



Business
OMBUDSMAN
Council

SMKOR as VAT administration system

Report on BOC's own initiative
investigation results



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Reasons for initiating the investigation

The problems of tax invoices suspension and the respective risk assessment monitoring system (SMKOR) has been in the spotlight of the Business Ombudsman Council (BOC) since the time when discussions about the expediency of their introduction were just being held. After all, this involved a significant change in the VAT administration process for businesses, and therefore opposed by business community due to reasonable concerns.

From 2017 to 2022,
BOC considered almost

4000

business SMKOR-
related complaints

- specific tax invoices/adjustment calculations suspension (TI/AC)
- inclusion of enterprises in risky payers' lists
- failure to accept tax data tables
- non-registration of TI/AC in accordance with court decisions



the number of
SMKOR-related
complaints in the
last two years

Thus showing their
crucial importance for
the business community



In 2019, BOC issued the first systemic recommendations on respective issues, and in 2020, SMKOR problems were covered in detail in the dedicated **systemic report “Administering Taxes Paid by Business”**.

In the summer of 2022, unsatisfactory implementation of the recommendations provided by BOC and a sharp increase in the number of enterprises that have suffered negative consequences of working with SMKOR led BOC to the idea of conducting an investigation on its own initiative. And after October 2022 changes, it had already become clear it would be impossible to provide one's understanding of the current situation solely within the framework of recommendations monitoring.

As part of the investigation, BOC collected statistical information from various bodies,

surveyed business¹, analyzed thousands of one's own proceedings, researched the practice of foreign countries. This made it possible to see the problem from different angles and to form principles which correction of the current situation should be based on.

It should be noted right away that since business activity and its regulation are not a static phenomenon and SMKOR functioning will continue, BOC's conclusions based on this investigation will not and cannot divert its attention to this topical issue. It is obvious that BOC will continue to keep abreast of SMKOR.

¹ Within the scope of the survey, BOC asked businesses that agreed to identify themselves on confidentiality terms 58 targeted questions. [Survey form](#).

The vision of SMKOR by the state and business

In the systemic report of 2020, BOC explained in detail SMKOR operating mechanism, sources of tax authorities' meticulousness and the reasons for business irritation. Meanwhile, the avalanche-like TI/AC suspension, which took place along with the military phase of the system restoration in 2022 and after the subsequent October changes, significantly polarized parties to the conflict.

The state, traditionally, does not see big problems in suspending individual TI/AC, apparently, looking at the problem in general as approximately +/-1% of total invokes submitted for registration, especially emphasizing blocking automation. The time for preparing explanations and a package of documents for one blocked TI/AC is estimated by the state as an hour, and business costs for such preparation, from the state's point of view, are only UAH 39.26.²

Attributing payers to the list of risky ones, according to the tax authority, does not pose a critical problem either, only requiring that each transaction be checked. In any case, such consequences, in the tax office's view, are justified for the purpose of combating VAT evasion and filling the budget.

In fact, almost immediately, SMKOR was applied based on criteria not directly provided for in the legislation, to refer doubts to the payer's activity in general and which were not necessarily directly related to VAT (a total tax burden, labor resources, wages amount, etc.).

It is obvious that the state can see a "benefit" from each suspension (since it, at least temporarily – until positive administrative or judicial procedures for the payer – artificially increases revenues to the budget). And those TIs/ACs that remained suspended were considered by the tax office to be the best example of algorithms accuracy and SMKOR operation.

Business, for its part, observed that tax authorities' meticulousness was constantly growing and covered more and more enterprises with adverse consequences,

reaching abnormal values in Q4 2022³. Business saw a human factor in SMKOR operations more and more (both in relation to the problem occurrence and in attempts to solve it within the framework of relevant procedures). It is noteworthy that over half of the respondents informed BOC that the procedure for preparing documents for unblocking a TI/AC takes more than 12 hours.

The payer's riskiness, according to the business, is equal to the actual complete blocking of activity (statistically, less than 10% of payers being in a "risky" status continue submitting TIs/ACs for registration).

The tax authority's going beyond VAT administration requirements was not accepted by the business, since different regional tax authorities used different approaches (which were not directly provided for by the legislation and unknown to the business) and, in case of disagreement, there was no possibility to effectively challenge them.

Business strongly disagrees with the justification of SMKOR's means as a noble goal, seeing the over-fulfilment of budget plans not because of fighting against VAT schemes, but because of bona fide buyers' tax credit "freezing", who would still get it back over time.

Over the years of SMKOR operation, businesses have never gained confidence that it is fictitious transactions that are being suspended⁴, and many blocked TIs/ACs are not contested just because it does not make economic sense (spending funds on legal aid, increased workload of accountants, difficulty of court decisions execution, inflationary processes, etc).

² Regulatory impact analysis (reviewed) of the Draft Decree of the Cabinet of Ministers of Ukraine "On Amendments to the Procedure for Suspending Registration of Tax Invoices/Adjustment Calculations in the Unified Register of Tax Invoices" dated June 28, 2022, posted on the [Ministry of Finance of Ukraine](#) website.

³ See "Main Problems and Challenges of SMKOR" section.

⁴ Both within administrative procedures (if we count registrations by both regional and central level commissions among those cases where the business tries to prove its case), and within court procedures, taxpayers receive a positive decision in over 90% of cases (which obviously testifies to automatic suspension inaccuracy).

SMKOR development history

Working since 2015 and constantly having the lion's share of tax issues under investigation (from year to year, our share of tax-related complaints roughly reaches 60-70%), BOC clearly notices the state's focus shift from the post-audit stage (i.e. conducting traditional tax audits) to the stage of carrying out a separate business transaction. So, gradually and even almost unnoticeably, the company's every business operation began to potentially be subject to mini-tax audit, with preparation of explanations, documents, complaints and again documents, but without face-to-face meetings with tax officials, having embodied the essence of both advantages and disadvantages of what is called "business-state relations digitalization".

2017

the Ministry of Finance laid down the main operation risk criterion (ORC1)

2019

the Government has reduced the fixed coefficient of the permissible balance of risk groups of goods to the level of 50%

2022

ORC1 began covering more and more of the economy of Ukraine

2017

So, for example, if earlier a buyer (who had to fight hard for his right to a tax credit during the audit) traditionally felt a "scape goat" then SMKOR largely put the burden of proof on the supplier (who, in most cases, in order to receive full payment for supplied goods, has a healthy business interest in registering its TI/AC). And all would be fine, but the rule speaking of the indisputability of the tax credit⁵, formed based on a registered tax invoice and based on which the state convinced businesses to accept the very idea of SMKOR in 2017, as time has shown, turned out to be only a declaration in practice. In other words, willy-nilly, the system was designed in such a way that taxpayers are first controlled at the stage of making a business transaction, and then again during tax audits.

In order to understand the reasons for a constant increase in the number of payers or TIs/ACs suspended in SMKOR, it is important to understand trends in the system's algorithms development.

So, back in 2017, the Ministry of Finance laid down the main operation risk criterion (ORC1) linked to the conditional (virtual) warehouse calculation, the share (balance) of risk groups of goods in such a warehouse and margin. In plain words, a tax invoice was suspended by SMKOR, if the system established that:

- (1) the volume of supply against such an invoice exceeded the balance of such goods in the virtual warehouse, taking into account 50% margin (coefficient 1.5) and
- (2) at the same time, over 75% of goods determined by the tax authority as risky were accounted in such the warehouse.

⁵ It is about the third para of Clause 201.10 of Article 201 of the Tax Code of Ukraine, according to which a tax invoice and/or adjustment calculation hereto, drawn up and registered after July 1, 2017 in the Unified Register of Tax Invoices by a taxpayer performing operations for the supply of goods/services, is a sufficient ground for the buyer of such goods/services to charge tax amounts related to the tax credit, and does not require any other additional confirmation.

2019

Since the end of 2019, the Government has reduced the fixed coefficient of the permissible balance of risk groups of goods to the level of 50%⁶. Meanwhile, there was an increase in the number of codes defined by the tax authorities as risky (from 64 4-digit UCGFEA codes in March 2018, in August 2019 they became 106, since February 2020 – 116, since September 2020 – 149, and from March to October 2021 there were 173 of them).

Surges in the number of suspended TIs/ACs and payers who have faced it are clearly visible

as the list of risk groups of goods expands and the allowed percentage of the balance of such goods in the virtual warehouse decreases.

Thus, when the condition was reduced from 75% to 50% of allowed risk balances in December 2019, comparing Q4 2019 and Q1 2020, respectively, it is clear that the number of payers who faced it increased twofold (3.3% and 6.3% accordingly).

2022

Gradually, ORC1 began covering more and more of the economy of Ukraine. However, a turning point was in October 2022, when the Government decided to completely remove the second mandatory condition from ORC1 – the remaining risk groups of goods in virtual warehouse. Such changes became the largest expansion of the ORC1 scope of influence in SMKOR history: the only condition for the risk to be triggered is the achievement of a supply

level 1.5 times higher than the purchase one. BOC failed to find an economic justification and targeting of such an approach to possible violators. On the contrary, in the conditions of the national currency devaluation and inflationary processes against the background of full-scale military aggression in 2022, the fixed coefficient of 1.5, from BOC's standpoint, cannot be considered a reasonable definition of risk.

Is it possible to consider a risk-oriented approach, according to which almost everything is subject to risk? – the question is rhetorical. Given this, can we blame business, which in the last six years of SMKOR operation has seen a trend of switching from automatic to manual control, culminating in October 2022? – In our opinion, no.

⁶ Introduction of the specified changes is conditioned by the adoption by the Cabinet of Ministers of Ukraine of Decree “[On Approval of the Procedures for Suspending Registration of Tax Invoices/Adjustment Calculations in the Unified Register of Tax Invoices](#)” dated December 11, 2019, No.1165.

Main problems and challenges of SMKOR

It quickly became clear that reality was harsher than expectations: a registered invoice does not guarantee anything; the problem of VAT evasion resurfaces in the public space with renewed vigor every year; there is a steady trend towards filtering more and more business through willful decisions of commissions instead of automated algorithms.

Corresponding differences in the views of business and the state on the same issues have not been resolved for years, and systemic injustice (concerning expectations, consequences and an unsatisfactory sustainable movement direction) could not remain steadfast for a long time.

BOC realized SMKOR functioning was affected by traditional shortcomings of poor, unpredictable regulation and law enforcement, having entailed the uncertainty of the acceptance criteria and motivation of negative decisions (both regarding registration of specific TIs/ACs, as well as tax data tables and riskiness of payers).

Based on the example of individual complaints considered by BOC during 2022, one can state that in 75% of cases, the real reasons for decisions on compliance with risk criteria and decisions on unacceptance of tax data tables were not indicated. The specified reasons were clarified only based on BOC investigation results or results of contacting tax officials' hotlines.

Very often BOC recorded disproportionality of adverse consequences for the business to those doubts that caused negative decisions to be made. Over half of businesses being risky VAT payers surveyed by BOC reported that their percentage of risky tax credit in the aggregate annual indicator was less than 10%. At the same time, in the vast majority of cases, the business reported non-compliance of the

counterparty with risk criteria at the time of cooperation with it, while TIs/ACs on respective business transactions were registered.

Therefore, a third of the respondents spoke in favor of establishing permissible limits of the questionable tax credit in the amount of up to 10% of the input VAT for a certain period of the payer's work, which will allow not to completely cease economic activity, if input tax credit indicators are insignificant.

Meanwhile, there are actually no effective (from the point of view of economic feasibility and speed of procedures) remedies for businesses. On a separate note, it should be mentioned that although the court practice demonstrated a dramatic advantage on the side of payers, not all business entities could take advantage of this due to significant legal costs and time frames for getting satisfaction.

Based on official court statistics, in 2022 taxpayers won 94.4% of cases under the "tax invoices registration suspension" category (93.5% in 2021).

The share of court judgements overturned as a result of the appeal was 9.5% in 2022, and 9.3% in 2021. According to the cassation appeal results, only 1% of court decisions were canceled in 2022, and 1.2% in 2021. Such bright statistical data are a litmus test of the (il)legality of state bodies' actions and the (un)reasonability of their decisions.

⁷ In 2022, out of 3,607 cases of this category reviewed by courts of first instance with a decision, in 3,406 cases the claims were satisfied. In 2021, taxpayers won 3,905 cases out of 4,176. In 2022, out of 1,754 reviewed decisions, 166 were overturned in appellate courts, and in 2021, 184 out of 1,960 reviewed decisions were overturned. The cassation instance did not bring any surprises: in 2022, out of 3,219 reviewed cassation appeals court decisions were canceled in 35 cases, in 2021, 45 decisions were canceled out of 3,543 reviewed complaints.



No wonder that the state is quite satisfied with this format, because it allows to keep money in the budget (temporarily or permanently). This “motivation” does not allow you to adjust your law enforcement practice taking into account positions of the courts, although in February 2021, BOC issued respective recommendations in a **systemic report “How Business Can Seek Execution of Court Decisions in Ukraine”**.

It is of interest that with the adoption of the Procedure for TIs/ACs suspension in the URTI, approved by the CMU Decree of December 11, 2019, No.1165 (Cabinet Decree No.1165) and in the following years there is a clear trend that SMKOR is gaining momentum and concerns a growing number of TIs/AC, their increasing amount and, accordingly, an increasing number of payers.

Year	Average number of TIs/ACs suspended (per quarter) (pcs.) colm. 10 of the Table	Average VAT amount of for suspended TIs/ACs (per quarter) (ths, UAH) colm. 11 of the Table	Average value of payers who faced Tis/ACs suspension (in the quarter) (pcs.) colm. 12 of the Table
2019	105 132	105 132	7 824
2020	304 972 (+190,1%)	304 972 (+190,1%)	25 443 (+225,2%)
2021	422 316 (+38,5%)	422 316 (+38,5%)	31 701 (+24,6%)
2022	562 416 (+33,2%)	562 416 (+33,2%)	38 212 (+20,5%)

The climax point was the end of 2022, when during Q4 alone, 65,188 providers faced suspension (and it is despite the fact that only 161,550 payers worked (submitted TIs/ACs for registration) during this period, i.e. suspensions affected over 40% of active VAT payers).

A similar trend can be observed in the issues of including taxpayers in risky taxpayers’ lists: starting from Q1 2021, percentage of risky taxpayers steadily increased, reaching 17.3% of all VAT taxpayers in Q4 2022 (45,214 taxpayers had a risky status).

Yet, it is despite the fact that the respective inclusion in the risky entities list cannot be appealed to the central level of the STS, the effectiveness of a judicial appeal is illusory (the

dialogue of BOC with business showed that over half of respondents reported that the legal process in their case lasted over a year, cases of risky status reassignment to payers after the formal execution of a court decision are also frequent), the grounds for including and excluding from the list are unclear, and various regional commissions practice differs significantly.

In 2022, problems with improper and unpredictable regulation and continued heading to human factor manifested themselves most clearly.

At first, it was revealed during SEA VAT launch (when the state did not take into consideration that positive tax history indicators changed

considerably after several months of downtime⁸). And already after these twists and turns in October, the problem reached an abnormal level, although according to the Ministry of Finance of Ukraine, the corresponding changes were also aimed at “eliminating misunderstandings between payers and controlling bodies”⁹.

After that, obviously realizing errors made, the state intensified movement in the right direction, introducing a number of positive changes (both in December 2022 and already in 2023). It is also worth pointing out state authorities’ readiness for the next ones, many of which being completely consistent with BOC’s vision.

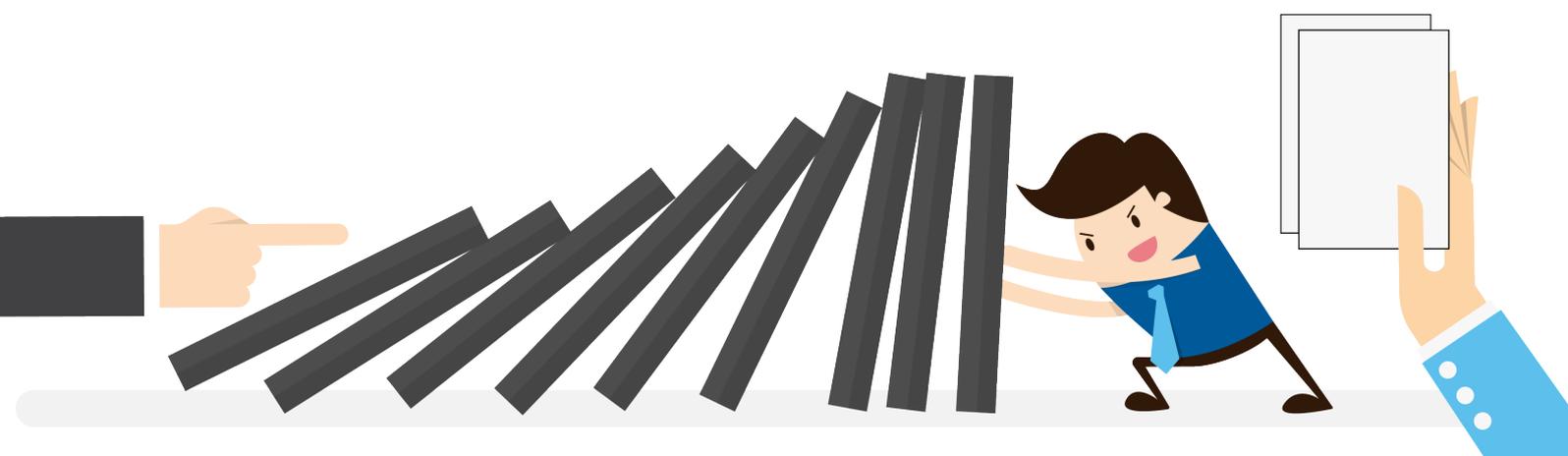
Meanwhile, in the situation with December changes to the Cabinet Decree No. 1165, one could see their rather limited effect, due to the same reluctance of the state to trust automatic algorithms¹⁰.

Under such conditions, business outrage may already not seem excessive. Irrespective of the list of “risky” goods, if you want to work without invoices suspension, then submit the tax data table for acceptance (i.e. go through a selection procedure, sometimes automatic, but rather get ready for a commission). On top of that, it is desirable to conduct one’s activities in such a way that the commission does not cancel your table.

Here we have the most dramatic difference: earlier, the business depended to a greater extent on automatic ROC1 (approved at the CMU level in the legal act) in case of purchasing a considerable share of “risky” goods, and now – on the tax data table and the possibility on its cancellation at the regional or central level commission, without the right to administrative appeal (after which TIs/ACs are automatically suspended).

Now absence of a tax data table becomes something similar to the status of a risky enterprise (which can also be got by a collegial decision of the tax office and not appealed to a higher-level authority either). Thus, the state’s arguments about processes automation finally lost their meaning. The only question is whether it was done intentionally or accidentally.

Apparently, it would be difficult to launch SMKOR operation by immediately informing the business that the replenishment of limits, additional time spent on TIs/ACs registration, the actual transfer of control from tax audits to the stage of carrying out economic transactions will not have confirmed credit on a registered invoice as a consequence; the respective control will not be automated; the enterprise’s work will depend on its perception by the regional tax office, whose decision cannot even be appealed.



⁸ It is due to the fact that a considerable number of taxpayers, in view of circumstances beyond their control, ceased to meet the positive tax history dynamic indicators, such as TI registration frequency with the same UCGFEA code during four of the last six months, the sequence of payment of Single social contribution at a certain level during the last twelve months with at least five employees, etc.

⁹ In the Regulatory Impact Analysis, the Ministry of Finance predicted 67% cost savings per year from implementing these changes and that they may affect only 11,215 payers during the year. However, only in Q4 2022, the number of entrepreneurs facing TI/AC suspension amounted to 65,188.

¹⁰ The CMU Resolution No. 1428 of December 23, 2022 amended the Cabinet Decree No. 1165 and, inter alia, provided for the possibility of one-time automatic registration of TI/AC suspended in the period from October 14, 2022 to January 11, 2023. However, these changes did not have the effect expected by business, particularly because the respective procedure required a tax data table accepted by the tax authority’s commission and not accepted automatically.

A general understanding of the relevant SMKOR drawbacks, realizing business and the state goals make it possible to form the following principles around which “work on mistakes” and further system functioning should take place:



1. Risk orientation.

Despite the fact that the Cabinet Decree No. 1165 is largely written in “technical” language, October changes gave the reason to state that for many businesses, a lucky pass to smooth registration of TI/AC is a tax data table accepted by people – commissions created under tax authorities. Also, only tables accepted by commissions became a guarantee of automatic registration of TI/AC based on December changes to the Cabinet Decree No. 1165. However, in BOC’s view, it is the automation of checks underlying the SMKOR, which is the key to not only minimizing the corruption component, but also to predictability of the state’s behavior in the eyes of business and the state’s ability to adjust its filters depending on the market behavior and its payers.



2. Legal Predictability.

BOC faced a total lack of understanding of business regarding what the SMKOR state policy was in general: why practices of tax officials changed without changes in the legislation; why one thing was written in the rules, and quite another in practice, and in addition the the regional practice varies from region to region; if it became so dramatically worse in October 2022, how to prepare for the next such “October” and when to wait for it, etc. Such sentiments undermine the foundation – the trust of business (and the public) in the state, deepen the gap and multiply narratives such as “they do not understand us, ordinary people”, which is particularly harmful in wartime.



3. Proportionality.

Unfortunately, the concept of proportionality is poorly developed in the administrative practice of Ukraine, including the field of taxes. So, for example, BOC has observed numerous cases of companies being included in “risky” lists or tax data tables unaccepted due to the fact that, as it turned out, dishonest counterparties were caught somewhere among the buyers or sellers after the fact. The latter can make up to 1%, 5% or 10% of the total “input” or “output” VAT of the payer, negatively affecting, however, 100% of this enterprise’s subsequent operations. Also, cases where the company won the court case after a few months, but after the formal execution of such a court decision received one more (and actually with the same justification) decision of the same tax authority, hardly fit into the paradigm of the rule of law. BOC is convinced that the situation in which the company has to register a new legal entity only because tax authorities’ doubts (major or minor) de facto blocked its activities had a negative effect on both parties, and therefore the proportionality direction should be developed.



4. Communication.

The BOC welcomes the introduction of regional communication platforms and “hotlines” in the second half of 2022, intended to remove formalities and help every single payer. However, the quality of work of these platforms, from BOC’s experience, differs greatly both between regions and the center. Communication is the key to understanding, therefore, it is necessary to develop these platforms, along with other explanatory and educational work for taxpayers, increase the explanatory level for tax authorities’ decisions, etc. BOC repeatedly witnessed how the attitude of business representatives changed when they saw tax officials in front of them – people, professional and frank, who sincerely try to speak the same language with taxpayers.



5. Digitization.

Processes automation, administrative procedures implementation and bringing the required information in a simple form to the attention of the payer and in an operational mode, with a minimum of formalities, is no longer a challenge, rather an objective present-day requirement. This applies not only to the essence of the changes to the legislation, but also, for example, to the openness of such data as economic performance indicators expected by the tax authority, the possibility of checking counterparties through the prism of information available in the tax office, etc.



6. Business focus.

From BOC standpoint, all the above-mentioned principles-directions should be coupled with business focus. In other words, the state must realize that it economically entirely and completely depends on business, and business is people, and in the long run it is better to treat them as partners than to see them as potential violators or merely as a source of filling the budget.



Recommendations based on investigation results

Having studied the information collected as part of the investigation, BOC was able not only to examine the problematic aspects of SMKOR operation, but also to develop certain recommendations that, in our opinion, could improve the current situation.

1. Genuine automation and risk orientation

The historical movement of SMKOR towards expanding automated criteria so that a huge number of businesses had to pass through the watchful eye of regional level commissions shows that truly automated procedures to combat fictitious credit are not enough.

At the same time, the more businesses have to pass screening officials' evaluations, the less the system looks like an automated and risk-oriented one. Applying a tax data table tool to such a large number of enterprises and consequences of such a policy vector do not correspond to the "automation" concept.

Accordingly, BOC considers such a movement incorrect and finds it necessary to adjust ROC1 (including a coefficient of 1.5) to return it to real risk orientation limits.

2. Analysis and forecasting

Before adopting any changes to TI/AC registration procedures, it is necessary to perform a thorough analysis and forecast the impact of proposed changes, especially – possible unfavorable consequences for business, based on actual data (particularly, it can be achieved through testing new algorithms on previous periods SMKOR database having comparable indicators with changes introduction expected period).

It is unacceptable to underestimate the impact of negative consequences for business (e.g. regarding the estimated number of enterprises to be affected by changes; concerning monetary or time costs of business for settlement). The relevant circumstances should be duly checked by bodies independent of the Ministry of Finance and the STS, particularly by the State Regulatory Service of Ukraine for compliance with risk orientation and proportionality principles. Such verification should be based on real data from the business community, not on minimum calculations for regulatory pro forma.

In cases where, based on testing results, it is established that implemented changes adverse consequences may affect over 10% of active VAT payers, it is expedient to apply additional procedures for communicating the relevant circumstances to society in advance (with a joint assessment of the results, including through open/public operating work groups).

The STS and the Ministry of Finance must inform the payer's office about possible and actual changes in the legislation that may affect his activity (regarding submission deadlines, appeals, fines, procedures for registration submission, etc.).

3. SMKOR safeguards

It is necessary to establish clear indicators-safeguards of business problems from SMKOR functioning (which arose as a result of the work of the STS and the Ministry of Finance), resulting in intervention by other authorities (parliamentary control of the Verkhovna Rada of Ukraine, CMU) should be carried out to prevent situations similar to October one. The list of relevant indicators may be adjusted if necessary (including based on the results of consultations with the public).

In particular, the following indicators can be calculated:

- percentage of VAT payers affected by TIs/ACs registration suspension (e.g., no more than 10% of the number of taxpayers who submitted TIs//ACs for registration);
- percentage of risky VAT payers of the total number of registered VAT payers (e.g., no more than 10% of the number of payers);
- percentage of TIs/ACs whose registration was suspended (e.g., no more than 0.2-0.7% among those submitted for the period).

According to the consequences of the respective intervention on the part of other state bodies, one should ensure:

- prompt resolution of business problems (for example, by returning previous regulation, ensuring simplification of administrative procedures) to bring the relevant indicators to the targeted limits;
- determining the reasons for relevant safeguards violation;
- making personnel decisions in the event of establishing the direct fault of individuals.

4. Administrative practice adjustment

The state should ensure implementation of systemic procedures for reviewing law enforcement practice based on stable SMKOR case-law formation results directly showing repeated violations of the law.

It should involve not only formal monitoring, but also a real change in the law enforcement practice of tax authorities; alternatively – it is necessary to change the legislation. The current situation, when year by year over 94% of payers' claims are satisfied, does not correspond to the "good governance" principle of the rule of law.

Appropriate work on bringing law enforcement practices in line with positions of courts should be carried out regularly and publicly, with the involvement of all branches of government and the public.

5. Intermediate stages before applying adverse consequences to payers

Making negative decisions within the framework of SMKOR operation (not only regarding TI/AC registration but also non-acceptance of a tax data table and riskiness), which immediately become effective, means a whole series of (un) foreseeable problems for business.

The limited time-frame and the general impossibility of challenging certain types of decisions show the need for greater awareness of business and its more active involvement in resolving the situation.

Taking this into account, proper awareness of enterprises before making a negative decision seems important.

For example, it seems appropriate to create:

- test functionality of TIs/ACs registration (when the payer is notified that the respective TIs/ACs will be suspended);
- interim information concerning the possibility of losing a positive tax history indicator due to risky transactions or risky counterparties;
- intermediate stages for additional documents submission to be considered by the commission (similar to the procedure before making a final decision on the refusal to register a TI/AC, failure to accept the tax data table or riskiness of the payer, or on the refusal to satisfy a complaint; in some cases, suspension of relevant deadlines may be provided).

6. Administrative appeal

The BOC notes that the absence of an administrative appeal procedure for decisions of regional commissions regarding riskiness and tax data tables, combined with the illusory effect of judicial protection against appeals of said decisions, increases the dependence of business on the will of tax authorities.

Thus, BOC frequently witnessed a situation when, when making a negative decision on riskiness and tax data tables, the company had to submit documents and explanations many times to overcome the expressed doubts. Meanwhile, under such conditions, it is impossible to predict how long it will take to solve a problem that is painful for business.

Taking into account the above said, in BOC's view, it is extremely important to introduce the procedure for administrative appeal of decisions on the said issues¹¹. We would like to remind that back at the end of 2019, BOC proposed to provide for a special mechanism for challenging decisions on riskiness and unacceptance of tax data tables. However, such BOC proposal was turned down, since its implementation would require amendments to the law.

¹¹ Taking into account Clause 8 of the Final and Transitional Provisions of the Law of Ukraine "On the Administrative Procedure", it is necessary to implement the administrative appeal procedure of the mentioned decisions before the said Law effective date (i.e. before December 15, 2023).

7. Informing of risky counterparties

It can be difficult for a payer to identify which of potential counterparties is risky from open sources. In addition, the process of analyzing potential counterparties has become even more complicated with the introduction of martial law as well as limited access to some registers and open data.

At the same time, according to BOC, a business-oriented position would be introduction of tools that would enable tax authorities to inform taxpayers about risky counterparties. In particular, BOC recommends providing an opportunity for payers to submit an electronic request regarding their counterparties (including potential ones). In order to prevent unauthorized access to sensitive business information, it is possible to stipulate identification of the payer who wishes to obtain such information, using electronic identification means (as an example of how VAT payers Register is currently accessed). It is recommended that the information to be submitted to the mentioned electronic request should cover all cases of inclusion/exclusion of the company from the risky category and the name of the body that made such a decision.

8. ΣDubious transactions

Judging by BOC experience, one of the most common reasons for adopting negative decisions by tax authorities in SMKOR is the latter's doubts about a certain part of the VAT payer's transactions (regarding his input VAT credit or transactions for forming such a credit for his customers). These doubts become the reason for making decisions on refusal to register TI/AC, unacceptance of tax data tables and inclusion in the risky list.

Apart from the fact that the taxpayer is often unaware of these tax officials' doubts for a long time, their application consequences are clearly disproportionate.

Due to versatility of use and the possibility of calculating, BOC admits the possibility of creating an additional indicator in SMKOR – the so-called ΣDubious transactions to be calculated as the amount of VAT on the suspicious, in the tax authority's opinion, payer's transactions.

Based on this indicator value, the state must clearly distinguish the consequences for business depending on the doubts of the tax authority and control proportionality and duration of their existence (i.e. based on the same level of doubt, different consequences for different taxpayers should be unacceptable).

Under certain conditions, even before adverse consequences are applied to the payer, it is advisable to define the legal procedure for refuting the tax authority's doubts (as part of administrative or judicial proceedings).

9. Riskiness of the payer: transparency, proportionality, effectiveness of procedures

Pursuing the logic laid out in recommendation No. 8, from BOC's standpoint, during inclusion in the risky list for reasons of dubious, in the opinion of the tax authorities, transactions should take place only when such transactions constitute a considerable volume in the structure of the payer's transactions (percentage or in monetary terms).

Unclear are situations when, for example, due to doubts about 2% of the payer's input credit (for a small VAT amount), he or she is included in the risky list and thus stops all outgoing operations for disproportionately larger volumes or actually stops operations forever (which is observed in most cases).

For example, BOC believes that inclusion of the payer in the risk category should occur only provided the VAT amount, according to the Σ Dubious transactions indicator, exceeds 10% of the payer's tax credit amount and/or tax liabilities in the structure of his tax credit and/or tax liabilities respectively for the last six months, or when, in monetary terms, this amount exceeds UAH 500k.

Similarly, the grounds for inclusion in risky (Σ Dubious transactions) can be used to develop an effective remedy.

In BOC's view, the current situation is unacceptable, when almost the only option for the payer is tax reporting adjustment (refusal of a credit that the tax authority considers questionable, or independent accrual of tax liabilities to pay additional VAT to the budget) without an effective and transparent legal procedure for refuting tax authorities' doubts.

In case of inclusion in the risky list, the payer must be able to initiate procedures for confirming the reality of transactions on the corresponding Σ Dubious transactions indicator, while his current activities must continue as usual.

In particular, an option is considered acceptable when, in order to be excluded from the risky list, the payer can temporarily reduce his or her limit by the respective Σ Dubious transactions indicator amount. In this case, he or she should be provided with: (1) the opportunity to continue working without the "risky" status and (2) the opportunity to initiate a separate procedure for confirming the reality of suspicious, in the tax authority's opinion, transactions (for example, as part of a tax audit initiation). Accordingly, in case of refutation of doubts on disputed transactions, the payer's limit should be restored, and the Σ Dubious transactions indicator should be updated.

10. Key indicators data availability

The lack of information from taxpayers about actual indicators assessed by tax authorities when making negative decisions does not allow businesses to understand the approaches of tax authorities and respond quickly, disproving certain doubts of theirs, or, if necessary, adjust their activities to avoid possible adverse consequences.

In this regard, it is necessary to ensure availability of information to payers about indicators targeted for them, which, in case of inconsistency, may indirectly affect the adoption of a negative decision on them.

In particular, from BOC's experience, such indicators can be: Σ Dubious transactions,

the average number of employees at an enterprise; the average salary per employee in the industry in Ukraine and by region; the average tax burden size by industry in Ukraine and in the region (according to the company's SIC code), etc. The mentioned indicators are recommended to be provided in the payer's electronic account with the median, upper and lower quartiles on a monthly/quarterly/annual basis.

It should be noted that inconsistency of indicators in itself cannot be used to make negative decisions, but it is clear that they can serve as auxiliary tools in understanding tax authorities' position.

The BOC sincerely thanks everyone —

taxpayers, experts, civil society institutions, state bodies who joined our investigation by completing surveys, sending their suggestions, sharing their problems, discussing on social networks, searching for statistics. Establishing clear and transparent rules of the game in relations between the state and business is impossible without an active civil society, that is, without you! Thank you for your trust, we appreciate everyone's input!

Annexes:

1. List of additional technical recommendations;
2. Table "Information on Functioning of Procedures for Suspending Tax Invoices/ Adjustment Calculations Registration in the Unified Register of Tax Invoices (hereinafter -TI/AC, URTI) on a quarterly basis for the years 2019-2022 and on a monthly basis for Q4 2022" dated 09 January 2023, No. 792/6/99-00-18-01-03-06.