

PROBLEMS OF DEVELOPMENT OF STATE CONTROL AND SUPERVISION IN THE CONTEXT OF LEGISLATIVE REFORM

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The subject. The system of state control and supervision in the Russian Federation was chosen as the subject of research. The relevance of the article is due to the need to find a balance between improving the level of law and security in various areas of business and reducing administrative pressure on business entities during control and supervisory activities.

The purpose of the article is the goal is to substantiate the scientific hypothesis that the existing system of state control and supervision in Russia needs further improvement despite the performing legislative reform.

The methodological basis for the study: general scientific methods (analysis, synthesis, comparison, description) as well as legal interpretation of legislative acts and drafts.

Results, scope of application. The correlation of the terms "control" and "supervision" is defined, the stages of development of these institutions are highlighted, and the directions for improving the control and supervision activities of the state are outlined. Analysis of the features of legislative regulation of state control and supervision allowed us to identify three stages of its formation. Currently, the third stage of the control and supervision reform is being implemented in Russia. Analysis of the new Federal law "On state control (supervision) and municipal control in the Russian Federation" made it possible to note that this act has some obvious advantages in comparison to Law No. 294-FZ: the extension of the scope of the risk-based approach, clear regulation of all control activities, avoiding monopoly inspections as the main tool of control and supervision, use of preventive approach rather than punitive approach.

Conclusions. It is concluded that the new Federal law "On state control (supervision) and municipal control in the Russian Federation" provides for the development of a risk-based approach in the implementation of control and supervision activities, as well as a number of other innovations that can, if being properly implemented, reduce the administrative burden on economic entities, change the punitive direction of the control activities to a preventive one. At the same time, the problem of unification of the conceptual apparatus in this area remains unresolved.

1. The relationship between the concepts of "control" and "supervision".

Improving the control and supervisory activities of public authorities is of continuing importance for the public administration system as a whole. At the same time, the question of the relationship between the terms "control" and "supervision" remains debatable.

The existence of this discussion is explained by the lack of a legislative definition of these categories, as well as the fact that in a number of regulations these terms are used as synonyms. Currently, in the science of administrative law, there are several points of view regarding the relationship between the concepts of "control" and "supervision".

Accordingly, the essence of the first approach is reduced to the identification of these concepts. In many respects, this point of view is due to the position of the legislator: in Federal Law No. 294-FZ of December 26, 2008 "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (supervision) and municipal Control", in a number of articles of the Administrative Code of the Russian Federation, as well as in other regulatory legal acts, the legislator uses these terms as synonyms. Proponents of the second approach (for example, G. I. Petrov, N. G. Salishcheva, Yu. A. Tikhomirov et al.) consider supervision as an integral part of control. Some administrative scientists (F. S. Razarenov, E. V. Shorina, V. F. Lomkina, etc.), whose point of view seems to be the most reasonable, understand supervision as an independent, different from control method of ensuring discipline and legality, but similar to it in certain elements of content.

N. M. Konin defines control as an organizational and legal way of ensuring legality and state discipline and a specific form of activity of the relevant state bodies for systematic monitoring and supervision of the activities of managing entities in order to verify the compliance of their decisions and actions with the requirements of legality and state discipline [1, p.324]. According to the author, the control includes three mandatory elements:

1. Verification of the actual result of the activities of controlled entities in comparison with the expected, unlabeled indicators.

2. Verification of ways and means of achieving this result, compliance of the methods used in this process with the requirements of law, morality, ethics, business and service ethics, economic expediency.

3. Taking appropriate measures based on the results of monitoring, both of a positive organizational and incentive nature and of a negative nature.

Therefore, control is aimed not only at achieving law and order, but also at ensuring efficiency and expediency. On the basis of the position H.M. Horse, the distinction between control and supervision can be made on criteria such as the breadth of the subject scope, as well as specific methods for their implementation and legal impacts.

We consider it appropriate to Supplement the above list of grounds for distinguishing between the considered concepts the following criteria: a control, usually carried out in relation to subordinate organizational entities, monitoring is, by contrast, activities in respect of persons not subordinate to the Supervisory authorities; the object of control is a wider range of various activities controlled objects (discipline, finances, etc.), while the object of supervision are some special rules (sanitary, fire, etc.) [2, p. 87].

Thus, the concepts of "control" and "supervision" are not synonymous. The proposals expressed in science on the differentiation of the concepts of "control" and "supervision", which are separate, independent functions of state authorities, deserve support [3, p.17], as well as proposals on the consolidation of various procedures for their implementation.

2. Stages of formation of the Institute of State Control and Supervision in the Russian Federation.

We believe that from the point of view of the peculiarities of the legislative regulation of this institution, three stages of its formation can be distinguished.

The first stage involves acceptance pursuant to the Decree of the President of the Russian Federation from June 29, 1998 No. 730 "On measures for elimination of administrative barriers at development of entrepreneurship" of the Federal law of 8 August 2001 No. 134 - FZ "On protection of rights of legal entities and individual entrepreneurs when conducting state control (supervision) [4, p. 358]. Up to this point, the norms governing the activities of control and supervisory bodies were dispersed in various regulatory legal acts. Law No. 134-FZ partially laid the legal basis for the relationship between business and the state in the implementation of control and supervisory activities. However, this normative legal act was not without drawbacks. In particular, it gave State inspectors too wide a range of powers. For example, Law No. 134-FZ gave state inspectors the right to take a decision on their own initiative to suspend the activities of a controlled object, which created conditions for corruption, unfair competition and, as a result, generally hindered the economic development of the country. In the process of applying this act, it became clear that it does not cope with the tasks assigned to it, and also that the guarantees of the rights of entrepreneurs established by this normative legal act are insufficient.

This fact served as an incentive for the development and adoption of Federal Law No. 294 – FZ of December 26, 2008 "On the protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (supervision) and Municipal Control", which marked the second stage of the development of the institute of State control and supervision. After the adoption of this act, the degree of protection of the rights of economic entities has increased. Also, the role of the prosecutor's Office has significantly increased, which has been entrusted with the authority to form an annual federal plan for conducting scheduled inspections and coordinating unscheduled inspections, which has reduced the total number of inspections carried out.

It should be noted that with the adoption of Law No. 294-FZ, the frequency of amendments to the legislation on state control and supervision

has significantly increased. Thus, the Law No. 134-FZ for 7 years of its existence was changed only 10 times, while the Law No. 294-FZ for ten years of its operation was changed more than 60 times, while the changes occurred in two opposite directions: first created favorable conditions for entrepreneurial activity, the second, on the contrary, manifested in the extension of powers of Supervisory bodies and, as a consequence, the limitation of rights of economic entities [5, p. 41].

The changes to which Law No. 294 – FZ was subjected had a negative impact on the integrity of the legal regulation of the institute of State control and supervision. The analysis of judicial practice shows that economic entities face the following problems when conducting state control (supervision): restriction of the rights of economic entities by establishing various kinds of requirements and obligations that are not provided for by law; restriction of the freedom of economic activity of entrepreneurs in the exercise of state control (supervision), including conducting inspections without an order, violation of their frequency without determining the start and end time, requesting more than the amount of documentation provided for by law when conducting inspections [5, p.42]. Let us illustrate the abuses allowed in the implementation of state control and supervision by examples from judicial practice.

Thus, the decision of the Tenth Commercial Court of Appeal of 17.08.2017 N 10AP-11197/2017 in case No. A41-19887/17 left unchanged the decision of the Commercial Court of First Instance on declaring illegal and canceling the decision on bringing to administrative responsibility under Article 14.15 of the Administrative Code of the Russian Federation. The court's decision is motivated as follows: according to part 2 of art. 20 of Federal Law No. 294-FZ of 26.12.2008, gross violations of the requirements for organizing and conducting inspections include, in particular, conducting an inspection without an order or order from the head or deputy head of the state control body, and the administrative body has not provided evidence of issuing the relevant order or order.

Another example is the decision of the Commercial Court of the Volga-Vyatka District of

30.05.2017 No. F01-2004/2017 in the case N A43-32191/2014, which left unchanged the decision of the court of appeal to invalidate the order of the administrative body. The essence of the reasoning of the decision of the court of cassation was limited to the following arguments: the representative of a state body audit of the compliance of society norms of civil defense at the facility, the results of which issued the contested order was not previously scheduled in the annual plan of scheduled inspections, and meanwhile, in accordance with article 20 of the Federal law of 26.12.2008 No. 294-FZ of the absence of grounds of scheduled review applies to gross violations of the requirements for the organization and conduct of inspections .

And such examples, unfortunately, are not the only ones of their kind. As noted by Yu. A. Bratashova, even after two stages of the reform of control and supervisory activities, the issues of finding a balance between private interests and public influence do not lose their relevance [6, p.31].

In parallel with the amendments to Law No. 294-FZ of the Ministry of Economic Development of the Russian Federation in accordance with the order of the President of the Russian Federation of 30.12.2015 N Pr-2724 and paragraph 6 of the order of the Government of the Russian Federation of 01.04.2016 N 559-r, a draft Federal Law "On State Control (supervision) and municipal control in the Russian Federation" was prepared . This draft law is intended to create new legal and organizational foundations for the system of state control (supervision) and municipal control of the Russian Federation. This draft law became the starting point of the 3rd stage of reforming the control and supervisory activities. in February 2018, the bill was adopted by the State Duma of the Federal Assembly of the Russian Federation in the first reading. however, further the pace of reform decreased. Again in the public field the discussion on the reform of control and Supervisory activities back in the beginning of 2019 . The provisions of this bill, and the problem of improving the system of control and supervision in General has repeatedly been the subject of scientific discussions not only scientists, but also

representatives of public authorities and the business community [7, p. 64; 8, p. 20; 9, p. 35; 10, p. 22-23; 11, p. 85; 12, p. 104; 13, p. 84]. In May 2019, an updated draft law on control and supervisory activities was submitted, designed to become, as analysts note, a control and procedural code.

In the autumn of 2019, the relevant commission of the government of the Russian Federation approved two draft laws: on state control and on mandatory requirements. The submission of comments and their further discussion took a considerable period of time.

A real breakthrough was the adoption in July 2020 of Federal Law No. 248-FZ of 31.07.2020 "On State Control (Supervision) and Municipal Control in the Russian Federation" and Federal Law No. 247-FZ of 31.07.2020 "On Mandatory Requirements in the Russian Federation".

Most of the provisions of the acts will come into force on July 1, 2020.

3. Application of a risk-based approach in the implementation of state control and supervision and other novelties of the Law on State Control (Supervision) and Municipal Control.

Risk-based approaches are widely used in countries such as the United States, the United Kingdom, Australia and Canada. Some elements of the system under consideration are also found in Scandinavia, Germany and other European countries [14, p. 23].

The main content of the risk-based approach is reduced to the following: there are some objective patterns that with a certain probability entail violations of the law and create unsafe situations, therefore, it is considered sufficient to establish criteria and indicators of risk, so that only if they are available to carry out control and supervisory measures, and sometimes even refuse to carry them out [15, p. 15].

In our country, the risk-based approach has been applied relatively recently. Article 8.1 of Law No. 294-FZ, which deals with a risk-based approach to the organization of state control (supervision), is applied only from January 1, 2018. The list of types of federal state control (supervision) in respect of which a risk-based approach is applied is

determined by the Government of the Russian Federation.

The Federal Law "On State Control (Supervision) and Municipal Control in the Russian Federation" has a whole chapter devoted to the risk-oriented approach. Thus, an attempt was made to make the legal regulation of this institution more detailed.

The risk of causing harm (damage) in Law No. 248-FZ is proposed to understand the probability of occurrence of events that may result in causing harm (damage) to legally protected values of various scales and severity.

The assessment of the risk of causing harm (damage) is understood as the activity of the control (supervisory) body to determine the probability of risk and the scale of harm (damage) for legally protected values.

In accordance with the act, the objects of control must be assigned to one of the following categories of risk of causing harm (damage):

- 1) extremely high risk of causing harm (damage);
- 2) high risk of causing harm (damage);
- 3) significant risk of causing harm (damage);
- 4) average risk of causing harm (damage);
- 5) moderate risk of causing harm (damage);
- 6) low risk of causing harm (damage).

For each type of state control (supervision), municipal control, at least three categories of risk of causing harm (damage) must be provided, including, without fail, the category of low risk of causing harm (damage).

An obvious positive assessment is the fact that according to the creators of law no. 248-fz, the risk-oriented approach should be extended to all relations between inspectors and verifiable persons. Bill directly the dependence of the frequency of routine inspections from a risk category, which will allow you to go from flat and straightforward system of state control and supervision, provide for scheduled inspections not more than once every 3 years in respect of all regulated entities without regard to the specifics of their activities.

At the same time, to implement the provisions of Law No. 248-FZ, it is necessary to develop and adopt a significant number of subordinate regulatory legal acts, which will require considerable time and may last more than one year [14, p.27].

The Federal Law under consideration is referred to in the literature as the Code of Control and Procedure for a reason. It is the first time that the terms "control and supervisory measures" and "control and supervisory actions" are used. Among the undoubted advantages of the draft law should be noted the rejection of the monopoly of inspections as the main tool of control and supervisory activities. In particular, the draft law provides for the following types of control and supervisory measures: 1) field survey; 2) control purchase; 3) monitoring purchase; 4) sample control; 5) inspection visit; 6) raid; 7) inspection. Thus, the emphasis is placed on more rapid and less labor-intensive activities. Unfortunately, the legislator excluded from the final version of the law the legal definition of the term "control and supervisory action". At the stage of the bill that the regulatory event was defined as the complex of interrelated actions, including Supervisory actions by the inspector (inspectors) or inspector (inspectors) and involve them in the monitoring and supervision of production in order to assess the compliance of controlled entities with mandatory requirements.

The legislator referred to the number of control and supervisory actions: 1) inspection; 2) inspection; 3) interview; 4) receipt of written explanations; 5) request for documents; 6) sampling (samples); 7) instrumental examination; 8) test; 9) examination; 10) experiment. At the same time, only a strictly defined set of control and supervisory actions can be applied within the framework of a specific control and supervisory event. For example, during an inspection visit, only four control and supervisory actions can be performed: 1) examination; 2) interview; 3) receipt of written explanations; 4) instrumental examination.

A whole chapter (Chapter 10) is devoted to preventive measures (information; generalization of law enforcement practice; announcement of a warning; implementation of counseling; preventive

visit, etc.), which confirms the thesis about the reorientation of the punitive approach in the implementation of control in the direction of prevention.

For the first time, a separate chapter on pre-trial appeal of decisions, actions (inaction) of supervisory authorities and their officials appeared in the act on control and supervisory activities, which sets out in sufficient detail the procedure for filing and considering complaints, the list of decisions of supervisory authorities that can be the subject of appeal, requirements for the form and content of the complaint.

Law No. 294-FZ also provides for the right to appeal against the actions (inaction) of officials of the state control (supervision) body, the municipal control body, which resulted in a violation of the rights of a legal entity, an individual entrepreneur during an inspection, in an administrative and (or) judicial procedure in accordance with the legislation of the Russian Federation. However, there is no detailed regulation of the procedure for appealing decisions, actions and omissions of authorized entities in the current law.

The reduction of pressure on business entities that are members of self-regulatory organizations, should promote the possibility of recognition of results of self-regulatory organizations to exercise control over the activities of its members by the enforcement Agency based on the agreement on the recognition of the results of such self-regulatory organization. The conclusion of such an agreement is possible provided that the subject of control of the self-regulatory organization is identical to the subject of state control (supervision), municipal control, or is broader). at the same time, the introduction of this provision will require special control over self-regulating organizations in the exercise of their control function [16, p.59-60].

Thus, the Federal Law "On State Control (Supervision) and Municipal Control in the Russian Federation" provides for the development of a risk-based approach in the implementation of control and supervisory activities, as well as a number of other innovations that can, if properly implemented, reduce the administrative burden on

economic entities, change the punitive direction of the activities of control entities to preventive. However, more reasonable conclusions can be made only after the beginning of the application of Law No. 248-FZ. At the same time, it should be noted that the question of the relationship between the concepts of "control" and "supervision" has not been resolved in Law no. 248-fz.

Reforming the system of control and supervision is inextricably linked to the adoption along with the Federal law "On the state control (supervision) and municipal control in the Russian Federation" the Federal law "On mandatory requirements" and the new edition of the administrative code.

4. Conclusions.

As part of the study, the authors found that the concepts of "control" and "supervision" are not synonymous. Their differentiation is essential when choosing the forms and methods of influence of state bodies, and therefore needs to be legislated. The proposals expressed in science on the differentiation of the concepts of "control" and "supervision", which are separate, independent functions of state authorities, as well as proposals on the consolidation of various procedures for their implementation, deserve support.

Analysis of the features of legislative regulation of the institute of state control (supervision) allowed us to distinguish three stages of its formation. Currently, the third stage of the reform of control and supervisory activities is being implemented in our country. Analysis of the Federal law "On the state control (supervision) and municipal control in the Russian Federation" made it possible to note that the bill has some obvious advantages in comparison to Law No. 294-FZ: the extension of the scope of the risk-based approach when implementing the state control and supervision, clear regulation of all ongoing activities and avoiding monopoly inspections as the main tool of control and supervision, use of when exercising control (supervision) preventive rather than punitive approach. At the same time, the problem of unification of the conceptual apparatus in the field under consideration remains unresolved.

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