

Business vs Criminal and Repressive Apparatus: Symbiosis or Fight for Survival...

Every political force that comes to power finds it necessary to start its activities with loud promises about improving the investment climate in Ukraine, simplify the conduct of business, reduce tax pressure and eradicate corruption, in particular in the system of law-enforcement and judicial bodies, which is one of the main factors influencing the low level of economic growth in Ukraine.

As a side note, since the declaration of independence of our state in 1991, Ukrainian businesses have felt "improvements" granted by six Presidents of Ukraine (without considering one acting President) and nine convocations of the Verkhovna Rada of Ukraine.

It appears absolutely logical that after almost thirty years of development of the business environment our state could be witnessing a real investment boom, with the national economy growing at a furious pace. The situation, however, is just the opposite. Moreover, administrative influence and the impact of corruption on businesses is rather high which, in turn, discourages foreign investors from investing funds in our country.

One of the primary reasons why the corruption system in the activities of law-enforcement and judicial bodies is flourishing and "enduring" is its prompt adaptation to both trends in the economic sphere and regular legislative changes.

A sector-wide change of objects exposed to unlawful pressure depending on economic factors is a visual example of transformation of "corruption preferences" of representatives of the law-enforcement system.

Thus, in the period of mass corporatization of state-owned enterprises and acquisition of initial capital, law-enforcement bodies were used to take production facilities by force. Being aware of those threatening trends, the Ukrainian Parliament adopted legislation to directly prohibit the involvement of representatives of law-enforcement bodies as physical security in resolving corporate conflicts.

Since the middle of the 2000s, in the period of economic growth, the palm of victory in unlawful pressure on businesses has been held by bodies of the Fiscal Service of Ukraine. Tax officials pay their utmost attention to large financial-industrial groups as well as industrial enterprises. As "exemplary" activities of tax officers we can note the mass attack on the Finance and Credit financial and industrial group, which resulted in the opening of 30 criminal cases in a week, sending of chiefs of enterprises to pre-trial detention facilities, seizure of over 1,000 pieces of computer hardware and the freezing of banking accounts and assets.

At the same time, to have a criminal case for tax evasion or fictitious entrepreneurship opened it is sufficient for the enterprise in question to submit documents to get a VAT refund or for inspectors of the State Tax Service to conduct investigation (often offsite) and forward a report to the tax police.

In order to stop exacting from businesses and blackmailing them through criminal prosecutions punitive measures (liability) under Article 212 of the Criminal Code of Ukraine (tax evasion) were reduced



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and Article 205 of the *Criminal Code* (fictitious entrepreneurship) was decriminalized. A moratorium was also imposed on checks by government agencies. As the leadership of the state intends, liquidation of the tax police and creation of the Bureau of Economic Security have to become the final step in eliminating pressure by security agencies on businesses. It is with this aim in mind that the Verkhovna Rada of Ukraine adopted the eponymous law on 29 January 2021, which specified a 6-month period to liquidate the tax police and establish the Bureau of Economic Security.

Tracking down difficult relations between businesses and law enforcement bodies, it is worth mentioning the leading positions of enterprises in the agricultural sector. Thus, in the period of 2010-2020, farmers turned from being non-stop consumers of government grants into the driving force of economic growth. According to the official statistics of international grain traders, during the last two years Ukraine has been the second biggest exporter in the

world, only lagging behind the United States.

Of course, since such a sweet spot couldn't be ignored by law-enforcement bodies, the second half of the 2010s featured a great number of criminal proceedings initiated by law-enforcement bodies against agricultural companies.

The scale of the problem was so large that the country's leaders had to organize meetings of representatives of business associations and owners of agricultural corporations with the Prosecutor-General and government officials.

In addition to that, the aforementioned period some representatives of the National Police of Ukraine invent truly unique methods to impose pressure, which painfully "hit" agrarians. Thus, the practice of arresting crops in fields gained popularity. Under such circumstances, land owners or farmers did not have the right to gather crops as such action could be qualified as non-execution of an injunction (a ruling of an investigative judge to arrest property). It is known that such stoppages in gathering crops are critically dangerous for the agricultural producer who often doesn't even have time to challenge such a ruling.

At the same time, while protecting the interests of our clients who represent the agricultural sector, our team worked out a clear plan of action, which is rather effective in such cases. As evidenced in practice, with a well-planned defence strategy, it takes around a week for the investigator or prosecutor to realize that the arrest of crops is the shortest path to criminal or disciplinary liability rather than the way to bringing a farmer to his or her office. As in any other criminal proceeding, in such a case the main precondition of success lies in using all possible remedies and approaching each case creatively.

As of today, I can confidently say that IT companies are the most popular with law-enforcement bodies. In the last six months alone we took part in more than 15 searches conducted by the Security Service of Ukraine or cyber police in offices of the above-mentioned enterprises.

Furthermore, grounds to institute criminal proceedings may allegedly be relations (transferring money) with enterprises located in the temporarily-occupied territories, Internet fraud, involvement in

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dubious schemes to launder funds obtained through criminal means, etc. At the same time, the main purpose of such searches is, in a way, to block the work of enterprises, seize computer hardware and servers with a view to "holding negotiations" with the owners of businesses.

Another peculiarity of criminal proceedings with respect to IT companies is participation of representatives of foreign law-enforcement bodies in investigations. Thus, recently defence lawyers of Equity Law Firm represented the interests of clients in investigative activities conducted jointly with investigators of the SBU (Security Service of Ukraine), FBI agents (United States of America) and Cyber Crime Department of the French Gendarmerie. Unlike investigative activities conducted independently by the SBU, the conduct of SBU investigators was exemplary in that case.

Generally, we have to say that, in connection with the spread of transnational crime, a defence lawyer who specializes in the defence of interests of clients within criminal proceedings into economic crimes is supposed to possess knowledge in the area of international finance, understand corporate structure and the principles of entrepreneurship in the most popular jurisdictions such as Great Britain, Cyprus or countries that are used as offshore zones. He or she is also supposed to be aware of the principles of Interpol activities, extradition procedure, etc.

As far as further tendencies in mutual relations between businesses and the state in the person of the system of law-enforcement bodies are concerned, we hope for significant reduction in pressure on the business community upon implementation of the provisions of the Law, which specifies liquidation of structural units of the SBU empowered to investigate economic crimes.

We remember the public's reaction to the draft bill, the provisions of which specified vertical deprivation of the prosecution bodies of their status of bodies of pre-trial investigation and general supervision (changes introduced to Article 131-1 of the *Constitution of Ukraine*). The opinion was imposed on the public that, following adoption of



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the Law, the state would simply drown in crime. However, as evidenced by recent practice, the number of crimes has not skyrocketed. At the same time, representatives of business circles claim that, as of today, prosecutors do not impose any pressure with a view to obtaining improper advantages.

Our readers can note that under current Ukrainian criminal procedural legislation prosecutors may enter information into the Unified State Register of Pre-Trial Investigations (in other words, institute criminal proceedings) as well as initiate or take any investigative and detective actions (measures).

However, it is quite easy to establish the interest of the prosecutor in investigating a criminal proceeding. In order to do it is sufficient to obtain an extract from the Unified State Register of Pre-Trial Investigations, find out who entered respective information to the aforementioned register, inquire if a group of investigators was formed and forward an enquiry to the chief

of a prosecution body or at the address of a senior prosecution body with a request to explain why it is the prosecutor who is performing the function of the body of pre-trial investigation. As evidenced by practice, after such straightforward steps the prosecutor loses his or her passion to conduct investigative actions and investigate a proceeding single-handedly.

Hopefully, with the liquidation of SBU units which investigated economic crimes, the situation will result in a similar situation.

Despite a sort of pessimistic tone in this publication, we can confidently claim that in the last 5-7 years our state has introduced a large number of effective measures aimed at combating corruption and reducing pressure on the business community. It is worth mentioning adoption by MPs of the so-called "stop mask-shows" laws which brought to end the excesses that took place during searches, strengthening criminal liability for acts of corruption, and simplifying registration and conduct of business. We hope such tendencies will get underway in the future and Ukraine will become a really attractive jurisdiction for the introduction of large-scale investment projects.