LEGAL SUPPORT OF TRANSPARENCY OF ACTIVITIES OF GOVERNING BODIES OF COMPANIES OF THE FUEL AND ENERGY COMPLEX

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In accordance with the Energy Strategy of the Russian Federation for the period of up to 2035, the enhancement of corporate governance is classified as a strategic task for the development of the fuel and energy sector. Legal support of corporate governance in companies with state participation in the energy sector, including companies in the power grid complex, is of great importance. The problems related to the legal support of transparency in the activities of the governing bodies of energy companies in the power grid complex are also of particular relevance. A significant problem of transparency of the governing bodies of energy companies, which still exists, is the identification and bringing the final beneficiaries to subsidiary responsibility.

Within this work, the author identified the key problems that arise in case of transparency of activities of the governing bodies of companies of the power grid complex. The expediency of bringing the final beneficiaries of these organizations to subsidiary responsibility is justified, and proposals to improve the transparency and efficiency of the governing bodies of organizations of the power grid complex are made.

Keywords: *energy law, legal support of energy security, legal status of power grid companies.*

The fuel and energy complex (hereinafter referred to as the "FEC") as a key sector of the Russian economy contributes significantly to the formation of the budget of the Russian Federation (about 40 %) and socioeconomic development of the state. Within this context, the FEC needs enhanced legal protection, both against external (the use of "contractual arrangements" with foreign states to harm the FEC, discrimination of the Russian FEC organizations on the global market) and internal threats, which include the increasing number of crimes and offences in the energy sector (theft, corruption, etc.).

It should be noted that in accordance with the Energy Strategy of the Russian Federation

for the period of up to 2035, the improvement of corporate governance is classified as a strategic task for the development of the fuel and energy sector. Legal support of corporate governance in companies with state participation in the energy sector, including companies in the power grid complex, is of great importance. In this respect, legal studies of these problems are of interest. [1] A.G. Lisitsyn-Svetlanov notes that in the post-soviet period, the Russian energy law, as well as a number of other complex branches of law, is meant to regulate a number of relations of an interdisciplinary nature. The interdisciplinary links are mostly expressed with such branches of law as antimonopoly and corporate law, and it is emphasized that not so many works have been dedicated to special issues of corporate regulation, and therefore the monograph edited by LL.D. V.V. Romanova "Current Problems and Tasks of Corporate Law", which highlights two problems: legal support of corporate governance in companies with predominant state participation and legal support of combating corporate blackmail, is of great interest. A.G. Lisitsyn-Svetlanov states that during the period of reformation of the Russian legislation in the area of both private and public law, the legal policy was aimed at providing a special status to relations with the state participation. At the same time, the current system of "special regulation" has serious gaps or does not take into account the specific features of relations in certain areas of the economy. This is largely the case with the energy sector. [2] When reviewing the problems of corporate governance in companies with state participation in the energy sector, V.V. Romanova notes that the regulations governing the activities of companies with state participation are not systematized, there are no unified principles of activity of these companies, approaches to evaluation of activity of companies with state participation taking into account the sector profile and the specific features related to it, including the need for proper maintenance of power infrastructure, its modernization, and construction of new infrastructure, have not been developed yet. [3]

It seems that the problems related to the legal support of transparency in the activities of the governing bodies of energy companies of the FEC are also of particular relevance.

The national security strategy of the Russian Federation, approved by Decree of the President of the Russian Federation No. 683 dd. December 31, 2015, and the Energy Security Doctrine, approved by Decree of the President of the Russian Federation No. 216 dd. May 13, 2019, specify the following as the major threats to the energy sector economy:

— defaults in payments;

— corruption;

— thefts;

It should be noted that corruption in the Russian legislation, in addition to passive or active bribery, also means power abuse or any illegal use by an individual of his/her official position in violation of the legitimate interests of the society and the state in order to obtain benefits, which can also be expressed in the form of money, property, and services (Federal Law No. 117-ФЗ dd. December 25, 2008, "On Corruption Combating").

These circumstances can be implemented both through the withdrawal of assets through deliberate and fictitious bankruptcies, as well as by entering into mock transactions, transactions with organizations affiliated to officials, as well as employment contracts with inflated wages.

The objectives of this article are:

— to identify the key problems that arise in conditions of transparency of activities of the governing bodies of the FEC companies;

— to justify the expediency and necessity of bringing the final beneficiaries of these organizations to subsidiary liability;

— to develop proposals on enhancement of transparency and efficiency of the governing bodies of the FEC companies.

At the moment, the achievement of these goals is one of the most urgent tasks that the state authorities and the energy market face.

Regulatory control of enhanced transparency of the activities of the governing bodies of FEC companies undergoes certain changes every year, and the legislative state authorities and parties involved continuously work on its improvement. Thus, according to the original version of Federal Law No. 273-ФЗ "On Corruption Combating" dd. Decem-

ber 25, 2008, the information on income, property and property obligations (hereinafter referred to as the "Income Records") had to be submitted by citizens who applied for positions of state or municipal service. Subsequently, by the revision of Federal Law No. 329-ФЗ dd. November 21, 2011, clarifications were adopted, and the specified obligation started to be implemented for citizens applying for the following positions: head, deputy head, as well as members of a management board or other collegial executive body at state corporations.

Resolution of the Government of the Russian Federation dd. July 22, 2013, No. 613 "On Submission by the Citizens Applying for Positions in the Organizations Created for Accomplishment of the Tasks Set for the Government of the Russian Federation and the Employees Occupying Positions in These Organizations, of the Information on Income, Expenses, Property and Property-Related Obligations, Verification of Reliability and Completeness of the Submitted Information and Observance by Employees of Requirements for Official Conduct" (hereinafter referred to as "Decree No. 613"), which was adopted later, sufficiently expanded the mechanism of transparency of activities of the governing bodies of companies with state participation by including the largest organization of the FEC such as Gazprom, OJSC, Zarubezhneft, OJSC, Inter RAO UES, OJSC, Rosneft, OJSC and others into the specified list.

Thus, organizations established to perform tasks assigned to the Government of the Russian Federation arrange the submission of income records to the Executive Office of the Government of the Russian Federation in relation to the head, deputy head, chief accountant according to the procedure and terms approved by Decree No. 613.

However, it is necessary to pay attention to Paragraph 3 of Order of the Chairman of the Government of the Russian Federation V.V. Putin No. ВП-П13-9308 [4] dd. December 28, 2011, (hereinafter referred to as "Order No. 9308"), according to which the FEC organizations with state participation (Gazprom, OJSC, AK Transneft, OJSC, Irkutskenergo, OJSC) are obliged to submit records on expenditures for an expanded list of the officers, which additionally includes members of the board of directors (supervisory board) of the organization, members of the collegial executive body (management board), heads of branches, subsidiaries and affiliates and other persons.

However, not the third point, but the fourth paragraph of this order is of the greatest interest. It has introduced additional responsibilities not only for FEC companies with state participation, but also for their contractors.

These responsibilities are as follows:

— disclosure by contractors under the existing contracts of information as to the entire chain of owners, including beneficiaries;

— during pre-contract work, arrangement of disclosure of information by contractors as to the entire chain of owners, including beneficiaries;

— ensuring introduction of amendments to the existing internal documents, which stipulate termination of current contracts and impossibility to sign new contracts with counterparties in case of failure to submit the above-mentioned information.

The FEC companies with state participation (Inter RAO UES, OJSC, RusHydro, OJSC, RAO ES of the East, OJSC, SO UPS, JSC, FGC UPS, OJSC, IDGC Holding, OJSC, and others) shall submit the specified information to respective federal executive bodies, Rosfinmonitoring and Federal Tax Service of Russia.

In the area of economic security in the FEC, the implementation of this order was aimed, among other things, at combating the conclusion of contracts with contractors who are affiliated to the officials of organizations.

However, in practice, there is a large number of legal conflicts and gaps that still do not allow for complete implementation of this order.

1. Thus, according to the legislation of the Russian Federation, institutions and unitary enterprises have owners, while joint-stock companies and limited liability companies have founders or participants.

2. The concept of a beneficial owner was introduced only by Federal Law No. 134-ФЗ dd. June 28, 2013. The contractors of such organizations were, accordingly, deprived of a clear definition of the persons, the records of which should be submitted.

3. In case of disclosure of the specified information, Federal Law No. 152-ФЗ dd. July 27, 2006, "On Personal Data" as amended on July 27, 2011, was breached, since operators and other persons who obtained access to personal data were obliged not to disclose or distribute such data without the consent of the subject, unless otherwise provided by the specified law. However, as of the date of Order No. 9308, there were no such exceptions.

4. Order No. 9308 does not possess a regulatory nature, and therefore does not create a legitimate obligation to provide such information for legal entities not specified therein.

5. The organizations specified in Order No. 9308 are deprived of the legitimate right for additional requirements to business entities pursuant to Federal Law No. 223-ФЗ dd. July 18, 2011, "On Procurement of Goods, Works, and Services by Particular Legal Entities". This provision may be interpreted as a violation of Part 1 of Article 15 of Federal Law No. 135-ФЗ dd. July 26, 2006, "On Protection of Competition".

6. In case the counterparty of the FEC company specified in the letter refuses to submit information on final beneficiaries, the contract shall not be concluded with such a counterparty.

At the same time, Article 448 of the Civil Code of the Russian Federation establishes that a Results Protocol shall be signed between the person who wins the tender and the organizer of the tender as of the day of the competition or tender, which shall have a contractual force. Thus, refusal to conclude a contract due to the failure to submit information will contradict the law.

The national corruption combating plan for 2018–2020, approved by Presidential Decree No. 378 dd. June 29, 2018, identifies one of the main tasks in the area under consideration which is the provision of the uniform application of the laws of the Russian Federation on corruption combating in order to enhance the efficiency of mechanisms of prevention and resolution of conflicts of interest, as well as improvement of measures on corruption combating in the procurement of goods, works, services for state or municipal needs and in the procurement of goods, works, services by particular legal entities. This provision is a direct continuation of the strategy of the state in part of the enhancement of disclosure of information on final beneficiaries of contractors of the FEC companies with state participation in order to avoid conflicts of interest and prevent abuse of the official position.

However, for the comprehensive and most efficient implementation of these provisions, as well as for enhancement of the transparency of activities of the FEC companies with state participation, the following amendments shall be made to Federal Law No. 223-ФЗ dd. July 18, 2011, "On Procurement of Goods, Works, and Services by Particular Legal Entities":

— to establish an obligation for the procurement participants to submit the information on final beneficiaries of the organization to the customer accompanied by the relevant documents;

— in case of failure to submit the specified information and (or) submission of false information due to the fault of the tender winners, to stipulate penalties for them;

— to establish an obligation for tender participants to request the specified information from their contractors as well, if they participate in the transaction chain with the FEC companies with state participation.

In terms of the procedure and content of income records submitted by the FEC companies with state participation, the legislative regulation is complete and, in my opinion, need no changes.

The need to increase the transparency and efficiency of the activities of the FEC companies in order to attract the final beneficiaries to subsidiary responsibility should also be emphasized.

Thus, the amount of losses that the state has incurred and is incurring, for example, in the power sales market due to an insufficiently effective mechanism of transparency of activities of energy companies in the power grid complex, as well as the lack of the institution that could practically bring the ultimate beneficiaries to subsidiary responsibility, exceeds several dozens of billions of rubles.

The first notorious case that revealed such gaps both in the laws and law enforcement practice was the bankruptcy and revocation of the status of guaranteeing suppliers since the beginning of 2011 of companies that were part

of the largest energy selling holding Energostrim (hereinafter referred to as "Energostrim GC"). [5]

The existing at that period of time mechanism of interaction between state bodies and the institution of bringing the final beneficiaries of these companies to responsibility in case of bankruptcy of enterprises allowed officials of Energostrim GC to withdraw more than 25 billion rubles to offshore companies and declare their insolvency by starting the bankruptcy procedure.

A key and significant problem of transparency of the activities of the governing bodies of power companies, which still exists, is the identification and bringing the final beneficiaries to subsidiary responsibility.

This mechanism includes the doctrine or concept of "lifting corporate veil", which is also called "breaking corporate shield" and "piercing corporate veil". [6]

Federal Law No. 115-ФЗ dd. August 7, 2001 (rev. dd. July 20, 2020) "On Countering the Legalization (Laundering) of Proceeds from Crime, and Financing of Terrorism" establishes that a beneficial owner is an individual who directly or indirectly (through third parties) finally owns (has a predominant share of more than 25 percent in the capital) customer (a legal entity) or can control the customer's actions.

However, most organizations do not disclose their beneficial (true) owners, especially when it comes to cooperation with offshore companies. It is sometimes impossible to make the head or tail and hold the final beneficiaries liable for the company's debts for several reasons: the lack of assets on the territory of the Russian Federation or their low value, the lack of information from fair creditors on those persons who really control the companies' activities, and so on.

Thus, the bankruptcy of Energostrim GC clearly manifests the problem of bringing the final beneficiaries to responsibility, in particular, it is manifested in the bankrupt proceedings of sales organizations owned by Energostrim GC.

According to the decision of the Arbitration Court of the Tula Region dd. December 18, 2013, on case No. A68-1355/2013, Tulaenergosbyt, OJSC was declared insolvent (bankrupt), and the liquidation procedure was started [7].

Within this bankruptcy of Tulaenergosbyt, OJSC, on July 17, 2019, the Khamovniki District Court of Moscow convicted the former Director General of this organization for stealing 100 % of the shares of CHARTAM PROPERTIES LIMITED, which assets included two land plots in the Moscow region and an object under construction. The value of these assets, according to preliminary estimates, was about 1.5 billion rubles. Later, these assets were transferred to other individuals in a number of transactions, as a result of which the bankruptcy estate of Tulaenergosbyt, OJSC lost about 1.5 billion rubles.

As part of the criminal case, a civil claim against Yu.B. Lyubchich was not filed, and the bankruptcy manager of Tulaenergosbyt, OJSC filed a separate claim at the general jurisdiction court. According to the results of the claim proceedings on case No. 2-8420/2019 dd. December 25, 2019, the Odintsovo Municipal Court of the Moscow Region rejected the claim for recovery of these property assets from someone else's illegal possession.

Within the bankruptcy proceeding No. A63-1355/2013 of Tulaenergosbyt, OJSC, a claim against the former Director General (as a controlling person) was filed by the bankruptcy creditor Transtekhstroy, LLC only in 2020. Currently, these assets have not been returned to the bankruptcy estate of Tulaenergosbyt, OJSC, and the final beneficiaries of the companies, namely the owners Energostrim GC have not been brought responsible, which breaches the rights and interests of fair bankruptcy creditors.

Within the bankruptcy proceeding of Energostrim, LLC itself, the Moscow Arbitration Court (Writ of the Moscow Arbitration court dd. April 28, 2017, on case No. A40-143034/12) brought the former Director General Yu.A. Zhelyabovsky to subsidiary responsibility for the obligations of Energostrim, LLC in the amount of 5,483,231,136.17 rubles only in 2017. However, due to the lack of property assets of the specified controlling person, the funds were not returned to the bankruptcy estate and remained undistributed among fair creditors. [8]

The above situation with the problems of bringing the final beneficiaries to responsibility

is not unique and is quite common in the Russian Federation.

Thus, the need to bring the final beneficiaries of the FEC companies responsible is relevant, and both the state and the FEC companies with state participation suffer significant losses due to the absence of this institution in practice.

In order to prevent these problematic circumstances and improve the efficiency of activities, it is necessary to oblige organizations applying for the status of a guaranteeing supplier to provide information about the owners of the organization, including the final beneficiaries, to the authorized federal executive authority.

To establish an obligation for the specified persons to submit to the authorized federal executive authority the records on income and property for the calendar year preceding the date of submission of records and documents for assignment of the guaranteeing supplier status.

In case the organization refuses to submit the specified information and (or) fails to properly submit it, organizations applying for the status of a guaranteeing supplier shall be obliged to create a reserve fund in the amount of at least 30 % of its annual net profit.

The above circumstances only confirm the need to improve legislation in the area of economic security in the FEC in terms of increasing transparency and efficiency of activities of both the governing bodies of the FEC companies and of the companies themselves.

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