

MITIGATION OF ADMINISTRATIVE LIABILITY IN COVID-19 TIMES

DE BERTI JACCHIA FRANCHINI FORLANI
STUDIO LEGALE

Covid-19 had a very negative impact on the business; however, under certain circumstances it may also represent a useful tool to save money when facing administrative liability issues. In particular, due to the new legislation enacted in connection with Covid-19, an administrative fine may be replaced by an official warning letter or may be decreased in its amount. In this article we will focus on the current court practice and will summarize the issues to be considered in order to mitigate the effects of administrative liability in the current difficult times.

Administrative fine replaced by an official warning letter

In the most recent court practice there have been cases when, based on the current economic situation in Russia due to Covid-19, an administrative fine was replaced by an official warning letter. In particular, in one case¹ it was held that in pandemic times even a minimum administrative fine (for alcohol distribution without a license) might cause the interruption of the business activity of a company and, therefore, the court issued a simple warning letter, instead of an administrative fine. In another case² the same court ruled that an administrative fine for payment of salary in cash to a non-resident without using a bank account was a much too severe and disproportionate penalty. Thus, taking into account also Covid-19, an official warning letter was preferred as penalty.

What to consider when limiting the penalty to an official warning letter

It is important to mention that Covid-19, by itself, is not sufficient to avoid an administrative fine. Other circumstances must be evaluated as well (such as the fact that violation may not cause harm to people, state security, etc.).

In practice, there are cases when the courts resolving disputes concerning administrative violations similar to those mentioned above refused to replace the administrative fines with an official warning

¹ Please see the decision of the commercial court of the Irkutsk region dated 1 June 2020 in the case No. A19-31267/2019.

² Please see the decision of the commercial court of the Irkutsk region dated 10 August 2020 in the case No. A19-10078/2020.

letter. For instance, in some court decisions³ it was held that distribution of alcohol without a license poses a risk to life and health of people. Likewise, in another case⁴ it was ruled out that settlement in cash to non-residents without using a bank account poses a risk to the economic security of the state.

Another important principle is that an official warning letter may only be issued in place of an administrative fine in respect of an offence that was committed for the first time⁵.

Decrease of penalty below minimum amount

The Russian code of administrative offences allows to decrease the penalty for companies below a minimum amount, provided that there are special circumstances connected with:

- the character of violation and its consequences;
- the financial situation of the company.

Generally, the courts take into account all these circumstances. However, sometimes certain arguments are considered more important. Recently, Covid-19 situation has been considered as an argument in favor of penalties' decrease.

How the pandemic is considered by the courts

In one case a company was held liable for execution of anti-competitive agreement in October 2018. An administrative fine in the amount of approx. RUR 3,6 million was issued. Following a period of suspension for more than a year, the proceedings were resumed in January 2020. At that time the court⁶ stated that the administrative fine was legitimate and proportionate, but too high. Therefore, the amount of the administrative fine was substantially decreased. Special attention was paid by the court to the limitations connected with Covid-19 that severely interfere with the company's business. In the appellate instance there was a further attempt to obtain an additional decrease of the fine. However, the first instance decision was upheld⁷.

In a case⁸ the court has decreased the administrative fine (for violations in the area of migration registration) below the statutory minimum taking into consideration the Covid-19 situation.

Another court decision⁹ also took into account the pandemic for decreasing the administrative fine (from RUR 3 million to RUR 1,5 million) for importation of alcoholic products without the necessary license. The appellate court¹⁰ upheld such approach.

What could also be considered by the courts

Apart from Covid-19, it is recommended to refer to courts also to the following circumstances:

³ Please see the decisions of the commercial court of the East-Siberian district dated 11 March 2020 in the case No. A10-2844/2019, of the commercial court of the Moscow district dated 16 December 2019 in the case No. A40-121998/2019 and of the commercial court of the Far Eastern district dated 8 October 2019 in the case No. Ф03-4360/2019.

⁴ Please see in the decision of the commercial court of the Ural district dated 20 July 2020 in the case No. Ф09-4354/20, of the commercial court of the West-Siberian district dated 27 May 2020 in the case No. A03-16321/2019.

⁵ It is worthwhile mentioning that the cases when companies are held liable as owners of the vehicles for road traffic offences cannot be considered as first offence. As stated by the higher court in the decision dated 19 February 2020 No. 309-ЭС19-23557 for such kind of offences, companies are held liable as owners of the vehicle and not as direct offender (i.e., drivers).

⁶ Please see the decision of the commercial court of the Republic of Tyva dated 9 June 2020 in the case No. A69-3152/18.

⁷ Please see the decision of the third commercial appellate court dated 19 August 2020 No. A69-3152/2018.

⁸ Please see the decision of the commercial court of the Republic of Tyva dated 3 June 2020 in the case No. A69-146/20t.

⁹ Please see the decision of the commercial court of Primorski region dated 23 June 2020 in the case No. A51-3958/2020.

¹⁰ Please see the decision of the fifth commercial appellate court dated 7 September 2020 in the case No. 05АП-4006/2020.

- availability of mitigating circumstances (e.g., voluntary cancellation of the offence, prevention of negative effects);
- absence of aggravating circumstances (e.g., previous non-commitment of the same offences).

In the recent practice there are cases¹¹ when an insignificant omission of the term in the offence was considered by the court in favor of the administrative fine decrease. Previously, this concept was mentioned in the Judicial review approved by the Presidium of the Higher Court of the Russian Federation dated 30 November 2016.

Reference to the absence of any negative effects out of the committed offence may also be useful. However, in case of the formally defined offence (i.e., when the negative effects are not strictly required) this argument will not be considered by the court. The court practice¹² confirms this position.

Argument concerning difficult financial situation

The courts often consider the financial situation of the offender as an optional (non-binding) circumstance that *per se* cannot help to decrease the administrative fine, provided that there are no other exceptional circumstances connected with the character and the effects of the offence. This position was expressed in a number of court decisions¹³.

The court¹⁴ may also reject the argument concerning the difficult financial situation, if this is not supported by any evidence. Accounting reports, bank statements and other financial documents may be used as relevant proof.

It is allowed not only to refer to the current difficult financial situation, but also to its possible further aggravation due to the payment of the administrative fine. For instance, in a court case¹⁵ a penalty decrease was granted considering the fact that the payment of the administrative fine of approx. RUR 100 million would prevent the company from paying salaries and, consequently, the overall business activity of the company might be problematic. Finally, another court¹⁶ pointed out that the administrative fine must not be used as an instrument of suppression of business activity.

November 12th, 2020

¹¹ Please see the decisions of the commercial court of the Moscow district dated 22 July 2020 in the case No. A40-278230/2019, of the second commercial appellate court dated 13 November 2019 in the case No. A31-8234/2019, of the fifth commercial appellate court dated 3 April 2019 No. 05АП-1456/2019.

¹² Please see the decisions of the eighth commercial appellate court dated 11 December 2019 in the case No. 08АП-13835/2019, of the fifteenth commercial appellate court dated 28 February 2020 in the case No. 15АП-23848/2019.

¹³ Please see the decisions of the court on intellectual rights dated 17 April 2019 in the case No. A32-43857/2017, of the fourth commercial appellate court dated 7 February 2020 in the case No. A19-22195/2019, of the fifteenth commercial appellate court dated 21 July 2020 in the case No. 15АП-8882/2020.

¹⁴ Please see the decisions of the commercial court of Moscow district dated 10 July 2019 in the case No. A40-269099/18, of the commercial court of Far Eastern district dated 22 October 2019 in the case No. Ф03-4704/2019, of the eighth commercial appellate court dated 22 June 2020 in the case No. 08АП-3683/2020.

¹⁵ Please see the decision of the ninth commercial appellate court dated 23 March 2020 in the case No. 09АП-9764/2020.

¹⁶ Please see the decision of the twelfth commercial appellate court dated 20 November 2019 in the case No. A12-19460/2019.

Il presente articolo ha esclusivamente finalità informative e non costituisce parere legale.


This article is exclusively for information purposes, and should not be considered as legal advice.



Igor Brazhevsky

ASSOCIATE

 i.brazhevsky@dejalex.com

 +7 495 792 54 92

 Ulitsa Bolshaya Ordynka 37/4
119017 – Moscow

MILANO

Via San Paolo, 7 · 20121 Milano, Italia
T. +39 02 72554.1 · F. +39 02 72554.400
milan@dejalex.com

ROMA

Via Vincenzo Bellini, 24 · 00198 Roma, Italia
T. +39 06 809154.1 · F. +39 06 809154.44
rome@dejalex.com

BRUXELLES

Chaussée de La Hulpe 187 · 1170 Bruxelles, Belgique
T. +32 (0)26455670 · F. +32 (0)27420138
brussels@dejalex.com

MOSCOW

Ulitsa Bolshaya Ordynka 37/4 · 119017, Moscow, Russia
T. +7 495 792 54 92 · F. +7 495 792 54 93
moscow@dejalex.com