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Legal Justification for the Prevention of Corruption Risks Associated with the Participation of State Civil Servants in The Management of Commercial Organizations

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ABSTRACT

The **purpose** of the article is to investigate the problem of preventing corruption risks associated with the participation of state civil servants on a gratuitous basis in the management of organizations and enterprises of various forms of ownership.

The **objectives** of the article are to study the cases of participation of persons holding public positions in the management of a commercial or non-profit organization allowed by the legislator. To consider the external and internal corruption risks associated with the participation of state civil servants on a gratuitous basis in the management of organizations and enterprises of various forms of ownership, to clarify the causes of their occurrence.

The **practical result of the study** is that, based on the provisions of Russian and international legal acts, in particular ISO 26000, ISO 37000, ISO 37001 and ISO 37002 standards, a list of measures and conditions for preventing corruption risks associated with the participation of state civil servants on a gratuitous basis in the management of organizations and enterprises of various forms of ownership has been developed.

Keywords: prevention of corruption risks; public civil servant; non-reimbursable (gratuitous) basis; organization management; collegial body

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In the national legislation, for persons holding state (municipal) positions, there is an almost absolute ban on holding other positions in state (local self-government) bodies, as stated in the Federal Law of 25.12.2008 № 273-FL “On Counteracting Corruption”¹; these bans, as E.A. Sumina and A.A. Kasatkina note, are mostly focused on excluding a conflict of interest [1]. At the same time, for example, “the ban on participation in the management of a commercial or non-profit organization” is characterized by a wide range of exceptions, the abundance and openness of the list of which still raises many questions. According to S.N. Sheverdyayev, “in this part, the Russian legislation is motivated by an applied, causal logic and is waiting for some phase of practical stabilisation to formulate rules of conduct of a more general nature”. [2].

In general, the overall logic of these exemptions to date is as follows: public officials, with a few exceptions, may not participate in the management of a for-profit or non-profit organisation (see *figure* below).

For example, state civil servants may be elected to the boards of directors of companies where the Russian Federation or its constituent entity is a founder (shareholder, participant). As an example, take Rosimushchestvo/Federal Agency for State Property Management (the body exercising the powers of the owner of shares) or other state structures, such as the Russian Ministry of Defence, the Russian Presidential Affairs Department, the Russian Ministry of Finance, the Russian Government.²

¹ Federal Law “On Combating Corruption” dated December 25, 2008 No. 273-FL (last edition). URL: https://www.consultant.ru/document/cons_doc_LAW_82959/?ysclid=lemrlgxsft683178828

² Federal Law No. 79-FL of 27.07.2004 “On Public Civil Service of the Russian Federation” (revised on 30.12.2021). Collected Legislation of the Russian Federation. 2004. № 31. Article 3215; Resolution of the Government of the Russian Federation of 03.12.2004 No. 738 “On Management of Federally Owned

In order to become a member of a collegial management body of a commercial company which is an organisation of a state corporation, state-owned company or public-law company holding more than 50% of its shares (interest), a civil servant must comply with the requirements of the Regulation approved by Resolution No. 1602 of the Government of the Russian Federation of 05.10.2020 (hereinafter the Regulation).³ Pursuant to this document, the civil servant must submit a petition and, having received permission from the representative of the employer, participate in the management of the organisation on a non-repayable basis and outside of official time.⁴

A civil servant may also participate in the management of other legal entities on a non-repayable basis and on the basis of an act of the President or the Government of Russia. For example, members of the supervisory board of “Rostechologies” State Corporation are appointed by the President of the Russian Federation.⁵

A public civil servant has the opportunity to be elected to the bodies of a legal entity

Shares in Open Joint-Stock Companies and Use of Special Right to Participation of the Russian Federation in Management of Open Joint-Stock Companies (“golden share”). Clauses. 2–5, 8, 12. URL: https://www.consultant.ru/document/cons_doc_LAW_50597/125721a1ce03a80be141051120f4a5fd8cd8f9f3/?ysclid=lemvg49z90772829093

³ Decree of the Government of the Russian Federation of 05.10.2020 No. 1602 “On Approval of the Regulations on the Procedure of Participation of a Federal Public Civil Servant on a Non-Governmental Basis in the Management of a Commercial Organization, which is an Organization of a State Corporation, State Company or Public-Law Company, with Over 50 Percent of Shares (Stakes) Owned by a State Corporation, State Company or Public-Law Company, as a Member of its Collegial Management Body”. URL: <https://ipbd.ru/doc/0001202010080003/?ysclid=lemvt59xgb177004508>

⁴ Ibidem. Clauses 2–3.

⁵ Federal Law of 23.11.2007 No. 270-FL «On the State Corporation for Promotion of Development, Production and Export of High-Tech Industrial Products “Rostech” (revised on 31.07.2020). Collected Legislation of the Russian Federation. 2007:48(5814). Art. 11, para. 3.

— First, participation free of charge in the management of a political party, trade union body or general meeting of another public organisation

— Second, participation on a pro bono basis in the management of a non-profit organisation - with prior notification to the relevant higher authority

— Thirdly, participation, free of charge, in the activities of a collegial body of the organisation under special authorisation from the relevant highest authority of that territorial level

— Fourthly, representation on a non-repayable basis of public interests in the governing bodies and auditing commission of an organisation whose founder is the Russian Federation, a constituent entity of the Russian Federation or a municipality

Fig. Exemptions when civil (municipal) servants are entitled to run a commercial or non-profit organisation

Source: compiled by the author based on Federal Law "On Combating Corruption" dated December 25, 2008 No. 273-FZ (last edition).

by non-profit organisations such as housing, housing and construction cooperatives, garage cooperatives, associations of property owners. In order to do this he must obtain the permission of the representative of the employer in accordance with the procedure established by the regulatory legal act of the state body.⁶

It should be noted that the election of a public civil servant who is included in the specified list as a member of the Board of Directors,⁷ and failure to notify the company in accordance with Federal Law No. 273-FL⁸ may serve as grounds for bringing the company to administrative liability under the

Administrative Violations Code of the Russian Federation,⁹ since the relationship between the company and a member of the Board of Directors is defined by civil law (as per the Civil Code¹⁰ and the Presidium of the Supreme Arbitration Court of the Russian Federation Information Letter No. 106 of 14.03.2006¹¹).

Legislation of the Russian Federation stipulates that participation of the above-mentioned employee in the management of a commercial organization is not permitted

⁶ Federal Law No. 79-FL of 27.07.2004 "On Public Civil Service of the Russian Federation" (revised on 30.12.2021). Collected Legislation of the Russian Federation. 2004:31(3215). Art. 17, p. 1, p. 3, par. "a".

⁷ Presidential Decree No. 925 of 21.07.2010 "On Measures to Implement Certain Provisions of the Federal Law "On Countering Corruption". Collected Legislation of the Russian Federation. 2010:30(4070).

⁸ Ibidem. Art. 4 para. 12.

⁹ Code of Administrative Offences of the Russian Federation of 30.12.2001, No. 195-FL (ed. as of 17.02.2023). Art. 19.29. URL: https://www.consultant.ru/document/cons_doc_LAW_34661/56fc8b160d7d4acf2ee8ed080d3a4632e6caeec2/?ysclid=lemxgljm12462536911/

¹⁰ Civil Code of the Russian Federation (CCRF). para. 4, Article 53(4). URL: https://www.consultant.ru/document/cons_doc_LAW_5142/?ysclid=lemxk32o37554973176

¹¹ Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 14.03.2006 No 106 "Review of the practice of arbitration courts in cases relating to the recovery of the unified social tax". Para. 2. URL: <https://www.garant.ru/products/ipo/prime/doc/12046420/?ysclid=lemxpp4bd1905948302>

if it leads or may lead to a conflict of interest in the performance of official duties or if it violates other restrictions and prohibitions laid down by federal laws.

From A. V. Konov's point of view, the movement of employees between state bodies and other institutions in general involves a certain array of corruption risks [3], both internal and external. The former include an increase in manifestations of corporate fraud and malfeasance; the threat of direct losses to the organisation from such actions of employees for personal gain rather than in the interests of the institution; an increase in the costs of activities, reduction of efficiency of business processes, increase in the cost of products (works, services); formation of an atmosphere of permissiveness and immorality in the organisation; possible weakening of its competitiveness, etc.; the latter include a decrease in stability of functioning of the institution, increased risk of raider attacks, vulnerability exploitation by competitors or other stakeholders; risk of being placed on rosters of unreliable organisations; vicarious liability on claims of the state or third parties; increased reputational risks; difficulties in building relationships with partners; difficulties in passing inspections (particularly those of official nature), etc.

The Russian Ministry of Labour agrees with this finding of high risk-taking. Thus, its Methodological Recommendations state that persons with a high degree of involvement in remedial risk functions are recommended to include those whose job duties include: decisive signatory powers; preparation and endorsement of draft decisions; participation in collegial decision-making bodies; drawing up an inspection report; issuing an order to eliminate violations and monitoring this process, direct maintenance of registers,

databases containing commercially sensitive information.¹²

The occurrence of these risks is provoked by a breach of prohibitions and restrictions established by Russian law — in particular, about owning one's own business, acquiring securities on which income can be generated, if this may cause a conflict of interest.

Accordingly, the prevention of corruption risks associated with the participation of civil servants on a pro bono basis in the management of organisations and enterprises of various forms of ownership is a priority task for the employer of such employees. The ISO standards provide a solution to this problem.¹³ For example, ISO 2600:2012 "Guidance on Social Responsibility"¹⁴ places emphasis, aside from the obvious points (such as identifying corruption risks and counteracting the occurrence of preconditions for corruption), on improving good business practice by raising awareness of corruption issues among employees and key stakeholders, encouraging reporting violations of corporate policies, unethical and unfair treatment, setting examples of anti-corruption conduct, etc. In turn, the authors of ISO 37001:2016 "Corruption Countering Management Systems — Requirements and Guidelines for Implementation" offer a full-fledged mechanism of corruption risk management and preventative measures (routine maintenance) of relevant manifestations

¹² Letter No. 18–0/10/B-8980 of the Ministry of Labour of the Russian Federation dated 25.12.2014 "On Corruption Risk Assessment by Federal State Bodies" (together with "Methodological Recommendations on Corruption Risk Assessment Arising in the Performance of Functions"). Section 2. URL: https://www.consultant.ru/document/cons_doc_LAW_178382/?ysclid=lemya4fhrt155596722

¹³ ISO standards are internationally recognised specifications for products, services and systems. They are created by the International Organization for Standardization (ISO) ISO to ensure quality, safety and efficiency.

¹⁴ ISO 2600:2012 "The Social Responsibility Handbook." URL: <https://www.iso.org/ru/iso-26000-social-responsibility.html>

that is also adaptable for public sector organisations. This standard should draw attention to the provision on documenting the anti-corruption policy, which should, firstly, be adequately documented, secondly, communicated to employees and business partners with whom corruption risks exceeding the minimum level are associated, and thirdly, made available to relevant stakeholders to the extent possible.¹⁵

Last year, the International Organisation for Standardisation produced and published two new documents, — ISO 37000:2021, “Organisation Management. Guidance”¹⁶ and ISO 37002:2021 “Corruption or Illegal Activity Reporting Management Systems. Guidelines”.¹⁷ The former is based on the so-called concept of “Good Governance”; the authors of the document believe that governing an organisation, regardless of its form of ownership, provides an opportunity to build trust with both internal and external participants in the corporate ecosystem, acting ethically and responsibly in its interactions with them, moving governance beyond pursuit of personal interests and complying with legal obligations, thereby reducing the likelihood of corruption risks and other such issues.

As for the second document (ISO 37002:2021), similarly to ISO 37001:2016, it is focused on the integration into the organisational management practice of the corruption offence reporting *management system* as a separate business process, whose main purpose is to develop a mechanism for targeted information exchange (with provision

of appropriate communication tools) about suspected or actual manifestations of such offences by employees. In spite of the rigidity of such measure, in our opinion, given the incompleteness of the mechanism of regulation of the institute of prevention of corruption risks associated with the participation of civil servants on a pro bono basis in the management of organisations and enterprises of various forms of ownership, the tools proposed by the developers of ISO 37002:2021 will be useful.

Taking the provisions of the international standards ISO 2600:2012, ISO 37001:2016, ISO 37000:2021, ISO 37002:2021 and the Methodological Recommendations of the Russian Ministry of Labour as a basis, the following measures should be implemented in order to minimise or eliminate the aforementioned risks:

- the redistribution of functions between structural subdivisions within the organisation (or enterprise) run by the civil servant;
- the use of information technology as a priority for business activities (official/business correspondence);
- integration into the management system of the organisation (or enterprise) in which the civil servant participates on a pro bono basis, of the business processes for whistleblowing management of corruption offences;
- eliminating the need for a public civil servant to personally interact with persons with whom property, corporate or close relationships may arise that could lead to a conflict of interest [1];
- improving the selection mechanism for civil servants applying for management positions in organisations of various forms of ownership;
- reduction in the number of civil servants with the power of casting

¹⁵ ISO 37001:2016 “Anti-Corruption Management Systems — Requirements and Guidelines for Implementation”. Art. 5.2. URL: <https://iso-management.com/wp-content/uploads/2019/10/ISO-37001-2016.pdf>

¹⁶ ISO 37000:2021 “Managing Organisations. Handbook”. URL: https://committee.iso.org/ISO_37000_Governance

¹⁷ ISO 37002:2021 “Corruption or Illegal Activities Reporting Management Systems. Guidelines”. URL: <https://www.iso.org/ru/standard/65035.html>

signatures, preparing and approving draft decisions, participating in collegial decision-making bodies, drawing up inspection reports, issuing orders to rectify violations and monitoring the rectification of detected violations, directly maintaining registers, databases containing commercially sensitive information;

- reducing the time taken to make management decisions;
- establishing clear regulation of the manner and timing for a public civil servant to act in the exercise of a corruptly dangerous function(s);
- establishment of additional forms of reporting by officials managing organisations and enterprises of various forms of ownership on the results of decisions taken;
- additional activities aimed at identifying corruption risks associated with public civil servants' pro bono participation in the management of organisations and enterprises of various forms of ownership, integrating and maintaining policies and practices that counteract such risks.

These measures should be implemented on an ongoing basis through:

- firstly, organisation of internal control based on the mechanism of verification activities (anti-corruption compliance [4–11]) over the performance of duties by civil servants involved in the management of enterprises and organisations of various forms of ownership. These actions should be carried out both within the framework of verification of reliability and completeness of information about income, property and property obligations and on the basis of information received about corrupt practices, including publications about such activities in the media, complaints and appeals of citizens and organisations, notifications about conflicts of interest;
- secondly, the use of video surveillance and audio recording in the reception areas of businesses or organisations;
- thirdly, conducting outreach, explanatory, and other work to reduce the potential for corrupt behaviour by civil servants in the performance of corruptly dangerous functions.

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