

Bashlakov-Nikolaev I. V.

**ABOUT THE MODEL OF ADMINISTRATIVE RESPONSIBILITY OF  
INDIVIDUAL ENTREPRENEURS IN PROTECTION OF COMPETITION**

*Bashlakov-Nikolaev Igor'  
Vasil'evich,  
head of the Office of the Federal Antimonopoly Service in  
Moscow region*

Here are considered the legal foundations for administrative prosecution of an individual entrepreneur or other individual associated with the violation of the prohibitions established by the Law on Protection of Competition on the grounds of committing administrative offences by these persons. The author substantiates the referring of the mentioned persons in the event of different administrative offences to the different categories of subjects of administrative responsibility – legal persons or officials.

**Keywords:** administrative and legal protection of competition, administrative responsibility, individual entrepreneur, administrative responsibility of an individual entrepreneur.

In accordance with part 1 article 37 of the Federal Law No. 135-FL from 26.07.2006 “On Protection of Competition” [3] (hereinafter – the Law on Protection of Competition) commercial and non-profit organizations and their officials, individuals, including individual entrepreneurs, are liable for violation of antitrust legislation under the legislation of the Russian Federation.

For violation of antitrust legislation provide for preclusive [13, 146] (restorative justice [10, 679]) responsibility in the form of execution of the requirements of antimonopoly body (article 23 of the Law on Protection of Competition), penalty responsibility in accordance with the Code on Administrative Offences of the Russian Federation [2] (hereinafter - CAO RF), as well as penalty responsibility in the form of transfer to the federal budget of income received as a result of antimonopoly legislation violation [9] (subparagraph "j" paragraph 2 part 1 article 23 of the Law on Protection of Competition).

In accordance with paragraph 5 article 4 of the Law on Protection of Competition, economic units are: a commercial organization; a non-commercial organization involved in an income-generating activity; an individual entrepreneur; another physical person that is not registered as an individual entrepreneur, but is involved in a professional income-generating activity, in accordance with the federal laws on the basis of state registration and (or) a license as well as due to membership in a self-regulated organization.

Economic units that are legal entities, whether they are commercial or non-profit organizations, are subject to administrative responsibility in accordance with the provisions of article 2.1 of the CAO RF. If an economic unit is an individual entrepreneur, it is brought to administrative responsibility as an official (in accordance with the last sentence of the note to article 2.4 of the CAO RF), unless CAO RF provides otherwise (for the sphere of protection of competition CAO RF does not provide otherwise). If an economic unit is another individual who is not registered as an individual entrepreneur, but performing activities that generate income, such person shall also be subject to administrative responsibility as an official.

CAO RF specially does not regulate the rules of bringing such persons to administrative responsibility. However, the last sentence of the note to article 2.4 of the CAO RF contains a wordings, according to which all persons engaged in entrepreneurial activities without forming a legal entity that have committed administrative offenses bear administrative responsibility as officials, if CAO RF does not provide otherwise.

Consequently, the rules of CAO RF do not differentiate regulation of responsibility of persons engaged in entrepreneurial activities without forming a legal entity, depending on whether a person registered as an entrepreneur or not, or it operates on other grounds, such as on the basis of a license, membership in self-regulatory organizations and etc.

It should be noted that all the restrictions in the sphere of protection of competition, including those, infringement of which leads to administrative responsibility

pursuant to CAO RF, are established for economic units without dividing them into categories. These are the bans established by the following articles of the Law on Protection of Competition: Prohibition of Abuse of Dominant Position by an Economic Entity (article 10); Prohibition on Competition-Restricting Agreements between Economic Entities (article 11); Prohibition on Competition-Restricting Concerted Actions of Economic Entities (article 11.1); Prohibition of Unfair Competition (article 14); Prohibition on Actions Carried out on Biddings and in Request for Quotes, Which can Lead to Restriction of Competition (article 17); Prohibition of Competition-Restrictive Agreements between Economic Entities and Public Authorities (article 16).

Articles of CAO RF, in which penalties are imposed for violations of antitrust legislation, named also after antitrust prohibitions: article 14.31 "Abuse of the dominating position on the commodity market", 14.31.1 "Abuse of the dominating position by an economic entity whose share in the market for a particular commodity is less than 35 percent", 14.32 "Conclusion of a competition-restricting agreement, carrying out of competition-restricting actions, coordination of economic activity", 14.33 "Unfair competition". These prohibitions are addressed to economic entities.

However, not economic entities are mentioned as the subjects of administrative responsibility provided for violation of antitrust legislation in accordance with CAO RF, but legal entities and officials, what corresponds to the model of administrative responsibility established by CAO RF. Moreover, economic entities that are not legal persons, on the basis of the note to article 2.4 of CAO RF, are given the status equal to officials.

Thus, persons engaged in entrepreneurial activity or income generating activity in relations regulated by the Law on Protection of Competition have the rights and responsibilities of an economic entity, and in relations regulated by CAO RF – of an official.

Also it should be noted that the Law on Protection of Competition refers an individual entrepreneur to individuals in all cases when it comes to the duties and rights of individual entrepreneurs, as well as the powers of antimonopoly bodies. Exceptions are made only in a few cases, when the Law on Protection of Competition puts in the foreground not affiliation of an individual entrepreneur to individuals, but the fact of its engagement in business activities or professional income-generating activity.

This approach is used in the definition of an economic entity (paragraph 5 article 4 of the Law on Protection of Competition). In addition, in paragraph 2 of article 25.1 of the Law on Protection of Competition indicate on the basis of inspec-

tion of an individual entrepreneur – expiration of three years from the date of state registration of an individual entrepreneur.

In paragraphs 16 and 17 part 5 article 32 of the Law on Protection of Competition establish different approaches applied for inclusion in the group of persons of individual entrepreneurs and individuals who are not individual entrepreneurs. The difference in approaches is exactly associated with relation towards entrepreneurship.

For violation of the prohibitions in the sphere of protection of competition, in accordance with article 3.2 of CAO RF, the following administrative penalties may be provided for:

for legal entities – warning, an administrative fine; for individual entrepreneurs – warning, administrative fine and disqualification.

Disqualification, in accordance with part 1 article 3.11, is a depriving of the right to hold positions in the executive body of a legal person management, carry out entrepreneurial activity for management of a legal person, as well as to manage a legal person in other cases stipulated by the legislation of the Russian Federation. Disqualification pursuant to part 3 article 3.11 of CAO RF is applied to an individual entrepreneur, as well as to persons engaged in business without forming a legal entity.

It should be noted that an individual entrepreneur, on the one hand, is an entity carrying out entrepreneurial activity, but without forming a legal entity. I.e. individual entrepreneur is a form of realization of enterprise activity. On the other hand, the individual entrepreneur at the same time exercises organizational and instructive functions when carrying out entrepreneurial activity, just like the head of a legal entity. Disqualification as an administrative penalty is expressed in the procedure of deprivation just a right to manage the business, but must not affect property rights of a person engaged in entrepreneurial activity.

For a legal entity that is exactly what is happening. Deprivation of a legal entity's head of the right to exercise leadership in this legal entity does not affect the property rights of the legal entity. Due to the fact that an individual entrepreneur combines property origin and management function, application to an individual entrepreneur disqualification procedure leads to the impossibility of their engagement in business in the form of an individual entrepreneur. Analogy of disqualification applied to an individual entrepreneur, for a legal entity would be the procedure of prohibition activity of the legal person.

Thus, in the field of protection of competition for the two types of economic entities – legal entities and individual entrepreneurs we have different models of

bringing to administrative responsibility, and, in addition, disqualification can be applied to individual entrepreneurs.

A. V. Kirin [8, 287] believes that individual entrepreneurs have been equated with officials for simplification the design of sanctions of offenses, where possible subjects may be also legal entities and officials. In the opinion of this author, the equating sanctions for individual entrepreneurs with sanctions of officials, increased in comparison with individuals, is due to the need of revival the class of small entrepreneurs after 70 years of repression and subsequent oblivion.

P. P. Serkov believes that the inclusion of an individual entrepreneur in the category of officials and refusing of independent differentiation of such category of persons as a subject of administrative offense was fully justified [12, 85].

In accordance with CAO RF, in a number of cases individual entrepreneurs are brought to administrative responsibility not as officials, but as legal entities. Such a possibility is provided for in the norm of the last sentence of the note to article 2.4 of CAO RF. So, according to this norm, persons engaged in entrepreneurial activity without forming a legal entity, who have committed administrative offences, shall be brought to administrative responsibility as officials, if CAO RF does not provide otherwise. Moreover, exceptions in the model of responsibility of an individual entrepreneur as an official and the transition to responsibility of a legal entity were made by the Federal Law No. 160-FL from July 17, 2009 [4]. For example, in accordance with note 1 to article 7.34 of CAO RF, it is stated that citizens carrying out entrepreneur activity without formation of a legal entity shall bear administrative responsibility as legal entities.

It should be noted that at present in the field of protection of competition CAO RF does not establishes cases of application administrative responsibility to individual entrepreneurs, which is applied to legal persons. I.e. in the field of protection of competition otherwise is not stipulated.

Referring to the retreat of the legislator from the responsibility of an individual entrepreneur as an official to its responsibility as of a legal entity, B. V. Rossinskii believes that this concept will be developing [11, 625].

A. V. Kirin [8, 288] points to the inconsistency of the status of an individual entrepreneur in administrative-legal relations, who is, on the one hand, equated to the officials under article 2.4 CAO RF, with the possibility of applying such a sanction as disqualification. On the other hand, under the provisions of article 3.12 of CAO RF and under the sanctions of many articles of CAO RF, is equated to legal entities, with the possibility to apply a special type of punishment – an administrative suspension of activities.

In the light of the foregoing A. V. Kirin believes that ultimately the concept of an official and an individual entrepreneur must be meaningfully and structurally separated in CAO RF [8, 290].

Necessary to set goals and the reason why the legislator in the model of administrative responsibility started to retreat from equating an individual entrepreneur with an official to equating with a legal entity. Whether such a departure is connected only with the increased sanction or with all elements of administrative responsibility, including with the foundations of responsibility?

For legal entities and individual entrepreneurs, as physical entities, different presumptions have been established. For an individual entrepreneur who has traits of an individual, under article 1.5 of CAO RF provide for the presumption of innocence. In conformity with article 2.1 of CAO RF a legal person is considered guilty of an administrative offense if it is established that it had the possibility to comply with the rules and regulations, for violation of which CAO RF provides for administrative responsibility, but the person did not take all the measures to comply with them, it moves away from the presumption of innocence.

A. V. Kirin believes that the Civil Code of the RF enshrines the presumption of guilt of a legal entity for the improper performance of its obligations, but this position allows the entity to rebut the presumption if the subjective aspect of an offense has been determined [8, 296].

It should be noted that for the actions of a legal entity and an individual entrepreneur establish different limits of civil responsibility. This difference may cause that the aggregate liability of an individual entrepreneur may exceed the amount of the property belonging to him, unlike a legal person.

In accordance with part 1 article 23 of the Civil Code of the Russian Federation [1] (hereinafter – CC RF), a citizen shall have the right to engage in entrepreneurial activities without forming a legal entity from the moment of its state registration in the capacity of an individual entrepreneur. According to article 24 of CC RF, a citizen shall bear responsibility for its obligations with its entire property, with the exception of that property, upon which, in conformity with the law, no penalty may be imposed. Under part 1 article 25 of CC RF, an individual entrepreneur, who is incapable of satisfying its creditors' claims, related to performance of its business activities, may be recognized as insolvent (bankrupt) by court decision.

In accordance with article 48 of CC RF, legal person may have separate property in its ownership, economic management or operative management, is answerable for its obligations with this property, may on its own behalf acquire

and exercise property and the personal non-property rights, bear duties and perform as a plaintiff and as a defendant in court.

The difference in the models of administrative responsibility of an individual entrepreneur and legal entity is due to the fact that an individual entrepreneur shall be liable for its obligations with all its assets, and a legal entity just with its separate property.

These features define the fact that at bringing to civil-law responsibility, which may follow after bringing to administrative responsibility, individual entrepreneurs, except penalty sanction, may be subject to an exaction in civil-law procedure. At that, the amount of exaction can range up to the amount of the value of all the property of an individual businessman.

This feature can also be the basis of different approaches when setting the model of administrative responsibility and the amount of sanctions for individual entrepreneurs and legal entities.

Assumption on the difference of magnitude of the harm that may be inflicted by an individual entrepreneur and a legal person in the commission of an administrative offense can be the justification of the establishment of different models of administrative responsibility for legal persons and individual entrepreneurs.

For legal persons articles 14.31-14.33 of CAO RF establish sanctions in the form of turnover-based fine (paragraph 3 part 1 article 3.5 CAO RF), and for individual entrepreneurs apply penalties established for officials in the form of a fixed fine.

There is established a differentiated approach to punishment in the sanctions enshrined in the form of a turnover-based fine for legal persons, depending on the turnover of an economic entity in the market, in which the infringement of anti-trust legislation occurred. This approach is justified economically and looks fair. However, in the event when a violation of the antimonopoly legislation has been committed by an individual entrepreneur, the sanction, to be applied to it, depends on its generic affiliation to an physical person, not related to its economic activity and not related to its turnover on the commodity market, where the infringement of antitrust legislation took place. Such an approach seems not quite fair.

The issues of compliance with the principles of fairness in imposing penalties are repeatedly considered by the Constitutional Court of the Russian Federation. So, in paragraph 4 of the Decision No. 1-P from 17.01.2013 [7] the Constitutional Court of the Russian Federation referring to the legal position of the Constitutional Court of the Russian Federation, which has been articulated in the Decision No. 11-P from July 15, 1999 [5], has pointed out that the constitutional requirements

of fairness and proportionality predetermine differentiation of public-law responsibility depending on the severity of an offense, the amount and nature of the damage caused, the degree of culpability of the offender and other important factors that determine individualization and application of these or other measures of state coercion.

In addition, in furtherance of this legal position the Constitutional Court of the Russian Federation in its Decision No. 8-P from May 27, 2008 [6] has pointed out that the measures established in the criminal law in order to protect the constitutionally significant values should be defined on the basis of the requirements of adequacy of generated by them consequences (including the person against whom they are applied) to the harm that is inflicted by a criminal act, for the purpose of ensuring: the proportionality of measures of criminal punishment to a committed crime, as well as the balance of the basic rights of an individual and the general interest, which consists of protection of personality and society against criminal encroachments. The mentioned legal position of the Constitutional Court of the Russian Federation, in accordance with the instruction contained in the Decision No. 1-P from 17.01.2013 [7], is applied to the administrative responsibility of legal persons, however, taking into account their specificity as subjects of law.

Based on the above, as well as on the specified by the Constitutional Court of the Russian Federation principle of adequacy of the measures of impact to the harm inflicted by a deed, it seems appropriate that administrative responsibility in the field of protection of competition for individual entrepreneurs has been changed.

Thus, for abuse of dominant position by an economic entity at market, competition-restrictive agreements between economic entities and public authorities at market, as well as for unfair competition individual entrepreneurs must be brought to responsibility:

as legal persons, if a “turnover-based” fine is provided for as a sanction (which is calculated as a percentage);

as officials, if a “fixed” fine is provided for as a sanction.

#### References:

1. Civil Code of the Russian Federation, No. 51-FL part 1 of November 30, 1994, [Grazhdanskiy kodeks Rossiiskoi Federatsii. Chast' pervaja ot 30 noyabrya 1994 g. № 51-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.
2. Code on Administrative Offences of the Russian Federation from December 30, 2001, No. 195-FL [Kodeks Rossiiskoi Federatsii ob administrativnykh



pravona-rusheniyakh ot 30 dekabrya 2001 № 195-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.

3. Federal Law No. 135-FL from July 26, 2006 "On Protection of Competition" [Federal'nyi zakon ot 26 iyulya 2006 g. № 135-FZ «O zashchite konkurent-sii»]. *System GARANT* [Electronic resource], Moscow: 2013.

4. Federal Law No. 160-FL from July 17, 2009 "On Amendments to the Code on Administrative Offences of the RF and Separate Legislative Acts of the Russian Federation [Federal'nyi zakon ot 17 iyulya 2009 g. № 160-FZ «O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

4. Resolution of the Constitutional Court of the RF No. 11-P from July 15, 1999 "On the Case of Verification the Constitutionality of Separate Provisions of the RSFSR Law "On the State Tax Service of the RSFSR" and the Laws of the Russian Federation "On the Bases of Tax System in the Russian Federation" and "Federal Bodies of the Tax Police" [Postanovlenie Konstitutsionnogo Suda RF ot 15 iyulya 1999 g. № 11-P «Po delu o proverke konstitutsionnosti otdel'nykh polozhenii Zakona RSFSR «O Gosudarstvennoi nalogovoi sluzhbe RSFSR» i Zakonov Rossiiskoi Federatsii «Ob osnovakh nalogovoi sistemy v Rossiiskoi Federatsii» i «O federal'nykh organakh nalogovoi politsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

6. Resolution of the Constitutional Court of the RF No. 8-P of May 27, 2008 "On the Case on Verification the Constitutionality of the Provision of Part one Article 188 of the Tax Code of the RF in Connection to Claims of the Citizen M. A. Aslamazyan [Postanovlenie Konstitutsionnogo Suda RF ot 27 maya 2008 g. № 8-P «Po delu o proverke konstitutsionnosti polozheniya chasti pervoi stat'i 188 Ugolovnogo kodeksa Rossiiskoi Federatsii v svyazi s zhaloboi grazhdanki M. A. Aslamazyan»]. *System GARANT* [Electronic resource], Moscow: 2013.

7. Resolution of the Constitutional Court of the RF No. 1-P of January 17, 2013 "On the Case on Verification the Constitutionality of the Provision of Part 5 Article 19.8 of the Code on Administrative Offences of the RF in Connection to Claims of LLC "Maslyanskii khlebopriemnyi punkt" (Maslyanskii grain reception center) [Postanovlenie Konstitutsionnogo Suda RF ot 17 yanvaryaya 2013 g. № 1-P «Po delu o proverke konstitutsionnosti polozheniya chasti 5 stat'i 19.8 Kodeksa Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh v svyazi s zhaloboi obshchestva s ogranichennoi otvetstvennost'yu «Maslyanskii khlebopriemnyi punkt»]. *System GARANT* [Electronic resource], Moscow: 2013.

8. Kirin A. V. *Administrative and Tort Law: (Theory and Legislative Foundations)* [Administrativno-deliktnoe pravo: (teoriya i zakonodatel'nye osnovy)]. A. V. Kirin, Moscow: Norma, INFRA-M, 2012.

9. Klein N. I. Protection of Public Order and Civil Rights in Case of Violation of Anti-trust Legislation [Zashchita publichnogo pravoporyadka i grazhdanskikh prav pri narushenii antimonopol'nogo zakonodatel'stva]. *Zakon – Law*, 2008, no. 2.

10. Leist O. E. *General Theory of State and Law. Academic course in three volumes* [Obshchaya teoriya gosudarstva i prava. Akademicheskii kurs v trekh tomakh]. Editor-in-chief – M. N. Marchenko, 3<sup>rd</sup> revised edition, Moscow: Norma, 2010.

11. Rossinskii B. V. *Administrative Law: textbook* [Administrativnoe pravo: uchebnik]. B. V. Rossinskii, Yu. N. Starilov, 4<sup>th</sup> revised edition, Moscow: Norma, INFRA-M, 2010.

12. Serkov P. P. *Administrative Responsibility in Russian Law: Current Understanding and New Approaches* [Administrativnaya otvetstvennost' v rossiiskom prave: sovremennoe osmyslenie i novye podkhody]. Moscow: Norma, INFRA-M, 2012.

13. Tot'ev K. Yu. *Competition Law (legal regulation of activities of competition subjects and monopolies): Textbook for Higher Schools* [Konkurentnoe pravo (pravovoe regulirovanie deyatel'nosti sub'ektov konkurentsii i monopolii): Uchebnik dlya vuzov]. 2<sup>nd</sup> revised edition, Moscow: RDL, 2003.