



Business
OMBUDSMAN
Council

SYSTEMIC REPORT

**ABUSE OF POWERS
BY THE LAW ENFORCEMENT
AUTHORITIES IN THEIR
RELATIONS WITH BUSINESS**



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1 FOREWORD

This report of the Business Ombudsman Council (the “Council”) discusses abuses of powers by the law enforcement authorities inflicting illicit pressure on the Ukrainian businesses (the “Report”). The magnitude of the problem is, among others, evidenced by the fact that as at February 1, 2016, out of 621 complaints received by the Council, 112 (or 18%) were filed to challenge various abuses committed by the pre-trial investigation authorities and public prosecutor’s bodies.

The Report concentrates on a taxonomy of abuses based on the Council’s practice. Each abusive practice have been addressed by (i) describing the nature of the respective abuse (being illustrated by the reference to the actual cases we faced in our practical work), and by (ii) elaborating the set of specific recommendations aimed at minimizing occurrence of each such abuse in the future.

We start by analyzing the practice of [groundless commencement of pre-trial investigation of criminal proceedings](#). As businesses are not vested with the right to challenge registration of data with the Unified Registry of Pre-Trial Investigations (the “URPTI”), in the scenario with groundless criminal proceeding, they are unable to affect the course of the ongoing pre-trial investigation. We also noted here that investigation authorities are not supposed to comply with the legislative requirements, which could specify time limits for conducting such investigation, due to their absence. Given the fact that 1/3rd of the complaints lodged with the Council against law enforcement authorities are challenging criminal proceedings commenced by the investigatory departments of the State Fiscal Service of Ukraine, in this section we concentrated on the following recommendations:

- (1) To prohibit criminal prosecution of person for tax evasion until tax liability is finally “approved/acknowledged.”
- (2) To ensure that materials of tax audit can be transferred to the investigatory units for financial investigations (i.e., tax

police) only after final acknowledgement of the tax liability under the framework of administrative and/or judicial procedure (in case taxpayer sought judicial assistance – from the date when court decision entered into force).

- (3) To increase the threshold amount of actual sums due to be paid to the budget (arising from the unpaid taxes, levies and unified social tax), triggering treatment of such action at the part of taxpayer as a criminal offence.

We continue by discussing the problem of [groundless refusals to commence criminal proceeding](#). Indeed, representatives of pre-trial investigation authorities often abuse their authority by asserting non-existent discretion to determine whether application on committed criminal offence shall be registered or not. Consequently, applications seeking commencement of the criminal proceeding due to committed criminal offence are rejected. Thus, the Council recommends:

- (1) The General Prosecutor’s Office of Ukraine to develop methodological recommendations and explanations for the persons lodging applications or notices about committed criminal offence. Among other things, such guidelines shall emphasize on the need to comprehensively and accurately describe circumstances of the committed criminal offence as well as give proper legal qualification of the committed crime (i.e., refer to the particular *corpus delicti* in the Criminal Code of Ukraine (the “CCU”) and specify place, time, persons and other factual circumstances, related to a particular crime).
- (2) Amending the Criminal Procedural Code of Ukraine (the “CPCU”) to impose a duty on investigator/prosecutor to notify an applicant about their receipt of application or notification about committed criminal offence, registration of the respective data with the URPTI and commencement of pre-trial investigation based on such application/notification.

- (3) Amending the CPCU to impose a duty on investigator/prosecutor to explain to an applicant his/her right to seek court protection by lodging lawsuit challenging investigator's inactivity in case of the latter's failure to register data with the URPTI.

The third type of abuse we paid attention to in the Report is [inefficient \(delayed\) course of the pre-trial investigation](#), essentially comprising inactivity of the pre-trial investigation authorities and inadequate supervision at the part of the public prosecutor's office in criminal proceedings that are lasting for years. Here our recommendations are:

- (1) To amend the CPCU to prescribe maximum time limits for conducting pre-trial investigation of criminal proceedings until suspicion notice is furnished to a person. Such time limits could be extended subject to consent of the superior prosecutor.
- (2) To grant persons vested with the authority to fulfill organizational and administrative functions on behalf of the entity (such as director, financial director, chief accountant, members of the management board of the joint stock company) that is subjected to various investigatory actions at the pre-trial investigation stage with *selected* procedural rights granted to persons who were furnished with the suspicion notice.
- (3) To amend the CPCU to enable third parties, whose rights are being restricted and/or violated in course of the pre-trial investigation (in whose relation a pre-trial investigation is taking place) with the right to challenge failure to observe reasonable time limits to the superior prosecutor. Currently only suspected person, accused person and victim are vested with such right.

The Report ends with the comprehensive analysis of various types of [abuses committed at the pre-trial investigation stage](#), comprising approximately ¼ of all complaints we received against actions (or inactions) of law enforcement authorities. Here we discuss (i) abuses of investigation authorities while carrying out

searches, exercising temporary access to objects and documents as well as arresting property; and (ii) non-proportional nature of procedural measures employed to secure ongoing pre-trial investigation. Here our recommendations are as follows:

- (1) The time duration of temporary access to documents (seizure), that do not themselves contain signs of a crime, shall be restricted by 3 months. To avoid the risk of abuse (whereby seizure of the originals of documents is used to inflict pressure on business), it is important to ensure that length of time, while the originals of documents could be seized by investigation authorities, should not directly depend upon the duration of pre-trial investigation. To attain this goal, the CPCU has to be amended to establish maximum time limits while investigation authorities are entitled to have access to the originals of such documents.
- (2) The CPCU shall be comprehensively amended to provide for a special procedure of seizure of digital data, which, *inter alia*, would not contemplate seizure of computer hardware and would allow avoiding stoppages in the work of businesses due to seizure of servers.
- (3) To amend the Law of Ukraine "On Judicial Expertise" to establish that standard time limits for conducting expertise shall be 3 months subject to extension by an investigatory judge/court, if necessary. The Council also proposes amending the Code of Ukraine On Administrative Violations to establish expert's liability for the breach of maximum time limits, foreseen for conducting expertise.
- (4) To consider amending the CPCU to introduce mandatory video recording of such investigatory action as search. It is also worth providing that only that evidence, whose collection was video recorded, is admissible.
- (5) To amend the CPCU to oblige public prosecutor to verify whether seizure of objects and documents made by

investigator was legal and to inform the person, whose property objects have been seized, accordingly – to be complied within 24 hours from the moment when assets and documents have been seized by the investigator.

- (6) To improve mechanism of personal liability of employees of law enforcement agencies for violations committed while carrying out investigatory actions. In particular, in addition to the existing Disciplinary Charters (Codes) of the Public Prosecutor's Office of Ukraine and Draft Law of Ukraine "On Disciplinary Charter of the National Police", both of which represent internal institutional mechanisms, to consider the opportunity of involving NGOs to the work of such disciplinary commissions.

* * *

To the extent some of the foregoing recommendations contemplate amending the Criminal Code or the Criminal Procedural Code, the Council envisages that following this Report's publication, the Cabinet of Ministers of Ukraine (the "CMU") would initiate creation of the Expert Group, tasked to elaborate the respective legislative amendments. To ensure effective follow-up to this Report, it is thought that, in addition to the CMU and the Council, the composition of such Expert Group would include the representatives of the Verkhovna Rada of Ukraine, the Administration of the President of Ukraine, judiciary and law enforcement authorities.

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While working on the Report the Council received valuable assistance from OECD, the Academy of the Public Prosecutor's Office, the Ukrainian Bar Association and all business associations – members of the Block 3 in our Supervisory Board.

2 THE TYPOLOGY OF ABUSES BASED ON THE COUNCIL'S PRACTICE

2.1. GROUNDLESS COMMENCEMENT OF PRE-TRIAL INVESTIGATION OF CRIMINAL PROCEEDINGS

THE PROBLEM

2.1.1. GENERAL OVERVIEW

Pursuant to the Criminal Procedural Code of Ukraine, that entered into force in 2012, the former stage of launching criminal case (foreseen by the previous wording of the Criminal Procedural Code) has been replaced with the stage comprising entering/ registration of data with the URPTI, triggering commencement of criminal proceeding.

In particular, pursuant to Article 214 of the CPCU, an investigator or prosecutor are obliged to accept and register application or notification about committed criminal offence and, within 24 hours, register with the URPTI respective information and commence pre-trial investigation.

It is worth noting, however, that in reality such new procedure of "automatic" opening of criminal proceedings (i.e., following receipt of any information about allegedly committed criminal offence) is often employed by pre-trial investigation authorities as a tool for inflicting pressure on business.

In particular, following registration with the URPTI, such pressure may be caused by (1) conducting investigatory actions (collection of evidence under Article 93 of the CPCU, carrying out searches and examinations); (2) usage of

such measures of securing criminal proceeding as summoning managers of a corporate entity to interrogation (as witnesses); or (3) by seeking temporary access to objects and documentation (often involving seizure of the original copies of documentation).

Notably, in such circumstances, businesses are not vested with the right to challenge registration of data with the URPTI. Hence, in the scenario with groundless criminal proceeding, they are unable to affect the course of the ongoing pre-trial investigation. Moreover, while investigating criminal proceedings launched against managers of a company, investigation authorities are, in fact, not supposed to comply with the legislative provisions specifying time limits for conducting such investigation due to their absence. Indeed, current legislation imposes time limits on investigation authorities only after suspicion notice is filed.¹

Consequently, it is not unusual that the mere existence of criminal proceedings opened against managers of a corporate entity (or, very often, vis-à-vis certain «fact(-s)») is typically viewed by businesses as an instrument, employed by investigation authorities to inflict illicit pressure on them.

¹ See Art.219 of the CPCU

CASE №1

Manufacturing company from Kherson Oblast approached the Council to challenge pressure inflicted on the company by the tax authorities that organized and carried out groundless tax inspections and launched criminal proceedings against the Complainant's managers based on fictitious grounds. The complaint challenged, *inter alia*, inability to retrieve information from the Oblast Department of the State Fiscal Service related to the details of the criminal proceeding.

Having investigated the merits of the complaint, the Council concluded that the criminal proceeding was launched by the officials of the Investigatory Unit of the State Fiscal Service in Kherson Oblast (claiming, preliminarily, that Complainant's managers committed acts falling under the scope of Article 15, para 2 and Article 191, para. 5 of the CCU – i.e. an attempt to commit a crime comprising embezzlement of property or acquisition thereto through

the abuse of an official power) to effectively bypass moratorium barring tax inspection of businesses.

The Council also noted that the criminal investigation has been transferred by the Public Prosecutor's Office in Kherson Oblast for investigation to be conducted by one of the Rayon Public Prosecutor's Offices. As the Council drew attention of the prosecutor's authorities that the launching of the criminal proceedings was groundless, the latter was closed two days thereafter.

As the facts of pressure on the Complainant at the part of the tax authorities in Kherson Oblast has, in the recent past, been acknowledged and documented by the Main Department of the SFS, the Council issued recommendation to the law enforcement bodies and the SFS to carry out the respective official investigation of the situation.

CASE №2

The Complainant, member of the Wholesale Electricity Market, approached the Council with the complaint challenging allegedly groundless seizure of certain technical documentation pertaining to the production of electricity from the renewable sources, comprising its' commercial secrets.

Seizure has been conducted by the officers of the Security Service of Ukraine under the framework of the criminal proceeding launched by the Public Prosecutor's Office in the City of Kyiv pursuant to the Article 191, para. 5 of the CCU – embezzlement or misuse of property or acquisition thereto through the abuse of an official power.

In its' explanation to the Council the Public Prosecutor's Office in the City of Kyiv pointed out, *inter alia*, that the enterprise has illegally received access to the state funds. Nonetheless, as funds in question are those belonging to the members of the Wholesale Electricity Market rather than to the state budget, the Council has concurred with the Complainant's view that

launched criminal proceeding was groundless.

Besides, the Complainant pointed out that in order to receive access to the documentation comprising its' commercial secrets, the law enforcement authorities attempted to bring into composition of the commission, which conducted inspection of the Complainant, the officer of the State Security Service in his capacity as the Advisor to the Head of the NERCUS (i.e., the commission was set up under the auspices of the National Commission for State Regulation of Energy and Public Utilities of Ukraine (the "NERCUS")). The Complainant also contended that due to the foregoing circumstances, the continuous validity of the license it received from the NERCUS to produce electricity from the renewable sources, could be endangered.

Although the criminal proceeding remains to be opened, the Complainant acknowledges absence of active actions at the part of law enforcement bodies authorities from the moment when the Council has intervened into the situation.

2.1.2. GROUNDLESS OPENING OF CRIMINAL PROCEEDINGS FOR TAX EVASION

The practice of groundless opening of criminal proceedings under Article 212 of the CCU (tax evasion) is particularly widespread.

According to the statistics disclosed by the General Prosecutor's Office of Ukraine, in 2015, pre-trial investigation authorities has commenced (registered) 1748 criminal proceedings under Article 212 of the CCU.² Nonetheless, only 55 ended up with the actual "act of conviction" being filed with the court. The one might conclude that it could have happened provided that many criminal proceedings, launched against alleged tax evasion, were initiated in the circumstances when a body of crime (hereinafter – "corpus delicti") – comprising criminal offence, foreseen by Article 212 of the CCU – was evidently absent. It, therefore, appears that in many such instances, the real objective, pursued by the pre-trial investigation authorities, was to inflict pressure on business rather than to diligently exercise their powers.

The Council observed that one of the main formal sources employed here is the use of Methodological Recommendations Regarding Procedure of Cooperation between Divisions of the State Fiscal Service while organizing, carrying out and implementing materials of audit of taxpayers, approved by the Order of the SFS of Ukraine #22, dated July 31, 2014 (the "Methodological Recommendations").

Pursuant to the Methodological Recommendations tax inspectors are obliged to transfer to the investigatory units for financial investigations (i.e., tax police) data about all sums comprising amounts of additional tax obligations of business, once they reach a material "threshold" triggering criminal liability (at the beginning of February 2016 it was UAH 689,000).

Notably, such an approach is often pursued despite the fact that additionally calculated

sums of tax liability are being challenged by a taxpayer administratively and/or judicially and, thus, cannot be regarded as "mutually agreed/acknowledged".

The Council observed that in this respect the Supreme Court of Ukraine noted as follows:

"...crime, foreseen by Article 212 of the CCU, is deemed to be accomplished from the moment of actual "non-arrival" to the budget or state earmarked funds of sums which should have been paid within time limits and in the amounts, foreseen by the tax legislation (i.e., sums of approved/acknowledged tax obligations, determined pursuant to the Law # 2181-III, namely – as of the day following expiration of the deadline, by which the tax must have been paid".³

In other words, the Supreme Court of Ukraine acknowledged that tax evasion could only occur in the event of the taxpayer's failure to pay the amount of "approved/acknowledged" tax obligation by complying with the time limits, prescribed by law. In order to determine what constitutes "approved/acknowledged" tax obligation and what are the time limits for making respective payment, the Plenum of the Supreme Court refers to the tax legislation.

As for the latter, the Tax Code of Ukraine provides that if taxpayer were to lodge a complaint against the tax authority under the framework of the administrative appeal procedure and/or by filing lawsuit seeking invalidation of the decision issued by the controlling authority, – tax obligation is deemed to be not "approved/acknowledged" until the date when the respective court decision would enter into force.⁴

Nonetheless, the Council observed that it is customary practice for the tax authorities to commence pre-trial investigation and carry out

² http://www.gp.gov.ua/ua/stst2011.html?dir_id=104402#

³ See Section 15 of the Resolution of Plenum of the Supreme Court of Ukraine dated October 8, 2004 № 15 «On Certain Matters Related to Application of Legislation Regarding Liability for [Tax Evasion].

⁴ See Section.56.15 and Article 56, Section 56.18, para. 5, of the Tax Code of Ukraine

investigatory actions in spite of the fact that tax obligations remain to be not “approved/acknowledged”, actual “not-arrival” of funds to the budget has not occurred and, hence, *corpus delicti*, foreseen by Article 212 of the CCU, is evidently absent.

Another common practice is when criminal investigations, opened against alleged tax evasion, are based solely on the official note issued by inspector or report of tax police operative containing his/her own subjective conclusion about existence of tax evasion. We noted that in many instances such documents do not even specify the amount of the allegedly inflicted damage (unpaid taxes). Nonetheless, the mere existence of launched criminal proceeding forces businesses to face various unavoidable obstacles preventing them from

the ability to carry out commercial activity in the normal way. Needless to say, it diminishes the overall level of trust between the businesses and law enforcement bodies and deteriorates investment attractiveness of the State.

Another factor explaining why the practice of commencing criminal proceeding for tax evasion became more widespread is that from 2011 (when the Tax Code entered into force) the threshold has, *de facto*, decreased twice in comparison with its' original equivalent in USD (i.e., from approximately USD 59,000 in 2011 to some USD 27,000 at the beginning of February 2016). Hence, “significant amount of funds not received by the budget” – constituting material element of *corpus delicti*, foreseen by the Article 212 of the CCU – has nowadays become much more “evident” for the taxpayers.

CASE №3

The manufacturing enterprise from Kyiv Oblast approached the Council to challenge pressure inflicted by the tax authorities – the Investigatory Unit for the Financial Investigations of the State Tax Inspection in Kyiv – Sviatoshyn Rayon of the Main Department of the SFS in Kyiv Oblast. As the absence of gross tax evasion had been acknowledged by the competent court, the Complainant contended that the criminal proceeding, which has been launched pursuant to Article 212, para 3 of the CCU, is groundless.

In particular, the Complainant argued that: (1) due to the absence of actual violations of the tax law, the act, issued following the completion of the tax inspection, is groundless; (2) due to the existence of launched and not yet completed procedure of administrative appeal of tax notifications-

decisions as well as absence of mutually agreed tax obligations, the commencement of pre-trial investigation is groundless; (3) evidences collected in course of pre-trial investigation falls beyond the merits of the criminal proceeding; (4) the investigator has deliberately failed to fulfill court decisions in order to create obstacles for the company's ordinary business activity; (5) the investigator has notified the Complainant's contractual parties about the existence of launched criminal proceeding; and (6) the Complainant's employees and top management were subjected to lengthy interrogations.

The Council has approached the SFS with the request to verify whether launching of the criminal proceedings; and subsequent investigatory actions had been legitimate.

CASE №4

The Council received complaint from a commercial bank challenging pre-trial-investigation launched pursuant to Article 212 of the CCU. The criminal investigation had been launched in furtherance of the Act of Inspection, issued by the State Tax Inspection in Shevchenikvskiy District in the City of Kyiv. Nonetheless, the Ruling of the Administrative Court acknowledged that the Complainant was not lowering the amount of its' tax liabilities.

Hence, the Complainant sought closure of the foregoing criminal proceeding, which, however, has been disregarded.

Indeed, despite existence of the court ruling acknowledging absence of the tax violation, the Complainant was suffering from application of the groundless procedural measures. In particular, groundless searches were regularly taking place, documents were being seized, summons to attend interrogation and intimidations were being regularly made by the Financial Investigations Unit of the Main Department of the SFS in Odesa Oblast within the framework of criminal proceeding registered with the URPTI.

According to the Complainant, while attending its' premises, the investigator has reportedly

behaved in the manner not appropriate for the employee of the law enforcement body. In particular, despite absence of any formal accusations lodged against the Complainant, and in violation of the presumption of innocence, the investigator reportedly said that the bank "shall return to the budget all stolen funds" combined with intimidating rhetoric that "you will get to know in the due course [and] more will follow", etc.

While carrying out groundless searches, threats and intimidations were again made, thus discriminating the bank in the eyes of its' clients then present in the premises.

The searched were reportedly carried out by persons not authorized to do so by the investigatory judge. Whereas only copies of the documentation were allowed to be seized pursuant to the text of the respective ruling issued by an investigatory judge, it were the original copies of the documents that were, in fact, being seized. Moreover, the documents were seized without issuance of the registry of the documents thus seized.

Following consideration of the Council's written request to the SFS, the criminal proceeding has been closed.

THE COUNCIL'S RECOMMENDATIONS

To prevent occurrence of the foregoing abuses in the future the Council recommends as follows:

- (1) To prohibit criminal prosecution of person for tax evasion until tax liability is finally "approved/acknowledged" (i.e., as foreseen in Section 3.5.6. of the Coalition Agreement between the Factions of the Deputies in the Verkhovna Rada of 8th Convocation, being an integral part of the Program of Activity of the Cabinet of Ministers of Ukraine (the "Coalition Agreement")). In order to do so the Council suggests amending Articles 212 and 212-1 of the CCU to expressly provide that "actual non-arrival of money to budgets or state earmarked funds" (in Article 212 of the CCU) and "actual non-arrival of money to mandatory state social insurance funds" (in Article 212-1 of the CCU) means "failure to pay the sums of approved/acknowledged tax obligation in compliance with time limits, established by law".
- (2) To amend Section 2.5 of the Methodological Recommendations Regarding Procedure of Cooperation between Divisions of the State Fiscal Service while organizing, carrying out and implementing materials of audit of taxpayers, approved by the Order of the SFS of Ukraine #22, dated July 31, 2014, to ensure that materials of tax audit can be transferred to the investigatory units for financial investigations (i.e., tax police) only after final acknowledgement of the tax liability under the framework of administrative and/or judicial procedure (in case taxpayer sought judicial assistance –

from the date when court decision entered into force).

- (3) To amend legislation to increase the threshold amount of actual sums due to be paid to the budget (arising from the unpaid taxes, levies and unified social tax), triggering treatment of such action at the part of taxpayer as criminal offence.

In the Council's view, increasing threshold to the amount/formula better reflecting what appears to be legislator's original intention, would allow decreasing the number of criminal proceedings or perception of the respective risk at the part of business. Needless to say, this would allow alleviating groundless pressure on business and would contribute to the improvement of the investment and business climate as a whole.

The Council believes that such an approach would correspond to the best international standards in the field⁵ and emphasizes that criminal liability should be applied only in cases when, in fact, there is a very significant evasion and threat of criminal liability should not be employed as effectively one of the main tools for ensuring tax compliance.

As for the practical guidance that could be taken into account while elaborating revised approach for determining threshold triggering criminal liability for tax evasion, inspiration can be drawn from the idea to increase such threshold twice, as foreseen in the Section 3.5.1 of the Coalition Agreement.⁶

⁵ For instance, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2010) prescribes the practice of activities of the participating countries of the OECD with respect to ensuring proper payment of taxes. In particular, Paragraph 4.20 of the Chapter IV of the document notes that: "... criminal penalties are virtually always reserved for cases of very significant fraud, and they usually carry a very high burden of proof for the party asserting the penalty (i.e. the tax authorities). Criminal penalties are not principal means to promote compliance in any of the OECD member countries. Civil (or administrative) penalties are more common, and they typically involve a monetary sanction (although as discussed above there may be a non-monetary sanction such as a shifting of the burden of proof when, e.g. procedural requirements are not met or the taxpayer is uncooperative and effective penalty results from a discretionary adjustment)" (http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2010/administrative-approaches-to-avoiding-and-resolving-transfer-pricing-disputes_tpg-2010-7-en#page1).

⁶ See Section 3.5.1 of the Coalition Agreement.

2.2. GROUNDLESS REFUSAL TO COMMENCE CRIMINAL PROCEEDING

THE PROBLEM

In addition to the problem of groundless criminal proceedings commenced against businesses, in its' practice the Council also faces instances of groundless refusals to register data about criminal offences committed against business or groundless decisions to close criminal proceedings issued by investigatory authorities.

As already mentioned above in the Section 2.1., the new CPCU introduced procedure of "automatic" commencement of criminal proceeding, imposing obligation on investigator/prosecutor to register the respective data with the URPTI and commence investigation upon receipt of any application or notification about committed criminal offence.⁷

As such, pre-trial investigation authorities are no longer entitled to rely on the alleged need to carry out pre-trial examination/inspection as the ground for not registering data with the URPTI and not launching criminal investigation. Indeed, the examination of application or notification about committed criminal offence shall now be carried out within the framework of already opened criminal proceeding.⁸

In the actual practice, however, representatives of pre-trial investigation authorities often abuse their authority by asserting non-existent discretion to determine whether application about committed criminal offence shall be registered or not. As a result, applications that request commencement of the criminal proceeding due to committed criminal offence are rejected.

The Council notes, generally, that while law enforcement authorities might enthusiastically exercise their authority when it comes to launching criminal proceedings against management of corporate entities, they tend to be far less proactive when they are supposed to fulfill their obligation to commence criminal proceeding following receipt of application filed by a manager of corporate entity or by a private entrepreneur.

For instance, the Council is currently considering two cases (in Kyiv and Khmelnyts'ka Oblasts), where complainants faced groundless rejections to register data with the URPTI. Here the Council observed that one of the most widespread formal grounds employed by the law enforcers was the argument that legal relations between complainant and tax authorities are "civil" – despite the fact that taxpayer's relations with the authority exercising its' official powers clearly falls under the category of administrative relations.

In certain cases, while issuing formal rejections, representatives of pre-trial investigation authorities even purport referring applicant to the existence of judicial procedure for challenging non-registration of data with the URPTI. Another "technique" to sabotage registration is to advise the person that his/her application about committed criminal offence would be treated as an ordinary petition pursuant to the procedure set forth in the Law of Ukraine "On Petitions of Citizens".

Such an erroneous practice is based on the "subjective" evaluation of the application about

⁷ See Para.1 of Article 214 of the CPCU

⁸ See Para.3 of Article 214 of the CPCU

committed criminal offence by investigator or public prosecutor – an approach not foreseen by the criminal procedural legislation. Indeed, Article 214, para 4 of the CPCU explicitly prohibits issuance of rejections to accept and register applications or notifications about committed criminal offence. Investigator, public prosecutor or another official authorized to accept and register applications and notices about committed criminal offence are, in fact, obliged to accept and register such applications or notifications.

Yet, the only mechanism envisaged by the CPCU enabling applicant whose rights has been violated due to the refusal to commence criminal proceeding and register the data with the URPTI, is the right to challenge such inactivity at the part of investigator and/or public prosecutor by exercising procedure envisaged in Article 303 of the CPCU.

Nonetheless, such complaints challenging inactivity of an investigator or public prosecutor, comprising failure to register data about committed criminal offence with the URPTI following receipt of a respective application or a notice, could be filed by an applicant only within 10 days from the date, when an investigator or public prosecutor must have opened criminal proceeding but failed to do so. However, it is often the case that an applicant, while waiting for a notice from the pre-trial investigation authorities acknowledging that the respective data has been registered with the URPTI, becomes aware about rejection to commence criminal proceedings after expiration of such term, thus missing 10 days deadline for challenging such inactivity.

CASE №5

The Council completed investigation of complaint lodged by a Private Entrepreneur from Kyiv Oblast challenging several violations committed by the pre-trial investigation bodies in Kyiv Oblast (Rayon Unit of the Ministry of Internal Affairs and Rayon Public-Prosecutor's Office) that refused to launch criminal proceeding against the Village Head's failure to fulfill court decision. The decision ordered removal of certain physical obstacles that prevent the Complainant to carry out normal business activity.

Following successful court challenge of the Rayon Public Prosecutor's Office refusal to register data with the URPTI, during May-June 2015 the Complainant 10 (!) times approached

investigatory judge to challenge refusal to grant her status of a "victim" as well as resolution to close criminal proceeding made by investigator of the Rayon Department of the Ministry of Internal Affairs.

As a result of the Council's intervention, the criminal proceeding has been transferred to a different Rayon Department of the MIA and the Rayon's Public Prosecutor has been stripped of his bonus for August 2015. Yet, several days after transfer of the proceeding to another Department of the National Police, it was closed again.

In December 2015 the closure of this criminal proceeding has, once again, been successfully challenged by the Complainant with the court.

CASE №6

The Council received complaint from the shareholder of a joint stock company challenging rejection of the Investigatory Unit of the Main Department of the Ministry of Internal Affairs of Ukraine to launch criminal proceeding following his respective application.

As prescribed by law, the Complainant approached Investigatory Unit of the Main Department of the Ministry of Internal Affairs in Kharkiv Oblast with application referring to the fact of raider's attack initiated by another shareholder, who reportedly enjoyed "protection" from the member of the Ukrainian Parliament. Nonetheless, the investigatory authority refused to register the application.

The Council's experts ascertained that in accordance with the requirements of the CPCU, the Investigatory Unit was obliged to register the complainant's application with the URPTI and

commence investigation within 24 hours from the moment of their receipt of application about committed criminal offence.

The Council sent official request to the Investigatory Unit of the Main Department of the Ministry of Internal Affairs in Kharkiv Oblast seeking confirmation that the Complainant's application has been received and registered with the URPTI and recommended commencing pre-trial investigation within reasonable terms. At the same time the Council approached Public Prosecutor's Office in Kharkiv Oblast with the request to verify facts, described by the Complainant and, in case they are confirmed, employ adequate measures of recourse.

The Council's recommendations were fulfilled in course of the complaint's consideration. Currently the criminal proceeding is at the pre-trial investigation stage.

THE COUNCIL'S RECOMMENDATIONS

To prevent occurrence of the foregoing abuses in the future the Council recommends as follows:

- (1) The General Prosecutor's Office of Ukraine to develop methodological recommendations and explanations for the persons lodging applications or notices about committed criminal offence. Among other things, such guidelines shall emphasize on the need to comprehensively and accurately describe circumstances of the committed criminal offence as well as give proper legal qualification of the committed crime (i.e., refer to the *particular corpus delicti* in the CCU and specify place, time, persons and other factual circumstances related to a particular crime).
- (2) Amend Article 214 of the CPCU to impose a duty on investigator/prosecutor to notify an applicant about their receipt of application or notification about committed criminal offence, registration of the respective data with the URPTI and commencement of pre-trial investigation based on such application/notification.
- (3) Amend Article 214 of the CPCU to impose a duty on investigator/prosecutor to explain to an applicant his/her right to seek court protection by lodging lawsuit challenging investigator's inactivity in case of the latter's failure to register data with the URPTI, as foreseen by Article 303 of the CPCU.

2.3. INEFFICIENT (DELAYED) PRE-TRIAL INVESTIGATION

THE PROBLEM

Periodically the Council receives complaints challenging inefficient course of pre-trial investigation. In most instances the complaints are challenging inactivity of the pre-trial investigation authorities and inadequate supervision at the part of the public prosecutor's office in criminal proceedings that are lasting for years.

Effective conduct of the pre-trial investigation by investigation authorities shall, in principle, mean that a given criminal proceeding is either (i) closed if an event of crime or respective *corpus delicti* are absent; or (ii) transferred to the court together with the respective act of conviction, followed by the issuance of the court decision acknowledging that a particular person has committed criminal offence.

According to the statistics disclosed by the General Prosecutor's Office of Ukraine,⁹ in 2015 pre-trial investigation authorities has commenced (registered) 7631 criminal proceedings in the sphere of commercial activity. Nonetheless, only 1958 criminal proceedings ended up with the actual "act of conviction" being filed with the court, whereas at the end of 2015 no procedural decision whatsoever has been adopted in relation to 5351 criminal proceedings launched in the field of commercial activity.

As no time limits for conducting investigation are foreseen until suspicion notice is submitted to a person,¹⁰ investigators frequently tend to take advantage of this fact by delaying pre-trial investigation. This allows them to maintain criminal proceeding in the "suspended" state without issuing such procedural decisions as closure of criminal proceedings or lodging suspicion notice.

It is not uncommon that in such circumstances pre-trial investigation authorities might be engaged in creating appearance of activity by

carrying out searches, summoning officials for interrogations and seizing property objects and documents. For instance, the Council has considered complaint received from private entrepreneurs, engaged in retail sale of meat products in the city of Dnipropetrovs'k, challenging several searches conducted by the officials of the Ministry of Interior and Public Prosecutor's Office in Dnipropetrovs'k. In this case, to address allegation that law enforcers extorted and received illicit income in the amount of USD 20,000, the Council inquired about the outcome of such searches with law enforcers only to find out that no evidentiary material has apparently been retrieved as a result of such actions. Hence, the Council was prompted to conclude that such actions of law enforcers were, in fact, unreasonable.

The Council observes that applicants are effectively deprived of any effective tools they could employ to ensure that pre-trial investigation of criminal proceedings is conducted in efficient and timely manner. In the Council's view, inefficient nature of pre-trial investigation is caused by the combination of the following factors.

First, it is heavy workload imposed on the pre-trial investigation authorities combined with the lack of an effective control at the part of the public prosecutor's bodies.

In this context one of the key factors is the lack of effective control over the course of pre-trial investigation at the part of the office of public prosecution. According to Article 308 of the CPCU suspected or convicted persons or victim are entitled to challenge investigator's failure to observe reasonable time limits during course of pre-trial investigation with the superior prosecutor. The latter, however, often issues only formal responses and instructions, causing no substantial impact to the overall quality of investigation.

⁹ http://www.gp.gov.ua/ua/stst2011.html?dir_id=104402#

¹⁰ See, generally, Article 219 of the CPCU

From that perspective, it is worth acknowledging significance of the role played by investigatory judges at the pre-trial investigation stage, which, if properly exercised, can enhance the efficiency of activity of the pre-trial investigation authorities. In particular, to ensure that the particular pre-trial investigation authority is actually complying with the requirements of the reasonable time limits, Article 114 of the CPCU provides that complainants are entitled to approach investigatory judge, so that the latter would exercise his/her authority to establish procedural time limits, taking into account circumstances discovered during a respective criminal proceeding. Among other things, it may allow ensuring that accusations, issued against a particular person, are either promptly submitted for judicial consideration or the respective criminal proceeding is closed.

Second, it is the absence of expressly specified time limits for conducting pre-trial investigation starting from the moment when application/ notification is filed with an investigation authority and until suspicion notice is furnished. Indeed, the CPCU establishes time limits for conducting pre-trial investigations only starting from the day when a person was furnished with the suspicion notice. As for the period of time in between registration of the data with the URPTI and lodging a person with the suspicion notice, since pre-trial investigation authorities are not restricted by any time limits, such proceedings might last for years.

Third, it is variety of factors related to the quality of personnel and overall state of the economy in the country. From that perspective, it is worth mentioning inadequate state of the professional training of the personnel of pre-trial investigation authorities and low motivation of staff due to heavy workload and low level of remuneration.

As a result, it is often the case that the investigator in criminal proceeding is not fulfilling his/her direct obligations, foreseen in the CPCU. The reasons for this vary, namely: inadequate level of knowledge, personal interest, lack of professionalism or plain laziness. Hence, it is particularly important to enhance overall level of competency of personnel engaged in carrying out pre-trial investigation.

For instance, some of the complaints lodged with the Council depict situations when businesses were challenging various ambiguous situations that appeared in course of their interaction with investigatory authorities. In particular, in circumstances when evidentiary base, sufficient to commence official investigation was evidently absent, some investigators initiated electronic communication with the officials of corporate entities (by e-mail or sms). In one of such instances, the Council approached the Office of the Public Prosecutor in the City of Kyiv, seeking explanation as to why their investigator attempted to summon the complainant for interrogation by e-mail, which, *inter alia*, did not contain all substantial details required by law. As a result of the Council's intervention, the investigator was dismissed.

¹¹ See Article 219 of the CPCU.

CASE №7

The Council considered complaint filed by the Private Entrepreneur to challenge actions of the public prosecutor's bodies and the MIA committed while investigating criminal proceedings regarding illegal repossession of the Complainant's transportation vehicles.

Based on the Complainant's statement and materials of the complaint, the Complainant (together with his wife) used to own small car rental business in the City of Kyiv. In course of 2014 5 vehicles has been effectively stolen from the Complainant by employing scheme whereby swindlers would rent a vehicle followed by forgery of documents either by a notary public or by employees of the State Automobile Inspection and subsequent transfer/sale of cars to third parties.

Currently the Complainant is registered as a "victim" within 3 criminal proceedings launched regarding illegal repossession of transportation vehicles – overall these cases feature 14 episodes and some 10 victims. Additional 8 episodes of illegal repossession of cars, featuring same persons accused of committing crime together with private notaries and the Service Center set up under the auspices of the State Automobile Inspection, were merged into one proceeding. Overall the Complainant is registered as either applicant or victim within more than 10 proceedings, lodged in connection

with the illegal repossession of transportation vehicles, forgery of documents, abuse of powers by the officials of the MIA, etc.

Having analyzed disclosed materials, the Council preliminarily concluded that, as far as foregoing proceedings are concerned, the officials of the public prosecutor's office deliberately delay investigatory actions, fulfil their duties to carry out supervision function in rather formalistic manner, fulfil their functions within criminal procedure by acting in the bad faith and, by failing to fulfil court decision, violate provisions of the CPCU.

It is noteworthy that the Complainant won the case with the administrative court, which, in its' ruling, obliged the Public Prosecutor's Office in the City of Kyiv to provide the Complainant with the comprehensive answers to his complainants and applications. As the Public Prosecutor's Office has lodged an appeal against this decision, it appears that actions employed by the officials of the Public Prosecutor's Office might have been driven by certain non-transparent motives. Although the Council has approached the Public Prosecutor's office with the requests to verify whether actions of the respective officials comply with the requirements of the CPCU, currently the information on the outcomes of such internal investigation is yet to be received by the Council.

CASE №8

The Council considered complaint received from the Complainant located in Khmelnytskiy Oblast challenging non-efficient pre-trial investigation of criminal proceedings launched against raider's take-over of the Complainant's commercial premises.

The Council noted that although the Complainant's original application filed with the law enforcement bodies explicitly specified persons who committed raider's attack against her enterprise, in course of the last 3 years, the latter persons had not been anyhow restricted in their ability to utilize the Complainant property. Moreover, even though the existence of the fact of illegal take-over of the enterprise's

property has been acknowledged by several court decisions, the respective criminal proceeding is still lasting.

Following the Council's intervention into the situation, to facilitate expeditious investigation of the matter, the Public Prosecutor's Office in Khmelnyts'k Oblast has issued an official order within the framework of the respective criminal proceeding.

Nonetheless, the Council continues to observe apparent unwillingness of the pre-trial investigation bodies to actually investigate the case.

THE COUNCIL'S RECOMMENDATIONS

To improve efficiency of the pre-trial investigations the Council recommends as follows:

- (1) To amend Article 219 of the CPCU to prescribe maximum time limits for conducting pre-trial investigation of criminal proceedings until suspicion notice is furnished to a person. Such time limits could be extended subject to consent of the superior prosecutor. Currently, time limits for conducting pre-trial investigations are foreseen by the CPCU only starting from the day when a person is furnished with a suspicion notice.
- (2) To vest persons authorized to carry out organizational and administrative functions on behalf of the entity (such as director, financial director, chief accountant or members of the management board of the joint stock company) that is subjected to various investigatory actions at the pre-trial investigation stage with *selected*

procedural rights granted to persons who were furnished with the suspicion notice, which are enlisted in Article 42 of the CPCU (*"Suspected Person/Accused Person"*), namely (the following list is not-exhaustive):

- a) Collect and submit evidences to investigator, prosecutor or investigatory judge;
- b) Participate in the procedural actions;
- c) During the course of the procedural action – ask questions, make comments and raise objections about the manner in which a particular procedural action is being held – all of which shall be entered in the respective protocol of action;
- d) Use technical tools during procedural actions where he/she takes part – in compliance with the requirements of the CPCU;
- e) In accordance with the procedure set forth in the law, demand indemnification of damages caused by illicit decisions, actions or inactions

of the authority carrying out operative-investigative activity, pre-trial investigation, public prosecutor's office or court.

The foregoing idea might, for instance, be fulfilled by expanding the scope of persons, who fall under the category of "parties" or "participants" of the criminal proceeding, by introducing respective amendments to the Chapter 3, §5, Article 3 of the CPCU (*"Court, Parties and Other Participants of the Criminal Proceeding"*).

- (3) Amend Article 308 of the CPCU to enable third parties, whose rights are being restricted and/or violated in course of the pre-trial investigation (in whose relation a pre-trial investigation is taking place) with the right to challenge failure to observe reasonable time limits to the superior prosecutor. Currently only suspected person, accused person and victim are vested with such right.

2.4. ABUSES AT THE PRE-TRIAL INVESTIGATION STAGE

THE PROBLEM

2.4.1. ABUSES WHILE CARRYING OUT SEARCHES, EXERCISING TEMPORARY ACCESS TO OBJECTS AND DOCUMENTS AND ARRESTING PROPERTY

Exercise of various investigatory actions and use of measures aimed at securing ongoing criminal investigations are the most widespread techniques of abuse employed by the pre-trial investigation authorities, which are faced by businesses within the framework of launched criminal proceedings.

In particular, such pre-trial investigatory bodies as investigatory departments for financial investigations (tax police), bodies of the National Police of Ukraine, the State Security Service of Ukraine frequently employ such investigatory actions as interrogations of the entity's employees as well as various searches, typically resulting into subsequent seizures of assets and documents.

While conducting such investigatory actions as search, the investigators tend to commit various breaches of the existing procedure for carrying on searches, hence resulting in the violation of a legitimate rights of individuals undergoing/exposed to such search.

For instance, we observed instances when, while carrying out searches, practically all documents and assets (including those that weren't relevant to a particular criminal proceeding) were seized from a business entity. Moreover, investigators are typically not inclined to ensure that persons, whose rights are affected or otherwise restricted by an occurrence of a search, are actually physically present in course of such investigatory action. Besides, we noticed that investigation authorities might often not allow the advocates to be present during the search or other pre-trial action. As a result, it violates the right of managers of an entity subjected to a search, to

obtain legal protection.¹²

The abusive practice of employing such measure of securing criminal proceeding as temporary access to objects and documents (including seizure of documents) is also quite widespread. Under the law, temporary access to objects and documents can only be granted subject to the existence of a respective court decision – i.e., ruling of an investigatory judge or a court of law.¹³ Nonetheless, bodies of pre-trial investigation frequently seek seizure of objects and documents from investigatory judges by failing to provide sufficient substantiation of rationale for such measure.¹⁴ Such violations are particularly evident when seizure of an original copies of documents is being sought, when risk of causing serious damage to a business through distortion of its' ordinary business activity is particularly high.

It is worth noting that the right of temporary access is vested only with the official (investigator, procurator) who is specifically mentioned in the resolatory part of the respective ruling made by an investigatory judge (court).¹⁵ Yet, the actual investigatory actions, pursued in fulfillment of a ruling of an investigatory judge, are frequently conducted by investigators (or other operatives), who are not mentioned in the ruling of an investigatory judge.

Besides, pre-trial investigation authorities often fail to comply with the express requirements foreseen in the CPCU to present original copy of the court ruling.¹⁶ The Council's practice also demonstrates that investigators frequently ignore provisions of the law requiring them to

¹² As guaranteed by Article 59 of the Constitution of Ukraine

¹³ See Para.2 of Article 159 of the CPCU

¹⁴ As required by Para.2 of Article 160 of the CPCU

¹⁵ See Article 165, para 1 of the CPCU

¹⁶ See Para.1 of Article 165 of the CPCU

pay a visit directly to the office of an enterprise (where assets and documents are stored) in order to personally review, make copies and (if permitted by a ruling of an investigatory judge), seize assets and documents, mentioned in the court ruling, at the place of their physical location.¹⁷

In addition, investigators frequently fail to comply with the duty to provide the owner with the description of all seized objects and documents.¹⁸

Another violation of the procedure for temporary access and seizure of the originals of documents is that, in spite of the explicit request of the owner of documentation, officials of pre-trial investigation bodies may refuse preparing copies of the documentation on their own and leave the original copies of the documents that are being seized in the possession of their holder(-s). Such practices at the part of investigatory authorities frequently imposes on businesses additional obligations, not foreseen by the CPCU.

The foregoing instances of abuses are evidenced by the taxonomy of complaints received by the Council challenging various violations committed while conducting searches, exercise of the right of temporary access to assets and documents (seizure) and, eventually, arrest of property. The taxonomy of **violations committed by officials of law enforcement authorities while conducting searches** can be summarized as follows:

- a) carrying out searches by an officials not being authorized to do so;
- b) seizure of property objects which are not specified in the respective court ruling;
- c) failure to submit assets and documents which are being seized during search to procedural witnesses for their review; as well as failure of an official, carrying out a search, to prepare a registry of such assets;
- d) threatening and intimidating officials of an entity subjected to a search;

- e) conducting searches at the addresses being different from those that are specified in the respective ruling issued by an investigatory judge;
- f) not permitting advocates to be present during such an investigatory action.

As far **as temporary access to objects and documents is concerned (seizure)**, the Council observed the following typical violations:

- a) original copies of the documents are seized (rather than copies, as foreseen in the respective court ruling); for instance, it is the original copies of the loan agreements that are being seized, whereas court permitted seizure of the copies of such contractual documentation;
- b) documents are being seized, whose seizure is not sanctioned by the court (for instance, the entire loan cases are seized (i.e., primary loan documentation, security agreements, lettering, etc.)) whereas the respective court ruling permitted seizure of copies of such loan documentation);
- c) forcing employees to allocate significant portion of their working time to ensure fulfillment of such investigatory action as seizure of documents, thus forcing business entity to face significant difficulties in course of its' ordinary business activity;
- d) various instances, when normal operation is significantly distorted due to seizure of a computer equipment belonging to a business entity.

Besides, some complaints filed with the Council demonstrate that arrests of property objects may affect interests of various third parties (i.e., entities and persons that are not engaged in a given criminal proceeding, including foreign entities, which violates their rights and interests, protected by the law). Too often such third persons are deprived of the opportunity to return arrested assets they own, despite the fact that the latter (i.e., assets) might not have any apparent relevance to the subject -matter of the ongoing criminal investigation.

¹⁷ See Para.2 of Article 165 of the CPCU

¹⁸ See Para.3 of Article 165 of the CPCU

CASE №9

The Council considered complaint of the manufacturing company challenging inactivity of the investigator – Deputy Head of the 2nd Department of the Investigatory Department for Criminal Investigations of the Main Department of the SFS in Poltava Oblast, comprising failure to fulfill ruling of the investigatory judge of Oktiabrs'k District Court of the City of Poltava (the "Ruling"). According to the Ruling, the investigator was obliged to return to the Complainant temporary seized property objects (in accordance with the list set forth in the resolutive part of the Ruling).

In response to its' request, the Council received letter issued by the Main Department of the SFS in Poltava Oblast, where, despite the fact that in the text of the Ruling the Complaint was acknowledged as the owner of property, the Council was informed that it was impossible to return temporarily seized objects to the Complainant until the actual owner will be identified. Having analyzed circumstances of the case, the Council recommended both Main Department of the SFS in Poltava Oblast and the

investigator of the Investigatory Department for Criminal Investigations of the Main Department of the SFS in Poltava Oblast, to undertake immediate actions to ensure return of the Complainant's property objects, as foreseen by the Ruling.

The Council also drew attention of the Head of Main Investigatory Department for Financial Investigations of the SFS of Ukraine to the facts of inadequate fulfillment of professional duties at the part of the Main Department of the SFS in Poltava Oblast and recommended carrying out official investigation to ascertain grounds and motives for such a behavior to prevent occurrence of similar failures to fulfill court decisions, which is the criminal offence.

Recently the Council was informed that previously seized property objects were returned to the Complainant and that criminal proceeding has been launched against the investigator of the Main Department of the SFS in Poltava Oblast for his failure to fulfill decision of the court.

2.4.2. NON-PROPORTIONAL NATURE OF PROCEDURAL MEASURES

In its' practice the Council also faces instances when the scope of procedural measures, employed at the pre-trial investigation stage, has a non-proportional nature.

As the time limits for conducting expert analysis are not specified in the legislation, objects and documents, seized for conducting expertise, are sometimes not returned to their owners for more than a year due to the long time the latter have to spend while awaiting for the actual commencement of expertise. In the Council's view, in order to resolve this problem it is necessary to establish maximum time limits for conducting various types of expert reviews.

Another abusive practice at the part of the pre-trial investigation authorities is when in course of investigatory actions or exercise of measures aimed at securing criminal proceeding, documents, that are not relevant to the respective criminal proceeding, are also seized. Yet, the seizure of such documents might considerably complicate (or, even, make it impossible) the corporate entity's ability to carry its' business activity in the normal manner.

The Council also faced instances when scope of procedural measures comprising arrest of property (arrests of bank accounts, finished commodities, means of production and corporate rights) was excessive as overall value of arrested property was more than 10 times higher than the value of claims lodged against a particular business. And this is despite the fact that as of November 2015 the value of property that may be arrested (except for instances when property is arrested to facilitate confiscation),

shall be proportional to the scope of damage, caused by the criminal proceeding; or the amount of the illicit profit, specified in the civil lawsuit; or amount of illicit benefit, which was or could have been gained by the legal entity.¹⁹

Besides, while deciding whether to proceed with the arrest of property, an investigatory judge (court) shall, *inter alia*, ensure that restriction of ownership right actually corresponds to such objectives of criminal proceeding as reasonableness and proportionality.²⁰ Nonetheless, it is often the case that when insignificant volume of digital data is sought to be retrieved, the court rulings are issued authorizing seizure of the entire hardware (servers). Thus, the Council believes that if modern procedure regulating seizure of digital data were to be developed, it would allow avoiding stoppages in the ordinary work faced nowadays by businesses due to seizure of servers.

Hence, it might be worth obliging investigatory judges and courts (while they authorize investigatory actions and measures aimed at securing criminal proceeding) to estimate anticipated impact of such sanctions on the commercial activity of a particular business and issue the respective ruling (decision) provided that the results of such an estimation are duly taken into account. Yet, the Council is mindful of the fact that even if the procedure for carrying out mentioned investigatory measures were to be meticulously regulated, it is the absence of inevitability of punishment for committing such abuses, that way too often triggers their occurrence.

¹⁹ See Article 170, para. 4 of the CPCU (in the wording of the Law # 769-VIII, dated November 10, 2015).

²⁰ See Article 173, para 2, subsection 5 of the CPCU

CASE №10

The Council received complaint from the company – user of mineral resources – challenging groundless arrest of its' property to secure possible lawsuit within criminal proceeding investigated the Investigatory Department of the General Prosecutor's Office of Ukraine.

The Complainant contended that the scope of the employed procedural measures (comprising arrest of bank accounts, finished commodities, mineral wells and means of production) has been excessive and, in its' aggregate volume, exceeded the value of the possible lawsuit against the Complainant by more than 10 times.

The Council has approached the General Prosecutor's Office twice seeking additional information on the matter. In particular, the Council requested information about materials

or other evidences, which would prove that the scope of procedural measures (authorized by the investigatory judge in response to the investigator's requests to impose arrests against the Complainant's property) has indeed been appropriate. Only with the third attempt, with the assistance provided by the Parliamentary Committee On Ensuring Law-Enforcement Activity, the Council received timely response from the General Prosecutor's Office, albeit rather formal in nature.

Currently, the Deputy Business Ombudsman Iaroslav Gregirchak is representing the Council at the Inter-Ministerial Working Group created under the auspices of the Ministry of Justice, tasked to settle possible international investment arbitration claim that is being contemplated by the Complainant against the State of Ukraine.

THE COUNCIL'S RECOMMENDATIONS

In order to prevent occurrence of the foregoing abuses in the future, the Council recommends the following:

(1) The time duration of temporary access to documents (seizure) that do not themselves contain signs of a crime shall be restricted by 3 months. To avoid the risk of abuse (whereby seizure of the originals of documents is used to inflict pressure on business), it is important to ensure that length of time, while the originals of documents could be seized by investigation authorities, should not directly depend upon the duration of pre-trial investigation. To attain this goal, Chapter 15 of the CPCU shall be amended to establish maximum time limits while investigation authorities are

entitled to have access to the originals of such documents.

- (2) The CPCU shall be comprehensively amended to provide for a special procedure of seizure of digital data, which, *inter alia*, would not contemplate seizure of computer hardware and would allow avoiding stoppage in the work of businesses due to seizure of servers. Hence, in the Council's view, it is appropriate to introduce respective amendments to the Chapter 20 ("*Investigatory actions*") of the CPCU.
- (3) To amend the Law of Ukraine "On Judicial Expertise" to establish that standard time limits for conducting expertise shall be 3 months subject to extension by an

²¹ Those that contain such signs comprise, for instance, a forged seal or a signature, signs of blood or other instances, fingerprints, etc.

investigatory judge/court, if necessary. The Council also proposes amending the Code of Ukraine On Administrative Violations to establish expert's liability for the breach of maximum time limits, foreseen for conducting expertise.

- (4) To consider amending Article 236 of the CPCU to introduce mandatory video recording of such investigatory action as search. In the Council's view, it might be appropriate to provide that such video recording shall commence when the manager of the entity is furnished with the resolution issued by an investigatory judge sanctioning such search and shall last until he/she is provided with the copy of the protocol of search. It is also worth providing that only that evidence, whose collection was video recorded, is admissible.

- (5) To amend Articles 168, 169, 236 and 237 of the CPCU to oblige public prosecutor to verify whether seizure of objects and documents made by investigator was legal and to inform the person, whose property objects have been seized, accordingly – to be complied within 24 hours from the moment when assets and documents has been seized by the investigator.
- (6) To improve mechanism of personal liability of employees of law enforcement agencies for violations committed while carrying out investigatory actions. In particular, in addition to the existing Disciplinary Charters (Codes) of the Public Prosecutor's Office of Ukraine and Draft Law of Ukraine "On Disciplinary Charter of the National Police", both of which represent internal institutional mechanisms, to consider the opportunity of involving NGOs to the work of such disciplinary commissions.



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