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THE INFLUENCE OF LEGISLATION ON STATE CONTROL (SUPERVISION) ON THE PRACTICE OF APPLYING LEGISLATION ON ADMINISTRATIVE OFFENSES**

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Subject. The article analyzes the current practice of applying legislation in the field of administrative responsibility, which is the result of changes in legislation in the field of state control (supervision).The choice of the research object is due to the need for systematic application of legislation in the areas of legal regulation under consideration, as well as the need to ensure uniformity in the practice of applying the Code of Administrative Offenses, which is due to the principle of equality before the law.
The purpose of the study. The article presents an analysis of current problems faced by courts. The results of the analysis of judicial practice and scientific approaches to solving the problems discussed in the article are presented.
Methodology. In the course of the work, the researcher was guided by a systematic way of interpreting current legal norms, as well as existing Russian scientific research in this area.
Conclusions. Based on the results of the study, norms were identified in the application of which uniformity was not ensured. In order to harmonize the legislation on state control (supervision) and the legislation on administrative offenses, it is proposed to take into account the scientific approaches that have emerged in the science of administrative law.

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1. Introduction

Adoption of federal laws dated July 31, 2020 No. 247-FL “On mandatory requirements in the Russian Federation” (hereinafter referred to as Law No. 247-FL) and dated July 31, 2020 No. 248-FL “On state control (supervision) and municipal control in the Russian Federation "(hereinafter referred to as Law No. 248-FL) is associated with the implementation of the reform of state control and supervision in Russia. It is worth mentioning that this is not the first experience of changing legislation in the sphere of control (supervisory) activities[1] [1]. Nevertheless, the current stage of reform is characterized by a number of points that are important for the present research. Firstly, a new approach to the organization and realization of control (supervisory) activities has been implemented - the priority of preventing violations of mandatory requirements regarding the control (supervisory) activities has been achieved[2]. Secondly, the practice of applying legislation in the sphere of control and supervisory activities[3] is formed with the specifications of the organization and implementation of state control (supervision), municipal control, the imposing a moratorium included. Thirdly, proceeding from the guidance for the reform of control and supervisory activities, changes were executed to the legislation on administrative offenses, which amended the rules for imposing administrative punishment and the procedure for proceedings in cases of administrative offenses. The latter has made actual the problem of harmonization of legislation on control and supervisory activities and legislation on administrative offenses. The discussion about the correlation between regulation in the noted spheres is not a new issue for scientific researches [2-7]. Mostly the correlation criteria are: classification of coercive measures [8, p. 324; 9, pp. 324-329], analysis of the constitutional foundations of the distinction [10] and law enforcement practice [11], the consequences of invalidity of the audit results [12, pp. 57-58].

Noteworthy is the imbalance in the number of norms established in the Code of the Russian Federation on Administrative Offenses (hereinafter referred to as the Code of Administrative Offenses of the Russian Federation, code) during the past two years and it determined the necessity to take into account legislation on control and supervisory activities when applying the code[4], in relation to the norms of Law No. 248 - Federal Law. The one contains single references to the legislation on administrative offenses: in relation to assessing the effectiveness and efficiency of the activities of control (supervisory) authorities, the consequences of identifying a violation within a monitoring purchase, the procedure of conducting a documentary check. It is worth mentioning that we note two articles of Law No. 248-FL, which are important for law enforcement: Part 3 of Article 1 excludes proceedings in cases of administrative offenses from the scope of application of Law No. 248-FL; Parts 3 and 4 of Article 90 regulate issues related to decision-making in the event of violations of mandatory requirements. The issues of

[1] The need for new approaches in the work of control (supervisory) bodies was outlined by the President of the Russian Federation in his message to the Federal Assembly of the Russian Federation in 2014. Rossiyskaya Gazeta\Russian Newspaper. 2014. No. 278

[2] In 2022, for the first time, the number of preventive visits exceeded the number of inspections. Summary report on state control (supervision), municipal control in the Russian Federation. https://www.economy.gov.ru/material/file/0b3a5879d3129306b03d3dc5a92f1b53/doklad_o_gosudarstvennom_kontrole_nadzore_municipalnom_kontrole_v_rossiyskoy_federacii_za_20 22_god.pdf (Accessed April 15, 2024)

[3] Federal Law of July 31, 2020 No. 248-FL “On state control (supervision) and municipal control in the Russian Federation”, Federal Law of June 11, 2021 No. 170-FL “On amendments to certain legislative acts of the Russian Federation in connection with the adoption of the Federal Law “On State Control (Supervision) and Municipal Control in the Russian Federation”, federal laws on types of control, by-laws adopted in accordance with these laws, as well as regulatory legal acts of the constituent entities of the Russian Federation

[4] This refers to the changes that were made to the Code of Administrative Offenses of the Russian Federation by Federal Law No. 290-FL of July 14, 2022 “On Amendments to the Code of the Russian Federation on Administrative Offenses and Article 1 of the Federal Law “On Amendments to the Code of the Russian Federation on Administrative Offenses” and Federal Law No. 70-FL of March 26, 2022 “On Amendments to the Code of the Russian Federation on Administrative Offences”

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application of these norms in the system of current legislation are as relevant as previously similar states of the Federal Law of December 26, 2008 No. 294-FL "On the protection of the rights of legal entities and individual entrepreneurs in implementing the state control (supervision) and municipal control" (hereinafter referred to as Law No. 294-FL) [12, 13, 14].

In its turn an analysis of the editions of the Code of Administrative Offenses of the Russian Federation allows us to conclude that the influence of legislation in the field of control and supervisory activities is increasing. Along with the norms of the code establishing the conditions for the admissibility of evidence and the elements of offenses, the qualification of which implies taking into account the provisions of control and supervisory legislation[5], the conditions for imposing an administrative penalty are made, the procedure of paying an administrative fine and the procedure of initiating a case on an administrative offense are determined, depending on the procedural form of identifying violations of mandatory requirements.

The practice of applying these states of the Code of Administrative Offenses of the Russian Federation is not always formed equally, which determines the practical significance of the research topic.

2. Administrative responsibility for violation of mandatory requirements: implementation of the "regulatory guillotine" mechanism

A significant achievement of the reform of control and supervisory activities was the revision of the system of mandatory requirements as part of the implementation of the "regulatory guillotine" mechanism, the results of which became the subject of expert assessment [15-18]. For the purposes of this study, of interest are those provisions of Law No. 247-FL that extend beyond the field of implementation the law and, in fact, determine the grounds for releasing a controlled person from liability for violation of mandatory requirements.

Firstly, Part 7 of Article 3 of Law No. 247-FL establishes the rules for the operation of mandatory requirements and provides for exemption from liability in the event of conflicting mandatory requirements in relation to the same object and subject of regulation established by regulatory legal acts of equal legal force. Ensuring that the controlled person complies with one of these mandatory requirements is stated as a condition for exemption from liability. Despite the fact that the legislator presumes clean hands of the controlled person, we understand that this approach does not guarantee the conscientious choice of the controlled person in favor of the most significant legally protected values from the point of view of the interests of the state and society. Along with the risk of abuse, it cannot be denied that in the case of competition of mandatory requirements, the choice of protected values itself requires expert assessment, because it must take into account the principle of legal certainty and consistency, as well as the asymmetry of mandatory requirements [19]. It should be noted that the prioritization of mandatory requirements is recognized by experts as a promising stage in the implementation of a risk-based approach. As well experts leave the determination of the priority of mandatory requirements to the control (supervisory) authorities in order to ensure that the control mechanism is adjusted taking into account the significance of the protected values [20, pp. 69-71]. Also, it is important to pay attention to the risks for the controlled people themselves. As a rule in the scientific literature the considered norm of Law No. 247-FL is evaluated positively, since "these rules protect the rights of business entities that conscientiously fulfill mandatory requirements in cases of errors and miscalculations of law-making and law enforcement authorities and authorized organizations" [21]. However, the practice of applying Part 7 of Article 3 of Law No. 247-FL, along with decisions made in favor of a controlled person[6], reveals that the latter do not always correctly evaluate the existence of conditions for applying the grounds for exemption from liability[7]. At the same

[5] For example, part 8 of article 15.29, articles 19.5, 19.6.1. Code of Administrative Offenses of the Russian Federation

[6] Resolution of the Arbitration Court of the Moscow District dated December 23, 2021 No. F05-31347/2021 in the case No. A40-39342/2021

[7] The Fourth Cassation Court of General Jurisdiction, in cassation ruling No. 88a-21152/2023 dated July 18, 2023,

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time there is a practice when courts leave without evaluation the argument of a controlled person about the presence of competing mandatory requirements established by regulations with equal legal force[8].

The second reason for exemption from liability is directly related to the revision of mandatory requirements as part of the implementation of the "regulatory guillotine" mechanism (Part 3 of Article 15 of Law No. 247-FL). It was expected that with the acceptance of the law, controlled people would be able to use actively the mechanism of judicial control both in relation to compliance with the establishment procedure and in relation to the content of the mandatory requirement. However, the practice of applying the law has demonstrated that the potential for challenging mandatory requirements for coincidence with the principles formulated in Law No. 247-FL[9] turned out to be less in demand than challenging the basis for bringing administrative liability in cases of "cutting off" a mandatory requirement with a "regulatory guillotine". An analysis of the practice of application by courts of Part 3 of Article 15 of Law No. 247-FL showed that the courts confirmed the legality and validity of bringing to administrative liability in the event of inclusion of a mandatory requirement in the "white list" [10]on the date of the commission of the offense and on the date of initiation of the administrative offense case. [11]In the most cases the courts have verified the fact that the document containing the mandatory requirement retains its legal force[12]. Let us pay attention particularly to the category of cases in which judges did not check the status of the normative legal act establishing a mandatory requirement but checked the relevance of the requirement itself. In such cases judicial acts compare the provisions of the canceled document containing mandatory requirements and the act that was taken in its place, despite the fact that the consequences of implementing the "regulatory guillotine" mechanism are quite clearly formulated in the law. The results of such a comparison were used by the courts to substantiate the conclusion that the obligation of the controlled person remained unchanged, and the act retained the sign of illegality, despite the "change of details" of the normative act[13]. In turn, the absence of similar mandatory requirements established after January 1, 2021 justifies decisions to cancel decisions on bringing to responsibility[14]. It seems that such a comparison within the framework of judicial control is at odds with the wording of Part 3 of Article 15 of Law No. 247-FL, which directly states non-compliance with the requirements "contained in these acts." The circumstance established by clause 5.1 of part 1 of article 24.5. Code of Administrative Offenses of the Russian Federation, is the basis for termination of proceedings in a case of an administrative offense, which does not imply

came to the conclusion that, contrary to the applicant's arguments, part 7 of Article 3 of the Federal Law of July 31, 2020 No. 247-FZ "On Mandatory Requirements" does not is subject to application, since no conflicts with the mandatory requirements are seen.

[8] Resolution of the Arbitration Court of the Far Eastern District dated June 20, 2022 No. F03-2627/2022 in the case No. A73-9873/2021

[9] For example, Determination of the Supreme Court of the Russian Federation dated April 28, 2021 No. AKPI21-110 // Reference system "Consultant Plus"

[10] Decree of the Government of the Russian Federation of December 31, 2020 No. 2467. Official Internet portal of legal information http://www.pravo.gov.ru (date of access: 04/10/2024). The original text of the document was published on the official Internet portal of legal information http://pravo.gov.ru, 01/09/2021

[11] Resolution of the Arbitration Court of the North-Western District dated 07/05/2021 No. F07-7879/2021 in case No. A56-85371/2020, Resolution of the Arbitration Court of the Central District dated 04/28/2023 No. F10-1198/2023 in case No. A84-1108/2022

[12] Resolution of the Ninth Court of Cassation of General Jurisdiction dated 03.03.2022 No. 16-508/2022, Resolution of the Third Court of Cassation of General Jurisdiction dated 26.02.2024 No. 16-71/2024. As a rule, judges check information posted on the official website of a government agency. The corresponding requirement is established by Part 5 of Article 8 of Law No. 247-FL.

[13] Resolution of the Izmailovsky District Court dated September 13, 2021 in case No. 7-19355/2021, Decision of the Primorsky Regional Court dated December 21, 2021 No. 21-1311/2021, Decision of the Moscow City Court dated December 9, 2021 in the case No. 7-19355/2021, Decision Kemerovo Regional Court dated November 26, 2021 in the case No. 21-813/2021

[14] Resolution of the Ninth Court of Cassation of General Jurisdiction dated March 3, 2022 No. 16-508/2022, Decision of the Kamchatka Regional Court dated November 17, 2021 in case No. 21-298/2021

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verification of the relevance of the content of the mandatory requirement within the proceedings in a case of the administrative offense.

In conclusion of the evaluating of the above-mentioned grounds for releasing a controlled person from liability for violation of mandatory requirements, we note that in the first case the ground is established only in Law No. 247-FL and is not provided for in the Code of Administrative Offenses of the Russian Federation. Whereas the basis for exemption from liability, established by Part 3 of Article 15 of Law No. 247-FL as a circumstance excluding proceedings in a case of an administrative offense, is also provided for in Article 24.5. Code of Administrative Offenses of the Russian Federation[15]. We believe that Article 1.3, paragraph 9 of part 1 of Article 24.5 of the Code of Administrative Offenses of the Russian Federation requires that the basis for exemption from liability need to be reflected in the Code of Administrative Offenses of the Russian Federation.

Another significant aspect of the practice of applying Part 3 of Article 15 of Law No. 247-FL is the assessment by the courts the possibility of applying Part 2 of Article 1.7. Code of Administrative Offenses of the Russian Federation in cases of cancellation of a mandatory requirement as part of the implementation of the "regulatory guillotine" mechanism. The controversial issues of extending the retroactive force of a law that abrogates administrative liability for a committed administrative offense to blanket norms of legislation are always in the focus of attention of the doctrine of administrative law [22, 23] and the abolition of mandatory requirements within the "regulatory guillotine" has complemented them. Noting the differing practice of applying Part 2 of Article 1.7. Code of Administrative Offenses of the Russian Federation in the cases under consideration[16], we share the thesis that "this is not about a substantive change in the relevant mandatory rules and requirements, but about the application of a special mechanism of legal influence aimed at optimizing control and supervisory activities and streamlining legislation on mandatory requirements. At the same time, the mandatory nature of the relevant requirements … the mechanism of the "regulatory guillotine" does not cancel and cannot in this regard be considered as a way of presenting a softer administrative-tort law, therefore, in the case under consideration we are not talking specifically about the retroactive force of the relevant norms.[17]"

3.The influence of the procedural form of identifying violations of mandatory requirements on the application of the rules for imposing administrative penalties

Remarkable changes in the practice of applying legislation on administrative offenses are associated with the implementation of the Federal Law of March 26, 2022 No. 70-FL "On Amendments to the Code of the Russian Federation on Administrative Offenses" and the Federal Law of July 14, 2022 No. 290-FL "On Amendments to the Code of the Russian Federation on administrative offenses and Article 1 of the Federal Law "On Amendments to the Code of the Russian Federation on Administrative Offences". The purpose of the new edition of administrative tort legislation is the liberalization of administrative liability for the commission of administrative offenses in the field of

[15] It is important to note that Article 24.5. The Code of Administrative Offenses of the Russian Federation was supplemented by Federal Law No. 29-FZ of February 24, 2021 "On Amendments to Article 24.5 of the Code of the Russian Federation on Administrative Offenses", the wording came into force on March 7, 2021, while Law No. 247-FL came into force on 1 November 2020. In fact, before the addition of Article 24.5. The Code of Administrative Offenses of the Russian Federation, a circumstance excluding proceedings in a case of an administrative offense, was established by Law No. 247-FL, which goes beyond the scope of the law and does not correspond to Part 1 of Article 1.3. Code of Administrative Offenses of the Russian Federation.

[16] Resolution of the Eighteenth Arbitration Court of Appeal dated 02/24/2022 in case No. A7261111/2021, Resolution of the Third Cassation Court of General Jurisdiction dated 03/14/2022 in case No. 16-574/2022, Resolution of the Arbitration Court of the Volga-Vyatka District dated 04/26/2022 No. F01-858 /2022 in the case No. A82-2209/2021, Resolution of the Arbitration Court of the Volga District of August 13, 2021 No. F06-5687/2021 in case No. A57-32469/2020, Decision of the Primorsky Regional Court of December 21, 2021 No. 21-1311/2021

[17] Resolution of the Arbitration Court of the Ural District dated June 17, 2022 No. F09-3207/22 in the case No. A76-21111/2021

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business activity[18].

At the same time, in relation to the rules for imposing an administrative penalty and the execution of a decision to impose an administrative fine, the liberalization of administrative sanctions is complemented by the conditions for their application. As one of the conditions, the legislator determined the procedural form of identifying an administrative offense - if the administrative offense was detected "during the implementation of state control (supervision), municipal control." Taking into account the complex system of legislation in the field of control and supervisory activities [5, pp. 44-46; 13, pp. 791-792], such a formulation expectedly raised questions related to the application of the norms of the Code of Administrative Offenses of the Russian Federation, and updated the discussion about the definition of the concepts of "state control" and "supervision" [5, pp. 8-15]. At the moment, we can state the established approach to the interpretation of the concept of "state control (supervision)" for the purposes of applying the rules for the appointment and execution of administrative punishment. The courts consider this concept in a broad meaning, without limiting it to the field of Laws No. 294-FL, No. 247-FL[19]. A different interpretation, taking into account the list of types of control (supervision), to the organization and implementation of which the provisions of Law No. 248-FL and Law No. 294-FL do not apply, will lead to the fact that the application of the Code of Administrative Offenses of the Russian Federation will depend not on the conditions established by the code, but on the type of control (supervisory) activity, inspection and the specific state (municipal) authority whose competence includes carrying out such control (supervisory) activities. It is noteworthy that a broad interpretation is also used when applying Part 5 of Article 4.4. Code of Administrative Offenses of the Russian Federation[20], despite the fact that in the norm itself the condition is formulated differently - an administrative offense was detected "during one control (supervisory) event during the implementation of state control (supervision), municipal control", in turn "a control (supervisory) event" – term of Law No. 248-FL. We believe that this approach deserves support. By defining the concept of "state control (supervision)" in a broad sense for the purpose of applying the provisions of the Code of Administrative Offenses of the Russian Federation, the courts thereby ensure compliance with the principle of equality of all before the law[21].

The practice forms differently in cases where an administrative offense is revealed during prosecutorial supervision. The different approach is due to the fact that, according to Law No. 248-FL, state control (supervision) and municipal control do not include the activities of the prosecutor's office in the implementation of prosecutorial supervision. Refusing to interpret the concept of "state control (supervision) in a broad sense" in relation to prosecutorial supervision, the courts refer to paragraph 7 of part 3 of article 1 of Law No. 248-FL[22]. It should be noted that the doctrine also draws attention to the need to distinguish between prosecutorial supervision and control exercised by administrative bodies [12, p. 21-22; 24; 25]. It seems that the isolation of prosecutorial supervision is

[18] Explanatory note to the draft federal law "On Amendments to the Code of the Russian Federation on Administrative Offenses." Archive of the system for supporting legislative activity. https://sozd.duma.gov.ru/bill/42172-8 (Date of access: 04/10/2024)

[19] Resolution of the Arbitration Court of the East Siberian District dated December 29, 2022 No. F02-6304/2022 in the case No. A33-9169/2022, Resolution of the Arbitration Court of the Ural District dated February 22, 2024 No. F09-9664/23 in the case No. A76-18101/2023

[20] Resolution of the Seventh Arbitration Court of Appeal dated January 11, 2024 in case No. A67-5768/2023, Resolution of the Fourteenth Arbitration Court of Appeal dated December 20, 2023 in case No. A05-8867/2023

[21] A similar position was outlined by the Supreme Court of the Russian Federation before amendments were made to the Code of Administrative Offenses of the Russian Federation in 2022, indicating that "the procedure for identifying the fact of committing an offense or the method of such identification does not relate to the circumstances that are taken into account when imposing punishment". Ruling of the Supreme Court of the Russian Federation dated 02.08.2019 No. 307-ES19-12049 in case No. A56-154322/2018

[22] Resolution of the First Cassation Court of General Jurisdiction dated September 12, 2023 No. 16-4766/2023, Resolution of the Seventh Cassation Court of General Jurisdiction dated September 14, 2023 No. 16-4233/2023, etc.

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important for the application of legislation regarding the organization and implementation of control and supervisory activities. As for the application of the provisions of the Code of Administrative Offenses of the Russian Federation, here the definition of the concept of "state control (supervision)" in a narrow sense leads to a deviation from the principle of equality of all before the law.

4. Changes in the procedure for initiating a case of an administrative offense

Another significant change in the provisions of the Code of Administrative Offenses of the Russian Federation and the corresponding practice of application was a change in the procedure for initiating a case on an administrative offense[23]. Scientific discussions about the criteria for distinguishing between control and supervisory proceedings and proceedings in cases of administrative offenses [13], as well as determining the sequence of implementation of control, supervisory and administrative-jurisdictional functions [26], do not lose relevance. This is not the first time that the legislator has made an attempt to exclude the substitution of control and supervisory activities with proceedings in cases of administrative offenses[24].

For the practice of applying the new version of Article 28.1. The Code of Administrative Offenses of the Russian Federation has the following meaning. Firstly, the legislator has defined two models for initiating a case: the general procedure and the exception established by part 3.1. Code of Administrative Offenses of the Russian Federation. In the latter case, the condition for initiating a case of an administrative offense with some reservations is carrying out a control (supervisory) action in cooperation with a controlled person, checking, performing a control (supervisory) action. An exception applies in those cases where the offense is perfomed in non-compliance with mandatory requirements, the assessment of compliance of them is the subject of state control (supervision), municipal control[25]. If a mandatory requirement is not the subject of state control (supervision), the general procedure for initiating a case is applied[26]. Secondly, the exception applies in the system with paragraphs 1-3 of part 1 of Article 28.1. Code of Administrative Offenses of the Russian Federation, i.e. applies to all reasons listed in the specified paragraphs. That is why the courts proceed from the fact that the assessment of sufficient data to resolve the issue of bringing to administrative liability can be carried out only based on the results of a control (supervisory) event in interaction with a controlled person[27]. Nevertheless, an analysis of the practice of applying the norm also reveals a different approach in relation to one of the reasons - messages and statements of individuals and legal entities indicating the presence of an administrative offense[28]. It is worth mentioning that within differing approaches courts use in their argumentation the position of the Supreme Court of the Russian Federation in one case[29].

[23] Changes were made by Federal Law No. 290-FL of July 14, 2022 "On Amendments to the Code of the Russian Federation on Administrative Offenses and Article 1 of the Federal Law "On Amendments to the Code of the Russian Federation on Administrative Offenses"

[24] First edition of Article 28.1. The Code of Administrative Offenses of the Russian Federation is associated with the adoption of the Federal Law of October 14, 2014 No. 307-FL "On amendments to the Code of the Russian Federation on Administrative Offenses and certain legislative acts of the Russian Federation and on the recognition as invalid of certain provisions of legislative acts of the Russian Federation in connection with the clarification of the powers of state authorities and municipal bodies in terms of the implementation of state control (supervision) and municipal control"

[25] Resolution of the Arbitration Court of the Volga-Vyatka District dated April 17, 2023 No. F01-1455/2023 in the case No. A28-8894/2022

[26] Resolution of the Arbitration Court of the Ural District dated 08/04/2023 No. F09-4653/23 in the case No. A71-18747/202

[27] Appeal ruling of the Sverdlovsk Regional Court dated November 16, 2023 in case No. 33a-17298/2023

[28] Resolution of the Arbitration Court of the Volga-Vyatka District dated 03/06/2023 No. F01-65/2023 in case No. A43-21226/2022, Resolution of the Arbitration Court of the Moscow District dated 05/02/2023 No. F05-7883/2023 in the case No. A40-99537/2022

[29] Decision dated August 30, 2022 No. AKPI22-494, Determination of the Appeal Board of the Supreme Court of the Russian Federation dated November 24, 2022 No. APL22-503

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Taking into consideration the growing number of appeals against rulings refusing to initiate proceedings on an administrative offense[30], we believe that in order to ensure equal practice in the application of these norms by courts, there is a necessity for clarification by the Supreme Court of the Russian Federation of the issues of application by courts of Article 28.1. Code of Administrative Offenses of the Russian Federation in the system with legislation on control and supervisory activities.

5. Conclusions

In conclusion, stating the influence of legislation on state control (supervision) on the development of legislation on administrative offenses and the practice of its application, it can be noted the lack of unity in the practice of applying a number of norms. Successful harmonization of legislation in the areas of our consideration based on the conditions of the doctrine of administrative law will contribute to a equal and systematic interpretation and application of regulations.

[30] The practice of handling complaints is also not uniform. See, for example, Resolution of the Arbitration Court of the Moscow District dated 02/06/2023 No. F05-28219/2022 in case No. A40-98507/2022

ISSN 2542-1514 (Print)

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