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Joint EU/CoE project on Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices

Technical Paper:

Proposals for strengthening the prevention of misuse of public authority in the corporate sector in the Russian Federation

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1 EXECUTIVE SUMMARY

Healthy investment environment requires that the legal framework and the application of laws in practice protect businesses against harassment and other abuse from both competitors and public authorities. Corporate conflicts should be resolved and acquisitions made based on transparent, predictable, fair, and as much as possible efficient and clear rules.

Public authorities have wide powers that affect every enterprise and entrepreneur and they are necessary to safeguard the public interest. The misuse of these powers can have disastrous effects on legitimate business disregarding whether the misuse is result of incompetence or – even worse – due to selfish corrupt intents of public officials or by misuse the public authorities by business competitors as a means for the advancement of their malicious private interests.

It is of fundamental importance to introduce procedures and measures to provide adequate guarantees against abuse in criminal investigation. For example, it should be possible to stay proceedings where abuse of process by investigators or prosecutors makes it impossible to give the accused a fair trial. Judicial overview over the criminal investigation stage should be strengthened, for example, by creating specialized judges charged with reviewing any investigative measure. Effective access to information about rights and the accusation should be acknowledged to individuals during the pre trial stage, for example, by granting them access to sufficiently detailed information on the charges and evidence gathered against them. Searches and seizures should respect the protection of confidential business information and trade secrets. Due consideration should be given to the impact of searches and seizures on the ability of an enterprise to continue its business activities.

An anti-raiding law should be considered in the Russian Federation with a precise definition of an illegal raid and its constitutive elements. Based on this law, respective criminal law provisions could be introduced. It must be possible to hold liable both the physical and the corporate perpetrators and apply to both such sanctions that are effective, proportionate and dissuasive. The criminal law should contain provisions against bribery in the private sector in line with international standards.

Prosecutors should guard against the criminal law being used for debt collection purposes or to protect the commercial interests of companies and organisations. Measures should be introduced to identify, prevent and punish behaviour that does not represent the good faith exercise of such rights as access to court and defence rights. Criteria of evidence and other measures concerning interlocutory injunctions should be considered to balance rights of all of the involved parties.

Insolvency administrators should be supervised by bodies, which are independent and prepared to set standards reflecting principles of fairness, impartiality, transparency and accountability. A good case can be made that bankruptcy proceedings should be overseen by, where possible, independent judges specializing in bankruptcy matters.

It is a vital public interest that the contents of enterprise registers and the like are correct and exhaustive as required by law. It is important to consider measures to facilitate access to the data including notifications concerning applications to change entries concerning a particular entity. Documents, which constitute the basis for change in the constituent documents of a legal entity, must be notarized. A notary should be required to verify the documentary justification for the decision on amendments to the constituent documents.

It is necessary to prepare for the establishment of administrative courts in the Russian Federation. A key reason for the need to establish such courts is the need to improve opportunities for businessmen to protect their property rights against unlawful acts of the State. Under judicial review, a tribunal should be in a position to examine all of the legal and factual issues relevant to the case. The judicial review should be effective, which includes the ability to restore a lawful situation and compel or prevent a new decision or action by an administrative authority where appropriate.

2 INTRODUCTION

This paper contains proposals for the strengthening of the integrity and rule of law measures for the prevention of the misuse of public authority in corporate conflicts, elimination of competition, and forced takeovers. The proposals have been developed based on the analysis of types of misuse, international standards and experience of member States of the Council of Europe. The full analysis is available in a separate paper.

The area covered by the subject of analysis is extremely broad. Therefore the approach to issues covered by the analysis and the proposals is necessarily selective. A wide variety of misuse of public authority can allow for, lead to or facilitate illegitimate attacks and distortions in the market.

To prevent such misuse as much as possible, a country needs to constantly review and keep improving its whole anti-corruption policy. This includes but is not limited to the need to monitor and, where necessary, strengthen recruitment practices in authorities that interact with the business, education of public officials and business people about corruption risks, control over conflicts of interest and assets of public officials, real implementation of the public-sector and business ethics principles, other preventive measures within the private sector, integrity, fairness and efficiency of the public procurement system, access to information, whistle-blower protection, combating of organized crime and money laundering.

However, the proposals in this paper do not cover all elements typical of an anti-corruption framework. Neither do they aim to cover the whole field or constitute a comprehensive recipe. They cover some rather specific areas of relevance for the rule of law where the potential for abuse appears high:

Criminal Procedure

- Prevention of misuse in criminal investigation;
- Search, seizure and confiscation;
- Preclusive effects in criminal cases;
- Corporate liability for criminal offences;
- Liability for corruption in the private sector;
- Overuse and misuse of the criminal law in the regulation of business activity;

Civil Procedure

- Prevention of procedural abuse;
- Interlocutory injunctions in civil matters;
- Preclusive effects in civil and commercial cases;
- Limits to the protection of good faith purchasers;
- Misuse of insolvency proceedings;

Administrative Procedure

- Registration of legal entities and the role of notaries;
- Administrative judicial review and State liability for damages;
- Administrative inspections;
- Implementation of competition policies.

The proposals and the underlying analysis were prepared with special attention to the Russian Federation. Therefore some of the proposals focus on particular provisions of the legislation of this country (marked as proposals for the legislation and practice of the Russian Federation). However, others are based on the more general analysis of the international experience and rely on the experts' conclusions about the good practice and most relevant international standards (marked as proposals for discussion). Thus not all of the proposals imply that there is a particular deficiency in the law or practice of the Russian Federation.

The proposals also differ as to their level of detail. This is due to the findings of the underlying analysis, which, in some areas identified the main principles that should be adhered to while, in others, found concrete elements and particular procedures that should be in place. Moreover not all the proposals would require amendments to the primary legislation. Some of them could be introduced in bylaws, internal regulations of agencies or just in the implementation and court practice.

3 CRIMINAL PROCEDURE

3.1 Prevention of misuse in criminal investigation

Proposals for the legislation and practice of the Russian Federation

1. Introduce safeguards and a detailed procedure with precise time limits concerning the obligation of all institutions, enterprises, organizations, officials and citizens to comply with requests, orders and inquiries of a public prosecutor, investigator, an inquirer or a body of inquiry. The legislation of the Russian Federation provides a fairly exhaustive list of means for effective verification of reports of crime, however safeguards against abuse for enterprises and other organizations are scarce.

2. Introduce in the legislation of the Russian Federation the concept of "entrepreneurship" as well as the notion of "crime in business" clearly distinguishing the terms "fraud" and "fraud in business". Under provisions of illegal enterprise a company should be considered unlawful only if its activity, object or goal is contrary to peremptory norms, public order or public decency. It is also necessary to provide additional special substantive and procedural guarantees resulting from the characteristics of entrepreneurial activity and protecting businesses from illegal criminal prosecution.

3. An anti-raiding law should be considered in the Russian Federation with a precise definition of an illegal raid and its constitutive elements. Based on this law, respective criminal law provisions should be introduced. For example raiding could be construed as the acquisition of control over an enterprise or over assets through the commission, over a certain period of time, of two or more predicate offences such as fraud, procedural abuse, bad faith filing of frivolous lawsuits or petitions for interlocutory injunctions, presentation and use of false evidence, private corruption, malicious litigation, market abuse. Alternatively the purpose of hostile takeover may be treated as an aggravating circumstance in the punishment of any of the above mentioned offences.

Proposals for discussion

4. The Russian authorities should consider strengthening remedies against abuses and violations committed in the framework of criminal investigations. A definition of abuse of process by investigative authorities should be introduced through legal provisions or through judicial interpretation to ensure that adequate sanctions are available. Depending on their gravity, remedies against violations committed by investigative authorities should include nullity or invalidity of acts and decisions, imposition of fines, disciplinary proceedings, recusal, exclusion of evidence, reversal of judicial decisions, civil and criminal liability. In the most grave cases where a fair trial in not possible anymore or when a criminal case would amount to misuse of process allowing courts to stay proceedings may be essential.

5. Judicial overview over the criminal investigation stage should be strengthened. One option would be creation of specialized judges charged with reviewing any investigative measure capable of interfering with defence rights such as deprivation of liberty, asset seizure, gathering of certain evidence which cannot be reproduced at trial. Such judges should be able to review in detail the grounds for detention and asset freezing (review should not be declined on the grounds that they would prejudge the merits: a review of issues such as the existence of reasonable suspicion, risk of dissipation, causal link between a crime and certain assets should already take place at this stage). Judges should also be empowered to exert stricter control over the length of investigations: a judge should be able to review whether investigative authorities have acted with reasonable efficiency in order to grant an extension of investigation.

6. The Russian authorities should also consider introducing another category of judge charged with the review of the evidence gathered by investigators and with the decision over whether an accused individual should be committed to trial. Such judge should be able to review the legitimacy and the merits of the charges.

7. Grounds and procedures for the application of disciplinary sanctions against investigators and prosecutors should be introduced through legislative provisions. The review of international practice shows that disciplinary sanctions may be applied for breaches in the exercise of their functions and for breaches perpetrated out of court.

8. The Russian authorities should consider introducing by legislative measures or judicial interpretation the right of companies to claim non pecuniary losses as a result of violations committed by public authorities (beyond damage to reputation): non pecuniary damages could be sought for the disruption of management, frustration suffered by members of an organization due to a violation of its rights, and the inconvenience of having to wait for an excessively long time for the final result of a dispute pending in national courts. Pecuniary damages suffered by companies may also cover a company's uncertainty in decision making, planning, the anxiety and inconvenience caused to the members of the management team.

9. The Russian legislation should clarify criteria and procedures for the determination of liability for damages of public officials. For example, the authorities may be held liable for any unfair damage resulting from the conduct, decision or judicial order issued either with intention or serious negligence in the exercise of their functions or resulting from a denial of justice.

10. Effective access to information about rights and about the accusation should be acknowledged to individuals during the pre trial stage, for example, by granting them access to sufficiently detailed information on the charges and evidence gathered against them in order to effectively challenge their detention. Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) of ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.

11. Other ways of protecting the right to information in criminal proceedings may include imposing on competent authorities a duty to inform suspects or accused persons promptly of their procedural rights, as they apply under national law, which are essential to safeguarding the fairness of the proceedings, either orally or in writing. In order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority. A written letter of rights should be provided to individuals upon arrest or detention.

12. The Code of Criminal proceedings should grant individuals under investigation better and earlier access to the criminal case file in the course of investigation. The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defense.

13. The Russian investigative and judicial authorities should be required by law to communicate to suspects or accused persons where, in the course of the criminal proceedings, the details of the accusation change to the extent that their position is substantially affected. Such communication should be mandatory to safeguard the fairness of the proceedings and should be made in due time to allow for an effective exercise of the rights of the defense.

14. Legislative measures on the grounds for recusal of judges, prosecutors and investigators should be adopted by including in them the commission of grave irregularities, or hostility justifying a reasonable suspicion as to their impartiality. Provisions in the code of criminal proceedings should allow a transfer of the proceedings to a different geographical area in grave circumstances.

3.2 Search, seizure and confiscation

Proposals for discussion

15. In carrying out searches of business premises, the investigative authorities should ensure that there is no adverse effect on the reputation and business of a company. Consideration should be given to the circumstances that permit the seizure and removal of original documents, including accounts from a legal entity. This is important because performance of an enterprise can be seriously hampered without the availability of the original documents. The rights guaranteed by Article 8 of the European Convention on Human Rights can be construed to include the right to respect for a company's head office, branch office, or place of business.

16. Searches and seizures should respect the protection of confidential business information and trade secrets. Mechanisms should be in place to protect this information and documents. For example investigators should be required, in case objections are raised in this respect, to seal the relevant documents and defer to a judge the determination as to whether and under which conditions certain information is confidential and can be seized. Due consideration should be given to the impact of searches and seizures on the ability of an enterprise to continue its business activities and on its right to peaceful enjoyment of possessions.

17. Investigative and prosecuting authorities as well as courts should be required to ensure that the terms of search warrants are precise and do not include vague formulations such as "any information relevant for the criminal investigation".

18. Searches and seizures should protect the integrity of evidence. Investigators should adhere to the established policies and procedures for the handling of evidence, including chain-of-custody documentation.

19. Mechanisms should be introduced to ensure the adequate management of seized assets. There should be measures/obligations to:
    a. Appraise the seized property;
    b. Properly care for and preserve such property as far as practicable
    c. Deal with the individual's and third party rights;
    d. Clearly define the situations when the confiscated property can be disposed;
    e. Keep appropriate records;
    f. Take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.

20. The Russian authorities should ensure that those responsible for managing (or overseeing the management of) property should at all times have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure

of property. They should have sufficient expertise to manage any type of property. Strong controls over administration of seized assets must be in place.

21. Effective judicial remedies against asset freezing and asset seizure orders should be in place enabling accused individuals and third parties to prove the lack of connection between a crime and the seized assets. For this purpose guidelines could be issued to the courts to clarify the extent of judicial review of provisional measures so that they do not decline jurisdiction and defer any determination to the subsequent trial on the merits.

22. Reasonable legal limits to the duration of asset seizures should be introduced by law.

23. The Russian authorities should consider adopting measures to ensure social reuse of forfeited property and to control the destination of forfeited assets.

3.3 Preclusive effects in criminal cases

Proposals for discussion

24. Article 90 of the Code of Criminal Procedure should be amended to the effect that a judicial decision should not have preclusive effects if it was adopted on the basis of a plea bargain

25. Provisions regulating the admissibility and evidentiary value of statements of co-accused turned witnesses should be introduced in the Code of Criminal proceedings.

26. Introduce in the legislation provisions requiring that any statement given by a co-accused during the investigation or in a separate trial should be admissible only upon condition that the statement was integrally audio or video recorded and that the accused can cross examine him/her at trial.

27. Co-defendants turned witnesses should not give statements under oath and should have the right to remain silent. Co-accused who have already been convicted and have denied their own responsibility or availed themselves of the right to remain silent should not be summoned as witnesses against other co-defendants.

28. Any witness statement that a co-defendant provides against another defendant at trial must be corroborated by other objective evidence and should not be sufficient for convicting another defendant. (Such statements must also have intrinsic characteristics such as consistency, spontaneity, logical coherence and repeated nature).

3.4 Corporate liability for criminal offences

Proposals for the legislation and practice of the Russian Federation

29. Both physical persons and legal entities are commonly engaged when crime related to corporate conflicts and illicit forced takeovers takes place. Therefore, it must be possible to hold liable both the physical and the corporate perpetrators and apply to both such sanctions that are effective, proportionate and dissuasive. The current division of proceedings against offences of physical persons and legal entities into respectively criminal and administrative liability carries artificial character in the Russian Federation. Two separate procedures can apply in a case where in reality a single offence is committed with participation of both individuals and organizations. In European countries, legislation on direct criminal liability for legal entities has become common. In view of the above, in the Russian Federation it appears necessary to take the following measures:

a. Ensure that the law includes effective and persuasive penalties, namely, ban on engaging in a specific type of activity, revocation of a previously issued license (if the legal person has committed an offence in the course of activities that require such license). It should be possible to link the fines with the profit gained by the legal person from the offence, defining the sanction as a factor of the profit.

b. Consider the introduction of direct criminal-law liability for legal entities and correspondingly the exclusion from the Code of Administrative Offences of the liability of legal persons for the involvement in crime (initially except for tax crimes).

30. The system of corporate criminal responsibility should clearly indicate under which conditions companies may be held liable for their employees' actions. In respect of the proportionality principle, sanctions should distinguish cases when a company is violating legal provisions from cases when a company is as such illegal or illicit.

Proposals for discussion

31. Corporate entities should be encouraged to develop and implement internal compliance programs in order to prevent wrongdoing by their employees. The possibility should be considered to hold a legal entity liable where no offence was committed by a specific physical person but an offence occurred as result of some defect in the entity's organisational structure.

32. Clear mechanisms to prevent the use of corporate vehicles (such as shell companies) for illicit purposes should be created through a system for obtaining and sharing information on beneficial ownership and control.

3.5 Liability for corruption in the private sector

Proposal for the legislation and practice of the Russian Federation

33. It is appropriate to reiterate the recommendation by GRECO of 2012:
"(i) to align the criminalisation of bribery in the private sector, as provided for in Article 204 of the Criminal Code, with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173), in particular as regards the categories of persons covered, the different forms of corrupt behaviour, the coverage of indirect commission of the offence, of instances involving third party beneficiaries and of non-material advantages; and
(ii) to abolish the rule that in cases of bribery offences in the private sector which have caused harm exclusively to the interests of a commercial organisation, prosecution is instituted only upon the application of this organisation or with its consent."[1]

Proposals for discussion

34. The State should encourage or even oblige private organizations to implement internal policies against corruption not only in relations with the public authorities but also in relations with other private parties. It is not uncommon that private sector entities and employees are unwilling to engage public authorities in the resolution of corruption suspicions. However, measures should be considered to promote reporting to the authorities about corrupt deals among businesses.

[1] GRECO (2012) *Evaluation Report on the Russian Federation. Incriminations*, p.26.
http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)6_RussianFed_One_EN.pdf

3.6 Overuse and misuse of the criminal law in the regulation of business activity

Proposals for discussion

35. Introduce safeguards to ensure that the criminal law is not used for debt collection purposes or to protect the commercial interests of companies and organisations. Criminal investigations should not be opened when the existence of ownership or other rights over assets are not clear and are the main object of a dispute. In case there is a doubt as to the title over property, investigators and prosecutors should not undertake any initiative until a civil or arbitrazh court has ruled on the matter.

36. The requirement of equality of parties in civil-law cases should always be honoured in line with the right to a fair hearing as established in the international standards. It is necessary to avoid reliance on the strong position of the State (e.g. through the public prosecutor's office) for the protection of a party's interests in what is in substance a civil-law dispute because in such way the requirements of equality of the parties and fairness are violated. Investigators should receive training on corporate law issues to help them better distinguish between grounded allegations of criminal offences and civil disputes.

37. Introduce measures against cases of maliciously instituting or causing a criminal action without a probable cause (malicious prosecution). Depending on conditions, such means may be criminal penalties or civil damages payable to the defendant.

Proposal for the legislation and practice of the Russian Federation

38. The legislative and judicial authorities should consider restricting the application of article 159 of the Criminal Code of the Russian Federation; "deception" should be limited to instances where fraudulent maneuvers or other unlawful means to mislead the victim and induce him in error have been used. Default on contractual obligations should be criminalised as fraud not simply when it was deliberate but when the intention to defraud already existed at the time the contract was concluded. Fraud by omission should be criminalized when the relevant individual had a duty to inform or disclose information to the other party.

4 CIVIL PROCEDURE

4.1 Prevention of procedural abuse

Proposal for discussion

39. Measures should be introduced to identify, prevent and punish procedural abuse. The crime of procedural abuse should be construed as covering any behaviour that uses proceedings as a tool or seeks in the framework of proceedings to obtain a profit by causing harm to others, through an unfair judicial decision caused by misleading the judge

4.2 Interlocutory injunctions in civil matters

Proposal for discussion

40. In the absence of a single best recipe and, taking into account the multitude of approaches in European countries, the following measures against the risk of misuse of interlocutory injunctions should be considered:

    a. clarification of criteria for interlocutory injunctions through standards of evidence;
    b. ensuring the safeguard of a defendant's rights in cases when injunctions are granted without hearing him/her (such safeguards can be review hearings after the injunction has been granted or a higher standard of evidence);
    c. subjecting the adoption of an interlocutory injunction to the payment by the applicant of an adequate security deposit or a guarantee, intended to ensure that compensation is available if required, for any prejudice suffered by the defendant.

4.3 Preclusive effects in civil and commercial cases

Proposal for discussion

41. Legislative provisions should be introduced to ensure that:

    d. preclusive effects of judicial decisions are only applicable to disputes involving the same parties, the same subject matter and the same cause of action;
    e. preclusive effects should not cover findings of facts or legal findings not necessary related to the earlier decision (incidental issues);
    f. the extent of erga omnes preclusive effects should be clearly regulated (for example limiting preclusive effects to judicial decisions ruling on title to property, filiation, family status, capacity and citizenship); courts should be empowered to require that co-claimants or co-defendants are represented at trial as a precondition for the applicability of preclusive effects against them;
    g. third parties affected by a judicial decision should be allowed, under certain conditions, to challenge the decision by appealing the court to set it aside (if the third party has an interest in the litigation and it was neither a party nor represented in the first action).

4.4 Limits to the protection of good faith purchasers

Proposal for discussion

42. Measures should be introduced to ensure the possibility to claw back assets fraudulently conveyed from third parties. In particular the courts should ensure that third parties who knew or should have known that assets or rights had been fraudulently obtained by the

seller/transferor do not benefit from the good faith exception. Recipients of misappropriated property should be, by law or judicial interpretation, considered strictly liable.

43. The Russian authorities should consider criminalising the negligent acquisition of suspicious goods or credits.

4.5 Misuse of insolvency proceedings

Proposals for discussion

44. Insolvency administrators should be supervised by bodies, which are independent of individual administrators and set standards reflecting principles of fairness, impartiality, transparency and accountability. For example, procedures should be considered to preclude possibilities of hidden, illicit collusions between particular administrators and judges who shall oversee them according to the law. Professional bodies, which are involved in the supervision, should be reasonably independent from their members and such independence should be clearly demonstrated through their constitution, mechanisms and processes, and through their staff.

45. In line with the World Bank's Principles and Guidelines, a good case can be made that bankruptcy proceedings should be overseen by, where possible, judges specializing in bankruptcy matters. The utmost importance of their independence goes without saying.

46. The World Bank's Principles and Guidelines also propose that "standards should be adopted to measure the competence, performance and services of a bankruptcy court. These standards should serve as a basis for evaluating and improving courts. [..] General standards for measuring competence, performance and services would include ready access to the court, efficiency and timeliness of court actions, integrity and independence in court decisions and treatment of parties, transparency in court decision making and operations, and public trust and confidence in the court."[2]

47. Based on the review of international practice, establishment of a specialized public body for the supervision of insolvency practitioners should be considered if there are continuous and widespread doubts about their integrity.

48. If there is a deficit of trust in the procedure of appointing administrators, introduction of an element of randomness in the selection should be considered. Although a downside of random appointment is the difficulty to select an administrator with the most appropriate experience and skills for the case at hand.

[2] The World Bank (2001) *Principles and guidelines for effective insolvency and creditor rights systems*, p. 58. http://www.worldbank.org/ifa/ipg_eng.pdf

5 ADMINISTRATIVE PROCEDURE

5.1 Registration of legal entities and the role of notaries

Proposals for the legislation and practice of the Russian Federation

49. Regarding the role of notaries, legislation of the Russian Federation should be amended as follows:
    a. Documents, which constitute the basis for changes in the constituent documents of a legal entity, must be notarized. A notary should be required to verify the documentary justification for the decision on amendments to the constituent documents of a legal entity. Moreover a notary should check the legal capacity of legal persons;
    b. A notary should be liable for illegal and unwarranted actions (inaction) in the case of registration of changes in the constituent documents of a legal entity;
    c. Administrative liability should apply to a notary or another person authorized to perform notarial actions for: unjustified refusal to carry out notarial actions (with guilt in the form of both direct and indirect intent), accepting of payment in addition to the notary tariff (including for the preparation of documents necessary for the performance of notarial actions), the imposition of notarial actions, works, services, etc.;
    d. The public authority must ask the notary information confirming the validity of the transaction.

Proposals for discussion

50. To increase the legal certainty, obstacles to gaining insight and obtaining extracts from the registered files should be removed as much as possible (with well-defined and limited exceptions as necessary). A procedure should be considered for persons to be able to receive immediate notifications concerning applications to change entries concerning their legal entities, which is an efficient way to ensure that attempts of illicit actions can be terminated within the shortest time possible.

51. A quick procedure should be considered for the correction of manifestly false data entered in the register as a result of an unequivocally fraudulent action. It should be possible for an interested party to apply for a temporary (for example, ten days) freeze of a file in the register to suspend possibilities to enter changes in the data concerning a particular legal entity. During the freeze, the party would be able to apply for a court injunction regarding the file.

5.2 Administrative judicial review and State liability for damages

Proposals for the legislation and practice of the Russian Federation

52. Authorities should consider the establishment of administrative courts in the Russian Federation. Currently their formation is only possible within the existing court system. This necessitates an increase in the number of staff in the courts of the general jurisdiction and specialization of judges.

53. One of key reasons for the need to establish administrative courts is the handling of claims for the liability of the State for damages caused by the misuse of the public authority. Reduced opportunities for businessmen to protect their property rights against unlawful acts on the part of the State worsen the business climate and reduce investor activity.

54. The principle of State liability should be extended to institutions, which are not executive bodies, but nevertheless carry out administrative activity in accordance with the law (the

Central Bank of the Russian Federation, the Agency for the Restructuring of Credit Organizations, management bodies of government extra-budgetary social funds). Damage caused by employees of government bodies must also be compensated for if caused by unlawful acts of such employees in the course of official duty.

Proposals for discussion

55. Under the power of the judicial review courts should be able to examine and determine the lawfulness of an administrative act and the adoption of appropriate measures. In addition to the review of any administrative act, the courts should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power. Violation of the law may take the form of a lack of legal basis, a direct violation of a legal standard or a legal error (where the administration has misjudged the scope of a rule).

56. With regard to administrative acts involving exercise of a discretionary power, although such a power is, in principle, exempt from judicial review, a tribunal may seek to determine whether the administration has overstepped permitted limits in the use of its discretionary power or whether it has committed manifest errors.

57. Where the contested measure was taken under the administration's regulatory powers, the tribunal to which the case is referred must be empowered to examine whether the administrative authority remained within the limits of the law. In this connection, the tribunal must be able to review the challenged measure in the light of, *inter alia*, principles of administrative law.

58. A tribunal should be in a position to examine all of the legal and factual issues relevant to the case presented by the parties. Regarding the facts, the court must be competent to ascertain these or at least to correct errors of fact.

59. Judicial review should be effective:
    a. A tribunal may take the necessary measures to restore a lawful situation. So, if a tribunal finds that an administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law;
    b. Courts should be competent at least to quash the administrative decision and if necessary to refer the case back to the administrative authority to take a new decision that complies with the judgment. They should have the power to order the adoption of a material action which should have been but was not adopted, particularly in connection with enforcing administrative decisions already taken; the power to order the adoption of administrative acts and decisions, in the case of limited discretion; and the possibility of preventing the adoption of decisions in cases of limited discretion, where the administration has acted *ultra vires*;
    c. A tribunal must be in a position to impose its judgment on the administrative authority when the latter issues a fresh decision, on referral after the original judgment has been set aside;
    d. In respect of the principle of effectiveness of judicial review courts should be able to adopt provisional measures pending the outcome of proceedings, that is, the power to prevent potentially prejudicial material actions. This principle is aimed at ensuring that implementation of the contested measure can be suspended in cases where its enforcement would place the person concerned in an irreversible situation.

5.3 Administrative inspections

Proposals for discussion

60. Rigorous risk-based approaches should be developed and implemented to help reduce discretion in the choice whom to inspect and how thoroughly to do it. Inspections should take place more often where the risks are higher rather than where it is easier to carry them out or where the chances to find violations are higher. Ranking of each enterprise according to the level of risk is one element of a risk-based approach.

61. Since even administrative inspections may involve considerable intrusion into the rights of persons whose activity is under scrutiny, the law governing inspections should establish such principles as independence, protection of the public interest and private interests, publicity and proportionality. The principles shall be upheld in practice. The powers of inspection authorities to carry out seizure should be defined in the law as clearly as possible with requirements of judicial warrant and possibilities of judicial remedies where fundamental/ constitutional rights are seriously encroached upon.

62. Whenever compatible with the purpose of the inspection, those subject to inspections should be given notifications sufficiently in advance. Online tools should be considered to facilitate mutual exchange of information between businesses and inspection authorities.

63. Inspection authorities typically do not possess strong independence guarantees, however, special accountability procedures such as detailed reporting requirements (with the assessment of effectiveness of inspection activity) or installing of public oversight boards should be considered.

5.4 Implementation of competition policies

Proposals for discussion

64. Provisions should be considered, which provide for or even require procedures to facilitate a dialogue between entities that are inspected/investigated for suspected breaches of competition law and the inspecting/investigating authority (as long as it does not represent a risk to the investigation proceedings). In particular, this can be ensured by providing an opportunity to hold the so-called state of play meetings or oral deliberations. The experience of the United Kingdom should be considered where there is a legal requirement to publish information and advice about certain tasks within scrutiny processes.

65. In particular, anti-monopoly authorities should consider provision of a written document with allegations to the parties and there should be possibilities to examine case files (subject to confidentiality concerns) allowing the parties to better prepare their defence. This would minimize risks of abuse of authority related to illegitimate involvement in corporate conflicts, elimination of competition or forced takeovers

66. Court review of decisions by competition authorities is available in all of the European countries that were covered in this study. Considering the risks of abuse, authorities should make continuous efforts to ensure that the judicial review is reasonably quick when anti-monopoly services engage in such intrusive actions as, for example, search and seizure.