

MOSCOW CORPORATE CRIME AND INVESTIGATIONS NEWSLETTER - JULY 2019

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Legal Briefings - By **Alexei Panich and Sergei Eremin**

This newsletter summarises recent Russian regulation, enforcement and court practice developments which may be relevant for doing business in Russia from corporate crime and investigations perspective.

Additionally, this newsletter spots some US and other relevant developments which should be kept in mind by Russian businesses having foreign parents or operations.

RECENT REGULATION DEVELOPMENTS

- On May 17, the RF Government initiated a change in the procedure of bringing foreign companies to responsibility for improper payments.¹ The initiative is part of the Russian National Anti-Corruption Plan for 2018 - 2020 adopted last year.²
- Under current Russian administrative laws,³ Russian and foreign companies operating in Russia and giving or offering improper payments can be subjected to administrative fines amounting to three times the sum of improperly provided or promised money, securities, other assets, property-related services and property rights, but not less than RUB 1 million, and to seizure of the mentioned assets. Please note that administrative responsibility does not exclude, and often precedes, criminal prosecution of the company's management.
- The existing procedure implies that any government investigation of corporate improper payments must not last longer than two months; the new draft law suggests that the

term of investigation will be extended to 12 months, providing a possibility for “a more thorough and comprehensive study of all circumstances”, including, where necessary, requests for judicial cooperation to foreign jurisdictions. Although inter-governmental interactions are currently not very common and are very significantly affected by the political environment, it appears that in practice such change, if adopted, may lead to more intensive information exchange between Russian and foreign anti-corruption enforcement agencies.

- The relevant draft law is currently under consideration of the State Duma.⁴ We recommend keeping eye on it and will be doing so ourselves.

COURT AND ENFORCEMENT PRACTICE DEVELOPMENTS

- Russian investigative authorities are very inventive when it comes to the prosecution of businessmen. Recently, they have started using a new instrument which we hadn't seen being applied before.
- In 2013, Article 193.1 was introduced to the Russian Criminal Code (the "**Code**"), criminalizing foreign exchange transactions where funds were transferred to a bank account of a non-resident based on the documents which are knowingly false. The crime is grave, with liability up to 10 years of imprisonment potentially, with fines amounting to RUB 1 million (or to five times the annual salary of the detained person). Back then, the article targeted very bold and relatively straightforward evasive schemes where Russian businessmen established sham entities abroad, procured that their Russian cash box businesses concluded import contracts or services contracts with these entities, had the Russian entities paid for the supplies of goods or services but never got the foreign suppliers perform under the contracts. By doing this, they achieved channelling funds out of Russia.⁵ Now, the article continues being applied to combat more advanced species of the same fraud, such as various "laundromats" (in particular, see the criminal case against the ex-head of the European Express bank, Oleg Kuzmin, in relation to the notorious "Moldova Laundromat").⁶
- Statistics indicate that Article 193.1 of the Code was very rarely applied in practice: e.g., in 2014, there were only 2 relevant cases; in 2017, only 18 individuals were held guilty of the crime; in 2018 - only 21. Just by way of comparison, the general fraud cases (which are often launched against businessmen) together with specific commercial fraud cases amounted to 20,933 cases in 2017, and 22,149 in 2018.
- However, in the last months, we have seen Article 193.1 applied in so different circumstances as to make one think it was even abused by the investigative authorities.
- In May 2019, the authorities launched a case⁷ in relation to the management of Vyatsky Kvas beverages business. The plot of the case was surprising: the authorities alleged that the payment of the dividends by the Russian operating entity TK Vyatich LLC to the

Cypriot entity Dapetson Global Assets Limited with a subsequent distribution of the funds by the latter to the beneficiary of the group in the course of liquidation pursuant to de-offshorization legislation constituted the crime prohibited by Article 193.1.

- The more recent case looked even more inventive: the Investigative Committee announced⁸ the initiation of criminal proceedings against a number of managers of the major Russian car dealer Rolf, and also against one of its beneficiaries, Sergei Petrov.⁹ The investigative authorities alleged that Petrov and his team channelled RUB 4 billion from Russia by way of procuring that the Russian entity Rolf purchased from Panabel Limited, a Cypriot entity, the shares of another Russian entity Rolf Estate. The authorities took the position that all three companies were controlled by Petrov, and the purchase price was way above the market price, which meant that the funds were paid illegally and in breach of Article 193.1. Petrov's defence argued that the transaction was merely a corporate restructuring allowing to move a chunk of business within the group.
- Interestingly, the authorities attempted to apply Article 193.1 in a similar sense earlier, when the first case against Mikhail Abyzov,¹⁰ ex-Minister for Relations with Open Government, was initiated in February 2017. The investigators inspected a transaction between Abyzov's controlled companies SIBECO (Russia) and Blacksiris Trading Ltd. (Cyprus), where the Russian entity acquired three operating companies in Siberia. However, for some reasons, the case didn't proceed. Now, Abyzov is being charged¹¹ in relation to the same transaction, but under Article 159 (Fraud).
- We have to note that the authorities have started applying Article 193.1 in extremely lateral manner. While it is not yet clear if that is already a trend or just few isolated instances, we note that many corporate restructurings, debt push downs and intra-group financial arrangements may be at risk of adverse attention. We recommend considering this and seeking counsel advice.

FCPA ENFORCEMENT NEWS

Walmart: Paper Compliance Program vs. Effective Compliance

- On June 20, US SEC chased the largest US retailer Walmart for “*violating the Foreign Corrupt Practices Act (FCPA) by failing to operate a sufficient anticorruption compliance program for more than a decade as the retailer experienced rapid international growth*”.¹² Notably, the investigation lasted since 2011 and can be viewed as one of the longest.
- Settlement fees amounted to the total of USD 282 million (USD 144 million to settle the SEC's charges and USD 138 million for the charges of the US Department of Justice). Jurisdictions in question were Brazil, China, India and Mexico.
- Under the case, although Walmart had its compliance program since as early as 2005,

the company failed to properly followup on the red flags, impose adequate accounting controls and investigate internal reports of misconduct. As a result, companies' foreign affiliates employed thirdparty intermediaries who made payments to foreign government officials without reasonable assurances that they complied with the FCPA.

- The takeaway from the Walmart case is that the development of internal compliance program and even reporting system is not a sufficient defence against FCPA charges. Discovered red flags need to be thoroughly investigated and addressed. Historically, Russian companies owned by foreign parents are not particularly good in addressing the FCPA risks, although many of them do have the sanctions programmes, and we believe this needs to be changed.

¹ Draft Federal Law No. 711643-7 "On Amending Article 28.7 of the Russian Code of Administrative Violations".

² Approved with Presidential Decree No. 378 of June 29, 2018.

³ Art. 2.6 and 19.28 of the Russian Code of Administrative Violations.

⁵ See: *Decision of Leninsky District court of Samara dated 21.11.2017 in case N 1-156/2017; Decision of Pervomaysky District court of Omsk № 1-348/2017; Appellate decision of Sverdlovsky Regional court dated 08.05.2018 in case 22-2732/2018; Appellate decision of Sverdlovsky Regional court dated 10.11.2017 in case N 22-8251/2017; Appellate decision of Moscow City court dated 17.05.2017 in case N 10-6525/2017, etc.*

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ALEXEI PANICH
PARTNER /
ADVOCATE, MOSCOW
+7 495 363 65 15
alexei.panich@hsf.com



SERGEI EREMIN
SENIOR ASSOCIATE
(RUSSIA), MOSCOW
+7 495 363 6887
Sergei.Eremin@hsf.com

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