

WHITE-COLLAR CRIME



GRATA

INTERNATIONAL IN RUSSIA

CRIMINAL LAW AND ECONOMIC REGULATION

In keeping with GRATA International's practice of informing clients regarding important legal developments that might affect their business, we highlight the impact of criminal law on business.

1. Current Status of Criminal Law Regulations affecting Business

On 16 February 2016, on the instructions of the President of the Russian Federation, a working group of the presidential administration was formed to monitor law enforcement in the area of entrepreneurship. The group will act a mediator in the relationship between law enforcement agencies and business. This is indicative of the increasing interest of the state in the criminal and legal risks of entrepreneurship.

In 2016, the business ombudsman (Boris Titov) presented to the President of the Russian Federation a report on the criminal prosecution of entrepreneurs. According to the report, since 2008, Russia has been actively taking measures to reduce the impact of criminal legislation. During this period, the number of sentences pronounced by the courts and the number of persons in prison and pre-trial detention facilities decreased. According to the Main Information and Analysis Centre of Ministry of Internal Affairs of Russia and the General Prosecutor's Office of Russia, in the period of 2009 through 2016, the total number of crimes per a year saw a one and a half times decrease. Figures produced by the Federal Penitentiary Service of Russia for the same period showed that the number of people in correctional camps, prisons and detention centres had decreased by 30%. Several reforms of criminal and criminal procedural legislation were adopted (decriminalisation of acts, payment of damages as a ground for the termination of criminal prosecution, etc.). In addition, there was an economic amnesty (2013), amnesty to commemorate the 20th anniversary of the Constitution (2013), amnesty to mark to the 70th anniversary of the Victory in the Great Patriotic War (2015).

In contrast to the trend to reduce the number of economic crimes, the number of criminal prosecutions increased in recent years. Thus, in 2016 the law enforcement agencies registered 260,065 economic crimes, and initiated over 240,000 criminal cases, which is more than in previous years. This is despite the increase in the damage thresholds on economic crimes by 1.5-2 times.

Despite the limitations on the use of detention for economic crimes, until 2017 there was a significant increase in the number of persons staying in detention facilities (from 2012 - by almost 1.5 times). A significant decrease in this as of February 2017 compared to 2016 was as a result of the implementation of the provisions of the Resolution of the Plenum of Supreme Court of Russia No. 48 'On Judicial Application of Legislation that Regulates the Specifics of Criminal Liability for Crimes in the Area of Entrepreneurial and Other Economic Activities'.

At the same time, the number of cases on economic crimes that have reaching the court decreased (by about 20%). However, searches, interrogations of employees and heads of enterprises are still conducted, as well as documents and property seized, etc. This trend is explained by the fact that today criminal prosecution of business is often a means of corrupt pressure and the settlement of economic disputes 'in a different manner' through the obtaining of documents and information, discrediting and destroying the business of competitors.

According to Professor of the Academy of the Ministry of Internal Affairs of Russia, Ivan Solovyov, quoted in 'Expert', an authoritative business publication: "today business is often seized at the stage of a businessman's arrest, and at that stage the prosecutor is powerless, even if he does not agree with the investigator's request. The best argument in support of such an initiative is the statistics quoted by the president: 200,000 cases were initiated, while only 15% resulted in sentences."

Criminal Practice

What we do:

Representing clients in relations with the law enforcement and regulatory authorities (prosecutor's office, Department for Fighting Against Economic Crimes (OBEP), other departments of the MIA, IFTS, DFTS, etc):

- General advising during on-site/off-site inspections in presenting explanations.
- Participating in inspections, seizures and searches, taking part in negotiations.
- Development of protection measures.

Defence in criminal proceedings:

- At the stage of pre-investigation check.
- At the stage of inquiry and preliminary investigation.
- At the stage of trial.
- At the stage of sentence appealing to cassation and supervisory boards.

A good example of such a trend is the so-called 'fraud articles'. Thus, the Article 159 of the Criminal Code of the Russian Federation 'Fraudulent Practice' is still of a broad nature, which allows it to be used to prosecute for civil law violations.

In 2011, 147,468 crimes were registered under Article 159 of the Criminal Code of the Russian Federation 'Fraudulent Practice' being the only effective at that time. When the Article was supplemented with some new crime components in 2012 (Articles 159-159.6), the number of crimes registered on them was constantly increasing. In 2016, 208,926 crimes were registered for 'fraudulent' articles (178,077 criminal cases were initiated). On the contrary, the total number of persons convicted under Articles 159-159.6 of the Criminal Code of the Russian Federation decreased (from 25,090 in 2013 down to 21,753 in 2016, including for imprisonment - from 5,662 down to 5,482). In 2013, about 20% of cases were resulted in a guilty verdict on these articles, while in 2016 - this number decreased down to 12%.

2. Criminal Risks of the Entrepreneurship

The criminal risk takes the form of claims from law enforcement agencies (ranging from formal investigations to the initiation of criminal proceedings). For a businessman such risk destabilises his/her activity as a result of the seizure of media, criminal records and even business 'seizure' itself.

This can all be prompted by reports to law enforcement agencies from competitors, banks, auditors, 'offended' employees and tax authorities.

What triggers criminal procedures?

First, it is a company's own activity being activities that violate the law or which can be treated as such.

In practice, the main violations are:

- tax avoidance;
- underestimation of value for customs purposes;
- failure to perform contractual obligations;
- violation of the auction rules;
- violation of intellectual property rights.

Second, violations by the counterparties:

- a) failure to perform tax liabilities (for instance, application of a tax deduction for a transaction with a company that is suspected of evading taxes; when your counterparties are under scrutiny, law enforcement agencies may have questions for you as well).
- b) failure to perform contractual obligations by a co-contractor.
- c) dealings with a fly-by-night company (according to the court position, a director of a company which transferred funds to the account of such a fly-by-night firm, will be deemed to know the nature of the firm).

Third, there can be the issuance of an 'order' of the state or competitors.

Effective methods to neutralise these risks include the following.

i. In case of wilful or unintentional violation of law by the company itself:

- analysis of the profit accumulation scheme (understanding of how the production cycle, sales and formation of pre-tax profits operates, and then considering whether the company has been paying its taxes)
- assessment of labour relationships (inspections by the safety department, including during the labour activity of an employee, rather than when first hired)
- analysis of intra-corporate relations
- analysis of the performance of obligations of counterparties
- analysis of relationships with competitors .

Special attention must be given to the likelihood of investigative measures and potential seizure.

How to prevent the leak of information crucial for your business?

First, a code regarding trade secret should be set up. Details thereon can be found in the Federal Law 'On Trade Secrets'. In summary, the process consists of several stages: drafting and issuing regulations on commercial secrets, approval of the list of information and documents, and then compiling a list of persons working with the information that constitutes a trade secret and amending the employment contracts of such persons. The hard disks of computers which contain information containing commercial secrets should be marked as such.

Pursuant to Article 183.3 of the Criminal Procedure Code of the Russian Federation, the seizure of documents containing commercial secrets requires a court order. The same is required by the Federal Law 'On Investigative Activity' and the corresponding instruction of the Ministry of Internal Affairs of the Russian Federation for the examination of business premises.

Second, a video surveillance system will help in proving illegal and unjustified actions by law enforcement agencies. It is relevant in case of an examination of the premises by officers during police checks.

Third, documents should be stored in a proper manner. In particular, confidential documentation should be kept in lockers; otherwise law enforcement officers can seize the documents during the examination. The server should be located in a separate room or in a remote data-centre.

Finally, it is also very important to prepare employees at the initial stage of an inspection and examination. There are often cases of employees being confused by law enforcement officers during interviews and interrogations. Here you can rely on Article 51 of the Constitution of the Russian Federation; if a person interviewed or interrogated believes that the information he/she has reported to law enforcement agencies will be used against them, he/she shall have the right not to testify against oneself.

ii. Violation of Law by the Company's Counterparties

First, it is necessary to identify fly-by-night firms, which under some circumstances may be your counterparties. In such a case, there is high probability that the company's director will be made criminally liable if the company transferred funds to or for such a fly-by-night firm.

How to Avoid Such Situations?

At the outset, verify the registration of a legal entity, its tax profile (no outstanding taxes), and powers of the signatory. In more detail, a list of documents and actions required:

- certificate of registration with the tax authority;
- extract from the Unified State Register of Legal Entities;
- order on the general director appointment;
- copy of the passport of the general director (for specimen signature);
- balance sheet (in the form of a certificate to be requested from the counterparty);
- accounting reports (in the form of a certificate to be requested from the counterparty);
- request on the debt to the budget (the tax authority may refuse, but the request may state: "no response to this request will be treated as the absence of debt of the counterparty).

iii. Order' by Competitors

In addition to proving non-involvement in the commission of a crime, it may be advisable in these cases to involve the media in order to demonstrate that the criminal case has been fabricated.

3. Our Assistance

Our company can offer the following services:

- Advising on business security and minimising criminal risks.
- Identification of unreliable business partners (fly-by-night firms, etc.).
- Legal review of your company's documentation to identify and minimise criminal and legal risks.
- Representing managers and employees of your company in the course of pre-investigation checks by law enforcement agencies and investigations in connection with criminal cases.
- Complex criminal and legal protection of your business.

Attorneys and lawyers of GRATA International have extensive experience in protecting clients in the area of economic crimes in the territory of the Russian Federation.

Our latest cases include:

- Successful protection of top managers of a large oilfield service company accused of commercial bribery. As a result of the investigation, the criminal case was dismissed.
- Successful representation of a leading businessman during a pre-investigation check on an illegal acquisition of a company's stake. No charges were brought.
- Successful representation of owners of a large meat-packing plant suspected of collusion with former business owners for the purpose of evading taxes. No charges were brought.
- Successful representation of a large international company as part of an investigation connected with a criminal case against the top managers of the Russian branch of the company on charges of non-payment of taxes.

We hope this Legal Alert of the GRATA Criminal Practice is of use. Please let us know if you have any questions. We would be glad to be of assistance.

As we are constantly trying to improve the quality of our services, we would highly appreciate your recommendations or comments as to how we can serve you better. Furthermore, if there is anything we omitted to mention when working on a project of yours, please do let us know.

Comments and recommendations can be sent to dgerasimov@gratanet.com. We will make sure we fix any problems and continue to offer you the best service we can.

Sincerely yours,

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