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CHANGES IN THE MECHANISM FOR SPECIAL INVESTMENT CONTRACT REGULATION

Special investment contracts (SPICs) were introduced in 2014 (SPIC 1.0). The SPIC 1.0 mechanism stipulated that an investor would undertake an obligation to execute an investment project to localize a new production facility or to modernize an already localized facility in exchange for state guarantees of the stability of the investor's operating conditions or other incentives. According to the State Industry Information System (SIIS), the Russian Federation has become a part of 47 contracts of this type.

After the introduction of amendments to the budget, tax, and industrial policy laws in 2019, and after the adoption of key bylaws, by 2021, businesses got a real opportunity to use SPIC 2.0 as an improved SPIC mechanism. As of now (November 2021), the SIIS contains information concerning 19 applications submitted for the conclusion of SPICs and 3 SPICs entered into.

The AEB entirely supports the introduction of SPIC 2.0 — an improved and more transparent SPIC mechanism. Nevertheless, analysis of the existing legal framework regulating the conclusion, performance, amendment, and termination of SPICs, as well as the experience of concluding the first SPICs 2.0 shows that both the concept itself and the related processes need improvement in order to make this mechanism more attractive for investors.

SPICs themselves can be a perfect platform for the execution of a wide range of projects aimed at creating new jobs and meeting the interests and needs of society. On the one hand, they allow the state to control an investor's fulfilment of its obligations to invest and to create (modernize) production facilities and, on the other hand, they can create interrelations between the fulfilment of such obligations and provision of a wide range of incentives for industrial activities. A SPIC is a way not only to ensure an inflow of investments into infrastructure but also to guarantee the production of industrial products that the country needs, using state-of-the-art technologies.

The potential that SPICs create as a platform can be realized to a greater extent if the range of incentives an investor can expect to obtain is widened and the SPIC attainment process is optimized.

For example, for a number of industries, guarantees regarding the sale of products (e.g., medical devices, drugs, etc.) are a key factor. The prevailing laws do not otherwise provide for such an opportunity outside of regional investment contracts. The right of the RF Government, established in Art. 111.3 of 44-FZ, in the event of conclusion with an investor of a SPIC providing for an investment of RUB 3+ billion and related to the production of products with the Russian Federation as their country of origin, does not guarantee that, in the event that such an SPIC is entered into, the customers will buy a specific amount of the products — the said right touches upon only 30% of the annual volume of products. According to the investor survey, this measure is insufficient for the long-term planning of investments. At the same time, the possibility of establishing a public party's obligation to buy a specific amount of products — even if such volume is based on flexible mechanisms allowing the needs of customers from different levels to be taken into account, changes in the competitive environment, and other risks could materially increase the popularity of localizing state-of-the art technologies. Moreover, the possibility of establishing such an off-take obligation could ensure a decrease in prices for the industrial products offered.

It shall be separately noted that the preferential treatment of investors entering into the SPICs provided for in Decree of the Government of the Russian Federation No. 719 needs improvement. As production processes become more sophisticated, especially taking into account the focus of SPIC 2.0 on state-of-the-art technologies, the three-year term (for an investor to ensure the performance of a volume of operations, i.e., to gain a number of points required for recognition of products as made in Russia) established in the Decree above is not enough. A differentiated term, depending on the product category, the availability in the Russian Federation of the required component base, etc., must be established.

It is noteworthy that it is necessary to synchronize the procedure for taking measures aimed at protecting state interests with industrial policy laws related to SPICs. This said, in the future, it will be practical to establish an exclusion from Art. 1360 of the Civil Code with regard to the products produced under a SPIC, provided that such a SPIC is actually realized. Such measures would significantly increase investors' interest in localizing production through SPIC mechanisms.

As the Association has previously noted, the current "grandfather clause" concept, allowing the stability of terms and conditions of business activities to be ensured, does not in fact work, except with regard to the stability of tax burden. Of course, entering into a SPIC shall not turn the respective production facilities into "regulatory enclaves" the existence of which causes disorganization in the circulation and supervision of industrial products while posing a threat to the health and lives of the population. Nevertheless, depending on the industry, it is practical to determine an approach to forming requirements that create a material burden for investors, but can be set aside with regard to investors entering into SPICS, as the risks associated with non-implementation of such new requirements are lower than the benefits of the creation or modernization of new production facilities, and to ensure the introduction of the respective amendments to the regulations establishing such requirements in the future.

The participants of tendering procedures note that the process is transparent and clearly staged. Nevertheless, the process provides for repeated provision of the same information in different formats and for the need to use both an electronic and handwritten signature when submitting documents, which complicates the process and increases the labor cost of its implementation.

It should be separately noted that the proposed exemplary form of SPIC 2.0 is a serious step forward, if compared with the form previously approved for SPIC 1.0.

Lastly, it would be practical to determine the criteria compliance with which allows the combination of different technologies to be combined within one project as permissible, which would allow an investor to develop documents in an appropriate and timely manner.

"CONSUMER EXTREMISM" IN VARIOUS REGIONS OF THE RUSSIAN FEDERATION

COMPLAINING ABOUT PRODUCT QUALITY WITHOUT RETURNING/SUBMITTING THE PRODUCT ITSELF

The Consumer Protection Law does not establish the mandatory nature of the pre-judicial resolution of disputes, particularly a consumer's obligation to provide products for quality audit prior to submission of a claim. The negative consequences of such a regulation are that the defendant lacks the right to audit the quality of disputed products; that this increases the load on the judicial system; the impossibility of collecting the products in question from a consumer who can use them during litigation; the extended period of accruing penalties (not from the provision of a product, but from receipt of a claim) and, consequently, increased amounts thereof.

RECOMMENDATIONS

- To prevent abuse on the part of consumers at the legislative level, it can be stipulated that ignoring the pre-judicial procedure for resolving a dispute entails the refusal to meet a claim for a forfeit and a penalty, and also that the period for meeting a claim is to be calculated not from the receipt of the consumer's complaint but from the audit of the product's quality, and, if an expert examination of the product has been ordered — from the moment of conducting the expert examination, the period of which is restricted as per Cl. 5, Art. 18 of the Consumer Protection Law.

DISPROPORTION OF FORFEIT AMOUNTS

The Consumer Protection Law (Cl. 6, Art. 13) establishes that a forfeit shall be recovered in favor of a consumer in the amount of 1% of the cost of the product in question per day for the entire period of delay, as well as a penalty of 50% of the amount adjudged in favor of the consumer. In practice, even after court-ordered reductions, the amount of a forfeit or penalty payable to a consumer can reach as much as 300–400% of the initial cost of the product. Moreover, in the event a court adjudges a forfeit of 1% per day of the cost of a product until the judgment is executed, without a reasonable reduction at the passing of the judgment, this results in a many-fold increase of the amount recoverable, as the bailiff may not reduce the forfeit amount. We observe an increase in the number of cases in which consumers intentionally avoid providing their bank details in order to receive a larger recoverable amount through a bailiff. Large amounts of recoverables obviously attract mala fide consumers.

RECOMMENDATIONS

- The AEB recognizes the necessity of having a mechanism for the protection of consumers who face a violation

of their rights. At the same time, the AEB believes that the penalty amounts should be determined based on Art. 395 of the Civil Code of the Russian Federation, which refers to the key interest rate of the Bank of Russia. The Association also believes that the total amount of all penalties, including the amount of forfeit accrued until the court's judgement, shall be limited to the cost of the product in question.

LIABILITY FOR THIRD-PARTY ACTIONS

As it follows from Part 1, Art. 20 and Art. 23 of the Consumer Protection Law, for the violation of the agreed time period for eliminating defects in products, the defendant who has committed such violation is liable to the consumer. There is a trend in court practice that, in case of repairs to a vehicle, liability is not born by the person who has performed the repairs, but by the seller or importer of the vehicle. Moreover, sellers and importers are held liable for third-party actions even in the cases when there are no legal relations between them.

RECOMMENDATIONS

- The AEB believes that the legislative provision should not entail no-fault liability for the actions of other parties. According to the AEB, the regulation in question should be amended to establish that further complaints shall be submitted to a court solely against the party actually violating consumer rights.

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