permitted release of harmful (polluting) emissions in the atmosphere may be set regarding:

— a given stationary source of harmful (polluting) emissions in the atmosphere and a legal person in general;

— a given stationary source of harmful (polluting) emissions in the atmosphere and separate industrial areas of the legal entity.

A similar legal norm is stipulated in Order No.650 of the RF Ministry of Natural Resources "On Approval of Administrative Regulations of the Federal Service for Environmental Supervision Regulating the Delivery of State Service on the Release of Harmful (Polluting) Emissions in the Air (Excluding Radioactive Substances)" of 25 July 2011 (revised on 25 June 2014)[4]. Para.1.1. states that "the quantity of harmful (polluting) emissions released into the air are set for each separate industrial area (for local territorial unit in accordance with the All-Russian Classifier of Administrative and Territorial Division with generalization concerning economic entity) of individual proprietor or a legal entity that are subject to federal state environmental supervision".

According to para.10 of Administrative Regulations approved by Order No.650 of the RF Ministry of Natural Resources of 25 July 2011 to obtain a permit for emissions the economic entity presents current norms of maximum permitted emissions and temporary approved permissions for

[4] Bulletin of Normative Acts of Federal Executive Bodies. 2012, No. 14 (hereafter Administrative Regulations approved by Order No. 650 of the Ministry of Natural Resources of 25 July 2011).

each stationary source of harmful (polluting) emissions into the atmosphere as well economic entity (including its industrial areas) or separate industrial areas sanctioned in due course to the local authority of the Federal Service for Supervision over Natural Resources.

Also, according to Annex 2 of the Administrative Regulations approved by Order No.650 of the Ministry of Natural Resources of 25 July 2011 setting the Form of the permit for the release of harmful (polluting) emissions in the atmosphere, the permit for the release of harmful (polluting) emissions in the atmosphere contains:

— the list and the quantity of harmful (polluting) substances permitted for the release in the atmosphere by the stationary sources located in the separate industrial areas;

— conditions for the validity of a permit for the release of harmful (polluting) emissions into the atmosphere;

— standards for the release of pollutant emissions in the atmosphere in each separate industrial area;

— standards for the release of pollutant emissions in the atmosphere concerning specific sources and substances.

In terms of the above said it is evident, that economic entities must comply with regulations setting the standards for the release of harmful (polluting) substances in the atmosphere concerning specific sources and substances and the standards for the release of pollutant emissions in each separate industrial area.

Accordingly, the permit for the release of the pollutant emissions must contain a list of specific stationary sources located in specific industrial areas concerning specific sources and substances.

Regarding the possibility to suspend the permit for the emissions, we would like to note the following.

Para.22.2 of the Administrative Regulations approved by Order No.650 of the Ministry of Natural Resources of 25 July 2011 states that that there are certain grounds which allow the local bodies of the Federal Service for Consumer Rights Protection and Human Welfare (*Rospotrebnadzor*) to

start the administrative procedure aimed at suspending the permit for emissions. These include obtaining the information on the results of the state environmental supervision about one of the following facts:

— failure to comply with orders to limit the emissions;

— failure to comply with the plan to reduce emissions in the period of severe weather conditions;

— failure to comply with the terms of the permit for the release of emissions including failure to fulfil in due time the activity plans for reducing the emissions, or failure to achieve the planned efficiency of completed activities.

Paras.22.1-22.6 of the Administrative Regulations approved by Order No.650 of the Ministry of Natural Resources of 25 July 2011 contain no provisions specifying the possibility to suspend the permit for the release of harmful (polluting) emissions in the atmosphere concerning only those sources of emissions where *Rospotrebnadzor* found any violations. Though, nothing is said about the need to suspend the permit for the release of pollutant emissions in the atmosphere concerning all sources of emissions in the economic entity including those where no violations were found. This conclusion is also embodied in court decisions, e.g. in the Decision of the Commercial Court of Khabarovsk Territory in case No.A73-2578/2010 of 13 May 2010.

There are no explanatory provisions of state executive authorities on the above matter.

"Unilateral" approach to interpreting this legal rule consolidated in practice seems not correct. The suspension of the permit to release pollutant emissions in the atmosphere is possible in general and concerning sources, emissions from which exceed the standards for air pollutants. This suspension should be based on an individualized approach and objective factors discovered during a planned check of a certain economic entity.

Besides, there is also a principle of adequacy of charges. Analyzing this principle, we conclude that there is a need to comply with the requirements of proportionality, fairness, adequacy and differentiality of charges

depending upon the severity of the offence, extent and nature of harm caused, and other objective and subjective characteristics that determine individualized sanctions.

In practice, this principle will definitely be violated in the event of suspension of a permit for the emissions from all the sources (1800 sources of emissions) that the enterprise has in case two non-reported sources of emissions were found.

On the basis of this approach, the permit for the emissions has to be suspended each time when the enterprise acquires new sources of emissions that will similarly be considered non-reported for a certain period of time. The said may paralyze business activities of bona fide enterprises-users of natural resources.

One more controversial issue that needs to be addressed is the possibility (non-possibility) of making an order to suspend the emissions concerning only those sources where violations were found during the state environmental supervision.

To answer this question, we should address the RF Government Decree No.847 of 28 November 2002 "On the Order of Limitation, Suspension or Termination of Polluting Emissions in the Atmosphere" (updated 22 April 2009)[5]. It regulates social relations in the sphere of limitation, suspension or termination of polluting emissions in the atmosphere and harmful physical impact on the atmosphere produced without a permit for emissions and harmful physical impact as well as with the violation of conditions provided for by the permit (para.1).

Accordingly, the legal force of the RF Government Decree No.847 of 28 November 2002 extends both to the sources of hazardous emissions provided for by the valid permit and to the sources of hazardous emissions not provided for by the valid permit.

Paras.2 and 3 of the RF Government Decree No.847 of 28 November 2002 stipulate the possibility for the *Rospotrebnadzor's* officials to order the limitation of emissions (para.3) and termination of emissions (para.4).

[5] Collection of Legislation of the Russian Federation, 2002, No. 48 Entry 4807.

Analyzing these legal norms, it becomes clear that the order for limitation, suspension or termination of polluting emissions may be given to the business entity which has a permit for emissions if it was found that there was exceedance of maximum permissible emissions or temporary approved emissions, and maximum permittable limits for harmful physical impact.

Para.4 of the RF Government Decree No.847 of 28 November 2002 names the cases when the order for the suspension of polluting emissions and harmful physical impact can be given to persons that have stationary sources of emissions and harmful physical impact. The order is given in one of the following cases:

1) failure to comply with the order to limit the emissions and harmful physical impact (as the next stage after the order to limit the emissions and the failure of business entities to comply with it in due time);

2) failure to comply with the plan to reduce emissions in the period of severe weather conditions;

3) the absence of permits for emissions and harmful physical impact.

According to para.3 of the RF Government Decree No.847 of 28 November 2002, the order to limit the emissions may be given in connection to the sources where there were violations in the form of the release of harmful (polluting) substances in the atmosphere with exceedance of maximum permissible emissions.

According to para.4 of the RF Government Decree No.847 of 28 November 2002, the order to limit the emissions may be given in connection to the sources that are not named in the permit for emissions or concerning the sources named in the permit which received the order to limit emissions, but the business entity did not fulfill it in due time.

In view of the foregoing, the RF Ministry of Natural Resources and Ecology should pass the interpretative regulation which would answer the discussed questions. The said would allow to reduce the number of legal disputes in this sphere and protect interests of law-abiding enterprises-natural resource users.

RESPONSIBILITY OF CONTROLLING PERSONS IN BANKRUPTCY PROCEEDINGS: SUBSTANTIVE AND PROCEDURAL ASPECTS

Vladimir F. Popondopulo
Professor, Doctor of Law, Head of Commercial Law Department, Saint Petersburg University, Saint Petersburg, Russia

Elena V. Slepchenko
Assistant Professor, Doctor of Law, Head of Entrepreneurial Law Department, Pushkin Leningrad State University, Saint Petersburg, Russia

Abstract
The article considers substantial and procedural innovations of entrepreneurial legislation connected with the responsibility of controlling persons.

Keywords: insolvency, bankruptcy, creditor, debtor, controlling person, responsibility.

I. Federal Law No.127-FZ "On Insolvency (Bankruptcy)"[1] of 26 October 2002 was amended by Federal Law No.266-FZ "On Amendments to the Federal Law "On Insolvency (Bankruptcy) and the RF Code on Administrative Offences"[2] of 29 July 2017. In this respect, the issue of responsibility of controlling persons is of great interest. Para.1 of the Resolution of the Plenum of the RF Supreme Court explains that the subsidiary responsibility of controlling persons is an exclusive mechanism to restore the violated rights of creditors. When applying it, courts should consider the nature of the legal entity's structure that implies property independence of this subject, its independent responsibility, wide discretion of founders (members) and other persons representing bodies of the legal entity in making (coordinating) administrative decisions in the sphere of

[1] Collection of Legislation of the Russian Federation, 2002, No. 43, Entry 4190 (hereafter Bankruptcy Law).

[2] Collection of Legislation of the Russian Federation, 2017, No. 31, Entry 4815.

business, as well as the prohibition to harm other economic actors by abusing legal forms (privileges that are provided by the possibility to conduct business through a legal entity).

Thus, the essence of the civil, administrative and legal responsibility for various wrongful acts during bankruptcy is reduced to restoring unlawful decrease of bankruptcy estate (impaired property interests of the creditors). If wrongful acts in bankruptcy are civil ones, they entail civil-law consequences in the form of subsidiary responsibility of controlling persons and recovery of losses caused by them. These acts are considered administrative offences which are punishable by the administrative fine or disqualification of the corresponding persons (Art.14.12, 14.13 of the RF Code on Administrative Offences). If the actions are considered crimes, then the guilty party will be fined or sentenced to correctional or compulsory work, or arrested, or subjected to restriction or deprivation of liberty (Art.195-197 of the RF Criminal Code).

Federal Law No.266-FZ of 29 July 2017 recognized Article 10 of the Law on Bankruptcy which was not correctly entitled "Responsibility of the Debtor and Other Individuals in a Bankruptcy Case"[3] invalid. The Law introduced new Chapter III.2 "Responsibility of the Debtor's Administrator and Other Individuals in a Bankruptcy Case". This chapter consists of 12 articles which set peculiarities of proceedings on the statements concerning the accountability of controlling persons in a bankruptcy case including the clarified definition of individuals that control the debtor (the said definition is excluded from Article 2 of the Law on Bankruptcy), determination of people that must apply to the Commercial Court to hold controlling persons liable, recognition of grounds and corresponding types of responsibility for these individuals, and some other issues[4].

[3] It must be noted that due to the brevity of norms contained in Art.10 and complexity in proving the offence, the judicial practice on the application of Art.10 of the Law on Bankruptcy is not numerous (See: Yu.O. Reznik, "O privlechenii k subsidiarnoj otvetstvennosti"["On Bringing to Subsidiary Responsibility"] // Arbitrazhnyj upravliaiushchij [Bankruptcy Manager]. 2012, No. 4; V.V. Konopatov, "O privlechenii k subsidiarnoj otvetstvennosti" ["On Bringing to Subsidiary Responsibility"] // Arbitrazhnyj upravliaiushchij [Bankruptcy Manager]. 2011, No. 5).

[4] We can mention that a similar process of developing the bankruptcy legislation was held earlier with the regulation of relations concerning challenging the debtor's transactions in a bankrupt-

Chapter III.2 of the Law on Bankruptcy regulates the proceedings of the Commercial Court concerning the review of applications for civil liability of controlling persons. The chapter defines the notion of controlling persons and the processing of the application to bring them to liability.

A controlling person is a physical person or a legal entity who, in the three-year period prior to accepting the petition for the recognition of the debtor as a bankrupt, had the opportunity to influence the decisions made by the company in one way or another. Namely, they had the right to give instructions binding on the debtor or had the opportunity – by virtue of being in relations of kinship or property with the debtor, by virtue of its official position or otherwise – to determine the actions of the debtor, including making transactions and determining their terms (Article 61.10 of the Law on Bankruptcy).

The Law contains the indicative list of the abilities of a person to define the actions of the debtor: 1) due to family relations with the debtor (head or members of the executive bodies) or due to an official position; 2) due to the authority to execute transactions on behalf of the debtor; 3) due to a special official position (e.g. the chief accountant, the financial director of the debtor or persons who have the right either independently or with the interested persons to dispose of more than 50% of votes at the general meeting of a legal entity's members, or who have the right to appoint (elect) the head of the debtor); 4) by other ways, including coercing the head or members of the executive bodies of the debtor (para. 2 of Article 61.10 of the Law on Bankruptcy).

Conditions for liability of the controlling persons are the fact of the offence, the fact of loss, the fact of a causal link between the offence and the loss, and the guilt of the controlling persons. Until proven otherwise, it

cy case. Article 103 "Challenging the Debtor's Transactions" which was originally enshrined in the Law on Bankruptcy was replaced by Chapter III.1 "Challenging the Debtor's Transactions". Nine articles appeared instead of one. They thoroughly regulate peculiarities of legal proceedings on cases challenging the debtor's transactions in a bankruptcy case. They also name the grounds for challenging the debtor's transactions in a bankruptcy case, persons who can apply to challenge the debtor's transactions, the order of examining such applications, consequences of considering the transaction invalid, statutes of limitation on such disputes resolved in bankruptcy cases, etc.

is assumed that a person was a debtor's controlling person if that person: 1) was the head of the debtor itself, the head of the management company, a member of the executive body of the debtor, the debtor's liquidator, or a member of the liquidation committee; 2) had the right either alone or in conjunction with the interested persons, to dispose of more than 50% of votes at the general meeting of a legal entity's members, or were entitled to appoint (elect) the head of the debtor; 3) gained benefit from the illegal or dishonest behavior of persons mentioned in para.1 of Article 53.1 of the RF Civil Code (persons authorized to act on behalf of the legal entity).

The Commercial Court may admit a person as a controlling one on other grounds in case it is proved that this person had a factual opportunity to guide the debtor's actions even it had the right to dispose of less than 50% of the authorized capital of the legal entity. The person cannot be controlling if such a conclusion is based only on direct possession of less than 10% of the authorized capital of the legal entity and the receipt of regular income arising from it.

Chapter III.2 of the Law on Bankruptcy stipulates specific civil offences which are the grounds for the liability of controlling persons in a bankruptcy case: 1) violation of the duty to submit a petition for recognizing a company as a bankrupt to the Commercial Court (Art.61.12); 2) actions (omissions) by the controlling persons due to which it became impossible to pay the amounts of the creditor in full (Art.61.11); 3) submitting a petition of the debtor to the Commercial Court if they could satisfy the demands of the creditor in full or absence of measures taken by the debtor to contest the unreasonable demands of the applicant or demands of the creditor in a bankruptcy case (Art.61.13).

1. Provisions of Article 61.12 of the Law on Bankruptcy are aligned with Article 9 of the Law on Bankruptcy which obliges the head of the debtor, in case it is found that there are any signs of the debtor's insolvency or the assets of the debtor are insufficient to satisfy the demands of the creditors in full, to submit a petition of the debtor to the Commercial Court. Failure to submit a petition of a debtor to the Commercial Court (convening a

meeting for making a decision about application to the Commercial Court with the petition of a debtor or making such a decision) in cases and time provided for in Article 9 of the Law on Bankruptcy entails subsidiary responsibility of persons who due to the Law on Bankruptcy are obliged to convene the meeting to make the said decision about submitting the petition of a debtor to the Commercial Court or to make such a decision, or submit the said petition to the Commercial Court.

When the said obligation is violated by several persons, they bear subsidiary liability.

The extent for liability of the said persons is determined by the amount of liabilities of the debtor (including compulsory payments) incurred after expiration of terms provided for by Article 9 of the Law on Bankruptcy and prior to the institution of bankruptcy proceedings (return of the authorized body's application on recognizing the debtor bankrupt).

The burden is on the liable person(s) to prove the absence of the causal link between the inability to satisfy the demands of the creditor and violation of the obligation provided for by para.1 of Article 61.12 of the Law on Bankruptcy.

The amount of liability does not include obligations prior to which the bankruptcy creditor knew or had to know about the grounds for an obligation provided for by Article 9 of the Law on Bankruptcy excluding claims to make obligatory payments and claims arising from agreements which the counter agent of the debtor was obliged to conclude.

2. Article 61.11 of the Law on Bankruptcy regulates the conditions for subsidiary liability of the controlling persons on the debtor's obligations if it is impossible to satisfy the claims of the creditors in full due to actions and (or) omissions to act of the controlling person. It also defines the amount of subsidiary liability of the controlling person.

Para.2 of the said Article lists all possible wrongful acts (omissions to act) of controlling persons which are the grounds for subsidiary liability of the controlling persons on the debtor's obligations; paras.3-7 name the controlling persons and those provisions which are applied to them.

There is also a presumption assuming that until the controlling person proves otherwise, full payment of the creditors' claims is impossible due to actions (omissions to act) of the controlling person if there is any of the circumstances provided for by para.2 of Article 61.11, i.e.

— harm has been caused to property rights of creditors as a result of actions by this person or for the benefit of the person or the approval by this person of one or several transactions of the debtor (carrying out such transactions by the order of this person), including transactions referred to in Articles 61.2 and 61.3 of the Law on Bankruptcy;

— accounting and reporting documents at the time of the decision on the introduction of monitoring or the decision to declare the debtor as a bankrupt are missing or do not contain information about the objects provided for by the Russian legislation, or this information is distorted, resulting in significantly hampered procedures used in case of bankruptcy, including the formation and implementation of the bankruptcy estate;

— claims of third priority creditors for the principal amount of debt incurred as a result of offenses for which there is a valid decision to bring the debtor or its officers, who are or were its sole executive body, to the criminal or administrative responsibility or liability for tax offenses, including requirements to pay the debt, revealed as a result of proceedings on such violations, exceed 50% of the total amount of the claims of third priority creditors for the principal amount of the debt included in the register of creditors' claims as of the closing date of the register of creditors' claims;

— documents storing of which was obligatory according to the RF legislation on joint stock companies, the securities market, investment funds, limited liability companies, and on state and municipal unitary enterprises and according to the normative legal acts accepted in compliance with such at the time of the decision on the introduction of monitoring (or appointment of temporary administration of a financial organization) are missing or distorted;

— on the date of the bankruptcy proceedings, no data about the legal entity which had to be registered in accordance with the federal law was

lodged, or the registered data about the legal entity appeared invalid. The said information should be fixed in the Unified State Register of Legal Entities on the basis of documents produced by the legal entity. The same concerns the information on actions of legal entities (including those that must be brought by a legal entity) that must be lodged in the Unified Federal Register.

If it is impossible to satisfy the claims of the creditors in full due to actions (omissions to act) of several controlling persons, they are held jointly liable.

The Commercial Court has the right to reduce the amount or exempt a person from subsidiary liability if this person proves that while performing the functions of executive bodies or the founder (member) of the legal entity he did not produce sufficient influence upon the activity of the legal entity (was the nominal administrator) and if due to this information the real controlling persons were established, including the one mentioned in subparagraphs 2 and 3 of para.2 of Article 61.10 of the Law on Bankruptcy; or the hidden property of the debtor or of the controlling person was found.

The controlling person due to whose actions (omissions to act) it became impossible to satisfy the claims of the creditors in full does not bear subsidiary liability if he proves that impossibility to satisfy the claims of the creditor occurred not to his fault. This person is not subsidiary liable if he acted within the limits of ordinary conditions of the civil turnover, faithfully and reasonably in the interests of the debtor, its founders (members) without violation of the creditors' property rights. The controlling person must also prove that his actions were performed to prevent greater harm to the creditors' interests.

The amount of subsidiary liability is equal to the cumulative amount of the creditors' claims included in the register and asserted after the date of closing the register of bankruptcy debts and the claims of the creditors on the current payments were not satisfied due to the insufficiency of the debtor's property (para.11 of Article 61.11 of the Law on Bankruptcy).

The amount of the controlling person's liability should be reduced if the latter proves that the amount of harm caused to the property rights of the creditor due to this person is considerably less than the amount of the claims which must be paid at the expense of this controlling person.

The amount of the controlling person's subsidiary liability does not include claims belonging to this person or interested persons. Such claims are paid from the resources recovered from the controlling person.

To satisfy the demands of the creditors, para.12 of Article 61.11 of the Law on Bankruptcy states that the controlling person bears subsidiary liability according to the rules set forth in Art.61.11 of the Law of Bankruptcy as well as in the case if:

— impossibility to satisfy the claims of the creditors occurred due to actions (omissions to act) of the controlling person, but the proceedings on the bankruptcy case were closed for lack of money to pay the legal costs for performing the procedures used in a bankruptcy case, or the application of recognizing the debtor insolvent was returned by the competent authority;

— the debtor began to fall under the definition of insolvency not due to actions and/or omissions to act of the controlling person but after that the latter performed actions (omitted to act) that significantly worsened the financial position of the debtor;

Article 61.11 of the Law on Bankruptcy provides for civil-law consequences of the offence expressed through causing to become bankrupt: if the debtor was recognized bankrupt due to actions (omissions to act) of the controlling persons, these persons are subsidiary liable for the debtor's obligations in the event that the debtor's assets are insufficient (Art.399 of the RF Civil Code).

The obliged persons may be subject to administrative or criminal liability if it is found out that the actions (omissions to act) of the controlling person contain elements of intentional bankruptcy (Art.14.12 of the RF Code of the Administrative Offences, Art.196 of the RF Criminal Code).

3. Article 61.13 of the Law on Bankruptcy prescribes civil-law sanctions for violating the provisions of the Law on Bankruptcy by the controlling persons and the debtor-citizen, namely for the loss suffered by the creditors.

Para.2 of this Article prescribes civil-law liability of the controlling persons to the creditors for the loss suffered due to the proceedings on the bankruptcy case or unreasonable admission (non-contestation) of the creditors' claims (producing the impression of bankruptcy). The offence may, inter alia, take the form of concealment the debtor's property from the seizure or refusal to contest the unreasonable claims of the claimant by prior agreement of the debtor and the claimant. Creditors' loss in these cases may be, inter alia, expressed in the creditors' expenses due to the suspended execution of the enforcement documents within the enforcement proceedings (Art.63 of the Law on Bankruptcy).

Rules of para.2 of the discussed Article are applied also in the event when the debtor did not contest the unreasonable claims of the creditors filed prior or after initiating the bankruptcy proceedings, outside the bankruptcy proceedings.

If the said actions (omissions) of the debtor have signs of fraudulent bankruptcy, then the obliged persons are subject to administrative or criminal liability (Art.14.12 of the RF Code on the Administrative Offences, Art.197 of the RF Criminal Code).

The order of detecting the signs of fraudulent or premeditated bankruptcy or other wrongful actions during bankruptcy is defined by the federal standards drafted by the national association of self-regulating organization of bankruptcy administrators and approved by the regulatory authority – the RF Ministry of Economic Development (paras.9, 12 of Art.26.1, para.4 of Art.29 of the Law on Bankruptcy). Chapter III of the Law on Bankruptcy states that bankruptcy administrators conducting bankruptcy procedures are obliged to detect the said administrative offence and crimes as well as circumstances liability for which are provided for by the chapter[5]. Having detected these signs, the bankruptcy

[5] Ob utverzhdenii Vremennykh pravil proverki arbitrazhnym upravliaiushchim nalichiia priznakov fiktivnogo i prednamerennogo bankrotstva [On Adoption of Temporary Rules to Verify

administrator informs persons participating in bankruptcy proceedings, meeting of the creditors, self-regulating organization of which bankruptcy administrator is a member, and authorities competent for initiating the administrative proceedings and reviewing crime reports (para.2 of Art.20.3 of the Law on Bankruptcy).

II. Proceedings on requests to bring charges against the controlling person in a bankruptcy case have the following specific features.

First, the Law on Bankruptcy defines persons who have the right to apply to the Commercial Court (Art.61.14). Depending upon the grounds for liability these are: the bankruptcy administrator, bankruptcy creditors, a representative of the debtor's employees, employees or former employees of the debtor who the debtor owes to, or the competent authorities.

The limitation period for bringing charges against the controlling person is 3 years. It begins from the date when the applicant learned or should have learned about the relevant grounds for subsidiary liability but not later than 3 years from the date of recognizing the debtor bankrupt (dismissal of the bankruptcy proceedings or return of the application on recognizing the debtor bankrupt to the authorized body), and not later than 10 years from the date of actions (omissions) which serve as grounds for liability.

Second, applications are usually considered by the Commercial Court within the framework of the debtor's bankruptcy case (Art.61.19 of the Law on Bankruptcy). Applications to recognize the controlling persons subsidiary liable are considered outside the bankruptcy case if after the bankruptcy procedure or closure of bankruptcy proceedings the claim of a person having the right to apply is not satisfied in full. The application submitted outside the bankruptcy case is considered by the Commercial Court that tried the bankruptcy case according to the rules of the RF Code of the Administrative Procedure regarding the provisions of Art.61.19 of the Law on Bankruptcy.

the Signs of Fraudulent or Premediated Bankruptcy by the Bankruptcy Administrator]. Ruling No. 855 of the RF Government of 27 December 2004 //Collection of the RF Legislation. 2004, No. 52. Entry 5519.

Third, a person against which the applicant filed a claim for liability has rights and obligations of a person that participates in the bankruptcy case, i.e. procedural rights and obligations connected with the review of the said claims, including the right to appeal against the judicial acts adopted on the results of the claim review (Art.61.15 of the Law on Bankruptcy).

Fourth, while preparing the subsidiary liability claim for the court proceedings, a preliminary court hearing is held. There the court examines the grounds for subsidiary liability; checks whether the person is a controlling one and bankruptcy procedures were initiated against him; considers the application on interim measures of protection and other matters necessary for considering the application on recognizing controlling persons subsidiary liable on the grounds provided for by Chapter III of the Law on Bankruptcy.

Thus, if bankruptcy proceedings were initiated against the liable person, then the question about accountability measures cannot be considered within the bankruptcy case (para.6 of Art.61.16 of the Law on Bankruptcy). But the persons participating in the case of bankruptcy of the controlling person can take part in the bankruptcy case which considers the question about subsidiary liability as third persons on the part of the person who faces subsidiary liability. The bankruptcy administrator in the bankruptcy case where the question on subsidiary liability is considered must on behalf of the debtor present a claim to include the creditor's demand in the register in a case of a controlling person bankruptcy. The claim should be based on the application of subsidiary liability.

Fifth, on results of considering the application to bring the controlling persons to subsidiary liability the court issues a ruling on bringing a person to subsidiary liability which contains the amount of the recoveries to be made from a person brought to subsidiary liability with regard to the way which creditors want to dispose of the right to claim provided for by Art.61.17 of the Law on Bankruptcy; or the ruling to refuse from bringing a person to subsidiary liability.

Para.2 of Art.61.17 of the Law on Bankruptcy provides that each creditor in whose interests a person is brought to liability has the right to send the application to the bankruptcy administrator. This application concerns the choice of way to dispose of the right to demand subsidiary liability: 1) recovery of the debt on the claim within the limits of the procedure used in a bankruptcy case; 2) selling of this claim according to the rules of para.2 of Art.140 of the Law on Bankruptcy; 3) assigning part of the claim to a creditor in the amount of creditor's claim. The creditor who has not sent the application in due time is considered to have chosen the way provided for by subparagraph 2, para.2 of Art.61.17 of the Law on Bankruptcy (selling the claim according to the rules of para.2 of Art.140 of the Law on Bankruptcy).

The bankruptcy administrator makes a report containing the results of the creditors' choice to dispose of the right to claim liability to the Commercial Court. The report should contain the information about the choice of each creditor, amount and priority to pay the debts. On the basis of the bankruptcy administrator's report, the Commercial Court beyond the expiry of the date for appeal or after the Court of Appeal has passed the ruling of subsidiary liability takes actions necessary to execute the claim of creditors to bring the controlling persons liable (changes the judgment creditors, issues the execution orders).

The provisions of Art.61.17 of the Law on Bankruptcy are not applied to bankruptcy cases which peculiarities are regulated by paras.4, 4.1 and 7 of Chapter IX of the Law on Bankruptcy. It is about bankruptcy of financial organizations, including credit organizations, and real estate developers. The said is explained by a great number of creditors in such bankruptcy cases. In such cases, the amounts on claims for liability are to be paid within the bankruptcy case or the rights to claim are realized according to Art.140 of the Law on Bankruptcy.

Sixth, the Law on Bankruptcy provides for a possibility to conclude a mediation agreement while reviewing the application for bringing a person to liability (Art.61.2 of the Law on Bankruptcy). Such an agreement may be

approved by the Commercial Court: a) if all the persons on the part of one who applied agreed with the application unanimously; b) if the defendant disclosed the information about the assets enough to fulfill the agreement; c) with respect to all persons on the part of one who applied and on the part of the person being brought to liability.

Seven, Article 61.22 regulates the requirements to disclose information on bringing the controlling persons to liability. These include information which must be included in the Unified Federal Register of Bankruptcy Information and requirements about the content of the information. The provisions of this article are special in relation to provisions of Art.28 of the Law on Bankruptcy that regulates the order of disclosing information provided for in the Law on Bankruptcy.

RECOVERY OF DAMAGES AS A RESULT OF MALA FIDE ACTIONS OF THE BANKRUPTCY MANAGER

Vladimir S. Belykh
Professor, Doctor of Law, Head of Entrepreneurial Law Department, Ural State Law University, Yekaterinburg, Russia

Abstract
The article focuses on controversial issues of recovery of damages resulting from *mala fide* actions on behalf of the bankruptcy manager. The author gives an example from economic practice and analyzes conditions for civil liability of the bankruptcy manager for the damage inflicted to the supplier in case of bankruptcy. The author makes conclusions and gives some recommendations.

Keywords: debtor's insolvency, bankruptcy creditor(s), debtor, *mala fide* actions of the bankruptcy manager, damages, grounds and conditions for liability

The situation

The supplier was shipping raw materials to the debtor during the procedure of administration in bankruptcy on the condition of 100% advanced payment. The raw materials were bought by the debtor to produce calcium carbide – one of the debtor's main productions in the course of ordinary economic activity. The debtor received its full consideration and did not make any claims concerning the quality of raw materials and/or the price.

Commercial courts found transactions concerning advanced payment for raw materials against the suit of the newly appointed bankruptcy manager invalid as they violated the order of satisfying claims of current priority creditors (Art.61.3 of Federal Law No.127-FZ[1] "On Insolvency (Bankruptcy)" of 26 October 2002 and p.13 of Decision No.63[2] of the Plenum of the Supreme Commercial Court of the Russian Federation on 23 December 2010). Finding such transactions invalid, commercial courts grounded their decisions on the fact that the supplier received a letter from

[1] SPS KonsultantPlus. Further – Law on Bankruptcy.
[2] Further – Decision of the RF SCC No.63 dated 23 October 2010 (rev.on 30 July 2013).

one of the current creditors which warned that the bankruptcy manager transferred money to the supplier violating the line of priority creditors and did not return the advanced payment to the debtor but supplied goods to the amount of advanced payment. It means that the supplier ignored such a warning and therefore it is the supplier who bears the burden of property losses.

The actions by the bankruptcy manager caused damage to the supplier in the form of the delivered pre-paid goods which after the supplier returned the paid sums to the debtor appeared to be unpaid and used (consumed) in the course of economic activity of the debtor.

It should be noted that the damage was caused by the failure on behalf of the bankruptcy manager to fulfill his obligations who had conducted transactions which were later found illegal. The improper performance of functions by the bankruptcy manager is confirmed by the effective decisions of courts which found transactions made by the bankruptcy manager invalid.

First, since the goods were delivered on the condition of advanced payment, it was the actions of the bankruptcy manager which caused damage to the supplier. Thus, making advanced payment in accordance with the provisions of the contract in violation of Art.134 of the Law on Bankruptcy, the bankruptcy manager created obligations for the supplier to deliver the goods against the advanced payment. The law *does not stipulate a right* for the supplier *to refuse* from the goods and return the money after the buyer made advanced payment. After receiving the advanced payment, the obligation of the plaintiff to deliver the goods derives from the contract as well as from current civil legislation: Art.309, 310, 457, and p.3 of Art.487 of the RF Civil Code. Besides, the current legislation establishes certain consequences for non-performance of obligations to deliver the goods: for example, the right of the buyer to accrue interest pursuant to Art.487 of the RF Civil Code as well as the right of the buyer to refuse to perform the contract (Art.523 of the RF Civil Code) and the right of the buyer to recover damages caused by the supplier in such a manner (Art.524 of the RF Civil Code).

Consequently, having received the advanced payment from the buyer (on whose behalf the plaintiff was acting as the bankruptcy manager), the supplier **cannot** refuse to deliver the pre-paid goods on legal grounds.

Secondly, the above mentioned *creditor* was sending notices to all suppliers on violations committed by the bankruptcy manager while making payments to the creditors and on threats to go to court about which the bankruptcy manager knew prior to the conclusion of the challenged transactions. However, the bankruptcy manager did not take any actions to settle disputes with creditors or to go to court with the request to agree upon the derogation from the provisions of Art.134 of the Law on Bankruptcy while making payments.

Thirdly, if the bankruptcy manager had acted with due care and prudence required and had settled payments with the creditors by the money paid in advance to the supplier, damages would not have occurred because the non-prepaid goods would not have been delivered by the supplier. Such non-delivery would not have been considered a breach of the contract on his part. On the other hand, if the bankruptcy manager had gone to the commercial court with the request to permit derogation from the priority line provided for by Art.134 of the Law on Bankruptcy, should the court have satisfied the claims of the bankruptcy manager, the transactions would not have been contested; if the court had refused to satisfy the claims, damages would not have occurred because the non-prepaid goods would not have been shipped by the supplier.

Though the claims of the supplier were included into the register of current fourth-priority creditors and damages were caused, the decisions of the courts established insufficient property to settle payments with current third-priority creditors.

Legal analysis

1. First of all, let us emphasize that the legal definition of damages is stipulated in Article 15 of the Civil Code of the Russian Federation (further – the RF CC). *Damages* are losses of a person whose right has been infringed incurred or to be incurred to restore the infringed right,

or a loss or damage to such a person's property (actual damage) as well as loss of profits which otherwise the person would have received in the ordinary business course if his right had not been infringed (the loss of profit).

Depending on the character of consequences, damages are classified as: actual damage and the loss of profit. *Actual damage* is the decrease of property which was in the possession of the aggrieved party. For example, if the buyers themselves should eliminate faulty elements in the delivered goods, it will increase the total amount of costs in the production of goods. When determining the amount of costs to eliminate defects, the actual damage includes production costs, variable costs for the maintenance of equipment, the cost of the used materials. Real damage also includes expenses by the aggrieved party. Should the faulty goods be returned, the costs include: the cost of the goods delivery from the warehouse to the place of shipment; the cost of the goods shipment; the total amount of payments and collections paid to the carrier when sending the goods; costs associated with the goods expertise to check their improper quality. In other words, **actual damage** is not only the loss of or damage to the property but actual expenses already borne or to be borne by the person to restore the infringed rights[3]. In its turn, **the loss of profit** is the amount of expected but not received profits which the person would have received during the ordinary business course if the debtor (harm-doer) would not have infringed the right of the creditor (the aggrieved party). A distinctive feature of the lost profit is the very wording 'during the ordinary business course.'

S.P.Zhuchenko says, "losses should be considered exclusively as actual ones causing negative consequences for the property sphere of the person"[4]. Losses are negative consequences!

[3] See: Belykh V.S. Pravovoe regulirovanie predprinimatel'skoj deiatel'nosti v Rossii: monografiia [Legal regulation of Entrepreneurial Activity in Russia: Monograph]. Moscow, 2008. P. 386.

[4] See: Zashchita grazhdanskikh prav: izbrannye aspekty: sbornik statej [The Protection of Civil Rights: Specific Aspects: Collection of Articles] /Y.N. Alferova, Y.V. Bajgusheva, Y.V. Vinichenko, etc.; head of the authors' team and editor-in-chief M.A. Rozhkova. Moscow, 2017.

The court practice also recognizes that losses are negative consequences in the property sphere of the aggrieved party, infringing the party's property interest[5], caused by unlawful actions.

Providing the definition and types of losses, Article 15 of the RF CC is silent on the mechanism (order) of recovering damages. At the same time, it is the very order of recovering damages that is still topical and causes different controversies in practice. In its Judgment No.309-ES15-10298 in case No.A50-17401/2014 on 15 December 2015 the RF Supreme Court states that such a measure of civil liability as recovery of damages can be applied if the following cumulative conditions are proved: unlawful actions by the harm-doer, causation between the actions and damages caused, *the existence of damages and their amount*. A similar position is expressed by the RF Supreme Court in its Judgment No. A40-14800/2014 in case No. 305-ES15-4533 on 7 December 2015 (Chamber for Commercial Disputes); in its Judgment No.A19-1917/2013 in case No. 305-ES14-6992 on 28 April 2015 (Chamber for Commercial Disputes); in its Judgment No. A19-1917/2013 in case No. 302-ES14-735 on 29 January 2015.

In other words, the existence of damages is one of the conditions for recovery of damages (as a universal measure of civil liability). In this connection, it is necessary to determine in advance whether it is possible to classify any negative property consequences for the organization (company) as damages.

Unfortunately, the law does not contain the legal definition of 'loss of property', making it necessary to refer to other sources.

For example, in its appellate decision in case No.33-1008/2016 on 3 February 2016, the Perm Krai Court concluded that loss of property is understood as the deprivation of the right to possess, use, and dispose of property (a similar position is expressed by the Commercial Court of the

[5] See: Decision No.F09-8361/14 of the Commercial Court of the Ural Okrug of 11 December 2014 in case No.A07-1270/2014; Decision No.F09-7206/14 of the Commercial Court of the Ural Okrug of 8 December 2014 in case No.A07-3268/2014; Decision No.F09-7675/14 of the Commercial Court of the Ural Okrug of 5 December 2014 in case No.A60-48725/2013).

Ural Okrug in its Judgment No.F09-9613/14 in case No.A60-2476/2014 on 27 January 2017).

As we see, such consequences as 'loss of property' should be construed liberally: *on the one hand*, loss of property may acquire its physical character (e.g. the physical loss of a property unit, its use or consumption, etc.); *on the other hand*, we can speak about 'legal loss' of property (e.g. when the property right to the unit without equal consideration is handed over to another person from whom it is not possible to obtain it back).

As a result, the reduced amount of property of a legal entity in case of absence of equal consideration to it gives grounds to conclude that the aggrieved party has suffered from actual damage. *Consequently, the losses borne by the aggrieved party are nothing but property losses.*

The analysis of the above said situation shows that the supplier: **a)** entered with the debtor into the contract of supply; **b)** received from the debtor advanced payment to perform the contract; **c)** supplied to the debtor the goods which were later used (consumed); **d)** after transactions to make payments against the contract of supply had been contested in court in bankruptcy proceedings, complied with the decision of the court and returned to the debtor all advanced payments received. **Thus**, the supplier provided the debtor with raw materials for further processing. The contract of supply was properly performed by the parties, and till present the contract has not been found invalid (or non-concluded). Therefore, the supplier does not have any grounds to make claims to the debtor both concerning the return of the goods and the compensation of the total value of the goods (taking into account the fact that the debtor used the goods).

Pursuant to p.1 of Article 223 of the RF CC, the right of ownership with the buyer under the contract occurs since the moment the property is transferred unless the law or the contract states otherwise. Article 223 of the RF CC, and namely p.1, stipulates that the right of ownership is ceased when the owner assigns its property to third parties, when the owner refuses from its ownership right, in case of loss or destruction of

property, or when the owner loses its ownership right in the cases provided for by the law. Consequently, having entered into the contract of supply and having received advanced payment under the contract and having transferred the goods to the debtor which was later used, the supplier completely lost its ownership right to the goods (in other words, the supplier ceased to be able to possess, use or dispose of the goods).

The most important thing is that after contesting the transactions to make advanced payment to *Holding*, it had to return the money received under the contract of supply and acquire the status of the creditor of the fourth priority in current payments (requirements to maintenance charges, utility charges, payments against energy supply agreements and other similar payments).

2. By virtue of p.1 - 2 of Article 5 of the Law on Bankruptcy, *current payments* in case of bankruptcy are, in particular, mandatory payments after the debtor is found bankrupt (p.7 of "Judicial Review of the Questions Connected with Participation of Authorized Bodies in Cases of Bankruptcy and Applicable Bankruptcy Procedures" (approved by the Presidium of the RF Supreme Court on 20 December 2016).

Despite the fact that creditors' claims against current payments are satisfied before the creditors whose claims are made before accepting the application to find the debtor bankrupt, such claims also are to be satisfied in the priority order established by law (p.1, 2 of Art.134 of the Law on Bankruptcy). **Consequently**, before lower priority creditors' claims are satisfied, higher priority creditors against current payments will not be able to get their claims satisfied. Though formally the supplier has received the status of the creditor against current payments in the fourth priority, as a practical matter it cannot be viewed as equal to the cost of goods delivered by the supplier to the debtor.

From the above, we can make the conclusion that the supplier under no circumstances will be able to get from the debtor the money recovered from the supplier while contesting payments. It means that the supplier

has completely lost its former property and as a result the supplier has suffered *negative property consequences which make up its losses*.

Should the debtor consume the goods delivered to it on the conditions of advanced payment, and the money for the goods delivered was then returned to the debtor on the basis of a judicial writ, the supplier is deprived of a possibility to receive it back, thus causing negative consequences in the form of actual losses (the loss of property).

Pursuant to p.8 of Decision No.62 of the Plenum of the RF Supreme Commercial Court dated 30 July 2013 "On Some Matters of Recovering Damages by Persons Included in the Composition of a Legal Entity", satisfaction of the claim to recover damages from the director does not depend on whether there was a possibility to recover damages of a legal entity by any other remedies to protect their civil rights, for example, by means of enforcing implications of an invalidated transaction, reclaiming property of a legal entity from unlawful possession, collecting unjustifiable enrichment, and also whether the transaction which inflicted damage to a legal entity was found invalid (as follows from p.12 of Decision No.62 of the Plenum of the RF Supreme Commercial Court dated 30 July 2013 the said clarification is also applied in case of recovery of debts from bankruptcy managers).

Therefore, if unreasonable or *mala fide* actions of the bankruptcy manager *per se* make up an essential element of damages (which caused material losses for the creditor against current payments), any other possibility in future to eliminate negative implications (for example, to satisfy the claims of the creditor against current payments within the bankruptcy procedure) shall not be a sufficient ground to relieve the bankruptcy manager from liability.

Such a conclusion is confirmed by Ruling of the RF Supreme Court of 4 July 2016 in case No. 303-ES16-1164(1, 2), A24-2528/2012. Commenting this judicial decision, Kukin A.V. and Pleshanova O.P. state that "courts refer to p.8 of Ruling No.62 which concerns cases when a legal entity has already recovered its material damages by means of other

remedies. Courts have different approaches to two non-fulfilled judicial acts: on recovering unjust enrichment from a legal entity which received payment, and on recovery of material damage from the executive director of the debtor convicted of embezzlement. The Supreme Court directly stated that p.8 of Ruling No.62 shall be applied in this case"[6].

Para.3 of the "Review of the Judicial Practice of the Supreme Court of the Russian Federation No.3 (2016)" (est. by the Presidium of the RF Supreme Court on 19 October 2016) also clarifies that *a bankruptcy manager may face civil liability in the form of recovery of damages* due to misconduct of the bankruptcy manager regardless of whether there are claims to recover damages caused to other persons.

Thus, the recognition of the supplier's status as the creditor's status against current payments in the fourth priority does not exclude the possibility to classify its material losses as a result of unreasonable and *mala fide* actions of the bankruptcy manager as losses.

3. Para.4 of Article 20.3 of the Law on Bankruptcy stipulates that the bankruptcy manager shall act reasonably and scrupulously in the interests of the debtor, creditor and society when undertaking actions in bankruptcy cases. In its turn, para.4 of Article 20.4 of the Law on Bankruptcy states a similar rule that the bankruptcy manager shall recover to the debtor, creditor or other persons losses caused by non-performance or improper performance of obligations by the bankruptcy manager in the case of bankruptcy and the fact of the losses caused is confirmed by the effective decision of the court.

At the same time, we should address paras.1, 12 of Ruling No.62 of the Plenum of the RF Supreme Court of 30 July 2013 which say that *the bankruptcy manager shall act in the interests of a legal entity scrupulously and reasonably* (p.3 of Article 53 of the RF Civil Code); should this

[6] See: Kukin A.V., Pleshanova O.P. Standarty otvetstvennosti konkursnogo upravliaiushchego. Kommentarij k OpredeleniiamSudebnoj kollegii po ekonomicheskim sporam VS RF [Standards of Liability of the Bankruptcy Administrator. Comments to Rulings of the Judicial Chamber for Economic Disputes of the RF Supreme Court] of 4 July 2016 No.303-ES16-1164 (1, 2), of 29 July 2016 No.309-ES15-18344 // Vestnik ekonomicheskogo pravosudiia Rossijskoj Federatsii [Bulletin of Economic Justice of the Russian Federation]. 2016. No. 10.

obligation be violated by the bankruptcy manager, he must cover losses borne by a person who is entitled by law to make a relevant claim.

Para.4 of Article 20.4 of the Law on Bankruptcy, the bankruptcy manager bears civil liability; therefore damages shall be recovered under the provisions of Article 15 of the RF Civil Code (Ruling of the RF Supreme Court of 29 July 2016 in case No. 309-ES15-18344, A60-13467/2004).

Consequently, to recover damages from the bankruptcy manager, it is necessary to prove: 1) unlawful conduct (by unreasonable and *mala fide* actions); 2) the existence of the losses borne; 3) causation between the conduct of the bankruptcy manager and the negative consequences for the debtor and/ or creditors.

Para.2 of Article 1064 of the RF Civil Code contains presumption of guilt on behalf of the party inflicting damage as general grounds for liability for losses. Within the meaning of this Article, the obligation to prove lack of guilt lies on the person whose actions have caused losses (in our case, such a person is the bankruptcy manager). Analyzing the lawfulness of the actions of the bankruptcy manager, it is necessary to consider whether this or that action was or should have been undertaken within the competence of the bankruptcy manager in the course of ordinary business activity, taking into account the scale of activities of a legal entity, the character of the relevant act and so on (p.3, 12 of Ruling No.62 of the Plenum of the RF Supreme Court of 30 July 2013, Ruling of the FR Supreme Court of 29 July 2016 in case No.309-ES15-18344, A60-13467/2004).

Pursuant to p.1 of Article 129 of the Law on Bankruptcy, since the date of appointing the bankruptcy manager till the date of dismissing the bankruptcy case, or concluding an amicable agreement, or discharging the bankruptcy manager, *he performs the functions of the head of the debtor and other managing bodies of the debtor*, as well as the owner of the property of the debtor – a unitary enterprise, within the limits, in the order and on the conditions established by the current Federal Law. Within the meaning of p.1 of Article 53 of the RF Civil Code, a legal entity acquires civil rights and assumes civil obligations through its bodies acting in full

compliance with law, other legal acts and constituent documents. Pursuant to p.3 of Article 53 of the RF Civil Code, a person entitled to act on its behalf by virtue of law, any other legal act or a constituent document shall act in the interests of a legal entity which such a person represents reasonably and scrupulously.

Making a decision to continue the production of the goods delivered in the course of ordinary business activity, the bankruptcy manager must have taken into account the fact that the purpose of bankruptcy proceedings is to undertake consistent actions to form bankruptcy assets and further sell them to pay to the creditors. Therefore, in this procedure, the time during which production activities of the debtor can be preserved should correlate with the time necessary and sufficient for performance of the said procedures to determine and sell the property by an efficient bankruptcy manager (see: p.18 of the "Review of the Judicial Practice of the Matters with Participation of Authorized Bodies in Cases of Bankruptcy and of Applied Procedures" (est. by the Presidium of the RF Supreme Court on 20 December 2016).

Consequently, having assumed the powers of the debtor's head, the bankruptcy manager before making a decision to continue the production activities of the debtor and entering into a contract of delivery should have: *first of all*, estimated the financial state of the organization; *secondly*, determined the period of time necessary and sufficient for taking actions to form bankruptcy assets and further sell them to pay to the creditors; *thirdly*, determined the period of time during which production activities of the debtor should be preserved in this procedure; *fourthly*, analyzed and compared the information received as a result of previous actions.

If after the preliminary work done, the bankruptcy manager comes to the conclusion that the contract of supply is necessary, he should take into account the information gathered while concluding such a contract so that the terms and conditions of such a contract shall meet the interests of the debtor, creditor and the party. Instead of that, the bankruptcy manager knowing the financial situation of the debtor and being aware of the fact

that the bankruptcy creditor was sending claims to the suppliers to return the money received under the contracts continued to increase the amount of debts against current payments by buying raw materials on the conditions of pre-payment.

The bankruptcy manager fully understands that under such circumstances: **1)** the supplier is entitled not to fulfill its obligations till the pre-payment by the buyer (p.2 of Article 328, p.2 of Article 487 of the RF Civil Code); **2)** the buyer does not have the right to make the seller fulfill its obligations before fulfilling its obligation to make pre-payment (p.3 of Article 328 of the RF Civil Code, p.2 of Article 487 of the RF Civil Code); **3)** after receiving the buyer's pre-payment, the seller has the obligation to claim the transfer of the goods paid for (p.3 of Article 487 of the RF Civil Code); **4)** if after receiving the buyer's pre-payment, the seller does not fulfill its obligation to deliver goods, the buyer acquires the right to insist on the payment of interest in accordance with Article 395 of the RF Civil Code (p.4 of Article 487 of the RF Civil Code); **5)** if after receiving the buyer's pre-payment, the seller does not fulfill its obligation to deliver goods, the buyer acquires the right to insist on recovery of losses caused by the termination of the contract (p.1 of Article 393, p.5 of Article 453, p.1 of Article 463 of the RF Civil Code).

Thus, after entering into the contract of supply on the conditions of pre-payment and after receiving the money, the supplier loses the opportunity to refuse to fulfill the contract without negative consequences.

In our view, entering into the contracts of supply on the conditions of pre-payment, the bankruptcy manager might deliberately mislead the suppliers concerning real consequences of fulfilling the contract because the bankruptcy manager knew that bankruptcy creditors had disagreements concerning the debtor's pre-payment condition under the contracts of supply.

These facts make us conclude that in this case the bankruptcy manager was obviously acting unreasonably and unscrupulously, because he did truly understand that the suppliers might be deprived of the money they

received since the bankruptcy manager knew that the bankruptcy creditor was sending letters to return the money received.

The current legislation has allowed the bankruptcy manager to reasonably and scrupulously continue the production activity of the debtor retaining the balance of interests of the debtor, creditors and third persons (suppliers):

a) to file an action to the court on the violation of the order of priority. Pursuant to p.40.1 of Ruling No.60 of the Plenum of the RF Supreme Court of 23 July 2009 "On Some Matters Connected with the Adoption of Federal Law No.296-FZ of 30 December 2008 "On Amending the Federal Law "On Insolvency (Bankruptcy)" considering the obligation of the bankruptcy manager *to act reasonably and scrupulously in the interests of the debtor*, creditors and society, the court has the right to recognize some deviation from the line of priorities legal, provided for by p.2 of Article 134 of the Law on Bankruptcy, if it is necessary for the purposes of the relevant procedure of bankruptcy, including with the purpose to avoid the loss of or damage to the debtor's property or to prevent the dismissal of the debtor's employees on their initiative.

The Review of the Judicial Practice of the RF Supreme Court (est. by the Presidium of the RF Supreme Court on 12 July 2017) clarifies that the question of changing the priority line of satisfying current claims of creditors *may be settled by a court trying a case of bankruptcy taking into account effective clarifications of paragraph 3 of p.40.1 of Ruling No.60 of the Plenum of the RF Supreme Commercial Court of 23 July 2009 "On Some Matters Connected with the Adoption of Federal Law No.296-FZ of 30 December 2008 "On Amending the Federal Law "On Insolvency (Bankruptcy)"*.

Though the judicial practice gives the bankruptcy manager a possibility to go to court with an application to allow deviation from the priority line of claims against current payments, the bankruptcy manager knowing about disagreements with bankruptcy creditors did not take the mentioned actions before entering into the contract of supply.

b) if the court had refused to agree upon the change of the priority line of current claims of creditors, the bankruptcy manager should have satisfied the claims of creditors existing at that time against current payments of the first, second and third priority before entering into a contract on the condition of pre-payment.

In such a case, payments made to the supplier could not be classified as transactions giving priority to one of the creditors.

c) to enter into a contract of supply on different terms of payment under which the supplier would have an opportunity not to fulfill the contract of supply in case of violating the priority line of current payments.

However, the bankruptcy manager knowing about the character and amount of obligations against current payments, knowing the real financial situation of the debtor and knowing about the position of the bankruptcy creditor did not take all the actions he could, which would allow him, without imposing unconditional liability on the suppliers to deliver goods after pre-payment, to avoid further challenging of the payments made in the case of bankruptcy. Under such conditions we cannot consider that the bankruptcy manager being an expert in the sphere of anti-crisis management fulfilled his obligation properly and acted reasonably and scrupulously.

As it was stated, p.2 of Article 1064 of the RF Civil Code contains presumption of guilt on behalf of the party inflicting damage as general grounds for liability for losses. So, as A.Konshina says, "in civil law, what is important is not the guilt as a condition for liability but the fact of proving by the party inflicting damage lack of guilt as a ground for relieving it from liability, which comes from the principle of presumption of guilt in civil law, unlike criminal law where presumption of innocence is applied[7].

In any event, *actions of the bankruptcy manager are considered mala fide*. To estimate the guilt we should refer to p.1 of Article 401 of the RF Civil Code: a person is considered innocent if such a person has taken all the measures to properly fulfill their obligations with due care and prudence

[7] See: Konshina A. Vina iuridicheskogo litsa v grazhdanskom prave [Guilt of a Legal Entity in Civil Law] //Rossijskij iuridicheskij zhurnal. 2006. No. 3. p. 118.

required of such a person by the character of the obligation and ordinary business course.

D.A. Pashentsev and V.V.Garamita state that many authors attribute the definition of the guilt stipulated by Article 401 of the RF Civil Code not only to contractual liability, but to tort liability[8]. The RF Civil Code does not contain any other references to guilt, therefore Article 401 of the RF Civil Code is applicable.

V.V. Baibak gave the following definition of guilt based on the contrary: "guilt is failure on behalf of the debtor to demonstrate such a degree of care and prudence required by the character of the obligation and ordinary business course"[9]. In his opinion, "civil law contains an objective criterion: while estimating guilt, a court should assess how each debtor is required to behave while fulfilling their obligations and compare behavior of each offender with this standard".

Such grounds for liability as unlawful behavior of the offender and guilt are recognized by civil law as rather interrelated things. In this connection, as it was stated earlier, the bankruptcy manager possessing professional skills and knowledge should have undertaken actions required by law, which would allow to exclude pre-payment. However, the bankruptcy manager did not take such actions.

Conclusions: The actions by the bankruptcy manager who did not take even minimum measures to prevent inflicting damage to the supplier are unreasonable and unscrupulous. Such actions do not comply with the standard of behavior of a person who professionally assists in the procedure of bankruptcy. Under such circumstances we should speak on the guilty behavior of the bankruptcy manager because he was making the "register" of claims against current payments, knowing that the bankruptcy creditor was against making payment to the supplier and knowing that the supplier

[8] See: Pashentsev D.A., Garamita V.V. Vina v grazhdanskom prave: monografiia [Guilt in Civil Law: Monograph] Moscow, 2010.

[9] See: Baibak V.V. Obshchie usloviia otvetstvennosti za narushenie obiazatel'st v st.401 GK RF: starye pravila v novom kontekste [General Grounds for Liability for Breach of Obligations in Article 401 of the RF Civil Code: Old Rules in a New Context] //Zakon. 2016. No. 10. pp. 132–143.

would not be able to refuse from the contract of supply without negatives consequences, but he still entered into the contract of supply with the condition of pre-payment. Thus, losses borne by the supplier were caused by *mala fide* actions of the bankruptcy manager.

THE PARTICIPATION PLAN OF THE DEPOSIT INSURANCE AGENCY IN THE IMPLEMENTATION OF MEASURES PREVENTING BANKS BANKRUPTCY: LEGAL PROBLEMS OF REALIZATION

Svetlana A. Karelina
Professor, Doctor of Laws, Business Law Department,
Lomonosov Moscow State University, Moscow, Russia

Abstract
Currently, the issues of realization of the Participation Plan of the Deposit Insurance Agency (hereinafter referred to as "the Agency") in the implementation of measures preventing banks bankruptcy cause some difficulties in practice. Legislative requirements regarding the preparation and implementation of this document, in particular, the determination of forms and amount of financial assistance of the Agency and the Central Bank of the Russian Federation to a particular bank, are often not taken into account. This article focuses on the analysis of this problem.

Keywords: bankruptcy of banks, measures preventing banks bankruptcy, Participation Plan, Deposit Insurance Agency.

The essence of measures preventing banks bankruptcy

The bankruptcy of credit institutions affects not only the private-law interests of individual creditors, but also the public-law interests of the state and society as a whole. From the viewpoint of public-law interest, it is more advantageous for the society not so much to bankrupt the debtor bank, but to preserve it as an element of a stable settlement system and a system of providing banking services.

The admissibility of public-law intervention in private-law relations was repeatedly reflected in the positions of the Constitutional Court of the Russian Federation. Thus, in Decree No.14-P of 22 July 2002 the Constitutional Court of the Russian Federation came to the following

conclusions: "However, bank deposits are a source of long-term investments, and this economic activity of depositors carried out in private interests **also has a public significance**, and, therefore, **the state** ensuring the implementation of a unified financial, credit and monetary policy has the right, in case of unfavorable economic conditions, *to carry out public-law intervention in private-law relations in the credit sphere* (clause (g) of Article 71 and clause (b) of Article 114 of the Constitution of the Russian Federation)"[1].

One of the elements of such intervention is the implementation by the Central Bank of the Russian Federation of measures preventing the bankruptcy of credit institutions.

• In the doctrine, scholars regularly state that measures to prevent bankruptcy are legal and economic measures are aimed at restoring the debtor's solvency and carried out by the founders (participants) of the debtor, the owner of the property of the debtor-unitary enterprise, or by agreement with the debtor – by creditors and other persons, before filing an insolvency (bankruptcy) case[2].

• In accordance with Article 30, § 4.1 of Ch.IX of the Federal Law on Insolvency (Bankruptcy), measures to prevent bankruptcy are implemented in the following two modes:

In the ***general mode***. These measures include, for example, the financial recovery of a credit institution (subpar.1, para.1 of Art. 189.9 of the Federal Law on Insolvency (Bankruptcy)), the appointment of an interim administration for the management of a credit institution (subpar.2, para.1 of Art. 189.9 of the Federal Law on Insolvency (Bankruptcy)), reorganization of the credit organization (subpar.3, para.1 of Art. 189.9 of the Federal Law on Insolvency (Bankruptcy)).

In the ***special mode***. The Federal Law on Insolvency (Bankruptcy) (subpar.4, para.1 of Art. 189.9) provides for special measures to prevent the bankruptcy of a credit institution that has a permit (license) to attract

[1] Collection of Legislation of the Russian Federation. 2002. No. 31. p. 3161.

[2] Ershova I.V., Enkova E.E., Bankrotstvo khoziajstvennykh sub'ektov: uchebnik dlia bakalavrov [Bankruptcy of Economic Entities: Course Book for Bachelors], Moscow, 2016.

natural persons' funds to deposits and to open and maintain bank accounts of individuals that are carried out with participation of the Agency. These measures include, in particular, the provision of financial assistance (subpar.1, Art. 189.49 of the Federal Law on Insolvency (Bankruptcy)), the organization of tenders for the sale of property (subpar.2, para.1 of Art.189.49 of the Federal Law on Insolvency (Bankruptcy)) and the performance by the Agency of functions of temporary administration for the management of the bank (subpar.3, para.1 of Art.189.49 of the Federal Law on Insolvency (Bankruptcy)). By virtue of subpar.3, para.1 of Art.189.9 of the Federal Law on Insolvency (Bankruptcy), these measures are implemented according to the Participation Plan approved by the Banking Supervision Department of the Central Bank of the Russian Federation.

It should be noted that the Supreme Court of the Russian Federation has repeatedly pointed out that the main purpose of measures to prevent bankruptcy is to restore the repayment capacity of the credit institution. Thus, in its *Definition of October 30, 2017 No.305-KG 17-9802 in case No.A40-17830 / 2017*, the Supreme Court of the Russian Federation noted that "the implementation of the strategy for carrying out rehabilitation measures reflected in the Plan is essentially **aimed at restoring the credit organization's solvency** in the framework of a pre-bankruptcy procedures..."[3].

In *its Definition No.305-ES16-4051 of August 16, 2016, in case No.A40-117039 / 2015*, the Supreme Court stated: "The Decision of the Board of Directors of the Central Bank of the Russian Federation dated December 22, 2014, Protocol No.46, approved the Plan for the Agency's participation in preventing bank's bankruptcy. Then it was changed by the Decision of the Board of Directors of the Central Bank of the Russian Federation on December 26, 2014 (Protocol No. 51) which provides for certain pre-trial activities aimed at preventing the bankruptcy of the bank, including the provision of significant financial assistance to the bank in the form of a loan(s) for up to 10 years with a loan from the Central Bank of the Russian

[3] The document was not published. Legal Reference System *ConsultantPlus.*

Federation aiming at maintaining the liquidity of the bank, as well as measures for the reorganization of the bank... Thus, in respect of the bank, the bankruptcy prevention procedure was initiated. Sanitation was carried out by the Agency in accordance with the requirements of the special law and the regulatory acts of the Central Bank of the Russian Federation published in its development. It implied **public-law intervention in private-law relations in the credit sphere aimed to protect the rights of depositors**, during which a controversial agreement was found, a claim on invalidation of which was lawfully declared by the bank to the Arbitrazh Court"[4].

Thus, *the law and jurisprudence proceed from the fact that the essence of measures to prevent bankruptcy carried out by the Agency on the basis of the Participation Plan (subpar. 4, para.1 of Art. 189.9, para.4 of Art. 189.15, Art. 189.47-189.49 of the Federal Law on Insolvency (Bankruptcy)) is to implement a set of rehabilitation procedures for the credit organization aimed at restoring its financial viability, as well as increasing its solvency and financial stability. This institution serves public-law purposes, namely, maintaining stability in the system-forming banking sector.*

Requirements of the law to the content and procedure for the development and approval of the Participation Plan

The law stipulates requirements both for the content of the Participation Plan and for the procedure for its development and approval.

According to subpar.4, para.3 of Article 189.49 of the Federal Law on Insolvency (Bankruptcy), "in the Participation Plan of the Central Bank of the Russian Federation or of the Agency of the implementation of measures to prevent the bankruptcy of the bank, **the form and amount of financial assistance provided by the Central Bank of the Russian Federation or by the Agency shall be established**".

Furthermore, the Agency developed the form of the Participation Plan (approved by the Decision of the Agency's Board of 28 May 2015, Protocol

[4] The document was not published. Legal Reference System *ConsultantPlus.*

No. 63, Section IV), according to which this document should have the following content:

1. General information about the Bank

2. The financial position of the Bank by the decision point of the participation of the Agency in the implementation of the Bank's bankruptcy prevention measures

2.1. The reasons for the worsening of the Bank's financial position

2.2. Analysis of the Bank's assets

2.3. Analysis of the Bank's liabilities

2.4. The final calculation of the fair value of the Bank's net assets

3. Measures to prevent bankruptcy of the Bank

4. Expected results of the implementation of measures to prevent bankruptcy of the Bank

5. Annexes

It should be noted that *the main requirement for the content of the Participation Plan is the mandatory indication of the form and amount of financial assistance provided by the Central Bank of the Russian Federation or the Agency.* In order to ensure that the content of the Participation Plan is in line with its rehabilitation goals, the Central Bank of the Russian Federation and the Agency must follow the procedures for its development and approval provided by the Federal Law on Insolvency (Bankruptcy) and the Regulation "On the Decision of the Participation of the State Corporation "Deposit Insurance Agency" in Preventing a Bank's bankruptcy and in Approving the Participation Plan in Preventing a Bank's bankruptcy" dated 30 March 2017 (hereinafter referred to as "Regulation").

In terms of requirements for the development and approval of the Participation Plan, the Federal Law on Insolvency (Bankruptcy) and the Regulation[5] provides for the following procedure, which must be observed by the Central Bank of the Russian Federation and the Agency:

[5] Regulation on the decision on the participation of the state corporation "Deposit Insurance Agency" in the implementation of measures to prevent bankruptcy or settle the bank's obligations and approve a plan for its participation in implementing measures to prevent bankruptcy or settle the bank's liabilities (approved by the Decision of the Board of the "Deposit Insurance Agency" dated 30 March 2017, Protocol No. 35, Section III).

1. The Central Bank of the Russian Federation sends to the credit organization (in case of an appropriate decision) an on-site inspection in order to analyze its financial situation to decide whether it is advisable to send proposals to the Agency about its participation in the implementation of measures preventing bankruptcy (para.4, Art. 18.47 of the Federal Law on Insolvency (Bankruptcy)). **The analysis period** of the financial position of the bank cannot exceed **45 calendar days** and, at the request of the Agency, can be extended for no more than **10 calendar days** (para.5, Art. 1889 of the Federal Law on Insolvency (Bankruptcy)).

2. The Central Bank of the Russian Federation adopts a decision on sending a proposal on the Agency's participation in the implementation of measures preventing the bank's bankruptcy if there are signs of its unsustainable financial situation, which creates a threat to the interests of its creditors (depositors) and (or) a threat to the stability of the banking system, and adopts a decision on sending the appropriate proposal (para.1 and 3, Art. 189.47 of the Federal Law on Insolvency (Bankruptcy)).

3. The Agency conducts an assessment of the appropriateness of its own participation in the implementation of measures preventing the bank's bankruptcy on the basis of information existing and available to the Agency, as well as of documents received from the Central Bank of the Russian Federation and of the proposal of the Central Bank of the Russian Federation. The Agency has the right to request the Central Bank of the Russian Federation to provide additional information and documents on the financial situation of the bank necessary to take a decision on the Agency's participation in implementing measures to prevent the bankruptcy of the bank, negotiate with the bank's administration, its founders (participants), and take other actions with a view to making a decision on the appropriateness of its participation in the specified measures (para.1, Art. 189.48 of the Federal Law on Insolvency (Bankruptcy), para.1 and 2 of Art. 2.3 of the Regulation);

4. The Department of Restructuring of Financial Institutions of the Agency prepares its opinion on the expediency or inexpediency of the

Agency's participation in the implementation of measures to prevent bankruptcy of the bank based on the results of the assessment (subpar. 3, para.2.3 of the Regulation);

5. Adoption by the Board of the Agency of a decision on the participation or refusal of the Agency's participation in measures to prevent bankruptcy and send the appropriate notice to the Central Bank of the Russian Federation (Art. 2.4-2.5 of the Regulation). This decision is made no later than within 10 days from the receipt of the Central Bank of the Russian Federation's proposal (para.3, Art. 189.48 of the Federal Law on Insolvency (Bankruptcy)). The Agency's decision is made on the basis of the principles of good faith, reasonableness, sufficient awareness of the financial situation of the bank, minimization of the use of the budget of the Mandatory Deposit Insurance Fund and other assets of the Agency[6] (para. 2, Art. 189.48 of the Federal Law on Insolvency (Bankruptcy)).

6. The Department of Restructuring of Financial Institutions of the Agency prepares the text of the Participation Plan in the implementation of measures for the prevention of bankruptcy and its introduction for consideration by the Agency's Board (Art. 3.1 of the Regulation).

7. Approval or refusal to approve by the Board of the Agency of the Participation Plan in the implementation of measures for the prevention of bankruptcy and forwarding it to the Central Bank of the Russian Federation for approval. *The approval and sending for approval shall be made no later than 20 days* after the notification to the Central Bank of the Russian Federation about the decision to participate in the implementation of measures to prevent the bank's bankruptcy (Art. 3.1 - 3.2 of the Regulation).

8. Approval of the Participation Plan by the Banking Supervision Department of the Central Bank of the Russian Federation (para.3, Art. 189.49 of the Federal Law on Insolvency (Bankruptcy)). This **decision is made within 10 days** from the date of receipt of the Agency's Participation Plan.

[6] Shishmareva T.P., *The Federal Law "On Insolvency (Bankruptcy)" and the Practice of its Application: Course Book for the Examination of the Unified Program for the Preparation of Arbitration Managers*. Moscow : Statute, 2015. p. 416.

Phasing is determined not only by the actual content (filling) of the relevant phases, but also fixed by certain terms of their implementation. For example, to analyze the financial situation of a bank for signs of its financial volatility, which creates a threat to the interests of its creditors and (or) a threat to the stability of the banking system, the legislator grants a period of no more than 45 calendar days to develop the Participation Plan and 20 days to send it to the Central Bank of the Russian Federation.

The scrupulous attitude of the legislator to both the content and timing of the implementation of the relevant phases of the procedure for developing the Participation Plan is not accidental. The law obviously provides for a sufficiently balanced and thorough approach by the Central Bank of the Russian Federation and the Agency to the development and approval of the Participation Plan, which is "**a key document** on the basis of which measures are taken to prevent bankruptcy"[7]. It is absolutely unacceptable to be completely formal concerning the specified procedures.

By establishing substantial terms for the analysis of the financial situation of the bank sent by representatives of the Central Bank of the Russian Federation and the Agency - in total up to 55 calendar days (in accordance with para.5 of Art. 189.47 of the Federal Law on Insolvency (Bankruptcy): up to 45 days with the possibility of extending to 10 days) - the legislator creates prerequisites for a well-founded and motivated decision of the Central Bank of the Russian Federation determining the feasibility of potential participation of the Agency.

As the Agency decides to participate in the prevention of bankruptcy of the bank or to refuse such participation, it also has the responsibility to assess the appropriateness of its participation. If the Central Bank of the Russian Federation has not exercised its authority to send representatives for a full-fledged financial analysis, the Agency's assessment of the appropriateness of participation takes place on the basis of documents submitted by the Central Bank of the Russian Federation as well as from official sources (para.2.3 of the Regulation).

[7] The definition of the Supreme Court of the Russian Federation of 27 October 2017 No. 305-KG17-9802 in Case No. A40-17830 / 2017.

Comparing the terms established for the analysis of the financial situation of the bank by the sent representatives (up to 55 days) and the time frame for making a decision on the Agency's participation (up to 10 days), it is necessary to note the fundamental importance of an adequate analysis of the financial situation conducted by the Central Bank of the Russian Federation to determine the appropriateness of sending a proposal for participation. It is during this analysis that the full volume of the bank's documentation is checked for signs of its financial volatility. If the Central Bank of the Russian Federation conducts such an analysis, the risk of taking an inexpedient decision is reduced.

Taking into account the described procedure, the legislator in total allows using up to 95 days for the analysis of the financial situation of the bank and approval by the Central Bank of the Russian Federation of the Participation Plan. Given the key importance of the Participation Plan for the entire bankruptcy prevention process, the submission of the proposal, the consent of the Agency, the development and approval of the Participation Plan for several days[8] *are clearly inadequate for the period provided by law that does not allow determining the expediency of the Agency's participation and developing an effective Participation Plan.*

In practice, there may be a problem with the answer to the question whether it is possible to introduce an interim administration by a credit institution if the Participation Plan does not contain any provisions on the forms and amount of financial assistance that will be provided by the Agency (para.4 of Art. 189.15, Art. 189.49 of the Federal Law on Insolvency (Bankruptcy)).

[8] We are talking about the *Yugra* Bank. On 10 July 2017, the Central Bank of the Russian Federation appointed a temporary administration in the bank in the person of the Deposit Insurance Agency, and on 28 July 2017, a license was withdrawn from the *Yugra* Bank, and the shareholders of the credit organization accused the Central Bank of the Russian Federation and the Agency of the deliberate bankruptcy of *Yugra* and tried to challenge its actions in court. In July 2017, the Prosecutor General's Office spoke referring to the stable financial situation of *Yugra* against the decisions of the regulator. On 10 October 2017, the Moscow Arbitration Court refused to satisfy the claims of the *Yugra* Bank to the Central Bank of the Russian Federation and recognized the legal introduction of the time constant administration and a moratorium on payments to creditors. It should be noted the *Yugra* Bank in the first half of 2017 took 33rd place in terms of assets in the Russian banking system.

As already stated earlier, in accordance with Article 189.49 of the Federal Law on Insolvency (Bankruptcy), there are several forms of implementing measures to prevent the bankruptcy of a bank; financial assistance is one of them.

Regarding the content of the Agency's Participation Plan in the implementation of measures to prevent bankruptcy, it is necessary to note the **mandatory availability of provisions on financing in the plan** (para.3 of Art. 189.49 of the Federal Law on Insolvency (Bankruptcy)).

According to para.1 of Instruction No.4462-U, the monthly report on the implementation of activities provided for by the Agency's Participation Plan should contain: "**information on the form and amounts of financial assistance** rendered to the bank by the cumulative total for the period from the date of receipt of financial assistance".

Thus, the provision of financial assistance is imminent in measures preventing bankruptcy. However, it should be noted that the Central Bank of the Russian Federation and the Agency have a wide discretion in establishing specific forms and amount of financial assistance.

Such discretion of the Central Bank of the Russian Federation and the Agency is due to a variety of measures to prevent bankruptcy, which are not only the provision of financial assistance, but also the exercise of the powers of the interim administration, the organization of bidding and other measures under Art. 189.49 of the Federal Law on Insolvency (Bankruptcy). It is presumed that the Central Bank of the Russian Federation and the Agency, based on their public-law tasks to maintain the stability of the financial market, will reflect in the Participation Plan the most effective combination of measures to prevent bankruptcy based on their reasonableness and validity, the Central Bank of the Russian Federation and the Agency's knowledge of the financial situation of the bank as well as the appropriateness of the Agency's participation.

Thus, *the Participation Plan should contain provisions on the forms and amount of financial assistance. The choice of a particular measure should be conditioned by a reasonable balance with other measures provided for*

by the Participation Plan. Provision of financial assistance to the bank must comply with the key characteristics of the Agency's participation in bankruptcy prevention activities - expediency[9]*, and the decisions taken in this regard should be taken in good faith and reasonably*[10] *with full knowledge of the financial situation of the bank.* However, it seems that it is not possible to establish the financial situation of the bank in good faith and the expediency of the Agency's participation in preventing its bankruptcy, and also to develop an appropriate Participation Plan for one or two days, such actions may be qualified as abuse of discretionary powers by the Central Bank of the Russian Federation. Moreover, the lack of information in the Participation Plan on the forms and amount of financial assistance of the Agency is in itself grounds for recognizing it as illegal.

Along with the principle of good faith and reasonableness, the principle of sufficient awareness of the financial situation of the bank is an important starting point in deciding the question of the Agency's involvement in implementing measures to prevent the bankruptcy of the bank. In contrast to the principles of good faith and reasonableness, the principle of sufficient awareness of the financial situation of the bank is special and is provided only by the Federal Law on Insolvency (Bankruptcy).

This principle means **proper verification** and investigation of the financial capacity of the bank, a reliable assessment of the available assets in order to identify the bank's ability to restore its financial position to the statutory standards. Sufficient awareness also allows the Agency to

[9] The maintenance of the principle of conscientiousness in a context of decision-making on expediency of participation in realization of measures on the prevention of bankruptcy is *shown in proper execution of duties by professional officials at reasonable use by them of the terms given by the law.*

[10] The principle of reasonableness is very closely connected with the principle of conscientiousness, so often the manifestations of one of these principles are simultaneously manifestations of the other. Thus, the above-mentioned manifestations of the principle of good faith when deciding whether to participate in the implementation of measures to prevent bankruptcy are also manifestations of the principle of reasonableness. For example, from the point of view of reasonableness, preparation by the Agency of a response to the Central Bank of the Russian Federation proposal for its participation in measures to prevent bankruptcy cannot be carried out without proper analysis of documents on the financial status of the credit institution. Hasty adoption of such a decision will equally indicate unfair implementation by the Agency's officials of their official duties.

determine the feasibility of its participation in preventing the bankruptcy of this bank and develop appropriate measures to prevent bankruptcy, which will lead to the restoration of the bank's solvency, taking into account its financial situation.

According to para.3.2 of the Regulation, when deciding on the reasonableness of the Agency's participation in the implementation of measures to prevent bankruptcy, the Agency **analyzes the documents** received together with the Central Bank of the Russian Federation's proposal to participate in preventing bankruptcy of the bank, as well as the results of assessing the financial situation of the bank, if it was held. Moreover, the Agency may use official information resources of the Central Bank of the Russian Federation, the Federal State Statistics Service, federal government bodies and authorities of the constituent entities of the Russian Federation, and local government bodies.

In order to fully implement the principle of sufficient awareness, the Agency is given the opportunity to apply to the Central Bank of the Russian Federation for additional information and documents on the financial situation of the bank necessary for making a decision on the Agency's participation in implementing bankruptcy prevention measures (Art. 3.2 of the Regulation).

Awareness of the financial situation of the bank enables the Agency to determine the criteria for its participation in the prevention of bankruptcy. According to the Regulation, the criteria for participation of the Agency are:

- The size of the bank's assets, determined at the time of the Agency's assessment of its financial situation;
- The amount of financial assistance provided by the Agency to the bank in order to prevent bankruptcy;
- The amount of cash balances on the accounts of individuals;
- Importance for the stability of the banking system;
- Essential for the economic and social development of the region, the presence of a network of units that provide a significant share of turnover.

Despite a relatively short period of time for responding to the Central Bank of the Russian Federation proposal for participation, stipulated in para. 3.1 of the Regulation: 10 days compared to, for example, 45 days for the analysis of the financial situation of the bank - the Agency is required to make a decision based on the principle of sufficient awareness of the financial situation of the bank. At the same time, the Regulation provides the Agency with additional 20 days for the development of the Participation Plan after the consent of the Agency to the Central Bank of the Russian Federation to participate in the prevention of bankruptcy of the bank (para.3.2 of the Regulation).

According to Article 2.2 of the Regulation, for the Agency's decision to participate in the settlement of the bank's obligations, **an economic feasibility study** is conducted for the Agency in implementing measures to settle the bank's liabilities **compared to its bankruptcy** (liquidation).

Thus, *the Agency's decision to participate in the implementation of measures to prevent bankruptcy should be taken with proper, in no case formal, preparation, it must take into account all relevant circumstances and be reasonable from the economic point of view, allowing eventually to restore the financial position of the bank and to prevent even greater losses of citizens and the state.*

COUNTERMEASURES AGAINST PRISONERS RADICALIZATION IN RUSSIA

Danil N. Sergeev
Candidate of Law, Senior Lecturer, Criminal Law Department, Ural State Law University, Yekaterinburg, Russia

Abstract
At present, there is a substantial number of data proving the spread of radical ideas in conditions of isolation from the society. A series of notorious terrorist acts is known to have been committed by people recruited for that in prisons. Taking into account that imprisonment will continue to be applied as the main type of punishment for a long time to come, it is necessary to make a decision to keep such convicts separately and apply special measures of deradicalization. Currently, Russia has no such institutions and programs. The author has personally researched the problem among people convicted of the said crimes and among officers of the penitentiary system dealing with terrorists and extremists and makes a conclusion about the reasons for primary radicalization in the Russian penitentiary system and how the level of education and competence of the personnel can influence the correction of convicts. The author puts forward some proposals concerning deradicalization programs and main ways of their implementation.

Keywords: prisoners' radicalization; deradicalization; judicial impact.

Introduction

The idea of separate detention of convicts was first expressed by John Howard in the XVIII century and by his efforts was further reflected in the English Penitentiary Act of 1779 which prohibits joint detention of first-time convicts and repeaters[1]. The separate detention of convicts was welcomed by the international prison practice and implemented practically everywhere, not only because this practice is more humane, but because it enables to effectively manage prisons and facilitates the achievement of goals. Article 80 of the current Russian Penal Code provides for a separate detention of men and women, adults and minors.

[1] Hardman P. J. The Origins of Late Eighteenth Century Prison Reform in England. Dissertation: Ph.D. University of Sheffield, Department of History, 2007. pp. 189–190

People convicted of committing crimes for the first time are kept separately from people who have served time in prison earlier. People convicted of dangerous recidivism, of extremely dangerous recidivism or those who are sentenced to life imprisonment or whose capital punishment has been converted to imprisonment through pardon are detained separately. Former workers of courts and law enforcement organs convicted of crimes are kept in separate penitentiary institutions. Based on the above provisions, it is the characteristics of the criminal (gender, age, prior criminal record, gravity of the crime, profession, certain diseases etc.) and not the types of crimes that a person is convicted of that serve as the criteria to create the Russian penitentiary system. For this reason, the Russian legislation does not provide creation of special penitentiary institutions for people convicted of certain types of crimes or a series of crimes. At the same time, the question of creating special penitentiary institutions for those convicted of terrorist and extremist crimes has been discussed for some years in Russia[2]. Such a proposal has been initiated by representatives of the Home Ministry of and legislators[3]. It should be noted that similar initiatives have been proposed and even implemented in some countries of the world. For example, in Israel, there is the Megiddo prison for those convicted of terrorism. The Netherlands has such prisons in Vught and Rotterdam (De Schie prison) which have separate blocks for those convicted of this type of crimes[4]. In August 2016, the UK Ministry of Justice published a document containing nine measures to counteract the spread of Islamic extremism among the convicts. The second measure is to separate those convicted of extremism from other types of convicts[5]. In 2016, the Kazakhstan Parliament also

[2] Petrov I. Imprisoned Separately [Syadut obosoblenno]// Rossiiskaya Gazeta, 27 May 2016.

[3] Runkevich D., Malai E. Special Prison for DAISH Members on Solovki [Dlya boevikov DAISH predlagaut sozdat' spets.tur'mu na Solovkakh] //Izvestiya, 22 December 2015.

[4] Veldhuis T.M. Prisoner Radicalization and Terrorism Detention Policy: Institutionalized Fear or Evidence-Based Policy. New York, 2017. P. 24.

[5] Government Response to the Review of Islamist Extremism in Prisons, Probation and Youth Justice. Policy Paper // https://www.gov.uk/government/publications/islamist-extremism-in-prisons-probation-and-youth-justice/government-response-to-the-review-of-islamist-extremism-in-prisons-probation-and-youth-justice [accessed on 30 May 2017].

initiated the creation of separate institutions for those convicted of terrorism[6].

To generalize all the proposals existing today, we see three main arguments put forward by proponents of creating separate institutions for those convicted of terrorism and/ or extremism. The *first argument* is that the joint detention of terrorists and/ or extremists with other convicts can lead to recruitment of new members of such organizations. *Secondly*, specialized institutions can apply special programs of correction. *Thirdly*, such institutions may have specially trained personnel.

1. The problem of dissemination of radical ideas among convicts

The present system of allocating convicts to penitentiary institutions provides for sending convicted terrorists together with other types of convicts. Under the Russian legislation, acts of terrorist nature are crimes of average gravity, serious crimes and extremely serious crimes. The gravity of the crime determines the choice of an institution (different types of colonies or prisons) by the court where convicts will serve their time. According to 2016 Russian statistics, 154 people were imprisoned for committing terrorist acts, among them 2 people were sentenced to life imprisonment[7]; in 2015 – 56 and 3 people; in 2014 – 49 and 5 people; in 2013 – 28 and 4 people; in 2012 – 22 people; in 2011 – 15 and 3 people[8] (Art.205 "Terrorist Act", Art.205.1 "Aiding Terrorist Activities", Art.205.2 "Public Calls for carrying out Terrorist Activities or Publicly Advocating Terrorism", Art.205.3 "Going through Special Training for carrying out Terrorist Activities", Art.205.4 "Organization of Terrorist Community and Participation therein", Art.205.5 "Organization of Activities of a Terrorist Organization and Participation in the Activities of Such an Organization" of the RF Criminal Code). All in all, during 2011 – 2016,

[6] Deputies Offer Creating Separate Prisons for Those Convicted of Terrorism [Otdel'nye tur'my dlya osuzhdennykh za terrorizm predlagaut sozdat' deputaty]// https://www.zakon.kz/4823826-otdelnye-tjurmy-dlja-osuzhdennykh-za.html [accessed on 30 May 2017]

[7] Summary Statistics on Convictions in Russia 2011-2016// http://www.cdep.ru/index.php?id=79&item=3834 [accessed on 30 May 2017].

[8] Ibid.

324 people were imprisoned for committing such acts. This data show a stable growth of convictions with a relatively small number of such convicts. Such a situation leads to an increased number of new recruits among convicts. The reasons are different: planned recruitment, popularity and even charisma of some people convicted of terrorism and extremism. Separate detention of such convicts from other types of convicts would reduce the dissemination of such ideas in jails.

Are there cases of proven dissemination of terrorist and extremist ideas among convicts? One of the most well-known examples was in 2012 when V.G.Ilmendeev convicted in 2006 for his involvement in the extremist organization "*Jamia of Ulyanovsk*" (under Art.209 part 2; Art.162 part 3 clauses "a", "b"; Art.222 part 3; Art.282 part 1 of the RF Criminal Code) was very active in spreading terrorist ideas in the penal colony of the Ulyanosvk region. He advocated the ideas of Said Al-Buryati, showed prohibited videos of the "*Caucasus Emirate*" and distributed extremist literature. "*Jamia*" had even its own flag and its own treasury called "*Baitul Maal*" to which money was sent, even from "outside". At first, the administration of the colony did not pay attention to regular gatherings of Ilmendeev's group considering it a usual religious practice. Soon they created their own council - "*Shura*". Ilmendeev was chosen as its "Emir". After the activities of this group in the colony were found out, Ilmendeev was transferred to Murmansk region where he continued his propaganda among convicts, and in Ulyanovsk region his work was continued by Ramis Akhmedzhanov[9]. Another member of "*Jamia of Ulyanovsk*" – D.L.Timofeev – was sent to the penal colony in Buryatiya in 2009, where he created a room for prayers and gathered around him followers of radical Islam.

B.M.Gayanov convicted under part 1 of Art.210 of the RF Criminal Code and sent to serve his sentence in the penal colony of the Altai krai established a unit of the prohibited international terrorist organization "*Hizb ut-Tahrir*" in the colony. For this end, he conducted special training

[9] Russia has seen "*Prison Jamaat*" // http://www.apn.ru/index.php?newsid=27691 [accessed on 30 May 2017].

of convicts and held discussions interpreting the provisions of Islam in his own "right" way[10].

Radicalization and Islamization of convicts in the Russian prisons has become widespread. Historically, since the beginning of the XX century, the Russian criminal environment has developed its own system of norms and rules of the criminal world which in prison jargon are called "thieves' concepts" or "thieves' code". The Russian scholar of Islam R.R.Suleimanov notes that "simplified" radical Islam can easily replace "thieves' code". The "cops' state" (i.e. the state where law and order have supremacy) is replaced by the "Kafir State", and "thieves' rules" are replaced by Sharia rules. Muslims from the workers of the Federal Penal Enforcement Service (FSIN) are considered to be "Murtads", i.e. renegades, and those who profess traditional Islam are called "Munafiquns", i.e. hypocrites, with whom you can do anything[11].

The 2017 survey among the workers of the Federal Penal Enforcement Service (with 74 respondents working with those convicted of terrorist and extremist crimes) shows an increased opposition of criminals and convicted Muslims, with the latter demonstrating greater solidarity.

The problem of radicalization of convicts is typical not only for Russia. In 2010, the Royal College of London did a special research "Prisons and Terrorism. Radicalization and Deradicalization in 15 Countries". The authors conclude that this problem is widespread in many countries[12]. After a sharp increase of terrorist activities in France, experts came to the conclusion that many terrorists had special training while being held in penitentiary institutions[13]. As a result, Prime Minister Manuel Valls decided to establish five "wings of deradicalization" housing 20 convicts

[10] Decision of the Leninsky District Court of Barnaul in Case No. 1-830/2010 // https://rospravosudie.com/court-leninskij-rajonnyj-sud-g-barnaula-altajskij-kraj-s/act-100180238 [accessed on 30 May 2017].

[11] Mel'nikov S. Strict Islam [Islam strogogo rezhima]// Ogonyek, 2013, No. 33. P. 31.

[12] Prisons and Terrorism. Radicalization and Deradicalization in 15 Countries. London, 2010. P. 7.

[13] Gee O. France to Isolate Terrorists in Special Prison Wings // https://www.thelocal.fr/20160125/france-opens-new-de-radicalisation-prison-wings [accessed on 30 May 2017].

in different prisons for separate detention of those convicted of committing terrorist crimes.

2. Special programs for correction

The purpose of establishing separate institutions is to provide an opportunity to introduce special programs for correction and prevention intended for those convicted of terrorism and extremism. The purpose of correction declared by the Russian legislation is based on creating respect for individuals, society, labor, norms, rules and traditions of the human society and incentives for obeying the law. How far is such a model of correction applicable to those convicted of terrorism and extremism? This category of convicts has a specific criminological, social and psychological character. Thus, 87.4% of convicts are from the North Caucasus, with a relatively small number of them - 17.2% with prior criminal record and who practically do not abuse alcohol and most of them have families[14]. The above features make it necessary to apply special measures of criminal penal intervention and transformation of the content of correction to a deradicalizing effect. Deradicalization can be viewed as a type of correction and consists of creating a moderate attitude to religion among convicts and right understanding of methods and ways of defending their interests and non-acceptance of extremist and terrorist ideology. In essence, deradicalization is opposed to radicalization (jihadization)[15] and is substantially different from the typical impact of the Russian penitentiary system since it requires special programs, methods, training of personnel, literature, etc. To a great extent, deradicalization is a type of activity concerned with training. It is not possible to deradicalize a convict by traditional regimen, discipline and labor. Unfortunately, the Russian penitentiary institutions are not

[14] Kazberov P.N. Classification of Criminal-Penal, Psychological and Social and Demographic Features of Those Convicted of Terrorism [Tipologizatsiya ugolovno-ispolnitel'nykh, psikhologicheskikh i sotsial'no-demograficheskikh kharakteristik lits, osuzhdennykh za prestupleniya terroristicheskoi napravlennosti] // Bulletin of the Udmurtsky University. Economy and Law Series. [Vestnik Udmurtskogo Universiteta. Seriya "Ekonomika i Pravo"], 2015, No. 5.

[15] SpearIt. Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm? // Gonzaga Law Review. Vol. 49. 2013. P. 64.

yet ready to introduce the practice of deradicalization and there are no programs to implement it.

3. The content of deradicalization programs

The deradicalization program should include the following sections:

1. Persons. As any judicial impact, deradicalization should have subject-subject orientation. Such interaction implies determining a circle of persons who are the object of such specific impact as well as a circle of individuals exercising such impact. In practice, we can face such problems as determining the list of convicts on whom measures of deradicalization are to be applied. In our view, this problem can be solved in the following way. First of all, this practice should be applied to those convicted of all crimes of terrorist and extremist nature. Secondly, the court should have the right to state the grounds for carrying out deradicalization if an act contains signs of extremism. It is equally important to determine the powers of the penal institution administration to carry out measures of deradicalization in respect to individual convicts who need that (for example, based on the opinion of a psychologist or teacher).

Workers involved in the process of deradicalization should go through special training programs which include the study of the psychology of radicalism, conflict resolution and religious teachings. In foreign jurisdictions, deradicalization involves representatives of religion and authoritative theologians. The secular character of the Russian penal system does not allow introducing the institute of "permanent imams" in the Russian penitentiary institutions, but, at the same time, there is no prohibition to cooperate with Islamic educational institutions, for example, with Islamic universities.

2. Measures of influence. Measures must be directly connected with the reasons of radicalization. During our research (2017) in the penitentiary institutions of the Sverdlovsk region and Perm krai (15% of the average population of convicts in the Russian Federation), we found several reasons for primary radicalization in conditions of isolation: 1) conflicts between religious convicts and criminals; 2) absolute

disregard for religious needs of convicts that makes them search for outside information and creates favorable conditions for missionary activities of recruiters, etc.; 3) domestic problems. For example, convicted Muslims consider that meals with pork are aimed at humiliating them as Muslims. Such a situation creates the necessary conditions for primary radicalization. Direct measures of deradicalization include: 1) special training; 2) psychological impact; 3) preventive registration. Under par. 24 of the Instruction on Crime Prevention among those detained in criminal penal institutions, convicts learning, promoting, professing or disseminating extremist ideology are to be registered for the purpose of prevention[16]. Preventive registration implies a comprehensive study of a convict, his criminal ties and criminally important features of character, his habits, inclinations, motives for criminal behavior and judgments; individual discussions and clarifications concerning the non-acceptance of crimes committed by them as well as their possible consequences; isolation of a suspected, accused or convicted person from all his ties and conditions which have a negative impact on him; and use of other forms and methods of positive influence on the people in the preventive registration list depending on specific conditions.

3. Measures of response. If deradicalization measures prove to be ineffective, they should not deteriorate the position of the convicted. However, this should be taken into account when solving the issue of probation or establishing post-penitentiary control.

4. Special training of the personnel in penitentiary institutions

Concentration of convicts in one institution will make it possible to involve specially trained personnel. During our research in penal institutions of the Sverdlovsk region and Perm krai, we conducted a poll among the workers dealing with those convicted of terrorist and extremist crimes. The results of the poll show that the most difficult factors in dealing with this type of criminals are: 1) the language factor – those

[16] Order of the RF Ministry of Justice of 20 May 2013 No.72 "On Establishing the Instruction on Crime Prevention among Convicts in Institutions of the Criminal Penal System"// Rossiiskaia Gazeta, 5 June 2013.

convicted of such crimes are not Russian speakers; in interpersonal communication and correspondence they speak other languages (this factor has been referred to in 76% responses); 2) the socio-cultural factor – the workers of penal institutions experience difficulties in assessing the behavior of convicts due to significant social and cultural differences (68%); 3) the religious factor – the personnel of such institutions does not have sufficient information on religious views of the convicts; the workers cannot distinguish radical views from usual religious convictions (81%). The same workers (74 people) were asked to take a simple test concerning the basics of Islam, and only 15% of respondents passed this test successfully. It proves insufficient education and training of the personnel of the penitentiary system in working with special categories of convicts which certainly affects the result of their activities. In this respect, creation of specialized institutions for those convicted of terrorist and extremist crimes would solve the issue of training of the personnel of such institutions.

Despite the importance of the three main arguments, the opinions of proponents to create specialized institutions for convicted terrorists and extremists cannot be ignored; neither can the opinions of opponents. The main counterargument is that specialized institutions can become the basis for establishing contacts and will intensify radical sentiment among convicts. Besides, the Russian legislation does not provide for the creation of specialized institutions depending on the category of the crime.

Conclusion

Undoubtedly, a radical change in the mode of serving time by convicted terrorists and extremists also will not improve deradicalization in prisons. For this reason, the state will have to take certain risks and conduct a social experiment to separate those convicted of this category of crimes from others and apply methods of deradicalization on them. Methods have to be developed and improved by taking this social experiment into account.

If the problem is not solved in the near future, prisons not only in Russia, but in other countries as well, will become incubators for recruiting and training new terrorists and extremists whereas such institutions should serve an absolutely different aim.