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ON THE THEORETICAL PROVISION OF THE STATUS OF A LAW CONSULTANT IN THE SPHERE OF ECONOMY

SUMMARY. This article is dedicated to the study of problems and deficiencies of legal regulation concerning organizational framework, status and activities of Russian law services in the sphere of economy. The author reminds that legal standing of several hundred thousand professionals in the mentioned sphere of law in contrast to their colleagues, specializing in other fields of law, is defined solely by the completely obsolete General Provision issued in 1972 which has actually become invalid to a great extent. The existing necessity of clarifying the concept of powers attributable to a commercial company's legal department, i.e. in defining whether this unit's authority rests in the company itself or its jurisdiction derives from the function of maintaining legality in the field of business activities, authorized by the state, is also subject to consideration. The latter solution would require official immunity from decisions taken by the administrator or the owner of a commercial company.

KEY WORDS. Law consultant, commerce, official immunity.

The legal service in Russia is carried out in four basic ways: by the associations of lawyers; by the specialized law firms; by so called "freelance" lawyers providing their services on the terms of contracts under the civil legislation of the Russian Federation (usually contracts of work and labor); but mostly by the in-house counsels working in a certain business entity on the basis of employment contract.

The headcount of specialists providing the last type of legal service can be defined by the number of business entities registered in our country.

According to the data of the Federal Registration Service as at the 1st of December 2012 there were 3 872 367 business organizations (legal entities) registered in the Unified State Register of Legal Entities (except for dissolved entities). Among them there are 358 general partnerships, 536 limited partnerships, 3 613 758 limited and superadded liability companies, 172 249 open and closed joint-stock companies, 18 181 production cooperatives, 11 293 unitary enterprises, 55 992 other business

entities. Aside from that, there are 623 123 noncommercial organizations such as consumer cooperatives, different state and municipal organizations, etc. which obviously carry out some business activities despite it is not their prime interest. Finally, there are 4 119 177 individual entrepreneurs and farm enterprises registered, among which there are 26 055 foreign citizens and 2 383 stateless individuals

It is obvious that the great part of the above-mentioned business entities and individual entrepreneurs can be called “dead souls” as they do not actually function and in some time will be excluded from the Unified State Register of Legal Entities . There is no doubt that the number of legal entities as well as the number of individual entrepreneurs and farm enterprises will be adjusted (it may happen that sufficiently adjusted) as a result of the implementation of correspondent enactments, connected with the improvement of the Civil Code of the Russian Federation (primarily, it will touch upon the classification and legal standing of different business entities).

In fact, all business entities and individual entrepreneurs permanently, seasonally, from time to time or for one time only need their activities to be supervised by a legal service. In most cases this legal service is provided by the in-house counsels, hence the total amount of such specialists goes beyond the total amount of their colleagues, practicing in other fields of law, such as judges, attorneys, investigators, notaries, etc.

Practically each of the above-mentioned groups of professional lawyers has a proficient legal basis concerning not only their status but also different procedures of their activities, whereas in-house counsels of numerous business entities do not.

In addition, the overwhelming majority of law specialists working in law enforcement, regulatory, superintendent agencies and such like, graduates in law, consider the job of the in-house counsel to be potentially available to them without any special professional re-training. In practice, such situations turn out to be great problems with negative consequences for both the lawyer and the company-employer.

The problem is neither in the fact that to be a good in-house counsel, a high degree of professional skills (not less than the professional skills of judges, investigators, etc.) concerning the matters of the legal service in the economic sphere are needed, nor in the absence of proper education for in-house counsels in the Universities of Russia (this is the consequence).

The deeper causes of such situations are as following:

1. Until now, the only regulatory legal act which determines in-house counsel’s status and sphere of legal activities in business is the General Provision on the legal department, chief legal counsel of the legal ministry or branch, the Executive Committee of the Deputies of working people, enterprises, organizations or institutes enacted in the Bylaw №467 of the Council of Ministers of the Soviet Union dated July 22nd 1972 (hereafter – the General Provision of 1972). Among the main objectives of the legal service, proclaimed in the General Provision of 1972, were such tasks as the promotion of socialist legitimacy in the work of the enterprise, organization or institute; the support (by means of law) of the enterprise’s activities in the improvement and safekeeping of socialist property.

Typically, the same objectives in the same organizational forms were determined by corresponding regulatory acts about legal service in the socialist countries. The general objectives were defined as follows: strict enforcement of socialist law in all spheres of company organization and business activities; the tightening of planning, contractual and financial discipline; advocacy in courts, arbitration and administrative bodies; the explanation of the legislation in force. The lawyers working in the economic sphere nowadays have the same general and/or main objectives.

Thus, formally the General Provision of 1972 may serve as a certain guide when clarifying the main objectives of the legal services as well as their responsibilities, rights, functions and liabilities which are not regulated by the RF and its regions' legislation. Indeed, the following facts should be taken into account: it was amended by the Bylaws of the Council of Ministers of the Soviet Union dated 4th December 1980 №1124, 1st December 1987 № 1367, and 21st December 1990 № 1332 (item 43, relating to the procedure of appointment and removal of the legal departments managers of different enterprises in concurrence with the superior body, was abolished) [2]. Paragraph 4 of Item 4 of the General Provision, relating to the necessity of the superior body consenting to the abolition of the law department and the disestablishment of the in-house counsel's office, was ruled as illegal and non-applicable by the Supreme Court of the RF when the first part of the RF Civil Code came into force [3]. The above-mentioned action can be explained by the fact that, according to the RF Civil Code, the rights of the legal entity can be limited only by law but not by bylaw, which the Bylaw of the Council of Ministers of the Soviet Union dated 22nd July 1972 №46 actually is.

In today's Russian economy, there are many different business organizations with various types of business forms acting on the basis of different types of ownership which, due to the law in force, have the right to define individually their structures and, with some minor exceptions, the local status of their departments including the legal department. But they have neither a reference nor a limitation for these procedures.

Some items of the General Provision of 1972 can be considered invalid, for instance: the regulation of Item 1, according to which in the Ministry or in any other department where there is Arbitrage, a law department with Arbitrage should be created, as there has been no such institution as Arbitrage of the Department since 1992. We also can mention here the regulation of item 14, according to which if drafts of orders, instructions or other legal documents to be submitted for the manager's signature are in conflict with law, the in-house counsel firstly should provide the manager with his opinion on how to resolve all the matters legally (even today such procedure seems to be sensible). If the above-mentioned documents have already been signed by the manager despite the in-house counsel's opinion, the latter should inform a superior body about this fact. Should he not take the necessary measures to avoid illegal actions, he should be duly liable for this together with the manager. At least, if we consider this regulation in relation to the business entities of the state with the market economy, it demands for a qualitatively new official immunity to be created

to protect the rights of in-house counsels in the case of such disagreements with their employers.

Therefore, today's situation, when the regulation of the business entity and its legal department in the state economy is provided for only by local acts, should not be taken for granted. The problem is not only current; there is no frame of reference for future improvement.

2. It is unclear whether the institution of legal service in the sphere of today's economy is a public or private body, that is to say whether the state should grant it individual (stemming from the state or even state-power) legal power and authority or whether all legal powers and authorities of the legal department should stem from the type of business organization.

Nowadays in all states with a market economy, including Russia, the main objective and the key target of any business entities, including those with public property, is profit-making. Consequently, the objective of the legal department of any business entity is to contribute, by means of law, to the solution of this main objective and hitting this key target. But what are the concrete duties of the in-house counsel working for any business entity? Two variants are possible here: 1) to ensure legal abidance in all spheres of the company's activities (both internal and external) by means of law (through the implementing of the necessary knowledge, abilities and skills); 2) to enable (by means of law) attainment of the key objective declared by the RF Civil Code, which is maximum profit-making.

As these two aims are distinct, the ways of reaching them are also distinct as well as the methods and means of solving problems which may arise on the way. Consequently, there is no way of reaching these two aims simultaneously. The businessman striving for high profit-making will not be pleased by the work of his or her in-house counsel (employed on the terms of a labour contract) if the latter puts all his efforts not into profit-making (which is the matter of top priority for his employer), but into the solving of his own abstract objective, which is actually providing the business activities of the company, all its bodies and departments, all employees, with a regime of strict law abidance. However, the promotion of law and order and the legal nurturing of all employees are just a tiny part of the in-house counsel's duties, although it demands a lot of time and effort. In its turn, the state (its bodies and services) should not stay indifferent should the in-house counsel put all his efforts, skills and abilities into profit-making, neglecting law abidance and perhaps even ignoring the constitutional paradigm that Russia is a state governed by the rule of law.

Certainly, speaking about the absence of contradictions in a state governed by the rule of law, we may admit that there is a hypothetical possibility for (maybe even a necessity of) symbiosis of the above-mentioned aims and objectives.

In fact, however, taking into account such facts as the condition of law-making in the sphere of business (and actually all other branches of law-making but constitutional law), stemming from the low level of the law-making process in Russia which is not based on the achievements of up-to-date research in the sphere of law;

the condition of variative -subjective law enforcement; and, finally, the condition of today's law culture (which is, by the way, the part of the culture of humankind), that is close to legal nihilism (or sometimes even to legal cynicism), we may proclaim that the balance between the aims and objectives of the in-house counsels will not be achieved soon.

As a result, there is a problem (primarily for research and only after that for the law-making procedure) in answering the basic question: whether the objective to provide the activities of the business entity with a legal basis is the individual problem of business entities themselves or a state problem as well.

There is no doubt that nowadays the state cannot keep aloof of the significant objective to provide business relations with legal order. Hence, it cannot be indifferent either to the matter of the provision of in-house counsels with the corresponding legal authorities, which includes both legal immunity and the defense of their rights from the decisions and actions of their employers (the owners or managers of the companies they work for). Unfortunately, the situation where an owner or manager asks "his or her" in-house counsel "to find a law to avoid another law" and, if the in-house counsel fails to accomplish this task, says: "what do I need you for then?" (with the predictable consequences), is omnipresent nowadays.

The critical state of the law enforcement in the business sphere and the activities of law departments of numerous companies, moreover, the critical absence of the concept "the provision of law in the sphere of business" and even the critical absence of an ideology of such a concept stems from some major reasons, the elimination or at least the minimization of which will take much time and state efforts.

Negligence of the possibilities of fundamental law research has affected the work of the in-house counsels, working in the sphere of business, more than the work of other law specialists. We may say for sure that it is not easy to find such a striking example of the multiple lacunas that exist in the legal sphere of certain public relations, as the absence of a proper legal framework for the status of the in-house counsels working in the economic sphere. This example clearly shows the underestimation of fundamental law research.

Some research on the legal service of the in-house counsels in modern Russia is being carried out, for instance: monographs are being published [4]; research and practice forums are being organized and held [5]; theses are being defended [6]. One should not underestimate the research carried out on the problems of the legal service in business. But all this research, without any exception, is accomplished on the initiative of enthusiasts and does not have the complexity necessary for such fundamental research. As a matter of fact, the results obtained (the propositions and recommendations) are not implemented and are even not in demand. The absence of demand for fundamental scientific work, aggravated by the absence of the general ordering customer (the state), is the acute problem of our country. This circumstance should be explained by scientific research as well.

Basically, fundamental research into the legal service in the business sphere should provide us with explicit answers to the numerous problematic questions of today's

situation, and try to apply the results for the future development of this sphere by means of forecasting the problems that may arise in the sphere of research interest.

We are not going to discuss here the organizational or financial problems of research, the participants, the ways of implementing their results, but let us point out that the research should be carried out in the following directions:

1. Detecting and defining the scope of rights and possibilities of in-house counsels, clarifying the necessity, reasonability and amount of the state regulation in matters of the status and activities of the law service in the sphere of today's economy. Today we may observe the absence of any regulation, as well as the absence of clarity in such small segments of the in-house counsel's status as: whether a person with a criminal record, convicted more than once for committing such profit-motivated crimes as the organization of large-scale economic crimes, has the right to work as an in-house counsel or not.

2. The determination of effectiveness indicators and parameters for the law service's work in the sphere of economy. It is absolutely unclear today what the in-house counsel should be praised or criticized for. Taking into consideration the risks of the in-house counsel's work, we may conclude that the problem of legal and ethical in-house counsel responsibility and the insurance of their risky activities is urgent nowadays.

3. Working out the project of public organization with a form of incorporation as a legal entity (a separate Association, a subdivision in the Association of Russian lawyers or a subdivision of the Industrial business and trade Association) for in-house counsels working in the business sphere. The working field of this organization is huge and can be compared with that of the Russian Center for Arbitration Assistance, which holds a public attestation of awarders, the headcount of which is less than that of the in-house counsels. Nowadays it is absolutely unclear who should hold the public attestation of hundreds of thousands of Russian in-house counsels, with their non-consolidated desire and the objective critical need for this. This organization will turn out to be a segment of forming the civil society of Russia. This organization (probably, in the form of a self-regulated entity) will be able to function as the coordinating, educational, methodological and, to some extent, professional center for in-house counsels. It may become the co-founder of a specialized law publication (i.e. something like "Russian In-house counsel"). The circulation of such a publication would be formidable and it may consolidate different professional (and other) interests and aspirations of the in-house counsels working in the sphere of business.

4. Work on the corresponding segment of Law Universities' educational process and the process of in-house counsels' professional training. The activation of scientific research on the urgent problems of the current and future law service in the sphere of economy is needed. The inclusion of such research in the University curriculum derives from the complexity of this issue.

5. Working out a structure that will provide for maintenance of the conceptual dilemma: in one respect, the in-house counsel of the business entity is responsible for maintaining legality in the company and by the company, including in the economic

sphere, and is thus a guide of the state's authority; in another, the in-house counsel is a member of the working team of the business entity and so he or she may and should get into the company's spirit. Nowadays in Russia, one can hardly find more than a few dozen companies with their own emblems which have existed for more than 20 years. For instance, there is a company in Japan that has been running a construction business since the seventh century. This fact is registered in the Guinness Book of World Records. There is no doubt that company spirit is very strong in this company. So, by his or her activities the in-house counsel should promote high profit-making for his or her company, which is of interest for his personal welfare. Thus, the in-house counsel carries out a private function.

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