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Compensation for Losses as a Result of Bringing a Legal Entity to Administrative Liability: Problems of Harmonization of Industrial Approaches

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Abstract:

The article covers problematic issues arising in the sphere of corporate governance, taking into account the established judicial practice in cases of compensation for losses due to the involvement of a legal entity in administrative liability. In order to identify sectoral harmonization, the functional features of administrative and civil law liability are analyzed.

The paper investigates difficult moments of law enforcement practice in the field of corporate governance in cases of compensation for losses by persons who form the bodies of a legal entity as consequences of an administrative offense and suggests conclusions aimed at forming a functional correspondence between civil law and administrative liabilities.

As a result of the study, the authors come to the conclusion that the models of civil law regulation of relations in the context of equality of the parties have the potential in the sphere of public administration, which should not contradict the functions of administrative and legal regulation, or diminish their regulatory properties.

In the course of the research, the authors rely on methods of general scientific and private scientific nature.

Keywords: *Liability, legal entity, an official, losses, a fine.*

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1. Introduction

The creation of the most optimal model for the protection of civil rights presupposes the use of various legal mechanisms by the state designated for for restoring the rights of entities violated as a result of the commission of offenses. In connection with this, discussions in the scientific literature about the compensatory nature of liability as a manifestation of the general normative idea of justice and the proportionality of punishment continue to arise (Karapetov, 2014).

The authors of this study generate a hypothesis that, at the present time, the procedure of compensation for losses as a result of bringing a legal entity to administrative liability and related issues of harmonization of sectoral legislation and law enforcement practice require a deep theoretical study, as evidenced by the contradiction between judicial and arbitration practice and the basic postulates of the doctrine of administrative liability.

The objective of the study is to verify the claimed hypothesis and determine the admissibility of using the legal mechanism of compensation for losses by an official of the body governing a legal entity as a result of the latter's bringing to administrative liability. The objective involves solving the following tasks: to study the institution of compensation for losses; to research functional specificity and correlation of administrative and civil law liability; to study the admissibility of the prejudice of the decision in the case of an administrative violation as a condition for the onset of civil law liability; to analyze relevant law enforcement practices.

The object of the research is public relations in the sphere of public and corporate management. The subject of the research is norms of administrative and civil law regulating administrative tort relations and civil law relations arising in connection with the compensation of losses due to the involvement of a legal entity to administrative liability.

2. Materials and methods

The theoretical basis of the research was the works of scholars in the field of legal liability, in general, administrative and civil law liability, in particular. The works of Vitruk (2009), Leyst (1981), Karapetov (2014), Suhanov (2000), Shatkovskava *et al.* (2017) are among them.

The analysis of the degree of elaboration of the problem under the study showed that specialists quite ambiguously assess the specification and admissibility of losses as a legal mechanism for restoring rights violated as a result of committing violations. In particular, Starzhenetskiy (2003) believes that, taking into account the punitive nature of the compensation institution, it can be argued that its attribution to the category of civil remedies by a lawmaker is erroneous. The main characteristic of civil remedies is their restorative justice function realized by means of compensation

of losses, including lost profits. Compensation is not the same as the demand for the recovery of losses both in the sense of the objectives of the indicated legal institution, and the procedure for determining it. Accordingly, given the penalty characteristics of compensation, judicial proceedings can not be built on the basis of a civil process. This should be an administrative or criminal process with its inherent characteristics.

Eliseev (2013) claimes that the legal mechanism that allows to recover multiple losses from persons violating the legislation on the protection of competition in favor of the victims needs to be adjusted. It is explained by its contradiction to the general principles of the Russian law representing public law liability to individuals.

Analyzing the optimal model for the protection of civil rights, Karapetov (2014) outlines the arguments in favor of and against purely compensatory protection, in which corporate and other civil rights are protected solely by a claim for losses. The author justifies the criterion of remedial justice which assesses the proportionality of legal sanctions and their influence on the restoration of the oppressed interest of the victim of an offense as a manifestation of the general normative idea of proportionality of punishment. The idea itself restores the balance of the property positions of the parties.

It should be noted that the correlation of administrative and civil law liability in the sphere of corporate governance in terms of their functional delineation is obviously relevant. The prejudicial significance of administrative liability as the basis for possible compensation for losses as a result of an administrative violation performs as a relevant issue as well.

In this regard, it is feasible to conduct a comprehensive study that is conditioned by the objective and tasks formulated above, as well as the subject area. The empirical basis of the research was the normative legal acts of the current administrative and civil legislation, as well as materials of law enforcement (judicial) practice. Mainly general scientific methods, including analysis, synthesis, induction, deduction served the methodological basis. A special formal legal method of research was also used.

3. Results

The institution for the recovery of losses has the most effective compensation functions in law enforcement practice. In terms of civil law liability, the unconditional nature of the recovery of losses from a person performing organizational, administrative and (or) administrative and economic functions in relation to a legal entity is a justified approach and can be assessed in the context of strengthening its compensatory function.

Being a civil law instrument for the restoration of the violated right, this institution is a ‘sui generis’ phenomenon, since it forms a very fine line between civil law and

administrative liability. This is evident in the sphere of corporate governance, taking into account the formed judicial practice in cases of compensation for damages by individuals who are part of the bodies of a legal entity (Decrees of the Presidium of the Supreme Arbitration Court of the Russian Federation № 17044/12 dated 18 June 2013, № 16450/12 dated 16 April 2013).

In particular, the fourth paragraph of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation № 62 dated 30 July 2013 "On certain issues of compensation for losses by individuals who are part of the bodies of a legal entity" (hereinafter referred to as Resolution no. 62) (Resolution, 2013a) envisages the following idea. Integrity and reasonableness in the performance of the duties assigned to the director consist in director's taking necessary and sufficient measures to achieve the objectives of the activities for which a legal entity was introduced. Both necessary qualities consist in the proper performance of public law obligations imposed on a legal entity by the current legislation. In this regard, in case a legal entity is brought to public legal liability (tax, administrative, etc.) because of unfair and (or) unreasonable behavior of the director, the losses of a legal entity incurred as a result of such behavior may be recovered from the director. In addition, there is no reason for a refusal to meet the demand for the recovery of losses from the director, since the act of the director which caused negative consequences for the legal entity, including the transaction, was approved by the decision of the collegial bodies of the legal entity, as well as its founders (participants). The losses are also to be recovered, if the director acted in compliance with the instructions of such individuals, since the director has an independent duty to act in the interests of the legal entity diligently and reasonably (paragraph 3 of Article 53 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code) (the Civil Code of the Russian Federation (part 1) dated 30 November 1994 № 51-FZ)) (P. 7 of Resolution № 6).

Collection of losses from an individual performing organizational and dispositive and (or) administrative and economic functions in relation to a legal entity, as a consequence of bringing a legal entity to the administrative responsibility results in a certain degree of loss of the functional essence of the institution of administrative responsibility. There is a very definite opinion on the basic functions of administrative responsibility in the theory of law. Thus, N.V. Vitruk believes that the leading function of administrative responsibility is a protective (defensive) function, which is implemented by means of punitive-penalty and restorative and compensatory subfunctions. Punitive-penalty subfunction consists in implementing a fair retaliation (penalty) for the committed administrative violations and taking measures of administrative penalties established by the administrative law.

Additional ways of performing the punitive function of administrative liability comprise conviction on the part of the competent authority and the "state of punishment" (administrative "conviction") in accordance with the provision of art. 4.6 of the Code of Administrative Offences of the Russian Federation (hereinafter

referred to as the CoAO of the RF) (Code of Administrative Offences of the Russian Federation dated 30 December 2001 № 195-FZ). Punitive-penalty measures of administrative responsibility apply not only to individuals, public officials, but also to legal entities (Vitruk, N.V., 2009).

The restorative and compensatory subfunction of the protective function of administrative liability is to restore the violated rights and freedoms of citizens and other individuals who have suffered from an offense, compensate for the property and moral harm resulted from the administrative offense (art. 4.7 of the CoAO of the RF). In particular, according to part 1 of art. 4.7 of the Code of Administrative Offenses of the Russian Federation, a judge considering a case on an administrative offense is eligible to resolve the issue of compensation for property damage when resolving a dispute on compensation for property damage along with an administrative punishment. The contentious issue of reimbursement of property damage and compensation for moral harm is resolved in civil proceedings (part 2 and 3 of art. 4.7 of the CoAO of the RF).

Civil law liability is fundamentally different from the public legal punitive administrative liability in terms of its functions.

According to the classical approach, civil law liability means a sanction applied to an offender in the form of imposing an additional civil law liability on the one or depriving him of civil law (Sergeev and Tolstoy, 1999). There are several classifications of the functions of civil law liability. Thus, Sukhshov (2000) defines restorative and compensatory function of civil law liability as the major function. Leyst (1981) refers to the compensatory, preventive, signaling (i.e. signals about "points of disadvantage") functions of civil law.

It is quite obvious that penalties with respect to administrative responsibility constitute a punitive measure (punishment), i.e. the reaction of the state to the commission of an administrative offense. As for civil law liability, it is not punitive, but compensatory and is aimed at restoring violated rights, unlike administrative, criminal or disciplinary liability.

In this connection, it is difficult to understand the logic of the law enforcer who proposes to ensure the restorative function of civil law liability by means of diminishing the punitive nature of administrative punishment. In support of the above mentioned, a number of characteristic court cases are given below.

The former director untimely sent to the Federal Financial Markets Service (hereinafter referred to as the FFMS) the rules for determining the value of the assets of the joint-stock investment fund, certified in accordance with the established procedure. In this connection, the society was brought to liability in the form of a fine. The court of cassation, leaving the judicial acts of the trial courts and courts of appeal unchanged, noted the lawfulness of satisfying the demand for recovery of

losses from the director, as unreasonable actions of the director were proved when organizing the direction of the rules in the FFMS, which caused damage to the company in the form of a fine. At the same time, the court of cassation referred to clause 4 of Resolution № 62, according to which integrity and reasonableness in the performance of the duties assigned to the director consist in taking necessary and sufficient measures to achieve the objectives of the activity for which the legal entity was created, including proper fulfilment public law duties imposed on a legal entity by current legislation. In this connection, in case a legal entity is brought to public law liability (tax, administrative, etc.) because of unfair and (or) unreasonable behavior of the director, the losses of a legal entity further incurred may be recovered from the director (Resolution, 2014).

In the second case, guided by Article 15 of the Civil Code of the Russian Federation and art. 44 of the Federal Law dated 8 December 1998 № 14-FZ "On limited liability companies", the arbitration court refused to recover damages in the form of a fine recovered from a legal entity envisaged by part 4 of art. 20.4 of the CoAO of the RF. The court established that the pantries were arbitrarily converted by the owners of the apartments. The owners of the apartments could not be identified, despite the measures taken by the legal entity; the defendant remained on the post of the head of the company for a short time and re-equipment of the pantry was not carried out while the defendant was in the position of the sole executive body of the company, but earlier; the respondent took measures to find the perpetrators of the conversion of the owner's pantry, and therefore came to the conclusion that the administrative punishment was applied to the society not because of the fault of the director, which excludes the possibility of bringing him to liability for losses (Resolution, 2015).

The situations under consideration are united by the fact that in the proceedings on the administrative violation case, the official (director) was not brought to administrative liability. The CoAO of the RF envisages the opportunity of simultaneous bringing a legal entity and an official to the administrative liability (part 3, art. 2.1 of the CoAO of the RF), but only cases of administrative liability of officials were noted in the materials of judicial and arbitration practice in the categories of cases investigated.

Anticipating and understanding the objections of scientists in civil law about different approaches to the concept of guilt in civil and administrative law, some ambiguity of the situation arising in practice should be noted.

Indeed, the approaches to the fault of the person who committed the civil and administrative violation are different. In accordance with para. 1 of art. 53 of the Civil Code of the Russian Federation, a person who by virtue of law, another legal act or constituent document of a legal entity is authorized to act on his behalf (clause 3 of art. 53 of the Civil Code of the Russian Federation) is obliged to reimburse at the request of a legal entity, its founders (participants), acting in the interests of a

legal entity, losses incurred because of its fault to a legal entity. Such a person is liable if it is proved that in the exercise of his rights and in the performance of his duties he acted unfairly or unreasonably, including if his actions (inaction) did not comply with the usual conditions of civil turnover or ordinary entrepreneurial risk. The liability provided for by clause 1 of art. 53.1 of the Civil Code of the Russian Federation is also borne by members of the collegial bodies of the legal entity, with the exception of those who voted against the decision that caused the loss to the legal entity, or, acting in good faith, did not take part in voting (para. 2 of art. 53.1 of the Civil Code of the Russian Federation).

Para. 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 24 March 2005 № 5 "On some issues arising in courts when applying the Code of Administrative Offenses of the Russian Federation" clarifies the following point. According to part 3 of art. 2.1 of the CoAO of the RF, in case a legal entity violates the administative law and specific officials are identified, because of the fault of whom the offense was committed (art. 2.4 of the CoAO of the RF), it is permissible to bring both a legal entity and officials to administrative liability at the same rate.

When determining the degree of liability of an official for committing an administrative offense that resulted from the implementation of a decision of a collegial body of a legal entity, it is necessary to ascertain one issue. Did the official take measures to draw the attention of the collegial body or the administration to the impossibility of executing this decision due to the fact that it may lead to an administrative offense.

Since the CoAO of the RF does not envisage any restrictions in the specified case when imposing an administrative penalty, the judge is eligible to apply any penalty to any legal and official person within the sanction of the relevant article, including the maximum one, taking into account mitigating, aggravating and other circumstances influencing the level of liability of each of these individuals (Decree of the Plenum of the Supreme Court of the Russian Federation dated 24 March 2005 № 5 "On some issues arising in courts when applying the Code of Administrative Offenses of the Russian Federation").

Accordingly, in determining the fault for bringing an official to the civil law liability, such categories as "bad faith or unreasonableness" are applied. When we talk about administrative responsibility, we take into account two forms of guilt – an intent or negligence. In this case, it is difficult to assume that an official acted in bad faith or unreasonably. Even if the action was made with an imprudent form of guilt, when an official foresaw the possible onset of the harmful consequences of the action (inaction), but presumptively hoped to prevent such consequences without sufficient grounds. Or if an official did not foresee the possibility of such consequences, although this fact should and could be foreseen and has not been proven in the process of proceeding in the case of an administrative offense.

Using the legal mechanism of compensation for losse due to the involvement of a legal entity in administrative responsibility, it should be understood what purpose the legislator needs to achieve in securing and protecting the violated right and what means should be adequate and effective to achieve this goal.

The state, involving a legal entity in administrative responsibility, first of all aims to establish a measure of responsibility for the committed administrative offense (punishment) and prevent the commission from new offenses committed both by the offender and other individuals.

The measures of responsibility and the procedure for their application differ in a corresponding way. The offender bears responsibility in the public sphere before the state and is brought to administrative or criminal liability by state bodies.

The fundamental importance lies in the fact that criminal and administrative proceedings are considered in special procedural forms that guarantee the rights of an individual accused of an offense, including the presumption of innocence, the imposition of the burden of proof on the prosecution, the right to a trial involving juries, increased standards of proof, the right to seek pardon (Starzhenetsky, 2003). These guarantees are fixed in the norms of international law, the Constitution and the laws of the Russian Federation. If the question of the application of punitive measures is resolved in the context of a lawsuit in which the defendant does not have such guarantees, the constitutional right to the due process of law is violated. Besides, the constitutional right to the consideration of this case in that court and by that judge to whose jurisdiction it is attributed by law (art. 6 of the Convention for the protection of human rights and fundamental freedoms, part 1, art. 47 of the Constitution of the Russian Federation).

The following opinion of Eliseev (2013) deserves support. The scholar states that granting the right to an individual to sue for imposing a fine, for example, in the form of multiple losses, beyond the compensation of the overall damage caused to him/her, i.e. to implement measures of administrative responsibility for violation of public interests in protecting the fundamental principles of the Russian law enforcement, the principles of the economic organization of society, means granting the functions of a public authority to an individual. The above stated contradicts art. 11 of the Constitution of the RF. Moreover, the issue of taking these measures will be resolved in the form of a lawsuit in which the defendant does not have procedural guarantees specific to administrative and criminal proceedings. In this regard, art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms and part 1 of art. 47 of the Constitution of the RF are violated. In the situation when fines are compensated as losses and recovered from an official in the process of applying civil law liability, the very essence of the public enforcement − the punishment of the offender in committing the offense − is lost.

Thus, administrative enforcement based on the norms of administrative law, which regulate administrative liability, is characterized by two main features. The first sign consists in the fact that administrative enforcement has the character of a state and administrative influence on the offender having its goal: a) to restore the violated law enforcement; b) to warn the offender against the possibility of committing a more dangerous offense; finally, c) to punish him to a certain extent. The second sign is the personification of an administrative offense. It consists in the fact that the guilty persons who have committed an administrative offense must be subjected to state compulsory treatment (Vaypan and Egorova, 2016).

Thus, the compensation of the amount of the administrative fine to a legal entity paid by it by means of its recovery as losses from the director emasculates the main purpose of state enforcement − to punish the person guilty of the offense. At the same time, if the fault of the official was not established in the administrative proceedings in the administrative violation case, the burden of establishing the official's guilt for an administrative offense is incurred by the plaintiff in the civil case. To be fair, it is to be noted that before the adoption of Resolution № 62, the courts refused to recover fines as a loss. Courts pointed out that an administrative fine as a measure of administrative punishment is a monetary penalty. A fine is an administrative punishment of a property nature and, unlike the civil law concept of losses, does not perform a compensatory function. Losses, by their nature, represent real damage or loss of profit and are subject to mandatory proof, according to art. 65 of the Arbitration Procedure Code of the Russian Federation. In addition, in accordance with part 3 of art. 2 of the Civil Code of the Russian Federation, civil law is not applied to property relations based on administrative or other authority subordination of one party to another, including tax and other financial and administrative relations, unless otherwise provided by law (Resolution, 2010).

4. Conclusion and discussion

Thus, the conducted research proves the introduced hypothesis and demonstrates the necessity of conceptual rethinking of the admissibility of compensation of losses as a result of bringing a legal entity to administrative responsibility and related issues of harmonization of sectoral legislation and law enforcement practice.

In this regard, it is necessary, first of all, to ensure the prejudicial nature of the decision on the case of an administrative offense as the evidence base for the guilt of an official (in terms of establishing the fact of the commission of certain actions by an official or lack thereof). The prejudice will allow resolving the issue of damages, taking into account the conclusions made in the framework of already held proceedings, provided that the legality of the earlier act in the case of an administrative offense is established in accordance with the current procedures or were not contested. Accordingly, it is sensible to initiate the formalization of a certain legislative and law enforcement algorithm based on the principle of legality of an earlier adopted judicial (or extrajudicial) act, which resolved the questions of

the guilt of a specific official who acted on behalf of a legal entity subject to administrative liability. The purpose of this article was to demonstrate the legal problems that lie at the interface of administrative and civil law relations. It should be noted that civil law has accumulated vast experience in regulating relations between equitable entities; its models have undniable potential in the sphere of public administration. At the same time, the introduction of such models in the legal mechanism for regulating power-subordination relations should not lead to a decrease in the own functions of administrative law.

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