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Research Article

**SOME AREAS OF LEGISLATION IMPROVEMENT
ON THE PARTICIPATION OF THE PROSECUTOR
IN THE CONSIDERATION OF CASES ON BRINGING
TO ADMINISTRATIVE RESPONSIBILITY IN COMMERCIAL COURTS**

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The article considers some features of legal regulation of participation of a prosecutor in consideration of cases on administrative offenses in arbitration courts, presents the main directions of improvement of legislation regulating the participation of a prosecutor in this area. The research methodology includes general scientific methods of cognition – materialistic and dialytic, method of analysis and synthesis, special legal method – formal-legal method. The analysis of practice and theory of participation of a prosecutor in consideration of cases on administrative offenses in arbitration courts has been carried out. It is proposed to recognize, taking into account the existing practice, the existing mechanism of participation of a prosecutor in consideration of cases on administrative offenses in arbitration courts as having shortcomings, to make advisory adjustments to the legislation.

Key words: *arbitration court, prosecutor, administrative responsibility, participation of the prosecutor, proceedings on cases of administrative offences*

**НЕКОТОРЫЕ НАПРАВЛЕНИЯ УСОВЕРШЕНСТВОВАНИЯ
ЗАКОНОДАТЕЛЬСТВА ПО УЧАСТИЮ ПРОКУРОРА
В РАССМОТРЕНИИ ДЕЛ О ПРИВЛЕЧЕНИИ
К АДМИНИСТРАТИВНОЙ ОТВЕТСТВЕННОСТИ
В АРБИТРАЖНЫХ СУДАХ**

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В статье рассмотрены некоторые особенности правового регулирования участия прокурора в рассмотрении дел об административных правонарушениях в арбитражных судах, представлены основные направления усовершенствования законодательства, регулирующего участие прокурора в данной сфере. Методология исследования включает общенаучные методы познания – материалистический и диалитический, метод анализа и синтеза, специальный правовой метод – формально-юридический метод. Проведен анализ практики и теории участия прокурора в рассмотрении дел об административных правонарушениях в арбитражных судах. Предлагается признать с учетом сложившейся практики существующий механизм участия прокурора в рассмотрении дел об административных правонарушениях в арбитражных судах имеющим недостатки, внести соответствующие корректировки в законодательство.

Ключевые слова: *арбитражный суд, прокурор, административная ответственность, участие прокурора в суде, производство по делам об административных правонарушениях*

Continuous improvement of legislation on administrative offences of legislation, including the development of the concept of a new Code on Administrative Offences of the Russian Federation, the adoption of the Federal Law ‘On State Control (Supervision) and Municipal Control in the Russian Federation’ is proof of the care of the state to form just such a system, which is able to reliably protect the rights and legitimate interests of participants. Prerequisites for a comprehensive theoretical study of issues related to the legal regulation of the content and essence of proceedings on cases of administrative offences have been created. Proceedings on cases of administrative offences include ‘a number of successively replacing each other stages (stages), characterized by their specific tasks and goals’ [Suponina 2018]. The leading stage of proceedings is the stage of consideration of the case, where the prosecutor occupies a special place. Participating in the consideration of cases on administrative offences by courts, the prosecutor pursues the objectives of protecting the rights, freedoms and legitimate interests of citizens, the interests of the Russian Federation. In order to effectively implement the tasks of prosecution bodies in proceedings on cases of administrative offences the prosecutor not only issues orders to initiate proceedings on administrative offences, but also ensures participation in its consideration in court¹.

The procedure for the participation of a prosecutor in the consideration of cases on administrative offences is provided by the Code on Administrative Offences of the Russian Federation (hereinafter – CAO RF), the Arbitration Procedure Code of the Russian Federation (hereinafter – APC RF), as well as by Order of the Prosecutor General of the Russian Federation of 19.02.2015 № 78 ‘On organization of work to implement the powers of a prosecutor in proceedings on cases of administrative offences’, which established that ‘in order to effectively implement by prosecutorial authorities tasks in proceedings on cases on administrative offences’.

It seems fair to consider the issue of participation of a prosecutor in proceedings on cases of administrative offences taking into account the form of this participation: in extrajudicial procedure, in courts of general jurisdiction and arbitration courts, such classification is provided in the work of A. Yu. Vinokurov [Vinokurov, Borisov, But et al. 2017].

¹ Order of the Prosecutor General of Russia from 19.02.2015 No. 78 ‘On the organization of work on the implementation of the powers of the prosecutor in proceedings on cases of administrative offenses’.

Participation of a prosecutor in proceedings on cases of administrative offences in arbitration courts is an important mechanism to ensure the protection of public interests.

To confirm the relevance of the study it is worth to refer to the data of the ADM form 'Implementation of the powers of the prosecutor in proceedings on cases of administrative offences', according to which in the Russian Federation the number of cases on administrative offences initiated by the prosecutor and considered in arbitration courts is in 2018 – 8056 cases; in 2019 – 7787 cases; in 2020 – 6144 cases; in 2021 – 6493 cases; in 2022 – 4874 cases².

On the Republic of Crimea the arbitration court considered 49 statements in accordance with Chapter 25 of the APC RF (the same period last year – 26), 43 are satisfied, or 87.8 % (the same period last year – 25, or 96.2 %), 43 persons are brought to responsibility (the same period last year – 25) in the form of an administrative penalty – 12 for a total sum of 2193 thousand rubles (the same period last year – 6 for 470 thousand rubles), warnings – 31 (the same period last year – 19)³.

These topics are subject to active discussion by the scientific community. Elaboration of theoretical issues and improvement of procedural legislation in this area is a fundamental element and foundation to ensure effective consideration of cases on administrative offences in arbitration courts.

The issue of participation of a prosecutor in the consideration of cases of administrative offences by arbitration courts has been covered in the works of A. Yu. Vinokurov [Vinokurov, Borisov, But et al. 2017], T. I. Otcheskaja [Otcheskaja 2018], E. A. [Treshheva 2015], T. Ya. Khabrieva [Lebedev, Khabrieva, Avtonomov et al. 2019: 320], other scientists.

As a result of the analysis of scientific works and the practice of the prosecutor's participation in the consideration of cases of administrative offences in arbitration courts, it becomes obvious that there are a number of main directions for improving the legal regulation of this area.

1. It is fair to assume that there are grounds for harmonizing the norms of the Tax Code of the Russian Federation and the Arbitration Procedural Code of the Russian Federation in terms of indicating that there is no need for the prosecutor to pay court costs.

2. Correction of the content of the norms of the Arbitration Procedural Code of the Russian Federation in order to prevent the substitution of the law by the resolutions of the Plenum of the Supreme Arbitration Court of the Russian Federation regarding the indication of the possibility of initiating proceedings on cases of bringing to administrative responsibility on the basis of a prosecutor's statement.

3. The need to adjust Chapter 3 of the Arbitration Procedural Code of the Russian Federation within the framework of regulating the possibility of recusal (self-recusal) of the prosecutor in the arbitration process is justified.

The participation of the prosecutor in the consideration of cases of administrative offences in arbitration courts is an important mechanism for ensuring the protection of public interests.

A feature of the consideration of cases on bringing to administrative responsibility in arbitration courts is its mixed procedural and legal regime. The specified mixed mode combines the general rules of the claim proceedings (sec. I and II of the APC of the Russian Federation), rules of administrative proceedings (Chapter 25 of the APC of the Russian Federation), rules of proceedings in cases of administrative offences (Chapters 28 and 29 of the Administrative Code of the Russian Federation). Thus, the powers of the prosecutor to participate in cases of administrative offences in arbitration courts, taking into account Part 1 of Article 202 and Part 1 of Article 207 of the APC of the Russian Federation, since chap. 25 The APC of the Russian Federation is not otherwise established, are determined in accordance with the Administrative Code of the Russian Federation. At the same time, in terms of the form (application) of the appeal, the APC of the Russian Federation takes precedence over the norm of the Administrative Code of the Russian Federation, since prosecutors apply to the arbitration court with applications, according to Part 2 of Article 202 of the APC of the Russian Federation. This is explained by the fact that according to the APC of the Russian Federation of the Russian Federation, the basis for initiating proceedings is

² Form ADM, approved by Order of the Prosecutor General of the Russian Federation of February 4, 2022 No. 64 'On approval and implementation of the statistical report' Implementation of the powers of the prosecutor in proceedings on cases of administrative offenses 'Section 1 Implementation of the powers of the prosecutor in proceedings on cases of administrative offenses in 2018, 2019, 2020, 2021, 2022 for the Russian Federation'.

³ Form of the ADM approved by Order of the General Prosecutor's Office of the Russian Federation of February 4, 2022 No. 64 Section 1 Exercise of the powers of the prosecutor in proceedings on administrative offenses for 2018, 2019, 2020, 2021, 2022 in the Republic of Crimea.



the filing of an application. When applying to the prosecutor's court with an application for bringing a person to administrative responsibility, the prosecutor enjoys the rights and duties of an administrative body, which are provided for by Chapter 25 and other norms of the APC of the Russian Federation.

According to the Order of the Prosecutor General's Office of the Russian Federation dated 07.07.2017 No. 473, prosecutors are obliged to consider the participation of prosecutors in the arbitration process as an effective means of strengthening the rule of law, in addition, there is a duty to ensure the personal participation of heads of prosecutor's offices in the consideration of cases of particular importance by arbitration courts⁴.

Implementing the requirements contained in Article 202 of the APC of the Russian Federation, the prosecutor, when drawing up an application for bringing the guilty person to administrative responsibility, is guided by the provisions of Article 125 of the APC of the Russian Federation, according to which the application must contain information about the name of the arbitration court and the applicant (prosecutor), a list of attached documents. In turn, when considering cases of administrative offences, judges of arbitration courts must proceed from the fact that in the arbitration process, the prosecutor enjoys the rights and bears the duties of the body, which are provided for by chap. 25 and other norms of the APC of the Russian Federation⁵.

Which allows us to conclude that the prosecutor is endowed with the norms of the APC of the Russian Federation with the rights and obligations of the party in the arbitration process.

At the same time, the issue of payment of state duty by the prosecutor has not been settled. Taking into account the provisions of Article 333.37 of the Tax Code, the prosecutor does not pay the state duty, in turn, Article 52 of the APC of the Russian Federation does not provide for the release of the prosecutor from court costs in the form of payment of the state fee for filing a lawsuit in court. At the same time, in civil proceedings, such a situation took place and was resolved by the introduction of Article 89 of the Civil Procedure Code of the Russian Federation, which provides for benefits for the payment of state duty in accordance with current legislation. It is fair to assume that making adjustments to art. 52 of the APC of the Russian Federation seems positive, in connection with which it seems correct to state Part 3 of Article 52 of the APC of the Russian Federation in the following wording: '3. The prosecutor who has applied to the arbitration court enjoys procedural rights and bears the procedural duties of the plaintiff, with the exception of the obligation to pay court costs'.

To date, there is a practice of reimbursement of court costs at the expense of the treasury of the Russian Federation if, based on the results of consideration by the arbitration court of the prosecutor's application for bringing a person to administrative responsibility, a decision was made to refuse to satisfy the relevant requirements, which is regulated by Part 1 of Article 110 of the APC of the Russian Federation. This is due to the fact that the prosecutor acts on behalf of the Russian Federation, financial support for the activities of bodies and institutions of the Prosecutor's Office of the Russian Federation is an expenditure obligation of the Russian Federation⁶ (Article 1, Article 52 of the Federal Law 'On the Prosecutor's Office of the Russian Federation'). And here we can talk about the lack of legal regulation at the proper level of the issue of bringing the prosecutor to disciplinary responsibility, in the case of repeated court decisions to refuse to satisfy the prosecutor's application and, accordingly, due to the fact that the costs incurred by the state in connection with the unfair performance of duties by an employee.

At the same time, by virtue of part 1 of Article 110 of the APC of the Russian Federation, court costs incurred by persons participating in the case in whose favor the judicial act was adopted are collected by the arbitration court from the side. At the same time, since, according to articles 1 and 52 of the Federal Law 'On the Prosecutor's Office of the Russian Federation', the prosecutor acts on behalf of the Russian Federation, financial support for the activities of the bodies and institutions of the Prosecutor's Office of the Russian Federation is an expenditure obligation of the Russian Federation, then if, based on

⁴ Order of the Prosecutor General's Office of Russia dated 07.07.2017 No. 473 (ed. dated 19.10.2022) 'On the Exercise of Powers by prosecutors in Arbitration Proceedings', available at: http://www.consultant.ru/document/cons_doc_LAW_280686 (accessed 10 May 2023).

⁵ Item 15 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 27.01.2003 No. 2. 'On some issues related to the entry into force of the Code of Administrative Offences of the Russian Federation', available at: https://www.consultant.ru/document/cons_doc_LAW_41468 (accessed 10 May 2023).

⁶ Federal Law 'On the Prosecutor's Office of the Russian Federation' dated 17.01.1992 No 2202-1, available at: http://www.consultant.ru/document/cons_doc_LAW_262/ (accessed 10 May 2023).

the results of consideration by the arbitration court of the prosecutor's application for bringing a person to administrative responsibility, a decision is made on refusal to satisfy the relevant claims, court costs in case are reimbursed at the expense of the Treasury of the Russian Federation. What is the basis for considering the issue of bringing the prosecutor to disciplinary responsibility, in case the court makes a decision to refuse to satisfy the prosecutor's application.

Previously, the APC of the Russian Federation did not provide for the right of the court to recognize the mandatory participation of the prosecutor in the case. Amendments to Article 52 of the APC of the Russian Federation dated 07.10.2022⁷, when interpreted literally, allow us to conclude that, at the initiative of the court, the prosecutor is obliged to enter the arbitration process as a person participating in the case. In addition, Part 5 of Article 52 of the APC of the Russian Federation gives the prosecutor the right to enter into the case at any stage of the arbitration process.

The problematic aspect here is the procedure for the prosecutor's entry into the process. Based on the latest amendments, in addition to its own initiative to enter into the process, it is possible to involve the prosecutor by the court to participate in the case, in connection with which it seems fair to provide in the APC of the Russian Federation notification of the prosecutor about the case in the proceedings of the arbitration court, in which the prosecutor is involved in the process, followed by a court ruling following the example of third parties.

At the same time, it should be noted that the legislator determines the sole purpose of the prosecutor's entry into the arbitration process – ensuring legality, as indicated by paragraph 7 of the order of the Prosecutor General's Office of Russia dated 07.07.2017 No. 473⁸. Drawing an analogy, the CPC of the Russian Federation recognizes the purpose of the prosecutor's entry into the process – giving a conclusion.

According to the APC of the Russian Federation, the prosecutor enters the arbitration process and is a person participating in the case, however, the law does not stipulate his obligation to give an opinion on the case, which provokes uncertainty of the legal status of the prosecutor in the arbitration process.

Accordingly, while maintaining the prosecutor's main goal – to ensure the rule of law, it is necessary to provide for the possibility of the prosecutor giving an opinion in the arbitration process, to provide for its form (oral or written) by analogy with the civil process. Since today, in fact, ensuring the legality of the prosecutor in the arbitration process is achieved only by the authority of the prosecutor's office [Ergashev, Pankova 2020: 58].

It is worth noting that the prosecutor does not have the opportunity, according to Article 52 of the APC of the Russian Federation, to apply to the arbitration court with an application for administrative responsibility, nor is the prosecutor mentioned under Article 202 of the APC of the Russian Federation, which contains a list of persons entitled to send the relevant application.

Of course, it can be argued that this gap is filled by judicial practice, paragraph 15 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 27.01.2003 No. 2, paragraph 1 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 23.03.2012 No. 15, which indicates the need for courts to 'take into account the powers of the prosecutor to initiate cases of administrative offences and send materials to courts authorized to consider relevant cases'⁹.

Also relevant in this issue are the provisions of paragraph 1 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.03.2012 No. 15 'On certain issues of participation of the prosecutor in the arbitration process' establishing that, taking into account Part 1 of Article 202 of the APC of the Russian Federation, since Chapter 25 of the Code does not establish otherwise, the powers of the prosecutor to participate in cases of administrative offences are determined in accordance with the Code of Administrative Offences of the Russian Federation. The fact of

⁷ Federal Law No. 387-FZ dated 07.10.2022 'On Amendments to Article 52 of the Arbitration Procedure Code of the Russian Federation and Article 45 of the Civil Procedure Code of the Russian Federation', available at: https://www.consultant.ru/document/cons_doc_LAW_428321 (accessed 10 May 2023).

⁸ Order of the Prosecutor General of the Russian Federation of 07.07.2017 No. 473 (ed. of 19.10.2022) On the Exercise by Prosecutors of powers in arbitration proceedings, available at: http://www.consultant.ru/document/cons_doc_LAW_280686 (accessed 10 May 2023).

⁹ Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 2 of 27.01.2003 (ed. of 10.11.2011) 'On some issues related to the entry into force of the Code of Administrative Offences of the Russian Federation', available at: http://www.consultant.ru/document/cons_doc_LAW_41468 (accessed 10 May 2023).

replacing the norms of the law with the provisions of the resolutions of the Plenum acts as a substitute for the law. In this case, the opinion of A. Yu. Vinokurov, on making adjustments to Article 202 of the APC of the Russian Federation, since the resolutions of the Plenum of the Supreme Arbitration Court of the Russian Federation cannot replace the norms of laws¹⁰. With this in mind, the statement of Part 2 of Article 202 of the APC of the Russian Federation in the following wording seems fair: ‘2. Proceedings on cases of bringing to administrative responsibility are initiated on the basis of statements of bodies and officials authorized in accordance with the federal law to draw up protocols on administrative offences (hereinafter in paragraph 1 of Chapter 25 of this Code – administrative bodies), statements of the prosecutor and those who have applied for bringing to administrative responsibility the persons specified in Part 1 of this Article. engaged in entrepreneurial and other economic activities’.

E. R. Ergashev [Ergashev, Pankova 2020: 58] addressed the question of the need to adjust Chapter 3 of the APC of the Russian Federation within the framework of regulating the possibility of recusal (self-recusal) of the prosecutor in the arbitration process in his work and here it is worth agreeing with the author justifying this position by the fact that in practice circumstances arise that exclude the prosecutor’s disinterest in the outcome of the case.

In this connection, it seems logical to provide for a prosecutor in Article 23 of the APC of the Russian Federation, supplementing the specified article with part 3 and stating the following wording: ‘3. The prosecutor is subject to recusal on the grounds provided for in paragraph 4, 5, 6 of Article 21 of this Code’. It seems incorrect to indicate the prosecutor in Part 1 of Article 23 of the APC of the Russian Federation due to the peculiarities of the status of the specified participant in the arbitration process.

The active use by prosecutors of the powers provided for by Chapter 25 of the APC of the Russian Federation is an effective means of preventing violations of the law by legal entities and individual entrepreneurs.

The practice of appeals from prosecutors shows that the main focus within the framework of this activity is given to the elements of offences under Articles 14.1, 14.17 of the Administrative Code of the Russian Federation, as well as in cases of intellectual property rights protection. For example, by the decision of the Arbitration Court of the Republic of Crimea dated 23.03.2022, at the request of the Deputy Prosecutor of Yevpatoria, LLC was brought to administrative responsibility under Part 3 of Article 14.17 of the Administrative Code of the Russian Federation in the form of an administrative fine in the amount of 1,500 thousand rubles. in connection with the storage of alcoholic beverages not at the location of a separate subdivision of the company and the transportation of alcoholic beverages without an appropriate license in violation of the provisions of Article 18 of Federal Law No. 171-FZ of 22.11.1995. According to the statement of the prosecutor of the Central district of Simferopol, the court on 14.03.2022 under Part 4 of Article 14.1 of the Administrative Code of the Russian Federation attracted ANPOO with the imposition of a fine of 50 thousand rubles. The court confirmed the gross violation by the organization of licensing requirements and conditions for the training of drivers of motor vehicles.

As part of the study of the institution of participation of the prosecutor in the consideration of cases of administrative offences in arbitration courts, it is fair to assume that there are a number of justified areas requiring adjustments.

1. Part 3 of Article 52 of the APC of the Russian Federation in the following wording: ‘3. The prosecutor who has applied to the arbitration court enjoys procedural rights and bears the procedural duties of the plaintiff, with the exception of the obligation to pay court costs’.

2. Part 2 of Article 202 of the APC of the Russian Federation in the following wording: ‘2. Proceedings on cases of bringing to administrative responsibility are initiated on the basis of statements of bodies and officials authorized in accordance with the federal law to draw up protocols on administrative offences (hereinafter in paragraph 1 of Chapter 25 of this Code – administrative bodies), statements of the prosecutor and those who have applied for bringing to administrative responsibility the persons specified in Part 1 of this Article engaged in entrepreneurial and other economic activities’.

3. Supplement Article 23 of the APC of the Russian Federation Part 3 and stating in the following wording: ‘3. The Prosecutor is subject to recusal on the grounds provided for in paragraph 4, 5, 6 of Article 21 of this Code’.

¹⁰ Vinokurov Ju. E. (2005) *Prokurorskiy nadzor* [Prosecutor’s supervision], Moscow, Vysshee obrazovanie, 350.

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