

Collisions of Criminal and Business Legislation Norms in the Context of the Effectiveness of Combating Crime

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Abstract: The article is devoted to the assessment of collisions between criminal legislation and legislation on entrepreneurial activity as a determinant of reducing the effectiveness of combating crime in the economic sphere. The inconsistency of criminal law norms with the provisions of the legislation on entrepreneurial activity, as well as the formation of contradictory doctrinal ideas, partly generated by the ambiguous criminal law policy in this area, significantly affects the crime detection due to the existing legal uncertainty in the assessment of criminality and punishability of acts. The implementation of dialectical, teleological, formal-legal, systemic-structural research methods have made it possible to formulate several conclusions and proposals of both conceptual and applicable nature. The first decision should include the need to revise the criminal law in the process of making changes and additions to the legislation on entrepreneurial activity in order to avoid collisions between them. It is proposed to correct the hypothesis of Part 1 of Art. 171 of the Criminal Code of the Russian Federation, adding an indication of the obligatory legal requirement on registration as a condition for making a formal accusation or, through judicial interpretation, to expand the interpretation of registration to any form of state recording of persons engaged in entrepreneurial activity, including notification of it and posting to the accounts as a taxpayer. The expediency of a clearer correlation mentioned in Art. 173.1 of the Criminal Code of the Russian Federation terminology with legal categories used in sectoral legislation is determined, as well as the extension of the norm to the practice of using previously created legal entities with a simultaneous indication of the illegal purposes of such actions.

1 INTRODUCTION

The problems of combating crime in the field of entrepreneurial activity quite often attract the attention of the scientific community. It is proved by several dozen dissertation and monographic studies, where it can be traced as the implementation of a systematic approach to solving problems arising here, which involves the analysis of theoretical issues, legislative regulation and judicial practice [Talan, 2002; Lopashenko, 1997; Zhilkin, 2019] and consideration of separate corpus delicti [Borovkov, 2018; Ivanova, 2010; Zatsepin, 2010]. Considerable attention is paid to this problem in foreign jurisprudence, where it is usually considered in the context of the concept of white-collar crime [Green, 2004; Friedrichs, 2007], the essential characteristics are increasingly eroded under the influence of private legal regulation. It does not allow determining a fixed and generally recognized set of necessary and

sufficient conditions that define this category of crimes [Green, 2004]. As a result, statements about the weakness of criminal law periodically appear [Kenneth, 2006], as well as the evolution of ideas about white-collar crimes is stated [Reurink, 2016].

Evaluating the effectiveness of the application of the relevant legal norms, researchers inevitably face the need to refer to the norms of legislation on entrepreneurial activity, sometimes offering their own methodological approaches to understanding its legal essence, linking with it certain areas of development of criminal legislation, including the formation of separate structures as formal [Zhilkin, 2019]. At the same time, insufficient attention is paid to the problems of inconsistency of criminal law norms with the norms of legislation on entrepreneurial activity, which can have both conceptual and legal-technical nature. Although there are separate publications devoted to the problems of harmonizing the application of civil and criminal

legislation [Sachs, 2001; Goldstein, 1992]. The issue of assessing conceptual approaches to this problem looks more complicated. It is no coincidence that it is noted that the roots of existing problems can be found in the culture of unrestrained competition and deregulation of the economy [Rodriguez, 2015].

Accordingly, the purpose of the study is the collision of criminal legislation and legislation on entrepreneurial activity in the context of the effectiveness of combating crime. Its achievement will be facilitated by the solution of the following tasks: 1) analysis of the reasons for the emergence of such conflicts of law; 2) identification of the negative consequences of their appearance for the effectiveness of combating crime; 3) determination of directions for improving legislation.

2 MATERIALS AND METHODS

The achievement of these goals and the solution of the designated tasks is facilitated by the use of a complex of general scientific and private scientific research methods, implemented in relation to such materials as regulatory legal acts, scientific publications and judicial practice.

The realization of the dialectical method of cognition with its global, universal nature made it possible to consider the problem of collisions of criminal legislation and legislation on entrepreneurial activity in an inextricable connection with changing ideas about the essence of entrepreneurial activity and the conditions for the legality of its implementation. The teleological method is particularly important. It presupposes the study of problematic issues related to the existence of the aforementioned collisions through the prism of goal-setting, development strategies and ensuring the optimal regime of legal regulation of business relations, which is characterized by the presence of contradictory trends.

The use of the formal legal method allowed to correlate and analyze the current norms of criminal and business law and the existing legal practice. The emphasis has been placed on the inconsistency of the used legal concepts, the identification of the essence of legal phenomena in the context of their criminal law protection, which made it possible to formulate proposals for improving legislation outside the political and legal context. The implementation of the systemic and structural approach allowed to raise the issue of the existence of a relationship between problems in law enforcement practice and conflicts between criminal legislation and legislation on entrepreneurial activity.

3 RESULTS AND DISCUSSION

The dynamic development of economic relations and contradictions in their legal regulation inevitably affect the effectiveness of their criminal-legal protection. We have to state the presence of a clear inconsistency of legislative activity in various spheres of legal regulation.

The collision between the essential characteristics of entrepreneurial activity in the Civil Code of the Russian Federation and the Criminal Code of the Russian Federation looks very indicative in this sense. The Criminal Code, characterizing illegal entrepreneurship, associates its implementation with the lack of registration, license or accreditation (Clause 1 of Article 171 of the Criminal Code of the Russian Federation). And if, in terms of compliance with the requirements for licensing and accreditation, a reservation was made on the application of these criteria only if they are mandatory, then the question remains open regarding registration. Meanwhile, even the Federal Law "On Amendments to Articles 2 and 23 of Part One of the Civil Code of the Russian Federation" dated July 26, 2017 no. 199-FZ, Art. 23 of the Civil Code of the Russian Federation was supplemented with a provision stating that "in relation to certain types of entrepreneurial activity, the law may provide for the conditions for citizens to carry out such activities without state registration as an individual entrepreneur." However, it did not receive systemic development.

The Tax Code of the Russian Federation contains an indication of individuals who are not individual entrepreneurs and who provide services to an individual for personal, domestic and (or) other similar needs without involving hired workers, as a special category of taxpayers exempted from personal income tax and insurance premiums (Clause 70 of Article 217 of the Tax Code of the Russian Federation), without defining the corresponding list of services (Clause 7.3 of Article 83 of the Tax Code of the Russian Federation). The Federal Tax Service of Russia, by its Order no. MMB-7-14 / 270 @ dated March 31, 2017, approving the form of notification of an individual about the implementation (termination) of activities to provide services to an individual for personal, household and (or) other similar needs, as well as the procedure for filling it out, among the types of activities that do not require registration as an entrepreneur, included services for the supervision and care of children, sick persons, persons who have reached the age of 80 years, as well as other persons in need of permanent nursing on the conclusion of a medical organization, tutoring and cleaning of living

quarters, housekeeping. At the same time, the constituent entities of the Russian Federation were given the opportunity to expand this list. In the Ryazan region, it includes hairdressing services at home, manicure and pedicure services at home, tailoring for individual orders at home, photograph services, car repairs, repair and maintenance of household and computer equipment at home, renovation of premises (Law of the Ryazan Region “On additional types of services for personal, domestic and (or) other similar needs, the income from their performance is exempted from taxation” dated November 3, 2017 no. 77-OZ), in the Altai Territory it includes only livestock grazing services, plowing vegetable gardens on an individual order of the population, cutting firewood on an individual order of the population, as well as written and oral translation (Law of the Amur Region “On types of services for personal, household and (or) other similar needs, the income from their performance is exempted from taxation” dated October 5, 2017 no. 119-OZ). Thus, the legality of entrepreneurial activity is made dependent not only on federal, but also on regional legislation, it leads to a paradoxical situation in the context of assessing criminality and punishability of acts.

A more universal approach is proposed by Federal Law “On conducting an experiment in establishment of a special tax regime” “Tax on professional income” dated November 27, 2018 no. 422-FZ (hereinafter the Law on TPI) which allows the implementation of activities without state registration as individual entrepreneurs, except for cases when the conduct of any type of activity requires mandatory registration as an individual entrepreneur in accordance with federal laws (Clause 6 of Article 2 of the Law). At the same time, the object of taxation is formulated extremely broadly, and the exceptions are very insignificant, which makes it possible to extend this tax regime to very diverse types of activities (Article 6).

The question of a legal and technical nature also arises regarding the possibility of a broad interpretation of the concept of registration in the hypothesis of a criminal law norm establishing responsibility for illegal business. If we implement a broad interpretation, which is not typical for the criminal law sphere, and bring under the concept of registration any forms of state recording of persons engaged in entrepreneurial activities without forming a legal entity, then the problem can be solved, since the Tax Code of the Russian Federation provides as a condition for the legality of the provision of services to individuals, the direction of the corresponding

notification to the tax authorities, and Art. 5 of the Law on TPI connects the possibility of applying a special tax regime with registration as a taxpayer. Such nuances could be taken into account in the framework of the judicial interpretation of the considered norm by the Supreme Court of the Russian Federation. However, the position of the Plenum of the Supreme Court of the Russian Federation, expressed in paragraph 3 of its Resolution “On judicial practice in cases of illegal entrepreneurship” dated November 18, 2004 no. 23 has not yet undergone changes and connects the implementation of entrepreneurial activities without registration with those cases when there is no record of the creation of such a legal entity or the acquisition by a person of the status of an individual entrepreneur in the Unified State Register of Legal Entities and Unified State Register of Private Entrepreneurs. As a result, the scope of Art. 171 of the Criminal Code of the Russian Federation actually includes both categories of individuals who, in principle, can overcome the income threshold set for criminal liability in an amount exceeding two million two hundred and fifty thousand rubles.

The concept of “figurehead” used in Art. 173.1 of the Criminal Code of the Russian Federation is also noteworthy. It unites categories that are different in meaning. The interpretation of the first of them has a clearly illegal component, since we are talking about entering data on specific persons into the Unified State Register of Legal Entities without their knowledge or as a result of misleading them. It is more difficult with persons who are the governing bodies of the organization who do not have the purpose of managing it. Firstly, a natural question arises whether these norms apply only to the stage of creating an organization or retain their force in the future, when the person who is the governing body actually retires. Such a conclusion follows from a literal interpretation, otherwise, as noted by Z.D. Rozhavsky, it could lead to criminal prosecution of persons who, for whatever reason, left the organization that they created and no longer engage in business [Rozhavsky, 2017]. But in this case, the practice of using already created legal entities is outside the scope of the norm, their existence is artificially supported to prevent the exclusion from the Unified State Register of Legal Entities as invalid in the manner prescribed by Art. 21.1 of the Federal Law “On State Registration of Legal Entities and Individual Entrepreneurs” dated August 8, 2001 no. 129-FZ, not to mention competition with Part 1 of Art. 170.1 of the Criminal Code of the Russian Federation, which provides for the qualification of

actions to submit documents containing deliberately false data to the tax authorities in order to enter in the Unified State Register of Legal Entities, inaccurate information about the founders (participants) of a legal entity and the head of its permanent executive body.

The considered norm clearly lacks an indication of the unlawful purpose of committing such actions. Meanwhile, as it is rightly noted by P.S. Yani, "the prohibition should have extended to the creation of such firms that are intended to be used in criminal activities, when participation in these firms, their management of persons planning to commit crimes, is masked by reflecting in the documents submitted for registration, information about other persons who are not involved in criminal activity" [Yani, 2014]. In addition, the question arises about the assessment of the management system of a legal entity, which includes the so-called beneficial owners, that is, individuals who ultimately directly or indirectly (through third parties) own (have a predominant share of more than 25% in the capital) by a client – a legal entity or have the ability to control the actions of the client. The legislation does not contain a ban on its use, and Federal Law "On Counteracting Legalization (Laundering) of Criminally Obtained Incomes and Financing of Terrorism" dated August 7, 2001 no. 115-FZ only establishes the requirement to disclose information about such persons (Article 6.1). In general, as it is noted in the literature, the question of who and under what conditions should be recognized as the actual head of an organization with all the variety of corporate governance models can be resolved ambiguously [Esakov, 2018].

Finally, it is not entirely clear that the concept of a "nominee leader" adopted in the field of entrepreneurial activity is abandoned by the Plenum of the Supreme Court of the Russian Federation in Clause 6 of Resolution "On certain issues related to bringing persons controlling the debtor to responsibility in bankruptcy" dated December 21, 2017 no.53 defines as a head who is formally a member of the bodies of a legal entity, but did not carry out actual management, in particular, who completely delegated management to another person on the basis of a power of attorney or who made key decisions on the instructions or with the explicit consent of a third person who did not have the appropriate formal authority (de facto leader). The fact that the controversial definition appeared in the Criminal Code of the Russian Federation earlier does not change the essence, since the terminology was formed quite a long time ago, being at one time

borrowed from foreign doctrine [Robilliard, 1995; Adam, 2016] and legislation.

4 CONCLUSION

The foregoing information allows us to formulate several conclusions, both conceptual and applicable nature.

Firstly, in the process of making changes and additions to the legislation on entrepreneurial activity it seems necessary to revise the criminal law norms in order to avoid collisions between them.

Secondly, it is necessary to correct the hypothesis of Part 1 of Art. 171 of the Criminal Code of the Russian Federation, adding an indication of the obligatory legal requirement on registration as a condition for bringing to criminal liability or by means of judicial interpretation to expand the definition of registration to any form of state recording of persons engaged in entrepreneurial activity, including notification of it and posting to the accounts as a taxpayer.

Thirdly, it is advisable to more clearly correlate the terminology used in Art. 173.1 of the Criminal Code of the Russian Federation with legal categories defined in sectoral legislation, to extend the action of the norm to the practice of using previously created legal entities, at the same time indicating the illegal purposes of such actions.

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