

TYPICAL CORRUPT PRACTICES IN THE CRIMINAL PROSECUTION OF BUSINESSMEN

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Article info

Received –

2021 June 8

Accepted –

2022 June 20

Available online –

2022 September 20

Keywords

Corrupt practices, criminal prosecution, entrepreneurs, Business Ombudsman, Commissioner for the Protection of Entrepreneurs' Rights, law enforcement authorities, KPIs of law enforcement authorities, fraud

The subject. The study is devoted to the study of corruption aspect of criminal prosecution of entrepreneurs in Russia.

The aim of this paper is to identify typical corrupt practices in the criminal prosecution of entrepreneurs, to investigate their causes, as well as to formulate recommendations for minimizing the identified practices of abuse.

The methodology. The author analyzes the cases of criminal prosecution of entrepreneurs who have filed appeals to the Center for Public Procedures "Business Against Corruption", the Center "Protection of Business". These public platforms act as filters of appeals for unwarranted criminal prosecution. In case of confirmation of the facts of illegal use of criminal law instruments in relation to an entrepreneur, the appeal with the attached expertise is sent to the Commissioner for the Protection of Entrepreneurs' Rights.

The main results, scope of application. To corrupt practices in the field of criminal prosecution of entrepreneurs the author included the following: unreasonable use of preventive measures in the form of detention in contravention of the direct prohibition of pt. 1.1 of the art. 108 of the Code of Criminal Procedure of the Russian Federation; ignoring the fact of committing a crime in the field of business and as a consequence qualification of the crime not by special business, but by common crimes; "superficial" preliminary investigation, resulting in criminal proceedings without due cause; ignoring the prejudicial facts established by arbitration courts in criminal proceedings; unreasonable imputing the commission of an intentional act.

The reasons for the corrupt practices highlighted and investigated by the author are such factors as the wording of the law and its interpretation, limitations and imprecision of the law, allowing discretion on the part of law enforcers; the established KPIs of law enforcement agencies that encourage "the pursuit of performance" and accusatory bias; declarative ethical standards adopted by public authorities and companies, i.e. the lack of effectively implemented instruments of integrity management; low level of public control over criminal proceedings.

In order to minimize the above practices, it is necessary to further improve regulations, to stimulate ethical regulation in organizations; to modernize the metrics for evaluating the effectiveness of law enforcement agencies, focusing on non-departmental parameters; to significantly increase the role of the institution of business ombudsman as an additional guarantor of legal rights and interests of entrepreneurs, and to actively introduce digitalization tools, in particular, digital records of criminal cases.

It is important to emphasize again that the author does not claim to cover all possible corrupt practices in the prosecution of entrepreneurs and their causes. For example, there is a vicious practice of reclassifying a witness in a criminal case after testifying as a suspect and subsequently as a defendant. Further research could look in more detail at each of these corrupt practices, identify and analyze additional practices, as well as explore opportunities for their mitigation. From the point of view of the applied implementation of the results of the study, it seems that they can be useful, on the one hand, to decision makers when improving criminal policy towards entrepreneurs, but also to entrepreneurs themselves to understand the potential criminal law risks that they may face and must minimize.

1. Introduction

The criminal prosecution of entrepreneurs in Russia is becoming a formalised institutional practice for vested and/or agency interests with each passing year. More than 30% of all complaints to the Presidential Ombudsman for the Protection of Entrepreneurs' Rights in 2020 were complaints of unjustified criminal prosecution¹. At the St. Petersburg International Economic Forum in 2021, Business Ombudsman Boris Titov noted that almost 80% of entrepreneurs do not believe that doing business in Russia is safe, and over 75% believe that legislation does not provide sufficient guarantees against unwarranted criminal prosecution², which is indirect evidence of the importance of the issue at hand.

An unlawful criminal prosecution often consists of an unjustified transfer of a civil law dispute into the criminal law arena. For example, at one of the meetings of the Moscow Centre for Public Procedures "Business Protection"³ experts analysed the high-profile case of the entrepreneur D.A. Zotov, ex-director of TransFin-M, from the "London list"⁴ by B.Y. Titov. Despite guarantees provided by the Ombudsman, the entrepreneur was arrested upon his return to Russia. Thanks to the efforts of the Federal Business Ombudsman and by bringing the situation to the attention of the Russian President, Mr Zotov was released, but the criminal prosecution was not terminated. At

the Center's meeting, the lawyer of the entrepreneur, T.A. Ermak and D.A. Zotov himself, described in detail the background to the conflict, indicating a low probability of victory for the opposing party in the arbitration proceedings, which, in their view, led to the use of criminal law tools. After a thorough examination of the case, the experts of the Defence of Business Centre agreed with this position, as did the Ombudsman for Entrepreneurs' Rights in Moscow, T.V. Mineyeva, for which reason it was decided to support D.A. Zotov's appeal⁵.

The existence of such a problem has been repeatedly stated by the President, representatives of the Government, the Supreme Court, the Prosecutor General's Office and other officials of the country. In particular, in his address to the Federal Assembly on 20 February 2019, Vladimir Putin called for reducing the pressure on business and eliminating the situation in which bona fide entrepreneurs fear criminal prosecution and administrative punishment⁶. On 17 June 2020, Prosecutor General I.V. Krasnov in his report to the Federation Council also pointed to the continuing practice of unwarranted criminal prosecution of entrepreneurs. According to the statistics he cited, the prosecutor's office identified 190 criminal cases that had been initiated without sufficient grounds⁷.

State authorities have repeatedly attempted to minimise the risks of unlawful criminal prosecution of entrepreneurs. For example, in 2016, Part 3 of Article 299 of the Criminal Code of the Russian Federation "Bringing a knowingly innocent person to criminal responsibility or unlawful

¹ XV All-Russian Conference of Entrepreneurs' Rights Commissioners (May 24, 2021) [Electronic resource]. URL: <https://www.youtube.com/watch?v=ox6gxLL8TM8&t=2133s> (accessed: 28.05.2021).

² Trust in national jurisdiction as a factor of economic development and business protection // SPIEF'21 [Electronic resource]. URL: https://forums.spb.com/programme/business-programme/91441/?fbclid=IwAR3kvST8Uw6rJqTULkp3aQf8_spPDsBN0Pya4WVdU-1QD9GnbiEWh-A14AQ#broadcast (accessed: 07.06.2021).

³ A public platform established in 2020 along the lines of the Centre for Public Procedures "Business Against Corruption", bringing together experts who review *pro bono* cases against entrepreneurs who complain of unfounded criminal prosecution.

⁴ A list of entrepreneurs who, in the Commissioner's view, have been unjustifiably prosecuted and have therefore left Russia.

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⁵ PROTECTIONBUSINESS On September 10, 2020 a regular meeting of the Public Council of the Private-Public Centre of Public Procedures "Business Protection" took place // PROTECTIONBUSINESS CENTRE OF PUBLIC PROCEDURES [Electronic resource]. URL: <https://protectionbusiness.ru/bp-news/news-11-09-20> (accessed: 16.05.2021).

⁶ Putin said that business should not constantly "go under the article" // Interfax.ru [Electronic resource]. URL: <https://www.interfax.ru/business/651342> (accessed: 13.09.2020).

⁷ Prosecutor General named share of illegal cases against entrepreneurs - RIA Novosti, 17.06.2020 [Electronic resource]. URL: <https://ria.ru/20200617/1573056421.html> (accessed: 13.09.2020).

initiation of criminal proceedings" introduced liability for illegally initiating criminal proceedings in order to obstruct entrepreneurial activity, but at the time of writing this study no officials have been prosecuted under this part of the article. In August 2019, a ban was introduced on the use of custodial measures for the economic elements of the Criminal Code⁸, but law enforcement authorities began to actively use Article 210 of the Criminal Code "Organization of a criminal association (criminal organization) or participation in it (it)"⁹, which is not covered by the above ban, and which was not originally intended for entrepreneurs, as pointed out by Deputy Chairman of the Supreme Court V. A. Davydov¹⁰.

2. Scientific development of aspects of criminal prosecution of entrepreneurs

The study by S. R. Borisov, M. A. Bludyan, M. A. Kallista, I. V. Melnikov provides recommendations on expanding the powers of the Commissioner for the Protection of Entrepreneurs' Rights in order to increase guarantees of protection of entrepreneurs, in particular, against unlawful criminal prosecution. The authors propose to make the expertise of the Ombudsman on the presence of unlawful initiation of criminal proceedings against entrepreneurs mandatory for investigation and prosecution authorities in terms of the selection of a preventive measure **[Error! Reference source not found.]**.

A number of studies have examined the problems of criminal law applied to entrepreneurs, in particular the most commonly used offences of fraud and other economic crimes (e.g. P. S. Yani **[Error! Reference source not found.]**, G. A. Esakov **[Error! Reference source not found.]**, I. A. Klepitsky **[Error! Reference source not found.]**, A. A. Gravina **[Error! Reference source not found.]**, A. I. Kozbanov **[Error! Reference source not found.]**, A. A. Borovkov **[Error! Reference source not found.]**,

K. V. Gorobets **[Error! Reference source not found.]**). A. A. Gravina points out the excessive repressiveness of the articles of the Criminal Code on economic crimes, while the actual public danger of such acts is not so high **[Error! Reference source not found.]**.

In the context of minimising the risks of unwarranted prosecution, research into compliance is of particular interest¹¹. It is particularly worth highlighting the publications of Y. P. Garmaev, E. A. Ivanov and S. A. Markuntsov **[Error! Reference source not found.]**, G. A. Esakov **[Error! Reference source not found.]**, P. S. Yani and N. V. Prokhorov **[Error! Reference source not found.]**.

Golovin points out in his article that the initiation of criminal proceedings against an entrepreneur without sufficient grounds may constitute a corrupt practice whereby unscrupulous law enforcement officials abuse their powers and initiate or threaten to initiate criminal proceedings, extort an informal payment or other illegal advantages from an entrepreneur and "destroy" his business **[Error! Reference source not found.]**.

The novelty of the author of this study lies in the fact that he focuses on the corruption component of the problem of criminal prosecution of entrepreneurs and attempts to study common corrupt practices in criminal prosecution of entrepreneurs.

This topic needs to be studied in order to further improve legislation and relevant law enforcement practices, as well as to reduce corruption in the prosecution of entrepreneurs and improve the business climate in Russia. In turn, the active development of entrepreneurial activity is a prerequisite for the successful development of the economy **[Error! Reference source not found.]**. In times of crisis COVID-19, there are additionally high expectations of business from the population. According to Edelman Trust Barometer (2021) business in 18 out of 27 countries surveyed has become the institution with the highest trust rating (approximately 60% of citizens from around the world) against the backdrop of declining trust in

⁸ Federal Law of 02.08.2019 N 315-FZ "On Amendments to Articles 108 and 109 of the Criminal Procedure Code of the Russian Federation

⁹ Until the notes, which came into force in April 2020

¹⁰ Deputy Chairman of the Supreme Court talked about criminal prosecution of business // PRAVO.RU [Electronic resource]. URL: <https://pravo.ru/story/217071/> (accessed 13.09.2020).

¹¹ Compliance is a system of compliance with applicable laws and ethical standards.

governments due to restrictive policies¹².

3. Research methods

In this study, a case study plays a predominant role. The author used the materials of the federal Center for Public Procedures "Business Against Corruption" and the Moscow Center "Protection of Business" on the appeals of entrepreneurs with complaints about illegal criminal prosecution. Experts from these platforms *pro bono* review incoming appeals, assess their validity and the possibility of legal support for entrepreneurs by business ombudsmen (federal and Moscow, respectively). These centres act as filters of appeals, screening out those which are insufficiently substantiated and/or represent an attempt by an entrepreneur to abuse the right and illegally take advantage of the Ombudsman's support.

4. Forms of corrupt practices in the prosecution of entrepreneurs

Unjustified criminal prosecution is one of the possible tools of unfair competition between business entities, corporate raiding [**Error! Reference source not found.**], obtaining a monetary payment from a company, etc. Corruptive practices consist of seeking to exert illegal pressure on a competitor, the CEO and/or the beneficiary of a business in order to liquidate a company, seize company assets and funds¹³, comply with departmental KPIs [**Error! Reference source not found.**] etc. From the point of view of the author of this study, **corruption in criminal prosecution** involves the *use of law enforcement tools and powers for personal purposes or for the benefit of others, but not for the purposes for which these powers are intended*. Next, let us highlight a list of common corrupt practices in criminal prosecutions of businessmen. It is important to note that corruption is a latent

phenomenon and therefore the following list of corrupt practices is not exhaustive, but only identifies some of them.

4.1. Unjustified detention

One of the main manifestations of corruption in criminal prosecution is the unjustified imposition of custodial measures of restraint. For example, about one third of all complaints of unjustified criminal prosecution made to the Business Ombudsman indicate a violation of the prohibition set out in part 1.1 of Article 108 of the RF Criminal Procedural Code. 108 of the Code of Criminal Procedure of the Russian Federation¹⁴. Entrepreneurs continue to be imprisoned in pre-trial detention centres on the grounds that the charges are not related to entrepreneurial activity, but to fraudulent activities. For example, when considering an appeal in the interests of the head of the "Nastyusha" group of companies, Igor Pinkevich, the experts of the Federal Centre for Human Rights concluded that the measure of restraint in the form of detention was unreasonable, since the incriminated act was committed in the sphere of entrepreneurial activity. On the basis of the conducted expertise, B.Y. Titov appealed to the General Prosecutor's Office, after which Igor Pinkiewicz was transferred to house arrest¹⁵. P.S. Yani points out four necessary criteria on the basis of which one should conclude whether a crime has been committed in the sphere of entrepreneurial activity. Thus, he points out 1) the necessity to determine the subjects of the crime, 2) the form in

¹⁴ Presidential Commissioner for the Protection of Entrepreneurs' Rights. Report to the President of the Russian Federation - 2021 [Electronic resource]. URL: http://doklad.ombudsmanbiz.ru/doklad_2021.html (accessed: 25.02.2022).

¹⁵ Pinkevich's preventive measure changed after Boris Titov's appeal to the Prosecutor General's Office - Centre for Public Procedures "Business Against Corruption". [Electronic resource]. URL: <http://www.nocorruption.biz/предпринимателю-пинкевичу-изменили/> (accessed: 27.02.2022); Information on case No. 402k-2111/2019 / Moscow City Court [Electronic resource]. URL: <https://www.mos-gorsud.ru/mgs/services/cases/first-criminal-exec/details/5b929d04-1c06-4cb5-86ac-ba5c60c4bdf0?respondent=пинкевич> (accessed: 27.02.2022).

¹² Edelman Trust Barometer - 2021 [Electronic resource]. URL: <https://www.edelman.com/trust/2021-trust-barometer> (accessed: 28.05.2021).

¹³ Presidential Commissioner for the Protection of Entrepreneurs' Rights. Report to the President of the Russian Federation - 2020 [Electronic resource]. URL: http://doklad.ombudsmanbiz.ru/doklad_2020.html (accessed: 15.05.2021).

which the crime is committed (whether it is committed in the forms in which the business activity of the subject is usually expressed), 3) whether the crime is committed *together* with the business activity, as well as 4) the relation of criminal and lawful activity¹⁶. The first three points are reflected in the new note to Art. 210, which was previously imputed to entrepreneurs to prolong the preventive measure, increase the potential punishment and thus increase the pressure on the entrepreneur¹⁷.

As an example of the unjustified imputation of Art. 210 we can cite the case of P.G. Gilyadov, the founder of the shipbuilding firm "Rostzheldostroy". The entrepreneur is accused under Part 4 of Article 159, Article 210 of the Criminal Code in connection with deceit and breach of trust expressed in the supply of machine tools actually manufactured in Italy under the guise of equipment manufactured in Russia in violation of Decree No. 1224 of the Russian Government of 24 December 2013 "On establishing a ban and restrictions on the admission of goods originating from foreign countries, works (services) performed (provided) by foreign persons for the purposes of the procurement of goods, works (services) for national defence and security needs". From the point of view of the lawyer and experts of the Commissioner for the Protection of Entrepreneurs' Rights, Article 210 of the Criminal Code was imputed to P. G. Gilyadov for the purpose of extending the preventive measure of detention (subsequently replaced by house arrest), and pressure on the entrepreneur by tightening the potential punishment¹⁸, as the available case file does not provide a basis for the intent to participate in the activities of the imputed criminal association, the composition of participants,

distribution of roles, etc. are not described¹⁹.

Without addressing the need to take into account the scale of legitimate business and criminal activity, significant corruption risks remain. However, the situation with the imputation of Art. 210 could potentially change due to the political will shown by the President²⁰. G. R. Volkov, Chairman of the Moscow PMC noted that Article 210 was imputed to entrepreneurs much less frequently²¹. However, at the presentation of the section "Criminal Prosecution of Entrepreneurs" in the report of the Commissioner for Entrepreneurs' Rights B.Y. Titov, it was noted that about 38% of entrepreneurs believe that the adoption of the note to Art. 210 had no effect on the problem of baseless criminal prosecution and about 4% - had a negative effect²².

In general, P.S. Yani says that the courts do not fully grasp the above scheme (specifically the fourth point), with the consequence that the situation, in particular with regard to precautionary measures, remains unresolved²³.

4.2. Misclassification of a business offence

The ignorance by the investigating authorities of the commission of a crime in the sphere of entrepreneurial activity has a devastating

¹⁶ NOC for the application of criminal law. Fraud in the field of entrepreneurial activity. Conference-Workshop. 9.06.2020 r. - YouTube [Electronic resource]. URL: <https://www.youtube.com/watch?v=xJ3v22hP5jw> (accessed: 03.05.2021).

¹⁷ Ibid.

¹⁸ Businesses will be freed from the stigma of OCG and indiscriminate tax inspections // Anticorr.media [Electronic resource]. URL: <http://anticorr.media/biznes-osvobodyat-ot-klejma-opg-i-besporядochnyx-nalogovyx-proverok/> (accessed: 25.02.2022).

¹⁹ The criminal case of Gilyadov, the founder of Rostzheldostroy, was handed over to the prosecutor's office // RAPSИ [Electronic resource]. URL: http://rapsinews.ru/human_rights_protection_news/20200817/306160556.html (accessed: 11.11.2020).

²⁰ Putin introduced amendments to the State Duma on the application of Article 210 of the Criminal Code on economic offences // TASS [Electronic resource]. URL: <https://tass.ru/ekonomika/7525177> (accessed: 28.05.2021).

²¹ A meeting of the Public Council of the Centre for Public Procedures "Business Protection" was held on 20 May 2021. [Electronic resource]. URL: <https://www.protectionbusiness.ru/bp-news/news-20-05-2021> (accessed: 28.05.2021).

²² XV All-Russian Conference of Entrepreneurs' Rights Commissioners (May 24, 2021) [Electronic resource]. URL: <https://www.youtube.com/watch?v=ox6gxLL8TM8&t=2133s> (accessed: 28.05.2021).

²³ NOC for the application of criminal law. Fraud in the field of entrepreneurial activity. Conference-Workshop. 9.06.2020 r. - YouTube [Electronic resource]. URL: <https://www.youtube.com/watch?v=xJ3v22hP5jw> (accessed: 03.05.2021).

effect on entrepreneurs not only through the imposition of unreasonably harsh measures of restraint. According to the report of the Presidential Commissioner for the Protection of Entrepreneurs' Rights 2021, most complaints (60.8% in 2020) of unjustified criminal prosecution are filed in connection with Article 159 "Fraud" of the Criminal Code²⁴. Head of the Expert Centre for Criminal Law Policy and Enforcement of Judicial Acts of the All-Russian Public Organization "Business Russia" E. V. Avdeeva pointed out that in case of qualification of swindle under "enterprise" part 5-7 article 159 of the RF Criminal Code, there's a possibility of exemption from criminal liability on the grounds of article 76.1 of the RF Criminal Code and possibility of termination of criminal case under article 28.1 of the RF Criminal Code, if the person compensates the appropriate amount of damage [Error! Reference source not found.]. From the point of view of the head of criminal law practice of EPAM V. A. Burkovskaya, compensation for damages can be a lifesaver for the business, as it allows to remove the arrest of the property of the owner, his relatives, other related persons and the company, as well as to contribute to mitigation of the preventive measure [Error! Reference source not found.]. However, the aforementioned possibility is absent in the imputation of the classic parts. 1-4 of Article 159 of the Criminal Code of the Russian Federation²⁵, which creates an opportunity to put pressure on entrepreneurs.

Another reason for qualifying business fraud as a classical offence may be the standard of proof. For example, P.S. Yani noted that in "simple" fraud three witnesses may be sufficient, whereas in the case of entrepreneurial fraud some twenty witnesses are needed [Error! Reference source not found.]. Thus, the task of exerting corrupt pressure on an entrepreneur is greatly simplified by the use of common criminal offences.

4.3. A "superficial" preliminary enquiry

Significant corruption risks lie in the conduct of pre-investigation. E.L. Sidorenko, General Director of ANO "Platform", noted that about 70% of the appeals of entrepreneurs to the platform "ZaBusiness.RF", contain complaints about the pre-investigation check²⁶. Thus, one of the possible signals of unjustified criminal prosecution²⁷ is the lack of proper pre-investigation and expedited initiation of criminal proceedings on the economic component, as well as misrepresentation of facts in the resolution on initiation of criminal proceedings [Error! Reference source not found.].

In 2018. The Centre for Public Procedures "Business Against Corruption" considered the case of entrepreneur P.A. Kondakov, General Director of LLC "Innovative Composite Materials", accused of embezzlement of more than 60 million rubles. From the point of view of the investigation, P.A. Kondakov supplied equipment to JSC "Information Satellite Systems named after Academician M.F. Reshetnev" (ISS) that did not meet the requirements of the technical assignment of the contract. The Centre's experts in reviewing the case noted that no pre-investigation was actually conducted in the case, criminal proceedings were initiated without any indication of the grounds, and the allegedly aggrieved party made no claims against the entrepreneur²⁸.

4.4. Ignoring prejudice

Article 90 of the Russian Criminal Procedure

²⁴ Presidential Commissioner for the Protection of Entrepreneurs' Rights. Report to the President of the Russian Federation - 2021 [Electronic resource]. URL: http://doklad.ombudsmanbiz.ru/doklad_2021.html (accessed: 25.02.2022).

²⁵ CPC RF Article 28.1. Termination of criminal prosecution in connection with compensation for damages / ConsultantPlus. Law Enforcement Review 2022, vol. 6, no. 3, pp. 224–239

²⁶ The Moscow Region discussed possibilities for protecting businesses from law enforcement agencies [Electronic resource]. URL: <https://xn--80acmfcf0b7a.xn--p1ai/news/news/86> (accessed: 21.05.2021).

²⁷ It is important to note that such practices may be the result of an investigator's error and not a manifestation of corruption.

²⁸ The expert council of the Centre for Public Procedures "Business Against Corruption" has accepted two cases with indications of illegal criminal prosecution of entrepreneurs - Centre for Public Procedures "Business Against Corruption". [Electronic resource]. URL: <http://www.nocorruption.biz/%d1%8d%d0%ba%d1%81%d0%bf%d0%b5%d1%80%d1%82%d0%bd%d1%8b%d0%b9-%d1%81%d0%be%d0%b2%d0%b5%d1%82-%d1%86%d0%be%d0%bf-%d0%b1%d0%b8%d0%b7%d0%bd%d0%b5%d1%81-%d0%bf%d1%80%d0%be%d1%82%d0%b8%d0%b2-%d0%ba/> (accessed: 16.05.2021).

Code establishes the rule that the circumstances established by a judgment in civil, arbitral and administrative proceedings must be recognised by the court, prosecutor, investigator and inquirer without further verification²⁹. However, the article in question refers to absolutely any circumstances that are relevant to the criminal case. In addition, if it is established by a court verdict that a civil law transaction had previously been concluded between the parties to the dispute, then their actions cannot be considered a crime [Error! Reference source not found., p. 285]. Ruling of the Constitutional Court of the Russian Federation of 21 December 2011 N 30-P "On the case of checking the constitutionality of the provisions of article 90 of the Criminal Procedure Code of the Russian Federation in connection with the complaint of citizens V.D. Vlasenko and E.A. Vlasenko" contains the provision that an arbitration court decision may be reviewed, but only in the prescribed manner³⁰, namely, during the investigation of a criminal case under article crimes against justice (Chapter 31 of the Criminal Code) [Error! Reference source not found., p. 41]. However, despite this provision a significant number of criminal cases under article 159 of the Criminal Code of the RF is initiated to illegally challenge court decisions in civil law cases, as well as under article 199 of the Criminal Code of the RF to challenge court decisions regarding the payment of taxes [Error! Reference source not found., p. 42].

One illustration of such a situation is the case of A.N. Dmitriev, General Director of CJSC "UKS of Trade and Agroindustrial Facilities" and I.I. Tazin, former General Director of LLC "EKOLEND", which was considered by the federal Centre for Public Procedures "Business Against Corruption" in 2017³¹. The Centre's experts concluded that

prejudice had been ignored by the investigation. UKS had entered into a contract with EKOLEND for the landscaping of a number of properties in Moscow. EKOLEND subsequently recovered about 46 million roubles in debt from the former. This dispute between the economic actors was resolved by arbitration courts, but the investigation initiated a criminal case under part 3 of article 30 and part 4 of article 159 of the Criminal Code of the Russian Federation, explaining it by the fact that the work allegedly had not been actually done. The client (the Trade and Agro-Industrial Complex) had changed the addresses of the landscaping facilities and, as a consequence, the work was carried out on other facilities, which was confirmed in arbitration³².

4.5. Unreasonable imputation of the commission of an intentional act

A number of specific prosecution cases considered by the Centre for Public Procedures "Business Protection" have pointed to the fact that the investigation has not actually proved the subjective side of the crime, namely the presence of direct intent to commit a crime.

On 11 February 2021, the Moscow-based Business Protection Centre considered the case of K. P. Korsun, General Director of JSC Novosibirsk Ekran Plant, accused of committing crimes under part 3 of Article 30, part 4 of Article 303 of the Criminal Code of the Russian Federation from November 2018 to May 2019. Article 159, paragraph 4, and Article 303, paragraph 1, of the Criminal Code of the Russian Federation. On 25 September 2017, a power line accident occurred that left JSC Novosibirsk Ekran

[Electronic resource]. URL: <http://www.nocorruption.biz/%d0%b8%d1%82%d0%be%d0%b3%d0%b8-%d0%b7%d0%b0%d1%81%d0%b5%d0%b4%d0%b0%d0%bd%d0%b8%d1%8f-%d1%86%d0%be%d0%bf-%d0%b1%d0%bf%d0%ba-%d0%be%d0%b1%d1%80%d0%b0%d1%89%d0%b5%d0%bd%d0%b8%d1%8f-%d1%8d%d0%ba%d0%be/> (accessed: 15.05.2021).

³² Intervention of the Commissioner helped to stop unjustified criminal prosecution of entrepreneurs // Inform-24: Parliamentary news [Electronic resource]. URL: <https://inform-24.com/16369-vmeshatelstvo-upolnomochennogo-pomoglo-ostanovit-neobosnovannoe-ugolovnoe-presledovanie-predprinimatelej.html> (accessed: 16.05.2021).

²⁹ CPC RF Article 90. Prejudice / ConsultantPlus.

³⁰ Decision of the Constitutional Court of the Russian Federation of December 21, 2011 N 30-P "on the case of verification of constitutionality of the provisions of Article 90 of the Criminal Procedure Code in connection with the complaint of citizens V.D. Vlasenko and E.A. Vlasenko" - Rossiyskaya Gazeta.

³¹ Results of the BPC CPC meeting: appeals of Ecoland and Probusinessbank accepted for further work - Centre for Public Procedures "Business Against Corruption".

Plant without electricity for more than two hours. This, in turn, led to a breakdown of the glass-making equipment. The management of Ekran sued Novosibirskenergosbyt for damages³³. However, a lawsuit was filed against K. P. Korsun had a criminal case opened where he was accused of causing this technogenic accident. After reviewing the case file, the experts concluded that, apart from the fact that the applicant had been granted power of attorney to represent him in the arbitration court, no evidence of either the objective or subjective side of the offence had been produced³⁴. In fact, the applicant had been ascribed an intent to commit embezzlement by deception. The case was also considered at a meeting of the federal "Business Against Corruption" Centre, where the case underwent further examination and was referred to the Presidential Commissioner for the Protection of Entrepreneurs' Rights³⁵.

5. Causes of corruption in the prosecution of businessmen

As a general rule, corruption as a socio-legal phenomenon has many causes. These include a low level of ethical standards and attitudes, inadequate law and law enforcement practices, lack of inevitability of punishment, low level of social control and many others. Apart from the

general reasons, corrupt practices in criminal prosecution have their own specific reasons. Here are some of them.

5.1. The wording of the law and its interpretation

One source of corrupt practices in the prosecution of businessmen is the wording of legislation that provides opportunities for abuse. As already noted, most complaints of unjustified criminal prosecution are made in connection with Article 159 "Fraud" of the Criminal Code. I. A. Klepitsky, based on a comprehensive study of foreign experience and historical development of the norm of fraud, criticises the wording of Article 159 of the Criminal Code of Russia. The danger of property crimes is mainly the infliction of harm rather than illegal taking of other people's things [Error! Reference source not found., p. 278-279], whereas the definition of fraud given in article 159 of the Criminal Code of the RF consists of theft of another's property or acquisition of the right to it. In a situation of low legal technique there is a problem of further application of this article by analogy (expressly prohibited by part 2 of article 3 of the Criminal Code of the RF), including for corrupt purposes [Error! Reference source not found., p. 278-279].

Another problem associated with Article 159 of the Russian Criminal Code is the official interpretation of the concept of mercenary intent. B. V. Khilyuta with reference to the Resolution of the Plenum of the Supreme Court of the RF of 30 November 2017 № 48 "On judicial practice in cases of fraud, misappropriation and embezzlement" indicates a broad interpretation of mercenary intent, which includes not only theft of another's property in favor of themselves or dependents, but any other persons, in this regard, this category loses specificity [Error! Reference source not found.]. This broad interpretation may create additional corruption risks for entrepreneurs as it provides more opportunities for unjustified prosecution.

5.2. Limitations and imprecision of the law

There is a widespread practice of using criminal case files in arbitration and civil

³³ Searches at RATM Holding's plant in Novosibirsk :: Novosibirsk :: RBC [Electronic resource]. URL: <https://nsk.rbc.ru/nsk/15/10/2020/5f87f72b9a794785c15c9a72> (accessed: 16.05.2021).

³⁴ A meeting of the Public Council of the Business Defence Centre was held on 11 February. [Electronic resource]. URL: <https://protectionbusiness.ru/bp-news/nevs-11-02-21> (accessed: 16.05.2021).

³⁵ The Centre for Public Procedures "Business Against Corruption" considered the appeals of the managers of JSC Novosibirsk Ekran Plant and PKO ASTOR LLC - Centre for Public Procedures "Business Against Corruption". [Electronic resource]. URL: <http://www.nocorruption.biz/%D1%86%D0%B5%D0%BD%D1%82%D1%80-%D0%BE%D0%B1%D1%89%D0%B5%D1%81%D1%82%D0%B2%D0%B5%D0%BD%D0%BD%D1%8B%D1%85-%D0%BF%D1%80%D0%BE%D1%86%D0%B5%D0%B4%D1%83%D1%80-%D0%B1%D0%B8%D0%B7%D0%BD%D0%B5%D1%81-7/> (accessed: 16.05.2021).

proceedings [Error! Reference source not found.; Error! Reference source not found.]. In this regard, one of the purposes of criminal prosecution may be to collect evidence for an arbitration dispute. Unlike countries of the Anglo-Saxon legal family, in Russia there is no clear obligation to disclose absolutely all the evidence relevant to the case [Error! Reference source not found.], which is a significant limitation. Subsequently, this restriction contributes to the initiation of criminal prosecution in order to collect the necessary evidence, which can be attributed to the manifestation of corruption.

Quite a significant limitation of the criminal procedural law is the absence of economic crimes in the jury trial jurisdiction, in particular art. 159 of the Russian Criminal Code. V. M. Lebedev, chairman of the Supreme Court of the Russian Federation, agreed with the suggestion of B. Y. Titov, the commissioner for the protection of entrepreneurs' rights, to expand the corresponding jury trial jurisdiction³⁶. From the point of view of the legal community, this change could create additional guarantees of protection of entrepreneurs from unlawful criminal prosecution and corruptive pressure³⁷.

5.3. KPIs of law enforcement agencies

One of the significant reasons for the emergence of corrupt practices in criminal prosecution of entrepreneurs lies in the adopted performance indicators of law enforcement bodies, both formal and informal. Order of the Ministry of Internal Affairs of 31 December 2013 No. 1040 "Issues of Evaluation of Activities of Territorial Bodies of the Ministry of Internal Affairs of Russia" regulates the performance indicators of the relevant law enforcement bodies. E. E. Novichkova

and M.M. Shakhmayev point out that of significant importance in the departmental evaluation is the parameter of the number of solved crimes per employee, which contributes to the increased workload of investigators, as well as their interest in a particular outcome of cases [Error! Reference source not found., p. 69].

Experts from the Institute for Law Enforcement Issues have identified several key problems with crime statistics, one of which is the purpose of their use. For example, indicators on detected crimes are mainly used to assess the effectiveness of law enforcement agencies rather than to analyse the crimes committed and improve countermeasures against them [Error! Reference source not found., p. 85]. In addition, this kind of KPIs exacerbate the existing imbalance in the criminal process between the prosecution and the defence [Error! Reference source not found., p. 196], which contributes to an increased risk of corruption pressure on entrepreneurs.

As an illustration of the negative manifestation of the adopted KPIs, the practice of "two-day" criminal cases on tax crimes can be cited. V.A. Burkovskaya noted that at the time of the act of the tax authority on the completion of the audit, the materials are automatically sent to the investigating authorities to initiate a criminal case in order to accelerate the payment of the identified arrears. In this respect, it is recommended that entrepreneurs should first pay the fine and penalty arrears and then challenge in arbitration court the additional charge if the tax authority has made a mistake. However, even though the disputed arrears and penalties have been paid in full, there is a practice of initiating criminal proceedings for tax offences several years later. In such cases, investigators have openly suggested that the suspect should write a petition for termination of the criminal case³⁸.

5.4. Ethical reasons

A low level of ethical compliance encourages the use of state regulatory instruments (in this case

³⁶ Head of the Supreme Court supported Titov's proposal to consider economic cases by jury trial // TASS [Electronic resource]. URL: <https://tass.ru/ekonomika/9830525> (accessed: 16.05.2021).

³⁷ Lawyers supported proposal to expand the competence of jury trial by economic crimes [Electronic resource]. URL: <https://www.advgazeta.ru/novosti/advokaty-podderzhali-predlozhenie-rasshirit-kompetentsiyu-suda-prisyazhnykh-ekonomicheskimi-prestupleniyami/> (accessed: 16.05.2021).

³⁸ Online discussion of AB EPAM "No-nonsense risks: how to protect business" // RBC Pro [Electronic resource]. URL: <https://pro.rbc.ru/demo/6049e04d9a79479947991473997c> (accessed: 16.05.2021).

criminal prosecution) for personal gain [**Error! Reference source not found.**, p. 41]. The majority of unsubstantiated criminal cases against entrepreneurs result from a conflict with another business entity (about 37 % of the total number), as well as from the interest of public officials (about 41 %) ³⁹. The team of the Project Learning Laboratory for Anti-Corruption Policy of the National Research University Higher School of Economics, to which the author of this study belongs, noted that a significant part of the principles and norms laid down in the ethical codes of public authorities are of declarative nature [**Error! Reference source not found.**], which contributes to abuses, including in criminal prosecutions.

5.5. Low level of public scrutiny

From Tikhomirov's point of view, an active civil society is required for proper and effective enforcement, but in Russia this institution is currently insufficiently active [**Error! Reference source not found.**, p. 92]. Along with transparency of laws and predictable law enforcement, impartiality of public administration, civil society has a significant anti-corruption value [**Error! Reference source not found.**, p. 557]. The Centre for Public Procedures "Business Against Corruption" and the "Business Defence" Centre, acting as a filter of incoming applications and quality legal expertise, on a *pro bono* basis handle on average about two to four criminal cases per month, which is not much in the total volume of all complaints of unjustified criminal prosecution against commissioners. There is a need for state support for these platforms to expand the coverage of prosecution cases.

6. Recommendations to reduce corrupt practices in the prosecution of entrepreneurs

As stated earlier, corrupt practices in the prosecution of entrepreneurs have a significant

negative impact on the investment climate and business activity in the country [**Error! Reference source not found.**]. Active work on a number of fronts is needed to mitigate the risks of such practices occurring.

6.1. Improving legislation

Systematic work is needed to improve the current legislation, including the elimination of existing contradictions and restrictions that can become an opportunity for abuse. The March 2021 novelties of article 81.1 "Procedure for admitting items and documents as physical evidence in criminal cases of crimes in the sphere of economy" and article 164 "General rules of investigation" of the Criminal Procedural Code, related to the clarification of the concept of crimes in the sphere of business activity, can be positively assessed. Thus ⁴⁰, Article 164 of the CPC of the RF sets out a ban on unjustified measures leading to the suspension of entrepreneurial activity "if these crimes are committed by an individual entrepreneur in connection with his entrepreneurial activities and (or) management of his property used for entrepreneurial activities, or if these crimes are committed by a member of the management body of a commercial organisation in connection with the exercise of his powers to manage the organisation or in connection with the implementation of commercial activities. However, this innovation is criticised by the potential insignificant influence of the specified clarifications on the actions of the law-enforcer ⁴¹. E. V. Avdeeva noted that the provisions of Art. 81.1 and Art. 164 of the RF Code of Criminal Procedure continue to be ignored, since crimes are not recognised as having been committed in the sphere of entrepreneurial activity ⁴².

⁴⁰ CPC RF Article 164. General rules for investigative actions / ConsultantPlus

⁴¹ A law clarifying the procedure for recognising items and documents as evidence under economic articles of the Criminal Code is passed [Electronic resource]. URL: <https://www.advgazeta.ru/novosti/prinyat-zakon-utochnyayushchiy-poryadok-priznaniya-predmetov-i-dokumentov-veshchdokami-po-ekonomicheskim-statyam-uk/> (accessed: 18.05.2021).

⁴² XV All-Russian Conference of Entrepreneurs' Rights Commissioners (May 24, 2021) [Electronic resource].

³⁹ Presidential Commissioner for the Protection of Entrepreneurs' Rights. Report to the President of the Russian Federation - 2020 [Electronic resource]. URL: http://doklad.ombudsmanbiz.ru/doklad_2020.html (accessed: 13.09.2020).
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This criticism is one illustration of the fact that improving legislation is not a panacea for combating corrupt practices when prosecuting entrepreneurs. In addition to adjusting the law, the potential of other anti-corruption tools and techniques needs to be exploited.

6.2. Ethical regulation

Discretionary powers cannot be completely eliminated, and are moreover extremely useful subject to "catch-up" institutions and a commitment to high ethical principles on the part of officials [Error! Reference source not found.]. Furthermore, regulating all necessary procedures and rules does not exclude opportunistic behaviour and financial incentives for employees may not always be in line with their expectations. In this regard, the issue of introducing ethical management tools not only to public authorities, but also to business structures is quite relevant, since the latter are often the customers of unjustified criminal prosecution. Ethical governance includes the significant role of public service and/or organizational values, a favorable organizational culture, ethical leadership and trust [Error! Reference source not found.].

Values clusters such as openness, honesty, reliability, professionalism, equal treatment for all, practicality, loyalty, flexibility, etc. [Error! Reference source not found.] should not be declarative for employees. It is important that officials and others base their work on these values (especially when making atypical decisions) as recorded in a code of ethics.

A working code of ethics should include all the core values of the organisation. It should be guided by the following: the text of the code should be logically structured, with each section dealing with a specific ethical issue; the code should be compact and readable so that it can be fully read; it should reflect the main potential ethical challenges that employees may face (such as conflicts of interest); where several interpretations or abstract provisions are possible, illustrative examples are needed. In addition, special attention needs to be paid to presentation

style. Large companies, following high-profile scandals, have begun to use the personal pronoun "we" in codes of ethics in order to make employees feel an additional sense of belonging to the organisation. However, a recent study shows that this approach, as opposed to impersonal treatment (e.g. "employee"), creates a condescending perception of the company and also reduces the expectation that punishment is inevitable [Error! Reference source not found.]. When drafting a code of ethics, it is advisable to involve employees of the organization in order to develop a document that is as targeted and clear as possible and to avoid the "top-down" effect [Error! Reference source not found.].

6.3. Modernizing KPIs for law enforcement agencies

In order to avoid the so-called "stick system" and its consequences, the role of non-departmental evaluation indicators should be increased [Error! Reference source not found., p. 17]. Traditional metrics not only provoke a "race to the bottom" but are generally insufficiently informative. One of the criticisms of uninformative metrics is non-obvious causality of indicators. Thus, decrease in the number of registered crimes can be a consequence of decrease in trust to law enforcement system and consequently in appeals of citizens rather than decrease in general crime rate [Error! Reference source not found.]. Another problem is that the statistics do not reflect "non-criminal" routine work that police officers have to perform on a regular basis (e.g. writing reports, answering appeals, making phone calls, etc.), while this type of activity may constitute a significant proportion of all working time [Error! Reference source not found.].

T. Hodgkinson, T. Caputo, M. L. McIntyre have proposed the introduction of a network approach to evaluating the effectiveness of law enforcement agencies, which consists of a joint definition of goals and metrics between law enforcement agency leadership and stakeholders, including taking into account the views of local communities [Error! Reference source not found.]. In the view of the author of this study, a shift to a greater use of social research methods to identify and measure KPIs for law enforcement agencies

would be optimal at this time. The research methodology could be developed by some of the country's leading research centres. At the moment, the evaluation of the effectiveness of the law enforcement agencies, based on sociological data, is insufficiently institutionalised and transparent [Error! Reference source not found., p. 267].

6.4. Increasing the role of the Presidential Commissioner for the Protection of Entrepreneurs' Rights

At the moment the actual powers of the business ombudsman are considerably limited, which means that the institution is not working efficiently enough [Error! Reference source not found., p. 420]. For example, the ombudsman has no rights in criminal proceedings established by the RF Code of Criminal Procedure. From the point of view of R. O. Dolotov and the author of this article, the powers of the Business Ombudsman to further guarantee their rights should be significantly expanded, in particular, it is proposed to make him a full participant in criminal proceedings (for example, article 60.1 "Business Ombudsman" in Chapter 8 "Other participants of criminal proceedings" of the CPC RF) [Error! Reference source not found.].

6.5. Digitalization

Digitalisation tools have a positive impact on reducing the prevalence of corruption [Error! Reference source not found.]. Repeatedly, the Commissioner for the Protection of Entrepreneurs' Rights B.Y. Titov has proposed to introduce a digital record of criminal cases⁴³. This could significantly increase transparency of criminal proceedings, the possibility to control the work of law enforcement agencies at all stages of work. A similar positive global experience exists in Germany [Error! Reference source not found.], Saudi Arabia, Georgia, Singapore and other countries [Error! Reference source not found.]. B. V. Momotov, Secretary of the Plenum of the Supreme Court of

the Russian Federation, noted that artificial intelligence could help unify judicial practice in accordance with the decisions of higher courts⁴⁴, which would have a positive impact on the quality of judges' work and reduce opportunities for abuse.

7. Conclusion

The article identified and analyzed the main typical corrupt practices in the prosecution of businessmen. For the purposes of this study, corrupt practices were defined as the use of law enforcement tools and powers for personal purposes or for the benefit of others, but not for the purposes for which these powers were intended. Such practices included the following: unjustified use of preventive measures in the form of detention in contravention of the direct prohibition of Part 1. 1. art. 108 of the CPC RF; ignoring the fact of committing a crime in the field of entrepreneurial activity and, as a consequence, qualification of the crime not under the special business corpus delicti, but under the common crimes; "superficial" preliminary investigation, resulting in a criminal case without proper grounds; ignoring the prejudicial facts established by arbitration courts; unjustified imputation of an intentional act, that is presumption of the subjective side of the crime.

The reasons for the corrupt practices highlighted and investigated by the author are such factors as the wording of the law and its interpretation, limitations and imprecision of the law that allow discretion on the part of law enforcers; the established KPIs of law enforcement agencies that encourage "performance chasing" and prosecutorial bias in legal proceedings; declarative ethical standards adopted by public authorities and companies, i.e. lack of effectively implemented ethical governance tools; low level of public scrutiny of the

In order to minimize these practices, it is necessary to further improve regulations, encourage ethical regulation in organizations; modernize the metrics for evaluating the effectiveness of law

⁴³ Titov proposed to introduce digital recording of criminal cases // RBC [Electronic resource]. URL: <https://www.rbc.ru/society/20/11/2018/5bf3bb569a7947198771b88e> (accessed: 19.05.2021).

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⁴⁴ Information and Communication Technologies in Justice // Zamyatin Expert Club Meeting. 26 May 2021. [Electronic resource]. URL: <https://www.youtube.com/watch?v=2x70p1wmL1g&t=4s> (accessed: 07.06.2021).

enforcement agencies by emphasizing non-departmental parameters; significantly increase the role of the business ombudsman institution as an additional guarantor of legal rights and interests of entrepreneurs; and actively introduce digitalization tools, in particular digital records of criminal cases.

It is important to reiterate that the author does not pretend to cover all possible corrupt practices in the prosecution of businessmen and their causes. For example, there is the perverse practice of reclassifying a witness in a criminal case after testifying as a suspect and subsequently as a defendant⁴⁵. Further research could look at each of these corrupt practices in more detail, identifying and analyzing additional practices and exploring possibilities for their mitigation. In terms of applied implementation of the research findings, it seems that they may be useful to decision makers when improving criminal policy towards entrepreneurs on the one hand, but also to entrepreneurs themselves to understand the potential criminal law risks that they may face and have to minimize.

⁴⁵ From witnesses to defendants (suspects): when is it possible // Criminal Lawyer [Electronic resource]. URL: <https://www.advo24.ru/publication/iz-svidetelya-v-obvinyayemye-podozrevaemye.html> (accessed: 18.05.2021).

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BIBLIOGRAPHIC DESCRIPTION

Porosenkov G.A. Typical corrupt practices in the criminal prosecution of businessmen. *Pravoprimerenie = Law Enforcement Review*, 2022, vol. 6, no. 3, pp. 224–239. DOI: 10.52468/2542-1514.2022.6(3).224-239. (In Russ.).