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On Certain Issues regarding the Liability of Persons Controlling the Debtor in Case of Bankruptcy

In order to ensure the uniform court application of provisions of Federal Law No. 127 of 26 October 2002 “On Insolvency (Bankruptcy)” regarding the liability of persons controlling the debtor in case of bankruptcy, 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 No. 3 of 5 February 2014 “On the Supreme Court of the Russian Federation”, hereby rules to provide the following explanations:

General Principles of Liability of Persons Controlling the Debtor in Case of Bankruptcy

1. Subsidiary liability of persons controlling the debtor is an exceptional mechanism of restoring the violated rights of the creditors. When applying it, the courts need to take into account the nature of the concept of a legal person (economic entity assumption) (Item 1 of Article 48 of the Civil Code of the Russian Federation, hereinafter referred to as the CC RF), its independent liability (Article 56 of the CC RF), the fact that members of corporations, founders of unitary organisations, other persons composing the bodies of a legal person have broad discretion when adopting (agreeing upon) business decisions, and also that it

is prohibited to those persons to harm the independent participants of the civil turnover by abusing the institute of the legal person (Article 10 of the CC RF).

2. When persons controlling the debtor are held subsidiary liable, general provisions of Chapters 25 and 59 of the CC RF regarding liability for breach of obligations and obligations arising as a result of damage are subject to application in the part that does not contradict the special provisions of Federal Law No. 127 of 26 October 2002 “On Insolvency (Bankruptcy)” (hereinafter referred to as the Law on Bankruptcy).

Person Controlling the Debtor

3. By general rule, a necessary condition for characterising a person as controlling the debtor is that this person must be actually capable of giving the debtor obligatory instructions or of otherwise controlling its actions (Item 3 of Article 53¹ of the CC RF, Item 1 of Article 61¹⁰ of the Law on Bankruptcy).

Exercise of actual control over the debtor is possible without presence (absence) of formal legal features of affiliation (kinship or in-law relationship with persons comprising the bodies of the debtor, direct or indirect participation in its capital or management, etc.). The court establishes the degree of involvement of the person held subsidiary liable in the process of the debtor’s management by examining, how significantly it could influence the adoption of important business decisions regarding the activities of the debtor.

If transactions that changed the economic and (or) legal fate of the debtor were made under the influence of the person that defined the fundamental terms of those transactions, such a person is recognised as the person controlling the debtor.

A person may not be recognised as controlling the debtor only because it was in a kinship or in-law relationship with members of the debtor’s bodies or because powers were transferred to it to perform certain ordinary transactions in the debtor’s name, in particular within the framework of ordinary economic activities, or because it occupied the positions of the debtor’s chief accountant, financial director (Sub-items 1–3 of Item 2 of Article 61¹⁰ of the Law on Bankruptcy). The aforementioned persons may be recognised as controlling the debtor in the general manner, in particular with the use of presumptions stipulated in bankruptcy

legislation; herewith, the advantages that they have due to their positions are taken into account.

4. By implication of interrelated provisions of the second paragraph of Article 2, Item 2 of Article 3, Items 1 and 3 of Article 61¹⁰ of the Law on Bankruptcy, the control that took place within the period preceding the actual appearance of signs of bankruptcy is by general rule taken into account for the purpose of application of special statutory provisions on subsidiary liability, independent of whether the actual financial situation of the debtor was being concealed. Namely, the three-year period preceding the moment on which it became impossible for the debtor to fully satisfy the creditors' claims, in particular the claims for obligatory payments, because the total amount of obligations exceeded the real cost of its assets (hereinafter referred to as objective bankruptcy) is taken into account.

The aforementioned statutory provisions do not exclude the possibility that the controlling person will be held liable for other actions performed outside of the three-year period, e.g. liability stipulated in legislation regarding legal persons (Article 53¹ of the CC RF, Article 71 of Federal Law No. 208 of 26 December 1995 "On Stock Companies" (hereinafter – the Law on Stock Companies), Article 44 of Federal Law No. 14 of 8 February 1998 "On Limited Liability Companies" (hereinafter – the Law on Limited Liability Companies), etc.).

5. Participation in the debtor's bodies does not by itself indicate that a person has controlling status. Exceptions to this rule are stipulated in Sub-items 1 and 2 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy, which list the persons that are presumed to have determined the debtor's actions (the presumption is refutable).

If a managing company acts as the debtor's head (single managing body; hereinafter – the head) (Item 3 of Article 65³ of the CC RF), it is presumed, until proved otherwise, that this managing company and its head are the persons controlling the debtor; by general rule, they bear joint and several liability stipulated in Articles 61¹¹ – 61¹³, 61²⁰ of the Law on Bankruptcy.

In accordance with Sub-item 2 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy it is presumed that a member of a corporation, a founder of a unitary organisation is a controlling person, if such a person and the persons affiliated with it (in particular, Article 53² of the CC RF, Article 9 of Federal Law No. 135 of 26 July 2006 "On Protection of Competition", Article 4 of the Law of the RSFSR No. 948–I of 22 March 1991 "On Competition and Limitation of Monopolistic

Activities on Commodity Markets”) have the rights to control 50 and more percent of the debtor’s voting shares (equity shares, participation units) or have a total of 50 and more percent of votes when decisions are made in a general meeting, or if their votes suffice to appoint (elect) the debtor’s head. It is presumed that the person meeting one of the aforementioned criteria is recognised as a controlling person along with the persons affiliated with it.

6. A head that is formally a member of the bodies of a legal person, but is not engaged in the actual management (hereinafter referred to as a nominal head), who, for example, entrusts a different person with the managing functions by virtue of a power of attorney or makes key decisions at the instructions or with clearly expressed consent of a third person that does not have the corresponding formal powers (the actual head), does not lose the status of a controlling person, because such conduct does not mean the loss of capacity to influence the debtor and does not exempt the nominal head from performing the duties of choosing a representative and controlling its actions (failure to act), as well as from the duty of ensuring the due functioning of the legal person’s management system (Item 3 of Article 53 of the CC RF).

In this case, by general rule, the nominal and the actual heads bear the subsidiary liability stipulated in Articles 61¹¹ and 61¹² of the Law on Bankruptcy, as well as the liability stipulated in Article 61²⁰ of the Law on Bankruptcy in a joint and several manner (first paragraph of Article 1080 of the CC RF, Item 8 of Article 61¹¹, second paragraph of Item 1 of Article 61¹² of the Law on Bankruptcy).

Herewith, by virtue of special regulations (Item 9 of Article 61¹¹ of the Law on Bankruptcy) the amount of subsidiary liability of the nominal head may be decreased, if the information disclosed by it (which was inaccessible for the independent participants of the turnover) helped discover the actual head and (or) the property of the debtor or of the actual head, concealed by them, at the expense of which the creditors’ claims may be satisfied.

When resolving the issue of decreasing the amount of subsidiary liability of the nominal head, the court takes into account, to what extent its actions in disclosure of information helped restore the violated rights of the creditors and compensate their property losses (Item 1 of Article 1064 of the CC RF).

If the subsidiary liability of the nominal head is decreased, the actual head bears subsidiary liability in full volume. The nominal head is jointly and severally liable

with the actual head in the part, in which its liability was not decreased (Item 1 of Article 1064, first paragraph of Article 1080 of the CC RF).

The foregoing explanations regarding the decrease of subsidiary liability of the nominal head apply both in cases of liability for the debtor's failure to submit (failure to timely submit) an application regarding its own bankruptcy and in cases of liability for failure to fully satisfy the creditors' claims (Item 1 of Article 6 of the CC RF, Item 9 of Article 61¹¹ of the Law on Bankruptcy).

The issue, whether the nominal or actual members of a debtor's body (in particular, participants of a corporation, founders of a unitary organisation), liquidators or members of a liquidation commission have the status of controlling persons, as well as issues of holding them subsidiary liable (Item 1 of Article 6 of the CC RF, Item 9 of Article 61¹¹ of the Law on Bankruptcy) must be resolved in the same manner.

7. It is presumed that the person benefitting from illegal conduct (in particular, bad faith conduct) of the debtor's head is a controlling person (Sub-item 3 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy).

In accordance with this rule, a person that gains significant benefits (in regard to the scale of the debtor's activities) in the form of increase (saving) of assets, which could not be gained, were the actions of the debtor's head in conformity with the law (in particular, with the principle of good faith), may be recognised as the controlling person.

For instance, it is presumed that a third person is controlling the debtor, if it received significant assets of the debtor (in particular, as a result of chain transactions), which the debtor ceased to own under a transaction performed by the debtor's head to the detriment of the managed organisation and its creditors (e.g. on terms that were clearly disadvantageous for the debtor or with a person clearly unable to fulfil the obligation (a "fly-by-night" company, etc.) or with the use of document flow that did not describe real economic operations, etc.). When refuting said presumption, the person held liable may prove it was acting in good faith, in particular by showing that the debtor's assets were acquired on a compensatory basis and on terms on which analogous transactions are normally made.

A beneficiary that gains significant benefits from a system of organisation of entrepreneurial activity aimed at redistribution (in particular with the use of

inconsistent document flow) of the joint income derived from such activity by persons united by a common interest (e.g. a single production and (or) marketing cycle) for the benefit of some of those persons with simultaneous accumulation of debt on the debtor's side is also presumed to be a controlling person. In such a situation, in order to refute the presumption the beneficiary must prove that its income-generating operations are recorded in accordance with their actual economic meaning, and the profits received are based on reasonable economic grounds.

The foregoing list of examples is not exhaustive.

Subsidiary Liability for the Debtor's Failure to Submit (Failure to Timely Submit) an Application regarding Its Own Bankruptcy

8. The debtor's head may be held subsidiary liable under the rules of Article 61¹² of the Law on Bankruptcy, if it fails to perform the duty to apply to court with a debtor's application regarding its own bankruptcy within a month-long term stipulated in Item 2 of Article 9 of the Law on Bankruptcy.

If the debtor's constituent document stipulates that several persons (directors) acting together or independently from each other (third paragraph of Item 1 of Article 53 of the CC RF) have the powers to act in the name of the legal person, by general rule these persons are held subsidiary liable in accordance with Article 61¹² of the Law on Bankruptcy in a joint and several manner.

Constituent documents cannot vest only one of the debtor's directors with the power to apply to court with a debtor's application regarding its own bankruptcy (sixth paragraph of Article 2, Article 9 of the Law on Bankruptcy, second paragraph of Item 1 of Article 53 of the CC RF).

9. The duty of the head to apply to court with an application regarding bankruptcy appears on the moment on which a reasonable head acting in good faith, finding itself in similar conditions within the framework of standard management practices and taking into account the scale of the debtor's activities, must have objectively discovered the presence of one of the factors listed in Item 1 of Article 9 of the Law on Bankruptcy.

If the debtor's head proves that the appearance of signs of inability to pay, of factors listed in the fifth and seventh paragraphs of Item 1 of Article 9 of the Law on Bankruptcy was not an indicator of objective bankruptcy, and that the head, disregarding the temporary financial difficulties, was in good faith expecting to overcome them within a reasonable time, making the necessary efforts for achieving such a result and executing an economically substantiated plan, such a head may be exempt from subsidiary liability for the period during which the execution of the plan seemed reasonable from the perspective of an ordinary head in a similar situation.

10. It follows from Article 9 of the Law on Bankruptcy that the head's performance of the duty to apply to court with a debtor's application regarding its own bankruptcy does not depend on whether the debtor has sufficient funds to finance the bankruptcy procedures. By implication of Item 5 of Article 61, Item 2 of Article 62 of the CC RF, if the debtor's property is insufficient for these purposes, the necessary expenses may be borne by its founders (participants).

11. A liquidator, members of a liquidation commission may be held subsidiary liable under the rules of Article 61¹² of the Law on Bankruptcy, if they fail to perform the duty of submitting a debtor's application regarding its own bankruptcy to the court within the ten-day period stipulated in Item 3 of Article 9 of the Law on Bankruptcy.

By general rule, members of the liquidation commission are held subsidiary liable in a joint and several manner (first paragraph of Article 1080 of the CC RF).

Members of a liquidation commission, who acted in good faith, taking all the measures depending on them and necessary for the commission to file a bankruptcy application (in particular, the members that called for a meeting of the commission members, voted to adopt the corresponding decision, etc.), but whose position was not supported by the other members, are not liable for failure to submit (failure to timely submit) a debtor's application regarding its own bankruptcy. The burden of proof of the aforementioned facts lies on the members of the liquidation commission being held liable.

12. In accordance with the second paragraph of Item 2 of Article 61¹² of the Law on Bankruptcy, a causal link is presumed to exist between the failure of the debtor's head, of the liquidation commission to file a bankruptcy application and

the lack of capacity to satisfy the claims of creditors, obligations in whose regard arose during the period of delay in the filing of the bankruptcy application.

13. If the debtor's head, the liquidation commission fails to perform its duty to apply to court with a debtor's application regarding its own bankruptcy within the stipulated time, the decision to apply to court with such an application must be made by the management body competent to resolve the issue of liquidation of the debtor (Item 3¹ of Article 9 of the Law on Bankruptcy).

By implication of Item 3¹ of Article 9, Article 61¹⁰, Item 1 of Article 61¹² of the Law on Bankruptcy, a person that is not the debtor's head, a liquidator, a member of the liquidation commission, may be held subsidiary liable for the failure to submit (failure to timely submit) a debtor's application regarding its own bankruptcy, if the following conditions exist simultaneously:

- this person was a controlling person, in particular proceeding from non-refuted presumptions of control of a majority shareholder in a corporation (Sub-item 2 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy), of control of the beneficiary in an illegal transaction (Sub-item 3 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy), etc.;
- it could not be unaware that the debtor was in such a situation that its head, the liquidation commission had a duty to apply to court with a bankruptcy application and that they failed to do so;
- this person had the powers to summon a meeting of the collective body of the debtor, competent to adopt a corporate decision regarding liquidation, or had the powers to adopt the corresponding decision on its own;
- it did not duly perform the actions aimed at summoning the collective management body for resolving the issue of applying to court with a bankruptcy application or aimed at adopting such a decision.

The controlling person meeting the aforementioned criteria may be held subsidiary liable for obligations that arose after the expiration of the aggregate of terms, stipulated for summoning, preparing and holding a meeting of a collective body, for adoption of a decision to apply to court with a bankruptcy application, of reasonable terms for preparation and submission of the corresponding application. Herewith, said aggregate of terms begins to run after 10 days from the day on which the person being held liable learned or must have learned about the failure of the debtor's head or liquidation commission to perform the duty to apply to court with a bankruptcy application (first paragraph of Item 3¹ of Article 9 of the Law on Bankruptcy).

The person referred to in this Item bears subsidiary liability with the debtor's head (members of the liquidation commission), in a joint and several manner, in regard of obligations arising after the expiration of the aforementioned aggregate of terms (second paragraph of Item 1 of Article 61¹² of the Law on Bankruptcy).

Members of a corporation, founders of a unitary organisation, who are controlling persons (based on affiliation among themselves) and who, in aggregate, possessed the number of votes necessary to summon a meeting of the debtor's collective body but failed to perform due actions for resolving the issue of applying to court with a bankruptcy application, bear subsidiary liability for failure to submit (failure to timely submit) a debtor's application regarding its own bankruptcy in a joint and several manner, if at least one of them could not have been unaware that the debtor was in such a situation that its head, the liquidation commission had the duty to apply to court with a bankruptcy application and failed to do so.

14. In accordance with the general provisions of Item 2 of Article 61¹² of the Law on Bankruptcy, the amount of subsidiary liability of the head equals the total amount of the debtor's obligations (including obligatory payments), arising from the day on which the month-long term stipulated in Item 2 of Article 9 of the Law on Bankruptcy expires and to the day on which a bankruptcy case is initiated.

By virtue of special regulations, if the debtor's bankruptcy application is returned to the authorised body due to lack of necessary evidence indicating that it is possible to discover the debtor's property, at the expense of which the costs incurred in the bankruptcy case may be covered, the debtor's obligations, arising from the day on which the one-month term stipulated in Item 2 of Article 9 of the Law on Bankruptcy expires and to the day on which the application of the authorised body is returned, are taken into account in determining the amount of the head's subsidiary liability. This special rule is not applied when the bankruptcy application is returned to the authorised body on other grounds.

Expenses necessary to conduct bankruptcy procedures are not taken into account in determining the amount of the head's subsidiary liability. Herewith, if it is proved that had the head duly performed its duty to file the debtor's application regarding its own bankruptcy, the amount of such expenses would be smaller, then these expenses (in part of excess caused by the head's failure to act) are taken into account in determining the amount of its subsidiary liability (Article 1064 of the CC RF).

By general rule, the obligations in regard of creditors, who, at the moment when the obligations arose, knew or must have known that the head already had the duty to file a bankruptcy application, are not taken into account in determining the amount of the head's subsidiary liability. This rule does not apply to obligations regarding creditors that were objectively compelled to enter into relations with the debtor or to continue the existing ones (unwilling creditors) – for example, the body authorised to demand the paying of obligatory payments, creditors under contracts that they were obliged to enter into, creditors in tort obligations (by implication of Article 1064 of the CC RF, Item 3 of Article 61¹² of the Law on Bankruptcy).

15. If the duty to submit a debtor's application regarding its own bankruptcy was not performed by several consecutive heads, the first one of them is held subsidiary liable for the debtor's obligations, arising from the day on which the month-long term stipulated in Item 2 of Article 9 of the Law on Bankruptcy expired and to the day on which a bankruptcy case was initiated, and every consecutive head – for obligations arising during the period from the day of expiry of a reasonable time, necessary for it as a new head to discover the circumstances under which the law prescribes the duty to file a bankruptcy application, extended by one month, to the day of initiation of the bankruptcy case. Herewith, if the debtor's obligations arise during periods of simultaneous liability of several heads, they are held liable in a joint and several manner (second paragraph of Item 1 of Article 61¹² of the Law on Bankruptcy).

A former head of the debtor, who openly announces to the general public the time on which the duty to apply to court with a bankruptcy application appeared (first paragraph of Item 1 of Article 30 of the Law on Bankruptcy) and that it failed to perform that duty, is not liable for the debtor's obligations arising from the day after the day of such a public announcement. Herewith, a former head that publicly distributed false information about the financial situation of the organisation it earlier managed is obliged, upon request of that organisation, to restore the damages caused by distribution of false information (Articles 152, 1064 of the CC RF).

When a liquidator, members of a liquidation commission are being held liable, explanations provided in this Item are applied with due regard to the ten-day period stipulated in Item 3 of Article 9 of the Law on Bankruptcy.

Subsidiary Liability for Failure to Fully Satisfy the Creditors' Claims

16. The actions (failure to act) of a controlling person that led to failure to satisfy the creditors' claims (Article 61¹¹ of the Law on Bankruptcy) should be understood as actions (failure to act) that proved to be the necessary reason of the debtor's bankruptcy, i.e. those, without which the objective bankruptcy would not take place. The court evaluates the significance of influence of the controlling person's actions (failure to act) upon the debtor's situation by verifying whether there is a causal link between said actions (failure to act) and the actual objective bankruptcy.

Unlawful actions (failure to act) may in particular take the form of adoption of key business decisions in violation of principles of good faith and reasonableness, including negotiation of, making of or approval of transactions on clearly disadvantageous terms or with a person clearly unable to fulfil the obligation (a "fly-by-night" company, etc.); giving of instructions to perform clearly loss-generating operations; appointment of such persons to managing positions, the results of whose activities will clearly contradict the interests of the managed organisation; creation and support of a system of the debtor's management, aimed at systematic gaining of benefits by a third person to the detriment of the debtor and its creditors, etc.

Since the activities of a legal person are carried out through a multitude of transactions and other operations, the last transaction (operation) initiated by the controlling person, which led to a critical change of an earlier formed unstable financial situation – the appearance of signs of objective bankruptcy, cannot, by general rule, be recognised as the only premise of the bankruptcy. The court should inspect the aggregate of transactions and other operations performed under the influence of the controlling person (several controlling persons), which contributed to the emergence of the crisis situation, its development and transfer to the stage of objective bankruptcy.

17. By virtue of direct indication in Sub-item 2 of Item 12 of Article 61¹¹ of the Law on Bankruptcy, the controlling person is also subject to subsidiary liability, if, after the objective bankruptcy took place, it performed actions (failed to act) that significantly worsened the debtor's financial situation. This means that by general rule the controlling person that created conditions for the further significant growth of a disproportion between the cost of the debtor's assets and the amount of its

obligations is subject to subsidiary liability in full volume, as it is presumed that its actions (failure to act) caused the final loss of opportunity to take rehabilitating measures in regard of the debtor, aimed at restoration of its capacity to pay, and, therefore, the opportunity of real settlement of all debts in the future was lost.

A controlling person that is subsidiary liable under Sub-item 2 of Item 12 of Article 61¹¹ of the Law on Bankruptcy and a controlling person subsidiary liable for causing the objective bankruptcy are held liable in a joint and several manner.

If the actions (failure to act) of the controlling person, which took place after signs of objective bankruptcy appeared, insignificantly worsened the debtor's financial situation, such a controlling person may be held liable under civil law in the form of restitution of damages on other grounds, not related to subsidiary liability.

18. A person controlling the debtor is not subject to subsidiary liability, if its actions (failure to act) that led to negative consequences for the debtor were within the framework of ordinary business risks and were not aimed at violation of rights and lawful interests of a civil law community uniting all the creditors (Item 3 of Article 1 of the CC RF, paragraph 2 of Item 10 of Article 61¹¹ of the Law on Bankruptcy). When considering disputes on holding the controlling persons subsidiary liable, this business judgment rule should be used as guidance with due regard to the established practice of its use in corporate relations, unless otherwise follows from the nature of legislative regulation in the sphere of insolvency.

19. Where the facts stipulated in Item 2 of Article 61¹¹ of the Law on Bankruptcy, which serve as grounds for refutable presumptions that a person caused the bankruptcy, are proved, it is presumed that exactly the actions (failure to act) of the controlling person were the necessary reason of the objective bankruptcy.

When proving the absence of grounds for being held subsidiary liable, in particular when refuting statutory presumptions (Item 2 of Article 61¹¹ of the Law on Bankruptcy), the controlling person may refer to the fact that the bankruptcy was caused solely by external factors (unfavourable market conditions, financial crisis, significant change of the business environment, accidents, natural disasters, other events, etc.).

If the bankruptcy resulted from the actions (failure to act) of the controlling person, but external factors contributed to the increase of amount of debt obligations along with said actions (failure to act) (e.g. unlawful asset stripping under the influence

of the controlling person and, simultaneously, deterioration of the debtor's products as a result of flooding), the amount of subsidiary liability of the controlling person may be decreased in accordance with the rules of the second paragraph of Item 11 of Article 61¹¹ of the Law on Bankruptcy.

20. When resolving what norms are subject to application – the general provisions on restitution of damages (including Article 53¹ of the CC RF) or the special rules on subsidiary liability (Article 61¹¹ of the Law on Bankruptcy), the court evaluates in each particular case, how significant was the influence of the controlling person (several persons controlling the debtor, acting jointly or separately) upon the debtor's activities, by verifying, how significantly the debtor's financial situation changed as a result of that influence and what trends the economic indices characterising the debtor took after that influence was exercised.

If the violations committed by the controlling person (several controlling persons) prove to be the necessary reason of bankruptcy, the norms on subsidiary liability (Item 1 of Article 61¹¹ of the Law on Bankruptcy) are subject to application; the total amount of that liability is determined, by general rule, in accordance with the first and third paragraphs of Item 11 of Article 61¹¹ of the Law on Bankruptcy.

Where, based on reasonable expectations, the damage caused by the controlling persons referred to in Article 53¹ of the CC RF should not have led to objective bankruptcy of the debtor, such persons are obliged to compensate the damages caused through their fault in the amount determined under the rules of Articles 15, 393 of the CC RF.

Independent of how the applicant calls the type of liability and what norms of law it refers to when applying to court, the court, with regard to Articles 133 and 168 of the Commercial Procedure Code of the Russian Federation (hereinafter referred to as the ComPC RF) qualifies the stated claims on its own. Where the grounds for holding a person subsidiary liable are not proved, but the unlawful conduct of the controlling person is proved, which entails a different type of liability, including the one stipulated in Article 53¹ of the CC RF, the court adopts a decision on restitution of damages by such a controlling person.

21. If a transaction or a number of transactions, from which a third person benefitted (and was later recognised as controlling the debtor based on the presumption stipulated in Sub-item 3 of Item 4 of Article 61¹⁰ of the Law on Bankruptcy), are the necessary reasons of objective bankruptcy, this controlling

beneficiary bears subsidiary liability stipulated in Article 61¹¹ of the Law on Bankruptcy, jointly and severally with the head of the debtor (first paragraph of Article 1080 of the CC RF).

22. By virtue of Item 8 of Article 61¹¹ of the Law on Bankruptcy and of the first paragraph of Article 1080 of the CC RF, if several persons controlling the debtor acted jointly, they bear subsidiary liability for causing the bankruptcy in a joint and several manner. In order to qualify the actions of the persons controlling the debtor as joint, the court may take into account their consistency, coordination and common intent, i.e. complicity in any form, including co-participation, acting as an accessory, etc. Until proved otherwise, actions of several controlling persons, affiliated with each other, are presumed joint.

If several persons controlling the debtor acted independently from each other, and the actions of each of them were sufficient to cause the debtor's objective bankruptcy, the aforementioned persons also bear subsidiary liability in a joint and several manner (Item 8 of Article 61¹¹ of the Law on Bankruptcy).

If several persons controlling the debtor acted independently, and the actions of each of them, significantly influencing the debtor's situation, were not enough to cause objective bankruptcy, but in aggregate their actions led to such bankruptcy, these persons are subject to subsidiary liability in shares (Item 1 of Article 61¹¹ of the Law on Bankruptcy, Item 1 of Article 1064 of the CC RF). In this case, the court distributes the total amount of liability, calculated under the rules of first and third paragraphs of Item 11 of Article 61¹¹ of the Law on Bankruptcy, among them, determining the share of each of the controlling persons in proportion to the amount of damage caused by it. If it is impossible to determine the amount of damage proceeding from concrete operations performed under the influence of this or that person, the amount of share of each controlling person may be determined in proportion to the duration of its actual control over the debtor.

23. In accordance with Sub-item 1 of Item 2 of Article 61¹¹ of the Law on Bankruptcy, the presumption that bankruptcy was caused by a transaction (a number of transactions) may be applied to a controlling person, if that transaction (transactions) resulted in significant damages for the creditors. Such transactions include, in particular, the debtor's transactions that are significant for it (with regard to the scale of its activities) and are at the same time significantly detrimental. Herewith it should be noted that the transactions that significantly influence the debtor's activities are, in particular, those that meet the criteria of

major transactions (Article 78 of the Law on Stock Companies, Article 46 of the Law on Limited Liability Companies, etc.). When resolving whether a significant transaction is significantly detrimental, the court should proceed from the premise that such may be a transaction made on terms significantly differing from the market terms (to the detriment of the debtor), as well as a transaction based on a market price, as a result of which it became impossible for the debtor to pursue economic activities in one or several directions, which earlier generated substantial income.

If a person that is the nominal or actual head or another controlling person, upon whose instructions the transaction was made, or a controlling beneficiary is held liable, in order to apply the presumption it is sufficient for the applicant to prove that the transaction caused significant damages to the creditors. The approval of such a transaction by a collective body (in particular, a supervisory council or the general meeting of participants (shareholders)) does not exempt the controlling person from subsidiary liability.

If a person controlling the debtor, which approved the transaction directly (e.g. a valid participant of a corporation) or indirectly (e.g. an actual participant of a corporation that influenced the nominal participant so that the latter would approve the transaction), is held liable, then in order to apply the aforementioned presumption the applicant must prove that the transaction caused significant damage to the creditors, which the controlling person knew or must have known at the moment of approval, proceeding from the existing circumstances and its position.

By implication of Item 3 of Article 61¹¹ of the Law on Bankruptcy, in order to use the presumption stipulated in Sub-item 1 of Item 2 of that Article, an effective judicial act recognising such a transaction invalid is not required. Likewise, it is not required to establish the aggregate of facts necessary for the invalidation of the corresponding transaction (in particular, the fact that the counterparty in the transaction acted in bad faith).

By implication of Sub-item 3 of Item 3 of Article 61¹¹ of the Law on Bankruptcy, if a court earlier refused to satisfy a claim for invalidation of a transaction due to the fact that the debtor received monetary consideration of equal value, afterwards the applicant has no right to refer to the non-market nature of the price of that transaction in order to use the presumption that the bankruptcy was caused by the transaction.

By implication of Sub-item 1 of Item 2 of Article 61¹¹ of the Law on Bankruptcy, in order to prove the fact that a transaction causing significant damage to the creditors was made, the applicant may refer to the grounds of invalidity, in particular those stipulated in Article 61² (suspicious transactions) and Article 61³ (transactions with unfair preference) of the Law on Bankruptcy. However, in this case as well the applicant is obliged to prove both that the transaction was of significant nature and that it was significantly detrimental. The fact that a suspicious transaction was made or the fact that a transaction was made with unfair preference for one of the creditors does not by itself prove the aforementioned circumstances.

24. By implication of Item 3² of Article 64, fourth paragraph of Item 1 of Article 94, second paragraph of Item 2 of Article 126 of the Law on Bankruptcy, the debtor's head is obliged to submit the debtor's documents to the insolvency officer for inspection or to transfer them to the insolvency officer.

The insolvency officer may demand through court action that the head (as well as other persons who actually possess the corresponding documents) performs this duty in kind, in accordance with the rules of Article 308³ of the CC RF. A judicial act is adopted after the consideration of this separate dispute, which may be appealed against in the manner stipulated in Part 3 of Article 223 of the ComPC RF.

The following must be taken into account when presumptions pertaining to the concealment, loss, falsification or failure to transfer the documents (Sub-items 2 and 4 of Item 2 of Article 61¹¹ of the Law on Bankruptcy) are used in resolution of disputes on subsidiary liability.

The applicant must provide the court with explanations as to how the absence of documents (absence of full information therein or falsified data therein) influenced the bankruptcy procedures.

The person held liable may refute those presumptions by proving that the faults in the documents submitted to the insolvency officer did not significantly complicate the bankruptcy procedures or by proving that it is not guilty of failure to transfer the documents or of their undue storage, in particular by confirming that it took all the necessary measures to perform the duties of maintenance, storage and transfer of documents, with the required degree of due care and diligence.

Significant complication of bankruptcy procedures is understood, in particular, as lack of possibility to establish all persons controlling the debtor, its main counterparties, and also:

- impossibility to establish and identify the debtor's main assets;
- impossibility to discover the transactions made during a suspicious period and their terms, which precludes from analysing those transactions and resolving the issue of disputing them in order to increase the bankruptcy assets;
- impossibility to establish the contents of decisions adopted by the debtor's bodies, which excludes the analysis of those decisions to determine whether they harmed the debtor and creditors and excludes the potential opportunity of recovering damages from the members of those bodies.

Presumptions stipulated in Sub-items 2 and 4 of Item 2 of Article 61¹¹ of the Law on Bankruptcy cannot be applied to a debtor's head, if the necessary documents (information) were transferred by it to the insolvency officer during court consideration of an application regarding subsidiary liability. Such transfer of documents (information) does not exclude the possibility that the head will be held liable in the form of restitution of damages caused by delay in performance of duty or that it will be held subsidiary liable on other grounds.

If the preceding head failed to transfer the necessary documents to the new one, this does not exempt the latter from liability and does not serve as evidence of absence of guilt. A reasonable head acting in good faith has a duty to act – to demand the documents from the previous head (with regard to Article 308³ of the CC RF) or to restore the documents in a different way (in particular by requesting copies of documents from the competent bodies, interacting with the counterparties in order to restore the original documents, etc.).

If several consecutive heads acted unlawfully as regards the maintenance, storage and restoration of documents, it is presumed that the actions of each of them were sufficient to cause objective bankruptcy of the debtor (Item 8 of Article 61¹¹ of the Law on Bankruptcy).

In accordance with Sub-items 2 and 4 of Item 2, Items 4 and 6 of Article 61¹¹ of the Law on Bankruptcy, if the persons obliged to maintain and store the corresponding documents (e.g. chief accountant) are also recognised as controlling persons, it is presumed that their joint actions with the debtor's head were the

necessary reason of objective bankruptcy of the debtor, if the facts of concealment, loss, falsification or failure to transfer the documents, complicating the bankruptcy procedures, are proved.

By implication of Sub-items 2 and 4 of Item 2, Items 4 and 6 of Article 61¹¹ of the Law on Bankruptcy, persons not recognised as controlling the debtor and obliged to maintain and store the corresponding documents (e.g. chief accountant) bear joint and several liability with the former head for causing the bankruptcy as accomplices, if it is proved that they performed actions that led to destruction, concealment or falsification of documents at the instruction of the head or jointly with it.

25. In accordance with the interrelated provisions of Sub-item 5 of Item 2, Item 1 of Article 61¹¹ of the Law on Bankruptcy, when resolving whether to apply a presumption regarding failure to enter information into the unified state register of legal persons or the unified federal register of activities of legal persons (or entry of false information into those registers), the applicant must provide the court with explanations as to how the absence of the corresponding information (or presence of false information in the register) influenced the bankruptcy procedures. The person being held liable may refute said presumption by proving, in particular, that the discovered faults did not lead to significant complication of bankruptcy procedures.

26. In accordance with Sub-item 3 of Item 2 of Article 61¹¹ of the Law on Bankruptcy, it is presumed that the actions (failure to act) of the controlling person were the necessary reason of the debtor's objective bankruptcy, if the aggregate of following facts is proved:

- the debtor was held liable under tax law for failure to pay (failure to fully pay) the taxes (fees, insurance payments) as a result of understatement of the tax base (base for calculation of insurance payments), another incorrect calculation of the tax (fee, insurance payments) or of other unlawful actions (failure to act);
- the taxes (fees, insurance payments), additionally charged as a result of tax control measures, amounted to more than 50 % of the total amount of debt to listed third-priority creditors.

This presumption is used when a debtor's head (actual and nominal), as well as other persons recognised as controlling ones at the moment of the tax offence are being held subsidiary liable (Item 5 of Article 61¹¹ of the Law on Bankruptcy).

Right to File an Application for Holding a Person Subsidiary Liable

27. Within the framework of a bankruptcy case, the bankruptcy creditors, a competent body, the debtor's employees (a representative of the debtor's employees) may file an application for holding a person liable based on the grounds stipulated in Articles 61¹¹ – 61¹³ of the aforementioned law, after the corresponding claims are listed in the registry of claims of the debtor's creditors, in particular in the manner stipulated in Item 4 of Article 142 of the Law on Bankruptcy (Items 1 and 2 of Article 61¹⁴ of the Law on Bankruptcy).

28. After the bankruptcy management is over or the proceedings in the case are terminated due to lack of funds sufficient to compensate the costs of bankruptcy procedures, an application for holding a person subsidiary liable may only be filed by those creditors, debtor's employees, whose claims within the framework of a bankruptcy case were recognised as substantiated and listed in the registry of claims of the debtor's creditors (in particular in the manner stipulated in Item 4 of Article 142 of the Law on Bankruptcy) (Items 3 and 4 of Article 61¹⁴ of the Law on Bankruptcy).

29. By implication of Item 3 of Article 61¹⁴ of the Law on Bankruptcy, after the bankruptcy management is over, or the proceedings in the case are terminated due to lack of funds sufficient to compensate the costs of bankruptcy procedures, the debtor's creditors under current obligations may file an application for holding the controlling person subsidiary liable on the grounds stipulated in Article 61¹¹ of the Law on Bankruptcy only if their claims are confirmed by an effective judicial act or another document subject to enforcement by virtue of law.

30. After an application to recognise the debtor bankrupt is returned to the authorised body, it may, outside of a bankruptcy case, file a claim for holding a person subsidiary liable on the grounds stipulated in Articles 61¹¹ and 61¹² of the Law on Bankruptcy, if the reason for returning the application was the lack of due evidence that it is possible to discover the debtor's property in sufficient amount, at the expense of which the costs in the bankruptcy case may be covered. In this case, other persons are not vested with powers to apply to court with a claim for holding a person subsidiary liable (Items 3 and 4 of Article 61¹⁴ of the Law on Bankruptcy).

When an application to recognise the debtor bankrupt is returned to the authorised body based on other grounds, that body is not entitled to raise the issue of initiation of proceedings to hold a person subsidiary liable outside of the bankruptcy case.

31. By implication of Items 3 and 4 of Article 61¹⁴ of the Law on Bankruptcy, when proceedings are terminated in a bankruptcy case based on eighth paragraph of Item 1 of Article 57 of the Law on Bankruptcy at the stage of verification whether the application to recognise a debtor bankrupt is substantiated (before the first bankruptcy procedure is initiated), the applicant in the bankruptcy case may file a claim for holding a person subsidiary liable on the grounds stipulated in Articles 61¹¹ and 61¹² of the Law on Bankruptcy, outside of the bankruptcy case, if indebtedness to it is confirmed by an effective judicial act or another document subject to enforcement by virtue of law. In this case, other persons are not vested with powers to apply to court, outside of the bankruptcy case, with a claim for holding a person subsidiary liable.

32. If a creditor writes off debt within the framework of its accounting policy, e.g. an authorised body writes off the debtor's indebtedness in obligatory payments due to its liquidation or exclusion from a state register in the manner stipulated in Article 59 of the Tax Code of the Russian Federation (hereinafter – the TC RF), or if a credit organisation writes off accounts uncollectable in regard of loans, this does not by itself preclude the future filing of an application for holding a person controlling the debtor liable under such written-off obligations and cannot be the sole reason for excluding written-off indebtedness from the total amount of liability of the controlling person.

***Procedural Features of Consideration of an Application
for Holding a Controlling Person Liable in Case of Bankruptcy.
Disposal of Claims to a Controlling Person***

33. An application for holding a person controlling the debtor subsidiary liable must in particular indicate the facts substantiating the applicant's position that the defendant is a controlling person and the evidence confirming those facts (Item 5 of Part 2 of Article 125, Item 3 of Part 1 of Article 126 of the ComPC RF, Item 2 of Article 61¹⁶ of the Law on Bankruptcy).

When resolving the issue of accepting the application for proceedings, the court does not examine the evidence presented by the applicant (Articles 125, 126 and 162 of the ComPC RF).

Herewith, if the aforementioned facts are not indicated in the application, and (or) the evidence confirming those facts (in the opinion of the applicant) is not attached to the application, the court leaves the application without action (Item 2 of Article 61¹⁶ of the Law on Bankruptcy) and returns the application, if the violations are not corrected (Item 4 of Part 1 of Article 129 of the ComPC RF).

34. Item 3 of Article 61¹⁶ of the Law on Bankruptcy stipulates features of consideration of separate disputes on holding the controlling persons subsidiary liable within the framework of bankruptcy cases. When preparing such disputes for trial, the court holds a preliminary court session under the rules of Article 136 of the ComPC RF.

The corresponding application is considered by the court within a reasonable time and in accordance with provisions of Part 2 of Article 225¹⁶ of the ComPC RF.

35. If there are two or more cases (separate disputes) regarding the liability of persons controlling one and the same debtor pending before the court, such cases (separate disputes) may be joined into single proceedings for joint consideration under the rules of Part 2¹ of Article 130 of the ComPC RF.

36. If a person participating in the case (separate dispute) did not motion for a certain manner of consideration of its provisional measures application in a dispute regarding liability stipulated in Chapter III² of the Law on Bankruptcy, the issue of adopting provisional measures in accordance with Item 5 of Article 61¹⁶ of the Law on Bankruptcy may be resolved by the court without notification of the interested persons, or (if it is necessary to hear the explanations of the applicant, the person being held liable, of other persons) in a court session, of which the interested persons are notified.

If a person participating in the case (separate dispute) motions for its provisional measures application to be considered in a court session with notification of the interested persons, the court may refuse to satisfy such an application only where Part 5 of Article 159 of the ComPC RF applies.

37. Where a bankruptcy case is initiated in regard of a person controlling the debtor, an application to hold that person liable under Chapter III² of the Law on Bankruptcy (in particular, under Article 61²⁰) is subject to consideration within the framework of the case regarding the bankruptcy of the controlled person (Item 6 of Article 61¹⁶ of the Law on Bankruptcy). In particular, the court notifies the insolvency officer appointed in the case regarding the bankruptcy of the controlling person about the time and place of the court sessions or of performance of separate procedural actions. That officer, by virtue of Item 4 of Article 20³ of the Law on Bankruptcy, must inform the persons participating in the case regarding the bankruptcy of this controlling person about the initiated court proceedings, in the manner stipulated for notifying the creditors about a creditors' meeting (Article 13 of the Law on Bankruptcy).

38. It is only possible to decrease the priority of a creditor's claims in accordance with Item 4 of Article 142 of the Law on Bankruptcy, where the possibility to file the claims within a two-month period stipulated in Item 1 of Article 142 of the Law on Bankruptcy objectively existed, but was not timely used by the creditor. This is why when a claim for compensation in subsidiary manner is filed in a case regarding the bankruptcy of the person controlling the debtor, the aforementioned two-month term begins to run no earlier than the statute of limitations regarding the application for holding such a controlling person subsidiary liable begins to run.

39. From the moment a claim resulting from restitution of damages is accepted for proceedings in a case regarding the bankruptcy of a controlling person, in particular within the period when the consideration of this claim is suspended (fourth paragraph of Item 6 of Article 61¹⁶ of the Law on Bankruptcy), the debtor, under whose obligations the controlling person is being held subsidiary liable, enjoys the rights and bears the duties of a person participating in the case. It may study the materials of the case, file objections regarding the claims of other creditors and the manner of sale of property of the controlling person, appeal against judicial acts, demand the removal of the insolvency officer, participate in creditors' meetings without a vote, etc.

If a debtor, under whose obligations the controlling person is being held subsidiary liable, misses the term for appealing against judicial acts adopted in the case regarding the bankruptcy of the controlling person, the court may restore the missed term based on when the person that filed the appeal learned or must have

learned about the violation of its rights and lawful interests (Article 117 of the ComPC RF).

40. Paragraph 5 of Item 6 of Article 61¹⁶ of the Law on Bankruptcy stipulates a rule that before the issue of listing the claim for holding a controlling person liable in the registry of claims of its creditors is resolved, the monetary funds acquired in realisation of its property are not distributed among its creditors. This rule does not apply to creditors of the controlling person, whose claims have a higher priority than the claims for holding that person liable (which belong to the third priority of satisfaction) (Item 4 of Article 134 of the Law on Bankruptcy).

41. By implication of Item 7 of Article 61¹⁶ of the Law on Bankruptcy, proceedings in a separate dispute on holding a person controlling the debtor subsidiary liable on the grounds stipulated in Article 61¹¹ of the Law on Bankruptcy are suspended by the court, if it is impossible to determine the amount of liability, but when all the other facts significant for holding a person liable in this manner are established.

In such a situation the court, in particular a court of appeal (if grounds for holding the controlling person liable are established during consideration of an appeal against the decree of a court of first instance to refuse to satisfy the corresponding claim), adopts a decree (ruling) to suspend proceedings in the separate dispute. Its operative part must contain information that the proceedings in the dispute are suspended and a conclusion that there are grounds for holding the person controlling the debtor subsidiary liable; the statement of reasons must contain the substantiation of that conclusion. Such a judicial act may be appealed against in the manner stipulated in Part 3 of Article 223 of the ComPC RF, both in the part regarding the existence of grounds for holding the controlling person subsidiary liable and in the part regarding the suspension of proceedings in the dispute.

If a decree of a court of first instance, a ruling of a court of appeal regarding the suspension of proceedings in the separate dispute due to impossibility to determine the amount of subsidiary liability does not contain conclusions that there are grounds for holding the controlling person subsidiary liable, it is subject to cancellation by virtue of Item 1 of Part 1 of Article 270, Part 3 of Article 288 of the ComPC RF.

Proceedings may be suspended in the separate dispute without establishing the grounds for holding the controlling person subsidiary liable only where Articles 143, 144 of the ComPC RF apply.

42. If a court of appeal suspends proceedings regarding an application for holding a person subsidiary liable, the operative part of the ruling must also indicate that the issues regarding the renewal of proceedings in the case and the determination of the amount of liability are remanded to the court of first instance (Items 8 and 9 of Article 61¹⁶ of the Law on Bankruptcy).

43. The conclusion of the court that there are grounds for holding the controlling person subsidiary liable, stated in the operative part of the decree regarding the suspension of proceedings in the case, is universally binding (Article 16 of the ComPC RF). This precludes repeated verification of this conclusion after the renewal of proceedings in the separate dispute by virtue of the first paragraph of Item 9 of Article 61¹⁶ of the Law on Bankruptcy.

44. The provisions of the second paragraph of Item 9 of Article 61¹⁶ of the Law on Bankruptcy, stipulating that the issues of determining the amount of subsidiary liability and of examining the report of the insolvency officer regarding the results of the bankruptcy procedure are considered in one court session, do not preclude the court from adopting two different decrees on these issues.

45. The operative part of a decree to hold a person subsidiary liable (regarding the amount of subsidiary liability) must indicate the total sum subject to recovery from the person controlling the debtor, held liable, in particular for the benefit of each of the creditors that chose the manner stipulated in Sub-item 3 of Item 2 of Article 61¹⁷ of the Law on Bankruptcy, and for the debtor's benefit in the remaining part.

If at the moment when the decree to hold a person subsidiary liable (regarding the amount of subsidiary liability) is adopted the creditors have not chosen how to dispose of their claim to the controlling person and cannot be regarded as having made a choice under the rules of the second paragraph of Item 3 of Article 61¹⁷ of the Law on Bankruptcy, the debtor is indicated as the recoveror in the decree to hold a person subsidiary liable (regarding the amount of subsidiary liability). Later the court performs a procedural replacement of the recoveror under the rules of Sub-item 1 of Item 4 of Article 61¹⁷ of the Law on Bankruptcy.

46. In accordance with Item 1 of Article 61¹⁷ of the Law on Bankruptcy, information that it is possible to choose the manner of disposal of the claim to the controlling person is made known to the creditors through publication of the corresponding message in the Unified Federal Register of Bankruptcy Information (hereinafter – UFRBI). The terms stipulated in Items 2 and 3 of Article 61¹⁷ of the Law on Bankruptcy are calculated from the day of publication of that message in UFRBI.

47. By implication of Items 13–15 of Article 61¹⁶ and Item 1 of Article 61¹⁷ of the Law on Bankruptcy, where proceedings regarding an application for holding a person subsidiary liable were not suspended, the creditors may choose the manner of disposal of the claim to the controlling person both before and after the court adopts a decree to hold it subsidiary liable.

If all the creditors choose that manner before the application for holding a person subsidiary liable is considered on its merits, the insolvency officer must timely inform the court about this by filing the corresponding report (Item 3 of Article 61¹⁷ of the Law on Bankruptcy). In this case, the message about the possible choice of manner of disposal of the claim to the controlling person is not subject to publication in UFRBI, and the decree to hold the person liable indicates the sum subject to recovery with regard to the manner of disposal chosen by the creditors (Item 13 of Article 61¹⁶ of the Law on Bankruptcy).

48. By implication of Item 5 of Article 61¹⁷ of the Law on Bankruptcy, the votes of the creditors, who are interested persons in regard of the debtor or in regard of the person held liable, are not taken into account both when determining how the bankruptcy assets will be supplemented (by recovering monetary funds from the controlling person or through compensated assignment) and when adopting the manner of sale of claims.

49. By implication of Items 5 and 6 of Article 61¹⁷ of the Law on Bankruptcy, the claims in the corresponding part are transferred to the creditor that chose assignment (Sub-item 3 of Item 2 of Article 61¹⁷ of the Law on Bankruptcy) independent of the choice the other creditors made. Their approval for the assignment is not necessary.

Creditors who chose assignment do not have the right of vote at the meeting regarding the manner of sale of the debtor's part of claims against the controlling person (second paragraph of Item 5 of Article 61¹⁷ of the Law on Bankruptcy).

50. In order to secure the execution of a judicial act regarding the liability of a person on the grounds stipulated in Article 61¹² of the Law on Bankruptcy, the insolvency officer opens a special banking account of the debtor. Debit of monetary funds from that account is performed at the request of the insolvency officer for the purpose of satisfying the claims of creditors, in whose interests the application for holding a person subsidiary liable was satisfied, in the order of priority stipulated in Article 134 of the Law on Bankruptcy.

If there are disagreements between the insolvency officer and the creditors entitled to receive monetary funds from the aforementioned account, any of them may file an application for resolution of those disagreements to the court considering the bankruptcy case; a decree is adopted after its consideration (Item 4 of Article 61¹⁸ of the Law on Bankruptcy).

51. An application for holding a person subsidiary liable both on the grounds stipulated in Article 61¹¹ and on the grounds stipulated in Article 61¹² of the Law on Bankruptcy (Part 6 of Article 13 of the ComPC RF), submitted within the framework of a bankruptcy case, is regarded as filed in the interests of all creditors who have the right to join the claim, independent of what creditors are listed in the text of the application. Such an application is considered by the court in accordance with the rules of Chapter 28² of the ComPC RF with due regard to the features stipulated in bankruptcy legislation (Item 4 of Article 61¹⁹ of the Law on Bankruptcy).

The form and contents of the aforementioned application must comply with the requirements stipulated in Item 4 of Article 61¹⁹ of the Law on Bankruptcy and Article 225¹³ of the ComPC RF. A state fee is paid for it in the amount determined under the rules of Sub-item 1 of Item 1 of Article 333²¹ of the TC RF based on the sum stated for recovery in the interests of the creditor filing the claim.

52. Proceeding from the purposes of legislative regulation and the general legal principle of equality, an application for holding a person subsidiary liable, filed outside of a bankruptcy case, may be joined by the debtor's creditors, who have the right to file the same application (Items 1–4 of Article 61¹⁴ of the Law on Bankruptcy), as well as by other creditors, whose claims against the debtor are confirmed by an effective judicial act or another document subject to enforcement by virtue of law (hereinafter – creditors entitled to join the application).

53. An applicant filing a claim for holding a person subsidiary liable outside of a bankruptcy case must offer it to the other creditors, who have such a right, to join the claim (Parts 2 and 4 of Article 225¹⁴ of the ComPC RF).

Such an offer must be done through publication of a message in UFRBI within three working days following the acceptance of the application for court proceedings (Part 6 of Article 13 of the ComPC RF, Sub-item 3 of Item 4 of Article 61¹⁹, Item 3 of Article 61²² of the Law on Bankruptcy).

In the decree on the acceptance of application and preparation of the case for trial, the court may oblige the applicant to additionally notify the creditors in a different way, stipulating the manner and form of such notification (Part 3 of Article 225¹⁴ of the ComPC RF).

54. Creditors entitled to join the application may join an already stated claim at any time prior to the adoption of a judicial act finalising the consideration of the case on its merits by forwarding the corresponding message to the applicant in writing, accompanied by documents confirming that they have such a right. The application filed in order to join a claim for holding a person subsidiary liable must be accompanied by a document confirming the payment of a state fee, calculated in accordance with the rules of Sub-item 1 of Item 1 of Article 333²¹ of the TC RF, based on the sum stated for recovery in the interests of the joining creditor, or confirming the right to relief from the state fee, or by a motion for postponement, decrease or payment of the state fee in instalments.

The applicant is obliged to provide information about the persons joining its claim and to present documents confirming their joining to the court (Part 5 of Article 225¹⁴ of the ComPC RF).

A person, whose message (application) regarding its joining the claim was forwarded to and received directly by the court, before which the case is pending, is regarded as joining the claim.

55. The applicant that failed to inform the court about the creditors joining its claim is liable to them in the form of restitution of damages (Article 1064 of the CC RF).

56. By general rule, the insolvency officer, creditors in whose interests the claim for holding a person liable was filed bear the burden of proof of the grounds on

which the person controlling the debtor is to be held liable (Article 65 of the ComPC RF). Herewith, if the members of management bodies, other controlling persons lack interest in disclosing the documents describing the actual state of affairs and the actual turnover, this must not decrease the level of legal protection of creditors in case of unsubstantiated trespass of their rights. This is why if an insolvency officer and (or) creditors, using indirect evidence, convincingly substantiate the statements that a person being held liable is a controlling one, and that it is impossible to satisfy the creditors' claims due to its actions (failure to act), the person being held liable bears the burden of refuting those statements. It must prove, why the written documents and other evidence of the insolvency officer, creditors cannot be used in substantiation of their arguments, by disclosing its own documents and providing explanations as to how commercial activities were actually performed (Item 4 of Article 61¹⁶ of the Law on Bankruptcy).

Materials of tax control measures taken in regard of the debtor or its counterparties, documents acquired during proceedings in cases regarding administrative offences and in criminal cases may be used as means of proof of the facts referred to by the applicant seeking to hold the controlling person subsidiary liable. Such materials do not have pre-established force for the court and are subject to assessment along with the other evidence (Articles 71, 75 and 89 of the ComPC RF).

***Identical Claims (Applications) regarding Subsidiary Liability.
Statute of Limitations in Claims for Holding a Person Subsidiary Liable***

57. By implication of interrelated provisions of the first paragraph of Item 5 and of the first paragraph of Item 6 of Article 61¹⁴, Item 3 of Article 61¹⁹ of the Law on Bankruptcy, it is not allowed to repeatedly resolve a claim for holding a person controlling the debtor subsidiary liable within the framework of a bankruptcy case, if earlier a claim for holding that person liable was submitted on the same grounds for the protection of interests of a civil law community uniting the debtor's creditors and was considered within the same bankruptcy case. Similarly, it is not allowed to repeatedly file a claim for holding the controlling person subsidiary liable outside of the bankruptcy case, if earlier a claim against the same person and on the same grounds was filed and considered within the framework of the bankruptcy case.

A creditor entitled to join the application for holding a person subsidiary liable, filed outside of a bankruptcy case, who did not use this right, loses the right to file such a claim against the same controlling person on the same grounds (Part 5 of Article 225¹⁶ of the ComPC RF), except where it was objectively impossible to join the first claim, e.g. the creditor had no opportunity to join the initial claim, as the court decision confirming indebtedness to it (or another document, in case of extrajudicial recovery of debts) was not effective at the time.

Herewith, the grounds of a claim for holding a person subsidiary liable, which should substantiate the status of the person controlling the debtor, are to be understood not as references to norms of law, but as the facts of the dispute, on which the claim for restitution of damage, filed by the civil law community uniting the debtor's creditors against a certain person, is based. In particular, a claim for holding a person subsidiary liable based on the failure of the debtor's head to transfer the constituent documents and a claim based on its failure to transfer documents regarding the debtor's main assets, or two claims based on different actions (failure to act) of the same controlling person cannot be qualified as identical.

58. Time terms referred to in the first paragraph of Item 5 and the first paragraph of Item 6 of Article 61¹⁴ of the Law on Bankruptcy are special statutes of limitations (Item 1 of Article 197 of the CC RF); they begin to run depending on a subjective factor (the moment on which the interested persons learn the corresponding information). Herewith, these terms are limited by objective circumstances: in any case, they may not exceed three years from the day on which the debtor is recognised bankrupt (when proceedings are terminated in a bankruptcy case or when the application to recognise the debtor bankrupt is returned to the authorised body) or from the day on which bankruptcy management is finalised and ten years from the day of unlawful actions (failure to act).

The statute of limitations is applied by the court only upon application of the person controlling the debtor, filed before the issue of a decree to suspend proceedings in the case (where such proceedings contain a conclusion that there are grounds for holding the controlling person subsidiary liable), or of a decree to hold the person liable (if proceedings in a separate dispute were not suspended), or before the adoption of a decision to hold that person liable (if the dispute is resolved within the framework of a bankruptcy case) (Item 2 of Article 199 of the CC RF).

59. The statute of limitations, stipulated in the first paragraph of Item 5 of Article 61¹⁴ of the Law on Bankruptcy, regarding a claim for holding a person subsidiary liable, is calculated, by general rule, from the moment when an insolvency officer acting in the interests of all creditors or an ordinary independent creditor entitled to file an application learns or must have learned about the existence of grounds for holding a person subsidiary liable – about the aggregate of the following circumstances: that there is a person that has the status of a controlling one; that this person performed unlawful actions (failed to act), causing damage to the creditors and entailing subsidiary liability; that the debtor's assets are insufficient to settle accounts with all the creditors (without finding out the exact amount of insufficiency). If during consideration of a separate dispute (case) it is established that one of the creditors learned or must have learned that there were grounds for holding a person liable before the other creditors could objectively learn this, the statute of limitations may be applied, upon application of the controlling person, to the part of the claim to which such an informed creditor is entitled (Item 1 of Article 200 of the CC RF, first paragraph of Item 5 of Article 61¹⁴ of the Law on Bankruptcy).

Herewith, in any case, the statute of limitations cannot begin to run before the right to apply to court with an application for holding a person subsidiary liable appears (e.g. before the first bankruptcy procedure is initiated, before an application to recognise a debtor bankrupt is returned to the authorised body, before proceedings in a bankruptcy case are terminated by virtue of the eighth paragraph of Item 1 of Article 57 of the Law on Bankruptcy at the stage of verification of substantiation of application to recognise the debtor bankrupt).

If during consideration of a separate dispute (case) it is established that an insolvency officer, acting in bad faith and in the interests of the controlling person, concealed from the creditors the circumstances that serve as grounds for holding a person subsidiary liable, the statute of limitations cannot be calculated from the moment on which that officer learned the corresponding information.

60. If the creditors learned or must have learned about the grounds for holding a person subsidiary liable only after the bankruptcy management was finished, the statute of limitations stipulated in Item 6 of Article 61¹⁴ of the Law on Bankruptcy is applied to the corresponding claim, filed outside of the bankruptcy case.

In this case, the statute of limitations is calculated from the moment on which an ordinary independent creditor entitled to file an application outside of a bankruptcy

case learned or must have learned that there were grounds for holding a person subsidiary liable. If during consideration of the case it is established that one of the creditors learned or must have learned about the existence of grounds for holding a person liable before that moment, then, upon application of the controlling person, the statute of limitations may be applied to the part of the claim to which such an informed creditor is entitled (Item 1 of Article 200 of the CC RF, first paragraph of Item 6 of Article 61¹⁴ of the Law on Bankruptcy).

61. The court may not refuse to satisfy a claim for holding a person subsidiary liable, filed outside of a bankruptcy case, only because the creditor (creditors) learned or must have learned about the grounds for holding a person liable before the end of bankruptcy management. In this case, the statute of limitations stipulated in Item 5 of Article 61¹⁴ of the Law on Bankruptcy is applied to the part of the claim regarding subsidiary liability, to which such an informed creditor (creditors) is entitled; the statute of limitations stipulated in Item 6 of Article 61¹⁴ of the Law on Bankruptcy is applied to the remaining part of the claim.

62. Provisions of the second paragraph of Item 5 and of the second paragraph of Item 6 of Article 61¹⁴ of the Law on Bankruptcy are special regulations with priority over the rules of Article 205 of the CC RF.

The statute of limitations may be restored for an insolvency officer, for creditors who are legal persons or entrepreneurs only in exceptional circumstances, when they indeed had no opportunity to timely apply to court for reasons beyond their control.

Herewith, no restoration is possible for the objective limiting three-year and ten-year terms, calculated from the day on which a debtor is recognised bankrupt (the proceedings in a bankruptcy case are terminated or an application to recognise a debtor bankrupt is returned to the authorised body) or from the day on which the bankruptcy management ends, the unlawful actions (failure to act) damaging the creditors and entailing subsidiary liability are performed.

Incentive Fee of the Insolvency Officer

63. When calculating the amount of the fee of the insolvency officer in accordance with Items 12, 13 and 17 of Article 20⁶ of the Law on Bankruptcy, the creditors' claims satisfied at the expense of monetary funds received from holding the person

controlling the debtor subsidiary liable are not taken into account. Herewith, in accordance with Item 3¹ of Article 20⁶ of the Law on Bankruptcy, the insolvency officer has the right to receive an additional incentive fee in the form of interest, due to holding the controlling persons liable; the amount of this fee depends on the results of work and on the real contribution of the insolvency officer to the end results (hereinafter – incentive fee).

64. The second and third paragraphs of Item 3¹ of Article 20⁶ of the Law on Bankruptcy stipulate the features of calculation of the incentive fee in case of satisfaction of the creditors' claims at the expense of monetary funds added to the bankruptcy assets as a result of holding the controlling persons subsidiary liable. The insolvency officer is entitled to receive 30 % of the sum added to the bankruptcy assets. These funds include compensation of the costs incurred by the officer due to employment of other persons for assistance in preparation of the necessary materials and representation during resolution of the corresponding dispute in court, as well as during execution (enforcement) of the judicial act regarding subsidiary liability.

The insolvency officer acquires the right to receive the incentive fee both when monetary funds are recovered to the bankruptcy assets as a result of execution of a judicial act regarding subsidiary liability and when monetary funds are acquired through sale of claims against the controlling person at an auction in accordance with the rules of Item 2 of Article 140 of the Law on Bankruptcy.

The amount of the incentive fee of the insolvency officer is established upon his/her application by a decree of the court considering the bankruptcy case. The corresponding sum is subject to transfer to the officer on the basis of that decree.

In accordance with the fifth paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy, the court may decrease the amount of the incentive fee or deny its payment. This rule on decrease of the incentive fee is applied, in particular, if it is established that the positive result in the form of supplement of the bankruptcy assets with monetary funds was reached through joint actions of both the insolvency officer and the specialists employed by him/her, as well as of other persons participating in the bankruptcy case. The court may deny payment of the incentive fee if it is proved that the insolvency officer and the specialists employed by him/her did not take measures aimed at the search of persons controlling the debtor and discovery of their assets, took a passive stance in the dispute (in particular, failed to present evidence based on which the controlling person was

held liable, failed to present the necessary arguments and to submit motions), directly or indirectly resisted the holding of controlling persons liable (in particular, tried to hold only the nominal head liable and to exempt the actual head from liability).

By implication of the seventh paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy, the insolvency officer must apply to the court considering the bankruptcy case with an application for recovery of sums actually paid in the form of court costs from the controlling person, in the interests of the creditors, at whose expense the incentive fee was withheld from the bankruptcy assets and paid out (Articles 106, 110 of the ComPC RF). If the insolvency officer evades this duty, the creditors, at whose expense the incentive fee was withheld from the bankruptcy assets and paid out, may claim the compensation of costs from the officer (Item 4 of Article 20⁴ of the Law on Bankruptcy) or apply to court on their own with an application for distribution of court costs.

65. Relations pertaining to the calculation and payment of the incentive fee in case of full satisfaction of the creditors' claims (Articles 113, 125 of the Law on Bankruptcy) or in case of full settlement of debts in obligatory payments (Articles 71¹, 85¹, 112¹ and 129¹ of the Law on Bankruptcy) are regulated by the fourth paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy.

In this case the insolvency officer has the right to receive the incentive fee if he/she proves that the claims of the creditors (authorised body) were satisfied as a result of him/her filing an application for holding the controlling person subsidiary liable. The issue of establishing the incentive fee is considered by the court simultaneously with the application regarding the intent to satisfy all the claims of the creditors, listed in the registry of creditors' claims, or all the claims for obligatory payments, listed in the registry of creditors' claims (hereinafter – an application regarding the intent).

If it is established that the positive result in the form of intent to satisfy all claims of the creditors (authorised body) was caused by the insolvency officer filing an application for holding the controlling persons subsidiary liable, the judicial act regarding the satisfaction of this statement of intent must indicate, among other issues, the amount of the incentive fee due to the insolvency officer and payable by the person satisfying the claims, in addition to the sum of the creditors' claims (claims of the authorised body).

In determining the amount of the incentive fee the court takes into account, to what degree the actions of the insolvency officer contributed to compensation of property losses of the creditors (authorised body) by the person satisfying their claims.

66. If the controlling person held subsidiary liable transfers the monetary funds directly to the creditor that receives a part of the claim as a result of assignment of claims (Sub-item 3 of Item 2 of Article 61¹⁷ of the Law on Bankruptcy), the insolvency officer may receive the incentive fee if he/she proves that the claims of the creditor that chose assignment were satisfied as a result of the officer's actions pertaining to the preparation and submission of an application for holding a person subsidiary liable and as a result of supporting that application in court (fourth paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy).

In this case, the amount of the incentive fee of the insolvency officer is determined, upon his/her application, by a decree of the court considering the bankruptcy case. By virtue of that decree, the corresponding sum is subject to recovery for the benefit of the officer from the creditor that obtained satisfaction.

In determining the amount of the incentive fee the court takes into account, to what degree the insolvency officer's actions contributed to the restoration of violated rights of the creditor (authorised body) that chose assignment and to the compensation of its property losses.

By implication of the seventh paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy, the creditor that chose assignment, at whose expense the incentive fee was paid out, may apply to the court considering the bankruptcy case with an application for recovery from the controlling person of the sum actually paid to the insolvency officer, in the form of court costs (Articles 106, 110 of the ComPC RF).

With regard to Part 2 of Article 112 of the ComPC RF, the creditor that chose assignment may file such an application to court no later than six months from the day on which the decree to recover the incentive fee from it became effective.

67. If the insolvency officer files an application asking to establish the incentive fee after the bankruptcy management has ended or after proceedings in the bankruptcy case were terminated (independent from the grounds for payment of the fee: e.g. whether monetary funds were added to the bankruptcy assets, claims of the creditors (authorised body) were satisfied by a third person, claims of the

creditor that chose assignment were satisfied by the controlling person), the corresponding application is considered by the court that previously considered the bankruptcy case (seventh paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy).

With regard to Part 2 of Article 112 of the ComPC RF, the insolvency officer may file such an application no later than six months from the day on which the bankruptcy management ended or proceedings in the case were terminated.

In this case, the incentive fee is subject to recovery from the controlling person for the benefit of the insolvency officer in accordance with the rules regarding compensation for court costs (seventh paragraph of Item 3¹ of Article 20⁶ of the Law on Bankruptcy, Articles 106, 110 of the ComPC RF).

Features of Holding a Person Liable on Corporate Grounds in Case of Bankruptcy

68. In accordance with Items 1 and 2 of Article 20⁶ of the Law on Bankruptcy, from the day of initiation of the first bankruptcy procedure and later during any bankruptcy procedure, the right to file, in the debtor's name, a claim for restitution of damages caused to the debtor by the members of its bodies and persons determining the debtor's actions (hereinafter – the director) on corporate grounds (Article 53¹ of the CC RF, Article 71 of the Law on Stock Companies, Article 44 of the Law on Limited Liability Companies), belongs to the bankruptcy creditors, the authorised body, the debtor's employees (including former ones), their representative. The corresponding claim is subject to consideration within the framework of the bankruptcy case.

Since by virtue of express statement in the Law on Bankruptcy such a claim is submitted in the debtor's name, the statute of limitations is calculated from the moment on which the debtor (e.g. in the person of a new director, not affiliated (directly or indirectly) with the director that committed a violation, or in the person of the insolvency officer, appointed after the powers of the director that committed the violation were terminated) gained a real opportunity to learn about the violation committed by the previous director, or from the moment when the violation became known or must have become known to a participant (founder), not affiliated (directly or indirectly) with the director being held liable, who could terminate the powers of the director that committed the violation. Herewith, the

statute of limitations cannot be calculated earlier than from the day on which the aforementioned persons learned or must have learned who the proper defendant (e.g. the actual director) was (Article 200 of the CC RF).

69. By implication of Item 3 of Article 61²⁰ of the Law on Bankruptcy, the right to state claims for restitution of damages on corporate grounds is acquired by the authorised body (when the court returns its application to recognise the debtor bankrupt due to lack of funds sufficient to compensate the costs of bankruptcy procedures), and also by the bankruptcy creditors and the authorised body, whose claims are listed in the registry of creditors' claims (when the proceedings in the bankruptcy case are terminated due to lack of funds sufficient to compensate the costs of bankruptcy procedures).

In this case, the special rules on jurisdiction stipulated in Item 5 of Article 61²⁰ of the Law on Bankruptcy are applied. The court performs recovery for the benefit of the bankruptcy creditor (authorised body) that filed the claim, in the amount of damages caused to the debtor, but not exceeding the sum of the claim of the creditor (authorised body), established within the framework of the terminated bankruptcy case, or the sum of the claim of the authorised body, indicated in the application to recognise the debtor bankrupt (which was returned to it). The statute of limitations regarding the claim of the bankruptcy creditor (authorised body) for compensation of damages begins to run on the moment determined with regard to explanations provided in the previous Item of this Ruling.

Closing Provisions

70. The following are not subject to application:

- second paragraph of Item 20⁵ of the Ruling of the Supreme Commercial Court of the Russian Federation No. 10 of 2 June 2004 “On Certain Issues Arising in Judicial Practice in Consideration of Cases regarding Administrative Offences”, as regards the words “and also in electronic form to the Supreme Commercial Court of the Russian Federation, for further placement on the website of the Supreme Commercial Court of the Russian Federation”;
- Item 7 of the Ruling of the Supreme Commercial Court of the Russian Federation No. 29 of 15 December 2004 “On Certain Issues of Application of Federal Law “On Insolvency (Bankruptcy)”;

- third paragraph of Item 47 of the Ruling of the Supreme Commercial Court of the Russian Federation No. 35 of 22 June 2012 “On Certain Procedural Issues Pertaining to Consideration of Bankruptcy Cases”.

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