

LIABILITY OF LEGAL ENTITIES WITHIN THE FRAMEWORK OF PROTECTION OF RIGHTS OF ENERGY MARKET PLAYERS

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The article has been prepared on the basis of theses of the author's speech delivered on April 5, 2019, at the scientific and practical round table on the Protection of Rights of Energy Market Players: Theoretical and Practical Issues held within the framework of the 6th Moscow Legal Forum (Moscow). Protection of rights of the participants of energy markets (meaning electricity, oil, gas, coal, relevant international and national, wholesale and retail markets) as trade and economic relations in the sphere of energy is an interdisciplinary issue and requires consideration from the standpoints of various branches of law.

These relations are typically based on fair competition and mutual benefit, but there are exceptions and, therefore, there is a need for legal protection of the participants of market relations against unlawful acts recognized as administrative offenses or crimes. While assessing efficiency of protection of energy market players' rights against unlawful acts, one of the key issues is to determine whether under current conditions, criminal liability of individuals committing crimes in the interests of legal entities is sufficient, or it is required to establish criminal liability for the legal entities, in the interests of which crimes are committed by the individuals.

In fact, there is an issue of recognizing or not recognizing a legal entity as a subject of crime.

The article deals with the establishment of criminal liability of legal entities in the Russian Federation in order to protect rights of energy market players as trade and economic relations in the energy sector. The foreign experience of such liability is analyzed, and arguments are produced about the practicality of using this experience to improve Russian laws.

Keywords: *energy markets, protection of rights of energy market players against unlawful acts, energy law, economic criminal law, criminal liability of legal entities.*

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Protection of rights of the participants of energy markets (meaning electricity, oil, gas, coal, relevant international and national, wholesale

and retail markets) as trade and economic relations in the sphere of energy (V.V. Romanova defines the energy markets as the sphere of circulation of energy resources, including electricity, gas, oil, their derivatives as well as work and services performed in various energy sectors) [1] is an interdisciplinary issue and requires consideration from the standpoints of various branches of law. These relations are typically based on fair competition and mutual benefit, but there are exceptions and, therefore, there is a need for legal protection of participants of market relations against unlawful acts recognized as administrative offences or crimes [2].

Economic criminal law providing for liability for such acts is distinguished abroad. For example, French specialists divide economic criminal law into three groups of crimes:

- crimes related to fraud (for example, theft, fraud, money laundering, bankruptcy, etc.);
- crimes that violate transparency (for example, forgery of documents, non-disclosure of information to shareholders or third parties, distortion of financial and reporting documents, insider violations, market manipulation, etc.);
- crimes that violate market regulation (for example, corruption, fraudulent agreements, violation of competition, etc.) [3].

Moreover, in many countries of the world, both individuals and legal entities may be held criminally liable.

In the Russian Federation, individuals guilty of such offenses in the area of energy markets may be brought to administrative or criminal liability for the committed offenses; guilty legal entities may be brought only to administrative liability.

While assessing efficiency of protection of energy market players' rights against unlawful acts, one of the key issues is to determine whether under current conditions, criminal liability of individuals committing crimes in the interests of legal entities is sufficient, or it is required to establish criminal liability for the legal entities, in the interests of which crimes are committed by individuals.

In fact, there is an issue of recognizing or not recognizing a legal entity as a subject of crime.

In our opinion, Russian lawyers, who believe that in many cases "the role of the

individual person as a criminal is relegated to the background, while the legal entity is brought to the forefront as a real criminal illegally receiving monetary or other benefits from criminal activities," [4] should be supported.

At the same time, the issue of criminal liability of legal entities and the study of corporate crime, including in the energy sector, are still on the periphery of scientific research.

This is explained by the fact that in the Russian Federation, criminal liability of legal entities is not yet provided, and since crime is a phenomenon of criminal law, there is no such crime *de jure*.

What is recognized as the crime committed by legal entities abroad, in Russian realities is regarded as delicts of legal entities, that is, unlawful acts that are not crimes.

This is due to a number of circumstances.

First, in our country, crime is traditionally identified by the acts of individuals.

Second, in the Soviet era, when socialist ownership of production tools and facilities prevailed, the study of issues of crimes committed by legal entities and their liability were rejected for ideological reasons, and foreign experience of establishing such liability was evaluated from the point of view of classes as aimed to infringe workers' rights.

Third, during the transition from socialist to market relations, attention was focused only on the civil liability of legal entities, and offenses involving them were often perceived as an inevitable temporary negative phenomenon of the period of initial capital accumulation that does not require recognition of legal entities as subjects of crime and administrative offenses.

Nevertheless, in the domestic criminological research and comparative legal studies, the actual presence in the Russian Federation of crimes committed by legal entities in the supranational meaning of them as a social reality that requires comprehensive study and an adequate response from the state began to receive recognition. Therefore, research of I.M. Matskevich, who substantiates the existence of such a subject of crime as the legal entity from a criminological point of view [5], should be mentioned.

Moreover, administrative liability of legal entities has already been established and received a doctrinal justification. It is used in cases established by law in committing administrative offenses or crimes by individuals on behalf of or in the interests of the relevant legal entities. For example, Federal Law dated December 25, 2008, No. 280-Φ3 *On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Ratification of the United Nations Convention against Corruption* dated October 31, 2003 and the Criminal Law Convention on Corruption dated January 27, 1999, and Adoption of the Federal Anti-Corruption Law supplemented the Code of the Russian Federation on Administrative Offenses with Article 19.28. Illegal Remuneration on Behalf of a Legal Entity that establishes liability of legal entities for illegal transfer, on behalf of or in the interests of a legal entity, to an official or a person performing managerial functions in a business or other organization, of money, securities, and other property as well as unlawful rendering of property services to it for performance, in the interests of this legal entity, by the official or the person performing managerial functions in the business or other organization of actions (omission) related to their official position.

Along with this, in our opinion, the position on the issue of criminal liability of legal entities should also be formulated.

Such liability is provided for by a number of international treaties [6], and it already exists in more than 70 countries of the world [7].

So, working in European markets, it should be borne in mind that, for example, in accordance with Directive No. 2009/73/EC (Brussels, July 13, 2009) of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [8], the EU member states should include administrative and criminal law regulations on individuals and legal entities for non-compliance with the provisions of the said Directive in the national laws (§ 17, Article 41 of Directive No. 2009/73/EC) [9].

Taking into account foreign experience, it seems not difficult to introduce criminal liability of legal entities for committing crimes, including in the energy sector, in the Russian Federation.

It is only necessary to determine the optimal legislative option for establishing such liability, in particular, to determine a practical method to do it (by amending the Criminal Code or by adopting a special law on criminal liability of legal entities), and to formulate relevant theoretical provisions that fit the national criminal law traditions.

In countries where criminal liability has been established for legal entities, various theories of such liability have been developed and are used.

For example, in the USA, it is “the theory of substituted liability”, in the UK, “the theory of representative of a legal entity”, in Japan, “the theory of liability of a legal entity as an integral whole”, and in China, the theory of personalized liability making it possible to integrate criminal liability of individuals and legal entities within the framework of criminal law [10].

It seems that the time has come to complete the doctrinal development and official recognition of the Russian theoretical concept of criminal liability of legal entities. Moreover, the Russian legislator has actually recorded the presence of such liability in Federal Law dated August 3, 2018, No. 290-Φ3 *On International Companies*, which provides for the possibility of bringing an international company to liability under both civil law and criminal law.

The grounds and conditions for bringing them to such liability are to be formulated; it should be determined whether criminal liability of legal entities should be introduced for all crimes; a list of legal entities, with regard to which criminal liability may be applied, should be set; and a system of penalties for legal entities should be developed.

It is necessary to withdraw from merely administrative liability of legal entities, since it cannot compensate for the lack of possibility of bringing them to criminal liability. So, if the individuals are criminally liable for unlawful acts, the related act of the legal entity should be recognized as a crime, but not an administrative offense, which is actually indicated in resolutions of the Constitutional Court of the Russian Federation and the European Court of Human Rights. Thus, the Constitutional Court of the Russian Federation recognized that offenses of legal entities can pose a social danger comparable to the social danger of crimes, and in some cases, the

danger is even higher [11]. Based on the significant size of the sanctions for a number of administrative offenses of legal entities, the European Court of Human Rights defines such offenses of legal entities as crimes and states the need for a criminal law investigation in relevant cases [12].

This will be in line with modern strategies for countering crime and international standards, and will fit into the process of implementing the provisions of international acts on liability of legal entities.

Settlement of this issue is very important and relevant for the energy markets players, as a number of foreign countries are very successful in forming the practice of bringing legal entities registered or operating in the Russian Federation, including in the energy sector, to criminal liability, and the Russian Federation cannot adopt adequate “tit-for-tat” measures against foreign

legal entities due to the absence of a legally established possibility of bringing them to criminal liability.

Moreover, abroad criminal liability of legal entities is an important component of legal administration, including in respect of the players in the energy markets, and the Russian Federation should not abandon the use of such efficient tools [13] by adopting relevant legislative decisions.

This will contribute to development of energy law as a complex industry, including but not limited to the regulations on administrative and criminal liability for violations in the area of energy markets [14]. As V.F. Yakovlev rightly notes, “energy law is the most complicated sphere, where various traditional areas of law are involved, public and private interests are combined, and international legal aspects interact” [15]. ■

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