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*Svetlana Vasileva*

**BUSINESS COMMUNITY AND  
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AND LEGAL FORMS OF  
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*Svetlana V. Vasileva*<sup>1</sup>

## **BUSINESS COMMUNITY AND AUTHORITIES: CONSTITUTIONAL AND LEGAL FORMS OF RELATIONSHIP<sup>2</sup>**

The author analyzes the different forms of relationships between businesses and bodies of state power in Russia: private and public partnership, the delegation of public powers and property, self-regulation, the transfer of government authority to the private organizations, self-regulation, and how public power is influenced including by specialists. The experience of foreign countries and the legal view on the social responsibility of business are provided. The political-legal traditions of the relationships between private organizations and bodies of state power are analyzed. This has predetermined the current legislation. The informal and relatively new mechanisms of protection of the rights of businesses are described.

Key words: Private and public partnership, delegating public powers and property, self-regulation, social responsibility of the business community, regulatory impact assessment.

JEL Classification: K10, K20, K23.

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<sup>1</sup> Candidate of Legal Sciences, Associate Professor, Department of Constitutional and Municipal Law, National Research University Higher School of Economics, masslo@yandex.ru

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**Introduction. The subject-matter of the research.** The data of the study has been fully incorporated into an academic course which is offered as a part of the Master Program “Public Law” in RSU HSE. This paper provides only the general comments and conclusions. The subject of the legal fundamentals of the relationship between the business community and the authorities is broad. These relationships have been studied not only within the framework of legal sciences (the relationship is regulated by various branches of law), but by other disciplines, including economics, political science, sociology, public administration and history. One academic paper cannot embrace all areas and issues, therefore, this research has been limited to a legal framework. Firstly, the relationship between business community and authorities has been analyzed primarily in terms of legal regulation. Although the paper refers to the legislative branches (civil, business, administrative law, etc.) it concerns the relationship between the business community and the authorities. The relationship as a legal category does not always give rise to specific legal relations. Legal basis of the relationship between the business community and the authorities provides an understanding of the legal foundation which is used for detailed industrial regulation. The legal characteristics of the type of business and its relationship with the authorities specified by the contemporary model of constitutional and legal development are the main area of the paper. The research provides an understanding of the role and status of businesses and the authorities both on the national and societal levels. The political and legal traditions of the relationship between the subjects and the state in Russia are emphasized.

Secondly, the research is limited to a few forms of the legal relationships between the business community and the authorities: public-private partnership; public authorization and transfer of property to companies; the interrelation between self-regulation and government control; businesses social responsibility and the measures taken by the government to stimulate it; company petitions to the authorities and other legal forms of influence on government agencies; activities undertaken by businesses; lobbying; resolution of disputes between businesses and authorities. The focus is on the legal contents of models and structures, which are also described by other disciplines. The constitutional and legal forms of the relationships are the key areas in the interaction between the business community and the authorities; they predetermine the type of the relations. Therefore we are not be able to draw conceptual conclusions without providing specific examples from various branches of law: which standards should form the basis for the development of the legislation; what the legal contents of any given forms of relationship are; how it is qualitatively covered by legal regulations; whether there are any objective restrictions on the subjects influence on each other. The research also suggests the

legal structures which would be required to help resolve difficulties in, or a breakdown of, relationships between business and the authorities.

**The research goals.**

1. To define the subjects of the relationship, to determine their legal status. To describe the legal structures of businesses and the government agencies. To describe the multipolar nature of their mutual relations.

2. To analyze the laws and regulations from the days of Peter the Great until today which form the basis for the relationships between businesses and the authorities and to highlight the political and legal traditions affecting current legislation.

3. To describe the legal foundations of the forms of relationship between business and the authorities in Russia. To show that the intended purpose of a specific form predetermines the specific characteristics of its legal regulation.

4. To identify the areas of the relationship between the business community and the authorities where informal law operates. To understand whether informal behavioral models should necessarily be viewed as illegal. To provide the social control models of informal behavior: self-regulation, legal regulation or ethics.

5. To analyze the legal characteristics of the relationships between the business community and the authorities in Russia providing the balance between public and private interests, the development of public consultations between the subjects, and the setting up special institutes for the dispute resolutions.

6. To compare legal regulations in Russia with the legislation and practice abroad. To identify positive experience and to analyze its potential application to the Russian situation.

7. To establish a correlation between public-legal and private-legal structures and procedures in the relationship between the business community and the authorities. To identify the cases where the subjects should use a certain type of structure and procedure (for instance, to manage public finances it is advisable to choose public structure not a private one. Organizing and operating a joint-stock company would not be applicable in this case.)

**Businesses and authorities are the subjects of the social relationships regulated by law.** The role and place of the business community in modern society is determined by specific qualities and functions of this part of the civil society. Businesses aiming at generating profit in the course of their activity make contributions to the public welfare: they move social and economic development forward. Therefore, the business community needs to be provided with the proper guarantees of ownership rights and freedom of economic activity. Their special interests in the economic area distinguish businesses from individuals and non-profit

organizations. Therefore, it is important to establish special procedures for the companies to exert influence on activities of the authorities (for instance, lobbying).

There is still a tendency for there to be “pressure” in the government’s impact on the economy and entrepreneurship in modern Russia, although there are many examples of liberalization of law, and legislative and regulatory compliance procedures. In one of his presentations Titov, Commissioner for the Protection of Rights of Entrepreneurs stated that the competitive economic environments are formed in the state not by the business representatives but by representatives of the authorities. Therefore, the rules for the business community actions depend on government power and public expectations.<sup>3</sup> This comment shows that a strong government role in economic regulation still exists. Government agencies have not only been regulatory authorities but they have also exercised control over business and manage public property.

Thus the questions arise: if governmental agencies enter into relationship with their subordinate organizations (enterprises and institutions), could we possibly speak here about the relationship between the business community and the authorities? If these organizations provide services for businesses, will the disputed issues be resolved within the relationship between business and the authorities? It is important to understand who the participants of the relationship are to be able to define the applicable regulatory law and administrative mechanisms: public-legal and private-legal.

The Civil Code of the Russian Federation does not provide a full understanding of business subjects which enter into relationships with the authorities. As a practical matter, such subjects can be represented by profit-based organizations and non-profit organizations, and their associations. To institutionalize all potential subjects entering into businesses relationships with governmental agencies, we should establish status characteristics of the subjects: their targets at the time of setting up, functions at present, and beneficiaries of the expressed interests. Self-regulatory organizations, public corporations, non-profit organizations where the profit generating target forms a huge part of their activity, could be in a relationship with the authorities.

Therefore, a subject’s position in the relationship between itself and the authorities is defined not only by its organizational and legal form but by its business activities. The legal identification of the subjects for a potential relationship has to be expanded. The legal scope (but not necessarily the legal regulation) may include such definitions as “business”, “business community”, “business-structure”, “subject of economic activity or business activity” and “business alliance”. The notion “subject of a private law” does not fully reflect the role and place

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<sup>3</sup> <http://www.liberal.ru/articles/5926> (Date of reference: November, 8, 2012).

of the organization it denotes: it narrows the status of an organization with the norms and approaches of civil law. Simultaneously, the public and legal component in the activity of public corporations is defined by certain federal laws. Federal laws of an individual nature devalue the meaning of this source of law. Aren't there too many waivers from the homogeneous legal statuses included in the Russian legislation? All this weakens the law, which, by its own nature, cannot be heterogeneous.

The governmental subjects who enter into relationships with the business community are not limited to public authorities. They can be represented by the above mentioned self-regulatory organizations and public corporations. Quite often development institutes and organizations with charter capital including public property and organizations which have been delegated the public power in accordance with the established procedure act on behalf of the authorities. Thus the legal scope could include such an informal legal notions as "authority".

The definition of a legal entity does not completely embrace the status of organizations entering into relations with businesses on behalf of the authorities. Due to the reforming of civil law it has been proposed to distinguish a special type of legal entity – a legal entity of public law. It has been noted in the literature that a subject established according to public law may also exercise its legal competence in the domain of private law without applying for additional legal status. To justify the potential of a subject to act on behalf of a public and legal structure (not in the civil arena but in the economy and business in general, for example, to be the subject of a private and governmental partnership), we need to find out not the absence nor presence of the legal status of the authority but analyze its competence.

**Political and legal traditions of the relationship between business and the authorities in Russia.** The development and practical application of legislation gradually establishes political and legal traditions. Russia has historical examples of partnership between businessmen and authorities. Military industrial committees used to work with publicly authoritative decisions mutually taken by trade and industrial community and the government during WWI.<sup>4</sup> The formation of political parties by entrepreneurs, some of them later sitting in the State Duma at the beginning of the 20<sup>th</sup> century, testify to authorities tolerance to the political activity of the trade and industrial population of Russia.<sup>5</sup> The structural alignment of the relationship between artisans and government agencies was based on Peter the Great's acts ("Procedural rules or statute by Chief Magistrate" of 1721 and "Guild decree" of 1722). They stipulated the legal status of the "tsunfts" – the municipal associations of craftsmen of a lower

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<sup>4</sup> See: *A.P. Pogrebensky*. Military-industrial committees // Historical notes. M., 1941. № 11. pp.160-200, M.F. Juri. Bourgeois military-public organizations in WWI. M., 1990.

<sup>5</sup> See: *S.A. Golubev*. Russian business at the beginning of the 20<sup>th</sup> century: political climate and economic expectations // Russian national identity: history and modern age. – M.: RAS, 2007. pp..343-347.

rank (the second guild of the town's residents); their members dealt with internal issues independently under the supervision of aldermen (heads of the guild), who were elected by members of the *tsunfts*. The functioning of *tsunfts* was supervised by the municipal magistrates and *tsunfts* themselves resembled modern professional unions.<sup>6</sup>

The relationship between entrepreneurs and the authorities in different periods of the Russian history cannot be always evaluated by modern definitions. For instance, craftsmen, merchants and innkeepers could be considered entrepreneurs. The sovereign's acts regulated economic policy in the interests of the treasury and manufacturing unions were organized as a matter of convenience to manage the territory and to fulfill the fiscal function. The decrees of Peter the Great, Catherine the Great and Alexander I concerning the banning of usury and covetousness show that the traditions of corruption in Russia are deeply rooted.

It was in autocratic times that the banning of employees combining their own duties and obligations with activities of other kinds appeared in a number of legal acts, there were also restrictions on nepotism, and connections with the private companies, and accepting gifts and offerings was prohibited as well. At the time some regulations covered employee conduct.<sup>7</sup>

Relationships between businesses and the authorities in the Soviet times were determined by the ideology of domination, and the economic and social policy of the Soviet state: a monopoly of public ownership and the absence of entrepreneurs as a social class. At the time of the new economic policy (NEP) the government allowed individuals to operate businesses. The literature even refers to NEP as a period of revival and development of entrepreneurship in Russia and reflects on the practice of public and private partnership with the participation of foreign capital.<sup>8</sup>

The political and legal traditions of the relationship between businesses and the authorities affect modern legislation and practice. We can observe ambiguity in government regulation: it gives something to businessmen and simultaneously takes away the same amount or even more. Also at present the government policy in some areas of social relationships is quite unpredictable.

It has been noticed that the government keeps silent when an appropriate legal regulation is required: for instance, in the regulation of public monopolies. There is also a tendency over-regulate when authorities feel the need to centralize and subdue businesses.

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<sup>6</sup> See: *N.A. Lyubutov*. Constitutional right of the citizen to be united: legal nature and implementation mechanism. Dissertation... c. of I.sc. M., 2011. Pp.. 29.

<sup>7</sup> See: The Senate decree on prohibition of bringing presents to heads of vicegerencies and other bureaucrats, of March, 10<sup>th</sup>, 1812; the Senate decree on prohibiting authorities to receive offerings from communities, of March, 9<sup>th</sup>, 1832, Nikolai I decree on assigning to bureaucrats as a reward a quarter, semi-annual and annual payment instead of gifts, of October, 10<sup>th</sup>, 1833, Corpus of statutes on civil service //Corpus of laws of the Russian Empire: V.3. Edition 1896

<sup>8</sup> See: *A.M. Balashov*. Revival and development of entrepreneurship in the course of New Economic Policy (public and private partnership with foreign capital investment): monograph. TNT, Stary Oskol, 2012.

Therefore, the procedure for the allocation of funds from the Russian Federal Investment Fund for infrastructure projects looks extremely formalized.

An example of the development of the informal type of relationship between businesses and authorities is the work of procurement officers in the Soviet times and the corrupt practices in a number of state owned industries at present. Excessive protectionism and the paternalism of the state which has led and still leads to its monopolistic control in the economy; business dependence on public policy; and the fusion of business and authorities.

One more political and legal tradition in Russia has been the lack of integration in the business community, the inability to combine allied economic interests to be effectively represented in the public authorities.

We cannot assume that there was nothing positive in the relationship between businesses and authorities in Russian history. There were also positive political and legal tendencies: protectionism for the promotion of Russian manufactured goods and the authorities support of the increase of non-commercial alliances of businesses and political parties at the end of 20<sup>th</sup> century. However, in order to assess the quality of modern Russian legislation, to understand the problems of legal regulation and to offer adequate solutions, we refer to the negative predispositions in the relationships between businesses and the authorities.

**Private and public partnership.** This can be defined in a broad and in a narrow sense. In a broad sense, a partnership between businessmen and the authorities can assume any form in any sphere and is based on a constitutional and legal interpretation. A partnership is formed based on mutual trust, their cooperation in establishing and realizing measures of the public regulation of the economy. The authorities should act predictably and supply any required information.<sup>9</sup> In taxation, for example, a presumption of a taxpayer's fidelity is a private case of the state's obligation to trust companies.<sup>10</sup> The Constitution of the Russian Federation defines the Russian model of partnership between businesses and authorities. It is built on the principle of a democratic state (article 1), freedom of entrepreneurship (article 34), freedom of association (article 30), the right to participate in the management of the state (article 32), a possibility of national power redistribution (article 78).

Russia does not consider private and public partnership a generic term to signify all forms of cooperation between businesses and the authorities. Regulatory legal acts and program documents of politicians of the executive authorities maintain its narrow informative meaning. Private and public partnership has become an applied economic and legal mechanism. Although there is no federal law on private and public partnership, it is constituted in regional legislation

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<sup>9</sup> See: par.4.1. of whereas of RF Constitutional Court Decree of March 23, 2004. № 9-П // СЗ РФ. 2004. № 19 (part 2).

<sup>10</sup> See: The decree of the RF Constitutional Court of November 12, 1998 № 24-П // СЗ РФ. 1998. № 42.



and municipal legal acts primarily in public and legal format. At present it is being actively debated whether a federal law on public and private partnership should be adopted. Moreover, both the literature and legal regulations use the notion differently: public and private partnership or private and public partnership. The different name provides a different emphasis on the phenomenon.

In the narrow sense, private and public partnership is characterized by a combination of private and public resources for the fulfillment of socially useful goals which is only possible in the certain areas of social relationships (for example, the realization of exclusive state powers is excluded from these areas) and which preserve the controlling functions of the authorities. Moreover, in most cases the right of ownership of the object that has been created in the course of partnership is kept by the state. The legal features of private and public partnership include the following: public and legal procedure for the execution of a project provided the guarantee of the freedom of the agreement is observed; a variety of legal constructions giving rise to this partnership; using normative and individual acts as the legal foundations for a concrete partnership; the development of institutional and legal infrastructure for the partnership's realization.

Private and public partnership does not include the following: arts patronage and charity work, social partnership, participation of the business representatives in the development of normative legal acts, the implementation of public procurement contracts by businesses, the activity of public corporations. Private and public partnership cannot include full privatization, when the government delegates the whole responsibility, risks and the total fee for the provided services to the private sector (provided the necessary public control in the activity of an organization is still preserved). In this case, a partnership may exist only at the stage of transferring all the above mentioned to organizations and later no traces remain of such partnership. In terms of a legal approach a private and public partnership is not a one-off but an ongoing state. Mutual endeavors and intentions of both parties to invest resources for the achievement of socially effective goals are needed to form a partnership. Therefore, private and public partnership cannot include special economic zones, because the authorities' decisions on establishing them represent primarily unilateral authoritative acts.

Establishing the format of private and public partnership with regard to certain social relationships allows a choice of the right methods of legal regulations and a balance of the application of private-legal and public-legal procedures. Private and public partnership requires the interests of entrepreneurs and the state to be equally provided for. There are acute issues of the distribution of risks, objects, proprietary and other rights. Therefore from the perspective of jurisprudence, private and public partnership is a legal fiction, combining a number of legal

mechanisms which correspond to the identified legal characteristics in the relationship between business and authorities. Single-type legal constructions which may have specific legal regulations are separated on its basis.

The types of private and public partnership can be classified according to several aspects:

- The types of private and public partnership (mutual investments in the equity capital of the companies, combining agreements with the publication of public and legal acts, allocation of funds from Investment Fund, etc.),
- The legal forms of private and public partnership (investment agreements, concession agreements, production sharing agreement, etc.),
- Risk assignment methods (distribution of rights and obligations in construction, property, operation, management, etc.),
- Instruments of private and public partnership (the state guarantees, bank loans, support of the development institutes, using pension funds, etc.).

The legal classification shows an aversion for such a variety of opinions in describing the legal entities of private and public partnership. However, the diversity of the phenomenon itself does not yet allow us to build a unified classification of private and public partnership based on a single criterion and to use terminology specially adapted to jurisprudence.

**Delegating public powers and property to organizations.** “The privatization of the state” by the institutes of civil society was a tendency in conjunction with political reforms and reforms of public management in a number of countries in the 20<sup>th</sup> century (USA, UK and others)<sup>11</sup>. In Russia this process has been observed since the beginning of 2000. One of the areas is substitution of licensing with self-regulation. The activity of self-regulatory organizations (SRO) has been a vivid example of nonpublic control over the entry of organizations into the economic market, the independent setting-up of standards and the providing of independent SRO control over the market and making violators liable.

As the Constitutional Court of the Russian Federation has announced, the Russian Federal Constitution does not ban the state from transferring the powers of the executive bodies to non-public organizations participating in the fulfillment of separate functions of the authorities. According to articles # 78 (parts 2 and 3) and #132 (part 2), such transfer can be possible only if it does not go against the Constitution of the Russian Federation and federal laws. Moreover, “the state disowns its constitutional powers to establish the legal foundation for the single market, particularly in cases when representatives of a given profession are endowed with public and legal functions and the self-regulatory organizations set up by them are

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<sup>11</sup> See: *E.V. Talapina* Public law and economy: lectures. M: Walters Clover, 2011. p. 242.

authorized to develop and establish professional rules mandatory for their members, and disowns its constitutional power to impact the contents of legal norms, adopted by self-regulatory organizations by virtue of judicial compliance assessment or otherwise.”<sup>12</sup>

A certain legal mechanism is required for the transfer of state powers to organizations. Its structure empowers public authorities with the ability to delegate public powers, including the requirements of the organizations capable of exercising public powers. Businesses should have the ability to do this, first of all, from the position of their organizational and legal work – they should be able to function not in private legal forms but in public legal ones. Thereby a self-regulatory association as a highly organized community is capable of independently normalizing social relations, putting them into practice and also taking upon themselves public-authoritative powers.

It is important to understand legally the object of transfer: whether it is functions and powers or separate management processes. It has been stated in the literature that the powers or separate management processes containing the minimal public component are available for transfer to organizations.<sup>13</sup> Legal mechanisms includes procedures for the realizing the transfer of public powers to organizations, their responsibility for any violations of the order, and the control by the state since the authorities are not completely entitled to dispense with their powers. Transfer of public powers leads to the formation of a multipolar legal relationship: between authorities and organizations, between organizations and individuals who, for example, receive public services and between authorities and individuals. There might be cases of a splitting of public powers between the authorities and organizations. In particular, carrying out anticorruption measures of the legal and regulatory drafts have been assigned to both the state and independent experts. The character of the whole process requires it to be legally constructed: whether it be the granting, transfer or delegation of powers. For example, the federal law authorizes the State Atomic Energy Corporation “Rosatom” to have certain public powers. Federal laws permit the transfer of certification powers to organizations and granting the cadastral functions to subordinated authorities.

The legal mechanism of delegating public powers has been well developed in German law: it distinguishes an organizational privatization, a functional privatization (public outsourcing), property privatization, and an absolute transfer of the function to the institutes of civil society.<sup>14</sup> Russia could benefit from the German experience. Particularly, by applying an administrative agreement as the ground for the transfer of public powers.

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<sup>12</sup>See: Ruling of the Constitutional Court of the Russian Federation of December 19, 2005. № 12-П // СЗ РФ. 2006. № 3.

<sup>13</sup> See: *E.K.Glushko*. Administrative and legal nature of public corporations // Reforms and law. 2008. № 3. SPS «ConsultantPlus».

<sup>14</sup> See: *A.F. Vasileva*. Delegation of public functions to the subjects of private law // Legal Science. 2008. № 2. p.67.

The transfer of the management of the public property to individuals has been quite common in the cultural sphere in Russia. Such transfers are made based on concession agreements and administrative acts of the authorities. For example, these legal forms were applied in transfer of the country estate “Serednikovo” located near Moscow to the descendants of Mikhail Lermontov and the icon Holy Virgin Hodegetria from the Russian Museum to the Alexander Nevsky church located on the territory of the cottage settlement “Knyazhe Ozero” near Moscow. In all cases the property transfer was accompanied by the signing of a writ of protection.

The civil concept prevails in federal law on concession agreements. If the Russian concept of concession contained the idea of the transfer of public powers to organizations, there would be no doubts regarding its public and legal essence. However Russian law has not entirely assimilated the idea. The concession agreement declares property to be the object under agreement rather than activity related to operation and maintenance of the property or its management. However, concessions cannot be realized in private-legal forms only. Investors are afraid of leaving the area of civil law and using regulations mixed with public-legal methods. Civil law provides them with guarantees and safety but public law, due to its underdevelopment and political dependence, does not. Having seen the inability of the state to figure out these mixed regulations, we can understand the feelings of investors.<sup>15</sup>

The theoretical and practical development of the legal mechanism regulating transfer of the public powers to organizations is vital for Russia. One should not confuse different formats: transfer of public powers, and private and public partnership. Budget allocation to businesses through an organization authorized by the state comes nearest to the transfer of powers by purpose. Therefore, public and legal procedures as opposed to private and public partnership should predominantly be used here.

Moreover, the law stipulates that dealing with socially beneficial issues (including, for example, management of public finances) in private-legal form is not allowed. One cannot transfer public powers to a specially set up open-stock company (OSC). To manage public finances one should public and legal procedures which cannot be applied by OSC. It is hard to agree with Storchak, Deputy Finance Minister, validating the creation of the Russian Government specialized agency to manage the Reserve Fund and the National Wealth Fund as well as national debt. He is unconvincingly regarding the fact that these powers cannot be entrusted to the Central Bank and State Corporation “Bank for Development and Foreign Economic Affairs” (Vnesheconombank). “Employees of this organization not be be bureaucrats, their functionality is closer that of invest bank employees, only they work with additional

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<sup>15</sup> See: *E.V. Talapina. Decree. Works. p.179.*

restrictions.”<sup>16</sup> A federal law would define the status of this agency, as in case with the state corporations or bylaws, and the issue remains open as to what kind of status could that be.

With regard to the self-regulatory sphere, it is vital for the legislation to precisely identify the contents of the transferred power in a specific industry. The procedure for its realization, a ban on specific activities, controlling and supervisory powers remain with the state. Apparently, it is also essential to specifically indicate the right to have judicial and administrative veto on self-regulating acts.<sup>17</sup> The fact that the state has decreased its presence in a specific relationship does not mean that the appropriate function has been transformed into a socially meaningful power.

**Self-regulation as a social mechanism. The legal nature of self-regulatory acts.** An economic approach to understanding self-regulation contrasts market forces with the state regulation of social relationships.<sup>18</sup> From a legal perspective, self-regulation is viewed as the decentralization of legal regulation: the independent activity of a professional community aimed at establishing and applying the behavioral norms for its members. Economic and legal approaches to understanding are similar - they overlap in the identification of the spheres and the results of these activities.

The federal law on self-regulating organizations (SRO) specifies a narrow area for self-regulation - primarily, economy and entrepreneurship. According to this law, self-regulation is the activity of the subjects in a business or professional sphere aimed at developing and setting up standards and rules including provision of control over compliance. Self-regulation can also be used in government: the self-regulation of political parties, communities of judges and attorneys, public territorial groups. Law theorists rightly view self-regulation in a broader way: as a social mechanism for improving social relationships in various spheres. At the same time the narrow approach to understanding self-regulation has an ideological background in Russia. Firstly, self-regulation is the border of state intervention in the economy, a practical application of the theory of a “minimalistic” state. Secondly, business self-regulation is one of the foundations of economic democracy. Pleskachevsky, in particular, thinks that economic democracy – free choice of market behavioral models, real competition, and self-regulating organizations – may lead to an improvement of quality of the whole socio-political system.<sup>19</sup>

In comparison with legal regulation, self-regulation is valuable for society and the state because professional societies react faster to changes in public opinion and quickly address those

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<sup>16</sup> See: How to manage reserves //Vedomosti. February, 4, 2013 г. pp.6-7.

<sup>17</sup> See: S.V. Vasileva, S.S. Zaikin, A.O. Lebedev, A.V.Chaplinsky Self-regulation as the basis for delegation of public-authoritative powers //Bulletin of Saint-Petersburg University. Series 14 «Law».Edition 3, September, 2011. p.76.

<sup>18</sup> See: M.Klinova. Globalization and infrastructure: new trends in the relationship between state and business // Economic Issues. 2008. № 8. p. 87.

<sup>19</sup>See: II All-Russia Forum of self-regulating organizations //Website of Russian Union of Industrialists and Entrepreneurs // <http://pcnn.pф/announce/view/239> (Date of reference: February 7, 2013).

changes. Self-regulatory acts could make up for the gaps in legal regulation. The efficiency of self-regulating acts is reinforced by their legitimacy: the subjects of professional society supporting autonomously established rules of behavior.

The reform of Russian public administration aims at self-regulating organizations being different from legal entities and their unions. Since self-regulating organizations set up the rules for participation, provide control and take measures of responsibility, some issues arise, including the following: what is the social and legal nature of these organizations, are they semi-governmental or purely social institutes? The federal law which assigns the status of non-profit organization to a self-regulating organization, does not answer these questions. Here we also need to consider those outside the scope of legal regulation – there are a few types of self-regulating organizations – organizations mentioned in the legislation; organizations which are not regulated at all; and organizations which are not directly called self-regulating.

Self-regulation in Russia develops on the authorities' initiative and with its support. Experts treat this ambivalently. Corruption can also be observed at the level of self-regulation. In some cases self-regulating organizations can unlawfully restrict businesses from entering the market. The subjects of a professional community do not have appropriate guarantees as to the accuracy of information related to SRO activity. Rule setting procedures in these organizations need to be improved.

Self-regulating organizations setting up the rules for the entry into economic market and its behavioral standards develop constitutional freedom of entrepreneurship and they can also restrict it. Its restriction, in conformity with article 55, part 3 of the Russian Federal Constitution, may be permitted. Therefore, a constitutionally-legal balance between self-regulation and freedom of entrepreneurship can be achieved only with public and legal procedures. Taking decisions on substituting the mechanism of state regulation with a self-regulatory mechanism must be based on a serious analysis of the situation in a specific business and economic sphere, including to what extent the market is monopolized and ready for self-regulation, and whether state participation in providing security for stakeholders in the SRO.

Self-regulating acts tend to contain the characteristics described in the legal theory of local, corporate and inter-organizational acts. Self-regulating acts such as normative legal sources represent a combination of universally binding social norms. The criteria of legal definitiveness should be applied to these acts as well. Moreover, the requirements of the law-making process in the formation of self-regulatory legislation must be maintained. It would be logical to stipulate in a federal law what self-regulatory acts cannot come into force without being approved by the public authorities or SRO associations. The following issues need to be addressed as well: can self-regulating acts be appealed administratively and on which authority?

What is appeal procedure? What control measures remain with the state regulator concerning self-regulating sphere?

**Social responsibility in business community.** This phenomenon rarely enters the orbit of juridical analysis and is practically unregulated by the law. The issues of the social responsibility of the business community are often the subject of studies in economics, political science, history and sociology. However, there is international experience in the social responsibility of business, and international standards of social accountability are developed in the UN, the European Union, and organizations of business people from different countries (for example, leaders of the US, European and Japanese business “Round Table Co.”).<sup>20</sup> A legal understanding of the social responsibility of business is important due to the development of responsible practices that have become almost formalized: socially oriented entrepreneurs getting special markings for the marketable goods; the preparation and publication of social reports on organizations. Socially responsible entrepreneurs invest in their image and their future development: they may count on the profit increase and favorable attitude of the authorities. The stimulation of social responsibility in business is one of the authorities’ functional areas which allows a strengthening of the state policy with the help of entrepreneurs. Using its own resources, the business community can support socially unprotected segments of the people; get involved in the realization of measures on safety and health, social welfare and environmental improvement (article 4, 37-38 and others, RF Constitution).

The legal mechanisms for stimulating business social responsibility include: tax benefits, financial support (subsidies, grants), providing property on preferential terms, informational, consulting and educational support. The RF Economic Development Ministry reduces the rates of compulsory pension, medical and social insurance with the total rate not exceeding 26 % for small businesses and other organizations working in production and social spheres, using simplified taxation system. Nevertheless, the level of business social responsibility depends on the subjects’ behavioral philosophy in politics and the economy of a country. In some countries the social responsibility of business is developed without state stimulation.

The norms of constitutional, civil, labor and environmental laws form the legal basis for business social responsibility. The social responsibility of business can be derived from the principle of the social state which lays the foundation for the ideas of social solidarity and social justice. Civil law establishes the burden of responsibility in connection with the possession,

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<sup>20</sup> See: *S.P. Peregodov, I.S.Semenenko* Corporate citizenship: concepts, international practice and Russian realities. – M.: Progress-Tradition, 2008. pp.79-82.

utilization and disposition of property. Labor law expands on the idea of social partnership. Environmental law stipulates the liability of the businesses, whose activity impacts environment.

The legal approach does not include in the business social responsibility the notion of businesses complying with legal requirements and fulfilling their obligations. For example, an employer providing appropriate working conditions for employees in conformity with the RF Labor Code is not actualizing social responsibility. It means doing more than what is stipulated by law and it has moral foundation: be merciful and help those in need. One cannot speak about the social responsibility of business when the state offers certain preferences to a business which provides employment to a certain group of people, rather private and public partnership. The best form for developing business social responsibility is self-regulation.

The development of business social responsibility at present indicates a shift in the consumer attitude from generally valid resource use to the idea of social entrepreneurship. Contrary to a legal approach, an economic approach has businesses being a part of the society which contribute to social development in exchange for using public infrastructure and resources. The idea of “corporate citizenship” has been the supporting rationale: those doing business in a certain territory are considered to be its corporate citizens and must be socially accountable. In Russia provisions on corporate citizenship have been stipulated by Social Charter of Russian Business of 2004 (revised in 2007), adopted at the convention of RUIE (Russian Union of Industrialists and Entrepreneurs).

The key areas of business social responsibility are social partnership and providing ecological security beyond normative standards set forth by law; effective resource utilization and prevention of negative risks caused by business activity, implementation of costly innovations; charity, including support of socially oriented non-profit organizations; transparent conduct of business based on trust and honest relations with all stakeholders.

The emphasis is placed on national identities. Organizations in European countries pay greater attention to environmental programs. In Russia business social responsibility aims at unresolved social and economic problems in education, employment, culture, mother and child welfare. However, there is a pessimistic point of view about the reality of business social responsibility. The aim of business is generating profit and satisfying shareholder expectations. There is no room for corporate philanthropy. The analysis of organizational social reports in Russia shows that entrepreneurs mostly announce the fulfillment of the obligations which are imposed on them by law. In a number of cases social responsibility cannot be distinguished from marketing. Regarding the preparation of social reports some questions arise and they require a legal solution: can we set up general requirements to their form and content? Can we dispute information included in them? What is the corrective state action in this area? The questions



remain open, especially in Russia, where authoritative pressure in actual practice is also felt in the area of business social responsibility.

**Business petitions to authorities and other forms of influence on state activity.**

Russian businesses are entitled to affect the action of authorities using various legal forms:

- petitions;
- conducting independent evaluations of drafts of publicly authoritative decisions, expert assessment of some activity (for example, environmental audit);
- taking part in public discussions of technical rules, public consultations of the drafts of normative legal acts submitted for the evaluation of regulatory impact, and public hearings if they are a mandatory stage of the lawmaking procedure, for example, hearings concerning general urban planning;
- participating in public hearings carried out by public chambers at the federal and regional levels, parliamentary hearings;
- discussing the drafts of publicly authoritative acts as members of government expert advisory structures and their subdivisions;
- sending proposals regarding drafts of normative legal acts as part of “Open Government”, and taking part in public discussions if a draft law was submitted for their consideration by the State Duma;
- participating in the work of the RF Government Council on Competitiveness and Entrepreneurship;
- meeting with officials and employees at all levels of government;
- assigning an employee to an executive body if they belong to the same industry.

For example, some profit-based organizations in electricity sector which the state is a shareholder of, send their representatives as employees to the RF Ministry of Energy, to express an expert opinion on the drafts of public-authoritative decisions under preparation.

An organization’s right to petition has been a traditional form of influence on authorities in Russia. Under Federal Law petitions include proposals, applications and complaints. Organizations send comments to the drafts of public-authoritative decisions. However, most petitions are related to the requirements to carry out certain actions by authorized bodies: giving organizational status, providing services and regulating disputes.

The impact of business on state activity is made on the basis of normative legal acts and informally, the latter cannot always be viewed as illegal. This is evidenced not only by lobbying which has not yet been addressed by law. The inefficiency of petitioning gives rise to informal practices: for instance, letters to officials, addressed through the mass media, where officials are asked not to adopt a certain law. The President’s manner of meeting with business

representatives is an issue that is not formally regulated. Is it good or bad? The issue remains open.

Legal regulation and the practical relationship between business and the state in Russia demonstrate the authorities' tendency to change their ideology. This is a new level of relationship: an urge to go to this level is highlighted in a few program documents,<sup>21</sup> and presidential addresses. The literature says "mutual penetration" is a function of authorities not only as individuals or groups exercising authoritative powers, but also as an organized and established network of relations and communications between public structures and society.<sup>22</sup> From the perspective of constitutional and legal ideology, the relationships between business and authorities being formed, go beyond the scope of a direct and representational democracy proposed in the RF Constitution. At present an advisory and communicative democracy, a democracy of partnership, including striving for the achievement of socially beneficial goals is being formed.

Provision of the uniform rule of law that helps entrepreneurs to influence authorities is an important trend in legal regulation. It would be reasonable that special discussions and consultations which are initiated in some cases by the state, be eliminated if their targets can be achieved through established legal procedures. It would require a stipulation that an authority, an official or an employee may not organize a discussion if it is possible to reach its target within the framework of current legal procedures. There is also some doubt whether it is necessary to implement a special process of discussing technical regulations.

**Advisory activity.** This work is an integral part of independent investigation. Its outcome is an expert report on the quality of a public project. Constitutional law does not stipulate the right of representatives of organizations to participate in the discussion of drafts as experts. There is no separate law on investigative activity or an authority's expert boards. Regulation of this activity is not generally performed through direct guarantees to organizations but by identifying procedural issues (for instance, creating working groups to prepare draft laws), requirements which in fact determine the dependence and work of public experts.

Expert and advisory structures have been created with many authorities on federal and regional levels. They also operate at the municipal level. However, we cannot call formation and operation of these structures transparent. Not everyone who wants to be heard is able to. The community of experts becomes closed and corrupt.

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<sup>21</sup> See: The RF Government Edict of November 17, 2008. № 1662-p «On Concept of Long-term Social and Economic Development of the Russian Federation for the period until 2020» // СЗ РФ. 2008. № 47.

<sup>22</sup> See: A.V. Berestovsky. Informational and communicational technologies for the interaction of the executive branch of the RF and society. Synopsis of thesis... Ph.D, M.: 2009. pp.8-9.

The law gives some organizations the right to investigate public projects: self-regulating organizations, chambers of commerce and industry and employer associations. In spite of these special instructions, the right to conduct an investigation of public projects is vested in any organization in a manner specified for a certain type of investigation. Normative legal acts make it possible to carry out an independent investigation of private and public partnership projects and in other cases, for example, in certification.

Some types of independent investigation were specially introduced to be carried out by businesses. Anticorruption expertise and expertise of administrative provisions performed by organizations primarily aims at discovering administrative barriers for entrepreneurship in the working procedure of the authorities. The investigation of technical regulations is also directly linked with business since it is carried out by defining mandatory requirements of the products, engineering processes, production, construction and assembly, conformity assessment, etc.

One cannot speak about organizations' veto rights to the drafts of normative legal acts which entrepreneurs' community of modern Russia advocates. The same holds true for the state offsetting expenses which were the result of an effective normative legal act that was negatively evaluated by business. Business alliances are disconnected ideologically and are bureaucratized. The key issue here is the high transparency of the process and its outcome. A congruence of interests in the course of adopting laws is provided according to the law-making process and its results affect society and the state in general. The guarantee of an organization's right to carry out an investigation would require the authorities to provide open access to all expert opinions which were received for a draft law. The expert opinion of businesses can be preserved by downloading the draft under discussion on Internet a few days prior to its submission for the consideration of the authorized body and it is not possible to introduce any amendments and additions during this time.

Public consultations with business during the evaluation of regulatory impact now embody relations between businesses and the authorities in discussing draft legal acts which introduce burdens for business. Regulatory Impact Assessment (RIA) is performed by the RF Economic Development Ministry and due to the latest changes in legislation shall be performed by any authority – the developers of drafts.<sup>23</sup> RIA is the evaluation of social cost and benefits which may arise as a result of adopting and implementing a certain regulatory legal act. The criteria for the acts' selection to be assessed are based on decrees of the RF Government and orders of Economic Development Ministry of the RF.

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<sup>23</sup> See: The RF Government Decree of May 2, 2012 № 421 "On measures to improve preparation of legal acts by federal executive bodies, introducing mandatory requirements not the subject to technical regulations" // СЗ РФ. 2012. № 20. Article 2530.

RIA is a demanding procedure requiring economic and legal calculations and forecasting, and therefore, it is expensive. It does not definitely encompass the whole range of legal material. At the same time, RIA practice (compared to legal monitoring) has a promising future. It is sought-after by the executive authorities, and is popular with business, although now primarily with large business alliances (Russian Union of Industrialists and Entrepreneurs, Chamber of Commerce and Industry of the Russian Federation, “Delovaya Rossiya”, “Opora Rossiyi”). They have more resources and are more involved in a dialogue with authorities. RIA demonstrates a better institutional adaptiveness and it is likely to overtake anticorruption measures soon.

RIA is politically important. It can stimulate the development of political competition. At present the assessment of regulatory impact is gradually being included in the law-making process in Russia. Economic Development Ministry sends reports on RIA for some draft laws being prepared for a second reading.

**Lobbying.** The understanding of this phenomenon need a legal approach in Russia. The right to promote the interests of organizations to the authorities is a constitutional right which has not been plainly stated but follows from the letter and spirit of the RF Constitution. It is an integral part of the right to participate in the management of state affairs (article 32). Lobbying is also a mechanism of feedback, intended to show business opinions on the drafts of publicly-authoritative decisions under discussion.

Each interested party can express its interest to an authorized body or its representatives. Here the critical issue is the transparency of the authorities’ activity, public placement of the law-making plans, and an open discussion of publicly-authoritative decisions.

Lobbying provides regulatory potential for both legal and ethical norms. To make lobbying effective rules are needed: rules about the ethical behavior of public officials, and uniformity in understanding the contents of these rules. Lobbyists themselves can also adopt ethical codes of behavior – self-regulating acts. They develop or enrich (and sometimes even substitute) legal regulation.

As a special procedure, lobbying, among other mechanisms of promoting business interests, has been established in a number of countries, for example, in the USA, Canada, Lithuania, Poland and Georgia. Based on the law of these states, lobbying defines the status of authorized officials and professional intermediaries between authorities and society: lobbyists and lobbying firms. The following mechanisms form the basis of the regulation: registration of lobbyists, reports on their contacts, information disclosure by authorities, including penalties.

Russia has not established a specialized lobbying. Lobbying in Russia is being built on a framework of the established potential of organizations to promote their interests. Any impact

organizations have on the activity of authorities can be regarded as lobbying. At an International seminar held on June 8, 2012 in Economic Development Ministry, Janos Bartok, Principal Administrator Innovation and Integrity, OECD Public Governance and Territorial Development Directorate (TBC) announced that many OECD members consider regulating lobbying as a specialized procedure since they accept effective mechanisms for promoting interests of organizations as being sufficient<sup>24</sup>.

Lobbying in Russia is not a means - it is the consequence of negotiating corruption. Legislative policy on lobbying regulation is wrongly connected with anticorruption reform. Lobbying regulation and anti-corruption efforts are two different ways of legal regulation which need not be linked. Lobbying itself does not give rise to corruption. The violation of public interest by officials and employees tempted by a lobbyist happens not because there is no law on lobbying. Coping with corruption is the subject-matter of laws on parties, elections, the status of authorities and the civil service. The key areas to improve quality of business impact on public and governmental decisions are developing the right to have information on authorities' activity and perfecting the activity of organizations.

**Settlement of disputes between business and authorities.** Legal mechanisms of the settlement of disputes between business representatives and the authorities includes various forms of securing and protecting the right of ownership and freedom of entrepreneurship: in administrative proceedings, judicially (including Constitutional Court of the RF and European Court of Human Rights), and in a pre-trial procedure if it is considered as the mandatory procedure for the settlement of a dispute. To protect their rights and freedoms entrepreneurs may refer to Plenipotentiary on Human Rights in the Russian Federation and plenipotentiaries on human rights in the constituent entities of the RF, various human rights agencies and organizations created by the state (President Council on Development of Civil Society and Human Rights, the RF Public Chamber) and by social non-profit organizations. The Civil Code of the RF allows self-defense. Using self-defense in the settlement of a dispute requires legal understanding.

The settlement of disputes between entrepreneurs and authorities in work and employment can be done within the mechanism of social partnership although it is not directly envisaged as a platform alternative to judicial and administrative proceedings.

The Chairman of the Supreme Arbitration Court of the RF once stated that arbitration courts were used as instruments for illegal takeovers in the beginning of the 2000s. Interlocutory injunctions were passed — for example, in Ingushetia a court decision forbidding a shareholder

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<sup>24</sup> See: Information on International Seminar on Organization and Legal Regulation of Lobbyism on the website of Economic Development Ministry // [http://www.economy.gov.ru/minec/about/structure/depogosregulirineconomy/doc20120613\\_09](http://www.economy.gov.ru/minec/about/structure/depogosregulirineconomy/doc20120613_09) (Date of reference: August 23, 2012)

meeting in Krasnoyarsk could be passed. All of a sudden it turned out that there was no problem anymore. However, now there is no problem only in the sphere of the influence of arbitration courts because they have shifted to investigating the authorities which have become the main instruments of raiders.<sup>25</sup> Due to drawbacks in the judicial and law enforcement systems in Russia, organizations frequently choose foreign and international jurisdictions to settle disputes between businesses.

In the opinion of some experts, there are too acts in the Russian Criminal Code concerning different aspects of business activity.<sup>26</sup> Criminal and criminal procedure legislation stipulating prosecution for businesses needs to be liberalized. Legislative innovations are designed to protect businesses from the groundless initiation of a criminal case and to protect their rights during special investigative activities. For some economic crimes (see articles 159 – 159.6, 160, 165 of the Criminal Code of the RF) it was proposed to introduce changes to article 20 of Criminal Procedure Code of the RF; according to these changes a criminal case can be initiated only if there is a victim-impact statement or an official complaint. There may be some exceptional cases, when harm was inflicted on the interests of the state or the target of crime was public or municipal property.

The legal mechanisms of the dispute settlement between business representatives and the authorities is currently undergoing transformation. It shows the intentions of authorities to alter the type of relationship between business and the authorities, defined by a contemporary model of constitutional and legal norms. This relationship is supposed to be based on the principles of trust and partnership between the parties, mutual consultation, and the co-participation of businesses and authorities in adopting publicly authoritative decisions. It is also possible that the weakness of judicial and law enforcement systems in Russia is speeding up the development of non-judicial conflict resolution procedures between businesses and the authorities. The Presidential Decree established the position of an Entrepreneurs Rights Commissioner. He has already done some practical work.<sup>27</sup> Some formats for conflict resolution between businesses and the authorities are being created, including business representative meetings with the President and officials, negotiation platforms at forums, and using mediation of business associations. A dispute settlement mechanism for businesses and self-regulating organization is being developed.

Indemnity procedures regarding harm inflicted on organizations by the unlawful action or inaction of authorities and officials is yet to be perfected. There are some difficulties with the

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<sup>25</sup> See: Chairman of the Supreme Arbitration Court protects business from investigation // Forbs. November 14, 2011. <http://www.forbes.ru/sobytiya/vlast/76305-predsedatel-vysshego-arbitrazhnogo-suda-pytaetsya-zashchitit-biznes-ot-sledstvi> (Date of reference: February 7, 2013).

<sup>26</sup> See: Criminal policy in economy: expert assessments. – M.: Foundation «Liberal Mission», 2011. p.5

<sup>27</sup> See: *S. Samokhina*. Boris Titov has assigned aides to industries // *Commerzant*. August 21, 2012 № 154 (4939).

ascertainment of guilt of the state, its authorities, officials and employees in terms of infliction of harm on businesses and the formation of evidence. A critical issue is execution of judgments in favor of businesses recognizing the need for the recovery of funds from the public treasury.

**Key findings:**

1. It is essential to correctly institutionalize the subjects of relationships between businesses and the authorities to establish applicable regulation and law enforcement mechanisms. To this end, the status characteristics of the subjects are to be defined: targets at the time of creation, present functions, and the beneficiaries of the expressed interests. For example, public corporations, self-regulating organizations, and organizations which received public powers may act on the part of business and on the part of authorities.
2. Political and legal traditions in the relationship between businesses and the authorities have an impact on contemporary legislation and practice. In the course of the Russian history some political and legal traditions were formed and they have to be dealt with gradually, including with the assistance of legal regulation and law enforcement: the unpredictability of state policy; the state being silent when legal regulation is required; excessive regulation in a number of social relationships spheres; corruption; excessive protectionism and the paternalism of the state.
3. In a general sense, partnerships between businesses and the authorities exist in many forms and spheres (social partnership, public consultations, etc.) and are based on constitutional and legal interpretations. In a narrow sense, this is an economic and legal mechanism. From a legal perspective, private and public partnership is a conceptual cover, combining a number of legal forms and mechanisms which correspond to the highlighted legal characteristics of relations between business and the authorities.
4. The transfer of public powers to organizations requires legal mechanisms. These mechanisms give public authorities with the authority to delegate public powers; define organizations capable of fulfilling public powers; outline the requirement for the realization of the delegated public powers; explain organizational responsibility for violations. In this situation businesses should be able to act in public and legal forms. Appeals against acts of this organization in relation to the transferred powers should be accepted in the case proceedings between citizens and the authorities.
5. In a general sense, self-regulation is a mechanism for harmonizing social relationships in various spheres. From a legal perspective, its consequences are self-regulating acts – one type of social norm. The narrow approach to understanding self-regulation in Russia (first of all, in entrepreneurship) has an ideological basis: it is viewed as the borderline of state intervention in the economy as well as one of the mechanisms for the practical realization of economic democracy. Self-regulating acts similar to normative legal sources should meet the requirements

of legal distinctness (precision, clarity, unambiguity). It would be logical to set the same requirements to the development of self-regulating acts as for the law-making process (negotiating of interests, participation of different subjects, etc.).

6. The social responsibilities of business are not limited to minimally fulfilling normative legal acts; they are social commitments beyond the limits of formal prescriptions. The legal foundations of business social responsibility are the norms of constitutional, civil, labor and environmental laws. A legal understanding of business social commitments is vital due to the development of the responsibility practices which are close to formalized mechanism: giving special branding for goods from community oriented entrepreneurs; preparation and publication of social reports by organizations.

7. Businesses can have an impact on authorities in various legal ways: petitions, participating in advisory structures of the authorities, public and social discussions, public consultations, etc. Lobbying the state is based not only on legal acts but takes place through informal channels which cannot always be considered illegal. The poor efficiency of petitioning in accordance with the federal law gives rise to informal practices such as letters to officials through the mass media.

8. The regulation of business advisory activities is usually performed through establishing procedural elements of government activity (for example, creating working groups to prepare draft laws), which in reality lead public investigations to be dependent on their needs. The formation and functioning of advisory agencies cannot be called transparent. Not all of those wishing to be heard, are heard. Some types of independent investigation were specially implemented to be carried out by businesses: anti-corruption advice, the investigation of administrative and technical rules, and assessment of regulatory impact.

9. Lobbying is not a means, but the result of negotiating corruption. Lobbying as a special procedure is not established in Russia, which need to be remedied. The representation of organizational interests relates to the promotion of the private interests of authorities.

10. At present legal mechanisms for the settlement of disputes between business and the authorities is being transformed. This can be seen in the intentions of the authorities to alter the type of relationship between businesses and the authorities, defined by a contemporary model of constitutional and legal development. This relationship is supposed to be based on the principles of trust and partnership between the parties, co-participation of entrepreneurs and authorities in adopting publicly authoritative decisions and mutual consultations. The process of developing non-judicial conflict resolution procedures between businesses and the authorities has intensified. A Presidential Decree established the position of an Entrepreneurs Rights Commissioner. Some formats for the conflicts resolution between businesses and the authorities



are being created, including meetings with the President and officials, negotiation platforms at forums, and using mediation through business associations.

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Svetlana V. Vasileva

Candidate of Legal Sciences, Associate Professor, Department of Constitutional and Municipal Law,  
National Research University Higher School of Economics

masslo@yandex.ru

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