



# **RULING OF THE PLENARY SESSION OF THE SUPREME COURT OF THE RUSSIAN FEDERATION**

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## **On Court Application of Legislation Regulating the Features of Criminal Liability for Crimes in the Sphere of Entrepreneurial and Other Economic Activities**

Pursuant to Articles 8, 34 and 35 of the Constitution of the Russian Federation, the unity of economic space, free movement of goods, services and financial means, support of competition, freedom of economic activities are guaranteed. Private property is acknowledged and protected on a par with other forms of property. Every person may freely use its skills and property for entrepreneurial and other economic activities not prohibited by law.

The effective solution of tasks of the state economic policy suggests the creation and maintenance of a favorable business, entrepreneurship and investment climate and of conditions for doing business in the Russian Federation by stimulation of lawful entrepreneurial activity, carried out by its subjects independently, at their own risk, and based upon the principles of legal equality and good faith of the parties, freedom of contract and competition.

The effective achievement of the business community's goals primarily depends on the presence of effective organizational and legal mechanisms that allow to exclude the possibility of using criminal prosecution as a means of pressure upon business organizations and of solving disputes between business entities, to shield the entrepreneurs from unfounded criminal prosecution for failure to discharge their contractual obligations, where such failure is caused by the usual entrepreneurial risks. For instance, such mechanisms include legally established additional substantive and procedural guarantees of enforcement of rights and

lawful interests of entrepreneurs, who are criminally prosecuted over cases involving crimes in the sphere of entrepreneurial and other economic activities.

In view of the issues that the courts face when applying the legislation regulating the features of criminal liability for crimes in the sphere of entrepreneurial and other economic activities, as well as with the purpose of ensuring the unity of judicial practice, the Plenary Session of the Supreme Court of the Russian Federation, guided by Article 126 of the Constitution of the Russian Federation, Articles 2 and 5 of Federal Constitutional Law of 5 February, 2014 No. 3 “On the Supreme Court of the Russian Federation”, hereby rules to provide the following explanations:

1. To draw the courts’ attention to the fact that for cases regarding crimes specified in Articles 159–159.3, 159.5, 159.6, 160, 165 of the Criminal Code of the Russian Federation (hereinafter referred to as “CrC RF”) (if these offences are committed in the sphere of entrepreneurial activity), as well as in Articles 170.2, 171–174, 174.1, 176–178, 180–183, 185–185.4, Part 1 of Article 185.6, Articles 190–199.2 of the CrC RF, criminal and criminal procedure legislation establishes the features of criminal proceedings pertaining, in particular, to the manner of consideration of a notification about a crime (Parts 7 – 9 of Article 144 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as “the CrPC RF”) and initiation of a criminal case (Part 3 of Article 20, Part 1.2 of Article 140 of the CrPC RF), admission of objects and documents as material evidence (Article 81.1 of the CrPC RF), remanding in custody (Part 1.1 of Article 108 of the CrPC RF), as well as the features of relief from criminal liability and termination of criminal prosecution (Article 76.1 of the CrC RF, Article 28.1 of the CrPC RF).

The requirements contained in the aforementioned provisions shall be rigorously complied with when the court exercises its powers during pre-trial proceedings on criminal cases of the abovementioned category, as well as when courts of first and higher instances consider such cases at all stages.

2. When courts consider appeals in the manner established by Article 125 of the CrPC RF regarding decrees on initiation of a criminal case in relation to a specific person for crimes specified in Articles 159 – 159.3, 159.5, 159.6, 160, 165 of the CrC RF, they should take into account the fact that by virtue of Part 3 of Article 20 of the CrPC RF, criminal cases on such crimes are cases of private-public prosecution and are initiated only upon an application filed by the injured person, if they were committed by an individual entrepreneur in the course of entrepreneurial activity and (or) management of her/his property, used for entrepreneurial purposes, or if such offences were committed by a member of the management body of a commercial organization in the course of exercise of powers of managing the organization or related to the performance of entrepreneurial or other economic activities by the commercial organization, except for the cases specified in that norm.

Herewith, the notion “members of the management body of a commercial organization” includes, in particular, a member of the board (supervisory board) or a member of the collective executive body of a commercial organization (for instance, the board of a joint-stock company), or a person discharging the functions of the sole executive body (director, general director, chairman of a production cooperative, etc.).

3. By implication of criminal procedure law, in cases specified in Part 3 of Article 20 of the CrPC RF, when the injured person is a commercial organization, the criminal cases specified in Articles 159–159.3, 159.5, 159.6, 160, 165 of the CrC RF, are instituted upon an application of a person who, according to the Articles of Association of the organization, is its sole manager (the person discharging the functions of the sole executive body) or the head of the collective executive body of a commercial organization (for instance, the chairman of the board of a joint-stock company), or a person who is authorized by the head of a commercial organization to represent its interests in criminal proceedings in accordance with Part 9 of Article 42 of the CrPC RF.

If the head of a commercial organization is suspected of committing such crimes, a criminal case may be initiated upon an application of the management body of the organization, which is competent in accordance with its Articles of Association, to elect, appoint and (or) terminate the powers of its head (for instance, the board of directors), or a person authorized by such a body to file such an application.

4. When verifying the lawfulness and validity of initiation of a criminal case on a crime specified in Article 172.1 of CrC RF, and, in particular, the investigator’s compliance with the requirements of Part 12 of Article 140 of the CrPC RF, following an appeal of an interested person, the court shall ensure that the reasons for initiating the criminal case were materials sent to the preliminary inquiry body by the Central Bank of the Russian Federation in accordance with Federal Law of 10 July, 2002 No. 86-FZ “On the Central Bank of the Russian Federation (Bank of Russia)”, as well as by the bankruptcy receiver (liquidator) to the financial institution to resolve the issue of initiation of a criminal case.

When verifying the lawfulness and validity of initiation of a criminal case on a crime specified in Articles 198-199.1 of the CrC RF, the court shall establish whether the investigator, pursuant to the requirements of Part 7 of Article 144 of the CrPC RF, sent, within three days, a copy of the notification received from a body of inquiry regarding such offences, attaching relevant documents and a pre-estimate of the presumed amount of tax and (or) levies in arrears, to a tax authority higher in relation to the tax authority that registered the taxpayer (tax agent, levy payer), as well as whether he received a conclusion or information specified in Part 8 of Article 144 of the CrPC RF from the tax authority. In such a case, it is necessary to take into account the fact that prior to receiving the conclusion or

information from the tax authority, the investigator may decide to initiate a criminal case only if there are grounds and sufficient data evidencing the elements of a crime (Part 9 of Article 144 of the CrPC RF), which must be verified by the court.

The data evidencing the elements of a tax crime may be contained, for instance, in materials sent by a prosecutor to an investigative body to resolve the issue of criminal prosecution, in an expert report and other documents.

If after such verification the court establishes that the decision to initiate a criminal case on crimes specified in Article 172.1 or Articles 198-199.1 of the CrC RF was adopted by the investigator in the absence of sufficient data evidencing the elements of such crimes, such a decision may be declared unlawful and (or) unsubstantiated. In such a case, the court shall oblige the investigator to eliminate the abovementioned violation of law.

5. When considering an appeal regarding the initiation of a criminal case in regard of a specific person on a crime in the sphere of entrepreneurial and other economic activities, the court shall take into account the fact that the inquiry officer, body of inquiry, head of the investigation body adopts such a decision only based on evidence received in the manner established by Article 144 of the CrPC RF.

In view of this, apart from other issues, the court shall verify the lawfulness and validity of procedural actions and investigative operations performed by the abovementioned bodies and their officials in the course of inspecting the notification about a crime, paying particular attention to actions and measures related to the restriction of proprietary and other rights and freedoms of entrepreneurs and (or) persons who have labor relations with them (for instance, appointment of documentary inspections and revisions, obtainment of samples to perform comparative examinations, discovery or seizure of documents and items belonging to an individual entrepreneur or commercial organization, including electronic storage devices, inspection of production facilities, buildings, constructions, land plots and transport vehicles belonging to them). If violations of law that lead to such evidence being declared unacceptable are discovered, the court shall assess the sufficiency of data evidencing the elements of crime, disregarding the results of such actions and measures.

6. It is explained to courts that Part 1.1 of Article 108 of the CrPC RF prohibits to remand a person in custody in the absence of circumstances specified in Items 1-4 of Part 1 of Article 108 of the CrPC RF in relation to the person suspected or accused of offences specified in Articles 171–174, 174.1, 176–178, 180–183, 185–185.4, 190–199.2 of the CrC RF, without any other conditions, and in relation to the person suspected or accused of crimes specified in Articles 159–159.3, 159.5, 159.6, 160 and 165 of the CrC RF, provided that such crimes were committed in the sphere of entrepreneurial activity.

However, the presence of circumstances specified in Items 1-4 of Part 1 of Article 108 of the CrPC RF established when considering a motion to remand such a suspect or person accused of crimes specified in Part 1.1 of Article 108 of the CrPC RF in custody, shall not relieve the court from the obligation arising from the provisions of Part 1 of Article 108 of the CrPC RF to discuss the possibility to apply a different (less restrictive) restraint measure in each case.

7. When resolving the issue of remanding the suspect or person accused of crimes specified in Parts 1-4 of Article 159, Articles 159.1–159.3, 159.5, 159.6, 160 and 165 of the CrC RF in custody, the court shall establish whether such crimes were committed in the sphere of entrepreneurial activity.

In order to resolve the issue of entrepreneurial nature of activity, the court shall take into account the fact that entrepreneurial activity is individual activity carried out at a person's own risk and aimed at systematically receiving profit from the use of property, sale of goods, performance of works or provision of services by persons registered in this capacity in the manner stipulated by law.

In view of this, the abovementioned crimes shall be deemed to have been committed in the sphere of entrepreneurial activity if they were committed by an individual entrepreneur pertaining to the engagement in entrepreneurial activity and (or) management of her/his property, used for entrepreneurial purposes, as well as by a member of the management body of a commercial organization in the course of exercise of powers of managing the organization, or by a commercial organization engaged in its entrepreneurial activity.

The courts' attention is drawn to the fact that based on Item 4 of footnotes to Article 159 of the CrC RF, crimes specified in Articles 5-7 of Article 159 of the CrC RF are always committed by the abovementioned persons only in the sphere of entrepreneurial activity.

8. If crimes specified in Part 1.1 of Article 108 of the CrPC RF are committed by an individual entrepreneur or a member of the management body of a commercial organization in cooperation with other parties that do not have such status, in the absence of circumstances specified in Items 1-4 of Part 1 of Article 108 of the CrPC RF, such persons cannot be remanded in custody.

9. By implication of Part 5 of Article 159 of the CrC RF, willful nonperformance of contractual obligations in the sphere of entrepreneurial activity shall mean willful, full or partial nonperformance of an assumed obligation by a person that is a party to a contract, in order to steal property of another or to acquire the right to such property by false pretenses or abuse of trust when the parties to the contract are individual entrepreneurs and (or) commercial organizations. The evidence

contained in the case shall manifestly confirm the presence of the person's direct intention to commit fraud.

Facts that confirm the willful nature of a crime may include, for instance, facts that evidence that the person had no (and could not have any) actual possibility of performing the obligation; concealment of information about the presence of debts and pledges of property; use of funds received from a party to the agreement for personal purposes; use of forged constituent documents, forged warranty letters, etc., when entering into the contract. Herewith, each of the abovementioned facts separately cannot evidence the presence of a willful intent to commit a crime, and the court's conclusions that the person is innocent shall be based upon the assessment of the full body of evidence.

10. Courts shall take into account the fact that for criminal cases on crimes specified in Parts 5-7 of Article 159, Articles 159–159.3, 159.5, 159.6, 160 and 165 of the CrC RF, if such crimes were committed in the sphere of entrepreneurial activity, as well as in Articles 171-174.1, 176–178, 180–183, 185–185.4 and 190–199.2 of the CrC RF, there are a special manner and time periods for recognizing the items and documents as material evidence, for returning them to the owners they were taken from (Article 811 of the CrPC RF).

A refusal of the investigator, inquiry officer to return (within the time period stipulated in Part 4 of Article 81.1 of the CrPC RF) the items discovered in the course of pre-trial proceedings, which were not recognized as material evidence, including electronic storage devices (except for items specified in Item 2 of Part 3 of Article 81 of the CrPC RF), and documents to the persons they were taken from, may be appealed against before the head of the investigation body or a prosecutor, as well as before the court in the manner stipulated in Article 125 of the CrPC RF.

11. When relieving persons from criminal liability on grounds stipulated in Article 76.1 of the CrC RF, it is necessary to take into account the footnotes to the relevant articles of the Criminal Code of the Russian Federation. In view of this, courts shall take into account the fact that a person is regarded as a first-time offender if this person has no outstanding or unexpunged conviction for the crimes specified in the same Article under which that person is relieved from liability.

12. In view of the interrelated provisions of Part 1 of Article 76.1, Item 2 of the footnotes to Article 198, Item 2 of the footnotes to Article 199 of the CrC RF, and Part 2 of Article 28.1 of the CrPC RF, restitution of damages caused to the budgetary system of the Russian Federation following a crime specified in Articles 198–199.1 of the CrC RF shall mean full payment (prior to the appointment of a court session by a court of first instance) of arrears, fees and penalties in the amount established by the tax legislation of the Russian Federation with due regard to the calculation of the amount of fees and penalties presented by a tax authority.

Pursuant to Item “j” of Part 1 of Article 61 of the CrC RF, full restitution of damages carried out after the court of first instance appoints the court session, is deemed by the court as a circumstance mitigating the punishment. Pursuant to Part 2 of the same Article, partial restitution of damages caused by the crime may also be deemed as a mitigating circumstance.

For the purpose of applying Part 1 of Article 76.1 of the CrC RF, full recovery of damages caused to the budgetary system of the Russian Federation may be confirmed by documents certifying the fact of transfer to the budgetary system of the Russian Federation of accrued amounts in discharge of indebtedness of the tax payer (an organization or individual), for instance, by a payment order or a receipt marked by the bank as executed. Herewith, the court may verify the abovementioned fact.

13. Restitution of damages and (or) monetary compensation specified in Article 76.1 of the CrC RF may be performed not only by the person who committed a crime, but (with that person’s request or consent) by another person as well. If crimes specified in Articles 199 and 199.1 of the CrC RF are committed, an organization, on whose behalf the person is charged with tax evasion, may retribute damages (Item 2 of the notes to Article 199 of the CrC RF).

Promises and various obligations of the person who committed a crime, to retribute damages and transfer money compensation to the federal budget in the future are not circumstances that give reason to relieve this person from criminal liability.

14. For relief from criminal liability for crimes specified in Part 2 of Article 76.1 of the CrC RF, restitution of damages caused to a citizen, organization or state as a result of the crimes, as well as the transfer of income and money compensation to the federal budget shall be performed in full.

Taking into account that Part 3 of Article 28.1 of the CrPC RF does not contain any requirements to retribute damages before a court session is appointed, criminal prosecution is subject to termination by the court where Part 2 of Article 76.1 of the CrC RF applies, if all of the requirements specified in this provision (damages are restituted, money compensation is paid to the federal budget) are met in full before the court retires to the deliberation room.

15. The amount of damages subject to restitution is established on the basis of civil contracts, primary accounting documents, extracts (certificates) from settlement accounts, information on transactions with the use of electronic payment means, etc. When it is necessary to establish the amount of damages subject to restitution, a forensic expert examination may be appointed.

For the purposes of monetary compensation, income is recognized as the general amount of unlawful enrichment received as a result of the crimes (without

deduction of expenses incurred), in monetary form (cash, non-cash and electronic funds in rubles and (or) foreign currency) and (or) in kind (movable and real property, proprietary rights, certificated and non-certificated securities, etc.).

16. Where not all actions specified in Article 76.1 of the CrC RF are performed or they are not performed in full by the person who committed a crime of minor or average gravity in the sphere of entrepreneurial and other economic activities, her/his motion to terminate criminal proceedings on the grounds specified in Articles 75, 76 or 76.2 of the CrC RF may be satisfied by the court, provided that the requirements specified in the abovementioned provisions are met.

17. If there were grounds specified in Article 76.1 of the CrC RF, and the court of first instance did not terminate the criminal case and (or) criminal proceedings, then pursuant to Article 389.21 of the CrPC RF, the court of appeal shall quash the convicting sentence and terminate the criminal case and (or) criminal prosecution.

Where there are other legal grounds to quash the convicting sentence, and also if at the time of consideration of the case by the court of appeal the convicted person met the conditions specified in Part 2 of Article 76.1 of the CrC RF regarding relief from criminal liability, unless there are grounds to pronounce an acquitting sentence, the criminal case or criminal prosecution is subject to termination according to the rules of Part 3 of Article 28.1 of the CrPC RF.

The decision to terminate the criminal case and (or) criminal prosecution on the grounds specified in Article 76.1 of the CrC RF may be adopted by the court of first instance or court of appeal only if the accused (convicted) person does not object to that. By implication of law, if the accused (convicted) person has such objections, the court shall continue to consider the case and deliver an acquitting sentence or a convicting sentence with relief of the convicted from punishment (Part 2 of Article 27, Part 8 of Article 308 of the CrPC RF).

18. As for cases on crimes specified in Part 2 of Article 76.1 of the CrC RF, committed by a group of persons who bear joint liability for damages caused by their joint criminal actions, the court shall terminate criminal prosecution in relation to all the joint offenders, if all the requirements of Part 2 of Article 76.1 of the CrC RF on restitution of damages and other payments are met in full by at least one of them.

19. When appointing the punishment in regard of the person found guilty of committing one or several crimes specified in Articles 159–159.3, 159.5, 159.6, 160, 165 of the CrC RF, if these crimes are committed in the sphere of entrepreneurial activity, as well as in Articles 170.2, 171–174, 174.1, 176–178, 180–183, 185–185.4, in Part 1 of Article 185.6, Articles 190–199.2 of the CrC RF, courts shall be guided by the general principles of appointment of punishment and shall consider the possibility of applying provisions of Parts 1 and 2 of Article 64,

Article 73, as well as of Part 6 of Article 15 and Article 80.1 of the CrC RF. It should be noted that remanding of the convicted person in custody until the sentence is pronounced cannot predetermine the appointment of punishment in the form of actual deprivation of liberty. However, by virtue of provisions of Part 5 of Article 72 of the CrC RF, when appointing the main punishment in the form of a fine, prohibition to hold a specific position or carry out a specific type of activity, the court, taking into account the period of remand in custody, shall mitigate the punishment or fully release the convicted person from such a punishment.

20. If during the consideration of a criminal case regarding a crime committed in the sphere of entrepreneurial and other economic activities, certain circumstances are discovered that were conducive to the commission of the crimes, as well as to the violation of rights and freedoms of citizens, other violations of law committed in the course of investigation or preliminary inquiry, the court, by adopting a special decree or ruling, draws the attention of corresponding organizations and officials to the abovementioned circumstances and facts of violation of law that require the adoption of necessary measures.

21. In view of this ruling, Item 16 is abrogated from Ruling of the Supreme Court of the Russian Federation of 27 June, 2013 No. 19 “On Court Application of Laws Regulating the Grounds and Manner of Relief from Criminal Liability”.

Chief Justice of the Supreme Court of  
the Russian Federation

V.M. Lebedev

Secretary of the Plenary Session, Judge of  
the Supreme Court of the Russian Federation

V.V. Momotov