

**RISKS AND THREATS AS SYSTEM-FORMING CATEGORIES OF STATE CONTROL AND SUPERVISION\*\*****Kirill V. Maslov, Alexander S. Matnenko***Dostoevsky Omsk State University, Omsk, Russia***Article info**

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The subject. The key characteristics of risks and threats in state control context are researched comprehensively.

The purpose of the article is to confirm or disprove hypothesis that threats and risks should be the basis for determining the content of other elements of the system of state control and supervision.

The methodology. The authors use the formal legal interpretation of normative acts, as well as systemic approach and analysis of philosophical literature, concepts of the security theory and monographs in different branches of law.

The main results, scope of application. The relationship between the concepts of "threats" and "risks" is determined, and their author's definitions are proposed. A threat in control and supervisory activities is a set of events or acts that cause or are capable of causing damage to socially significant values. Risks are such threats to socially significant values, which are expressed in the actions of participants of social relations. Risks are associated with an incorrect assessment of the objective situation and can lead to harm with varying degrees of probability. The categories "risk" (in the negative aspect) and "threat" highlight two facets of the same entity. When describing malicious phenomena as threats, attention is focused on the possibility of causing harm as an integral attribute of such phenomena. Understanding them as risks allows us to give a quantitative description of the probability of occurrence of harmful consequences of the impact of a particular act on the protected object. Problems are identified in the reflection of the essential characteristics of risks and threats in the current legislation on state control (supervision) and in the new Federal Law of 31.07.2020 No. 248-FZ "On State Control (Supervision) and Municipal Control in the Russian Federation". The analysis of the Russian legislation shows that there is no comprehensive approach to fixing the essential characteristics of threats and risks, which are aimed at minimizing the control and supervisory activities. New Russian Law No. 248-FZ of 31.07.2020 also demonstrates that the legislator does not have a systematic approach to identifying risks and other threats and therefore effective measures to counteract their implementation through control and supervisory activities are not determined. The scientific substantiation of the characteristics of risks and threats in general allows both to enrich the theory of public control, and to improve the legislation on control and supervisory activities, as well as to increase the effectiveness of the protection of public interests in the process of its application.

Conclusions. The key nature of threats and risks for determining other elements of the system of state control and supervision is substantiated. The use of the term "threat" is preferred because of its more universal nature. Threats determines both the goals and principles of control and supervisory activities in any area, as well as its forms and methods.

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## 1. Introduction.

The coronavirus pandemic and measures to counteract its spread have significantly limited the opportunities for direct interaction between control (supervision) bodies and supervised entities. In such conditions, the problem of the effectiveness of control and supervisory activities comes to the fore, the need to find the optimal way to allocate the resources available to control and supervisory bodies (personnel, time, material and other) to prevent harm to protected public interests or to minimize it. Therefore, the urgency of organizing control and supervisory activities on the basis of identifying threats to protected public interests, segmenting them and determining how to respond depending on the degree of danger of specific threats increases dramatically. In recent years, Russia has seen an increase in the attention of scientists and practitioners to this issue, mainly through the analysis of practical aspects of the use of a risk-based approach in control and supervisory activities. At the same time, there is a lack of theoretical research on the basic categories of "threat" and "risk" in relation to state control (supervision), without which the attempts to introduce a risk-based approach in the planning and implementation of control in certain areas, stimulated by the legislator, are doomed to be chaotic, unsystematic, and therefore ineffective.

## 2. The concept of threat in the context of control and supervisory activities.

The legislator, as well as in the scientific literature in the control and supervisory discourse, mainly pays attention to the category of "risk"; threats are practically not analyzed. Perhaps this approach is a consequence of the incorporation of terminology adopted in English-language sources, where the orientation of public control to eliminate risks was studied in the last third of the twentieth century. Quite logically, the question arises about the ratio of risks and threats. The resolution of this issue is not sophistic, but essential, since it allows us to identify the key features of the object and content of control and supervisory activities, which, when using the "risk" category, may remain out of the focus of scientific analysis and evaluation of law enforcement agencies.

The legal definition of a threat as a public-legal phenomenon is currently contained in the National Security Strategy of the Russian Federation, where the threat to national security is defined as "a set of conditions and factors that create a direct or indirect possibility of harming national interests" . The description of threats in various spheres of public life through the categories of factors, interests, damage (danger) is often carried out by scientists [1; 2, p. 72; 3].

We believe that the definition of threats as factors or conditions is extremely abstract, reports only the most general characteristics of threats: the importance, the causal relationship between the threat and the consequences , and therefore does not allow us to identify the threat substrate.

Equally vague are the definitions of threats as "the state of social development, the process of weakening the state" [4, p. 18]. The state, a certain level of development of social relations is actually security, but the threat is a specific phenomenon that prevents the achievement of such a state.

In the philosophy of security, there is an approach according to which a threat is understood as "an event or a set of events that directly affect the existence of the subject and can lead to the termination of this existence or significantly worsen it" [5, p. 86].

Meanwhile, threats to protected values are manifested not only in events (phenomena of the "environment", as some scientists point out [6, p. 13]), but also in the actions (primarily illegal) of individuals committed on their own behalf or on behalf of the organizations they represent.

Equally, it is impossible to limit threats exclusively to the actions of subjects of public relations, as suggested by some authors [7, p. 11-12].

Of course, threats to protected values mostly come from the actions of certain individuals, but we cannot exclude those dangers that are caused by natural and man-made factors: for example, man-made accidents, global warming, and other climate changes.

The threat is not only the most harmful violations of the law, but also the deeper determinants that make such illegal behavior accessible and profitable for the controlled entity.

Meanwhile, the use in the legal definition of

security threats of the design "creating a direct or indirect possibility of harming national interests" belittles the importance of threats, since in this approach, phenomena that directly harm protected interests are not recognized as threats. Such a construction (with an emphasis on the potential for an unfavorable development of the situation when the threat is realized) is repeated in the scientific literature [8].

Combining the above features, we can propose a definition of a threat in control and supervisory activities as a set of events or acts that cause or are capable of harming socially significant values.

### **3. The concept of risk in the context of control and supervisory activities.**

The concept of risk has been studied in sufficient detail by sociological science, as a domestic science [10; 11; 12; 13], and foreign [14; 15; 16]. At the same time, in modern legal science, according to the correct remark of A. Yu. Povarenkov [17, p. 134], it is one of the most poorly studied and underestimated. Although there are more and more works in administrative and legal science that address risks in control and supervisory activities, many of them are more applied in nature.

The concepts of "risk" and "threat" in the legal literature are often identified, used without a clear and precise distinction [18; 19, p. 63; 20]. This is also typical for sources devoted to the legal aspects of security in various fields [21, p. 11; 22, p. 16]. The absolute identification of security threats and risks, in our opinion, is impractical, since this understanding does not take into account the specific properties of risks.

The National Security Strategy of the Russian Federation does not contain a definition of risk. At the same time, in the Strategy of Economic Security of the Russian Federation for the period up to 2030, which separated "threats" and "risks" in the field of economic security, the risk in the same area is understood as "the possibility of harming the national interests of the Russian Federation in the economic sphere in connection with the implementation of the threat to economic security". Based on this definition, the risk should

be understood as an independent phenomenon that occurs as a result of the implementation of the threat. This position is supported by a number of economists [23]. That is, according to the Strategy, the institutional scheme for the development of the harmful impact of negative phenomena on protected interests is as follows: the threat is realized in the risk; the risk causes damage. This model is also supported by some scientists who study security in various spheres of public life [24, p. 20-21]. R. A. Kryuchkov, for example, notes that "threat (danger) is a risk factor, is an element of the objective side of risk and is related to it as a part and whole" [25, p.84]. However, this interpretation impoverishes the content of the concept of "threats", excluding from them such phenomena that can directly harm protected interests.

Based on the analysis of existing approaches to risk in legal science, we will try to formulate a number of conclusions about their essence.

T. E. Rozhdestvenskaya fairly divides the main approaches to understanding risk formed in legal science into objective and subjective ones [26]. In the first case, scientists focus on the uncertainty about the possible occurrence of adverse consequences. In the second – the mental attitude of subjects to the probable consequences of their behavior. Yu. A. Dyatlov calls risk a form of manifestation of human subjectivity in objectively determined social situations that creates an environment of uncertainty [27, p. 30]. Thus, a common feature of risk in the views of representatives of both approaches is, first, the uncertain, probabilistic nature of the occurrence of adverse consequences. Uncertainty is not just one of the sources of legal risks, as some scientists note [28, p. 156-157], but their immanent property.

Secondly, a significant sign of risk is the form of its expression. Some scientists associate risks with "the probability of negative consequences ... due to the occurrence of adverse events" [29, p. 116]. Others note that risks are generated both by subjective reasons (for example, violations of the law, mistakes of government bodies and legal entities), and "phenomena and events of an objective nature" [19, p. 63].

More reasonable is the activity - based approach to risk, adopted in the philosophy of

security and linking it with the subject who makes a choice in conditions of uncertainty of one of the alternative actions or inactions [30, p. 79]. N. A. Povetkina defines the latter as "an action, the implementation of which jeopardizes the satisfaction of any sufficiently important need" [31, p. 92]. Yu. A. Tikhomirov in his early works characterizes risk as "conscious volitional behavior of a person aimed at achieving a legitimate positive result in a situation with ambiguous development prospects" [32, p. 6]. Similar definitions with an emphasis on the manifestation of risk in the activities of subjects are also found in the works of other scientists [18, p. 25; 33, p. 78]. L. E. Kalinina notes the peculiarity of risk as an action or behavior of the security object itself, while he refers to actions and events that do not depend on it [34]. Thus, the risks are expressed in the actions and inactions of powerful and non-powerful participants in public relations. The same approach is applied in the legislation of the Republic of Kazakhstan, where Article 141 of the Business Code of the Republic of Kazakhstan defines risk as "the probability of causing harm as a result of the activities of the subject of control and supervision to human life or health, the environment, the legitimate interests of individuals and legal entities, the property interests of the state, taking into account the severity of its consequences".

Third, a mandatory property of risk is the consequences it causes for the public interest. "Risk is always a potential danger" [35, p. 21]. "Risk is the probable occurrence of an event and the commission of an action that entails negative consequences for the implementation of a legal decision and may cause damage to the sphere regulated by it," writes Yu. A. Tikhomirov [36, p. 11]. At the same time, there is a fairly well-founded approach in science, according to which the risk can lead to a positive result for the development of public relations. Tikhomirov points to the permissibility of risk when the probability of a positive deviation from the intended legal model (concept) and the current laws in the activity is higher [19, p. 9]. That is, the risks can be objectively divided into positive and negative. That is why the concept of threats in comparison with risks better reflects the goals of ensuring security and

protecting public interests, focusing the attention of the researcher and the practitioner on the dangers that require a response. Further, when talking about risks, we will use this term in a "negative" sense.

As can be seen from the above, the properties attributed to risks are specific attributes of a form of threat such as acts. Thus, risks are essentially nothing more than a variety of threats. If we adhere to the activity approach, risks and other threats to public relations should be differentiated depending on the manifestation in the behavior of citizens and their associations.

At the same time, the principal property of risk is its measurability, it can be characterized as "measurable uncertainty" [37, p. 30]. Risk is a quantitative measure of the danger, the probability of losses [23; 38].

That is, regardless of the approach to the form of risk (activity or event), the categories of both "risk" (in the negative aspect) and "threat" highlight two facets of the same entity. When describing malicious phenomena as threats, attention is focused on the possibility of causing harm as an integral attribute of such phenomena. Understanding them as risks allows us to give a quantitative description of the probability of the occurrence of harmful consequences of the impact of a particular act on the protected object.

Accordingly, risks can be called such threats to socially significant values, which are expressed in the actions of participants in public relations associated with an incorrect assessment of the objective situation and can lead to harm with varying degrees of probability.

#### **4. Reflection of the key features of threats in the legislation on control and supervisory activities.**

Although the concepts of risks and threats have been used in legislation, including on control (supervision), for quite a long time, an important step in their introduction into general legal circulation was the adoption of Federal Law No. 172-FZ of 28.06.2014 "On Strategic Planning in the Russian Federation". This law, describing the subject of forecasting as a kind of strategic planning, separates the risks of socio-economic development and threats to national security. For the reasons

described above, the risks of socio-economic development cannot but create threats to national security, since the growth of economic potential and the stability of social ties are the most important conditions for the existence of the state in modern conditions. Therefore, the regulation of risks and threats in the basic law, which defines the vectors of the organization of public administration, cannot be considered fully justified. In addition, responding to security threats should be one of the tasks of public administration bodies not only in forecasting, but also in the process of implementing other functions.

Since 2015, the basic legislative act in the field of control and supervisory activities, Federal Law No. 294-FZ of 26.12.2008 "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs in the exercise of State Control (Supervision) and Municipal Control", which is still in force (until July 1, 2021), has established the basis for using a risk - based approach in the organization and implementation of public control (supervision). The Law 294-FZ correctly states that the use of this approach contributes to the optimal use of labor, material and financial resources of the subjects of control and to increase the effectiveness of their activities, reducing the costs of controlled persons. The essence of this approach is to assign each object of control a certain risk category or hazard class (category), which determine the intensity, frequency and duration of measures to control and prevent violations of mandatory requirements.

At the same time, there is no definition of risk in the above-mentioned regulations. The legislator pays even less attention to the description of threats, which is not comparable with their actual significance for public control (supervision).

Threats (causing harm to the life, health of citizens, animals, plants, the environment, objects of cultural heritage of the peoples of the Russian Federation, museum objects and museum collections, especially valuable documents of the Archival Fund of the Russian Federation, documents of special historical, scientific, cultural significance, state security, as well as threats of natural and man-made emergencies) are

mentioned in the legislation in the context of one of the control and supervisory measures-verification:

- as a basis for an unscheduled inspection;
- as one of the possible grounds for drawing up a checklist (a list of control questions) during a routine check;
- as a basis for the immediate adoption of measures to prevent harm when threats are identified during the inspection.

At the legislative level, the risk management system is described in more detail in relation to customs control in Federal Law No. 289-FZ of 03.08.2018 "On Customs Regulation in the Russian Federation and on Amendments to certain Legislative Acts of the Russian Federation" (which is covered in a separate chapter 54). The Federal Tax Service has made significant progress in applying the risk-based approach to tax control, but its achievements are mostly not registered in the form of publicly available regulatory legal acts and are not public.

Thus, the analysis of the Russian legislation indicates the absence of a comprehensive approach to fixing the essential characteristics of threats and risks, which are aimed at minimizing the control and supervisory activities.

##### **5. Novelties about risks and threats in the legislation on control and supervisory activities.**

Federal Law No. 248-FZ of 31.07.2020 "On State Control (Supervision) and Municipal Control in the Russian Federation" (hereinafter referred to as Law No. 248 – FZ) pays much more attention to risks and other threats in the regulation of control and supervisory activities.

In Part 2 of Article 1, the orientation of control (supervision) to achieve minimization of the risk of harm (damage) to legally protected values caused by violations of mandatory requirements is absolutely correctly fixed, which is considered as a socially significant result of control and supervision activities.

An absolute achievement is the emergence of a legal definition of the risk of causing harm (damage), which in Part 2 of Article 22 of Law No. 248-FZ is understood as the probability of events that may result in causing harm (damage) of various scales and severity to legally protected values. At the

same time, for the reasons described above, it is impossible to welcome the consolidation as a form of risk realization exclusively of events, which formally excludes acts from the scope of the law and can create difficulties in law enforcement.

A separate chapter of Law No. 248-FZ is devoted to risk management. At the same time, the purpose of such activities in Part 4 of Article 22 is to ensure an acceptable level of risk of causing harm (damage) in the relevant field of activity. The permissible level of risk of causing harm (damage) should be fixed in the key indicators of the type of control. That is, at the terminological level, the objective goal of risk management (minimizing the public danger of the activities of controlled entities) was replaced by the achievement of established indicators (often set subjectively). More appropriate for the purpose of risk management is the wording used by the legislator when describing the categorization of risks in Part 3 of Article 23: the need to prevent and minimize harm (damage) to legally protected values with optimal use of the material, financial and human resources of the control (supervisory) body.

Part 4 of Article 20 defines the main directions of risk management in control and supervisory activities (although not directly, but through a description of the goals of interdepartmental interaction of control bodies with the relevant executive authority). Such management is carried out by:

- determining the probability of occurrence of the risk of causing harm (damage) and the extent of the harm (damage) caused to the legally protected values,
- organization of continuous monitoring (collection, processing, analysis and accounting) of information used to assess and manage the risks of causing harm (damage),
- development and approval of indicators of the risk of violation of mandatory requirements,
- assignment of control objects to risk categories within the scope of control types,
- development and approval of a program for the prevention of risks of causing harm (damage);
- formation of a plan of planned control (supervisory) measures,

- monitoring compliance with mandatory requirements.

At the same time, monitoring is used twice, and some of the actions that essentially relate to the areas of risk management are defined in other articles of the law (Articles 23, 24). For methodological and practical purposes, it is necessary to consolidate the list of risk management areas (measures to ensure security in protected public relations) in an independent article of Law No. 248-FZ).

From the point of view of the effective use of the resources of the control (supervision) bodies, it is necessary to positively assess the consolidation of the criteria for assessing the integrity of controlled persons in the risk assessment (Part 7 of Article 23), giving legal significance to an independent assessment of compliance with mandatory requirements (Part 8 of Article 22).

As in Law No. 294-FZ, risk categories affect the frequency of planned control measures. At the same time, it is possible to differentiate the type of planned event depending on the risk category in the regulation on the type of control (paragraph 5, part 5, Article 3 of Law No. 248-FZ). The criteria for classifying the objects of control to the categories of risk of causing harm (damage) are also established by the regulation on the type of control (paragraph 2, Part 5, Article 3 of Law No. 248-FZ). In such objects, the regulations on the type of control can be installed in a shorter period of holding control (Supervisory) activities, peculiarities of their content, the volume of submissions, instrumental examination, tests, examinations and experiments (part 8 of article 25).

Received direct mounting orientation preventive measures to reduce the risk of harm (damage), such events justified given the precedence over other (article 8 of the Law No. 248-FZ).

The category of threats in Law No. 248-FZ is still used in the meaning of one of the risk characteristics that mainly affects the decision to conduct, although not only an inspection, but control and supervisory measures in general (Part 3 of Article 74). More important is the law on information about threats. According to Article 13, information concerning harm to health and threats to people's lives is not subject to concealment. In our opinion,

this legal regime should apply to information about threats not only to the life and health of people, but also to other socially significant values.

The provisions of Law No. 248-FZ indicate an incomplete understanding by the legislator of the meaning of threats and their difference from the facts of the actual harm caused, and, as a result, an unjustified confusion of the legal consequences of establishing such circumstances.

According to Part 4 of Article 45 of Law No. 248-FZ, the inspector's determination of both a threat and the actual fact of causing harm to legally protected values entails sending information about this to the head. The latter, when considering such information obtained from any sources, is obliged to assess its reliability by requesting information and materials, conducting a control event without interaction (Part 2.3 of Article 58 of Law No. 248-FZ). It is obvious that when establishing the fact of causing harm (and in many cases, in the presence of a threat), it is necessary to promptly respond by conducting, at least, a full-fledged control and supervisory measure, which these norms prevent.

In addition, we believe that when identifying the fact of harm to legally protected values (as opposed to the possible threat of causing such harm), it is urgently necessary not to check the reliability of such information or any control measures (provided for by Law No. 248-FZ), but to immediately initiate a case on an administrative offense or a crime (depending on the severity of the harm) and use appropriate sectoral preventive measures. The provisions of Law No. 248-FZ should clearly provide for a different algorithm for responding to the threat of harm and the fact of harm.

By virtue of paragraph 1, Part 1 of Article 57, Article 60 of Law No. 248-FZ, when making a decision to conduct a control event, indicators of the risk of violating mandatory requirements are taken into account. Such indicators are approved by the authority responsible for the regulatory and legal support of the relevant sphere of control (Part 10 of Article 23). A positive initiative in the context of categorizing threats and risks, due to imperfect legislative regulation, can lead to complete insecurity of protected values, since Part 2 of art. 60 of Law No. 248-FZ obliges the control body, if it

is impossible to determine the parameters of the activity of the controlled person, for which indicators are provided, to limit itself to sending a warning about the inadmissibility of violating mandatory requirements, instead of conducting a control event. That is, for this situation, the same consequences are unjustifiably provided for, as if it were a question of non-confirmation of the reliability of information about causing harm (the threat of this).

As a result of the legislator's misunderstanding of the nature of threats, there are also terminological discrepancies in Law No. 248-FZ. Thus, paragraph 4 of Article 45 obliges the inspector to immediately send information to the head when establishing an obvious immediate threat of causing harm (damage) to legally protected values during preventive measures. When fixing the grounds for conducting control (supervisory) measures in other articles (for example, in paragraph 1 of part 1 of Article 57), it is already referred to a simple threat of causing harm (damage) to legally protected values. Such discrepancies are not based on the results of scientific analysis and will entail an unjustified increase in the discretion of the law enforcement officer with unpredictable consequences.

Thus, the federal Law No. 248-FZ of 31.07.2020 "On State Control (Supervision) and Municipal Control in the Russian Federation", which replaced Law No. 294-FZ, also demonstrates that the legislator does not have a systematic approach to identifying risks and other threats and determining effective measures to counteract their implementation through control and supervisory activities.

## 6. Conclusions.

The main task of public control is "prevention of the danger that may arise in the course of economic activity, prevention of the threat and subsequent monitoring of the situation" [40, p. 245]. Therefore, the categorical apparatus of the security theory, including threats in general and risks in particular, should be the basis for determining the content of other elements of the system of state control (supervision), including both the goals and principles of control and supervisory activities in any field, as well as its forms and methods. The categories "risk" and

"threat" highlight two facets of the same entity. However, the use of the term "threat" is preferred because of its more universal nature. The scientific substantiation of the characteristics of risks and threats in general allows both to enrich the theory of public control, and to improve the legislation on control and supervisory activities, as well as to increase the effectiveness of the protection of public interests in the process of its application.



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