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ON THE ISSUE OF «LEGALIZATION» OF CRIMINAL LIABILITY OF LEGAL ENTITIES IN KAZAKHSTAN

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Abstract. *The article was prepared in connection with the proposed amendments to the current legislation of Kazakhstan. These include the Constitutional Law "On Amendments and Additions to the Constitutional Law 'On the Prosecutor's Office'", the Laws "On the return of illegally acquired assets to the State" and "On Amendments and additions to some legislative acts of the Republic of Kazakhstan on the return of illegally acquired assets to the state", "The amendments to the Code of the Republic of Kazakhstan on Administrative Offences" and "The amendments to the Code of the Republic of Kazakhstan on Taxes and other mandatory payments to the budget (Tax Code)".*

The main emphasis in this article was placed on the analysis of the main conceptual, legislative, unresolved issues of current legislation in relation to the existing institution of criminal liability of legal entities and legal mechanisms for the execution of criminal penalties against a legal entity.

The authors of the article unanimously conclude that the «legalization» of the institution of criminal liability of legal entities in the current national legislation will have a beneficial effect on the development of the country's economy. This will lead to an effective and proportionate solution to issues related to combating economic, environmental, corruption, and organized crime. It will contribute to the prevention of harm to many objects of criminal law protection (life and health of citizens, military, political, information and public security of citizens, public health).

Keywords: *criminal liability, legal entity, criminal law, lawmaking, administrative responsibility.*

ҚАЗАҚСТАНДАҒЫ ЗАҢДЫ ТҰЛҒАЛАРДЫҢ ҚЫЛМЫСТЫҚ ЖАУАПКЕРШІЛІГІН «ЗАҢДАСТЫРУ» МӘСЕЛЕСІНЕ

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Аннотация. *Мақала Қазақстанның қолданыстағы заңнамасының мынадай: «Прокуратура туралы» Конституциялық заңға өзгерістер мен толықтырулар енгізу туралы» Конституциялық заңмен, «Заңсыз сатып алынған активтерді мемлекетке қайтару туралы», «Заңсыз сатып алынған активтерді мемлекетке қайтару мәселелері бойынша Қазақстан Республикасының кейбір заңнамалық актілеріне өзгерістер мен толықтырулар енгізу туралы», «Қазақстан Республикасының Әкімшілік құқық бұзушылық туралы Кодексіне*

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толықтырулар енгізу туралы», «Салық және бюджетке төленетін басқа да міндетті төлемдер туралы» Қазақстан Республикасының кодексіне (Салық кодексі) толықтырулар енгізу туралы» заңдарын толықтыруға байланысты дайындалды.

Осы мақалада заңды тұлғалардың қолданыстағы қылмыстық жауаптылық институтына және заңды тұлғаға қатысты қылмыстық жазаны орындаудың құқықтық тетіктеріне қатысты қолданыстағы заңнаманың негізгі тұжырымдамалық, заң шығарушылық, шешілмеген мәселелерін талдауға баса назар аударылды.

Мақала авторлары заңды тұлғалардың қылмыстық жауапкершілік институтын қолданыстағы ұлттық заңнамада «заңдастыру» ел экономикасының дамуына пайдалы әсер етеді деген қорытындыға бірауыздан келеді. Бұл экономикалық, экологиялық, сыбайлас жемқорлыққа және ұйымдасқан қылмыстылыққа қарсы іс-қимыл мәселелерін тиімді және пропорционалды шешуге әкеледі. Көптеген қылмыстық-құқықтық қорғау объектілеріне (азаматтардың өмірі мен денсаулығы, әскери, саяси, ақпараттық және қоғамдық қауіпсіздік, халық денсаулығы) зиянның алдын алуға ықпал ететтін болады.

Түйінді сөздер: *қылмыстық жауапкершілік, заңды тұлға, қылмыстық заңнама, заң шығару, әкімшілік жауапкершілік.*

К ВОПРОСУ «ЛЕГАЛИЗАЦИИ» УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ ЮРИДИЧЕСКИХ ЛИЦ В КАЗАХСТАНЕ

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Аннотация. *Статья была подготовлена в связи с пополнением действующего законодательства Казахстана следующими нормативными актами: Конституционным законом «О внесении изменений и дополнений в Конституционный закон «О прокуратуре», Законами «О возврате государству незаконно приобретенных активов», «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам возврата государству незаконно приобретенных активов», «О внесении дополнений в Кодекс Республики Казахстан об административных правонарушениях», «О внесении дополнений в Кодекс Республики Казахстан «О налогах и других обязательных платежах в бюджет (Налоговый кодекс)».*

Основной акцент в данной статье был сделан на анализе основных концептуальных, законотворческих, нерешенных вопросах действующего законодательства в отношении существующего института уголовной ответственности юридических лиц и правовых механизмов исполнения в отношении юридического лица уголовного наказания.

Авторы статьи единодушно приходят к выводу о том, что «легализация» института уголовной ответственности юридических лиц в действующем национальном законодательстве окажет благотворное воздействие на развитие экономики страны. Это приведёт к эффективному и соразмерному решению вопросов противодействия экономической, экологической, коррупционной и организованной преступности. Будет способствовать превенции вреда многим объектам уголовно-правовой охраны (жизни и здоровья граждан, военной, политической, информационной и общественной безопасности граждан, здоровью населения).

Ключевые слова: *уголовная ответственность, юридическое лицо, уголовное законодательство, законотворчество, административная ответственность.*

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Introduction

The problem of properly understanding and recognizing the institute of criminal liability of legal entities, its legalization, and consequently, the formation of a unified investigative-prosecutorial and judicial (law enforcement) practice remains one of the complexes (but solvable) tasks.

The ultimate goal is to "legalize" this institute of liability on the territory of the Republic of Kazakhstan. Why "legalize" and not introduce? This issue will be discussed in detail below.

As a historical and legal note for those not familiar with the essence of the question, it is worth recalling the following:

Firstly, the process of bringing legal entities into the sphere of criminal law impact was activated in the 80s of the twentieth century, and especially in the 90s, in connection with the adoption of state criminal law codes. For example, the criminal liability of legal entities was established in the Netherlands in 1982, in Portugal in 1992, in France in 1995, in Finland in 1997, and the same year, this liability was introduced in neighboring China [1].

Currently, criminal liability of legal entities already exists in England, the USA, Canada, Scotland, Denmark, Norway, Finland, Japan, India, Moldova, Lithuania, Jordan, Lebanon, Syria, and other states.

Also author Malanchuk analyzes the doctrinal provisions of the criminal law of Ukraine and emphasizes that the issue of applying criminal liability to legal entities remains controversial, suggesting improvements to national legislation based on international experience and practices [2].

Secondly, it should be noted that in the theory of criminal law (already "sovereign" judgments, that is, within the framework of independent republics) proposals on the possibility of recognizing legal entities as subjects of crime began to be seriously discussed from 1991 [3]. By that time, supporters of criminal liability of legal entities in Russia included quite authoritative professors, such as A.V. Naumov (Criminal law in conditions of transition to a market economy // Soviet State and Law. 1991. No. 2. p. 35; also him. Enterprise at the dock // SO. 1992. No. 17, 18. p. 63), S.G. Kelina (Liability of legal entities in the draft of the new Criminal Code of the Russian Federation // Criminal Law: new ideas / Ed. by S.G. Kelina and A.V. Naumov. M., 1994. p. 50-60), A.S. Nikiforov (On the criminal liability of legal entities // Criminal Law: new ideas. p. 43-49), F.M. Reshetnikov, and others.

Pan Dunmei concludes that in the context of a risk society, the criminal liability of legal entities should be based not on harsher penalties, but on encouraging companies to implement compliance programs, which helps prevent internal risks and reduce the level of corporate crime [4].

In Kazakhstan, this problem (at an early stage) was considered in a scientific and legislative context by U.S. Jekebayev [5] (On the criminal liability of legal entities // News of the Academy of Sciences of the Republic of Kazakhstan. Series of social sciences, 1993, No. 4), A.K. Kanatov [6] (Criminal liability of legal entities // Law. Republican scientific journal. No. 7. - 1999); at the contemporary stage, by M.Ch. Kogamov [7] and others.

Thirdly, extensive theoretical discussions are currently being conducted, pointing out the shortcomings of "implementation" into the current criminal legislation of legal entities as subjects of criminal offenses (crimes).

Methods and materials

The article uses formal logical and dialectical methods, comparative legal, empirical analysis, as well as quantitative, qualitative and special methods of scientific research.

Results and discussion

Briefly, the following key issues emerge:

a) The prevailing, primary notion that only a natural person can be a subject of criminal liability. The category of "guilt" has become the main stumbling block in domestic criminal law. Most scholars focus their attention on this.

This "notion" formally stems from the well-known legal maxim expressed in the Latin formula: "Societas delinquere non potest" (a collective subject cannot be guilty of a crime), which, in turn, is based on the more well-known maxim: "Nulla poena sine culpa" (no punishment without guilt).

b) The realisation of the principles of personal responsibility and individualisation of criminal liability and punishment. The problems that arise include:

- 1. The distribution of the severity of criminal liability between a natural and a legal person;
- 2. It is wholly inappropriate to hold a manager responsible for actions committed while carrying out the functions of their

predecessor, particularly when those functions were being carried out at the time of discovering the criminal act.

c) Imposing criminal penalties on legal entities. The application of traditional punishments to legal entities is indicated to be futile, as they are unable to meet one of their universally recognised goals. Without delving into the debate surrounding the involvement of legal entities in criminal liability, it is sufficient to consider the legislative aspect of this issue.

Main part

1. In accordance with the decree of the Government of the Republic of Kazakhstan dated 30 April 2010 (No. 371)[2], a draft law of the Republic of Kazakhstan, entitled "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Introduction of Criminal Liability of Legal Entities", was submitted for consideration to the Mazhilis of the Parliament of the Republic of Kazakhstan., This draft law was developed in accordance with the instructions of the head of state dated December 2, 2009, No. 51-10.112 and item 5 of the Plan of the Government's legislative work for 2010[3]. The draft law proposed amendments to the Civil, Criminal, Criminal Procedure, Criminal Executive Codes, and other legislative acts.

In the explanatory note to the draft law, the following directions are indicated as justifications:

a) the introduction of criminal liability for legal entities for a number of economic, environmental, corruption, and terrorist crimes;

b) the regulation of the procedure for conducting cases of crimes committed by legal entities, as well as the execution of criminal penalties applied to legal entities;

The introduction of criminal liability for legal entities will result in an increase in the level of compensation for damage caused by criminal activities, as it will be possible to apply property sanctions directly to legal entities in cases where they are found to be culpable.

Furthermore, the Committee on Legislation and Judicial-Legal Reform of the Mazhilis of the Parliament considered the proposed draft law and reached a favourable conclusion (No. 5-4-1605 dated 15 December 2010). In particular, it was emphasised that the objective of the draft legislation is to contain and prevent the commission of crimes by those in managerial or supervisory roles within companies, in the interests of the legal entity and its founders.

In turn, by the resolution of the Mazhilis of the Parliament of the Republic of Kazakhstan (No. 1584 - IV MP, dated December 22, 2010), this draft law was approved in the first reading.

In conclusion, the government of the Republic of Kazakhstan did not address the fundamental comments and proposals submitted by the relevant central government bodies, including the National Bank of the Republic of Kazakhstan. Consequently, the government withdrew the draft law from the Mazhilis of the Parliament of the Republic of Kazakhstan. The draft law was entitled "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Introduction of Criminal Liability of Legal Entities" (No. 324 dated 12 March 2012). In our opinion, on a medium-term basis, the issue of introducing criminal liability for legal entities may be updated (taking into account the adjustment of the final version) in the Mazhilis of the Parliament.

2. Taking into account the above-mentioned (theoretical, scientific-practical, legislative, and foreign experience) aspects of the institution of criminal liability of legal entities, the issue of the "legalization" of the latter is based on the following legal assumptions and realities.

A) According to paragraph 3 of Article 1 of the Criminal Code of the Republic of Kazakhstan[4], "International treaties ratified by the Republic of Kazakhstan have priority over this Code. The procedure and conditions for the application of international treaties on the territory of the Republic of Kazakhstan, of which the Republic of Kazakhstan is a participant, are determined by the legislation of the Republic of Kazakhstan".

Kazakhstan (by the Law of the Republic of Kazakhstan dated May 4, 2008, No. 31-IV)[5] ratified the United Nations Convention against

[2] *Постановление Правительства Республики Казахстан от 30 апреля 2010 года № 371 «О проекте Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросу введения уголовной ответственности юридических лиц» // — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/P100000371_ ИПС «Әділет» (Дата обращения: 15.06.2024)*

[3] *Постановление Правительства Республики Казахстан от 2 марта 2010 года № 162 «О Плане законопроектных работ Правительства Республики Казахстан на 2010 год» // — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/P100000162_ ИПС «Әділет» (Дата обращения: 15.06.2024)*

[4] *Кодекс Республики Казахстан от 3 июля 2014 года № 226-V ЗРК «Уголовный кодекс Республики Казахстан» // — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/K1400000226 ИПС «Әділет» (Дата обращения: 20.06.2024)*

[5] *Закон Республики Казахстан от 4 мая 2008 года N 31-IV «О ратификации Конвенции Организации Объединенных*

Corruption dated October 31, 2003. In turn, Article 26 "Liability of Legal entities" of this Convention provides for the following:

"1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal entities for participation in offenses recognized as such in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal entities may be criminal, civil, or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offenses.

4. Each State Party shall, in particular, ensure that legal entities held liable in accordance with this article are subject to effective, proportionate, and dissuasive criminal or non-criminal sanctions, including monetary sanctions".

In our opinion, it is also necessary to meet the requirements for the implementation of the provisions of the United Nations Convention against Corruption dated October 31, 2003, in the current legislation of the Republic of Kazakhstan on the criminal liability of legal entities.

B) Meanwhile, in our opinion, the criminal liability of legal entities in Kazakhstan has long existed. The legislator (whether willingly or unwillingly) simply masked the criminal liability of legal entities with other types of their liability (administrative, tax, environmental, antimonopoly, etc.).

The legislative case is the administrative liability of legal entities, which was first introduced on January 30, 2001, in the "old" Administrative Code of the Republic of Kazakhstan. Currently, this is the NEW Administrative Code of the Republic of Kazakhstan dated July 5, 2014.

One of the common types of administrative penalties is an administrative fine (Article 44). Clause 2 of this article mentions fines against legal entities:

- The size of the fine imposed on small businesses and non-profit organizations shall not exceed seven hundred and fifty monthly calculation indices.
- The size of the fine imposed on medium businesses shall not exceed one thousand monthly calculation indices.
- The size of the fine imposed on large businesses shall not exceed two thousand monthly calculation indices.

AT THE SAME TIME, in Clause 1 of this same article, it is noted:

In cases provided for in the articles of the Special Part of this section, the size of the fine is expressed as a percentage of:

1. the rates of payment for negative environmental impact, as well as the amounts of economic benefit obtained as a result of violations of environmental legislation of the Republic of Kazakhstan; 1-1) the amounts of damage caused to subsurface resources as a result of violations of state property rights to subsurface resources;

2. the amounts of unfulfilled or improperly fulfilled tax obligations;

3. the amounts of unpaid (unlisted), untimely, and (or) incompletely paid (unlisted) social payments;

4. the amounts of unlisted, untimely, and (or) incompletely calculated, withheld (calculated), and (or) paid (unlisted) mandatory pension contributions and mandatory professional pension contributions;

5. the amounts of the cost of excisable goods received as a result of illegal entrepreneurship;

6. the amounts not accounted for in accordance with the requirements of the legislation of the Republic of Kazakhstan on accounting and financial reporting or improperly accounted for;

7. the amounts of transactions (operations) carried out in violation of the financial legislation of the Republic of Kazakhstan;

8. the amounts of income (revenue) received as a result of monopolistic activities or violations of the legislation of the Republic of Kazakhstan on electric power, natural monopolies, the legislation of the Republic of Kazakhstan regulating the activities of the financial market and financial organizations;

9. the cost of energy resources used in excess of the established standards for the period in which the violation occurred, but not more than one year;

10. the amounts of unaccounted national and foreign currency;

11. the amounts of unpaid (unlisted), untimely, and (or) incompletely paid (unlisted) contributions and (or) premiums for mandatory social health insurance.

The ABOVE-MENTIONED convinces us of the fact of "masking" the criminal-legal nature of the sanctions imposed on legal entities and creating the illusion of non-criminal nature of

Наций против коррупции» // — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/Z080000031_ ИПС «Әділет» (Дата обращения: 20.06.2024)

various tax, antimonopoly, environmental, and other fines and other measures.

It should be noted that such "fine sizes, expressed as percentages" for small, medium, and large enterprises, as well as non-commercial organizations, depend on:

- the amount of economic benefit;
- the amount of damage caused to subsurface resources;
- the amount of the transaction (operation);
- and others.

It is extremely important not to resist criticism, even at the initial stages of interaction. This extends beyond the conventional boundaries of administrative and legal relations. Concurrently, the legislator, cognizant that "fines in percentages" for legal entities will unavoidably encroach upon the criminal-legal domain, endeavored to establish a maximum ceiling for sanctions (in the Administrative Code of the Republic of Kazakhstan) for legal entities at "a sum not exceeding two thousand monthly calculation indices." As of the present date (May 27, 2024), this equates to a maximum of 7,384,000 tenge ($16,600 USD).

C) The introduction of administrative liability for legal entities in Kazakhstan on 30 January 2001 (and civil-legal liability even earlier) has resulted in a significant increase in the number of cases being brought before the courts. This has highlighted the issue of the "Procrustean bed" of administrative fines for legal entities (which are not criminal sanctions), which are nevertheless treated as such by the legal system. First CASE. Fine of $138 billion.

In 2023, Kazakhstan, through the authorized body "PSA" LLP (acting on behalf of the Ministry of Energy of the Republic of Kazakhstan), filed a lawsuit against the operator of the North Caspian project (NCOC), whose shareholders are developing the oil field Kashagan. The essence of the lawsuit: Kazakhstan demanded investments of $60 billion plus $13 billion of "unauthorized expenses" for the period of 2010-2018. According to Bloomberg, Kazakhstan "added" a fine of $138 billion to this lawsuit for lost profits and interests.

Second CASE. Events of 2003.

The Healthcare Department of the South Kazakhstan region, in violation of the Law "On Licensing" and orders of the Ministry of Health, grossly violated the procedure for issuing licenses for medical and pharmaceutical activities. As a result, 62 licenses were illegally issued for activities related to the turnover of narcotic drugs and psychotropic substances.

In the Kyzylorda region, in pharmacies belonging to "Pharmatsiya" OJSC, "Zheldorpharmatsiya" CJSC, "Hurricane Kumkol-Munay" Medical Center OJSC, the narcotic drugs were stored in premises that did not meet the requirements, and there was a widespread lack of fire alarm systems.

Many heads of medical and preventive institutions did not ensure the accounting of ampoules from under narcotic drugs. The records in the disposal acts did not match the data entered in the medical history. In Kostanay, during the inspection of "Hippocrates" LLP discrepancies were found in five cases between the acts of disposal and the medical histories of patients. For example, according to the medical history of citizen Makarenko and the narcotic drug records, 11 ampoules were used, while in fact, 14 ampoules were disposed of.

The Prosecutor's Office of Almaty city revealed facts where the conditions of storage, certification of narcotic drugs in "Medical Service of Transport" AB OJSC, "Interpharma – K" OJSC were violated, and drugs were stored with expired shelf life. Without certification, drugs were found in "Interpharma – K" OJSC, "Astana – Dari" LLP. In our opinion, precisely the encroachment on the certification and storage of narcotic drugs is a sign of a serious violation of the current legislation and bears a criminal-legal nature.

Third CASE. Work of compliance services.

At present (as of January 1, 2024), in Kazakhstan, 6000 anti-corruption compliance services are operating in the state and quasi-state sector (QSS) (336 in the Central Government Office; 5619 in Ministries; 176 in National Companies). Only in Samruk-Kazyna JSC, there are 279 portfolio companies.

Foreign experience of compliance services activities includes the following examples of fines and sanctions against legal entities:

- The cryptocurrency exchange Binance - $4.3 billion;
- META - $1.2 billion for violation of GDPR (General Data Protection Regulation);
- Vimpelcom and the Swedish-Finnish TeliaSonera - $1.76 billion for bribes;
- Beeline Uzbekistan - $3.3 million for non-compliance with radio communication standards;
- An Apple manager - $4.5 million for passing secret information to the company's suppliers.

3. In his address to the people of Kazakhstan on September 1, 2022, "A FAIR STATE. ONE NATION. PROSPEROUS SOCIETY" the head of state instructed a revision of the Criminal

and Criminal Procedure Codes to eliminate anything that is ineffective or hinders justice.

At present, the Mazhilis of the Parliament is conducting thorough work on the draft law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Issues of Optimizing the Criminal, Criminal Procedure and Criminal Executive Codes".

FOR REFERENCE. The draft law regarding the improvement of the Criminal Code provides for:

- strengthening criminal liability for certain types of crimes against property, economic crimes, and other socially dangerous acts, as well as introducing criminal liability for illegal actions of persons held in institutions of the penal system, detention centers, temporary detention facilities;
- improving the characteristics of certain components of criminal offenses, including the characteristics of group disobedience in institutions providing isolation from society;
- decriminalizing the illegal transportation and circulation of oil and oil products in insignificant amounts;
- ensuring the principle of the inevitability of criminal liability with the establishment of punishability for attempted minor offenses and crimes of minor gravity;
- transforming certain types of additional penalties into measures of criminal law impact with the establishment of the possibility of their application to persons released from criminal liability or punishment;
- improving the rules for assigning and executing certain types of punishments, including the correction of the concept of criminal arrest and the mitigation of detention conditions, and introducing the possibility of assignment for committing certain types of minor offenses.

MEANWHILE, institutional and substantive problems of enshrining norms on the criminal liability of legal entities remain unaddressed.

Recall that on July 12, 2023, the Law of the Republic of Kazakhstan "On the Return of Illegally Acquired Assets to the State" was adopted.

FOR REFERENCE. As is known, as a result of the "accelerated" work of the Parliament (the draft laws were registered in the Mazhilis on May 23, 2023; July 12, 2023, is the date of signing of the laws by the Head of State), five legislative acts were adopted: the Constitutional Law of the Republic of Kazakhstan "On Amendments and Additions to the Constitutional Law 'On the Prosecutor's Office'", the laws of the Republic of Kazakhstan "On the Return of Illegally Acquired Assets to the State", "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Return of Illegally Acquired Assets to the State", "On Amendments and Additions to the Code of the Republic of Kazakhstan on Administrative Offenses", "On Amendments to the Code of the Republic of Kazakhstan on Taxes and Other Mandatory Payments to the Budget (Tax Code)".

In this regard, it is necessary to activate the activities of the Working Group under the Administration of the President of the Republic of Kazakhstan on reforming the law enforcement system of the country, which is also working on the issue of legislative regulation of the institution of financial investigation as part of the follow the money.

Simultaneously, the government developed an Action Plan for implementing the Concept of Anti-Corruption Policy of the Republic of Kazakhstan for 2022-2026, which includes introducing the institution of parallel financial investigation (follow the money). The tasks of this type of pre-trial investigation will be the search for stolen assets and criminal incomes, comparison of incomes and expenses, and the return and confiscation of assets.

In our opinion, the introduction of the institution of parallel financial investigation into the national (material and procedural) criminal legislation will require the elaboration of the introduction of the analyzed institution of criminal liability of legal entities.

4. Another convincing example of the "legalization" of criminal liability of legal entities is the legalized administrative liability of legal entities, in particular, the presence in the Administrative Code of the Republic of Kazakhstan of 79 compositions of administrative offenses:

- not having signs of a criminally punishable act;
- not containing signs of a criminally punishable act.

These are articles 73, 76, 79, 80, 85, 135, 137, 147-1, and so on, up to articles 676, 677, 678.

JUSTIFICATION. According to legislative logic, if there are compositions of administrative offenses for legal entities WITHOUT SIGNS OF A CRIMINALLY PUNISHABLE ACT, then, accordingly, there should be compositions of paired criminal offenses in the current Criminal Code of the Republic of Kazakhstan (that is, in the Administrative Code). However, there are none of them.

It turns out that legal entities, that is, subjects

of small, medium, and large businesses, violating the criminal law, remain unpunished. And of course, individuals will be held criminally responsible for them.

Let us take, for example, article 159 (Administrative Code) on Monopolistic Activities.

FOR REFERENCE.

1. In accordance with the Entrepreneurial Code of the Republic of Kazakhstan, anti-competitive agreements between market entities are prohibited unless they contain indications of a criminal act. In such cases, the subjects involved, whether small or medium businesses or non-commercial organizations, are liable to a fine of three percent of their income (revenue) generated from monopolistic activities. For large businesses, the fine increases to five percent of their income. Additionally, the confiscation of the monopolistic income gained from these activities is permitted, although this may not exceed one year.

2. The Entrepreneurial Code of the Republic of Kazakhstan prohibits anti-competitive concerted actions of market entities that do not constitute a criminally punishable act. In such cases, the code mandates the imposition of a fine on subjects of small or medium businesses or non-commercial organizations equal to three percent of the income (revenue) received as a result of monopolistic activities, with the confiscation of the monopolistic income received as a result of monopolistic activities. The fine is to be paid within a period of one year.

3. Abuse by market entities of their dominant or monopolistic position by establishing, maintaining monopolistically high (low) or monopolistically low prices, prohibited by the Entrepreneurial Code of the Republic of Kazakhstan, if these actions do not contain signs of a criminally punishable act, – entail a fine on subjects of small or medium businesses or non-commercial organizations in the amount of three percent, and on subjects of large businesses in the amount of five percent of the income (revenue) received as a result of monopolistic activities, with the confiscation of the monopolistic income received as a result of monopolistic activities, but not more than for one year.

3-1. Abuse by market entities of their dominant or monopolistic position, except for the establishment, maintenance of monopolistically high (low) or monopolistically low prices, prohibited by the Entrepreneurial Code of the Republic of Kazakhstan, if these actions do not contain signs of a criminally punishable act, – entail a fine on subjects of small or medium businesses or non-commercial organizations in the amount of three percent, and on subjects of large businesses in the amount of five percent of the income (revenue) received as a result of monopolistic activities.

4. Actions provided for in parts one, two, three, and 3-1 of this article, committed repeatedly within a year after the imposition of an administrative penalty, entail a fine on subjects of small or medium businesses or non-commercial organizations in the amount of five percent, and on subjects of large businesses in the amount of ten percent of the income (revenue) received as a result of monopolistic activities, with the confiscation of the monopolistic income received as a result of monopolistic activities, but not more than for one year.

5. Coordination of physical and (or) legal persons of the economic activities of market entities, capable of leading to or leading to any form of anti-competitive agreements of market entities prohibited by the Entrepreneurial Code of the Republic of Kazakhstan, entails a fine on physical persons in the amount of fifty, on subjects of small businesses or non-commercial organizations in the amount of fifty, on subjects of medium businesses in the amount of five hundred, and on subjects of large businesses in the amount of one thousand monthly calculation indices.

6. An action provided for in part five of this article, committed repeatedly within a year after the imposition of an administrative penalty, entails a fine on physical persons in the amount of two hundred, on subjects of small businesses or non-commercial organizations in the amount of three hundred fifty, on subjects of medium businesses in the amount of seven hundred, and on subjects of large businesses in the amount of one thousand five hundred monthly calculation indices.

The maximum size of the fine for monopolistic activity is only one thousand five hundred monthly calculation indices if these actions do not contain signs of a criminally punishable act in relation to a subject of large business.

Note that there is a paired article 221 on Monopolistic Activities in the Criminal Code of the Republic of Kazakhstan.

FOR REFERENCE.

1. The establishment and (or) maintenance by market entities of monopolistically high (low) or agreed prices, the establishment of restrictions on the resale of goods (works, services) purchased from a market entity occupying a dominant or monopolistic position,

according to territorial characteristics, the number or price, the division of commodity markets according to territorial characteristics, the assortment of goods (works, services), the volume of their sales or purchases, the circle of sellers or buyers, as well as other actions aimed at restricting competition, if they caused significant damage to a citizen, organization, or state or are associated with deriving a large income by the market entity, are punishable by a fine of up to one thousand monthly calculation indices or corrective labor for the same amount, or by public works for up to four hundred hours, or by restriction of freedom for up to one year, or by imprisonment for the same period.

2. The same acts committed repeatedly or by a person using their official position, are punishable by a fine of up to three thousand monthly calculation indices or corrective labor for the same amount, or by public works for up to eight hundred hours, or by restriction of freedom for up to three years, or by imprisonment for the same period, with or without confiscation of property, with deprivation of the right to hold certain positions or engage in certain activities for up to three years or without it.

3. Acts provided for in parts one and two of this article, committed:

1) by a criminal group;

2) with the use of violence or the threat of its use, as well as the destruction or damage of another's property or the threat of its destruction or damage in the absence of signs of extortion, are punishable by restriction of freedom for up to six years or imprisonment for the same period, with or without confiscation of property.

This article does not correspond with the article of the Administrative Code. Meanwhile, it is evident to the naked eye that monopolistic activities by their nature are precisely inherent to legal entities. Everyone is familiar with the term “cartel agreements”, etc.

CASE. May 20, 2024.

The Agency for the Protection and Development of Competition (APDC) reported on an investigation, during which cases against several pharmaceutical companies were reviewed in court.

“Companies “KFK “Medservice plus” LLP, “Akniyet” LLP and “Stopharm” LLP were held accountable for participating in a cartel agreement during the procurement of services for the transportation and storage of medicines conducted by “SK-Pharmatsiya” LLP. As a result of the judicial proceedings, the organizations involved in the agreement were held administratively liable and fined a total of 342 million tenge”, the report says.

The court confirmed that these pharmaceutical companies had previously agreed on bids among themselves, creating fictional competition, which is a violation of the antimonopoly legislation of Kazakhstan.

Those who deny the criminal liability of legal entities contend that the issue is a contrivance and that all potential sanctions against a legal entity (monetary penalties, suspension of activities, or even a prohibition on it) are already embedded within administrative law, which provides for such liability. Nevertheless, this assertion is difficult to accept. It is not possible to circumvent the sectoral level of fines, which depends on the nature and degree of public danger of the act in question. The distinction between criminal law and administrative law is a fundamental one. It is a matter of public record that the financial penalties imposed by American courts on corporations can amount to millions or even billions of dollars. To illustrate, in the USA, the prominent corporation Siemens was convicted of criminal liability and sentenced to a fine of approximately 2 billion US dollars. It is evident that the imposition of fines of this magnitude is incongruous with the tenets of administrative law.

It would be reasonable to inquire whether such fines could be found in the Administrative Code of the Republic of Kazakhstan. A review of the current legislation (Administrative Code and Criminal Code) reveals numerous examples of violations of the principle of "parity." Article 176 of the Administrative Code and Article 237 of the Criminal Code, for instance, address improper actions during the rehabilitation and bankruptcy processes, among other matters.

It is established that an administrative offence differs from a criminal offence solely in regard to the degree of public danger, which is one of four mandatory signs distinguishing between the two. This signifies that the approval of the Administrative Code concerning the administrative liability of legal entities (from 30 January 2001 to the present) provides precise examples of the extent (and nature) of the public danger associated with the offence, ranging from administrative to criminal. The distinction between these two categories is subtle but significant.

Conclusion

The scope of administrative and civil law delicts does not always extend to encompass wrongful acts perpetrated by legal entities. In a number of instances, the existing administrative and civil law framework proves inadequate in addressing these acts (the aforementioned cases serve to illustrate this). It is indubitable that

a favourable solution to this problem will have a beneficial effect on the country's economic development. It should be noted that this problem is not limited to issues of combating economic, environmental, corruption, and organized crime. The solution will assist in the reduction of harm to a number of objects of criminal-legal protection, including the life and health of citizens, property, political, informational, and food security, and public health.

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