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JUDICIAL CONTROL OVER DISCRETIONARY ADMINISTRATIVE ACTS: EUROPEAN EXPERIENCE[1]

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Judicial control over discretionary administrative acts in France, Germany and the UK is analyzed in the article. The author puts forward the thesis: discretionary acts require special concept of further judicial control over them. The focus is given to the known genetic similarity between some French claims, the German doctrine and practice of the principle of proportionality in relation to discretionary acts and the elaborated by English courts test on reasonableness of an administrative decision. It is concluded that in developed foreign legal systems courts increasingly check administrative acts not only in terms of legality, but also their reasonability and justness.

Keywords: discretion, administrative act, administrative procedures, principles of administrative law, principle of proportionality.

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Until recently, the exercising of public authority, in any case, in the Romano-Germanic legal tradition, was based on number of postulates (axioms). In particular, on a more or less strict separation between authorities (their functions), the demarcation of the rulemaking and law-enforcement. The forms of managerial actions themselves were examined through the prism of a formalized and "discrete" approach: from the plethora of conducts of an authoritative subject in a particular situation only one option was recognized, firstly, lawful, and, secondly, correct; therefore, all other managerial decisions were denied such a property. On the other hand, after facing with discretionary powers, the courts limply evade the issues of verification of the forms of managerial actions taken within the framework of their implementation (that, bearing in mind the constantly spreading competence of the executive power, made the latest all less subjected to external control). The legislator, in this situation, tries to create the most "dense" regulation, formulate the maximum number of administrative procedures, within the framework of which it seeks to set strict criteria for taking administrative decisions. Jurisdictional oversight bodies orient on literal interpretation of such legal norms, considering the deviations from the latter (or more precisely, from their verbatim interpretations of administrative procedures) as illegal, and therefore subject to modification or cancellation.

However, management system is being changed. First, as rightly pointed out in the scientific literature, in a constant changing environment (e.g., new technologies) the need for decision-making related to the managerial risks causes blurring of boundaries between the rule-making and law-enforcement in the modern administrative law [5, 91]. Because it is increasingly difficult to rely on a predefined algorithm that would ensure the selection of only correct decision. This non-trivial fact is studied and in foreign science of administrative law [8].

Second, the role of law principles increases dramatically. It is related with the same predicament (or even impossibility) of hard all-encompassing juridization (legalization) of administrative procedures, administrative actions and criteria for their adoption. At that, the principles encompassing not only "traditional" requirements of legality, but also – the principles of appropriateness, reasonableness, soundness, become more and more significant. This intensification of the "work" of principles inevitably has an impact on judicial control. At that, this impact is many-sided. On the one hand, they force the courts to "expand" and "deepen" their control (supervision) in respect of managerial decisions of public administration, "rising" over procedural and other normative requirements, and on the other hand – itself this increase of non-traditional

regulatory legal means is the result of an increasingly active role of judicial bodies.

The third, key trend (simultaneously – a factor, prerequisite and consequence) of complication of public management is associated with administrative discretion. The role and value of the last increases dramatically; not without reason many foreign researchers believe that the problem of regulation of administrative discretion and judicial control over it is one of the most important and complex problems of European administrative law [11, 73; 12, V]. At that, individual authors as the main vector declare shift in emphasis from "law protection" approach (i.e., judicial control) to prevention of "bad" decisions through the development of new, more perfect (including – informal) administrative procedures [8]. Of course, it would be at the least strange to deny the usefulness of aprioristic rationalization of public management, establishment of rather flexible and effective regulatory mechanisms. However, the hope only on the resources of public administration itself and administrative procedures, in our view, is fundamentally wrong. On the contrary, in process of complication of the latter, the judicial control itself also must inevitably become more complex. Just this begins to most clearly show the above factors of blurring the boundaries between rule-making and law-enforcement (not just public administration "balances", taking complex administrative acts, but also court decisions are beginning to penetrate deeper into the legal system); increasing the role of legal principles (exactly courts give "final point" in the assessment of forms of managerial actions, and often are guided by not only and not so much the specific rules, but by the principles of law, or at least by extensive interpretation of certain norms). Finally, exactly the assessment of discretionary decisions has exacerbated the need for implementation of not so much formal-juridical dichotomous approach ("legally" – "illegally"), but – of based on dialectical logic "grading scale", where itself a violation of certain requirements (including – administrative procedures) does not mean aprioristic nullity. Conversely, absolute support of "hard" procedures does not guarantee the legalization of managerial decisions on the part of courts.

Thus, the evolution of public management – is largely an evolution of the legal regulation of administrative discretion, which in turn forces to reconsider traditional approaches to both themselves administrative procedures and judicial control over them. Let's try to check the said statement (so far – in the rank of hypothesis) through analysis of a number of European legal orders.

We think that we should start with France. After all, exactly there have been taken the in many ways unique for continental Europe of that time first attempts to

legalize such property of an administrative act as its legitimate purpose. According to a very accurate remark of A. I. Elistratov, "we can outline new horizons for the development of public law in the idea of a legitimate purpose of administrative act. A judge appointed for the interpretation of the purpose of law inevitably rises from the formula of law to those public interests, to which the law should serve. The compliance of an administrative act to public service tasks becomes its supreme criterion for determining the legality of the act. To find this criterion, a judge posed between the ruling authorities and citizens should reduce the law to its own understanding of public benefit, harmonize it with its own legal consciousness" [4, 157]. The origin of this trend meant the attempt to extend administrative justice to administrative discretionary power [4, 266]. The main legal means of verifying the corresponding administrative acts are the mentioned above claims because of abuse of authority (contentieux de L'exces de pouvoir). Let us briefly explain: a complainant in such dispute is going to prove not the violation of its subjective rights, but inconsistency of a contested act to applicable legislation, norm of administrative law. Judicial practice highlights several reasons for the cancellation of a contested decision.

And if most of those are very familiar and traditional for contemporary reality (defects of form or procedure; incompetence of an authority or official; violation of substantive law norms [1, 283-284]), then at least one of them – deviation of power (detournement de pouvoir) – still looks very original. The novelty of such direction in checking administrative acts that are being considered for deviations from lawful purpose is most pronounced in the "deviation of power". There are various examples of such cases in the scientific literature: closing of a private plant by local administration under the pretext of non-compliance with sanitary regulations, and in fact for elimination of unwanted competition to state plant; dismissal by a Mayor of an official who has drawn up a Protocol against saloon-keeper, who host political supporters of the Mayor; ban on getting naked on the beach not for reasons of public morality (formal cause), but in order to people pay for use of paid municipal cabanas [1, 284; 4, 266]. It is easy to see: in case of claims for deviation of power we can observe a significant expansion of the boundaries of judicial verification of administrative acts (which is exercised, we note, not by the legislator, but by law-enforcer): technically it is also about the rule of law, but in reality the authorized body reconsider administrative act for its feasibility. This is done in order to link administrative discretion by external control.

This step of the French administrative law not only immediately attracted attention, but also caused very strong feelings of some researchers of the late 19th-

early 20th centuries. So, according to categorical statement of L. Djugi, since then "there is not and cannot be the discretionary acts of management" in France [10, 208; 4, 267]. However, after at least a century the initial enthusiasm must be tempered. As noted in the contemporary literature, in practice the cases of voiding of an administrative decision in connection to abuse of authority are extremely rare, since it is very difficult to prove the illegality of aim of a contested decision [1, 284]. Thus, the above attempt (the first of the Romano-Germanic legal orders) to extend administrative justice to the sphere of administrative discretionary acts proved to be original, but ineffective.

It is difficult to overestimate the contribution of German (wider – Romano-German) administrative law in the development of European doctrine and legislation. But for a long time in a part of the judicial assessment of discretionary judicial acts the situation evolved somewhat differently. Administrative justice of Germany for a long time as if was in a trance – first from the absolutist monarchy of Hohenzollerns. The doctrine and judicial practice of the German Empire categorically denied the ability to verify discretionary acts (on this issue see: Fleiner, Einzelrecht und öffentliches Interesse Staatsrechtl. Abh-Festg. BD. II, pages. 3-39 [4, 266]), and then was paralyzed by Nazi tyranny. However, since the mid XX century, after shaking off the torpor and recovering from years of confusion, the German legal system intercepts from France the leadership in attempts to resolve the issue of judicial verification of forms of management activity not only in terms of their compliance with certain formal (and therefore the simplest) procedural and substantive criteria, but also with other, more complicated, in advance hard formalized requirements. One of the main legal instruments of such becomes the principle of proportionality, which has incorporated the French concept of the aim of act and creatively finalized it. The specified principle of law-enforcement is based on the correlation of aim with taken legal efforts, and this is the next step in the long path of legal verification of formally-legal phenomena. At the same, exactly in Germany, begins to take shape an independent theory of discretion, in which with some conventionality we can distinguish the following main elements: form of discretion, the grounds for judicial reconsideration and the density (intensity) of judicial control.

But first, let us turn to the legislation. According to paragraph 40 of the Law of Federal Republic of Germany from 1976 on administrative procedure (hereinafter – LAP), if an administrative body has the power to act on its own discretion, then it must exercise this right in accordance with the purpose of delegated powers and comply with the statutory boundaries of discretion [2, 39]. The provisions of LAP in part of judicial verification of corresponding administrative acts have

been developed in paragraph 114 of the Law of Federal Republic of Germany from 1960 "On Administrative and Judicial Process": "If an administrative body is competent to act at its own discretion, the Court also checks whether an administrative act or refusal of its publication or omission of an administrative body is illegal insofar as the statutory limits of discretion have been exceeded or the right to discretion has been exercised in a form that is not appropriate for the purpose of the powers granted. Only in administrative-court proceedings administrative body may supplement its ideas concerning the right of discretion regarding administrative act" [2, 136]. Easy to see the accentuation of the aim of an administrative act as a kind of property that is beyond the formal dictations of law norms. However, according to correct comment of German legal scholars, the above legal prescriptions – in fact the only ones that are trying to regulate the reconsideration of discretionary acts. But the norms of LAP and LACP are completely inadequate, they demand strengthening by general provisions of the doctrine of discretion [11, 78].

Let's start with the forms of discretion. Traditionally, in German scientific and educational literature separate two such forms of discretion as undefined legal concepts and discretion itself (in the narrow sense). Undefined legal concepts ("justice", "honesty", "reliability", "public interest", "good reason" and so on) are set out in legal acts, but have very little concrete information, needing further clarification. Specification of these norms takes place in law-enforcement activity of administrative bodies. Therefore, there is already some space for actions of administration, within which it can interpret the legal concepts and even decide whether they can be applied to the circumstances of a particular case [1, 323]. The second form is "ordinary discretion" ("discretion in the narrow sense"), it is determined by H. Maurer as follows: "Discretion takes place, if under certain circumstances determined by law the management **may choose between different modes of action** (emphasis added). In this case the law does not correlate circumstances with one legal consequence (unlike management linked to the law), but empowers the management to independently determine legal consequence, at that, it is offered two or more options or a specific area of actions. Discretion may refer to whether the management want to resort to a permissible measure (**decision at discretion**), or to what of various permissible measures it wants to use in case of actions (**choice at discretion**)" [6, 67]. Thus, a crucial element of discretion in the narrow sense is the choice between the various types of action proposed, which, in any case, from a legal point of view are equivalent [6, 67].

Along with the above mentioned, in the scientific literature often distinguish other forms of discretion, including – discretion in planning [11, 78-81; 6, 38-39, 76-85].

Subsequently judicial practice and doctrine in close collaboration have elaborated different grounds for reconsideration (in other words – "groups of errors") of discretion, primarily for the ordinary discretion (but not only):

1) going beyond discretion (body choses an action with legal consequence, lying outside the statutory powers);

2) failure to use discretion (in the case of provision of space for discretion an administrative body is required to use it, even if the discretion of the body includes the question, will it resort to any action or not);

3) erroneous use of discretion (administrative body deviated from the purpose of a power or relied on erroneous considerations in assessing circumstances);

4) violation of fundamental rights or general administrative and constitutional principles [1, 326].

However, for this study the greatest interest is represented by the third problem – the elaborated by the German legal system density of judicial control over administrative discretionary acts. Figuring out of the limits of judicial reconsideration of the latter is similar to the search for the philosopher's stone. Indeed, as has been noted above, the legislative prescriptions on this subject are rather scarce; however, it cannot be otherwise, because there is a situation, by definition going beyond the literal content of "typical", specific-regulatory legal norms. The vacuum caused by the imminent withdrawal of the legislator is tried to be filled in, on the one hand, by courts and, on the other hand, by legal scholars.

Verification of discretion in the narrow sense (to which were devoted paragraph 40 LAP and paragraph 114 CACP) takes place in two stages. First, they find out, what is aim of power to exercise discretion, and then evaluate a specific case and analysis of the use of discretion in accordance with the aim of this discretion [1, 325-326]. It is not difficult to see that already here the teleological interpretation by court of corresponding authorizing norms from the perspective of the principle of proportionality comes to the fore.

However, a much more complex problem is the issue of judicial verification of vague legal concepts, these quasi-legal dot-dash lines, for obvious reasons deprived of any formalized content. How should an external controlling instance act in this situation? Should it content with verification of "classical" legality? But it is extremely difficult (if at all possible). Adherence to this position allows complying with the familiar axiom of inadmissibility of judicial

control penetration in areas that increasingly difficult to call the legality (and which are getting closer to the other fundamental principles of administrative law and administrative procedures – feasibility, reasonableness, and fairness). Exactly this path was chosen by German doctrine. According to K. Raytemayer, the works of A. Bachofen, who has elaborated the so-called doctrine of space for estimates, have become the foundation of theoretical approaches to the verification of indefinite legal concepts. According to him, administrative bodies have to get some space for estimates, in which they being free from any instructions can take autonomous decisions. Administrative courts must accept these decisions and have the power to check only the fact of staying of administrative bodies within the borders of this space. Almost all German legal scholars share this theory, building on and complementing it [1, 325].

But the conservative desire to preserve the "purity" of judicial control has one obvious and irremovable consequence – increase of administrative discretion that is beyond not only administrative procedures, but also not subject to judicial verification. That is fraught with adverse consequences for powerless subjects. Apparently, that by these considerations were guided German courts, gradually and increasingly resolutely rejecting restrictive doctrinal approaches. As an example we take the decision of the Federal Administrative Court of Germany (hereinafter FAC) from November 10, 1988 on the case of the license for the production and sale of pesticides [16]. The circumstances of the case are as follows: the claimant had a license for the production and sale of pesticides. However, the authorized federal executive body denied to extend the license (for earlier legalized pesticides), as well as to issue another for a new product. The applicant has fulfilled all the necessary procedural requirements. The refusal was justified by conclusion, which has revealed that the pesticides may have unacceptable harm in terms of science. Refusal was appealed to the Administrative Court of first instance. The latter has established the following. According to article 15 of the Law on Plant Protection (Pflanzenschutzgesetz), pesticides must not pose a threat to human health, animals, have harmful effect on water resources, as well as should not have "other consequences", in particular – "for the ecological system, which from the point of view of scientific knowledge are unacceptable". According to the Court, this means that the refusal to provide license is valid only in cases where there is a high degree of probability of harmful effects of pesticides on the environment. And then the Court, actually having evaded from the checking the presence or absence of harmfulness of pesticides, decided on the partial satisfaction of the claim and obligated the licensing body to extend the license for two

years and 10 months. With a rather strange, in our view, motivation: because during such limited period the harmful effects on the environment should not be expected.

Decision of the Court of first instance was appealed to the Federal Administrative Court. The position of the executive body was that the wording "other consequences for the ecological environment" is an indefinite legal concept, and therefore is subject just to a limited judicial verification, and this when exactly the administrative body is vested with discretionary powers to assess. The Court can check this administrative act only for errors (including procedural ones) in the application of discretionary power. However, the FAC did not agree with either licensing body or the Court of first instance, holding that courts are empowered to conduct full verification of indefinite legal concepts. This means that judicial control is not restricted, as it is in the case with verification of ordinary discretion. The Administrative Court of first instance had to fully check all the facts concerning the case, and concretize for the purposes of the last all the concepts, including "other harmful consequences". Despite the fact that the power to determine harmful or not harmful effects of pesticides belongs to the executive body, exactly the courts are empowered to check the correctness of application of the law to the facts, including by examining new evidence, expert opinions, etc. [11, 119-122].

However, among the "ordinary" undefined legal concepts German courts distinguish an independent group of concepts with the so-called "space for assessments". These typically include assessments of examinations (and similar decisions); assessments in the field of service law; evaluative decisions on the part of authorities, consisting of highly specialized experts or representatives of the groups expressing different public interests; predictive (planned) decisions, particularly in the area of economic law; decisions of administrative-political nature [1, 325; 24, 44-65]. If, however, the German administrative courts are trying to respect the special position of designated spheres of social relations and their respective administrative acts, the Federal Constitutional Court of Germany (hereinafter FCC) went on the real offensive.

Here is the first example – the decision of 1990 on the case about the verification of short story «Josephine Mutzenbacher» [17]. Authorized executive authority imposed certain restrictions, in accordance with the legislation on distribution of books, dangerous for minorities, on the publication of a pornographic novel, dedicated to the life of a Vienna prostitute. The applicant in contacting the FCC insisted that the provisions of the mentioned legislation do not apply to the publication, since it is a "work of art". The FCC decided that judicial control in this

case also applies to the evaluation of concept of "harm to minorities", and the executive body does not have freedom of assessments.

The second example is more indicative and touches upon the sphere of examination results. The applicants challenged the understated, in their view, results of estimations on the status of lawyers. The Administrative Court of first instance and the FAC refused to reconsider administrative decisions due to the fact that there are indefinite legal concepts with the space for administrative assessments. But the FCC in its decision of 1991 [18] approached the situation somewhat differently, pointing out that the courts had the right to fully check the academic questions of exam answers (even if it would involve experts), "confirming", however, actually the right of relevant organizations to put examination assessments [11, 115-117].

We think that even a little bit – and the German court procedure "will break" the last restrictions on judicial control over administrative acts through not only its application on the verification of compliance with the administrative procedures and other requirements of legality, but also through definitive, unambiguous and irrevocable enshrining of the courts' power to assess the form of managerial actions from the perspective of the principle of appropriateness. However, the thesis of L. Djugi from the 19th century concerning the disappearance of discretionary acts in respect of modern Germany still was a bit hasty. So, the judicial practice with respect to sphere of planning comes from a reasonable reduction of density of judicial control in this sphere [11, 80-81; 6, 42-43, 60-64, 76-84].

Thus, in the Romano-Germanic legal system was a distinct process of juridization of the forms of managerial actions (as the climax of which, apparently, should be recognized the adoption of laws on administrative procedures). The hope only on procedures, however, did not answer the question of how to deal in the situation with discretionarily taken administrative acts. That stimulated the doctrinal development of discretion and judicial control over it.

In parallel with all these existential searches on the continent, other reality was forming within the framework of Western European jurisprudence. We mean, of course, the Common Law System, specifically its British branch. However, we immediately note: for us, the representatives of the Roman-Germanic legal concepts, the legal reality of the UK is so unusual, and the system of precedents is so complex and multifaceted, that seems that if you want in it you can find any approaches and justify any, even the most opposing theses. Therefore, all further reasoning can be as true as false at the same time precisely because of the inherent ambivalence of Common Law System in the eyes of European positivists (such as the author of this study).

So, first we need to distinguish between "classic" judicial control over administrative acts and the appellate powers of the Parliament of Great Britain. As noted by P. Cane, one of the key differences lays in the grounds for reconsideration: if the appellate court examines all the advantages of an administrative decision, the judicial control is reduced to verification of the legality of administrative decision [9, 35].

As for the most complex of all discretionary administrative acts – the British law, unlike German one, does not distinguish separate forms of discretion. At the same time there are three main areas of social relations, in which such powers can be manifested, in the scientific literature. The first group is education, social welfare, planning, and immigration law. The second is the so-called "implied discretionary powers", expressed in such concepts as, for example, "public interest". Finally, the third group of discretionary powers is formed of "the royal prerogative" – unformalized sphere, which includes the powers traditionally exercised by the British Monarch. Although judicial control is also slowly spreading on them, there are still issues seized from the jurisdiction of courts (declaring war and concluding peace, international relations, management and deployment of armed forces, appointment and dismissal of Ministers, dissolution of Parliament). Finally, some authors distinguish an additional group – "common law discretionary powers", to which they attribute the powers to conclude contracts. However, the existence of the latter is debatable [11].

Grounds for reconsideration of discretionary acts at first glance in the most general terms correlate with the discretion errors distinguished by German doctrine and practice – failure to apply discretion and abuse of discretion. The density of the judicial control, according to M. Kunnecke, is less intense than in Germany (especially when compared to the in-depth verification of indefinite legal concepts). British courts orient on relatively obvious errors (including of procedural nature) of administrative bodies, recognizing the known independence of the latter. Exactly such a relatively cautious approach well correlates with the practice of the ECHR [3], what eventually puts, according to metaphorical expression aforementioned author, the German legal system in splendid isolation on this issue [11, 122].

It seems here we would complete the analysis of the British experience. But this hypothesis concerning finality of findings seems erroneous. The fact of the matter is that, when talking about the legality as a key requirement to the forms of managerial actions, the Anglo-Saxon tradition does not necessarily imply compliance of an administrative act with law norms contained in a legal act of greater legal force. Often such normative acts in principle do not exist. But even in case of

adoption of a normative act, as is known, a huge role in determining their "actual content" will be played by other legal instruments. And first of all – court decisions. Known gaps of legislation and empiricism of case-law system, in our opinion, have become the legal reasons, which have led to the emergence of new, totally unusual for classical traditions of continental Europe, grounds for reconsideration the decisions of administrative bodies. First of all, of course, it is about the irrationality and unreasonableness of administrative acts.

A vital role for the development of these requirements to administrative acts was played by the case of Wednesbery, which John Laws poetically named the legal equivalent of Beethoven's Fifth Symphony that not by choice had become a hackneyed (vulgarized) [13, 185]. The circumstances of the case are such. Movie company "Associated Provincial Picture Houses Ltd" in 1947 received from an authorized corporation (Wednesbery Corporation) the license for movie screenings in the city of Wednesbury with the restriction in the form of ban on visits of Sunday cinema show for persons under the age of 15. The movie company found this ban as an unacceptable going of the corporation beyond its powers and contested it in court. The Court after verification of facts and the current legislation (including the Cinematography Act of 1909, Act on Sunday Entertainments of 1932) did not revealed direct violations, recognized a certain scope of discretionary powers of licensing bodies and decided that it could not cancel the decision of the defendant simply because he was not agree with it. However, Lord Greene formulated the rule, according to which the court might intervene if a taken decision was so unreasonable that no one intelligent power would ever adopted it.

This decision was in many ways a turning point in the evolution of the judicial control over administrative acts in the UK. It is the violation of the requirement of reasonableness is a "core" of such group of errors (violations) as "discretion abuse" [11, 92-110]. However, we cannot fail to agree with John Alder, who marks: the very concept of "unreasonableness" is so vague that virtually invites a judge to represent its subjective vision of due in the assessment of decisions [7, 382]. Moreover, the requirement of reasonableness (already very indefinite) is constantly changing, especially in the direction of expansion. Thus, in the case of CCSU v. Council of Civil Service Unions [14] Lord Diplok decided: the Court will intervene only if an act does not have reasonable grounds or is so outrageous in denial of universally recognized moral principles (emphasis added) that no sane person, who applies its mind to the resolving of issue, would take such a decision. The scope of this principle is outlined primarily by rights of powerless subjects; for example, in political matters such a basis for reconsideration is applied only in exceptional

cases [7, 382-383]. Finally, the principle of reasonableness in recent years enters in some competition with the principle of proportionality receiving increasing dissemination after the ratification of the European Convention on Human Rights, [11, 95-105]. However, as noted by Lord Slynn in the case of R. v. Secretary of State [15], the difference between these principles in practice is not as great as it might seem; "the principles of proportionality and reasonableness should not be held in different compartments". Researcher D. Los agrees with the judge and emphasizes: the principle of Wednesbery has evolved up to position of one of the basic principles of modern administrative law of England [13, 186].

So, the absence of not only specific administrative procedures, but often of corresponding substantive legal norms coupled with certain legal traditions have led to the fact that British courts when assessing administrative acts become able to directly apply the principle of fairness. Requirement of legality so evolved that became dependent on the principle of appropriateness. Actually this gave to courts immense powers in determining the grounds for reconsideration of administrative acts (and indirectly – the density of judicial control itself). In this situation, administrative discretion is largely replaced by judicial discretion. That does not always have a positive effect on defendant, as well as on claimants. Extension of the jurisdiction of courts happens without forming of strict rules on the right to judicial protection. So, according to "the principle of fairness" (do not confuse with the requirement of reasonableness), the court itself shall determine in each case the presence or absence of general principles, including the right to court hearing. Thus, the applicant quite unexpectedly for itself can face a situation where he cannot appeal administrative act that violates its legal status [7, 389-390].

In conclusion we note: administrative procedures have not managed to sufficiently link truly complex administrative decisions, especially in the area of discretionary powers. The principle of legality, which reached its apogee in their face, has the known limits of its penetration. In this situation courts play an increasingly important role in various European legal orders. Judicial practice all larger modifies legal norms. And its general direction lays in a gradual, but steady expansion of the subject of judicial control; transition from verification of "pure" legitimacy to other principles of administrative law and administrative procedures – appropriateness, reasonableness, and soundness. This judicial practice is not always uniform: pushing on some fronts (as, for example, in the case of indefinite legal concepts in German administrative law), on the other fronts, it retreats (planning area). At that, courts tend to be "shy" to directly talk about the appropriateness of an administrative act (exception, but a vivid exception is the United Kingdom).

In adopting its decisions, they continue to put on them the customary clothes of legality. But the essence does not change because of such terminological masking. Today the compliance with mere administrative procedures and other normative requirements is not always enough for the proper legal existence of an administrative act. Increasingly, its suitability becomes a subject of much more multifaceted judicial verification.

References:

1. *Administrative Law of Foreign Countries: Textbook* [Administrativnoe pravo zarubezhnykh stran: Uchebnik]. Under edition of A. N. Kozyrin and M. A. Shtatina, Moscow: Spark, 2003.

2. *Administrative Procedural Law of Germany – Verwaltungsrechtsshutz in Deutsch-land: Law on Administrative Proceedings; Law on Administrative-judicial Process; Legislation on the execution of administrative decisions* [Administrativno-protsessual'noe pravo Germanii – Verwaltungsrechtsshutz in Deutsch-land: Zakon ob administrativnom proiz-vodstve; Zakon ob administrativno-sudebnom protsesse; Zakonodatel'stvo ob ispolnenii administrativnykh reshenii]. Translation from German, V. Bergman, Moscow: 2007.

3. Case Upjohn Ltd v. The Licensing Authority Established by the Medicines Act 1968 and others ((Case c-120/97) January 21, 1999).

4. Elistratov A. I. *Basic Principles of Administrative Law* [Osnovnye nachala administrativnogo prava]. 2nd revised and enlarged edition, Moscow: G. A. Leman and S. I. Sakharov, 1917.

5. Kudryashova E. V. Innovation Sciences of Administrative Law in the Field of Adoption of Decisions on Risks Management (through the example of planning) [Innovatsii nauki administrativnogo prava v oblasti prinyatiya reshenii po upravleniyu riskami (na primere planirovaniya)]. *Innovatsii v nauke i praktike administrativnogo prava: sbornik nauchnykh trudov, posvyashchennyi pamyati Yu. M. Kozlova* (VI Kozlovskie chteniya) – *Innovations in Science and Practice of Administrative Law: collection of scientific papers dedicated to the memory M. Kozlov* (VI Kozlov's Readings), Editor-in-chief E. P. Andryukhina, Moscow: publishing house of Kutafin Moscow State Law Academy (MSLA), 2013.

6. Rikhter I., Shuppert G.F. *Judicial Practice on Administrative Law: Study Guide* [Sudebnaya praktika po administrativnomu pravu: Uchebnoe posobie]. Translation from German, Moscow: 2000.

7. Alder J. *General Principles of Constitutional and Administrative Law*. Fourth Edition, 2002.

8. Barnes J. Towards a Third Generation of Administrative Procedure. *Comparative Administrative Law*, S. Rose-Ackerman, P. L. Lindseh, Northampton: 2010.

9. Cane P. *An Introduction to Administrative Law*, 1996.

10. Duguit L. *Transformations* [Les transformations].

11. Kunnecke M. *Tradition and Change in Administrative Law. An Anglo-German Comparison*, 2007.

12. Redecker K. / von H. J. Oertzen. – Verwaltungsgerichtsordnung [Court of Administrative Procedure]. 1997.

13. *Sir John Laws in Forsyth and Hare, The Golden Metwand and the Crooked Cord*, 1998.

14. (1984) 3 All ER 935, HL.

15. (2001) 2 All ER 929 at 976.

16. (1988) 81 BVerwGE (Compilation of Decisions of the Federal Administrative Court (Germany)) 12.

17. BVerfGE (Compilation of Decisions of the Federal Constitutional Court (Germany)) 83, 130.

18. BVerfGE (Compilation of Decisions of the Federal Constitutional Court (Germany)) 84, 34.

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NON-COMMERCIAL (POLITICAL) RISKS OF IMPLEMENTATION OF FOREIGN INVESTMENTS

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Defining non-commercial (political) risk as a threat (probability) of violation by a state the guarantees of foreign investors' rights, the author examines the mechanisms of protection of investors against non-commercial risks (mainly insurance).

Here is noted a direct or indirect link of emergence non-commercial risks with the action of a state-recipient of investments.

The author focuses that national legislation in most cases includes non-commercial (political) risks to the category of so-called force majeure events that do not entail the obligation of insurer to compensate to the injured party the damage suffered.

Keywords: foreign investments, investment activity, investment risks, non-commercial risks, political risks, non-commercial risks insurance.

The implementation of foreign investments in the territory of foreign countries involves numerous risks, including the risks of nationalization of investments, non-payment of adequate compensation for requisition of investments, breaches of obligations by contracting party of investor and etc. The risk to one degree or another is always present in the cross-border investment activity, is its integral sign, "an inevitable, and moreover, an essential element of investment activity" [9, 14]. There is a determinative position in the scientific literature, according to which "risk institute is an institute of the theory of law, receiving development and concretization both in sectorial legal institutes of risk and in complex institutes" [16, 88].

Investment risk is considered as an integral part of overall financial market and is determined as the "probability" (threat) of financial losses, unreceived income from investments or occurrence of additional investment costs" [17, 283]. Also the concept of investment risk is disclosed through the negative consequences that occur due to certain circumstances. In particular, A. A. Bogatyrev understands investment risk as "damage inflicted to investments in the event of nationalization, requisition, excessive taxation, as well as physical damage to investment property in the case of war..." [5, 11]. The economic literature contains such definition of investment risk: this is the "possibility of investments loss, unreceived or short-received income in implementation of investment projects" [11, 52].

The criterion of risk as a necessary investment sign was designated by the International Centre for Settlement of Investment Disputes (ICSID) in course of consideration the case of Salini Costruttori S.PA. and Italstrade S.PA v. Morocco. Based on the proceedings of the case ICSID introduced the so-called "Salini-test", which it started to use to determine investments in accordance with the Washington Convention. This test lies in the presence of four conditions, which an investment must meet: 1) there must be a kind of injection; 2) project must be continuous; 3) presence of an operational risk, and 4) contribution to the development of the host state [20] (For more on the determination of the concept of "investment" in the documents or decisions of ICSID [4, 44-46; 7, 7-9]). The Lloyd Corporation in order to investment risks can be insured makes to them two basic requirements. Namely, for inclusion in an insurance policy the risk should be an event, the probability of occurrence of which is unknown, and it should be able to be measured in monetary terms [22].

The problem of determining the classification criteria for investment risks is associated with the legal essence and specific features of investment risk, as well as with the types of investment activities in general. So, traditionally in the legal

literature they single out the following main types of investment risks. Depending on the object of investment activity – single out the risk of financial investment touching on stock and cash (currency) market, and the risk of real investment (risk associated with capital investments, construction risks). By forms of ownership of the means of investment there are distinguished: the risks of state investment; the risks of private investment; risks of foreign investment; joint investment risks. By the criterion of the basis of emergence and the nature of insured event in the international investment activity single out commercial risks and non-commercial (political) risks [15, 22-23; 17, 283-286; 18, 16-20].

On the basis of examination of the represented in doctrine various definitions of non-commercial (political) risk with taking into account the provisions of international-legal documents in this field, it can be concluded that under such a risk it is justified to understand the risks arising from the events of political nature, which cannot be controlled by a foreign investor; these risks are conditioned by the possible actions of state-recipient, which may directly or indirectly adversely affect the ability investor to possess, use and dispose of its investments. Consequently, non-commercial (political) risk is the threat (probability) of violation by a state of the guarantees of foreign investors' rights. All kinds of non-commercial risks are peculiar of direct or indirect connection of their emergence with the actions of state-recipient of investments.

One of the main mechanisms for the protection of investors' rights against non-commercial risk is insurance of private investments in the implementation of cross-border investment activity. The primary task of foreign investment risks insurance is the rapid compensation of losses incurred by the investor from an independent source upon occurrence of an insured event. The main international-legal instrument in this field is the Seoul Convention of 1985 "On establishment the Multilateral Investment Guarantee Agency" [21] (*hereinafter referred to as the Convention on the establishment of MIGA*). The Russian Federation had joined to the Convention on the establishment of the MIGA in 1992, and this international-legal act entered into legal force on the territory of our country since 1995.

It should be emphasized that national legislation in the majority of cases attributes non-commercial (political) risks to the category of so-called force majeure events, which do not entail an insurer's obligation to compensate damages to the aggrieved party. In particular, article 964 of the Civil Code of the RF provides that under general rule the insurer shall be released from the payment of insurance compensation and the insurance sum, when the insured accident commenced owing to military action, as well as maneuvers or other military events; civil war,

civil unrest or strikes of any kind, for damages arising out of the seizure, confiscation, requisition, arrest or destruction of the insured property by the order of public authorities. In this regard, the MIGA insurance of exactly political risks acts as an important legal protective mechanism in the implementation of foreign investments.

Convention on the establishment of the MIGA (art. 11) singles out the following types of non-commercial (political) risks, in respect of which the insurance is exercised:

1) currency transfer risk;
2) risk of expropriation and similar measures;
3) breach of contract risk;
4) war and civil disturbance risk.

The content of the mentioned risks in more detail is disclosed in the MIGA Operational Regulations [19]. It is justified to describe the main aspects characterizing the species of non-commercial risks covered by the guarantee of MIGA.

1. The risk of currency inconvertibility of a host state and the risk of untranslatability abroad of local currency (if it is converted) or foreign currency, to which the national one is converted. This guarantee applies only to the amounts of currency received as income of investment activity or proceeds from the liquidation of investments. An essential condition for the provision of insurance indemnity on this type of non-commercial risk is an objective impossibility of conversion because of exchange restrictions imposed by the recipient country. The considered type of insurance guarantees protection of investor in case of delays in obtaining convertible currency because of an action or omission of the Government of the host state; unfavorable changes in foreign currency exchange laws; deterioration of the conditions affecting the currency exchange and outflow of foreign exchange. However, from the analysis of the provisions of article 11 of the Convention on the establishment of MIGA, it follows that this type of insurance does not cover one of the most common and property significant for investor adverse events – the devaluation of local currency. In particular, paragraph (b) article 11 of the Convention contains the following prescription: "Under the joint statement of investor and host party the Board of Directors of ... may approve the extension of coverage under this article to specific non-commercial risks … but in no way to the risk of devaluation and depreciation of currency".

2. The risk of expropriation or similar measures – this type of insurance protects an investor from "any legislative action or administrative action or omission coming from the host government, which has the effect of depriving the holder

of guarantee of ownership of its investments, control over them or a substantial benefit from such investment" [10]. Insured event under this type of guarantee can be not only the measures of public authorities of recipient country depriving the investor the rights on its property, but also restricting investment activity. However, this type of insurance does not cover measures relating to taxation, compliance with environmental and labor legislation, measures to maintain public order and other generally applicable non-discriminatory measures that are usually taken by Governments to regulate economic activity on their territory.

3. Breach of the terms and conditions of treaty (contract). This type of insurance is designed to protect the property interests of investors against losses arising from breach of terms or rupture of contract on the part of the Government of host state. For insurance reimbursement, you must have one of the following circumstances: an investor does not have the ability to appeal to a court or arbitration body with a claim on a treaty (contract) against the Government of host-state; such authority does not take a decision within a reasonable time, as it is provided for in the treaties on guarantee in accordance with the provisions of MIGA; after a final judgment in its favor a foreign investor cannot achieve its execution.

4. Insurance of the risk of war and civil disturbance protects an investor from damage, destruction or disappearance of the fixed assets as a result of these events. This risk includes revolutions, revolts, state coups and other similar acts, which cannot be regulated by the Government of host state. However, paragraph 1.53 of the MIGA Operational Regulations contains restrictive conditions for action of this type of insurance. So, under a general rule, MIGA shall not compensate the investments' damage resulting from trade unionists, students and other actions to protect the specific interests, as well as in the case of terrorist acts directed against the holder of guarantees (investor), and kidnapping.

MIGA will insure foreign investments against political risks, if the investments meet certain requirements, which can be identified through the analysis of article 12-14 of the Convention. Firstly, the investments should be medium-term or long-term investments; secondly, the insurance applies only to private investments, i.e., in the role of investors may be only foreign individuals and legal entities acting on a commercial basis; thirdly, investing should be carried out only on the territory of a developing member country belonging to Category II specified in the Annex to the Convention on the establishment of MIGA. In addition, investments must be economically justified and contribute to the development of host country, as well as investments shall comply with laws, regulations, objectives and priorities of the development of the host country. In addition to

the above, when concluding an insurance agreement, MIGA must verify the existence of conditions for investments in a host country, including existence of a fair and equal approach to investment and legal protection for it. At that, MIGA, pursuant to article 15 of the Convention, shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designed for cover.

As noted in the literature, despite the fact that Russia has fully joined to the analyzed Convention December 29, 1992, "but no cases of the reference to it in order to make best practical use of all the benefits provided by this Convention has not yet been observed" [8]. In this context, it is reasonable to suggest that exactly the system of high requirements and conditions for investment, so that they can be insured by MIGA, creates serious legal obstacles to the practical implementation of the provisions of the Convention on the establishment of the MIGA. Meanwhile, as rightly pointed out by A. G. Bogatyrev, the role and importance of foreign investments' insurance institute within the framework of MIGA will increase substantially with the development of the investment activities of the International Bank for Reconstruction and Development, the International Finance Corporation and other international financial organizations [6, 167].

The next question, before which it is advisable to stop for disclosure the mechanism of insurance of foreign investments against non-commercial risks, concerns the legal regulation of subrogation. In bilateral investment agreements subrogation is understood as a relation, by virtue of which "Contracting Party or its authorized body, which have made payments to an investor on the basis of guarantee of protection against non-commercial risks in connection with its investment in the territory of another Contracting Party, will be able to exercise in the order of subrogation the rights of the investor in the same extent as the investor" [1; 2; 3]. In accordance with article 18 of the Convention on establishment of the MIGA, after payment or consent to the payment of compensation to the owner of the guarantee (the insured), the Agency is assigned the rights or claims related to a guaranteed investment that can be of the owner of the guarantee in respect of host country or other debtors. The treaty on guarantee provides for the terms and conditions of such assignment.

The MIGA's need during subrogation to interact with recipient states, whose actions have caused the insured event, makes unique the legal status of MIGA that has a dual nature. On the one hand, it is an international intergovernmental organization with an international legal personality. On the other hand, regarding the content of its main activity (investment insurance against non-commercial risks) MIGA can be characterized as a subject of international business law, so MIGA

also has signs specific to a commercial organization (has a share capital; bears an independent property responsibility on its insurance obligations to policyholders, etc.). The dual nature of the legal status of MIGA is described by some authors [12, 112-113; 14, 206-207; 17, 294].

When subrogation the relations from the private-law sphere on the insurance contract of MIGA with the investor move into international public sphere, the parties to which are two entities of international public law (international organization and recipient state). This is the main feature of the international-legal mechanism for foreign investment insurance against non-commercial (political) risks within the framework of MIGA. This transformation of the legal status of MIGA discloses the originality of investment legal relations in general.

Summarizing the above, it should be noted that non-commercial risks insurance of foreign investments occupies an important place in the system of civil-legal methods to protect the rights of foreign investors. Implementation and increased efficiency of protective legal mechanisms in the implementation of international investment activities largely depends on the solving the tasks of harmonization of national legislation with the provisions of international documents, development of insurance companies engaged in insurance of various risks of cross-border investment activity, detailed elaboration and improving the content of insurance contracts in this area, extension the list of risks of foreign investments covered by insurance, creation of legal opportunities to facilitate access of private investors to the use of insurance of investments within the framework of MIGA.

References:

1. Resolution of the RF Government No. 456 from June 09, 2001 "On the Conclusion of Agreements between the Government of the Russian Federation and the Governments of Foreign Countries concerning the Promotion and Reciprocal Protection of Investments [Postanovlenie pravitel'stva RF ot 09 iyunya 2001 g. № 456 «O zaklyuchenii soglashenii mezhdu Pravitel'stvom Rossiiskoi Federatsii i pravi-tel'stvami inostrannykh gosudarstv o pooshchrenii i vzaimnoi zashchite kapitalovlozhenii»]. *SZ RF – Collection of Laws of the RF* from 18.06.2001, no. 24, article 2578.

2. Agreement between the Government of the Russian Federation and the Government of the Argentine Republic on Promotion and Mutual Protection of Investments (Moscow, June 25, 1998) [Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Argentinskoi Respubliki

o pooshchrenii i vzaimnoi zashchite kapita-lovlozhenii (Moskva, 25 iyunya 1998 g.)]. *System GARANT* [Electronic resource], Moscow: 2014.

3. Agreement between the Government of the Russian Federation and the Government of the Algerian People's Democratic Republic on the Promotion and Reciprocal Protection of Investments (Algeria, March 10, 2006, the treaty is not ratified by the Russian Federation) [Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pra-vitel'stvom Alzhirskoi Narodnoi Demokraticheskoi Respubliki o pooshchrenii i vzaimnoi zashchite kapitalovlozhenii (Alzhir, 10 marta 2006 g.)]. *System GARANT* [Electronic resource], Moscow: 2014.

4. Alisievich E. S., Kolpinskaya A. Yu. International-legal Problems in Development of a Common Definition of the Concept of "Investment" [Mezhdunarodno-pravovye problemy vyrabotki edinogo opredeleniya ponyatiya «investitsiya»]. *Zakony Rossii: opyt, analiz, praktika – Laws of Russia: Experience, Analysis and Practice*, 2011, no. 1.

5. Bogatyrev A. G. *State-legal Mechanism for Regulating Investment Relations (Theory Issues)*. Thesis abstract of a Doctor of Law [Gosudarstvenno-pravovoi mekhanizm regulirovaniya investitsionnykh otnoshenii (voprosy teorii). Avtoref. dis. … dokt. yurid. nauk]. Moscow: 1996.

6. Bogatyrev A. G. *Legal Regulation of Investment Relations (Issues of Theory and Practice)* [Pravovoe regulirovanie investitsionnykh otnoshenii (voprosy teorii i praktiki)]. Moscow: Ekon-inform, 2012.

7. Dolinskaya V. V. Investments and Investment Activity [Investitsii i investitsionnaya deyatel'nost']. *Zakony Rossii: opyt, analiz, praktika – Laws of Russia: Experience, Analysis and Practice*, 2011, no. 1.

8. Doronina N. G., Semilyutina N. G. *International Private Law and Investments: Theoretical and Practical Study* [Mezhdunarodnoe chastnoe pravo i investitsii: Nauchno-prakticheskoe issledovanie]. Moscow: Kontrakt, Volters Kluver, 2011.

9. Inshakova A. O. Legal Mechanisms to Minimize Investment Risks in Implementation of Investment Activity [Pravovye mekhanizmy minimizatsii investitsionnykh riskov v khode osushchestvleniya investitsionnoi deyatel'nosti]. *Zakony Rossii: opyt, analiz, praktika – Laws of Russia: Experience, Analysis and Practice*, 2011, no. 1.

10. The Convention on Establishing MIGA [Konventsiya ob uchrezhdenii MAGI]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2014.

11. Krichevskii N. A. *Investment Insurance: Textbook. 2nd edition* [Strakhovanie investitsii: uchebnik. 2-e izd.]. Moscow: publishing and trading corporation «Dashkov i K°», 2007.

12. Labin D. K. *International Law to Protect and Promote Foreign Investments* [Mezhdunarodnoe pravo po zashchite i pooshchreniyu inostrannykh investitsii]. Moscow: Volters Kluver, 2008.

13. Lisitsa V. N. *Legal Regulation of Investment Relations: Theory, Legislation and Practice of Application*: Thesis abstract of a Doctor of Law [Pravovoe regulirovanie investitsionnykh otnoshenii: teoriya, zakonodatel'stvo i praktika primeneniya: Avtoref. dis. … dokt. yurid. nauk]. Novosibirsk: 2010.

14. *International Private Law: Textbook* [Mezhdunarodnoe chastnoe pravo: uchebnik]. Under general edition of G. V. Petrova, Moscow: publishing house Yurait, 2011.

15. Polyakova T. S. Risk Insurance as a Form of Protection the Rights of Foreign Investors [Strakhovanie riskov kak forma zashchity prav inostrannykh investorov]. *Yurist – Lawyer*, 2011, no. 12.

16. Tikhomirov Yu. A. Legal Risks [Pravovye riski]. *Zakony Rossii: opyt, analiz, praktika – Laws of Russia: Experience, Analysis and Practice*, 2012, no. 2.

17. Farkhutdinov I. Z. *International Investment Law and Process: Textbook* [Mezhdunarodnoe investitsionnoe pravo i protsess: uchebnik]. Moscow: Prospekt, 2010.

18. Shichanin A. V., Grivkov O. D. Some Aspects of Minimization Legal Risks in Investment Activity [Nekotorye aspekty minimizatsii pravovykh riskov pri osushchestvlenii investitsionnoi deyatel'nosti]. *Pravo i ekonomika – Law and Economics*, 2007, no. 6.

19. *Operational Regulations (As amended by the Board of Directors through February 4, 2011)*. Available at : www.miga.org/documents/Operations-Regulations.pdf. (accessed : 23.03.2014).

20. *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Marocco ICSID Case No. ARB/00/4, Decision on Jurisdiction. 23 July 2001*. Available at : icsid.worldbank.org (accessed : 02.04.2014).

21. The Convention Establishing the Multilateral Investment Guarantee Agency. *International Legal Materials*,1985, no. 24.

22. Available at : *www.lloyds.com/Lloyds/Investor-Relations/Lloyds-overview/Insurance-for-beginners* (accessed : 02.04.2014).

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TOWARDS THE QUESTION ABOUT LEGAL ASPECTS OF CURRENCY REGULATION

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Considering the amendments to the Federal Law No. 173-FL from December 10, 2003 "On Currency Regulation and Currency Control", the authors note a significant reduction in foreign exchange restrictions (including the abolition of restrictions on conducting of capital transactions) and changing of a complex of currency regulation measures in favor of economic methods.

As development prospect of currency regulation and currency control is proposed: to raise the status of certain currency control agents up to the status of currency control body, as well as, in order to detect and prevent offenses related to the conducting of foreign trade operations, to create "common information space" and a legal framework for inter-departmental interaction of the FTS of Russia, Rosfinnadzor, Ministry of Economic Development of Russia, the MIA of Russia, the Bank of Russia and other structures.

Keywords: currency legislation, currency regulation, currency control bodies.

The goal of currency legislation, which is enshrined in the preamble to the Federal Law No. 173-FL from December 10, 2003 "On Currency Regulation and Currency Control" [1] (hereinafter – Law No. 173), is to ensure the implementation of a unified state currency policy, the stability of the currency of the Russian Federation and the stability of the domestic currency market of the Russian Federation as factors of the progressive development of the national economy and international economic cooperation.

The mentioned goal, set by the Russian legislator, is achieved through the implementation of currency regulation.

Currency regulation is a totality of norms that govern public relations in currency sphere. The main normative act governing the sphere of currency legal relations is Law No. 173. However, currency legislation consists not only of the mentioned law but also includes normative acts adopted on the issues of currency regulation by the bodies of currency regulation and control.

Currency control bodies are the Central Bank of the Russian Federation and the Government of the Russian Federation. These bodies within their competence issue acts of currency control bodies that are compulsory for residents and non-residents. At that, the Law clarifies the activity of the Central Bank of the Russian Federation as a body of currency regulation: Bank of Russia sets unified forms of accounting and reporting on currency transactions, the order and terms of their submission, and also prepares and publishes statistical information on currency transactions (part 4 article 5 of the Law No. 173).

If the procedure for implementation of currency transactions, the procedure for accounts use are not set by currency control bodies in accordance with this federal law, currency transactions are carried out, accounts are opened and transactions on accounts are carried out without restrictions.

Establishment by currency control bodies of requirement of receiving individual permissions by residents and non-residents is not allowed. It is not allowed for currency control bodies to establish requirement of pre-registration.

Currency regulation is ensured by currency legislation and is exercised at the normative and individual levels. Normative regulation is the establishment of legal norms, whose object is public relations associated with currency. Individual-legal regulation is expressed in the application of law norms to specific life circumstances, entailing the emergence, change and termination of certain currency legal relations.

Currency regulation in the Russian Federation has recently undergone significant changes due to, first of all, the entry of the Russian Federation to the World

Trade Organization (hereinafter – WTO), as well as the formation of a unified customs territory of Russia, Belarus and Kazakhstan in connection with the entry of these countries into the Customs Union within the framework of the Eurasian Economic Community (EAEC), that is reflected in the legislation governing the sphere of currency relations.

The result of amendments to currency legislation is a significant reduction of foreign currency restrictions, removal of restrictions on capital transactions and change of a number of measures of currency regulation in favor of economic methods, which has contributed to the improvement of the financial situation in the country, strengthening of the national currency, as well as Russia's entry as a full member into the world economic space.

We note the significant amendments introduced by the Federal Law No. 406-FL from December 06, 2011 "On Amending the Federal Law "On Currency Regulation and Currency Control" in the Part of Facilitation the Procedure of Currency Control" [2], as well as the Federal Law No. 155-FL from July 02, 2013 "On Amending the Federal Law "On Currency Regulation and Currency Control" [3], the Federal Law No. 251-FL from July 23, 2013 "On Amendments to Certain Legislative Acts of the Russian Federation due to Transferring to the Central Bank of the Russian Federation of Powers to Regulate, Control and Supervise in the Field of Financial Markets" [4], which are aimed to simplify the procedures of currency control, to clarify certain provisions of the existing currency legislation:

1) The range of citizens classified as non-residents has been expanded: now they also include citizens of the Russian Federation, who reside abroad for at least one year on the basis of either a residence permit in a foreign state, or job or study visa with validity at least one year, or totality of such visas with common validity period not less than a year.

This change is aimed at removing barriers associated with payment of wages in foreign currency by a Russian company to its employees, who work outside of the Russian Federation and reside there for at least one year.

2) Residents have been obligated to provide information on the time terms of execution of foreign trade contract. Previously, this norm did not exist in the Law No. 173.

The essence of this change is that residents, who are engaged in foreign trade, should provide to authorized banks the information about expected, in accordance with the contractual terms, maximum terms of: 1) the receipt of foreign currency and (or) the currency of the Russian Federation from non-residents on their accounts for the execution of obligations in the form of transfer of goods, performing

work or services for them; 2) performance by non-residents of the obligations under the contracts in the form of transfer of goods, performing works or services by them (part 1.1, 1.2, article 19 of the Law No. 173).

The new edition of this article "will allow blocking of one of the most applied in our country schemes of withdrawal capital abroad. The essence of the scheme is quite simple: parties sign a foreign trade contract (the contract provides for advance payment form), which does not specify the terms of delivery of goods and return of the advance payment by the non-resident in the case of non-delivery of goods, failure to perform works, non-rendering of services, non-transfer of intellectual property. The contract comes into force from the moment of its signing and is valid till complete fulfillment of obligations by the parties (i.e., a precise date of fulfillment of obligations under the foreign trade contract is not defined)" [5]. In this case, the funds can be transferred abroad irreversibly, since currency control agents had no reason (until new edition) to register the violations.

3) The new edition of the Law No. 173 directly establishes data that should be contained in transaction certificate. Previously this data was enshrined only in a by-law (current at that time Operating Instructions of the Bank of Russia No. 117-I from June 15, 2004).

4) Possibility to implement electronic document interchange between bodies and agents of currency control is legally established (part 6.1, 17 article 23 of the Law No. 173). In the previous edition of this norm was absent.

5) Amendments have also touched upon currency transactions. The list of currency transactions has been expanded (paragraph 9 part 1 article 1), that has become one more step forward ensuring control over schemes of withdrawal capital out of our country. One of the common unlawful schemes of withdrawal of capital in the new edition of the Law is recognized as a currency transaction, this allows the bodies and agents of currency controls to verify and monitor such transactions and, if necessary, prohibit their carrying out.

We are talking about subparagraph "g" paragraph 9 part 1 article 1 of the Law No. 173 "transferring of the currency of the Russian Federation from a resident's account opened outside the territory of the Russian Federation to an another resident's account opened on the territory of the Russian Federation, and from a resident's account opened on the territory of the Russian Federation to an another resident's account opened outside the territory of the Russian Federation".

Introduction of this paragraph places additional responsibility on authorized banks that will be obliged to track such transactions and apply appropriate measures in case of currency legislation violations.

Thus, currency legislation is constantly changing in the light of the requirements arising from international agreements, and taking into account the current economic situation in our country. These amendments are aimed at filling the gaps of currency legislation, which are enjoyed by the participants of foreign-economic activity with a view to withdrawal capital abroad, concealment or distortion of the actual data on currency transactions from the bodies and agents of currency control.

As the development prospects for currency regulation and currency control, given the complexity and importance of control over conducting of currency transactions and outflow of capital from the country, we believe it is appropriate to:

1) to raise the status of certain agents of currency control up to the status of currency control body. The return of the status of currency control body to the Federal Customs Service, which in the case of revealing of currency control violation could independently within the framework of its competence bring to responsibility for breaches in the currency field, would be well-founded.

2) taking into account the specificity and complexity of the organization of control over conducting currency transactions, to create "common information space" and a legal framework for inter-departmental interaction of the FTS of Russia, Rosfinnadzor, Ministry of Economic Development of Russia, the MIA of Russia, the Bank of Russia and other structures in order to detect and prevent offenses related to the conducting of foreign trade operations.

References:

1. Federal Law No. 173-FL from December 10, 2003 "On Currency Regulation and Currency Control" [Federal'nyi zakon ot 10 dekabrya 2003 g. № 173-FZ «O valyutnom regulirovanii i valyutnom kontrole»]. *SZ RF – Collection of Laws of the Russian Federation*, 2003, no. 50, article 4859.
2. Federal Law No. 406-FL from December 06, 2011 "On Amending the Federal Law "On Currency Regulation and Currency Control" in the Part of Facilitation the Procedure of Currency Control" [Federal'nyi zakon ot 6 dekabrya 2011 g. № 406-FZ «O vnesenii izmenenii v Federal'nyi zakon «O valyutnom regulirovanii i valyutnom kontrole» v chasti uproshcheniya protsedur valyutnogo kontrolya»]. *Rossiiskaya gazeta – Russian Newspaper* from December 09, 2011.
3. Federal Law No. 155-FL from July 02, 2013 "On Amending the Federal Law "On Currency Regulation and Currency Control" [Federal'nyi zakon ot 2 iyulya 2013 g. № 155-FZ «O vnesenii izmenenii v Federal'nyi zakon «O

valyutnom regulirovanii i valyutnom kontrole»]. *Rossiiskaya gazeta – Russian Newspaper* from July 05, 2013.

4. Federal Law No. 251-FL from July 23, 2013 "On Amendments to Certain Legislative Acts of the Russian Federation due to Transferring to the Central Bank of the Russian Federation of Powers to Regulate, Control and Supervise in the Field of Financial Markets" [Federal'nyi zakon ot 23 iyulya 2013 № 251-FZ «O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v svyazi s peredachei Tsentral'nomu banku Rossiiskoi Federatsii polnomochii po regulirovaniyu, kontrolyu i nadzoru v sfere finansovykh rynkov»]. *SZ RF – Collection of Laws of the Russian Federation*, 2013, no. 30 (part I), article 4084.

5. Motokhin A. M., Rodionova Z. I. Currency Regulation and Currency Control in Russia: Development Prospects [Valyutnoe regulirovanie i valyutnyi kontrol' v Rossii: perspektivy razvitiya]. *Mezhdunarodnye bankovskie operatsii – International Banking Transactions*, 2011, no. 4.

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TOPICAL ISSUES OF ACTIVITY OF PRECINCT POLICE COMMISSIONERS EXERCISING ADMINISTRATIVE SUPERVISION OVER PERSONS RELEASED FROM PRISONS

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Topical issues of precinct police commissioners exercising administrative supervision over persons released from places of detention are considered in the article.

Keywords: administrative supervision, persons released from prisons, internal affairs bodies, police, precinct police commissioner, administrative restrictions, individual preventive work.

During the last several years each year more than 350 thousand ex-convicts are released from prison. They commit every fifth crime [6, 10]. Many specialists believe that one of the main reasons for this situation is the lack of a well-functioning system of administrative supervision over persons released from places of imprisonment and who have not taken the path of correction. Institute of administrative supervision legislatively introduced in the Russian Federation is designed to correct this situation.

Federal Laws of the Russian Federation on administrative supervision adopted in 2011 [2; 3] formed the basis for the revival of the existed in the Soviet period institute of administrative supervision, required amendments to the federal legislation (Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, Correctional Code, Code on Administrative Offences of the Russian Federation), as well as the development of departmental normative legal act – the Order of the Ministry of Internal Affairs of Russia [5], which regulated the procedure for monitoring over compliance by persons released from prison with established by court administrative restrictions of their rights and freedoms, as well as over the fulfillment of their obligations provided by law.

Since July 1, 2011 normative legal acts on administrative supervision have entered into force. From that moment the administrations of correctional institutions, in accordance with article 261.5 of the Code of Civil Procedure of the Russian Federation [1], began to apply to the courts with applications on the establishment of administrative supervision over the persons to be released from these correctional institutions (prisons).

The current legislation provides that the organization and implementation of administrative supervision is a duty of units on organization and implementation of administrative supervision or officials charged with responsibility to implement administrative supervision in order to prevent commission of crimes and other offences by persons released from prisons, to provide individual preventive impact on them.

In addition, in the implementation of administrative supervision are involved:

1) precinct police commissioners;

2) employees of combatant units: Patrol-Guard Service of the Police; non-departmental guard; Road Patrol Service of State Road Traffic Safety Inspectorate;

3) units authorized to carry out operational-investigative activities;

4) police dispatch centers of territorial internal affairs bodies;

5) police offices of line units, departments of the Ministry of Internal Affairs of the Russian Federation on the rail, waterway and air transport.

As part of the study, the authors surveyed 50 precinct police commissioners of Regional Office of the Ministry of Internal Affairs of Russia for Omsk Region, ROMIA of Russia for Tomsk region, ROMIA of Russia for Tyumen region.

The following results were obtained to the question about the contribution to the implementation of administrative supervision over persons released from places of imprisonment, which is done by a various services of internal affairs bodies (except for precinct police commissioners):

- significant – 8 pers. (16% of respondents);
- insignificant – 40 pers. (80% of respondents);
- difficult to answer – 2 pers. (4% of respondents).

Thus, the main burden to exercise of administrative supervision over persons released from prison lies on the service of precinct police commissioners.

The rights and duties of precinct police commissioners to establish and exercise supervision are defined by the legislation of the Russian Federation, departmental orders and instructions, as well as other normative legal acts of the Russian Federation.

According to part 1 article 4 of the Federal Law No. 64 from April 06, 2011 "On Administrative Supervision over Persons Released from Prisons" (hereinafter – the Federal Law "On Administrative Supervision ..."), there can be set five types of administrative restrictions in respect of the person under surveillance:

1) prohibition to stay in certain places;

2) prohibition of visits to places of mass and other events, and participation in these events;

3) prohibition of staying out of residential or other premises, which are the place residence or staying of a supervised person at a certain time;

4) prohibition of going out of the territory stipulated by court;

5) required visits from one to four times per month in the internal affairs bodies at the place of residence or stay for registration.

The order of the Ministry of Internal Affairs No. 818 from July 08, 2011 (as amended on June 30, 2012, No. 657) approved the Procedure for the implementation of administrative supervision over persons released from prisons. According to this document, precinct police commissioners:

- exercise monitoring over the arrival from correctional institution within the prescribed time of a person in respect of whom supervision is established, by place of residence (stay) after its release from prison;
- inform institution of the Federal Penal Service of Russia about the arrival of a supervised person, in respect of which supervision is established before its release from prison, as well as about registration in the territorial body of the Ministry of Internal Affairs of Russia;
- carry out activities on identification the location of supervised persons, who have not arrived after release from prison within the time period determined by correctional institution to the chosen by it place of residence or stay, or have changed the place of residence or stay, without notifying the territorial body of the Ministry of Internal Affairs of Russia, in which the supervision was carried out;
- conduct individual preventive work with supervised persons; visit supervised persons at the place of residence (stay) at certain time of the day, during which it is forbidden to stay out of definite premises, as well as draw up acts of the results of the visit;
- make records in the passport of administrative district and monthly report to the Chief of the territorial body about the compliance by supervised person with the established by court administrative constraints and performance of its duties, about the possibility of committing offences, including those related to evading of administrative supervision;

- under the orders of the Chief of the territorial body they conduct collection of materials regarding persons evading from administrative supervision, before the transfer of materials in specialized unit of inquiry; if there are grounds they prepare materials for establishing administrative supervision over persons subject to the provisions of the Federal Law "On Administrative Supervision...";

- prepare applications on the establishment of supervision and restrictions in respect of persons of this category for the consideration in court; initiate and keep recording and preventive affairs of supervision; conduct talks with persons, in respect of which the court has decided on the establishment of supervision, during which they warn them of the responsibility for non-compliance with administrative constraints that the court established against them and etc.

Study of the activity of precinct police commissioners for the implementation of administrative supervision over persons released from prisons has identified a number of problems that need resolving. In particular, precinct police commissioners often perform functions not directly related to the work at administrative district, implementation of which distracts them from the proper implementation of administrative supervision.

The question about the factors complicating the work of a precinct police commissioner for implementation of administrative supervision over persons released from prison was given the following answers:

- heavy workload at administrative district – 3 pers. (6% of respondents);

- distraction from performing official duties at the assigned administrative district (performance of official duties instead of precinct police commissioners, who are: on vacation, on a business trip, at session, at hospital; protection of public order during festive, sporting, socio-political and other events, etc.) – 47 pers. (94% of respondents);

In this connection, attention should be drawn to the fact that one of the most important tasks of a precinct police commissioner in the implementation of administrative supervision is the prevention of crimes and administrative offences among supervised persons, the formation of their law-abiding conduct. Therefore, the attraction of precinct police commissioners to the performing of uncharacteristic functions should be minimized.

Let's pay attention to one important issue that needs resolving. The Federal Law "On Administrative Supervision..." has assigned to internal affairs bodies a duty to implement administrative supervision, while the number of the staff in this area is minimal. Therefore, implementation of this function is assigned primarily to precinct police commissioners, who are already overloaded without this. In this

connection it seems necessary as soon as possible to finish the formation of units on the organization and implementation of administrative supervision, through providing for that the necessary staff.

The Russian Federation, as a civilized state that perceives international standards of human rights, actively joins to modern advances in the sphere of correction and rehabilitation of persons released from prison, who have not taken the path of correction. So, the Concept of development of the correctional system of the Russian Federation until 2020 [4], taking into account the existing advanced foreign experience, sets a task to create the conditions for the preparation of persons released from places of imprisonment for further post-penitentiary adaptation through the probation service (for example, in England and the United States such measure as probation (test) is associated with the performance by a supervised person of the requirements established in court judgment (prohibition of meetings with certain people, visiting certain places, and etc.) [7, 373]).

The foregoing leads to the conclusion that in the modern period the administrative supervision over persons released from prison as one of the elements harmoniously integrates into a complete system of crime prevention.

Despite the relatively large number of services and units of internal affairs bodies exercising the considered type of activity, the bulk of the duties (not counting units of the internal affairs bodies on organization and implementation of administrative supervision or officials who are responsible for exercising administrative supervision) is exercised by the representatives of the service of precinct police commissioners.

In order to improve supervision activity of police in respect of persons released from prisons, it is necessary:

- to complete the formation of the units on organization and implementation of administrative supervision within the existing staff size in the territorial bodies of the Ministry of Internal Affairs of the Russian Federation at the regional and district levels (except for line departments of the Ministry of Internal Affairs of the Russian Federation on the rail, waterway and air transport).
- to minimize the involvement of precinct police commissioners to perform functions not directly related to the work on an assigned administrative district.

References:

1. Civil Procedure Code of the Russian Federation from November 14, 2002 No. 138-FL (as amended on April 02, 2014 No. 51-FL) [Grazhdanskii

protsessual'nyi kodeks Rossiiskoi Federatsii ot 14 noyabrya 2002 g. № 138-FZ (v red. ot 2 aprelya 2014 g. № 51-FZ)]. *SZ RF – Collection of Laws of the RF*, 2002, no. 46, article 4532.

2. Federal Law No. 64-FL from April 06, 2011 "On Administrative Supervision over Persons Released from Prisons" (as amended in Federal Law No. 432-FL from 28 December 2013) [Federal'nyi zakon ot 6 aprelya 2011 g. № 64 «Ob administrativnom nadzore za litsami, osvobozhdennymi iz mest lisheniya svobody» (v red. Federal›nogo zakona ot 28 dekabrya 2013 g. № 432-FZ)]. *SZ RF – Collection of Laws of the RF*, 2011, no. 15, article 2037.

3. Federal Law No. 66 from April 06, 2011 "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law "On Administrative Supervision over Persons Released from Prisons" [Federal'nyi zakon ot 6 aprelya 2011 g. № 66 «O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v svyazi s prinyatiem Federal'nogo zakona «Ob administrativnom nadzore za litsami, osvobozhdennymi iz mest lisheniya svobody»]. *SZ RF – Collection of Laws of the RF*, 2011, no. 15, article 2039.

4. RF Government Decree No. 1772-r from October 14, 2010 "On the Concept of Development the Penitentiary System of the Russian Federation until 2020 [Rasporyazhenie Pravitel'stva RF ot 14 oktyabrya 2010 g. № 1772-r «O Kontseptsii razvitiya ugolovno-ispolnitel'noi sistemy Rossiiskoi Federatsii do 2020 goda]. *SZ RF – Collection of Laws of the RF*, 2010, no. 43, article 5544.

5. Order of the RF MIA No. 818 from July 08, 2011 (as amended in the Order of the RF MIA No. 657 from June 30, 2012) "On the Procedure for Exercising Administrative Supervision over Persons Released from Prisons" [Prikaz MVD Rossii ot 8 iyulya 2011 g. № 818 (v red. Prikaza MVD Rossii ot 30 iyunya 2012 g. № 657) «O poryadke osushchestvleniya administrativnogo nadzora za litsami, osvobozhdennymi iz mest lisheniya svobody»]. *Rossiiskaya gazeta – Russian Newspaper* from 26.08.2011, no. 189.

6. Kosikhin D. *Former Convict, Go to the Registration* [Byvshii osuzhdennyi, proidite na registratsiyu]. EZh-Yurist, 2011, no. 37.

7. Krylova N. E. France (Doctrine of Punishment and other Legal Consequences of a Committed Deed) [Frantsiya (Uchenie o nakazanii i inykh pravovykh posledstviyakh sovershennogo deyaniya)]. *Esakov G. A, Krylova N. E., Serebrennikova A. V. Ugolovnoe pravo zarubezhnykh stran: Uchebnoe posobie – Esakov G. A, Krylova N. E., Serebrennikova A. V. Criminal Law of Foreign Countries: Study Guide*, Moscow: Prospekt, 2011.

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LEGAL RISKS ASSOCIATED WITH THE MEMBERSHIP OF RUSSIA IN CUSTOMS UNION AND WORLD TRADE ORGANIZATION

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The author gives characteristic of those legal risks that exist and may be relevant in the coming years due to the increasing influence of international integration processes on the Russian legislation.

Keywords: Customs Union, WTO, WTO membership, rule-making legal risks, law-enforcement legal risks, Customs Code of the Customs Union.

Rule-making and law-enforcement legal risks, which are associated with Russia's membership in the Customs Union and World Trade Organization, today have a key influence on the development of new Customs Code of the Eurasian Economic Union and the implementation of the Russian commitments to the WTO.

The study of Russia's membership in the two integration associations influencing on the domestic legal system – the Customs Union and World Trade Organization – has identified legal risks in this area.

The new Customs Code of the Customs Union (hereinafter – CC CU) is currently under elaboration [2]. Analysis of current international standards and foreign experience in the field of customs regulation and customs administration suggests that the modernization of CC CU is of "catching-up nature". However, already now it is necessary to formulate the norms of the Customs Code, on the basis of the nearest prospects of launching the Eurasian Economic Union, which is scheduled to run from January 1, 2015. Thus the norms of supranational and national customs legislation of Russia, Belarus and Kazakhstan should comply with the requirements of the highest level of economic integration.

In addition, May 19, 2011 Russia, Belarus and Kazakhstan signed the Treaty on the functioning of the Customs Union within the framework of the multilateral trading system [3]. This Treaty defines the correlation of norms and regulations established by the WTO and Customs Union, as well as the procedure for coordination of the parties' actions regarding taking of commitments to the WTO. In accordance with the Treaty, WTO norms dealing with the sphere of regulation of the Customs Union become a part of the legal system of the CU.

If the WTO Agreement stipulates other rules than those stipulated by agreements of the CU and (or) the decisions of its bodies, then the rules of the WTO Agreement shall be applied. Thus, there will be the priority of the country's obligations with respect to the WTO, and the conflict of norms of the CU and the WTO will not happen. Consequently, the Russian commitments to the WTO de facto will be also performed at the level of the CU.

In this regard, we offer the characteristic of those legal risks that currently exist and which will continue to be relevant the next five to seven years due to the increasing influence of international integration processes on the Russian legislation.

A feature of the work on the modernized Code is involving by the legislators of the three states of business representatives of Russia, Belarus and Kazakhstan. Partially, this approach has been applied in administrative legislation of Russia in part of control over the implementation of the "Road map", decrees and orders of the Government of the Russian Federation (paragraph 40 of the "Road map" on compulsory public discussion of its implementation with the participation of representatives of public associations of businessmen, experts and interested federal executive authorities and executive authorities of the constituent entities of the Russian Federation (including the use of information and telecommunication network "Internet"). The consideration of opinions of these categories of persons is also necessary in matters on establishment, reorganization and

liquidation of regional customs departments, customs offices and customs posts (paragraph 3) [6]; monitoring the performance indicators of customs authorities (paragraph 9) [5]).

However, even such a measure, which fully complies with the requirements of the WTO and the International Convention on the Simplification and Harmonization of Customs Procedures (hereinafter referred to as the Kyoto Convention) [1; 4], does not guarantee leveling of the legal risks that already now have a significant influence on the administrative-legal regulation of legal relations in the customs field.

Using the classification developed by M. A. Lapina and D. V. Karpuhin [9], we can attribute legal risks, associated with the membership of Russia in the international integration associations, to rule-making and law-enforcement ones, as well as identify the adverse consequences associated with these risks.

1. Misunderstanding of the ideology of the Kyoto Convention, Framework standards of security and facilitation to the trade of the World Customs Organization [12], the norms of the WTO. Mismatch of the Russian legislation with international requirements, due to membership in the Customs Union and WTO, is an adverse consequence. For example, the institute of prior informing in the CC CU erroneously associate only with the arrival of goods. Although in the Kyoto Convention, international acts and practice of prior informing it is a tool of customs control. In addition, there is a legal risk of complaints of states-trading partners of Russia to the Body on consideration of WTO disputes and very likely loss of our country in connection with discrepancy of its national legislation with the WTO norms (EU complaint against actions of Russia on the application of utilization fee for vehicles).

2. To date, the scientific-practical analysis of the provisions of the WTO Agreement on trade facilitation, adopted in 3-6 December, 2013 [9], in part of influence of its norms on the Russian system of administrative-legal regulation, has not been carried out, although about 80% of Agreement norms are devoted exactly to the activities of customs authorities [10]. The mentioned WTO Agreement will have a key impact on the functioning of the customs administrations of the countries of the world and possibly lead to the revision of the Kyoto Convention, as evidenced by the first results of the work of the joint working group of the WTO and the World Customs Organization [11] on the implementation of the WTO Agreement on trade facilitation.

3. Russia does not have the system of comprehensive study of international standards, to which our country has acceded. Adverse consequences in this case

may include the lack of complete understanding of seriousness and extent of the influence of Russian obligations under international treaties, the ignorance of its benefits and advantages (e.g., regarding the use of dispute resolution procedures to protect the interests of its producers and consolidate precedents beneficial for Russia). More than a year and a half had passed before in the beginning of 2014 the Center for Analysis of WTO Problems was opened, as well as an alternative to it Center under the Ministry of Industry and Trade of the Russian Federation, permanent Mission of the Russian Federation at WTO was established[7]. There is an acute lack of WTO's law experts in public authorities, in business community.

4. Declaration of accounting of international standards substitutes their actual implementation. A negative consequence of this legal risk is that there is still a need to adapt Russian legislation into line with the international obligations of the WTO and Kyoto Convention, but this process will take place in a hurry and under adverse conditions of constant threat of sanctions. Moreover, the ignoring of international standards for customs administration and customs regulation means that Russia dooms juridical and physical persons to material and time losses when crossing customs border, does not use a powerful lever for economic development. During the negotiation process on accession of the Russian Federation in the WTO, one of the conditions that were put forward was the correspondence of national customs legislation to international standards. According to the WTO position, the costs of import tariffs are often less than the losses incurred by the international trading community as a result of time-consuming and expensive customs clearance procedures, vague and excessive documentation requirements and ignoring of information technologies [13]. So, the impact of the lack of high-quality customs administration on the final cost of imported goods is reflected in the percentage of direct costs of participants of foreign economic activity related to customs operations and procedures and is an average from 10-15 up to 40-50% in the cost of logistics operations, from 1 up to 4-5% in the ultimate value of goods [8, 23].

5. Most of the international acts that are used in law drafting work are presented in incorrect translation, resulting in a distortion of the original meaning and its wrong enshrining in the supranational and national customs legislation.

6. There is no clear understanding of legal institutes in the customs law, in the CC CU. For example, customs declaration and release of goods constitute a single legal institute that is associated with the putting of goods under a customs procedure.

Another example is the institute of importation of goods and crossing of customs border, which includes the arrival of goods into the customs territory. Import,

arrival, release – the stages of one process, they should not be broken and torn apart; there shall be no removal of any element from the specified sequence.

Insufficient account of the features of separate institutes of customs law adversely affects the legal regulation of constituting public relations. For example, the institute prior informing of customs bodies is widely used. At that, CC CU established the term of "prior informing", and the decisions of the Commission of the Customs Union and the Eurasian Economic Commission contain the term of "prior information". In addition, a whole institute is being tried to squeeze into a Procrustean bed of one article (article 42 of the draft CC of the Eurasian Economic Union) through codification the norms of international agreements on prior informing.

The mixing of the various institutes of customs law happens in the same way. For example, in the course of work on the new CC of the Union, they try to use prior informing for the procedure of customs transit. However, goods under customs transit procedure require a preliminary customs declaration. The given example illustrates the ignorance of international standards, international practice, confusion of concepts, not understanding of ideology.

7. Legal risks associated with the process of codification of the CC EEU are expressed in the fact that this process is conducted, supposedly, on the basis of the Kyoto Convention. However, implementation of not whole (full) institutes, but individual standards and fragments of institutes, takes place in violation of the letter and spirit of the Convention

At present, prior informing of customs bodies about the arrival of goods by vehicles is obligatory. In 2014, it is expected to consolidate similar duties when carriage by rail transport. However, in the CU, preliminary information in accordance with international standards is not automatically sent in the System of risk management of customs bodies. Thus, the CU implements only part of the institute of prior informing, what completely distorts the original concept: prior informing – risk management system – automatic release of goods.

The mentioned legal risk can be illustrated by another important example of partial implementation of individual standards, rather than whole institutes. So, the institute of customs clearance was not fully moved from the Kyoto Convention, and Implemented only in part of verification of registered customs declarations. Thus, CC CU has two independent structural units: chapter 27 "Customs Declaration of Goods" and chapter 30 "Customs Operations Involving the Production of Goods for Domestic Consumption". And in the Kyoto Convention it is a unified institute "Customs Clearance and other Customs Formalities".

8. The emergence of centrifugal forces in the integrated unification within the framework of EurAsEC: both Russia and Belarus and Kazakhstan are constantly trying to attribute norms beneficial for them to the level of national and not of supranational legislation, in order to enshrine in national acts more preferential conditions than in supranational acts. The adverse consequence is desire to level the value of supranational legislation to create a competitive advantages in the struggle with the partners in the integration process.

9. At the national level (as opposed to supranational) continue to give insufficient attention to the issue of promoting trade and encouraging FEA participants for bona fide conduct. The ideology of the Kyoto Convention and the WTO norms is based on the interaction of FEA participants and customs and other regulatory bodies, at that, regulatory bodies are obliged to provide bona fide commercial operators maximally possible simplifications and speed for passing customs procedures. Customs bodies in law-enforcement and rule-making activity consider FEA participants as potential offenders, and the proposed by business representatives amendments to CC CU as an opportunity to create favorable "loopholes" in the customs legislation.

10. A large number of gaps in the legislation, which are due to the complexity and the dynamic development of legal relations in the field of international trade and movement of goods across customs border.

Taking as the basis the developed by M. A. Lapina and D. V. Karpukhin interpretation of public-law risks as a potential hazard, the probability of events that have a negative impact on social relations, which are the subject of legal regulation of certain public-law branches [9], we can describe the negative impact of the legal risks associated with Russia's membership in the WTO and CU:

1) considerable decline in the legal technique of national and supranational rule-making activity;

2) creation of grounds for further contradictions, conflicts with Russia's international obligations;

3) creation of grounds for applying to the Russian Federation of penalties and other measures of responsibility, which can be imposed by an authority responsible for considering disputes for failure to meet WTO requirements;

4) in part of the functioning of the Unified Economic Space, adverse impact of legal risks is an expression of the growing competition between Russia, Belarus and Kazakhstan, which may have a significant negative impact on the integration processes in the Eurasian Economic Community and to prevent the start of functioning of the Eurasian Economic Union from the January 1, 2015.

To summarize the analysis of existing legal risks, it should be noted that the system of administrative-legal regulation of relations in the sphere of moving goods across customs border is currently experiencing a dramatic impact of the norms of international law, in many ways is defined by it (international law). The enumerated legal risks lead to the fact that the supranational and national legislation of Member States of the Eurasian Economic Union will not be adequate in the implementation of international-legal obligations of Member States to each other and to the Member States of the WTO.

References:

1. The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) (Kyoto, May 18, 1973, as amended on 1999) [Mezhdunarodnaya konventsiya ob uproshchenii i garmonizatsii tamozhennykh protsedur (Kiotskaya konventsiya)]. *System GARANT* [Electronic resource], Moscow: 2014.
2. Customs Code of the Customs Union (as amended by the Protocol No. 16 from 16.04.2010). Annex to the Agreement on the Customs Code of the Customs Union adopted by the Decision of the Interstate Council of the Eurasian Economic Community No. 17 taken at the level of Heads of States November 27, 2009 [Tamozhennyi kodeks Tamozhennogo soyuza (v redaktsii Protokola № 16 ot 16.04.2010). Prilozhenie k Dogovoru o Tamozhennom kodekse Tamozhennogo soyuza, prinyatomu Resheniem Mezhgosudarstvennogo soveta EvrAzES, prinyatogo na urovne glav gosudarstv ot 27 noyabrya 2009 g. № 17]. *SZ RF – Collection of laws of the Russian Federation*, 2010, no. 50, article 6615.
3. *Treaty on the Functioning of the Customs Union within the Framework of the Multilateral Trading System from May 19, 2011* [Dogovor o funktsionirovanii Tamozhennogo soyuza v ramkakh mnogostoronnei torgovoi sistemy ot 19 maya 2011 g.]. Official website of Eurasian Economic Commission, available at : http://www.tsouz.ru/MGS/MGS-15/Pages/P-87.aspx (accessed : 21.03.2014).
4. Federal Law from November 29, 2011 "On the Accession of the Russian Federation to the International Convention on the Simplification and Harmonization of Customs Procedures" [Federal'nyi zakon ot 29 noyabrya 2011 g. «O prisoedinenii Rossiiskoi Federatsii k Mezhdunarodnoi konventsii ob uproshchenii i garmonizatsii tamozhennykh protsedur»]. *SZ RF – Collection of laws of the Russian Federation*, 2011, no. 26, article 2381.
5. *RF Government Decree No. 994 from September 29, 2012 "On Approval of the Provision on the System of Performance Indicators of the Russian Federation Customs*

Bodies, the Manner and Method of their Monitoring" [Postanovlenie Pravitel'stva RF ot 29 sentyabrya 2012 № 994 «Ob utverzhdenii Polozheniya o sisteme pokazatelei raboty tamozhennykh organov Rossiiskoi Federatsii, poryadke i metodike ikh monitoringa»]. Official website of the Government of the Russian Federation, available at : http://government.ru (accessed : 19.03.2014).

6. *RF Government Decree No. 1071 from October 20, 2012 "On Approval the Rules of Establishment, Reorganization and Liquidation of Regional Customs Departments, Customs Offices and Posts"* [Postanovlenie Pravitel'stva Rossiiskoi Federatsii ot 20 oktyabrya 2012 g. № 1071 «Ob utverzhdenii Pravil sozdaniya, reorganizatsii i likvidatsii regional'nykh tamozhennykh upravlenii, tamozhen i tamozhennykh postov»]. Official website of the Government of the Russian Federation, available at : http://government.ru (accessed : 19.03.2014).

7. *RF Government Decree No. 68 from January 31, 2014 "On Ensuring the Activity of the Permanent Mission of the Russian Federation in the World Trade Organization"* [Postanovlenie Pravitel'stva RF ot 31 yanvarya 2014 № 68 «Ob obespechenii deyatel'nosti Postoyannogo predstavitel'stva Rossiiskoi Federatsii pri Vsemirnoi torgovoi organizatsii»]. Official website of the Government of the Russian Federation, available at : http://government.ru (accessed : 19.03.2014).

8. Kolesnikov P. Yu. *Improvement of Customs Procedures in Russia under the Principles of Harmonization and Simplification*. Thesis of a candidate of legal sciences [Sovershenstvovanie tamozhennykh protsedur v Rossii na printsipakh garmonizatsii i uproshchenii. diss…kand. yurid. nauk]. Moscow: 2007, page 23.

9. *Agreement on Trade Facilitation. WT/MIN(13)/W/8 Ministerial Conference Ninth Session Bali, 3-6 December 2013*. Available at : http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm (accessed : 20.03.2014).

10. *WCO and Customs' roles for the ATF*. Available at : http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/wco-and-customs-roles-for-the-atf.aspx (accessed : 20.03.2014).

11. *WCO implementing the WTO ATF*. Available at : http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf.aspx (accessed : 20.03.2014).

12. *WCO Safe Framework of Standards and the implementation of UN Security Council Resolution 1540 United Nations, New York, 23 February 2007*. Available at : http://www.wcoomd.org/fr/media/newsroom/2007/february/wco-safe-framework-of-standards-and-the-implementation-of-un-security-council-resolution-1540.aspx (accessed : 20.03.2014).

13. *World Trade Organization (2002) Trade Facilitation: Overview of Trade Facilitation Work*. World Trade Organization, Available at : www.wto.org/english/tratop_e/ tradfa_e/tradfac2_e.htm (accessed : 20.03.2014).

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LEGAL RISKS IN INFORMATIONAL SPHERE

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Considering information-legal risks as a variety of public-law risks, the author defines them as the likelihood of juridical activity leading to negative consequences as a result of the adoption, implementation and interpretation of information-legal prescriptions.

Depending on the nature of the information-legal risks, they are separated into general and special risks.

The author notes a negative invasion of law-enforcers in processes that cannot be legally regulated, gives examples of such invasion.

Keywords: legal regulation of informational processes, legal risks, informational risks, Internet risks, information-legal risks.

Informational infrastructure has currently generated in the economy of states a new industry of social production that covers the processes of creating, distributing, processing and use (consumption) of information. Informational technologies and means are widely implemented in all spheres of society, including science, education, arts, military, etc. Informatization directly affects the development and formation of the informational sphere, which is sometimes identified with an informational space.

Application of informational technologies, both at international and domestic level, is an important determinant of the level of development of modern societies. However, along with the obvious advantages, such as increased speed and quality of informational processes, availability of services, reduction of costs, etc., the use of informational technologies brings new significant risks. Exactly risks' reduction is becoming more important with the development of informational component in public relations. These risks have received the name of informational (IT-) risks, we note that in recent times among informational risks increasingly single out Internet-risks as ones having their own characteristics due to the specificity of informational space of their emergence.

Risks in the informational sphere are well studied both in the science of Informatics and in the theory of management. In management the standard for elaboration of any managerial decision is the application of methodology known as the "risks management", which takes into account, inter alia, informational risks. Currently, we should be based on the provisions of the GOST R 51897-2011/ISO Guide 73: 2009. "National Standard of the Russian Federation. Risk Management. Terms and Definitions".

By virtue of the growing volume of requirements for the ordering of relations in informational sphere, in parallel with the development of IT-technologies legal regulation of informational processes remains in the process of continuous improvement. Growth of activity and quality of work of state bodies in this direction does not keep pace with the development of informational technologies, and in recent times there are situations of probabilistic events development in making any legal decisions.

Exactly the category of risk is proposed to use as legal-technical means to designate a situation where it is very difficult to predict in advance the result. Therefore, it can be concluded that in informational relations has been formed a new type of risks – information-legal risks. In order to eliminate the possibility of the presence of legal risk in informational sphere we should identify the methodological and theoretical aspects of this category, as well as to draw an analogy with the informational risks and identify mutually stipulating aspects.

The importance of informational risk is indicated in the "Doctrine of Informational Security of the Russian Federation" approved by the President of the Russian Federation from 09.09.2000 No. Pr-1895. So, economic methods of ensuring information security in the Russian Federation include: development of programs of informational security of the Russian Federation and determination of the order for their financing; perfection of the system of financing the works related to

the implementation of legal and organizational-technical methods of information protection, establishment of a system of information risk insurance of physical and legal persons [7].

Information-legal risks are traditionally attributed to legal risk, the problem is that the theoretical aspects of these risks are currently in a formative stage, a clear terminological apparatus has not been formulated. The most common definition of "legal risk" was given by M. D. Shapsugova: risk of legal activity arising in a situation of choice when making legal decisions in connection with overcoming uncertainty of legal consequences [16, 167-174].

To determine the place of information-legal risks in the system of legal risks, it should be borne in mind that, for the most part, informational and legal relations are of public-law nature, therefore we, based on the opinion of M. A. Lapina and D. V. Karpuhin [15], also consider them such.

M. A. Lapina and D. V. Karpuhin understand public-law risk as a potential threat of adverse development of socially significant, public-law relations as a result of the adoption, implementation and interpretation of legal prescriptions [15]. Similar views in formulating the definition of different categories of public-law risks are stated by A. E. Zhalinskii, A. P. Anisimova, A. E. Novikova [12, 13].

A. V Karyagina recognizes risk in informational sphere as an activity in conditions of uncertainty of its consequences, because inadequate assessment of the content of information can take the form of legitimate risk, without actually being such [14, 5-7].

In general, sharing the specified point of view, we will try to elaborate a definition of information-legal risk. However, we believe that the reduction of information-legal risk only to danger, uncertainty, error, is unsubstantiated.

The legislator has suggested a probabilistic approach. The Federal Law No. 184-FZ from 27.12.2002 "On Technical Regulation" normatively defined the concept of risk as the probability of causing harm to the life or health of citizens, property of natural or legal persons, state or municipal property, the environment, the life or health of animals and plants, taking into account the gravity of that harm [1]. In GOST R 51897-2011 / ISO Guide 73:2009. "National Standard of the Russian Federation. Risk Management. Terms and Definitions" (Order of Rosstandart № 548-st from November 16, 2011) risk is a result of influence of uncertainty on achievement set goals [9].

We consider information-legal risks as kind of public-law risks – the probability of legal activity leading to negative consequences as a result of the adoption, implementation and interpretation of information-legal prescriptions.

Information-legal risks, by virtue of the specifics of regulated social relations, have a number of individual features that make it possible to highlight them in a subsystem within the system of public-law risks.

Depending on the nature of information-legal risks we can distinguish general and special risks.

Risks of a general nature entail the possibility of negative consequences due to underestimating by law-making bodies of all levels of informational processes and adoption of non-competent acts.

Either an error is in attempt of invasion of law-enforcers in processes that are beyond of legal regulation.

A vivid illustration of the first is the legal definition of the Internet in the Federal Law No. 149-FL from July 27, 2006 "On Information, Informational Technologies and Protection of Information" as informational and telecommunication network, which is a technological system for the transmission of information, with access to it by the means of computer facilities [3].

According to normative and technical documentation the informational and technological system is a set of informational and technological resources, which provide services by one or more interfaces [10]. At that, the concept of technological system is even more limited – the ultimate totality of production items and performers to perform in regulated manufacturing environment.

Thus, it is normatively enshrined that the Internet is a finite number of computers involved in any technological process. Every schoolchild knows that this is far from the case and the main characteristics of the Internet are its infinity and its multisystem nature.

Given that, to date, there are no a normatively defined concept of the Internet and clear criteria to describe its legal essence are not developed, we can talk about existence of information-legal risk. The concept of informational space or cyberspace, which would solve this problem in the domestic legislation, did not receive proper enshrining, although already in use, as an example we can provide the Decree of the RF President No. 761 from June 01, 2012 "On the National Strategy for Action on Children in 2012 – 2017", which refers to the rules of safe conduct in the Internet space, [4] and a number of documents, including the Concepts of development of international informational security prepared by the Security Council of the Russian Federation.

It is impossible to normatively regulate the full content of information that will be represented in a TV-broadcast going on live television. And the appearance in such broadcast of prohibited by law information, according to article 4 of the Law

"On the Media", will be classified as abuse of the freedom of the media, which entails responsibility under article 13.15 the Code on Administrative Offences of the Russian Federation. The requirements to already past live broadcasts also may be ambiguously qualified (exactly to the MEDIA, and not to the individual that has said a phrase), as an example, many questions are raised by the letter of Russian scientists to check for signs of extremism, incitement of inter-ethnic and inter-state discord all the broadcasts of Dmitrii Kiselev "Vesti Nedeli" that have passed in the past three months, [17] and not the statements of the citizen Kiselev.

Special information-legal risks, in our view, are very linked to the informational risks and lie in the plane of implementation of public-law prescriptions. Based on this interrelation, we will try to identify the most common information-legal risks.

One of the most common IT-risks is risks of loss of sensitive data and the risks of loss of informational system health. If we consider only the legal aspect, then the probability of such events is in direct dependence on the degree of settlement and clarity of normative prescriptions in the sphere of information protection.

An example might be the RF Government Decree No. 1091 from November 28, 2013 "On the Uniform Requirements for Regional and Municipal Informational Systems in the Sphere of Procurement of Goods, Works and Services for State and Municipal Needs", which states that when the establishment and operation of regional and municipal systems the requirements provided for by legislative and other normative legal acts of the Russian Federation regulating relations in the field of protection of information, as well as the requirements regarding the use of electronic signature, should be exercised. The problem is that the protection of information in the Russian Federation is regulated by quite a large number of regulatory legal acts of various state bodies. And such a formally correct, but rather vague, wording entails the need to clarify the requirements at the regional level and/or when creation of a particular system. Here is an information-legal risk, because the compliance with the requirements of Government will happen, but the correctness of meeting the requirements will be considered only with a certain probability.

As a good example of counteraction informational risks we indicate the Standard of the Bank of Russia "Ensuring of Informational Security of Organization the Banking System of the Russian Federation. General Provisions" STO BR IBBS-1.0-2010 [11], the document containing detailed requirements uniquely demanded for all organizations of the Banking System of the Russian Federation.
It talks about a specific information-legal risk of ambiguous understanding the requirements level of a management body.

Informational technologies are acquainted with the risk of lack of integration of informational systems. This usually occurs after certain period of operation of an informational system for organizational and technical reasons because of the lack of common standards for data, reporting, calculation of indicators, introducing of new innovative technologies, generation change of technical means and other factors. Hence we can describe the following information-legal risk – the risk that an adopted normative act does not account for the specific of development of informational technologies. So, for example, according to the Federal law No. 131-FL from October 06, 2003 "On General Principles of Local Self-government in the Russian Federation" in the constituent entities of the Russian Federation were created registers of municipal normative legal acts [2], since 2008 the Ministry of Justice of the Russian Federation has begun work on creation of the Federal Register of Municipal Normative Legal Acts and one of the challenges was ensuring the compatibility of existing informational systems [8].

Change of normative requirements to the IT-systems may lead to a situation where these systems will not be able to function or their activity will take place in violation of legislation. This may be due to economic, technical or other reasons related to the peculiarities of formation of various informational objects, communication networks, etc. Thus, there is an information-legal risk of impossibility of performance of public-law prescriptions due to objective reasons relating to the functioning of informational technologies. So, the time terms of transition of the RF to DTV set by the Federal Target Program "Development of Broadcasting in the Russian Federation for 2009-2015" are being constantly adjusted.

Peculiarities of building the Internet do not allow us to clearly identify the Russian segment, so one and the same time a web-site can be located in the jurisdiction of several states. On the basis of this specificity, public-law prescriptions for regulation of Internet legal relations can with some probability be in conflict with the legislation of another country, and this is the basis for the distinguishing of another information-legal risk.

Therefore, the modern juridical activity in the information-legal sphere has a number of very specific information-legal risks that inevitably arise in the mentioned sphere of relations. These risks can be of different in nature, can be classified according to a variety of grounds, but ultimately, their presence causes the likelihood of negative consequences, which significantly complicates the achievement of the final result that is expected by public authorities. In this regard, it seems appropriate to pay particular attention to this aspect in making, implementation and interpretation of information-legal prescriptions.

References:

1. Federal Law No. 184-FL from December 27, 2002 "On Technical Regulation" [Federal'nyi zakon ot 27 dekabrya 2002 g. № 184-FZ «O tekhnicheskom regulirovanii»]. *SZ RF – Collection of laws of the Russian Federation*, from 30.12.2002, no. 52 (part 1), article 5140.

2. Federal law No. 131-FL from October 06, 2003 "On General Principles of Local Self-government in the Russian Federation" [Federal'nyi zakon ot 6 oktyabrya 2003 g. № 131-FZ «Ob obshchikh printsipakh organizatsii mestnogo samoupravleniya v Rossiiskoi Federatsii»]. *Rossiiskaya gazeta – Russian Newspaper*, no. 202 from 08.10.2003.

3. Federal Law No. 149-FL from July 27, 2006 "On Information, Informational Technologies and Protection of Information" [Federal'nyi zakon ot 27 iyulya 2006 g. № 149-FZ «Ob informatsii, informatsionnykh tekhnologiyakh i zashchite informatsii»]. *System GARANT* [Electronic resource], Moscow: 2014.

4. Decree of the RF President No. 761 from June 01, 2012 "On the National Strategy for Action on Children in 2012 – 2017" [Ukaz Prezidenta RF ot 1 iyunya 2012 g. № 761 «O Natsional'noi strategii deistvii v interesakh detei na 2012 - 2017 gody»]. *SZ RF – Collection of laws of the Russian Federation*, from 04.06.2012, no. 23, article 2994.

5. RF Government Decree No. 985 from December 03, 2009 "On the Federal Target Program "Development of Broadcasting in the Russian Federation for 2009-2015" [Postanovlenie Pravitel'stva RF ot 3 dekabrya 2009 g. N 985 «O federal'noi tselevoi programme «Razvitie teleradioveshchaniya v Rossiiskoi Federatsii na 2009-2015 gody»]. *System GARANT* [Electronic resource], Moscow: 2014.

6. *RF Government Decree No. 1091 from November 28, 2013 "On the Uniform Requirements for Regional and Municipal Informational Systems in the Sphere of Procurement of Goods, Works and Services for State and Municipal Needs"* [Postanovlenie Pravitel'stva Rossiiskoi Federatsii ot 28 noyabrya 2013 g. № 1091 «O edinykh trebovaniyakh k regional'nym i munitsipal'nym informatsionnym sistemam v sfere zakupok tovarov, rabot, uslug dlya obespecheniya gosudarstvennykh i munitsipal'nykh nuzhd»]. Available at : http://www.pravo.gov.ru (accessed : 15.04. 2014).

7. "Information Security Doctrine of the Russian Federation", approved by the President of the Russian Federation September 09, 2000, No. Pr-1895 [«Doktrina informatsionnoi bezopasnosti Rossiiskoi Federatsii», utverzhdennoi

Prezidentom RF 9 sentyabrya 2000 g. № Pr-1895]. *Rossiiskaya gazeta – Russian Newspaper*, from September 28, 2000.

8. Order of the RF Ministry of Justice No. 300 from December 22, 2008 "On Approval of the Procedure for Provision of Data Contained in the Federal Register of Municipal Normative Legal Acts" [Prikaz Minyusta RF ot 22 dekabrya 2008 g. № 300 «Ob utverzhdenii Poryadka predostavleniya svedenii, soderzhashchikhsya v federal'nom registre munitsipal'nykh normativnykh pravovykh aktov»]. *Byulleten' normativnykh aktov federal'nykh organov ispolnitel'noi vlasti – Bulletin of Normative Acts of Federal Executive Bodies*, no. 6 from 09.02.2009.

9. Order of Rosstandart № 548-st from November 16, 2011 "National Standard of the Russian Federation GOST R 51897-2011 / ISO Guide 73:2009 "Risk Management. Terms and Definitions" [Prikaz Rosstandarta ot 16 noyabrya 2011 № 548-st «Natsional'nyi standart Rossiiskoi Federatsii GOST R 51897-2011 / Rukovodstvo ISO 73:2009 «Menedzhment riska. Terminy i opredeleniya»]. *System GARANT* [Electronic resource], Moscow: 2014.

10. Recommendations for Standardization R 50.1-048-2004 "Informational and Telecommunication Game Systems. Terms and Definitions" Approved by the Decision of Gosstandart of the RF No. 87-st from March 09 2004 [Rekomendatsii po standartizatsii R 50.1-048-2004 «Informatsionno-telekommunikatsionnye igrovye sistemy. Terminy i opredeleniya» utverzhdennye Postanovleniem Gosstandarta RF ot 9 marta 2004 g. N 87-st]. *System GARANT* [Electronic resource], Moscow: 2014.

11. Standard of the Bank of Russia "Ensuring of Informational Security of Organization the Banking System of the Russian Federation. General Provisions" STO BR IBBS-1.0-2010 [Standart Banka Rossii «Obespechenie informatsionnoi bezopasnosti organizatsii bankovskoi sistemy Rossiiskoi Federatsii. Obshchie polozheniya» STO BR IBBS-1.0-2010]. *Vestnik Banka Rossii – Bulletin of the Bank of Russia*, no. 36-37 from 29.06.2010.

12. Anisimova A. P., Novikova A. E. Environmental Advocacy Risks: Issues of Theory and Practice [Ekologicheskie pravozashchitnye riski: problemy teorii i praktik]. *Advokatskaya praktika – Legal Practice*, 2008, no. 4.

13. Zhalinskii A. E. *Criminal Law in Anticipation of Changes: Theoretical and Instrumental Analysis* [Ugolovnoe pravo v ozhidanii peremen: teoretiko-instrumental'nyi analiz]. Moscow: Prospekt, 2009.

14. Karyagina A. V. Ensuring of Informational Sovereignty of Russia: Historical and Legal Aspects [Obespechenie informatsionnogo suvereniteta Rossii:

istoriko-pravovoi aspect]. *Istoriya gosudarstva i prava – History of State and Law*, 2011, no. 20.

15. Lapina M. A., Karpukhin D. V. Legal Risks in Public Administration: Invitation to Discussion [Pravovye riski v publichnom upravlenii: priglashenie k diskussii]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2014, no. 2.

16. Shapsugova M. D. Legal Risks: Problem Statement [Yuridicheskie riski: postanovka problemy]. *Problemy razvitiya sovremennogo rossiiskogo prava i pravovoi teorii: materialy yubileinoi nauchno-prakticheskoi konferentsii – Problems of Development of Modern Russian Law and Legal Theory: proceedings of anniversary scientific conference*, Rostov-on-Don: publishing house of North-Caucasian Academy of Public Service, 2011.

17. Available at : *http://slovosfera.livejournal.com/108928.html* (accessed : 14. 04. 2014).

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GENERALIZATION AND ANALYSIS OF COURT LAW-ENFORCEMENT PRACTICE AS A WAY TO MINIMIZE LEGAL RISKS DURING PARTICIPATION IN ARBITRATION PROCESS

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The author provides thesis on minimization of legal risks when preparation for court proceedings in arbitration through a careful study of law-enforcement practice of courts in similar legal situations, as well as on the need for certain analytical skills of the subjects of law. In connection with it he discloses the main directions of study the law-enforcement practice of the Higher Arbitration Court of the RF.

Keywords: arbitration process, court practice, generalization of court practice, legal risks, minimization of legal risks.

It is generally recognized that the analytical work, which includes the study and generalization of court practice, of course, plays a critical role in the activity of arbitration courts and is primarily aimed at ensuring uniformity in law-enforcement.

At that, M. A. Lapina and D. V. Karpukhin rightly single out risks of law-enforcement nature as a separate category of administrative-legal risks [6, 63-76].

Since arbitration (and any other) courts are certainly law-enforcement bodies, in such kind of risks may also occur in their activity. At that, they can affect

both participants in an arbitration process (performance of a judicial act not in their favor, without taking into account the existing law-enforcement practice) and the judges themselves (possible cancellation of their judicial act, which is taken without taking into account the existing law-enforcement practice, by a higher court).

We recall that in the legal literature the court law-enforcement practice is understood, in particular, as a number of judicial decisions taken by various courts on identical cases that contain a single legal position concerning settlement of a dispute, recognized lawful and justified by a higher court. In addition, judicial practice can be considered "full-fledged" after the confirmation by the highest courts of legal positions expressed in the judicial decisions of lower courts concerning considering of certain legal disputes [5].

Chairman of the Higher Arbitration Court of the Russian Federation (hereinafter – HAC RF) A. A. Ivanov rightly noted that "... Each judge must take as an imperative the setting for the resolution of disputes in accordance with the current court practice – so, as this kind of cases is usually solved. This setting should be developed by a judge itself, and it will require a specific approach to the resolution of cases, maybe even contrary to any personal or scientific beliefs of the judge, sometimes even to its notions of justice" [3, 9].

Thus, it is clear that not only judges, but also representatives of parties, with the purpose of minimization of legal risks in preparation for trial need careful study of law-enforcement practice of courts for similar legal situations.

We would like to touch briefly on the main directions of this work, regarding participation in an arbitration process:

1. Examination of law-enforcement practice of HAC RF.

This appears to be the main activity on the considered issue. At that, the most convenient way to implement this task is to work with the site of HAC RF (http://arbitr.ru), which provides all the necessary materials, and also with the server "Card-file of Arbitration Cases" (http://kad.arbitr.ru).

At the same time, since January 2012, the Department of Private Law of HAC RF has been preparing and publishing on the above website in section "Legal Positions of the Presidium of HAC RF" (http://arbitr.ru/pravovie_pozicii_prezidiuma_vas_rf) reviews of decisions by the Presidium concerning private-law disputes.

Unfortunately, the Department of Private Law and Process of HAC RF does not yet implement preparation of similar materials.

Study of law-enforcement practice of HAC RF can be carried out in the following main directions:

1.1. Analysis of legal situations, which have become the subject of consideration by HAC RF, which includes:

- the study of legal situations considered by the Presidium of HAC RF in the discharge the functions of Court of supervisory instance. In this case, if the question is just submitted for consideration, it is advisable to familiarize yourself with the legal position as set out in the relevant ruling of HAC RF panel of judges, determine the date, on which the meeting of the Presidium is scheduled, as well as to keep track the date of making (the announcement of operative part) and publication of final decision. This is done, inter alia, also for further bringing to the attention of court conducting proceedings on a similar case the information about the presence of controversial legal situation, which is the subject of consideration by HAC RF;

- analysis of HAC RF decisions taken on cases considered in first instance, primarily on cases of contesting normative legal acts in the field of interest for a corresponding subject (in particular, the Government of the Russian Federation, the Ministry of Finance, Ministry of Fuel and Energy, Ministry of Economic Development, Ministry of Culture, Ministry of Health, Ministry of Education and Science, Federal Anti-Monopoly Service, Federal Financial Markets Service, Federal Tariff Service, Federal Tax Service and Federal Customs Service);

- consideration of the most interesting legal positions formulated in the rulings of HAC RF panels of judges on refusal to transfer cases for consideration by the Presidium HAC RF. However, as rightly pointed out by the Chairman of HAC RF A. A. Ivanov, "...there is no need to rush into drawing conclusions based on negative rulings. This practice cannot be equated to the practice of decisions of the Presidium HAC RF. It should be understood that the denial is an opinion of three judges, other judges at their place could take an opposite decision. Rulings are, if I may say so, a more weakened branch of practice" [4].

1.2. Study of judicial acts of HAC RF, published in full.

HAC RF has established that it exactly from the date of placement of Decision of the Presidium in full on the web-site of HAC RF the practice of application of the legislation, on the provisions of which the Decision is based, is considered defined [2]. Therefore, for the correct forming of legal position in a court session, it is very important to keep track of when the text of judicial acts of HAC RF will be published on the corresponding web-site

This is particularly relevant in the light of the provisions of paragraph 5 part 3 article 311 of the Arbitration Procedure Code of the RF, in accordance with which a ruling or change in decision of the Plenary Session of HAC RF or in decision of the Presidium of HAC RF on application of a legal norm, if the corresponding act

of HAC RF contains reference to the possibility of revising of judicial acts entered into legal force, by virtue of this circumstances shall be recognized as new circumstance, under which arbitration court may reconsider a judicial act that has been taken by it and has entered into legal force.

The most effective way of such control, we believe, is registration of electronic subscription on the web-site of HAC RF.

1.3. Tracking of publications of Decisions of the Plenary Session of HAC RF and Information letters of the Presidium of HAC RF is also necessary with taking into account their key importance for the formation of unified court law-enforcement practice. It seems that corresponding acts must be monitored and analyzed even at the stage of draft, and, of course, immediately after their publication on the web-site of HAC RF.

Here we would like to draw attention to the fact that HAC RF not only makes available on its web-site in the section "Draft Documents of HAC RF" (http://arbitr.ru/vas/proj) drafts of key decisions of the Plenary Session, Information letters, explanations, but also invites all interested persons to submit their comments and proposals on their content. It appears that such a possibility should be actively used.

2. Analysis of judicial acts and reviews of practices of other arbitration courts.

In preparing for a trial it seems appropriate, in addition to law-enforcement practice of HAC RF, also to examine judicial acts of arbitration courts of first instance, appeal and cassation instances, which dealt with similar disputes.

At that, it is recommended firstly to pay attention to the formation of law-enforcement practice exactly in the arbitration district (recall that in Russia there are 10 – Volga-Vyatka, Eastern-Siberian, Far-Eastern, West-Siberian, Moscow, Volga, North-West, North-Caucasus, Urals, Central), in the territory of which the dispute is considered, since it is no secret that in some cases the federal arbitration courts of different districts formulate different legal approaches to similar situations, what has repeatedly been pointed out by HAC RF, for example, in the rulings of HAC RF from 08.10.2012 No. VAS-10734/12, from 21.09.2012 No. VAS-10252/12, from 07.08.2012 No. VAS-6759/12.

All judicial acts of arbitration courts are available on the server of HAC RF "Card-file of Arbitration Cases" (http://kad.arbitr.ru), in addition it is advisable to use reference legal systems, the most famous of which are Konsul'tant Plyus, Garant, Kodeks.

Attention should also be given to thematic reviews of court practice prepared by arbitration courts of first, appeal and cassation instances.

At that, from September 2011 HAC RF changed the overall concept of organization of work for the study and generalization of court practice.

Earlier, in accordance with the Decree of HAC RF No. 35 from 06.05.2006, the arbitration courts of all instances prepared reviews of court practice in the form of a thematic collection of judicial acts setting out the thesis of legal position, which was laid down in the basis of their adoption and after their approval by the presidium of a corresponding arbitration court they were sent to arbitration courts carrying out verification of judicial acts taken by the arbitration court that had prepared the overview (arbitration courts, verification of the judicial acts of which was carried out by the arbitration court that had prepared the overview), as well as to the Higher Arbitration court of the Russian Federation for informational purposes.

At present, in view of the position set out in the Procedure for organization of work for the study and generalization of court practice in Federal arbitration courts of districts, arbitration appeal courts, arbitration courts of the constituent entities of the Russian Federation, approved by the order of HAC RF No. 87 from September 30, 2011, creation of legal approaches to the issues of law-enforcement is assigned to the Federal arbitration courts of districts.

These reviews are available in the section "Generalizations of Arbitration Courts of the Russian Federation" on the web-site of HAC RF (http://arbitr.ru/as/pract/ac_prac) and on the web-sites of the respective courts. As an example, let's take generalization of the practice of Federal Arbitration Court of the North-West District on the issues of application chapter 28 of the Tax Code of the Russian Federation (vehicle tax) [8].

3. The study of the legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights.

With regard to this area of work we would like to draw attention to the following provisions:

- part 2 article 74 of the Federal Constitutional Law No. 1-FCL from 21.07.1994 "On the Constitutional Court of the Russian Federation" (in the current edition), pursuant to which the Constitutional Court of the Russian Federation shall pass the decision on the case assessing both the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or the prevailing law-applying practices, as well as proceeding from its place in the system of legal acts;
- part 5 article 79 of the Federal Constitutional Law No. 1-FCL from 21.07.1994 "On the Constitutional Court of the Russian Federation", which provides for that the position of the Constitutional Court of the Russian Federation

on whether the meaning of a normative legal act or of an individual provision thereof attributed to them by the law-applying practices conforms to the Constitution of the Russian Federation, expressed in the judgment of the Constitutional Court of the Russian Federation, including judgment in a case on verification, upon complaint against violation of constitutional rights and freedoms of citizens, of constitutionality of a law that has been applied in a specific case, or on verification, at request of a court, of constitutionality of a law that ought to be applied in a specific case shall be taken into consideration by the law-applying bodies from the moment of coming into force of the respective judgment of the Constitutional Court of the Russian Federation.

Paragraph 3.4 of the Decision of the Constitutional Court of the Russian Federation No. 1-P from 21.01.2010 indicates that in the Russian judicial system interpretation of law by the highest judicial bodies has a significant impact on the formation of court practice. By a general rule, it in fact – being based on the powers of the superior court instances dealing with the repeal and change of judicial acts – is obligatory to the lower courts for the future. However, as a legal consequence of such an interpretation in cases, where by reason of general legal and constitutional principles it becomes possible to provide it retroactive effect, it is permissible to reconsider and repeal of previously taken judicial acts that are based on a different interpretation of the applied norms.

Within the framework of this article we see it unnecessary to substantiate the obvious fact that the legal positions of the Constitutional Court of the Russian Federation have a significant impact on the formation of court practice (including cases involving tax legislation) and therefore should be mandatory studied.

In the same paragraph of the considered Decision of the Constitutional Court of the Russian Federation it is noted that the practice of the European Court of Human Rights contain cases of resolving cases, including on the complaints of Russian citizens, taking into account the legal positions previously elaborated for them on the basis of cases of similar categories. This shows that the European Court of Human Rights considers its legal positions as binding to a uniform approach in assessing of the single-type in their nature factual and legal grounds when resolving particular cases.

Indeed, the award of just compensation to injured party does not absolve State of the obligation to execute the final decisions of the European Court of Human Rights in cases to which they are parties (article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms). Exercising of these acts assumes in case of need an obligation on the part of the State to take measures of

a private nature, aimed to eliminate the violations of human rights under the Convention and the consequences of these violations to the applicant, as well as general measures in order to prevent the repetition of such violations [7].

At that, in accordance with paragraph 3 part 4 article 311 Arbitration Procedure Code of the RF, application on the revision of judicial acts on new established circumstances in connection with the detected by the European Court of Human Rights violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, when considering by the arbitration court of a particular case, may be submitted by those persons involved in the case, in connection with the taking of decision on which the appeal to the European Court of Human Rights has taken place, as well as by other persons not involved in this case, about the rights and obligations of which the arbitration court has taken judicial act [1].

The above also confirms the need for analysis of the legal positions of the European Court of Human Rights.

4. Analysis of materials placed in print and electronic media, on information and legal portals and legal social networks.

In addition to the study of information contained on the official web-sites of public authorities (in relation to the considered issue – of HAC RF and other arbitration courts, in the first place, of the corresponding arbitration district), it would also seem useful to carry out selective analysis of materials published in print and electronic media, on information and legal portals and legal social networks.

Special attention should be given to articles and reviews of court practice of the leading legal journals ("Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii", Vestniki arbitrazhnykh sudov okrugov, "Sud'ya", "Zakon", "Yurist", etc.).

A number of interesting publications is accumulated in the section "Press about HAC RF" (http://arbitr.ru/press-centr/smi) of the web-site HAC RF.

Among the Internet resources we would like to point out Pravo.ru (http://pravo.ru), Zakon.ru is the first social network for lawyers (http://zakon.ru), "Zakoniya" – information and legal portal (http://www.zakonia.ru).

Undoubtedly, in view of the ongoing judicial reform in our country, and in particular the formation of a unified Supreme Court of the Russian Federation, the described in this article activity to study and generalize law-enforcement practice of arbitration courts will significantly evolve, acquire new forms. At that, achievement of a positive result in any judicial processes, and minimization of risks of law-enforcement nature in any case requires not only thorough knowledge of legislation norms, but also the possession of skills of analytical work.

References:

1. Resolution of the Plenum of the HAC RF No. 52 from June 30, 2011 "On application the provisions of the Arbitration Procedural Code of the Russian Federation in the revision of judicial decisions under new or newly discovered circumstances" [Postanovlenie Plenuma VAS RF ot 30 iyunya 2011 g. № 52 «O primenenii polozhenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre sudebnykh aktov po novym ili vnov' otkryvshimsya obstoyatel'stvam»]. *System GARANT* [Electronic resource], Moscow: 2014.

2. Regulations of arbitration courts of the Russian Federation, approved by the Resolution of the Plenum of the HAC RF No. 7 from 05.06.1996 (in the current edition) [Reglament arbitrazhnykh sudov Rossiiskoi Federatsii, utverzhdennyi Postanovleniem Plenuma VAS RF ot 05.06.1996 № 7 (v deistvuyushchei redaktsii)]. *System GARANT* [Electronic resource], Moscow: 2014.

3. Ivanov A. A. Practice Becomes Unified only after Daily Hard Work of every Judge [Edinoi praktika stanovitsya v rezul'tate ezhednevnoi kropotlivoi raboty kazhdogo sud'i]. *Vestnik Federal'nogo arbitrazhnogo suda Moskovskogo okruga – Bulletin of the Federal Arbitration Court of the Moscow District*, 2010, no. 3.

4. Ivanov A. A. You cannot be "Holier than the Patriarch of Rome" [Nel'zya byt' «svyatee papy rimskogo»]. *«Nalogovye spory" – "Tax Disputes"*, 2009, no. 1.

5. Kovalenko K. A. The Concept of "Prevailing Law-enforcement Practice" in Federal Constitutional Court Procedure [Ponyatie «slozhivshayasya pravoprimenitel'naya praktika» v federal'nom konstitutsionnom sudoproizvodstve]. *Zhurnal konstitutsionnogo pravosudiya – Journal of Constitutional Justice*, 2012, no. 1.

6. Lapina M. A., Karpukhin D. V. Legal Risks in Public Administration: Invitation to Discussion [Pravovye riski v publichnom upravlenii: priglashenie k diskussii]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2014, no. 2.

7. Rekhtina I. V. Decisions of the European Court of Human Rights as a Ground for Revision of Court Judgments in Civil Proceedings under New Circumstances [Postanovleniya Evropeiskogo suda po pravam cheloveka kak osnovanie dlya peresmotra sudebnykh postanovlenii v grazhdanskom protsesse po novym obstoyatel'stvam]. *Yurist – Lawyer*, 2012, no. 4.

8. Available at : *http://fasszo.arbitr.ru/welcome/showall/113* (accessed : 14.04.2014).

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Vasilenko G. N.

ADMINISTRATIVE-LEGAL REGULATION OF DECLARATIONAL RELATIONS

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Considering the objects and subjects of declarational relations, specifics of declarational relations the author notes that administrative-legal method of declaring aims at economic entities, declaring becomes one of the most optimal and effective mechanisms to regulate relations between state and society in various fields.

Declarational relations are defined as regulated by administrative law public relations arising in connection with notification of authorized public authorities in normatively prescribed manner by physical and legal persons about their income, income of third parties, on the compliance of their cash, things, other material objects or produced goods, works or services with normatively acceptable quality (or) quantitative indicators, in order to implement intraeconomic and state control (supervision) in certain areas of activity defined by administrative legislation.

Keywords: administrative-legal relations, types of administrative-legal relations, administrative-legal institutes, institute of declaring, declarational relations.

Administrative-legal relations, as it is known, in contrast to other legal relations (e.g. civil law ones) are formed on the basis of "power-subordination". The very nature of managerial activity, in the process of which executive power is implemented, requires a special subject. Therefore, administrative-legal relation always has such subject as one of its parties (participants). This is executive authorities (their officials), i.e. a subject formulating an appropriate expression of the will that is addressed to the other party. However, as rightly pointed out by Professor N. Yu Starilov, in modern conditions, with the appearance of market relations, horizontal relations between executive authorities, local authorities and other participants, in which they act as equal parties to managerial activity, have become more common.

Administrative-legal relations are a variant of general legal relations and express all of the essential features of any legal relation. Accordingly, administrative-legal relations – regulated by administrative law public relations in the field of management, the parties of which act as carriers of reciprocal rights and duties established and guaranteed by an administrative-legal norm.

Being managerial by nature administrative-legal relations have broad scope for their emergence, modification or termination. They cover all the main areas of socio-economic, cultural and administrative-political spheres of social life.

On the basis of this multifacetedness in public administration, there are inevitable preconditions for emergence of new types of administrative-legal relations.

Scientific community has developed a variety of grounds for the classification of administrative-legal relations, however, we are interested in only one – the classification by institutional affiliation of the norms governing public relations in the field of public administration.

This classification allows us to distinguish administrative-legal relations developing within various administrative-legal institutes, such as licensing, monitoring, accreditation, certification, standardization and etc.

A feature of most of the mentioned institutes of administrative law, within the framework of the problem under consideration, is that executive authorities in exercising their powers within the limits of the established competence usually occupy the dominant positions – "positions of power" and project these powers on natural and legal persons.

This feature is a distinctive feature of administrative-legal relations, which are dominantly regulated through the use of mandatory method. However, the development of social relations shows that not always an active participation of the State in regulating of social relations from the position of "power-subordination"

brings sustained positive effect. Free market relations, being the key to the successful development of the State, can and should positively develop without total government control.

Current legislation gradually opens up the possibilities of self-regulation, and this means self-maintenance of law and order by some categories of the subjects of law, in particular, self-regulatory construction organizations actually have replaced licensing bodies in this area, and so on.

Any classification is the result of a coarsening of the real facets between types (institutes), since they are always conditional and relative. Clarifying and modifying of classifications happens with the development of knowledge and public relations.

As a new type of administrative-legal relations we offer to consider relations developing within the framework of administrative-legal institute of declaring, i.e. declarational relations.

Qualitative novelty of these relations is explained by one of its key features – when submission of declaration the declarant is initially perceived by public authority as a person acting in good faith and who should be protected using all the mechanisms provided for by the current legislation, until its dishonesty is proven by supervisory authority.

Presumption of good faith, which has initially been reflected in the tax legislation, today extends its influence far beyond of tax declaring and is also reflected in customs declaring, declaring of fire safety, declaring of conformity, declaring of the retail sale of alcoholic beverages, energy declaring, forest declaring and so on.

Declarational relations can be defined as public relations regulated by the norms of administrative law emerging in connection with the notice in the normatively prescribed manner by natural and legal persons of authorized public authorities about their income, the income of the third parties, about conformity of belonging to them funds, things, other material objects, produced by them products, works or services to normatively acceptable qualitative and (or) quantitative indicators, in order to implement intraeconomic and state control (supervision) in areas of activity defined by administrative legislation.

The structure of declarational relations is classical. However, the content of structural elements has certain distinctive features, for example, among the subjects of relations can be distinguished the declarants and declarational bodies. These participants of relations have unique administrative-legal status, particularly in respect of competence.

Objects and subjects of declarational relations are diverse and allow you to classify the considered relations with the simultaneous distinguishing of both traditional tax and customs declarational relations and relatively "new" relations within the framework of declaring of fire safety, industrial security, forest, energy, project declaring and many others.

Specificity of declarational relations is also confirmed by the peculiarities of the method of their legal regulation, which, being inherently imperative, has a "notification color" – the state represented by authorized bodies of executive power (declarational bodies) as if transfers a part of responsibility for the legal order in a particular area of declaring to the declarant, reserving the right to exercise control over the observance of declarational conditions set forth in the submitted and approved declaration. At that, the control regime within the framework of declaring is strictly normatively defined.

Administrative-legal method of declaring is primarily aimed at economic entities. Specificity is that these very entities in the current environment may use legislatively established methods of declaring for assessment of produced by them goods, rendered services or to determine the level of security on their production facilities and so on.

In conditions of conducted administrative reforms, the problem of quality of administrative-legal regulation of public relations becomes paramount. The quality of administrative-legal regulation directly affects the success of socio-economic and administrative-political transformations in the country.

The purpose of development of the systemic administrative-legal regulation is increasing the efficiency of public administration performance. This is achieved, among other things, by the ability of administrative structures to quickly and timely adapt to changes in the socio-political and economic development, to changes in the structure and methods of the very management system. Administrative-legal institutes and administrative institutes – is a unified system. Institutional approach to the study of public administration makes it possible to reasonably and in the dynamics of development of specialized public relations clarify and fix the boundaries of the subject of regulation of administrative law.

In conclusion, we note, that, harmoniously combining the demanded today qualities of most of administrative-legal institutes, declaring becomes one of the most optimal and effective mechanisms to regulate relations between the State and society in various fields.

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Zorina E. A.

THE CONTROL FUNCTIONS OF THE FEDERAL TAX SERVICE IN THE SPHERE OF REGISTRATION OF LEGAL ENTITIES

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State registration of legal persons is considered in the article as an element of state control over the subjects of entrepreneurial activity and taxation.

The author notes that for conducting of registration action it is necessary to collect information about the object or the process of registration, to carry out its analysis, processing, generalization.

The essence of the Federal Tax Service control functions in the area of registration of legal entities is determined in the article.

Keywords: state registration, registering body, control, supervision, the Federal Tax Service of Russia.

For the implementation of state tasks to create an efficient market economy and coordination of all kinds of economic activity in society the state influence is subdivided into:

- creation of economic entities;
- planning;
- business regulation;
- monitoring over entrepreneurial activity.

State registration refers to the relations of power and subordination. That is, state registration procedure is carried out by the public authorities, which exercise their powers on the basis of law norms through establishment of rights for entities who have applied for state registration. Failure to comply with the procedure of state registration entails bringing to administrative responsibility.

Recording is a part of the registration. For registration one needs to gather information about the object or the process of registration: its gathering, analysis, processing and generalization.

Recording is considered as a management function, which is closely linked with another function of management – control.

One should notice an important feature of both recording and registration. These forms of state-managerial impact on social relations are subject to control purposes, in relation to it they are the lower-order tasks. In this connection, state registration of legal entities can be considered as an element of the system of state control over the subjects of entrepreneurial activity and taxation.

The concepts of "recording", "control" and "registration" are interrelated. Control is a broader concept in relation to registration and recording, however, without the registration and recording of objects and processes conducting of control over them is impossible.

Since state registration is a manifestation of powers of authority and significantly affects the rights and interests of the various categories of subjects, its implementation is the responsibility of public authorities. On the basis of the current structure of federal bodies of executive power (it includes three types of such bodies: ministries, federal services and federal agencies) the powers for registration refer to functions of federal services.

According to the Decree of the RF President No. 314 from March 09, 2004, federal service is a federal body of executive power executing control and supervisory functions within the assigned field of activity, as well as special functions in the field of defense, national security, protection of the State border of the Russian Federation, fight against crime, public safety. The content of the control and supervisory function, in accordance with this Decree of the President, includes also registration of acts, rights, documents, objects, as well as issuance of individual legal acts [2].

Functions of state registration of legal entities and natural persons as individual entrepreneurs and peasant farms are referred under jurisdiction of the Federal Tax Service of the Russian Federation (hereinafter – FTS RF) that is under the authority of the Ministry of Finance of the Russian Federation. It should be said that the body responsible for the state registration of non-commercial organizations, public associations and parties is the Ministry of Justice of the Russian Federation.

FTS RF acts in accordance with the Provision on the Federal Tax Service, approved by the RF Government Decree No. 506 from September 30, 2004 "On Approval of a Provision on the Federal Tax Service" [3] (hereinafter – Provision). Thus,

in accordance with the Provision in the field of state registration of legal entities FTS RF implements state registration of legal entities and physical persons as individual entrepreneurs and peasant farms; keeps in the prescribed order the Unified State Register of Legal Entities, Unified State Register of Individual Entrepreneurs and the Unified State Register of Taxpayers; approves forms of applications, notifications, messages submitted when state registration of legal entities, peasant farms and physical persons as individual entrepreneurs; approves the requirements for documents submitted to a registering body; approves form and content of a document confirming the fact of the record in the Unified State Register of Legal Entities or Unified State Register of Individual Entrepreneurs; approves the procedure of submitting documents to registering body using informational and telecommunication networks of common use, including the Internet, including Federal State Information System "Unified Portal of public and Municipal Services"; approves the procedure of interaction of registering bodies in the location of reorganized and established as a result of reorganization legal entities.

Control functions of the Federal Tax Service in the sphere of registration of legal entities consist in the fact that registering body (officials), using specific techniques and methods, figures out presence or absence of applicant's violations of legality and advisability. If there are such violations, the body takes measures to eliminate them, to restore violated rights, to bring guilty officials to responsibility.

It is difficult to agree with D. A. Stepanov that control and supervisory functions in the area of registration of legal entities are virtually non-existent. The author substantiates his words by the fact that public authorities are not responsible for the consequences of activity of a registered legal person; State does not bear any responsibility for the actions of officials of the legal entity, if the latter inflict damage to the State, citizens, organizations [5, 26].

It seems that state control is already carried out at the time of filing of documents on the establishment of a legal entity in a registering body. The latter checks information about future address (location) of the permanent executive body of the legal entity that will be used for communications with the organization, identifies signs of "nominee director". These actions are aimed at fighting "fly-by-night" companies, which can potentially cause damage to the State, citizens, and organizations. When registration of liquidation of a legal person the monitoring functions of a registering body are manifested in verifying the absence of debts on taxes and fees, as well as contributions to the regional Pension Fund of the Russian Federation, otherwise it will be followed by a refusal of state registration of liquidation of a legal person.

Attention should be drawn to the expansion in recent years of the list of grounds for denial of state registration and to the expansion of powers of registering body to verify accuracy of information in the documents submitted for state registration.

So, based on subparagraph "p" paragraph 1 article 23 of the Federal Law No. 129-FL from August 08, 2001 "On State Registration of Legal Entities" (as amended on 21.12.2013) [1] (hereinafter – the Law on Registration) registering body has the right to refuse state registration if there is confirmed information about the unreliability of submitted information about address of legal person, that is, that such an address has been specified without the intention to use it for communication with legal entity. However, in the Decree of the Plenary Session of the Higher Arbitration Court of the RF from July 30, 2013 No. 61 "On some Issues of the Practice of Consideration Disputes concerning the Validity of Address of a Legal Entity" [4], the Plenary Session of the HAC RF explained that courts should bear in mind that, within the meaning of paragraph 4 article 9 of the Law on Registration a registering body does not have the right to place on a person, who has applied with the relevant application for state registration, the burden of validation the accuracy of any presented information about legal entity's address, including by submitting additional documents other than provided for by the Law on Registration.

State registration of legal entities gives rise to the duty of an organization to observe the legislation on taxes and fees, timely submit reporting, comply with antitrust and civil legislation. Controlling bodies on their part shall have the right to control and supervise a newly registered legal person, may bring it to various types of responsibility.

The competence of FTS RF is largely defined by its powers as an authorized federal executive body engaged in state registration of the subjects of entrepreneurship. FTS RF keeps the unified state registers of legal entities and individual entrepreneurs, as well as implements control and supervision in the fiscal sphere.

References:

1. Federal Law No. 129-FL from August 08, 2001 "On State Registration of Legal Entities" [Federal'nyi zakon «O gosudarstvennoi registratsii yuridicheskikh lits» ot 8 avgusta 2001 g. № 129-FZ]. *System GARANT* [Electronic resource], Moscow: 2014.

2. Decree of the RF President No. 314 from March 09, 2004 "On the structure of the federal bodies of executive power" (as amended on 22.06.2010) [Ukaz Prezidenta RF ot 9 maya 2004 g. № 314 «O strukture federal'nykh

organov ispolnitel'noi vlasti» (red. ot 22.06.2010)]. *SZ RF – Collection of Laws of the Russian Federation*, 2004, no. 11, article 945.

3. RF Government Decree No. 506 from September 30, 2004 "On Approval of a Provision on the Federal Tax Service" [Postanovlenie Pravitel'stva Rossiiskoi Federatsii ot 30 sentyabrya 2004 g. № 506 «Ob utverzhdenii Polozheniya o Federal'noi nalogovoi sluzhbe»]. *System GARANT* [Electronic resource], Moscow: 2014.

4. Decree of the Plenary Session of the Higher Arbitration Court of the RF from July 30, 2013 No. 61 "On some Issues of the Practice of Consideration Disputes concerning the Validity of Address of a Legal Entity" [Postanovlenii Plenuma VAS RF ot 30 iyulya 2013 № 61 «O nekotorykh voprosakh praktiki rassmotreniya sporov, svyazannykh s dostovernost'yu adresa yuridicheskogo litsa»]. *System GARANT* [Electronic resource], Moscow: 2014.

5. Stepanov D. A. *State Registration of Legal Entities*: thesis of a candidate of legal sciences [Gosudarstvennaya registratsiya yuridicheskikh lits: Diss. … kand. yurid. nauk]. Omsk: 2004, page 26.