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## Investigation of Criminal Bankruptcy: Practical Problems and Ways to Resolve Them

### 1. Introduction

The proclaimed European integration course of state policy obliges Ukraine to ensure the effective functioning of institutions that will guarantee the rule of law, respect for the rights and interests of individuals and legal entities, and their effective protection. At the same time, these are measures to protect the state's economy. According to the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, it is necessary to strengthen the level of document security (Article 16, paragraph 2); the parties undertook to cooperate in order to prevent and combat money laundering and terrorist financing (Article 20)<sup>2</sup>. So the Parties shall strengthen bilateral and international cooperation in this field, in particular cooperation at the operational level. The Parties shall ensure the implementation of rel-

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<sup>2</sup> Uhoda pro asotsiatsiyu mizh Ukrainoyu, z odniyeyi storony, ta Yevropeiskym Soyuzom, Yevropeiskym spivtovarystvom z atomnoyi enerhiyi i yikhnimy derzhavamy-chlenamy, z inshoyi storony vid 27.06.2014 r. [Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, dated 27.06.2014]. *Ofitsiyyny visnyk Ukrainy* vid 26.09.2014 r., no. 75, vol. 1, pp. 83, art. 2125.

evant international standards, in particular the standards of the Financial Action Task Force on Money Laundering and Terrorist Financing (FATF) and standards equivalent to those adopted by the Union. Currently, one of the problems in Ukraine is the fight against economic crime (crimes in the sphere of economic activity), which necessitates the development of methods of investigation of the «new generation», in particular, methods of investigation of intentional bankruptcy.

## **2. Current state of the fight against intentional bankruptcy in Ukraine**

Investigation of crimes in the field of economic activity is characterized by significant difficulties due to the need to use economic, financial and other specialized knowledge; the vast majority of such crimes are multi-episode, with an extensive system of criminal connections, including international ones. The investigation process is accompanied by the study and investigation of a large number of financial and economic documents that may indicate the commission of other types of crimes. According to official statistics, the level of detection of crimes in the sphere of economic activity does not meet the needs of economic protection. Thus, in 2020, 5,342 crimes were registered, 2087 criminal proceedings were reported, and an indictment of 1620 was sent to court, which is 30%; in 2019, 5,947 crimes were registered, of which 1,686 criminal proceedings were sent to court with an indictment, which is 28%. In particular, law enforcement agencies specializing in the fight against economic crimes face difficulties in investigating bankruptcy (Article 219 of the Criminal Code of Ukraine). However, the methodology of investigation of criminal offenses, given the complexity of economic relations and interaction of economic entities, the instability of the regulation of control over economic activities, including in the field of international economic cooperation, does not meet the needs of today; existing guidelines do not take into account new economic challenges and threats; electronic payment networks make it difficult to identify signs of a criminal offense; the existence of a developed network of international economic cooperation limits the jurisdiction of the state to collect evidence, etc. According to the Prosecutor General's Office of

Ukraine in 2016. for st. 219 of the Criminal Code of Ukraine, 44 crimes were registered, a notice of suspicion was served on 1 person, and no decisions on closure or suspension were made on 43 crimes at the end of the reporting period. In 2017, 59 crimes were registered, 1 person was notified of the suspicion; in 2018, 29 crimes were registered, no person was notified of the suspicion, in accordance with Art. 280 of the CPC of Ukraine, the pre-trial investigation was suspended on two criminal offenses due to the fact that the whereabouts of the suspect are unknown<sup>3</sup>. According to the State Judicial Administration of Ukraine, in 2016–2020, no person was convicted of bankruptcy<sup>4</sup>.

### 3. Legal support in the fight against criminal bankruptcy

The word «bankrupt» means «overturned (broken) bench.» In the epoch of the early development of capitalist relations in the markets, money changers exchanged loans and placed them in places designated for them and sat there on benches (chairs). This is where the term «bank» comes from. The word «bank» translated from German and English or «bank» translated from Italian means «bench». The name of the bank's institution also comes from this, meaning a credit and financial institution. In the event that such a money changer went bankrupt, he overturned or broke his bench. According to the glossary of financial terms, bankruptcy is the inability of a debtor to meet creditors' claims on debt obligations. The term «insolvency» is sometimes used, meaning that the phenomenon of bankruptcy is related to the insolvency of a person or enterprise (individual or legal entity). It occurs when expenses exceed income and free cash is not enough to repay loans. In the world economy, an entity whose insolvency exceeds three years is declared bankrupt. The very concept of insolvency appeared in ancient times with the de-

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<sup>3</sup> Statystychna informatsiyi Heneral'noyi prokuratury Ukrainy (2020). [Statistical information of the General Prosecutor's Office of Ukraine]. Retrieved from: [https://old.gp.gov.ua/ua/stst2011.html?dir\\_id=112661&libid=100820](https://old.gp.gov.ua/ua/stst2011.html?dir_id=112661&libid=100820) (accessed 03.03.2021).

<sup>4</sup> Zvit Derzhavnoyi sudovoyi administratsiyi Ukrainy shchodo zdiysnennya pravosudnya mistsevymy sudamy [Report of the State Judicial Administration of Ukraine on the administration of justice by local courts] (2020). Retrieved from: [https://court.gov.ua/inshe/sudova\\_statystyka/](https://court.gov.ua/inshe/sudova_statystyka/) (accessed 03.03.2021).

velopment of the economy, trade and money circulation. For example, in ancient Greece, a debtor's family, including a servant, or a bankrupt person, fell into debt bondage. It could last until the creditor's damages were fully compensated. But in many ancient Greek cities, debt slavery was limited to five years, and the physical integrity of the debtor's family was guaranteed. The Old Testament provided for the forgiveness of debts to the Jews every seven years and the forgiveness of debts to all residents, including non-Jews, every fifty years, and all debtors were released from debt prisons.

The ancient Romans had the right to take all the debtor's property on account of unpaid loans. But if the debtor found the funds, he was given the right to redeem his own property, paying off debts. In ancient Rome, a whole system of rules and procedures for debt collection and declaration of insolvency of Roman citizens was gradually developed.

After the fall of the Roman Empire, the institution of financial insolvency was preserved and further developed on its territory in Italy. To this end, specialized commercial courts were established in Italy, although the debtor himself had the right to declare himself insolvent. The debtor's property was transferred to the management of the creditors' committee, although an amicable agreement with the debtor was allowed.

In the process of development of trade relations in different countries, the procedure of financial insolvency became clear, legislative norms and rules were developed. Thus, in England at the beginning of the XVIII century, for the first time in world practice, it was formulated that a bona fide bankrupt (one who facilitates the fastest and complete repayment of loans and losses) can count on the forgiveness of unpaid debts. The East Slavic states also tried to regulate the issue of bankruptcy.

In particular, *Russkaya Pravda* contains rules concerning the insolvency of debtors and their liability. Under these laws, the debtor or members of his family could be sold into debt bondage («for purchase»), and the order of satisfaction of debt claims was established. Later, the rules for working with debtors were enshrined in a number of treaties of Russian princes and cities (Novgorod) with German, Dutch, Swedish and Danish cities.

On May 14, 1992, Ukraine adopted the Law of Ukraine «On Restoration of Debtor's Solvency or Recognition of Debtor's Bankruptcy», which established the conditions and procedure for restoring the debtor's solvency or declaring him bankrupt and applying liquidation procedures to fully or partially satisfy creditors' claims. By law, «bankruptcy» is the inability of the debtor recognized by the commercial court to restore its solvency through reorganization procedures and amicable settlement and repay the monetary claims of creditors established in the manner prescribed by this law only through the application of liquidation procedure (Article 1)<sup>5</sup>. This law listed the types of bankruptcy, taking into account the peculiarities of the recognition of insolvency: 1) bankruptcy of business entities that have public, other value or special status; 2) bankruptcy of agricultural enterprises; 3) bankruptcy of insurers; 4) bankruptcy of professional participants in the securities market and mutual investment institutions; 5) bankruptcy of the issuer or the manager of mortgage certificates, the manager of the construction financing fund or the manager of the real estate fund; 6) bankruptcy of an individual; 7) bankruptcy of the farm; 8) bankruptcy of state-owned enterprises and enterprises in the authorized capital of which the share of state ownership.

The current Bankruptcy Code of Ukraine of October 18, 2018 states that bankruptcy is a recognized by the commercial court inability of the debtor to restore its solvency through the procedure of rehabilitation and restructuring and repay the established in the manner prescribed by this Code, monetary claims of creditors other than through liquidation procedures (Article 5)<sup>6</sup>.

Obviously, bankruptcy can be caused by inefficient management, mismanagement, carelessness in the performance of professional duties, as well as intent to bring bankruptcy. Bankruptcy is one of the types of economic crimes. Legislative enshrinement in the disposition of Article

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<sup>5</sup> Закон України «Про відновлення платоспроможності боржника або визнання його банкрутом від 14.05.1992 № 2343-XII [Law of Ukraine «On the restoration of the debtor's solvency or recognition of his bankruptcy» of 14.05.1992 № 2343-XII ]. *Holos Ukrainy vid 06.06.1992.*

<sup>6</sup> Кодекс України з процедур банкрутства від 18.10.2018 р. (2019) [Code of Ukraine on Bankruptcy Procedures of October 18, 2018.]. *Holos Ukrainy vid 20 kvitnya, no. 17.*

219 of the Criminal Code of Ukraine allows only to draw a conclusion about the criteria for detecting a criminal offense in general. The complexity of gathering evidence, the process of establishing and verifying the circumstances to be proved, lead to low results of the investigation and bringing the perpetrators to justice.

According to Art. 219 of the Criminal Code of Ukraine, bringing to bankruptcy – that is, intentional, for selfish motives, other personal interests or in the interests of third parties committed by a citizen – founder (participant) or official of the business entity actions that led to permanent financial insolvency of the entity economic activity, if it caused great material damage to the state or the creditor.

Material damage is considered great if it is five hundred times more than the tax-free minimum income of citizens, in 2020 this amount is 525,500 UAH. and more (50% of the subsistence level for able-bodied persons, which in the Law of Ukraine «On the State Budget of Ukraine for 2020»<sup>7</sup> is defined at UAH 2021, according to the Law of Ukraine «On the State Budget for 2021»<sup>8</sup>, the subsistence level is 2270 hryvnias).

#### 4. Problematic issues of investigative practice

Against the background of a low level of crime detection on November 22, 2018. adopted the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses» (as amended on December 3, 2019, entered into force on July 1, 2020), which introduces the concept of criminal offenses, investigation which occurs in the form of inquiry. According to Art. 12 of the Criminal Code of Ukraine, criminal offenses are divided into criminal offenses and crimes (Part 1)<sup>9</sup>. A criminal of-

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<sup>7</sup> Закон України «Про Державний бюджет України на 2020 рік» від 14.11.2019 р. [Law of Ukraine «On the State Budget of Ukraine for 2020» of November 14, 2019]. *Uryadovyy kurier* від 14.12.2019. no. 241.

<sup>8</sup> Закон України «Про Державний бюджет України на 2021 рік» від 15.12.2020р. [Law of Ukraine «On the State Budget of Ukraine for 2021» of 15.12.2020]. *Holos Ukrainy* від 30.12.2020. no. 242.

<sup>9</sup> Закон України «Про внесення змін до деяких законодавчих актів України щодо спрощення досудового розслідування окремих категорій кримінальних правопорушень» від 22.11.2018 р. [Law of Ukraine «On Amendments to Certain

fense is an act (action or omission), for which the main punishment is a fine of not more than three thousand non-taxable minimum incomes or other punishment not related to imprisonment (Part 2)<sup>10</sup>. Investigation of criminal offenses is carried out in the form of inquiry, entrusted to the investigator – an official of the inquiry unit of the National Police, security body, the body that monitors compliance with tax legislation, the body of the State Bureau of Investigation.

According to the above classification, the crime of «bankruptcy» fell into the category of misdemeanor, so it became obvious the expediency of increasing the responsibility for the crime in order to prevent simplification of the investigation procedure.

Bankruptcy is divided into intentional (criminal) and due to external factors (inflation and other force majeure), ie one that does not depend on the will of the subject, taking into account the appropriate in the title of the crime to emphasize the criminal component, Article 219 of the Criminal Code to clarify and state in the following wording «Intentional bankruptcy».

Deliberate bankruptcy is accompanied by corrupt connections, which guarantee the security of the preparation, commission and disguise of this type of crime. However, the current legislation does not classify this crime as corruption. It is advisable to supplement the Note of Art. 45 of the Criminal Code of Ukraine by Article 219 of the Criminal Code of Ukraine and to state in the following wording: "Note. Corruption criminal offenses in accordance with this Code are criminal offenses under Articles 191, 219, 262, 308, 312, 313, 320, 357, 410, in case of their commission by abuse of office, as well as criminal offenses under Articles 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3 of this Code".

According to the investigative practice, during the investigation of bankruptcy there is a need for covert investigative (search) actions, but the law recognizes them admissible only for serious and especially seri-

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Legislative Acts of Ukraine on Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses» of November 22, 2018]. *Holos Ukrainy vid 24.04.2019.* no. 79.

<sup>10</sup> Kryminalnyi kodeks Ukrainy vid 05.04. 2001r. [Criminal Code of Ukraine of 05.04. 2001]. *Holos Ukrainy vid 19.06.2001.* no. 107.

ous crimes, which makes it impossible to use such a mechanism in these proceedings.

## 5. Issues of jurisdiction

Currently, the law enforcement function in the field of economic violations of business is performed by the tax police, the Security Service of Ukraine and the National Police of Ukraine. Insufficient effective work, primarily of the tax police in the investigation of economic crimes, necessitates the removal of law enforcement agencies from their uncharacteristic functions and to separate the law enforcement function from the service function of the tax. The creation of a single state body responsible for combating economic crimes and avoiding duplication of functions in different law enforcement agencies is also one of the requirements of the Memorandum on Economic and Financial Policy<sup>11</sup>. Currently, a bill has been developed to eliminate the tax police, optimize the structure and number of bodies involved in combating crimes in the economic sphere, eliminate duplication of their functions and establish the Bureau of Economic Security of Ukraine to prevent, prevent, detect, stop, investigate and detect criminal offenses. referred by law to their jurisdiction. The main tasks of the Bureau of Economic Security of Ukraine are to determine the following:

- 1) prevention, detection, termination, investigation and disclosure of criminal offenses referred by law to its jurisdiction;
- 2) participation in ensuring the economic security of the state by comprehensive counteraction to criminal offenses that have a significant negative impact on the national economy, contribute to its shadowing, capital flight and other negative phenomena that slow economic growth and threaten national economic interests;
- 3) collection and analysis of information on economic crime, referred by law to the jurisdiction of the Bureau of Economic Security of Ukraine, and identify ways to prevent their occurrence in the future.

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<sup>11</sup> Proekt Zakonu Ukrainy "Pro byuro ekonomichnoyi bezpeky" [Draft Law on the Bureau of Economic Security of Ukraine]. Retrieved from: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69331](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69331) (accessed 03.03.2021)



## 6. Conclusions

The analysis of investigative and judicial practice confirms the expediency of creating a specialized law enforcement body that will specialize in the investigation of economic crimes – the Bureau of Economic Security of Ukraine, but further improvement of current substantive and procedural legislation and methodological support of the investigation.

## References

- Kodeks Ukrainy z protsedur bankrutstva vid 18.10.2018 r. (2019) [Code of Ukraine on Bankruptcy Procedures of October 18, 2018.]. *Holos Ukrainy vid 20 kvitnya*, no. 17.
- Kryminalnyi kodeks Ukrainy vid 05.04. 2001 r. [Criminal Code of Ukraine of 05.04. 2001]. *Holos Ukrainy vid 19.06.2001*. no. 107.
- Proekt Zakonu Ukrainy «Pro byuro ekonomichnoyi bezpeky» [Draft Law on the Bureau of Economic Security of Ukraine]. Retrieved from: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69331](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69331) (accessed 03.03.2021).
- Statystychna informatsiyi Heneral'noyi prokuratury Ukrainy (2020). [Statistical information of the General Prosecutor's Office of Ukraine]. Retrieved from: [https://old.gp.gov.ua/ua/stst2011.html?dir\\_id=112661&libid=100820](https://old.gp.gov.ua/ua/stst2011.html?dir_id=112661&libid=100820) (accessed 03.03.2021).
- Uhoda pro asotsiatsiyu mizh Ukrainoyu, z odniyeyi storony, ta Yevropeiskym Soyuzom, Yevropeiskym spivtovarystvom z atomnoyi enerhiyi i yikhnimy derzhavamy-chlenamy, z inshoyi storony vid 27.06.2014 r. [Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, dated 27.06.2014]. *Ofitsiyyny visnyk Ukrainy vid 26.09.2014 r.*, no. 75, vol. 1, pp. 83, art. 2125.
- Zakon Ukrainy “Pro Derzhavnyy byudzhet Ukrainy na 2020 rik” vid 14.11.2019 r. [Law of Ukraine “On the State Budget of Ukraine for 2020” of November 14, 2019]. *Uryadovyy kurier vid 14.12.2019*. no. 241.
- Zakon Ukrainy «Pro Derzhavnyy byudzhet Ukrainy na 2021 rik» vid 15.12.2020r. [Law of Ukraine «On the State Budget of Ukraine for 2021» of 15.12.2020]. *Holos Ukrainy vid 30.12.2020*. no. 242.

Zakon Ukrainy «Pro vidnovlennya platospromozhnosti borzhnyka abo vyznannya yoho bankrutom vid 14.05.1992 № 2343-XII [Law of Ukraine «On the restoration of the debtor's solvency or recognition of his bankruptcy» of 14.05.1992 № 2343-XII ]. *Holos Ukrainy vid 06.06.1992.*

Zakon Ukrainy «Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrainy shchodo sproshchennya dosudovoho rozsliduvannya okremykh katehoriy kryminalnykh pravoporushen» vid 22.11.2018 r. [Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses» of November 22, 2018]. *Holos Ukrainy vid 24.04.2019.* no. 79.

Zvit Derzhavnoyi sudovoyi administratsiyi Ukrainy shchodo zdiysnennya pravosuddya mistsevymy sudamy [Report of the State Judicial Administration of Ukraine on the administration of justice by local courts] (2020). Retrieved from: [https://court.gov.ua/inshe/sudova\\_statystyka/](https://court.gov.ua/inshe/sudova_statystyka/) (accessed 03.03.2021)

## Summary

Investigations of economic crimes require the development of new methods, due to the rapid development of economic relations, the international corporation, the use of digital payment instruments, increased competition and the presence of corruption. The low level of crime detection and the absence of convictions indicate the expediency of amending the current procedural legislation to determine jurisdiction, empowering law enforcement agencies to conduct covert investigative (search) actions, to appoint examinations before criminal proceedings; define in substantive law the concept of economic crimes. In Ukraine, reforms in the criminal justice system, law enforcement and the judiciary have not yielded the expected results. Established law enforcement agencies often duplicate the powers of others, which creates a risk of corruption and hinders the effective collection of evidence in criminal proceedings. Professional training of investigators who are working on investigating of economic crimes requires a high level of legal and economic awareness. The use of special knowledge (involvement of specialists, appointment of expertise) needs to be reviewed, as investigators are deprived of the right to interrogate an expert. Dynamic changes in the legislation have negatively affected the activities of law enforcement agencies, which have been temporarily deprived of self-appointment. These powers rested with the investigating judge and the court.

The protection of the economy requires the strengthening of law enforcement agencies on the methods of detecting criminal encroachments on the economic base of the state.

**Keywords:** Bankruptcy, economic crimes, economic security bureaus, insolvency