



Exclusion from EGRUL: possible subsidiary liability of the controlling persons

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The practice concerning liability of controlling persons for debts of legal entities excluded from the unified state register of legal entities (EGRUL) following a decision from tax authority is being developed. In the past the Supreme Court and Constitutional Court of the Russian Federation took different views on this matter: from presumption of guilt for the controlling person to obligation of the creditors of the legal entity to monitor possible exclusion of such entity. In this article we will focus on the current court practice and the more correct approach.

According to the general rules that are applicable in case of bankruptcy¹, subsidiary liability of the persons controlling the legal entity for the debts of

such legal entity is frequently applied in practice. As provided by Art. 3, par. 3.1, of the Federal law dated 08.02.1998 No. 14-FZ “On limited liability companies” (hereinafter the “**Law on LLC**”), the persons controlling a legal entity excluded from EGRUL also bear subsidiary liability for the debts of such legal entity.

The court practice illustrated two possible approaches in applying subsidiary liability:

- 1) holding the controlling persons not liable since the creditors must monitor the situation with their debtor (inter alia, its exclusion from EGRUL);
- 2) holding the controlling persons liable if such persons allowed the exclusion from EGRUL of the legal entity with debts (unfair actions of the controlling persons in this regard are committed).

¹ As per Chapter III.2 of the Federal law dated 26.10.2002 No. 127-FZ “On insolvency (bankruptcy)” and the Decision of the Plenum of the Supreme Court of the Russian Federation dated 21.12.2017 No. 53.



The Supreme Court² clarified that exclusion of the company from EGRUL as a result of actions or omissions of the controlling persons are not considered as sufficient grounds for subsidiary liability of the controlling persons. It is required to prove that unreasonable and/or unfair actions (omissions) of the controlling persons led to inability of the legal entity to fulfil its obligations towards its creditors. This practically means that the controlling persons are liable for causing the bankruptcy of the legal entity. So, if the due procedure of liquidation of the legal entity was conducted, the debts of the such legal entity towards its creditors would still not be settled.

The Constitutional Court in its decision dated 21.05.2021 No. 20-П, on one hand, upheld the practice of the Supreme court as regards the grounds for holding the controlling persons liable. On the other hand, the Court pointed out that, in case of filing a claim with the courts to hold the controlling persons liable, the same controlling persons as defendant must prove that they did their best to fulfill their obligations towards the creditors of the legal entity. However, this interpretation was provided by the Constitutional Court merely in relation to physical persons as claimants, probably in order to protect physical persons from entrepreneurs. At the same time, the Constitutional Court added that this can also be applicable to physical persons.

Following this decision of the Constitutional Court, the courts have changed their practice and guilt of the controlling persons became a presumption only following to the exclusion from EGRUL of the legal entity with debts. This rule was applicable regardless of whom was the subject who filed a claim: either a physical person or an entrepreneur.

Considering this incorrect trend, the Supreme court has taken the decision by the Court Collegium for economic cases

dated 03.11.2022 No. 305-ЭC22-11632 in the case No. A40-73945/2021 to clarify the following issues:

- subsidiary liability under Art. 3, par. 3.1, of the Law on LLC is only possible in case of causing bankruptcy (inability to fulfill obligations towards the creditors) of the legal entity excluded from EGRUL;
- there is no presumption of guilt in case of filing a claim by the creditors (entrepreneurs), so the claimant must prove that exclusion of the company from EGRUL occurred as a result of unreasonable and/or unfair actions (omissions) of the controlling persons that eventually led to the incapability of the legal entity to fulfill its obligations towards its creditors. The courts must determine whether the claimant presented any objections as regards the exclusion of the legal entity from EGRUL. This differs from the cases when claims are filed by physical persons when the guilt of the controlling persons is presumed³.

This position of the Supreme court represents the correct approach in terms of subsidiary liability. It is worthwhile mentioning that, even in bankruptcy cases, the Supreme court has never established the presumption of guilt just due to the fact that the claim was filed by a physical person. At the same time, it is obvious that the creditor, being an external person to the legal entity, is not able to prove its claim confirming the exact unreasonable and/or unfair actions (omissions) committed by the controlling persons if such creditor does not have access to the internal documentation of the legal entity.

Presumption of guilt of the controlling persons - as clarified by the higher court - in practice leads to the fact that the lower courts, in compliance with the instruction from the higher court, immediately take a decision concerning subsidiary liability of the controlling

² Decision of the Court collegium for economic cases of the Supreme Court dated 30.01.2021 No. 306-ЭC19-18285 in the case No. A65-27181/2018, Decision of the Court collegium for economic cases of the Supreme Court dated 25.08.2020 No. 307-ЭC20-180 in the case No. A21-15124/2018.

³ Decision of the Court collegium for civil cases of the Supreme court dated 27.09.2022 No. 5-КГ22-63-К2

persons. Any attempts to prove the contrary by the controlling persons acting as defendant are unsuccessful. The position of the courts in this respect is that the controlling persons could act in a better way and thus prevent the legal entity from inability to fulfill its obligations towards its creditors, as well as exclusion of the legal entity from EGRUL. In the absence of such actions by the controlling persons, its subsidiary liability is reasonable.

In reality, a due balance between the claimant and the defendant is needed. On one hand, the controlling persons (defendant) must be given the opportunity to present even a minimum clarification as regards the financial situation of the legal entity prior to its exclusion from EGRUL and to disclose

the documents requested by the claimant⁴. On the other hand, the claimant (the creditor), on the basis of the information and documentation obtained from the defendant, must prove the essence of a causal connection between the actions (omissions) of the controlling persons and the inability of the legal entity to pay its debts towards the creditors, as well as to prove the guilt of the defendant.

Should the controlling persons deny to present such clarifications and disclose the evidence, this theoretically may be considered as an unfair behavior by the controlling persons. In this case, presumption of unfair behavior and guilty actions of the controlling persons seems to be reasonable.

⁴ Such approach can be found in the Decision of the Court collegium for economic cases of the Supreme court dated 09.08.2022 No. 307-ЭС22-5640 in the case No. А26-507/2021



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