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# GENERAL PROVISIONS OF THE CODE ON ADMINISTRATIVE RESPONSIBILITY: SUBJECTS OF ADMINISTRATIVE RESPONSIBILITY

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Is proposed the author's classification of the subjects of administrative responsibility for the future (the next) codification of administrative and tort legislation. Substantiates the relationship of the basic principles of administrative and tort legislation with different subjects of administrative responsibility.

**Keywords:** administrative responsibility, subjects of administrative responsibility, public persons, the codification of the administrative and tort legislation.

No one doubts the future complex changes in the administrative and tort legislation. Among scientists who study administrative law exists the view about the need of detaching the Administrative Procedural Code from the Code on Administrative Offences of the RF [9] and conducting the third codification of administrative and tort legislation [10, 42]. Estimating the available doctrinal developments, law making activities of a legislator and law-enforcement practice, it can be noted that the partial changes that have been made to the Code on Administrative Offences of the RF, since its adoption, are unable to resolve a number of issues that have arisen among the jurists in process of its application. For example, Professor A. P. Shergin wonders whether further development of administrative and tort legislation will follow the path of mixed codification of substantive and procedural norms of administrative responsibility, or will be realized a separate codification [10, 45-48]. E. V. Denisenko notes the de facto of presumption of impunity of individual delinquents-physical persons in mind of their special service status [4]. Professor E. B. Luparev asks himself about the ratio for norms of financial and administrative responsibility under the Tax Code and the Code on Administrative Offences of the RF, instrument of administrative coercive measures [8, 29].

Professor V. V. Denisenko puzzled about the combination in the Code on Administrative Offences of the RF of objective fault imputing to a delinquent-legal entity with the laid down principle of the offender guilt, based on the psychological theory, noting that "while establishing administrative responsibility for this or that sphere of social relations, the legislature each time had to decide the same question which of two options to prefer: the presence of guilt as a mandatory feature of an offense or the objective imputation" [3, 39].

Issues of guilt determination were the subject of study by V. V. Kizilov who rightly believed in the possibility of a combination in administrative and tort legislation of Russia depending on the subject of objective and subjective imputation [5, 7].

As we see it, now is the time when in the first place should be conducted a deep revision of general provisions of the Code on Administrative Offences of the RF to eliminate the conflicts of the applied principles and presumptions, and to clarify the subjects of administrative responsibility by "widening" the category of an official under its constituent subjects. On the multiplicity of subjects of the mentioned category pointed V. V. Kizilov [6] and we agree with the author that the integration of these subjects creates problems in law-enforcement in bringing to administrative responsibility of a delinquent-official.

The main reason of administrative and tort legislation's imperfection seems to us the lack of will of the legislature to abolish their own legal immunity and to keep civil society calm remains the disapplication of administrative responsibility for other categories of public servants. In our opinion, the responsibility for administrative offence committed by a physical person should bear all persons, including ones who possess special administrative and legal status. As a matter of fact the question is not about the administrative responsibility for an official offence, then we agree that a number of public officials in their service activity are not subject to administrative responsibility (e.g., the President, the Prime Minister, judges and prosecutors), we are talking about administrative responsibility for offences of a private entity (private subject of law). It seems to us, for a good example to civil society physical persons who have a special legal status of an official, which provides a special procedure for bringing to administrative responsibility, should bear greater responsibility for an administrative offense than an ordinary private person. For this in the Code on Administrative Responsibility should be provided provisions on the procedure of holding these subjects liable and not to use reference rules similar to part 2 of article 1.4 of the Code on Administrative Offences of the RF [1].

The main point determining the forming the general part of the Code on Administrative Responsibility shall became the chapter on the subjects of administrative responsibility. As we see it, should be divided two main groups of subjects – public and private persons. And with respect to these subjects administrative responsibility define the principle of guilt determination (subjective or objective imputation). Taking into account the vast array of regulated public relations administrative law admits in the administrative and tort legislation the combination of the principles of objective and subjective imputation of guilt for different subjects of administrative responsibility. However, as we see it, and we agree with V. V. Kizilov [7], should be reviewed unconditional and monopoly application of psychological theory of guilt (borrowed from criminal law) in administrative and tort legislation. State in pursuing and protecting the public interest implements the controlling impact in a number of private legal relations by establishing obligatory rules and norms for the parties of civil turnover. Therefore, it is quite possible to apply to subjects of business activity, when committing by them administrative and legal torts, behavioral theory of guilt in determining the subjective element of an administrative offense structure.

Previously, we carried out a classification of public persons, where we considered the feasibility and acceptability of bringing to administrative responsibility of collective public persons [2]. In our opinion, it is absurd to bring to administrative responsibility the very public formations – the sovereigns of the territories and representing the whole their population. However, it is quite possible to bring to administrative responsibility collective public subjects:

- public authorities, acting as legal representatives of public-legal formations (this refers to persons who under the power of the law in a certain amount have been given powers of authority , as well as a directly impact on their implementation, i.e., the agents of the public authority);
- institutions of public authority (economic entities that provide services and perform a public social provision of services), which arise usually on the basis of a legal act of a public authority (laws, decrees, resolutions, etc.) and in a regulatory order;
- public-law associations in the form of an organization (political parties, public associations).

Taking into account previously said, all subjects of the administrative responsibility will be placed in the following structure:

1. Public persons.
    1.1. Collective public persons.
        1.1.1. Public legal entities.
        1.1.2. Public persons without the status of a legal entity.
    1.2. Individual public persons.
        1.2.1. Public civil servants.
        1.2.2. Municipal civil servants.
        1.2.3. Military servicemen.
        1.2.4. Public formations officials.
        1.2.5. Law enforcement officers
        1.2.6. Special subjects: deputies, judges, prosecutors.
2. Private persons.
    2.1. Individual private persons.
        2.1.1. Citizens.
        2.1.2. Foreign citizens and persons without citizenship.
        2.1.3. Officials.
        2.1.4. Individual entrepreneurs.
        2.1.5. Special private subjects: notaries, lawyers.
    2.2. Collective private persons.
        2.2.1. Legal entities.
        2.2.2. Collective persons without legal education.

As we see it, only at a specified classification of delinquents is possible the solution of problems faced by the administrative and tort legislation, and ensuring its fundamental principles (including real, but not imaginary equality before the law).

It should be noted that there is possible a separation of administrative and tort legislation in the legislation providing for separately administrative responsibility of public and private persons, for example, by analogy with the legislation regulating labor (service) relations and assignment pensions.

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*From the editors of the magazine.*

*The present article was firstly published in the proceedings of the II All-Russian scientific-practical conference held in the settlement Nebug, Tuapse district of Krasnodar region on October 5-7, 2007 under the theme «The theory and practice of administrative law and procedure». Critical views of the author on administrative and tort legislation of Russia set out in the article, in the opinion of the editorial board, are worthy of attention after five years from the date of bringing them to public disclosure. In respect that the materials from the annual conferences of administrative jurists are not available to a wide range of people, the editors, with the consent of the authors, will publish in the journal «The topical issues of public law» the most interesting and not losing relevance articles.*

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# DOMESTIC LEGISLATION ON ADMINISTRATIVE RESPONSIBILITY: ILLUSIONS OF PERCEPTION

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Outlines critical views on some of the approaches of the legislator in adopting laws on administrative responsibility, provides an alternative assessment to the normative consolidation of administrative and tort legislation principles, the objectives of administrative punishment, and in general to the process of codifying the legislation on administrative offenses.

**Keywords:** administrative responsibility, administrative offences, legislation on administrative responsibility, presumption of innocence, administrative punishments.

Many have seen the so-called picture-changelings when the same graphic image from one angle is seen, for example, a princess, and from another – the old woman. Psychologists call this effect the illusion of perception. Without going into the details of the nature of this effect, I will note only that it is caused as by a specific construction of human attention, and by features of the perceived object.

The same associations I have when analyzing the Russian legislation. Emerges a feeling that the deputies regard adopted laws as samples of perfection although in fact they are not such.

Several years ago, on the pages of the magazine "Juridicheskaja mysl'" there was a rubric suggested by Professor V. D. Sorokin: "Reportages from the country of legal thoughtlessness". Unfortunately, the state of domestic legislation on administrative offenses is such that the rubric may be in demand for a long time.

In Russia they always say: "Beautiful babies are born from great love." I think that the "birth" of the qualitative laws is hardly possible when indifferent pragmatic attitude of legislators towards their future "baby".

Code on Administrative Offences of the RF (hereinafter CAO RF) was adopted in December 2001, only at the second attempt, a year after the rejection of the previous edition by the President of the Russian Federation. However, the time "wasted" by deputies on rework of the CAO RF, did not make it more perfect. Frankly, such a conclusion is not very easy to make in relation to the Code, the adoption of which we all have been waiting for, and which, no doubt, has become a step forward in the development of domestic administrative and tort legislation, but I am deeply confident in its legitimacy and at our last year conference was justifying my position on the issue [12, 31-44].

I remind that at that time it was a disagreement with the legislator on a number of fundamental, in my view, moments, in particular, with the name of the Code, which by its content would rather be called as Code on Administrative Responsibility; with the concept of "a legal entity guilt" and also with that the content of article 2.1 of the CAO RF in reality expresses the position that guilt is a mandatory feature of an administrative offense, committed not only by a physical person, but also by a legal entity; with absence of a legal concept of "an administrative offense structure" and its elements, that is conditioned by the need to increase informational awareness of citizens who do not have legal education, and also with the fact that one of conditions for compliance with the law by the citizens is their understanding of the essence of legal norms.

I do not know how the expression "constant dropping wears away a stone;" applies to the field of jurisprudence, but the desire to "reach out" lawmakers

does not leave me. Because of that, again, I want to draw attention to some legal novelties, which I perceive as illusions of the legislator.

*The first illusion: with the adoption of the Code on Administrative Offences of the RF has been overcome the decodification of legislation on administrative offenses.*

Let me remind that in 1999 in the article "On the two trends that destroy the integrity of the administrative responsibility institute" [16, 46-54] Professor V. D. Sorokin wrote: "The first destructive tendency is manifested in a kind of "erosion" the single legal framework of administrative offenses, and consequently the integrity of the very category of administrative responsibility. Practically this is the case, that in the last few years, many structures of administrative offences turned outside of the Code on Administrative Offences".

Code on Administrative Offences of the RF incorporated the norms on administrative offenses, formerly contained in the number of codes (see e.g.: articles 230-289, 291-299, 306-366, 368, chapters 49-51 of section X, chapter 63 of section XIV of the Customs Code of the Russian Federation [3]; paragraphs 2 and 4 of article 66, paragraph 2 of article 73 of the Town Planning Code of the Russian Federation [1]), dozens of laws [4, 5, 6], and even decrees of the Presidium of the Supreme Council of the RSFSR [7, 8, 9 ]. Therefore, the provision of part 1 article 1.1 of the CAO RF, which determined that the legislation on administrative offenses consist of this Code and adopted in accordance with it laws on administrative offences of subjects of the Russian Federation should instill optimism. Its text literally implies the following: the norms which contain structures of administrative offense cannot be and should not be outside of the CAO RF and the laws of the subjects of the Russian Federation on administrative offences. However, the analysis of federal legislation proves the opposite. The Budget Code of the Russian Federation (articles 281-284), Tax Code (articles 116-120, 122, 123, 125, 126, 128), the Federal Law No. 119-FL of July 21, 1997 (as amended from 26.06.2007) "On Execution Proceedings" (articles 85-87), still contain norms that provide for as a matter of fact administrative responsibility.

Having recognized today as a separate type of legal responsibility, for example, tax responsibility to the same extent must be recognized customs, environment responsibility, and so forth, and in the process of formation, for example, medical, sports, space law, we will have to recognize the existence of the medical, sports, space responsibility.

*The second illusion: the principle of presumption of innocence enshrined in the CAO RF adequately reflects the Russian society democratization process and the purposes of administrative responsibility.*

Firstly, as rightly noted Denisenko E. V., the presumption of innocence principle – it is not impossibility to bring a person to administrative responsibility, but a special procedure to prove the guilt of the person [13, 311]. Indeed, the ascertainment of a person's guiltiness is not the basis for holding him administratively liable, due to the limitations taking place in respect of military servicemen and citizens called up for military training, police officers, bodies of the Criminal-Executive System, the State Fire-Fighting Service, bodies for control over the circulation of narcotics and psychotropic substances, customs authorities; as well as immunity from administrative liability of deputies, judges, prosecutors, some categories of foreign citizens.

Therefore, should be supported the suggestion that along with the presumption of innocence should be legislatively enshrined the presumption of impunity, the main points of which are as follows.

1. An administrative penalty cannot be imposed on a person who is not subject to administrative responsibility.

2. Person who is subject to administrative responsibility cannot be subject to administrative penalty until his guilt of an administrative offense is proven in prescribed by law procedural order and the decision on the case on an administrative offense does not enter into legal force [13, 312].

Along with the foresaid, article 5.1 of the Code on Administrative Offences of the RF attracts attention due to the fact that in accordance with the Federal Law No. 210-FL of 24.07.2007 from the 1st of July, 2008, this article will be added by the following Note: "Note. Provision of part 3 of the article [2] does not apply to administrative offences provided by chapter 12 of the current Code, in the case of their recording by special automatic technical equipment which have functions of photographing and filming, video recording or by equipment of photographing and filming, video recording".

I think the time comes for more detailed analysis and of those changes that accompany the introduction of the note to article 5.1 of the CAO RF. We are talking about the addition from the 1st of July, 2008 of article 28.6 by part 3, which determines the procedure of making and formalization the decision on case on an administrative offense without the presence of the person against whom has been instituted a case on an administrative offense under chapter 12 of the CAO RF, as well as about the addition of article 4.1 of the CAO RF by part 3.1, which imperatively establishes obligation of imposing for a specified category of cases, the smallest administrative penalty within the sanctions of applied article of the Special part of the CAO RF.

I do not mind the changes that really clarify certain procedural actions or lead

to reduction in the discretion limits of law-enforcement officials, but only when it is really justified. However, I'm skeptical about that the exception to the rule only emphasizes the rule. Unfortunately, knowing "our" legislators, there is no guarantee that the mentioned note will not be followed by others exemptions from the scope of principle of the presumption of innocence, which, in the end, will change its originally intended purpose.

*The third illusion: the legal age of incurrence of administrative responsibility allows its application to all physical persons who are guilty of committing administrative offences.*

Under the general rule laid down in part 1 of article 2.3 of the CAO RF, a person may be a subject to administrative responsibility if at the time of an administrative offense he or she is sixteen years old or older. Of course, that the not reaching a specified age is attributed to the circumstances precluding the proceedings on an administrative offence (clause 2 article 24.5 of the CAO RF). At first glance, this legislators' approach can lead only to the debate on whether to decrease or increase the starting age to bring an individual to administrative responsibility. However, each time considering the provisions contained in part 1 of article 2.3 of the CAO RF, I remember the television program shown by the First Russian TV channel on the 1st of October, 1997. From that day passports were firstly awarded to Russian citizens who are at least 14 years old (previously age was 16 years), and the leaders of the major parties did not fail to take advantage of this event. So, a boy, just received passport of the Russian Federation from the hands of the chairman of LDPR (Liberal-Democratic Party of Russia) Vladimir Zhirinovsky, asks for an autograph from a famous politician, who to universal glee of surrounding makes a record in the passport and displays it on the television camera absolutely not thinking about the fact that in front of millions of TV viewers he has committed an administrative offense under article 179 of the Code on Administrative Offences of the RSFSR (which was in force at that time) "Intentional damage or loss of the passport by negligence". There can be no doubt that the recording was made not by negligence, but namely intentionally, for the purpose of personal PR.

Also in the CAO RF are included the articles which show that the following acts shall be punishable:

- residence or stay of the Russian Federation citizen, who is required to have identity card (passport), without identification card (passport) or by an invalid identification card (passport) or without registration at the place of stay or residence (part 1 article 19.15);
- intentional destruction or damage of ID (Passport) or careless storage of ID (Passport), which caused the loss of ID (Passport) (article 19.16).

Taking the Code on Administrative Offences of the RF, the deputies did not pay attention to such a "trifle" as the fact that according to the decree of the President of the Russian Federation No. 232 from March 13, 1997 "On the main document certifying the identity of a citizen of the Russian Federation" [10] and the decision of the Government of the Russian Federation No. 828 from July 8, 1997 "On approval of the Resolution on the passport of the citizen of the Russian Federation, the blank form and description of the passport of a citizen of the Russian Federation" [11] it is required to have a passport by all citizens of the Russian Federation, reached the age of 14 years old and living on the territory of the Russian Federation. As a result young Russian citizens between the ages of 14 to 16 years old can totally with impunity do with their Passport everything that comes into their heads.

*The fourth illusion: goals of imposing administrative punishment are reduced to private and general prevention of administrative offenses.*

In accordance with article 3.1 of the CAO RF an administrative punishment is established by the state measure of responsibility for administrative offence and is applied in order to prevent the commission of further offenses by the offender as well as by others. Thus the definition combines the content of administrative penalty and the purpose of its application.

Proposed structure directly indicates of only two purposes, namely private and general prevention. In the traditional understanding of "punishment" is defined as "the measure of impact against the person committed a crime, misconduct" [14, 325]. Thus, the legislator declares the goal to impact only on future behavior of the person committed misconduct, and does not focus attention on the more than obvious goal of prosecution the person for an already committed unlawful act.

*The fifth illusion: administrative suspension of activities (remark by the author. Article 3.12 of the CAO RF was introduced by federal law No. 45-FL from 09.05.2005) organically fits in the system of administrative penalties.*

In accordance with paragraph 1 of article 3.1 of the CAO RF, the administrative penalty is an established by the state measure of responsibility for administrative offence... In other words, not committing of an administrative offense should not lead to administrative responsibility. However, the legislator does not think so.

In part 1 article 3.12 of the CAO RF is established that "administrative suspension of activity is a temporary cessation of the activities of persons engaged in entrepreneurial activities without forming a legal entity, legal entities, their branches, representative offices, structural subdivisions, production sites, as well as operating machines, facilities, buildings or constructions, performing specific activities (works), provision of services." Formally, this measure can be considered

as a measure, the application of which is associated with undergoing by persons to whom it is assigned some discomfort, what is inherent to measures of administrative punishment. However, its imposing is provided not only "in the case of an administrative offense in the field of trafficking narcotic drugs, psychotropic substances and their precursors, in the field of countering the legalization (laundering) of proceeds of crime and terrorist financing, in the field of restrictions on the exercise of certain activities established in accordance with federal law in respect of foreign nationals, stateless persons and foreign organizations, in the field of rules to attract foreign nationals and stateless persons for work carried out on the trading facilities (including hypermarkets), and in the area of urban development activities" but also "is applied in case of a threat to life or health of people, emergence of epidemic, epizooty, infection (contamination) of under quarantine facilities by quarantine facilities, occurrence of a radiation accident or man-made disaster, infliction significant damage to the state or quality of the environment".

Along with the fact that the Code is full of internal contradictions, I have the impression that the legislators do not consider it necessary elementary to read texts of adopted by them laws.

Let me give you an example. Article 23.3 of the CAO RF established jurisdiction of cases on administrative offenses to internal affairs bodies (police). In part 1 of the article in the list of cases on administrative offences, consideration of which is implemented by the bodies of internal affairs (police), in the original version was included article 6.8 establishing the administrative responsibility for the illegal purchase, storage, transportation, manufacturing, processing, without the purpose of sale of narcotic drugs, psychotropic substances or their analogues. However, in part 2 of this article legislator "forgot" to determine who of officials of the law enforcement bodies (police) are entitled on their behalf to consider such cases. In other words the decision to impose an administrative penalty under article 6.8, taken by any official of internal affairs body (police), including its head, must be regarded as rendered by an unauthorized by law person. This misunderstanding was terminated only when article 6.8 of the CAO RF was withdrawn from the jurisdiction of the internal affairs bodies (police) and attributed to the jurisdiction of judges.

Among the officials authorized on behalf of the internal affairs bodies (police) to consider cases on administrative offenses the CAO RF classifies senior district inspectors, district inspectors (paragraph 9 of Part 2 of article 23.3), although the staffing of city and regional law enforcement bodies does not have such positions, but there is – the senior district commissioners of police and district commissioners of police. Strictly speaking, any lawyer can easily appeal the decision taken by senior

district commissioners of police or district commissioners of police, as rendered by an inappropriate person, i.e. a person not named in the law.

By this the misadventures regarding competence of officials of the internal affairs bodies (police) in respect of consideration cases on administrative offences assigned to their jurisdiction, are not limited.

In accordance with paragraph 3 of part 2 of article 23.3 of the Administrative Code, the duty shifts' chiefs of front office of linear offices (departments, divisions) of Internal Affairs on transport, chiefs of linear police stations may on behalf of the internal affairs bodies (police) consider cases on administrative offenses provided for in parts 1, 3-5 of article 11.1 and articles 11.9, 11.14, 11.15, parts 1-3 of article 11.17, articles 13.24, 20.1 and 20.20 of the Code. Simultaneously, in part 3 of article 23.3 of the CAO RF is established a restriction of rights of these persons regarding the fact that they have the right to impose administrative penalties only in the form of a warning or an administrative fine of up to three hundred rubles. In the 17 corpus delicti, consideration of cases on which falls within the competence of persons listed in paragraph 3 of part 2 of article 23.3 of the Code, these requirements are fully met by the sanctions provided for in parts 4 and 5 of article 11.1, part 3 of article 11.14, parts 1-3 of article 11.17 (6 corpus delicti), partially met by (for certain types of subjects of an administrative offense) – part 3 of article 11.11, part 2 of article 11.14, part 1of article 20.20 (3 corpus delicti). For other eight corpus delicti sanctions of articles do not provide such a type of administrative penalty as a warning, in addition the minimum size of an administrative fine ranging from five hundred to one thousand rubles. Thus, consideration of cases on administrative offenses formally reduced to the fact that according to the results can be made only a resolution on the transfer of a case, in accordance with paragraph 1 of part 2 of article 29.9 of the Code, to an official of internal affairs body (police) who is authorized to impose administrative penalties of other type or amount.

Quality of legislation of the subjects of the Russian Federation is not much better than federal legislation on administrative offenses. Vivid confirmation of this fact is a regional law of the Rostov region No. 273-3S from October 25, 2002 "On Administrative Offences". Preparation of a draft of the law was entrusted to eminent legal practitioner, who has been working in a regional prosecutor's Office for a long time. However, a good connoisseur of criminal procedure, turned out to be not so experienced in the field of administrative law. I'm not mentioning the name of the author of the regional law, because the reason of the birth of a "stillborn baby" is not the result of his unsuccessful work, but the result of malpractice when drafting of bills and adoption them by non-specialists.

Here is just one example of how a good idea turns in nothing. In accordance with article 2.3 of a Regional law, committing actions that violate the silence and tranquility of citizens, from 11 p.m. to 7.00 am, with the exception of emergency and rescue operations and other emergency operations or other actions necessary to ensure the safety and protection of citizens' rights or functioning vital infrastructure – entails a warning or an administrative fine on citizens in the amount ranging from 100 to 2,000 RUR, on officials – from 500 to 3,000 RUR, on legal entities – from 1,000 to 20,000 RUR.

First of all, attention is drawn to the scatter between the upper and lower amount of an administrative fine: for officials to 6 times, and for citizens and legal persons to 20 times! This raises the question – what purpose did pursue legislators, when they were establishing the sanction? Perhaps they intended to give law-makers wide possibilities in the determination of an administrative penalty taking into account the nature of an offense and individual features of the subject of an administrative offense. But then we can only envy of the imagination, which should have a person determining the amount of an administrative penalty for breach of silence and tranquility of citizens, for example, depending on the noise level in decibels, or, more simply, on the type of noise source: a tape recorder, a car horn, siren etc. Although, this scheme provides a "favorable" situation for municipal officials for trivial abuse of their official position. We are talking about well-known practice, when a guilty person "is suggested" to pay half of the amount in cash of the maximum administrative fine provided for under a sanction of this or that article. Personally, I have no doubt that the provision to an official of the right to take decision at the discretion in inexplicably wide limits indicates a significant corrupt nature of such a law.

Though law-abiding citizens are usually interested not in the problem of the application the rules of law, but another, and, above all, the issue of where and whom to ask for help. It is logical to assume that if at 3 a.m. someone breaches the silence and tranquility of citizens, most of them will call the number "02" (universal police telephone number). And they will do it in vain, as from part 1 of article 11.1 follows that "the right to draw up a record of administrative offense, under this regional law, belongs to officials of the agencies authorized to consider cases on administrative offenses, within the competence of an appropriate body". At the same time the cases on administrative offenses provided by article 2.3 are considered by municipal administrative committee (article 10.7), formed in accordance with the Regional law of the Rostov region No. 274-ZS from October 25, 2002, later Regional law No. 281-ZS of 28.11.2002

"On municipal administrative committees in the Rostov region".

Unfortunately, the number of examples proving the poor quality of national legislation and the appropriate level of legislators is enough to write a separate book.

Sometimes there is a feeling that, like a character of Saltykov-Shchedrin M. E. the city mayor of Glupov City Benevolensky, our legislators firmly believe that "the purpose of making laws is dual: some are issued for the greater nations and countries administration, others – for legislators not to sink in idleness ... ". Frankly, I do not want today's Russia to be covered by ""dusk of laws ", that is, such laws that, with the benefit occupying spare time of legislators, cannot have any inner concern regarding others" [15, 398].

Is it possible to change for the better? Yes it is. In this case, not focusing attention on the fact that the legislative process does not suffer fuss, I note that, to obtain a high quality of laws we need not only the availability of professional knowledge and skills. The legislator should also be guided by the fact that in a constitutional state the priority is given to an individual, his rights and freedoms, and to appreciate the results of his legislative activities, at least not lower than his deputative post. And in case if our "legislators" do not believe that "the purpose of making laws is dual: some are issued for the greater nations and countries administration, others – for legislators not to sink in idleness" and that Russia needs the "dusk of laws ", that is, such laws that, with the benefit occupying spare time of legislators, cannot have any inner concern regarding others" [15, 398].

Frankly I want to be hoped that I was wrong about the true abilities and capabilities of Russian legislators. And if so, then there is a probability that legislative illusions will dissipate gradually.



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# PROSPECTS FOR THE ADOPTION OF FEDERAL LAW "ON THE PARTICIPATION OF CITIZENS IN THE PUBLIC ORDER PROTECTION"

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Estimating prospects for adoption at the federal level, the normative act regulating the participation of citizens in public order protection, in the article are being considered problems of correlation citizens' rights restriction by public institutions with ensuring of constitutional human and citizens' rights. Identified issues requiring legislative approval, in case of adoption the political decision at the federal level on inclusion citizens and public associations in the work on the protection of public order, by analogy with the Soviet period in Russian history.

**Keywords:** citizens, public order protection, police, internal affairs bodies, law-enforcement activity, establishment of rights.

According to internal affairs bodies data, the number of revealed administrative offences in Russia which are covered only by disorderly conduct (Article 20.1 of the Code on Administrative Offences of the RF) was 2,442,009 in 2006, 2,627,209 in 2007, 2,677,927 in 2008, 2 720,764 in 2009 and 2,205,062 in 2010 (See digests on Russia. Information on the administrative practice of Internal Affairs Bodies of the Russian Federation for January - December 2006-2010). Significant reduction of such crimes in the past year is more likely due to the ongoing reform, reducing staff numbers of law enforcement officers, as well as the beginning of the transition to the new

principles of performance evaluation of Police. This follows from the content of part 6 of article 9 of the Federal Law "On Police", which states that "public opinion is one of the main criteria for a formal performance assessment of police which is determined by the federal executive body in the field of internal affairs". [3]

Thus, in a situation when police is baffled by solution in-house problems, comprehension of new approaches to law enforcement activity, many of administrative offenses simply go unnoticed.

Meanwhile, general modernization of the Internal Affairs bodies provides fundamentally new capabilities in ensuring the protection of public order and public safety. Thus, pursuant to part 7 of article 9 of the Federal Law "On Police", "Under the jurisdiction of the federal executive body in the field of internal affairs and territorial bodies community councils are formed, which are designed to ensure the harmonization of socially important interests of citizens of the Russian Federation, federal authorities, bodies of state power of the subjects of the Russian Federation, local self-government bodies, public associations, human rights, religious and other organizations, including professional associations of entrepreneurs, to resolve the most important issues of the police activities... ". This rights' establishment allows internal affairs bodies to consider other state and public institutions as potential forces and means to improve effectiveness of ensuring the rule of law.

In this sense, the real breakthrough is the way in which it is proposed to do: "... the involvement of citizens and public associations in the implementation of the state policy in the field of public order by ensuring public safety and combating crime". [3] Thus, rather inexpressive state policy in the field of bringing citizens and public associations to law enforcement begins to take specific legal silhouettes.

But this is not enough. Legal mechanism of bringing a wide range of social institutions to maintain law and order in public places requires systemic changes of current federal legislation and the adoption of a special law, which could get rid of existing legal contradictions and gaps.

Let's determine and analyze the most important of them.

1. Public order protection is linked with the need to use coercive measures, based mainly on the use of physical force and special means of influence against persons who violate the public order. This raises the question of how should act a citizen when a delinquent does not obey his requirements: use physical force, special means available, deliver the offender to a specially reserved room for detention? Essence of a problem is that these powers could severely restrict human rights, and in connection with part 3 article 55 of the Constitution of the Russian Federation are possible only on the basis of the federal legislative regulation. This implies the need

to adopt a federal law that specially enshrines the legal status of citizens and public associations, which voluntarily implement protection of public order, specifies the types, reasons and procedures of application measures of state coercion, legality control mechanisms of these actions.

Obviously, the absence of such a law does not prohibit citizens to protect public order, but significantly restricts their abilities. Their scope is outlined by the limits of necessary self-defense (Article 37 of the Criminal Code), and in a situation that goes beyond its limits, should be reduced only to the organized revealing of an offence and the call for internal affairs bodies to the place of the offense. Legislative practice of the majority of subjects of the Russian Federation only confirms this. Regional laws regulating the legal status of citizens and their associations of law-enforcement orientation are similar. Exceptions are only the multi various mechanisms for the promotion and incentives.

2. Protection of public order by citizens, which are members to public associations of law-enforcement orientation, will raise the necessity of the coordination of law-enforcement activities of state and public institutions, harmonization of time and place of patrols and other actions in the event of detection illegal facts. The question of who will manage the available forces and means should be resolved in favor of public authorities, not least because they, unlike the citizens and their associations, implements law-enforcement activity on professional basis, and thus bear a direct responsibility to the society and state for ensuring public order.

Moreover, the powers to apply measures of public enforcement will inevitably raise the issue of control of the activities on the part of the state. Procuratorate, courts, special police possessing the same powers are required to take the complaints, to respond to all cases of illegal activities, including in connection with the performance of public functions of public order protection.

Finally, the affiliation of a citizen to a public formation of law-enforcement orientation, in connection with the implemented functions, puts him in a special position that distinguishes him from the legal status of other citizens.

All this requires building vertical relations based on power of authority powers.

Meanwhile, article 19 of the Constitution of the Russian Federation established, that the State guarantees the equality of rights and freedoms of a man and citizen, regardless of affiliation to public associations. Equality of public associations before the law irrespective of their organizational-legal form is established by article 15 of the Federal Law No. 82-FL “On Public Associations”[2]. In accordance with article

17 of the same federal law intervention of public authorities and their officials in the activities of public associations, as well as interference of public associations in the activities of public authorities and their officials shall not be permitted, except in cases provided for by this Federal Law.

Eliminating of these contradictions is seen in the additions and amendments to articles 15 and 17 of the Federal law "On Public Associations".

3. The function of protection public order, as opposed to the protection of other social relations, for example, in the consumer market, involves the risk of injury, not only offenders, but also public order defenders. In this regard, the critical issue is the creation of regulatory instruments to ensure legal protection of citizens affected during public order protection.

In contrast to the RSFSR Criminal Code (see article 191.1) [1], the current Criminal Code does not have an article about criminal responsibility for resisting a public association representative, encroachment on his life or insult in the performance by him functions of ensuring public order and public safety. At the same time, article 317 of the Criminal Code "Encroachment on life of a law enforcement officer" includes responsibility for the encroachment on the life of a law enforcement officer, a military serviceman, as well as their relatives, in order to obstruct the lawful activities of such persons for the protection of public order and public security, or in revenge for such activity. The same fate befell the administrative and tort legislation.

There are no administrative penalties for disobedience people's guard and freelance police officer, which were provided for in the Code on Administrative Offences of the RSFSR (article 165) in article 19.3 of the Code on Administrative Offences of the RF, which provides administrative responsibility for failure to obey a lawful order of a police officer, military serviceman and other officials.

At present, these norms are increasingly common in the regional laws on administrative offenses, in those regions of the Russian Federation, where have already been established legal and social traditions of public order protection by the citizens (for example, article 2.11 of the Law of the Arkhangelsk region "Obstructing the lawful activity of a member of voluntary peoples' unit on protection the public order" [4]).

However, in case of adoption of a relevant federal law (under paragraph 3 part 1 of article 1.3 of the CAO RF, jurisdiction of the Russian Federation in the field of legislation on administrative offenses includes establishment of administrative responsibility for violations of the rules and norms stipulated by federal laws and other normative legal acts of the Russian Federation), there will be loss of effect of

regional standards, providing for liability for violations of civil rights, protecting public order.

However, in case of adoption the relevant federal law (under paragraph 3 part 1, article 1.3. of the CAO RF establishment of administrative responsibility for violations of the rules and norms stipulated by federal laws and other normative acts of the Russian Federation is included to the jurisdiction of the Russian federation in the field of legislation on administrative offenses), there will be loss of legal force of regional norms providing responsibility for violations the rights of citizens protecting public order.

Thus, with the adoption of the Federal Law on the participation of citizens in the protection of public order will be required amendments and additions to the Criminal Code and the Code on Administrative Offences of the RF ensuring legal guarantees of compliance with legitimate demands of citizens protecting them from illegal encroachments in connection with performance of their public duties to public order protection.

Along with this, it is important to develop social protection measures, the financial and social incentives for citizens.

The need to introduce social protection measures is increased by the high risk of injury. However, the fact that the damage inflicted to health of a citizen in the process of implementation by him social order protection must be confirmed officially, as the consequences of this decision are of the budget and financial nature. Consequently, we should resolve at least two questions. The first relates to the inclusion in the law of blanket standard that establishes the legal basis of the medical examination, and the second is associated with the development of a mechanism to provide guarantees of social security based on the payment of material funds and providing preferential health care. Obviously, all this, depending on the degree and duration of loss of health, can be both temporary and permanent.

Financial and social incentives are aimed at creating and sustaining the interest of citizens to participation in the public order protection – visual evidence of state interest and involvement in supporting the social forms of law enforcement.

In the absence of a special federal law existing laws of the subjects of the Russian Federation in this area determine the following types of incentives: presentation of thank you letters, commendations and valuable gifts, presentation a challenge cup. For employees of enterprises and institutions organizes additional weekends. For active participation in the people's guard are paid quarterly and annual bonuses. For some categories of citizens at the local self-government level,

provides for preferential prices for housing and communal services. For students – free residence in the hostels, the provision of sports gyms, flexible educational process, allowances to scholarships, and in the light of the experience gained while working in student teams of public order protection, after the finishing their educational institution they are provided with employment opportunities in the Internal Affairs bodies to the position of district militia officers. [7]

However, with all the diversity of these measures, in the laws of the subjects of the Russian Federation is not regulated the form of their application. Meanwhile it is of fundamental importance, since the principles of openness and transparency are the basis for the procedure of promotion and are designed not only to promote the very awarded person, but also to popularize the ideas of citizens' participation in public order protection.

Thus, in case of adoption the Federal Law on the participation of citizens in public order protection, it will be necessary to provide a mechanism of financial and social incentives in the form of public action, involving the media.

4. Finally, another task is a resolving the issue of the responsibility of citizens for acts of misconduct in the process of public order protection.

The main problem is the undefined status of such citizens. On the one hand, this are persons implementing law enforcement activities on a voluntary basis, not related to professional business, the principal difference of which is a lack of a rigid legal regulation of mutual rights and obligations between the leadership and performer. On the other hand, the specificity of public order protection involves the application of state coercion measures restricting the rights of man which bring this activity to analogical work of state law enforcement agencies, with most cruel to date measures of control the legality of their activities. An eloquent example is the Federal law "On Police", where one of the chapters meticulously establishes the legal details of the interaction between police officers and citizens (chapters 2, 4, 5 of the law) [3].

In this sense, comparing the current legal status of a citizen and police officer who implement public order protection, we meet a number of inconsistencies, causing an acute feeling of social and legal inequality. For example, for the same violations of citizens' rights one can only lose the right to participate in the protection of public order, other loses the bases of material well-being – a profession. Some risk of being brought to criminal responsibility for excess of necessary defence under part 1 of article 114 of the Criminal Code RF (the maximum term of deprivation – 1 year), the other for abuse of authority under part 2 of article 286 of the Criminal Code RF (the maximum term of deprivation – up to 7 years).

The existence of this problem is once again confirmed by the current regional legislation in the considered field. Most of the laws of the subjects of the Russian Federation on the participation of citizens in the protection of public order do not provide any measure of responsibility of citizens for offenses committed in connection with the protection of public order [6], and those not many laws that establish it, just refer to the current legislation [5].

Thus, the adoption of the Federal Law on the participation of citizens in the protection of public order must be associated with the study of the issue on possible inclusion in the Criminal Code and the Code on Administrative Offenses of the RF corpus delicti which provide for the measures of legal responsibility in respect of citizens who violate the rights of others in connection with the implementation of public order protection.

In summary, it can be concluded that the establishment of a legal model of citizens' participation in the protection of public order – this is not just an unification of legal norms that enshrine the goals, tasks, forms, restriction of such participation, rights, duties, powers, social protection measures and legal guarantees, but a more difficult law-making problem, the successful solution of which is seen in the complex amendments and addenda to federal legislation.

The all foregoing indicates that the adoption of the Federal law on the participation of citizens in public order protection is of remotely-promising nature.

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# ADMINISTRATIVE AND LEGAL MEANS OF COMBATING AGAINST NON-MEDICAL DRUG CONSUMPTION IN THE RUSSIAN FEDERATION

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Gives the critical historical analysis of the Russian Federation legislation in part of the application administrative measures to drug users. Provides examples of the negative impact of legislative indulgence in part of the liability for non-medical consumption of drugs, including the exclusion of compulsory treatment of drug addicts. States the need for such a legal regulation in which the law norms can operate effectively in relation and aggregate, i.e. in correlation with other norms of law.

**Keywords:** non-medical consumption of drugs, combating against drug addiction, administrative liability for drug consumption, administrative and legal measures.

Russian Federation Law «On Safety» defines safety as a state of protection of the vital interests of an individual, society and the state from internal and external threats (article 1). In the field of its ensuring the law distinguishes strategic issues of state, economic, social, defense, information, environmental and other types of safety, protection of population health, prediction, prevention of emergency situations and overcoming their impacts, ensuring stability and the rule of law. In its turn, the World Health Organization considers the health as the state of complete physical, mental and social well-being and not merely the absence of disease or physical handicap.

Today, speaking of drug addiction and illegal drug trafficking in the Russian Federation, it is regrettable that in the past few years, and the last decade, the drug situation in the country has been becoming worse. Every year in Russia tens of thousands of people become victims of drug addiction, dying from a drug overdose or from «low-quality» drugs. Hundreds of thousands of people survive,

continue to consume narcotic drugs and psychotropic substances, but become disabled or criminals.

Among the main objectives listed in the Strategy of state anti-drug policy of the Russian Federation until 2020 [5] (hereinafter - the Strategy) was introduced the task to create a state system of prevention of non-medical consumption of drugs with priority measures of primary prevention, and also the development and implementation of national set of measures to prevent the illegal distribution of drugs in the territory of the Russian Federation. The strategic aim of preventing non-medical drug consumption is the reduction of the scope of non-medical consumption of drugs, the formation of negative attitudes towards illicit trafficking and consumption of drugs and significant decline in demand for them.

Back in 1994, A. Sergeev in his article "On the Legalization of Drugs" said: "Today, Russia faces a terrible prospect of losing a whole generation, as nearly 70% of drug addicts – are young people" [12, 3]. This is confirmed by other studies, which, in particular, noted that persistent drug addiction formed, usually under age of 18 [11, 9], as well as by the author's study conducted in a group of authors of Research Center No. 2, All-Russian Scientific Research Institute of the MIA RF in 2005 year. Meanwhile, the prevention of non-medical consumption of drugs and preventing its illegal trafficking has been being just declared for many years.

Our analysis of the development of the legislation aimed to combat non-medical consumption of narcotic drugs and psychotropic substances, showed that in our country for the past twenty years preference is given to so-called "medical-pedagogical approach", the essence of which is the categorical rejection of the application of legal responsibility measures to people who consume drugs and psychotropic substances. The most common argument of proponents of this approach is a thesis that persons who consume drugs are sick, and patients need to be treated rather than punished.

Legal responsibility for non-medical consumption of drugs in the form of administrative sanction was firstly established by the Decree of the Presidium of the Supreme Soviet of the USSR from 25 April 1974 "On strengthening combating against drug addiction" of domestic anti-drug legislation. Paragraph 10 of the normative legal act provided for an administrative fine of up to 50 RUR. In 1984, this norm was enshrined in article 44 of the adopted Code on Administrative Offences of the RSFSR.

In June 1987, the Decree of the Presidium of the Supreme Soviet of the USSR "On amendments and additions to some legislative acts of the USSR" increased legal liability for non-medical use of drugs. It was expressed, first of all, in tightening of administrative penalties – amount of the fine was increased to 100 RUR.

In addition was introduced a punishment in the form of corrective labor for a period from one to two months with retention of 20% of salary or administrative arrest for up to 15 days. Secondly, was introduced criminal liability for consumption of narcotic drugs with an administrative prejudice: a person was brought to criminal responsibility for the second drug consumption without a doctor's prescription in the course of the year after the imposition of an administrative penalty for the same actions. For the consumption of drugs was also envisaged criminal liability. Article 224 of the Criminal Code of the RSFSR "Illegal purchase or storage of drugs in small amounts or consumption of narcotic drugs without a prescription", envisaged punishment by imprisonment for a term not exceeding two years, or correctional labor for the same period, or a fine of up to three times the minimum monthly wage.

However, in accordance with the Law of the RSFSR from December 05, 1991 "On Amendments and Additions to the Criminal Code of the RSFSR, the Code of Criminal Procedure of the RSFSR and the Code on Administrative Offences of the RSFSR" criminal and administrative responsibility for the use of narcotic drugs without a medical prescription in Russia was abolished [4].

Six years later, in 1998, the Federal Law "On Narcotic Drugs and Psychotropic Substances" in article 40 "Prohibition of the Consumption of Narcotic Drugs or Psychotropic Substances without a Medical Prescription" enshrined: "In the Russian Federation is prohibited to consume narcotic drugs or psychotropic substances without a medical prescription".

In 2001, in the Code on Administrative Offences of the RF was enshrined article 6.9 "Consumption of narcotic drugs or psychotropic substances without a medical prescription".

Thus, for 25 years, from the Decree of 1974 "On strengthening combating against drug addiction" till adoption on December 20, 2001 by the State Duma of the Code on Administrative Offences of the RF legal regulation of relations connected with drug consumption for non-medical purposes, was changing in considerable, sometimes radical, way.

Now we can say that the ten and a half years, following the abolition of legal responsibility (from December 05, 1991 to July 01, 2002, when the new «administrative» code came in force) have led to an unprecedented increase in drug trafficking and spread of drug addiction in Russia [8, 43-45].

It should be noted that with the growth of key indicators which show negative development of the drug situation in the country over the past few years has significantly reduced the number of revealed administrative offenses related to drug trafficking (in 2010 – 128,192 offenses (- 32.1%). In in 2009 the figure was 188,806 (- 43.1%), and in 2008, 331,829 offenses were detected). In 2010, a 6.5% decline in

the number of persons brought to administrative responsibility for offenses related to drug trafficking. It amounted to 126,588 people (against 135,363 people in 2009, and 144,048 people in 2008). As follows from the statistics, the only exception is 2010, in which some of the indicators (the total number of revealed drug-related crimes, including those relating to the sale; committed by organized groups and criminal associations) that characterize the drug situation in the Russian Federation, though slightly, but declined.

Occurred in December 1991 decriminalization of drug consumption, has been evaluated by several authors [10, 172] as the actual legalization of drugs, that, from our point of view, is not so. Other authors rightly pointed out that the appearance of the Law of December 05, 1991 has raised the question of the existence of drug lobby in Russia: «The theme of drug lobby is fairly new for us and has not been explored. But due to the adoption of the law on the legalization of drug consumption from December 05, 1991, it has become extremely topical" [7, 53].

It is interesting to note the arguments expressed in those years in favor of abolishing compulsory treatment of drug addicts. In particular, one of these arguments can be found in the Conclusion of the Committee of Constitutional Supervision [6], in which was said that after 1985 "normative acts governing the compulsory treatment of drug addicts, ceased to consider violation by them of the public order, labor discipline and rules of socialist community as one of the essential reasons for the direction of such persons to the medical-labor and medical-educational dispensaries". Logic dictates that such practices had to be suppressed, while preserving the institution of mandatory treatment for drug consumers who disturb others' living.

Proponents of this position, referring to the Constitution of the Russian Federation, in particular to article 2: "Man, his rights and freedoms are the supreme value", and part 1 of article 17: "In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution", for some reason do not see part 3 of the same article 17, which states that "The exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people", and corresponding to this norm part 3 of article 55: "The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State". They also do not notice article 5 of The Universal Declaration of Human Rights, which states that "the law shall not have the right to prohibit anything other than actions *harmful* to the society".

Comparison with the legislations of other states indicates unsatisfactory, from our point of view, legal regulation of the fight against non-medical drug consumption in Russia. And it's not because Russian sanctions are significantly softer. The problem is that the legislative norms for consumption of narcotic drug are essentially "non-working".

Three articles of the Code on Administrative Offences of the Russian Federation establish responsibility for consumption drugs without a medical prescription: article 6.9, part 3 article 20.20 and article 20.22. If we remember that prior to December 05, 1991 "administrative" Code envisaged responsibility for that deed only in article 44, it seems to be possible to speak about the desire of the legislator to strengthen fight against this offence by administrative means.

Part 3 of article 20.20 establishes responsibility for consumption of drugs in public places. Thus, article 6.9 provides for responsibility for their consumption out of so-called public places, that is, without a public demonstration, and part 3 of article 20.20 – for the same acts committed in public places. In fact, the separation occurs on some features of the objective side of committing a tort, and it would be logical if attracted tougher sanctions in respect of an offense under part 3 of article 20.20, as more socially harmful. However, the sanction under part 3 of article 20.20 is limited to a fine of one to one and a half thousand rubles, but the sanction of article 6.9 provides, along with a fine of between four and five thousand rubles, also administrative arrest of up to 15 days. We conclude that if under article 44 of the "administrative" Code of the RSFSR (until December 1991) the penalty for consumption, including public one, could be appointed as arrest, according to the new law, public drug consumption is even more "profitable" for offenders, because entails less punishment. Article 20.22 provides for administrative responsibility (in the form of an administrative fine in the amount of 300 to 500 rubles) of the parents or other legal representatives of a minor who is under 16 years for the consumption by him narcotic drugs and psychotropic substances.

Thus, firstly, the Russian Federation Code on Administrative Offenses in comparison to the same code of the RSFSR, in fact, weakened the administrative methods of influence to drug consumers which were in force prior to the Act of December 5, 1991. Secondly, while assessment of legislative innovations it is necessary to consider that legal norms can only operate effectively in interconnection and aggregate. No matter how perfect is this or that norm, it would not act without correlation to other norms of law. In our opinion, in order that the norms of «administrative» code start to «work», we must return the criminal liability for drug consumption with administrative prejudice. Only being conscious of the prospect of criminal responsibility, the consumer of narcotic drugs and psychotropic

substances will probably refrain from reoffending. With that, of course, we should not forget that to criminal responsibility with administrative prejudice must be brought persons who are not in the painful depending on the drug. Persons in drug dependence should be subject to criminal liability for refusal to voluntary treatment or systematic violation of its regime.

Meanwhile, analysis of the Federal Law No. 162 of December 08, 2003 allows us to conclude that the legislature thought works in the other direction. Just so is possible to estimate changes made by this legal act to article 97 of the Criminal Code of the Russian Federation. Mentioned norm established the basis of application by court coercive medical measures to persons who "committed a crime and were recognized to be in need of treatment for alcoholism or drug addiction". The Law of December 08, 2003, cancelled paragraph "g" part 1 of article 97 of the Criminal Code of the Russian Federation. Consequently, condemned person who are addicted to drugs and do not want be voluntary treated, can become distributors of illicit drug consumption in prisons.

To sum up, we want to note that ignoring the requirements of international conventions, one of participants of which is Russia, one-sided interpretation of certain norms of the Constitution of the Russian Federation led today to the fact that existing measures of combating non-medical consumption of narcotic drugs and psychotropic substances are of the limited and formal nature and do not give law enforcement agencies effective legal means of restriction and prevention of these offences.

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# BASES FOR PRESUMPTION OF GUILT OF PUBLIC OFFICIALS, WHEN COMMITTING ADMINISTRATIVE OFFENCES

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On the basis of analyses of legislation governing the various types of public service, as well as procedural legislation of the Russian Federation, proves the possibility and need for introduction to the administrative and tort legislation presumption of guilt of public officials for committed by them administrative offenses.

**Keywords:** presumption of guilt, public officials, administrative offences, administrative responsibility of officials.

In accordance with the terms given in the United Nations Convention against Corruption (adopted by the UN General Assembly on October 31, 2003) [6], by public officials in the context of this article, we will understand:

- any appointed or elected person holding a post in legislative, executive, administrative or judicial body of the Russian Federation and the subject of the Russian Federation on a permanent or temporary basis, with salary or without one, regardless of the level of posts of this person;

- any other person who performs a public function, including for a public department or public enterprise, or provides a public service as defined in the legislation of the Russian Federation and the subjects of the Russian Federation, and as applied in the pertinent area of legal regulation of the mentioned public formations;

- any other person defined as a «public official» in the legislation of the Russian Federation and the subjects of the Russian Federation;

- any other person who performs public functions at the level of municipal formations.

The issue of establishing the principles of guilt determination of public officials of committed service (official in the context of the CAO RF) administrative offenses is significant not only for the law-enforcer, but also for the legislator, who

resolves the task of modernization of the administrative and tort legislation. Application of presumption of innocence and subjective imputing while consideration of public officials' administrative offenses, in our view, is unreasonable in respect of the mentioned special subject of administrative responsibility.

As correctly pointed Semenov A. V.: "modern constitutional system is based on a presumption of responsibility (responsible conduct) of public authorities to citizens" [15, 22]. Indeed, the adoption of decisions by public officials, committing of legally significant actions "always somehow affects legally protected rights and freedoms of a man and citizen, interests and values expressed in them" [14, 143]. Commenting on the provisions of article 53 of the Constitution of the Russian Federation, Semenov A. V. repeats statements of other authors on the presence in them of the objective nature of the state responsibility, emerging regardless of its officials' guilt [14, 145]. So why, allowing the responsibility of the state and its bodies to the citizens, we are surprised of objective imputing of public officials? As we see it, upholding the institute of subjective imputing in respect of public officials is being implemented only with one purpose – to provide an opportunity for this delinquent to move away from legal responsibility (in our case from the administrative responsibility for service (official) administrative offenses).

This situation is not conducive for effective security and protection of constitutionally recognized rights and freedoms of a man and citizen, as it generates impunity of offenders – public officials. Occurs a paradoxical situation where there is a fact of violation the rights of a man and citizen, as well as of collective private subjects of law, at the presence of the subject of administrative responsibility and his tort deed, the offender avoids administrative responsibility due to failure of evidence of guilt.

In considering the issue, whether subjective imputation at all is possible in its pure form and how to deal with situations involving deviations from this principle, it should be noted that in the evolving legal practice, there are many cases of going beyond subjective imputation and necessity to implement administrative responsibility based on objective principles.

With the increasing number of administrative and legal torts of the representatives of authorities [9] refusal of bringing of public officials who commit administrative offences to administrative responsibility, even for the sake of the rule of law principles (the principle of subjective guilt imputing) will not contribute to strengthening of the rule of law. Appropriateness of administrative responsibility in such cases is doubtless, as it is socially conditioned. Objections of lawyers may cause only explanation of this responsibility, which under the current

administrative and tort legislation, can occur only in accordance with the principle of subjective imputing. Meanwhile, it seems to us that in such cases we need different principle of guilt determination based on objective imputing.

Objective imputing in the administrative and tort legislation, of course, should be limited to these specific subjects of administrative responsibility – public officials.

As pointed out by Bytko S. Yu. "objective imputation actually remains in the criminal law and performs the function of restoring social justice when bringing to criminal responsibility for crimes of negligence that caused significant damage, and itself is not the cause of violation human rights and freedoms of citizens; the prohibition of objective imputation is a legal fiction that allows to reconcile the formalism of criminal law and the diversity of real life"[10, 101]. Appeal of a lawyer to the issue of applying objective imputation in criminal law demonstrates the relevance of its application in tort legislation of Russia.

Keeping in mind our concept, the responsibility for an administrative offense of a public official should occur regardless of the state of that person at the time of its commission (we mean volitional and psychological aspect) [11]. There is no need to figure out what exactly was conscious and willing delinquent at the time of the offense and it is not required for his conviction. The fact of committing a punishable under administrative and tort legislation deed is of essential importance.

We believe that the principle of the presumption of guilt of a public official (enshrined in objective imputation) who committed a wrongful act, means that the burden of proving absence of guilt when a particular consideration of a case on an administrative offense in the court should be assigned to this public official, but not to an administrative jurisdiction body. To avoid administrative penalties a public official charged with an administrative offense must refute the arguments of an administrative jurisdiction body about his involvement in tort, prove his innocence or existence of the circumstances precluding administrative responsibility [13].

It is well known, if legislation presumes the guilt of an illegal deed and imposes to a delinquent the obligation to prove his innocence, it is already the fact of presence of subjective prerequisites of bringing to responsibility. In legal literature, this is considered as the application of framework of strict liability, which strengthens the presumption of guilt. Applying the presumption of guilt to a public official, the legislator thus imposes on the person the obligation to exercise the highest degree of diligence in the performance of ministerial acts. Presumption of guilt will actually include all subjectively possible measures of conduct of a public official, including in the event of accidental circumstances.

As we see it, there will be not so much opponents of the idea of introducing the presumption of guilt of a public official in the administrative and tort legislation of Russia. The more that de facto this presumption already exists in procedural legislation and is applied by the courts when considering administrative and legal disputes and resolving cases arising from other public-law relations. Under part 1 of article 249 of the Code of Civil Procedure of the RF [2], part 3, article 189 and part 5 of article 200 of the Arbitration Procedural Code of the RF [1] the obligation of proving the circumstances that led to the adoption of normative (non-normative) legal act, its legitimacy and the legitimacy of contested decisions, actions (or inactions) of public authorities, local self-government bodies, officials, state and municipal employees is assigned to the body that adopted the normative (non-normative) legal act, bodies and individuals who adopted the contested decisions or committed contested actions (inactions).

The reasons for imposing a presumption of guilt in administrative and tort legislation, in our opinion, are in the legislation governing the various types of public service, as well as in subordinate legal acts, regulating the procedure of service, establishing of official regulations, etc. As we see it, the normatively vested rights, obligations and prohibitions of employment activity of a public official, form good-faith conduct (delineate the boundaries of lawful conduct) of that person, going beyond of which or deviation from which should be regarded as an intentional or negligent (i.e. guilty) offense.

For example, article 12 of the Federal law No. 25-FL from March 02, 2007 "On Municipal Service in the Russian Federation" [7] (hereinafter referred to as the Law on Municipal Service) established the following obligations of a municipal employee, non-compliance of which may result in administrative and legal tort:

- compliance with and ensuring the enforcement of the Constitution of the Russian Federation, federal constitutional laws, federal laws and other normative legal acts of the Russian Federation, constitutions (charters), laws and other normative legal acts of the subjects of the Russian Federation, charters of a municipal formation and other municipal legal acts;

- execution of duties in accordance with the job description;

- compliance with the rights and legitimate interests of citizens and organizations in the performance of official duties;

- compliance with the rules of internal labor regulations, job description, procedure of work with official information established in the body of local self-government, office of the municipal election Commission;

- no disclosure of information constituting state or other secrets protected by

federal laws, as well as the information which he has got to know in connection with the performance of official duties, including information relating to private life and health of citizens, or affecting their honor and dignity;

- careful attitude to state and municipal property, including the provided to an employee for execution of his official duties;

- providing in accordance with the procedure stipulated by the legislation of the Russian Federation, information about himself and members of his family;

- informing the representative of employer about renunciation of the citizenship of the Russian Federation on the day of exit from the citizenship of the Russian Federation or about the acquisition of nationality of a foreign State on the day of acquisition of nationality of a foreign State;

- compliance with restrictions, obligations, not a violation of the prohibitions established by federal laws [8];

- notice in writing to his immediate superior about the personal interest during the performance of official duties, which can lead to a conflict of interests, and adoption of measures to prevent such a conflict;

- do not perform given to him illegal order.

Article 14 of the Law on Municipal Service established for municipal servants the following prohibitions the breach of which may give rise to administrative and legal tort:

"1. in connection with the passage of municipal service the municipal servant is prohibited to:

1) be a member of the management body of the commercial organization, except if otherwise is provided by federal law, or if in procedure stipulated by a municipal legal act in accordance with federal laws and the laws of the subject of the Russian Federation, he was not ordered to participate in the management of this organization;

…

3) engage in entrepreneurial activities;

…

5) receive in connection with the official position or in connection with the performance of official duties remuneration from physical persons and legal entities (gifts, money reward, loans, services, payment for entertainment, recreation, transportation costs and other remunerations) ...;

6) go on a business trip at the expense of physical persons and legal entities, except for trips undertaken on a mutual basis by the agreement of the local self-government body and the election commission of municipal formation with local

self-government bodies, electoral commissions of other municipal formations, as well as with public authorities and local self-government bodies of foreign states, international and foreign non-profit organizations;

7) use for purposes not related to the performance of official duties means of logistical, financial and other supporting , other municipal property;

8) disclose or use information, which is classified in accordance with the federal laws as confidential information or information, which became known in connection with the performance of official duties for purposes not related to the municipal service;

9) allow public statements, judgments and assessments, including in the media, regarding the activities of the local self-government body, Election Commission of municipal formation and its leaders, if it is not a part of his official duties;

10) take without the written permission of the head of a municipal formation awards, honorary and special ranks (except scientific) of foreign States, international organizations, as well as political parties, other public associations and religious associations, if his job duties include interaction with these organizations and associations;

11) use advantages of official position for waging an election campaign or a referendum campaign;

12) use official position in favor of political parties, religious and other public associations, as well as to publicly express attitude to these associations as a municipal civil servant;

13) form in the bodies of local self-government, in other municipal bodies political parties, religious and other public associations (with the exception of labor unions, as well as veterans' and other local community bodies) or contribute to the creation of these structures;

…

15) be part of the administration of guardianship or supervisory boards, other bodies of foreign non-commercial non-governmental organizations and their structural divisions acting in the territory of the Russian Federation, unless otherwise is stipulated by an international treaty of the Russian Federation or the legislation of the Russian Federation;

16) be involved in paid work, which is funded entirely by foreign states, international and foreign organizations, foreign citizens and stateless persons without the written permission of the representative of the employer, unless otherwise is stipulated by an international treaty of the Russian Federation or the legislation of the Russian Federation".

In addition to these duties and prohibitions of the Law on Municipal Service the norms of part 1 of article 75 of the Federal Law "On General Principles of Local Self-Government in the Russian Federation", [4] determine the cases of incurrence of responsibility (as a matter of fact here are being presumed guiltiness):

- of a municipal formation head and head of local administration (see part 1) - "because of the adoption by a local self-government official a legal act contrary to the Constitution of the Russian Federation, federal constitutional laws, federal laws, the constitution (charter), the laws of the subject of the Russian Federation, the charter of a municipal formation if such contradictions are revealed by the appropriate court, and this official has not adopted within its competence measures for enforcement of a court's judgment within two months from the date of entry into force of the court's judgment or within another period prescribed by a court decision".

- of an official of a local self-government (see part 2) - "In the case of committing by an official of a local self-government actions, including adoption by him a legal act, not of a normative nature, entailing violation of the rights and freedoms of a man and citizen, threat to the unity and territorial integrity of Russia, national security and defense, the unity of the legal and economic space of Russia, spending subventions from the federal budget or budget of the Federation subject for the wrong purposes".

Norms of the Law on Municipal Service governing the admission to the municipal service, its passage and termination, give reason to believe that in respect of the person who proceeded to municipal service, there is no such circumstance precluding administrative responsibility as insanity (Article 2.8 of the CAO RF).

All what we have said about the presumption of guilt of municipal employees, in full measure applies to public civil servants, the service of which is carried out in accordance with the Federal Law No. 79-FL of July 27, 2004 «On the Public Civil Service of the Russian Federation» (hereinafter The Law on Public Civil Service) [5].

Article 15 of this law establishes the following obligations of a public civil servant, failure to comply with which may result in an administrative-legal tort:

- compliance with and enforcement the Constitution of the Russian Federation, federal constitutional laws, federal laws and other normative legal acts of the Russian Federation, constitutions (charters), laws and other normative legal acts of the subjects of the Russian Federation;

- execution of official duties in accordance with the official regulations;

- execution of orders of appropriate leaders, which are given within the limits of their powers, established by the legislation of the Russian Federation;
- compliance with the rights and legitimate interests of citizens and organizations in performing official duties;
- no disclosure of information constituting state or other secrets protected by federal laws, as well as the information which became known in connection with the performance of official duties, including information relating to private life and health of citizens, or affecting their honor and dignity;
- careful attitude to state property, including the provided to an employee for execution of his official duties;
- providing in accordance with the procedure stipulated by the legislation of the Russian Federation, information about himself and members of his family;
- informing the representative of employer about renunciation of the citizenship of the Russian Federation on the day of exit from the citizenship of the Russian Federation or about the acquisition of nationality of a foreign State on the day of acquisition of nationality of a foreign State;
- compliance with restrictions, performing obligations and requirements to service conduct, not violation of the prohibitions established by federal laws [8];
- informing the representative of an employer about the personal interest during the performance of official duties, which can lead to a conflict of interests, and adoption of measures to prevent such a conflict;
- not performing given to him illegal order.

Part 1 of article 16 of the Law on Public Civil Service, which establishes the limitations of civil service, prescribes norms that give reason to believe that when committing of an administrative offense by a public civil servant there will be absent circumstances precluding administrative liability on account of his insanity (article 2.8. CAO RF).

For a public civil servant is also set a number of prohibitions, the failure to comply with which may result in an administrative offense. Such bans are, in our opinion, paragraphs 1), 3)-9), 11)-17) of part 1 of article 17 of the Law on Public Civil Service.

In respect of forming the institute of administrative responsibility of public civil servants was dedicated a monograph containing the concept of administrative responsibility of the mentioned category of delinquents [12], so there is no need to repeat the earlier arguments on the principles of bringing public civil servants to administrative responsibility.

Considered by us public officials are only the part of the representatives of public persons, in respect of which when the commission of an administrative offense should be applied a presumption of guilt.

We believe that for persons performing military service, the severity of disciplinary responsibility for committed official torts is comparable to the administrative liability of civilians. Official torts of judges unless they are a criminal offence may be a subject matter of regulation by administrative and tort legislation. However, the presumption of guilt cannot be applied against judges. It would be absurd to believe that justice is administered by the person who is a potential delinquent.

Jurists, we believe, do not wonder about application of administrative punishment to persons who serve in law enforcement agencies. However, application of the presumption of guilt in respect of employees of law enforcement agencies and procuratorate is unacceptable, as this could undermine the authority of law enforcement agencies themselves.

The seeming multiplicity of offenses committed by law enforcement officers, which is covered in the media, is a result of increased attention of civil society to the work of law enforcement agencies. In contrast to the bodies of public civil and municipal service, in law enforcement agencies traditionally take place units that carry out the fight against tortious manifestations of their employees. Cases of revealing torts in law enforcement bodies are generally made public. It seems to us, that if all torts at civil and municipal service are fixed, the number of such would be incomparably greater.

Due to the fact that public officials of the state civil and municipal service routinely make many decisions, implement managing impact on citizens and legal entities, the question of the implementation of the administrative responsibility for committed by them official administrative-law torts is of paramount importance. In our opinion, without accepting by the legal science and the legislator the presumption of guilt of a public official for committed administrative offences, suffers the principle of inevitability of punishment for torts.

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# EVIDENCE OF THE REALITY OF TRANSACTIONS IN TAX DISPUTES

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In the article are considered the circumstances, documents, testimony of third parties, and other evidences which may be contrasted to the position of the tax authority asserting unreality of the taxpayer's transactions with a counterparty and obtaining by the taxpayer an unjustified tax benefit.

**Key words:** tax disputes, evidences, evidences in tax disputes, unreality of transaction, unfair counterparties and unfair taxpayers.



It is no secret the presence of unfair performing tax obligations by taxpayers who use "fly-by-night" and "shell" companies to reduce their tax burden, referred to in tax disputes as unfair counterparties. With these companies, taxpayers draw up documents on transactions without the real acquisition of their products and services. In such cases, we should agree with the tax authorities, accusing taxpayers in collusion with a counterparty providing illegal service, which allows taxpayers to receive unjustified tax benefit (reduction of the taxable base for tax on profit and VAT deductions).

It seems to us that in these cases there is the fact of making by a taxpayer an sham or feigned transaction, which, by Article 170 of the Civil Code of the RF is Insignificant. Boundary between the sham and ostensibility of transaction, you can determine just by setting all the circumstances of the transaction of a taxpayer (or a chain of related transactions involving multiple counterparties). The use by a taxpayer the combination of sham and feigned transactions is quite possible.

The authors of the Commentary to the Civil Code of the Russian Federation determine the sham as follows: "Sham transactions are actions performed

in order to deceive certain persons not involved in the transaction, by creating a false impression about the intentions of participants of the transaction. This can be done with a variety of purposes: a fictitious lease for the registration of a legal entity, a fictitious sale of the property under the threat of bankruptcy or confiscation of property for a crime, fictitious purchase in order to obtain a loan, and others. A sham transaction is associated with an understanding of the parties that this transaction does not bind them, and they do not intend to perform it or to demand its fulfillment" [9].

In the comments of other authors to Article 170 of the Civil Code of the RF is also considered only civil aspect of a sham transaction goal, although the goal of the subject of entrepreneurial activity transaction may well be getting unjustified tax benefits. As we have already said, a sham deal in tax optimization of a taxpayer may take place either in transactions of buying commodity stocks and supplies and the acquisition of services. However, it seems to us, to a greater extent, this optimization is used with immaterial objects, that is, services that are impossible to measure, evaluate in physical units of measurement.

With commodity stocks and supplies an unfair taxpayer is likely to apply transactions containing feigned elements. For example, really buying goods from the counterparties, in documents the taxpayer overstates the cost of its acquisition and accordingly the amount of VAT paid in the price of goods.

However, we do not set a goal of this article to explore the options of an unfair taxpayer's tax optimization schemes. More relevant is the task to protect a good faith taxpayer from applying to him by a tax authority similar technology of unlawful increase in tax liabilities due to qualification of actual transactions with counterparties as unreal (not occurring in real life).

The claims of a tax authority to a taxpayer usually occur in the absence of the documents requested in the third party audit from the counterparties of the taxpayer. In these cases, the taxpayer may be not only a victim of counterparty's tax unfairness (in the performance obligations of the counterparty on the transaction, the counterparty fails to perform subsequent tax obligations), but also face an unfair attitude to him in the form of refusal of the counterparty (its management bodies) from the transactions made with the taxpayer.

The position of the tax authorities in these cases is following – the taxpayer has not shown due diligence in the selection of counterparty, conducts the business on his own risk, and therefore should suffer the adverse effects of transactions with unfair counterparties. The exception of bringing the taxpayer to tax responsibility for the third person are cases where the taxpayer wins a tax dispute by providing

compelling evidence of the absence of collusion with an unfair counterparty and reality of transactions committed by an unfair counterparty.

It is quite difficult to prove the reality of transactions made with an unfair counterparty if the head of the counterparty when performing procedures of tax control refused:

- involvement in transactions;
- signature on documents;
- involvement in the activities of the counterparty as an official;
- to participate in the creation of a legal entity.

To strengthen the evidence base of unreality of deals at the mentioned behavior of the counterparty's head, the tax authority performs corresponding handwriting comparison of transaction documents of a taxpayer with a counterparty, as a rule determining the nonidentity of the specimen signature taken from the head of the counterparty, that has a place in the transaction documents of the taxpayer and this counterparty.

The motives of the tax authority for a special attention to transactions of the taxpayer with counterparties are the following facts:

- absence of a taxpayer's counterparty at the place of registration;
- submitting to the tax authority at the place of the taxpayer's counterparty registration of «zero» VAT declarations;
- submitting to the tax authority at the place of the taxpayer's counterparty registration of VAT declarations with turnovers less than specified in purchase book of a taxpayer under this supplier;
- the absence of any accountability to the tax authority under the taxpayer's counterparty that proves productive and economic activity of this counterparty;
- availability of information in law enforcement agencies about refusal of the taxpayer's counterparty head any transactions with anybody;
- the absence of taxpayer's counterparty's staff, property and other resources available to conduct commercial activities;
- registration of the counterparty at the place of mass registration of legal entities;
- registration of the counterparty by persons establishing multiple legal entities;

- presence of different graphic performance of signature on the transaction's with the counterparty documents with the clarification of the same official of the counterparty;

- the absence of documents proving the physical movement of goods from the counterparty to the taxpayer, etc.

On the basis of the tasks assigned to the tax authorities, which include control over the correctness of calculation, completeness and timeliness of payment (transfer) to the budget of the Russian Federation of taxes and fees, and in the cases stipulated by the legislation of the Russian Federation, the correctness of calculation, completeness and timeliness of (transfer) to the budget of the Russian Federation, other obligatory payments (see part 1 of article 30 of the Tax Code of the RF, [1]), "mistrust" of the tax authorities to the taxpayer's transactions with unfair counterparties is quite justified. All the more, the accusation of bad faith of the very taxpayer allows charging additional taxes from the taxpayer (tax on profit and VAT).

The tax authority does not accept the declared by the taxpayer deductions on transactions for the acquisition of goods from unfair suppliers and puts in doubt the very fact of these transactions, considering that they took place only on paper, and the taxpayer did not incur expenses of purchasing goods. In the act of Plenum of the Higher Arbitration Court of the RF [6] such a circumstance is considered as an unreliability (and / or divergence) of information contained in the documents, in other interpretation "fact of discrepancy with the reality of information reflected in the submitted taxpayer's documents" [11, 25].

Excessive suspicion of the tax authority to transactions of taxpayers is justified. Do not make secret illegal methods of reducing the tax burden used by entrepreneurs. Different kinds of tax optimization schemes are the subject of study by tax authorities, courts, [7], practicing lawyers [10, 11] and Jurisprudence [8]. However imperfect legislation and weak evidence base presented by tax authorities in many cases allows unfair taxpayer to avoid responsibility, and in contrast, imposes responsibility for unfair counterparty on good-faith taxpayer who was not prepared to dishonesty of counterparty emerged as a result of a tax audit.

It is difficult not to agree with E. A. Lysenko, who notes that courts settle tax disputes in favor of the tax authority, when in support of the decision of the tax authority is put information about the lack of records on organization-counterparty in The United State Register of Legal Entities, when the persons referred to as managers or owners of such organizations deny any involvement in their activities [11, 25]. In this case, a good-faith taxpayer will not only have to prove the reality

of transactions with the counterparty, but also contradict a witness (manager or owner of the organization, which is a counterparty of the taxpayer).

We believe that if the counterparty has not reflected in the accounting and tax accounting transactions with the taxpayer, the representative of the counterparty will definitely deny the supply of goods (providing services) to the taxpayer, because otherwise, he recognizes not only the fact of a tax offense, but the fact of a criminal offense under article 199 of the Criminal Code of the RF. Therefore, the only denying of the counterparty's representative to sign the documents on transactions with the taxpayer is not sufficient and other evidences are required. However, not all evidence may be reliable, for example, handwriting examination. There are cases when individuals possessing skills of writing signatures in different graphic styles, use these skills for unlawful purpose. Conclusive proof of signing invoices (bills, contracts and other documents on the transaction) by the authorized person of the counterparty (in the case of his refusal to write the signature) can be obtained only upon condition of the physical presence in the procedure of signing these documents and the implementation at this time a video or photo-documentation. Also undeniable proof can be provided by the procedure of signing documents in the presence of a notary. To prove signing / not signing invoices by authorized persons through handwriting expertise is possible only with a certain probability. Than further away in time from the tax dispute the date of drawing up invoices, the harder it is to provide the necessary material for handwriting expertise. During the examination it is necessary to ensure the identity of the conditions of signing documents and find out the fact if the heads of counterparty had (did not have) various techniques of signing, how many variants of signature used the heads.

However, as we see it, compliance with these procedures is unlikely to promote fair and lawful resolving of a tax dispute. Therefore, judicial authorities stopped on the issue of evaluation reality of transactions. Deserves special attention the position of the Constitutional Court of the Russian Federation, which said that "the resolution of disputes concerning the implementation of the obligation to pay taxes is a competence of arbitration courts, which should not only be limited to the formal determination conditions of application of the norms of the legislation on taxes and fees and in the case of doubt the correctness of application the tax legislation, including the legality of application of tax deductions, are required to determine, explore and evaluate the totality of important circumstances for the proper settlement of a case – the fact of payment goods (works, services) by a buyer, the actual relations of a seller and buyer, the presence of other, apart from invoices,

documents confirming the payment of the tax in the price of goods (works, services), etc." [2, 3, 4, 5].

In our opinion, the fact of the witness testimony (the representative of a counterparty), which give reason to doubt the reality of the transaction with the taxpayer unquestionably proves only one thing, that the taxpayer, at least, was not in collusion with the unfair counterparty in order to obtain undue tax benefit. In case No. A57-3530/2008 [12] these testimonies were parried by the taxpayer who presented evidence:

- statement of The United State Register of Legal Entities, in which as leaders of unfair counterparties were declared witnesses, who denied their involvement to the activities of the organizations-counterparties;
- cards of specimen signature provided to the Bank, when opening a settlement account;
- documents on registration of a legal entity;
- judicial act on another case in which a witness, admitted his involvement in the formation and activities of an organization-counterparty;
- testimony in the framework of procedural events held prior to institution of a criminal case by law enforcement agencies.

The above is only counter-arguments of some part of the arguments of a tax authority on the unreality of taxpayer's transactions. The judges resolving the tax dispute seek from the taxpayer tangible evidences of the actual implementation of economic operations on the transaction. For example, commodity stocks and supplies must be stored, moved, processed and sold. Therefore, as evidence of the reality of transactions on acquisitions of goods can be:

- road waybills of carrier, indicating the type of transport, state license plates (the real presence of the mentioned carriers' vehicles can be checked by the tax authority at the place of registration of vehicles);
- contracts for storage and documentation on the movement of goods in the warehouse (the real presence of warehouses for storage of goods can be checked by inspection procedure in the implementation of control activities by the tax authority);
- testimonies of drivers, freight forwarders, warehouse workers;
- photo and video documentation of loading and unloading works, warehousing places of the goods;

- registration data of security services performing the checkpoint regime in the territory and objects where locates the taxpayer;
- testimonies of buyers of goods (as a taxpayer cannot sell a product, which he does not have);
- provision of complete information on the chain of causal events (from the acquisition of goods (commodity stocks and supplies) from the counterparty prior to its sale to the buyer) with an explanation of the tax consequences on transactions of purchase and sale (for example, in case No. A57-3530/2008 was made a table, from which it followed that the taxpayer's tax liability arose from transactions with unfair counterparties – was calculated and paid the VAT and tax on profit).

But the best proof of the reality of the transaction with the counterparty is a reflection by this counterparty transaction with the taxpayer in its accounting and tax accounting, and the presentation of documents requested by the tax authority at the counter audit. Therefore, if the taxpayer is confident in his counterparty, has a connection with him, the taxpayer himself should ask the providing of documents on the transaction with a cover letter, especially in cases where the tax authority claims about the alleged absence of the counterparty at the place of registration and the counterparty's failure to provide documents on the counter audit. The fact of unfair conduct of the tax authorities during executing a tax audit in respect of a taxpayer, took place in case No. A57-8626/2010 [13], when under the appeal of the taxpayer the higher tax authority took off accrued to pay taxes, fines and penalties for transactions with an allegedly unfair counterparty, after the presentation from the counterparty the documents at the request of the taxpayer.

As we see it, savings in transport costs taking place in the taxpayer activities turns to his problems with the proof of the reality of transactions in cases of counterparty's misconduct and non-confirmation of the transaction by submitting documents on the counter audit. Lack of fixation in the documents of the taxpayer of another's vehicle which delivered the goods (where the obligation to deliver the goods to the warehouse of the taxpayer is assigned to the counterparty), also leads the tax authority to the question about the reality of the transaction.

Taxpayer performing the sale/purchase transactions without processing of goods, as a proof of the reality of transactions may submit documents on the sale of goods purchased from an unfair counterparty. Matching with product names, number of units purchased and sold with taking into account the balance at the store in a package of documents for the purchase and subsequent sale of goods and

also the absence of evidence of the tax authority about another source of acquisition of goods by the taxpayer contributes to the Court's conclusion about the reality of the transaction with the counterparty.

It should be noted that the claims of the tax authorities to the taxpayer regarding the unreality of transactions with an unfair counterparty are meaningless in case when between the taxpayer and the counterparty was conducted transaction on exchange of commodities. Conclusion and performance of transactions before witnesses, sureties, guarantors as well as liability insurance on the transaction are universal means of proof the reality of transactions.

In respect of transactions of the taxpayer, who purchases services or accepts contract work, we can only advise the taxpayer to be careful in choosing the counterparty and implement video fixation of contract works being performed for the taxpayer, from the beginning to the end.

In fact there are a lot of different circumstances and in the seeming similarity of cases there are certain nuances as a result of which one time the court adopts the position of the taxpayer, and another time the position of the tax authority. Tax dispute as a chess game, victory in the game depends on the skill of playing opponents, because both parties are governed by the same rules – rules of the Tax Code of the Russian Federation.

Absence of concepts in the Tax Code of the RF on the reality of transactions, tax benefit, valuation concepts of bad faith of a taxpayer, due diligence and diametrically opposite aims of the tax authority and economic entities lead to the fact that the number of tax disputes, in which basis are unreal transactions of a taxpayer, for a long time will not be having a tendency to decrease, despite the growing number of cases resolved at court.



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# ACTUAL PROBLEMS OF PUBLIC RESPONSIBILITY FOR VIOLATIONS OF ANTITRUST LAWS: THE MATERIAL AND PROCEDURAL ASPECTS

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Disclosed systemic problems of legal regulation in the sphere of responsibility for violations of antitrust laws. Examines the norms of tort legislation for duplication of powers and allocation of competence between public bodies responsible in some way for the protection of competition. On the basis of examples of antimonopoly regulation in developed countries, here are offered approaches of resolving problems existing in Russian legislation.

**Keywords:** public responsibility, antimonopoly activity, antitrust legislation, antitrust regulation, liability for monopolistic actions, violations of antitrust legislation.

One of the problematic blocks of public-law regulation in the Russian Federation today remain the issues of regulation and application of public responsibility, including legal procedures for its implementation.

In recent years in the field of the development of competition law has been done a lot. On the basis of mainly foreign models have been formed the basic legal institutions and mechanisms allowing in general to carry out an effective policy for the protection of competition. According to estimates of practitioners and professionals-academics authoritative resource focused by antimonopoly body allows to take the most radical legal decisions and measures against violators of competition legislation. In general these prerogatives if there is an adequate political will allow to successfully restrain monopolistic tendencies and control the market

in terms of the permissible concentration and the competitive balance. However, the existence of these prerogatives on the other hand causes the problem of their adequate and effective use and the guarantees of compliance with the rights of individuals – objects of control. To achieve these goals we need a holistic system of non-contradicting public-law regulators of control activity, which include both a logically structured and conceptually grounded model of substantive prohibitions, obligations and sanctions and stable, clear procedures of the publicly-authoritative activity.

General dogmatic analysis of the legal environment of publicly-authoritative activity to prosecute offenders and to suppress violations of the antimonopoly legislation reveals many systemic issues of legal regulation in this area and allows us to conclude that in Russia today simultaneously coexist several directions and types of legislation, which differently regulate both material and procedural relations arising in this area, that does not contribute to the achievement any of aims of administrative and legal regulation – either the substantial effectiveness of publicly-authoritative activity, or the protection of subjective rights and legitimate interests of private subjects of public competitive relations.

From what regulators does consist an array of rules regulating publicly-tort competitive relationships? First, Antimonopoly legislation through its central act – the Law on Competition Protection [3] – contains a number of procedural articles and norms governing the consideration of cases on violations of antimonopoly legislation (see chapter 9, etc.). Second, if violations of the antimonopoly legislation fall under corpus delicti of administrative offences stipulated by the Code on Administrative Offences of the RF [1] (and in most cases they fall), administrative responsibility for such violations is applied in accordance with the procedural order, as enshrined in the CAO RF. Third, if the violation of the antimonopoly legislation shows the signs of a criminal offense, criminal procedural order come in force. In addition, in antimonopoly monitoring is also applied the legislation on operational-search activity, as well as the norms and institutions of other certain federal laws.

All of these directions of legislative and legal regulation have specific legal regimes, establish and apply special sectorial legal principles, provide for different composition of public subjects, not always addressed to coinciding categories of private entities, etc. Upon that, these types of legislative regulation are not put in a single system, which would be concurrently built around a single object – state antimonopoly control, public system of competition protection and subjective competitive rights of citizens. Procedural complexity is aggravated by the lack of

an elaborated concept in the model providing simultaneously both administrative and criminal responsibility for the same violation of antimonopoly legislation.

How do more specifically manifest the disadvantages of the current model? A number of problems arise in the substantive regulating unit. Criminal Code and Code on Administrative Offences of the RF contain several articles ensuring public-law protection from violation of antimonopoly legislation. In particular, article 178 of the Criminal Code of the RF [2] and articles 14.31-14.32 CAO RF stipulate responsibility for monopolistic activity in the context of articles 11-10 of the Law on Competition Protection (the title of article 178 of the Criminal Code of the RF – "Banning, restricting or eliminating competition", and it is based directly on the prohibitions laid down in articles 10 and 11 of the Law on Competition Protection). However, these three regulators – the Criminal Code, the Code on Administrative Offences of the RF and the Law on Competition Protection have many discrepancies and inconsistencies. Let us look at one of them.

The objective aspect of part 1 article 178 of the Criminal Code of the RF includes, in particular, such deeds as prevention, restriction or elimination of competition by entering into a competition-restricting agreements or implementing of organized actions restricting competition (*Note of the author*. For the purposes of this article there is no need to consider qualified offenses specified in part 2 and 3 of article 178 of the Criminal Code of the RF, so we dwell on the only part 1 of this article.)

It should be noted that the Law on Competition Protection includes the institute of admissibility of separate prohibited under a general rule agreements and concerted actions: these rules are contained in articles 11, 12 and 13 of the Law. However, neither the Criminal Code of the RF nor the CAO RF takes this approach. There is a paradoxical situation – an agreement that can be recognized as valid by the antimonopoly body, can simultaneously become a reason or cause for the criminal responsibility of a physical person for such an agreement under article 178 of the Criminal Code of the RF.

Article 14.32 CAO RF in this sense is more coordinated with the Law on Competition and punishes for conclusion by an economic unit an agreement or concerted actions *prohibited* by the antimonopoly legislation of the Russian Federation. That is, it is presumed, and it follows from the logic of correlation of antimonopoly (under the Law on Competition Protection) and administrative-tort procedure (procedure under the CAO RF), when at first antimonopoly body recognizes agreement or concerted action as valid or invalid, and only after there is instituted an administrative case under the CAO RF and applied responsibility under article 14.32.

For the implementation of Article 178 of the Criminal Code of the RF not required such a link either under the structure of the objective side of the article, or in force of criminal procedural procedure of institution of a criminal case, which is implemented without any procedural need to clarify admissibility or inadmissibility of an agreement from the economic point of view in the spirit of the principle of reasonableness (proportionality) and other approaches to the admissibility of agreements enshrined in antimonopoly legislation.

Further analysis and comparison of article 178 of the Criminal Code of the RF with articles 14.31-14.32 CAO RF, in the context of legal regulation of countering monopolistic activities in antimonopoly legislation, reveals a number of other major and minor inconsistencies and collisions that lead to violations of the rights of private actors, as well as reduce the effectiveness of public control.

On the other hand, criminal law creates unnecessarily broad terms of criminal liability application for the abuse of a dominant position. Thus, the law providing for the responsibility for the abuse of a dominant position recognizes as the base for this responsibility only repeated commission of the offense, namely, "the committing by a person the abuse of a dominant position for more than two times in three years, for which the person has been brought to administrative responsibility". Here we see some systemacity, the relationship of criminal and administrative-tort law in the regulation of public responsibility for violations of antimonopoly legislation, but this systemacity is built in such a way that raises many questions, and can hardly be considered satisfactory. So, and this is a general disadvantage of article 178 of the Criminal Code of the RF, it does not define precisely the subject of a crime. The fact is that the abuse of a dominant position is a tort of a collective subject, organization, or even a group of legal entities: antimonopoly legislation recognizes as the subject of such actions business entities, which more often include commercial and non-commercial organizations and in theory could include individual entrepreneurs (article 4, the Law on Competition Protection), and while the Criminal Code of the RF establishes responsibility only of individuals. Probably, article 178 of the Criminal Code of the RF, providing for responsibility for the abuse of a dominant position, means individuals whose actions have led to the violations of relevant organizations. But the law does not expressly say who can potentially fall under the prohibition of article 178 of the Criminal Code of the RF. It seems that this suggestiveness and legal uncertainty are not allowed in such an Act as the Criminal Code that restricts the freedom of the individual.

On the other hand, this connection of administrative and criminal responsibility causes a problem of a different kind – the difficulty of the actual possibility to bring

to criminal responsibility the person whose actions, instructions led to the abuse of dominant position by a subject of market. We recall that according to article 178 of the Criminal Code of the RF, punishable only a *repeated* abuse of a dominant position, which is recognized under the committing by a person the abuse of a dominant position for more than two times in three years, for which the person has been brought to administrative responsibility. Let us imagine that a top manager, guilty of abusing of dominant position by his organization, after committing an administrative offence for the second time in three years temporarily transfers to another position, to wait three years and then come back into place. Formally, the new top manager, who gave an illegal order, which led to a new abuse of the organization, cannot be criminally punished. This means the actual inability of article 178 of the Criminal Code of the RF to effectively prevent violations of antimonopoly legislation in the form of abuse by economic units of their dominant position.

So we can see in the structure of criminal and legal prohibitions of article 178 of the Criminal Code of the RF, on the one hand, the excessive rigidity to the subjects restricting competition of agreements, on the other hand, incomprehensible liberalism to the subjects who are accessory to the abuse by organizations of a dominant position.

The above substantive regulatory issues of administrative and criminal responsibility for monopolistic actions in their interconnection with each other and antitrust regulators are closely intertwined with the procedural ones, arising from a common problem of eclectic signs of regimes to legal regulation of public-law relations in the field of competition.

The essential problems here are duplication of powers and lack of an effective model of the distribution competences between the number of public bodies responsible in some way for the protection of competition, as well as a not unified system of co-existence of administrative and antimonopoly, administrative and tort and criminal and procedural procedures to protection of competition and subjective competition rights.

Today in Russia there are several types of public subjects endowed with executive and instructive and law-enforcement powers to implement the powers of authority in the field of antimonopoly control. In this case, the separation of powers of controlling bodies is implemented not by type of markets, functional pattern, type of crime, levels of public administration and administrative-territorial division, and so on, but by the legal regime of activity of these subjects. Thus, monopolistic activity on the market of milk may be the subject of an investigation by the antimonopoly

authority. However, the same case may be of interest to internal affairs bodies, since article 178 of the Criminal Code of the RF under jurisdiction of the Investigation Committee of MIA, also provides for responsibility for monopolistic activities. Also, at General Prosecutor's Office operates an interagency working group to combat price fixing arrangement. However, investigative agencies of procuratorate have no powers to investigate cases under article 178 of the Criminal Code of the RF.

This system has a range of shortcomings, both in terms of protecting the rights of citizens (objects of control), and in terms of efficiency of public administration. Let's begin with the latter. Antimonopoly body has human resources and resources to conduct a full examination from the receipt of initial information on the case and beginning the pre-trial investigation till making an authoritative decision. However, the Federal Antimonopoly Service of Russia operates only in the context of the administrative antimonopoly procedure and has no any criminal and procedural powers. This means that in the actual discovery of elements of the criminal offence of violating the antimonopoly legislation, FAS should pass the case to law enforcement authorities. However, it seems, that the complex of relations, arising in connection with the need to resolve the question of instituting criminal proceedings, is not enough settled. Thus, in this regard the Law on Competition Protection contains only two interrelated norms. In Part 3 of Article 41 of the Law is established that "a decision on the case of violation of the antimonopoly legislation also contains conclusions on the presence or absence of the grounds for taking by an antimonopoly body of other measures to prevent and (or) eliminate the consequences of violation of the antimonopoly legislation, ensure competition (including the grounds for appeal to court, for the transfer of materials to the police, for sending recommendations on the implementation of actions aimed at ensuring competition to government or local government bodies)". Under part 1 of article 49 of the Law "Commission of antimonopoly authority on consideration a case of violation of the antimonopoly legislation after taking decision on the case decides question about issuing directions and about their content, as well as on the necessity to exercise other actions aimed at elimination and (or) prevention of the antimonopoly law violation, including the question of sending materials to the law enforcement agencies, referring a claim to court, sending proposals and recommendations to the public authorities and local government bodies".

The said provisions are formulated so that many issues remain unclear, such as whether is the Commission obliged each time to resolve the issue of the presence of a criminal offense, or it is not the duty of the Commission, but only a prerogative at discretion? What is a required set of signs and what is a basis of the consideration

of violation with respect to the presence of these signs? What set of violation's signs is needed to have sufficient grounds for referral of the case materials to law enforcement bodies? It should be noted that in fact the FAS to decide on such a referral should conduct a preliminary qualification of an action to detect elements of corpus delicti. In fact there is every indication of criminal procedural powers, but they are not reflected in the criminal-procedural legislation.

Next, suppose that the case comes to the law enforcement bodies. The competent authorities again have to understand all the intricacies of the case, again conduct an investigation already in purposes and under the regime of criminal procedure to make at least a preliminary decision on the existence of a corpus delicti, not to mention a comprehensive investigation for indictment and start of court proceeding. Thus, the legislation essentially establishes a model of dual investigation of one and the same violation by two different bodies within different legal regimes, in cases where the violation of antimonopoly legislation also falls under the scope of the criminal law. The internal affairs bodies enter the process how would in the middle and are forced to get to the bottom of the case, including with the words of antimonopoly bodies' specialists who explain the case materials, if questions arise. At the same time, having deeply penetrated into the heart of the matter, conducted an administrative investigation and taken appropriate administrative decisions the antimonopoly authorities at the peak of understanding the situation are forced to distance itself from the case, passing it to new participants of proceeding. By itself, such a model does not look effective from the position of duplication of functions, double spending of public resources, overexpenditure for allowance of public servants. To this is added the problem of the quality of the investigation. If FAS has a narrow specialization, the entire body, its primary staff aims at the realization of the protection of competition, continually accumulates departmental experience of law-enforcement in this area, this cannot be said about law-enforcement bodies. Even the formation of a special division for antimonopoly investigations has made not much to change the situation.

From the point of view of a private actor this doubling the burden and costs is an actual "nightmare" to consistently withstand the law-enforcement press of various regulatory authorities on the same case.

On the other hand, it should be noted that according to the data of practitioners, often, regardless of the investigations conducted by the FAS of Russia, internal affairs bodies independently institute the cases, which have little to do with the issues and the subject of antimonopoly regulation, often artificially attracted to the elements of crimes covered by article 178 of the Criminal Code of the RF.

So, the questions of interaction of competitive bodies among themselves and with other bodies are reflected in legislation only partially and in the most general terms, even on enforcement issues directly affecting the rights and interests of citizens. Many important procedural matters are not regulated at all or regulated by departmental acts. It seems that this situation is hardly acceptable to regulate administrative and tort framework of antimonopoly relations and is directly not valid in the area of intersection of antimonopoly control and criminal procedure.

The second group of procedural problems arises from the lack of a legislative systematic unity in the regulation of the very *administrative* antimonopoly procedure.

As has already been noted, in today's Russia administrative and tort antitrust procedure is regulated at the legislative level, on the one hand by the antimonopoly legislation, particularly by the Law on Competition Protection, on the other hand by the Code on Administrative Offences of the Russian Federation. Just as in the case with the criminal procedure the antimonopoly legislation "relates" to the administrative and tort one vertically – by the sequence of application different types of legislation, but does not delimits horizontally (e.g., by types of markets or offences). In other words, firstly conducts an antimonopoly investigation under the procedures specified in the Law on Competition Protection. Then, if the violation falls under the articles of the Code on Administrative Offences of the Russian Federation (today most of the types of violations of antimonopoly legislation fall under the articles of the CAO RF) institutes a case under the CAO RF, and under the procedures already established in this act applies administrative responsibility for violations of antimonopoly legislation. Further it is getting even more interesting. Decision and order, that finish antimonopoly investigation on the procedures of the Law on Competition Protection may be appealed to the Court in the manner prescribed in the Law on Competition Protection and forensic-procedural legislation. Acts adopted under the procedures of the CAO RF, should be appealed in a different manner – separately from decisions and orders of the antimonopoly body, though, the acts provided for by the antimonopoly legislation (decision or order) and acts of the CAO RF (for example, the decision to impose a fine) are the acts on the same antimonopoly case. The situation is complicated by the fact that by many types of offences antimonopoly administrative acts are appealed both in arbitration courts and courts of general jurisdiction. This model leads to a procedural overload of the antimonopoly proceeding, legal collisions. There are problems of unification and delay of terms of consideration, the lack of uniformity of judicial practice, increasing costs of private actors on the conduct of the case, the appealing of the acts of an antimonopoly authority, legal stability.

On the other hand, only the external connection, but not a system combination of antimonopoly jurisdictional procedures with the procedures of the CAO RF, does not allow in the administrative process, which is implemented in the framework of the procedures established in antimonopoly legislation, to realize the potential of standards and principles established in the CAO RF and confirmed by the many acts of higher judicial bodies, including the Constitutional Court of the RF. Formally, neither the principle of presumption of innocence, nor other principles established or arising from the norms of the CAO RF, are not important for antimonopoly legislation, since neither the CAO RF is systemic for sectorial laws determining features of the administrative and legal regulation of controls in some areas, nor the Law on Competition Protection contains indications that the general principles and rules established by the CAO RF are indispensable for the application of antimonopoly procedures of the Law on Competition, and shall be applied as filling up deficiencies of the last.

We have examined, not all the problems, inconsistencies, contradictions of substantive and procedural regulation of the issues of the grounds and implementation of public responsibility for violations of antitrust legislation, but even they can speak of a serious systemic crisis of legal regulation in this area. Lack of conceptual unity and system logic aimed at effective public control and protection of competitive relations and the rights of consumers and market participants from unlawful infringement of other private entities as well as the state, is also shown in comparison of the domestic model with the approaches of foreign countries, which are notable for stable system of public-law regulation of competition protection, including with regard to the regulation of public responsibility for violations of antimonopoly legislation.

Foreign experience in its turn demonstrates the unification in matters of material and procedural regulation of public responsibility for violations of antimonopoly legislation, despite the fact that different countries have their own specificities and characteristics peculiar to their legal system as a whole.

Thus, in the U.S.A public responsibility for antitrust violations is unified in the framework of criminal responsibility, that is provided for under both the federal level and at the level of states [7, 9, 10 and 6]. Distribution of grounds of criminal responsibility occurs in accordance with the general approaches of distribution of competencies between the Federal and states' antimonopoly agencies on the whole.

Considering the federal level as an example, it should be noted that, despite the fact that two public subjects are entrusted with public defense of competition,

only one of them – the Ministry of Justice, represented by Antitrust Department, has the powers to apply criminal measures and conduct criminal proceedings. The second one is the Federal Trade Commission that acts within the framework of administrative procedures. However, unlike Russia, the FTC does not apply measures of administrative responsibility, which according to Russian understanding is absent in the United States, but the FTC is authorized to apply other measures of administrative coercion, aimed at preventing and suppressing illegal monopolistic actions. So there is no situation of competition and contradiction in corpus delicti of criminal and administrative offences in the area under consideration.

In addition, corpus delicti and criminal sanctions for monopoly are contained in the antitrust act – the Sherman Act. Hence the complete unification of antitrust prohibitions and a criminal corpus delicti, absence of conflicts and contradictions between them.

It should also be noted that the American system of criminal responsibility for monopoly is unified and logical in terms of the subject of responsibility. As is well known, the United States provides criminal responsibility for individuals and legal entities. As the Antitrust Department of Ministry of Justice conducts antimonopoly criminal proceedings from the beginning of receipt of initial information on a case till the prosecution in court, within criminal proceedings is provided a comprehensive investigation of the case, where detects the offense, installs the guilt for specific individuals and legal entities, and in court if he agree to a guilty verdict will be passed a punishment, both to the organization and the citizen who is guilty of monopolistic activities of his company. This system does not require the initiation of two parallel procedures – criminal and administrative ones to ensure penalty of antimonopoly offence against separately individuals and separately legal entities.

The American experience of regulating public investigations and public responsibility for monopolistic actions is not dominant in the world, and most countries characterized by the unification of public responsibility within the administrative law. The classic example here is Germany [7; 9]. In this country the administrative responsibility for monopolistic actions is envisaged in the antimonopoly (competitive) legislation. In one law stipulated prohibitions and the validity of actions limiting competition, powers of antimonopoly authorities, procedures for their activities, procedure of application of administrative and control measures, including the procedure of application of responsibility measures, corpus delicti, types and amounts of penalties. It also does not cause confusion

and contradiction between the system of prohibition and regulation of public responsibility for their violation.

It should be noted that in Germany, the criminal law contains offenses and responsibility for them in the field of competition, but these structures are not associated with the cartel (competitive) law and aimed at the suppression and prevention of specific types of unlawful infringements. The emergence of these structures relates to 1997, when by the Law on Combating Corruption in the Criminal Code of Germany was introduced chapter 26 "Crimes against Competition" [8]. This chapter contains several crimes and punishes mainly managers and employees of commercial organizations that go to conspiracy with competitive firm against the interests of their firm. So, chapter 26 establishes responsibility for agreements limiting competition in the description of goods, bribery and graft in business. The cartel (competitive) law of Germany in its turn is directed against other acts, traditionally forming in the world practice the subject of antimonopoly control – abuse of dominant position, market cartel conspiracies, etc. Thus, criminal procedure and criminal prohibitions against anti-competitive actions is not in competition with the administrative and tort procedure and administrative offenses, have different objectives and are used to counter the various illegal phenomena. The administrative procedure and administrative responsibility for monopolistic actions in its turn are fully unified and brought into a single system within the cartel (competitive) legislation.

Many other European States follow similar principles and approaches. So, competition legislation of Spain includes the full amount of systematic administrative and legal rules of antimonopoly control, including all stages of the administrative antimonopoly procedure from the primary obtaining of information and institution administrative proceedings till the jurisdictional decision involving at the same time the application of administrative sanctions. Moreover, the main competitive law contains all needed material rules – prohibitions, administrative procedures, a list, types, sizes of penalties for violation of these prohibitions, the cases and procedure of their application, the base for release from liability and other relevant issues.

Besides, according to the adopted in Spain model of administrative and legal regulation, the sectorial legislation, governing individual directions of public management and control and defining the functions, powers and procedures of activity of some separate public entities, must comply with the basic administrative and legal acts, such as the Laws "On the Legal Regime of Public Administration and General Administrative Procedure" [11] "On the Organization and Activities

of the General State Administration" [13] "On the Administrative-litigatory Court Proceedings" [14]. Gaps of the competition law and other sectorial acts in such a system are imperatively completed by institutions and norms of general procedural laws. Typical in this respect the approach adopted in the administrative and legal regulation of public activity for the protection of competition. Despite the fact that more than half of the country's basic competition act – the Law on Competition Protection is devoted to administrative procedures, including that have been regulated major institutions, stages, actions, elements of the antimonopoly procedure, procedure of sanctions application, their types and application cases, etc., herewith, according to the direct order of article 19 of the Law on Competition Protection in the cases not-settled by the law operate the general rules of the legislation on public administration of Spain, including the Law "On the Legal Regime of Public Administration and General Administrative Procedure", "On the Organization and Activities of the General State Administration". This provides common rules, legal principles, and guarantees of private subjects of competition law – the objects of antimonopoly investigations during the whole antimonopoly procedure – from receipt of preliminary information on possible violations and the institution of proceedings till the application of coercive measures against violators and further contesting the acts and actions of competition authorities in court. In General, publicly-authoritative activities on protection of competition in Spain is unified under the administrative legal regulatory regime.

Unification of public responsibility within the administrative and legal regulation is typical of the European Union as a whole, as quasi-government formation and independent public subject of antimonopoly control with functions and powers independent from the member states. Typical sanctions, which are imposed on violators by the European Commission within the framework of EU competition law, are fines, which can reach 10% of the turnover of a guilty company [7].

The identified material and procedural problems of regulating public prosecution of antimonopoly violations, raises serious questions over the need to streamline the domestic model.

It seems, that in view of traditions of the Russian legal regulation of administrative responsibility, the differences in the subjects of criminal responsibility in Russia and most foreign countries, in terms of responsibility of legal entities, the least satisfactory condition of exactly criminal-legal means to counter monopolistic activities in Russia and their meager role in achieving purposes of antimonopoly policy should be developed approaches, on the one hand, taking into account these

circumstances, on the other hand providing systemic change of legal regulators in this field so far as is necessary to achieve two main goals and objectives of the publicly-tort antimonopoly law – the effectiveness of the public protection of competition and antimonopoly control, and protection of the rights of private entities of publicly-tort competitive legal relations.

The above circumstances and global trends of unification and system unity of regimes of publicly-tort antimonopoly activity make the society to seek for development such a system also in Russia choosing a priority type of legal regime. The specificity of domestic publicly-tort regulators gives more preference in choosing of the administrative and legal regime as a priority one. In the context of the ongoing reform of the internal affairs authorities, in particular, on the issue of declining the amount of functions, this approach obtains additional justification and relevance.

It seems that the renunciation of the criminal prosecution for violations of antimonopoly legislation, stipulated in article 178 of the Criminal Code of the RF will not weaken the potential of public authorities in the fight against monopolies, what is a confirmed by many examples from foreign practice. On the other hand, the unification of public control within the institutions of administrative law will let to move from extensive to intensive development of legal regulators, their continuous improvement, because it will enable the elite and the expert community to focus on improving of a more compact group of norms, interconnected into a single system within a single administrative and legal regime.

At the same time, in this approach remains the problem of bringing to a more coherent and unified system of administrative antimonopoly legislation and administrative-tort legislation (CAO RF). Search and detailed justification of specific proposals in this area is beyond the scope of this article, however, we can make some general considerations on the matter.

First, of course, such a system of unification is necessary. Second, given the foreign experience, on the one hand, and the current Russian model of regulation of administrative responsibility, on the other, we can talk about two possible ways of development of the system in the field. One of the approaches is related to the unification of all the issues – from the institution till the consideration of a case and the application of administrative sanctions in the legislative body of antimonopoly legislation. The second approach involves the development of the Code on Administrative Offences of the Russian Federation to the level of a system act for sectorial administrative and legal legislative regulators, in part of conducting administrative investigations, establishing the guilt of a subject, applications the measures of

administrative coercion. However, the second approach encounters a number of theoretical and practical complexities of a systemic nature, that causes delay in the procedure of resolving the issues raised in this work. So, the CAO RF covers not all areas of administrative and control activities, focusing on the issues of regulation and application of administrative responsibility, and in order to give it a systemic nature in the legal regulation of administrative and jurisdictional procedures in general it is necessary to think about the reforming or even replacing by this unified act of such acts as the Federal law No. 294-FL of 26.12.2008 [4], linking changes with forensic-procedural legislation, in particular, Arbitration Procedure Code of the RF and a number of other system acts.

In this connection probably more preferable in tactical plan, in our view, is the autonomous development of administrative-tort regulators within the antimonopoly legislation with simultaneous developing of a systemic administrative and legal legislative act or systemic group of administrative and legal laws, which ensure unified principles of administrative and legal regulation, defining the general principles, approaches of the publicly-authoritative activity, establishing common standards and guarantees for private subjects of public legal relations. Such an updated legislation forming the system, framework of administrative and legal regulation, could replace the current scattered administrative and legal acts and become, for example, by experience of Spanish or German model, an effective guarantor of lawful activities of both antimonopoly administration and other responsible for different areas of public administration.

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# ABOUT ADMINISTRATIVE RESPONSIBILITY FOR VIOLATION LEGISLATION ON CHILDREN PROTECTION FROM INFORMATION HARMFUL TO THEIR HEALTH AND (OR) DEVELOPMENT

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Analyzes the structures of administrative offences entered into the Code on Administrative Offences of the Russian Federation by Federal law No. 252-FL of July 21, 2011 on Making Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal law on the Children Protection from Information Harmful to their Health and Development.

**Keywords:** children protection, information harmful to children health and development, administrative responsibility.

One of the main objectives of the national policy for children in accordance with part 1 of article 4 of *the Federal Law No. 124-FL of July 24, 1998 "On basic guarantees of children's rights in the Russian Federation"* (in edition from 03.12.2011) [2] is a promotion to the physical, intellectual, mental, spiritual and moral development of children, education in them patriotism and civic consciousness. In order to achieve it article 14 of the Law earmarks as a way to ensure the rights of children in the Russian Federation the protection of children from information, propaganda and agitation damaging their health, moral and mental development.

In accordance with it the bodies of state power of the Russian Federation take measures to protect children from information, propaganda and agitation, harmful to their health, moral and mental development, including from the national, class, social intolerance, the advertising of alcoholic beverages and tobacco products, the propaganda of social, racial, national and religious inequality, and also from the distribution of printed materials, audio and video products, which propagate violence and cruelty, pornography, drug consumption, substance

abuse, antisocial behavior. In order to ensure the health, physical, intellectual, moral, emotional security of children the federal law, the laws of the subjects of the Russian Federation establish standards for distribution of printed materials, audio, video and another products that are not recommended for use by children under the age of 18.

An important step towards strengthening the mechanism of legal protection children from the negative information became the adoption of the Federal Law No. 436-FL from December 29, 2010 "On Protection of Children Against Information That May Be Harmful to Their Health and Development" [3] (hereinafter – the Law on Protection of Children from Information). In terms of content the Law:

- enshrines the definition of key concepts in the field of protection of children from information harmful to their health or development;
- establishes the powers of a federal body of executive power, bodies of State power of the subjects of the Russian Federation in the field of protection of children from information harmful to their health or development;
- defines the types of information harmful to the health or development of children;
- enshrines the categories of information products and rules of its classification;
- establishes the requirements for turnover of information products;
- regulates the procedure for the examination of information products;
- appoints the subjects of supervision and control and their rights in the field of protection of children from information harmful to their health and (or) development.

Taking into account the "revolutionary" nature of the Law on Protection of Children from Information for the Russian legislation parliamentarians have envisaged a considerable temporary reprieve of its entry into force. In accordance with article 23 of the Law on Protection of Children from Information it will happen on September 01, 2012.

In order to implement certain provisions of the Law on Protection of Children from Information and harmonize with it the current legislation of the Russian Federation was adopted the Federal Law No. 252-FL from July 21, 2011 «On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law "On Protection of Children Against Information

That May Be Harmful to Their Health and Development" [4] (hereinafter – the Law on Amendments). Taking into account the obvious fact that the enforcement and implementation the norms of the Law on Protection of Children from Information is impossible without the application of coercive mechanisms, including legal sanctions, the Law on Amendments envisages adding to the Code on Administrative Offences of the RF from December 30, 2001 No. 195 - FL [1] (hereinafter – CAO RF) the complex of norms providing for administrative responsibility for violation of the legislation on protection children from information harmful to their health and (or) development. We would like to dedicate this article to analysis of these norms.

First of all, the Law on Amendments introduces to the CAO RF a new structure of an administrative offence – article 6.17. "Violation of the legislation of the Russian Federation on the protection of children from information harmful to their health or development". It includes three parts.

Before the beginning of their analysis is necessary to clarify the content of the basic concept of "information harmful to health, and (or) development of children", which is used in dispositions of all parts of article 6.17 CAO RF, as well as in its title. In accordance with paragraph 7 article 2 of the Law on Protection of Children from Information it is recognized by information (including information contained in information products for children), distribution of which among children is prohibited or restricted in accordance with this Federal Law. As can be seen from the definition, there are the two categories of such information: 1) one, which is totally prohibited for distribution among children, and 2) one, which in general is not prohibited for children, but for which an age limit is introduced. List of types of information falling within each of these categories is established respectively by parts 2 and 3 of article 5 of the Law on Protection of Children from Information.

Part 1 of Article 6.17 CAO RF establishes liability for violation the requirements of distribution among children of information products containing information damaging to their health and (or) development. Under the distribution of information products on the basis of paragraph 12 of article 2 of the Law on Protection of Children from Information should be understood its sale (including subscription), rent, lease, distribute, checkout at Public Libraries, public showing, public performance (including by means of broadcasting or cable TV, events and shows), posting in the information and telecommunication networks (including the Internet) and in mobile radio communication networks.

Themselves requirements of distribution of information products for children containing information damaging to their health and (or) the development

are regulated by chapter 8 of "Requirements for turnover of information products" of the Law on Protection of Children from Information. The possible forms of violation may be: a) distribution among children of information products containing information prohibited for children; b) distribution among children of information products containing information, which is limited to children of certain ages, without the sign of information products; c) demonstration through spectacular event of information products containing information damaging to their health and (or) development, without audio message just before the spectacular event on the inadmissibility or restrictions on the presence at such a demonstration of children of certain age categories, etc.

In order to avoid collision of part 1, article 17 CAO RF with other articles of CAO RF, as well as with the norms of the Criminal Code of the Russian Federation (in particular, article 242 and 242.1 of the Criminal Code of the RF) the disposition of the considered norm contains two clauses: "except as specified in part 2 of article 13.21 of this Code" and "if this action does not contain a criminal offense". As for part 2 of article 13.21 CAO RF, this new norm is also entered in CAO RF by the Law on Amendments and will be considered by us below.

Part 2 of Article 6.17 CAO RF provides for responsibility for non-use by communications providers, that provide telematic services at collective points of access to the information distributed by information and telecommunication networks (including the "Internet"), technical, software and hardware to protect children from information harmful to their health and (or) development. The obligation of communications providers on the use of such means is established by article 14 of the Law on Protection of Children from Information. Specific requirements concerning the nomenclature and technical characteristics of these protection means are determined by the federal body of executive power authorized by the Government of the Russian Federation. According to information available such a subordinate act has not yet been adopted.

The rules of providing telematic services are approved by the Resolution of the Government of the Russian Federation No. 575 from September 10, 2007 (in edition from 16.02.2008) [5]. First of all, we are talking about the operators providing access to the Internet in the so-called Internet cafes, as well as in points of collective access in educational institutions. However, the definition of "telematic communication services in the collective points of access to information available through information and telecommunication networks" could include also services of wireless access to the Internet, which currently are in many institutions: hotels, shopping malls and business centers, cafes and restaurants and etc.

Part 3 of Article 6.17 CAO RF establishes responsibility for posting in information products for children, including information products, placed in the information and telecommunication networks (including the "Internet"), announcements about bringing children to participate in the creation of information products that are harmful to their health and (or) development. These actions are in violation of one of the additional requirement for the turnover of certain types of information products for children, stipulated by part 1 of article 15 of the Law on Protection of Children from Information. Under information products in this Law are recognized the intended for circulation in the Russian Federation media products, printed materials, audio-visual products on any type of media, programs for computers and databases, as well as the information made available through the spectacular events, information posted in information and telecommunications networks (including the Internet) and networks of mobile radio communication.

Subjects of administrative liability under article 6.17 CAO RF are citizens (part 1 and 3); officials (part 1 and 3); persons carrying out business activity without establishment of a legal entity (part 1 and 2); legal entities (part 1, 2 and 3). As the main type of administrative penalty for all the entities has been established an administrative fine (parts 1-3 of article 6.17 CAO RF), which in the considered article is associated with the confiscation of the subject of an administrative offense. For committing of an administrative offense under part 1 of article 6.17 CAO RF in respect of persons engaged in entrepreneurial activities without forming a legal entity, and legal entities as an alternative to the fine has been established administrative suspension of activity.

In addition to the introduction to CAO RF of the new article 6.17, article 13.21 "Violation of the procedure of manufacturing or distribution of media products" of the current edition of the CAO RF by the Law on Amendments has been added by part 2, which establishes administrative responsibility for violation of the established procedure of distribution among children mass media products, containing information damaging to their health and (or) development. In fact, this offense is a special corpus delicti with respect the general corpus delicti of an administrative offence stipulated in part 1 of article 6.17 CAO RF. Its hallmark is a subject of an administrative offense, which is a media product (recall, that in part 1, Art. 6.17 CAO RF it is such an information products for which media products is one of its kinds). Thus, for violation of the established procedure of distribution among children media products containing information damaging to their health and (or) development, a person will take responsibility under part 2 of article

13.21 CAO RF, and for the same actions with respect to other types of information products – under part 1 of article 6.17 CAO RF.

Subjects of administrative responsibility in part 2 of article 13.21 CAO RF are: citizens, officials, legal entities. An administrative fine and confiscation of the object of administrative offence are provided for as the types of administrative punishment.

The third novation stipulated by the Law on Amendments is an addition of article 19.5 "Failure to Follow in Due Time a Lawful Direction (Order, Proposal) of a Body (Official) Exercising State Supervision (Control)" of the current edition of the CAO RF with a new corpus delicti of an administrative offense (part 16) with the disposition as follows: failure to follow in due time a lawful direction of a federal body of executive power exercising state supervision and control over the observance of the legislation of the Russian Federation on the protection of children from information harmful to their health and (or) development. In accordance with the resolution of the Government of the Russian Federation No. 859 from December 24, 2011 "On amendments to some acts of the Russian Federation Government, with regard to the distribution of powers of federal executive bodies in the field of protecting children from information harmful to their health and (or) development" [6], federal executive bodies exercising state supervision and control over the observance of the legislation of the Russian Federation on the protection of children from information harmful to their health and (or) development include the following federal agencies of: supervision in the field of Communications, Information technology and Mass communications (Roskomnadzor Rossii – in Russian); supervision in the sphere of education and science (Rosobrnadzor Rossii – in Russian); supervision in the field of consumer rights protection and human welfare (Rospotrebnadzor Rossii – in Russian). The objective side of the analyzed offence consists in the failure to comply in due time a lawful direction of such a body.

Subjects of administrative liability under part 16 of article 19.5 CAO RF are citizens; officials; persons carrying out business activity without establishment of a legal entity; legal entities. As the main type of administrative penalty for all the entities has been established an administrative fine, and in respect of persons engaged in entrepreneurial activities without forming a legal entity and legal entities as an alternative penalty has been established administrative suspension of activity.

Consideration of cases on administrative offences, prescribed by the introduced to the CAO RF articles 6.17, part 2 of article 13.21 and part 16 of article 19.5, is attributed to the competence of judges. The powers for drawing up protocols on these administrative offences are given to officials of the federal body of executive

power exercising state supervision and monitoring of compliance with the legislation of the Russian Federation on the protection of children from information harmful to their health or development. As such bodies, depending on jurisdiction can serve Roskomnadzor Rossii, Rosobrnadzor Rossii or Rospotrebnadzor Rossii (the titles of institutions are in Russian), as was said earlier.

All the considered by us novation to the CAO RF provided for by the Law on Amendments come into force on September 01, 2012, as well as the Basic Law on the Protection of Children from Information.

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