

BUSINESSMEN V. INVESTIGATORS: WHO IS RESPONSIBLE FOR THE POOR RUSSIAN INVESTMENT CLIMATE?

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This article aims to examine the extent to which Russian investigations into economic and financial crimes are influenced by such factors as systemic problems with Russian gatekeepers, the absence of a formal corporate whistle-blowing mechanism and the continuous abuse of the law by the Russian business community. The traditional critical approach to the quality and effectiveness of Russian economic and financial investigations does not produce positive results and needs to be reformulated by considering the opinions of entrepreneurs. The author considers that forcing Russian entrepreneurs, regardless of the size of their business, to comply with Russian laws and regulations may be a more efficient way to develop the business environment than attempting to gradually improve the Russian judicial system. It is also hardly possible to expect the Russian investigatory bodies to investigate what are effectively complex economic and financial crimes in the almost complete absence of a developed whistle-blowing culture. Such a culture has greatly contributed to the success of widely-publicised corporate and financial investigations in the United States and Europe. The poor development of the culture of Russian gatekeepers and the corresponding regulatory environment is one more significant factor that permanently undermines the effectiveness of economic investigations and damages the investment climate.

Key words: Russia; investigation; economic crime; gatekeepers; whistleblowing.

1. Introduction

The aim of this article is to analyse the ongoing conflict between Russian investigators and the Russian business community, and to make one more attempt at answering the long-standing question regarding how a satisfactory balance between the interests of effective investigation and the protection of the business community can be reached.

This research expressly avoids any attempts to discuss in depth the recent history of different high-level and widely politicised cases, beginning with the famous Most Bank¹ and Yukos affairs,² and on to the BTA Bank collapse³ and the Bank of Moscow fraud investigation.⁴ These and similar investigation failures are used conventionally by international researchers to draw public attention to the main problems in the Russian police and judiciary and to show that contemporary Russia is very far from being called a 'state under the rule of law.' However, it is assumed that 'political cases,' 'publicly important cases' and 'large-scale investigations'⁵ represent a limited and distinct group of criminal investigations (a tiny fraction of all investigations conducted by the police, FSB, the Investigatory Committee, *etc.*), which may attract significant media attention and look quite shocking to the Western community but do not actually allow a properly grounded judgment to form on problems concerning the failures of the overall quality of Russian investigators.⁶

For the purpose of this article, the terms 'investigators' and 'investigations' denote all Russian investigatory bodies involved in investigating business and financial crimes in accordance with Russian criminal procedural law.⁷ Any administrative or legal differences between the responsibilities of the Investigatory Committee of the Russian Federation's Department of Large-scale Investigations, and low-level regional investigators, will be ignored. This article focuses primarily on investigations into economic and financial crimes, which have much in common with the corresponding offences (*e.g.*, different types of fraud) in common law countries.⁸ Nevertheless, the

¹ See *Gusinskiy v. Russia*, no. 70276/01 (Eur. Ct. H.R., May 19, 2004).

² See Dmitry Golobov, *The Yukos War: The Five Year Anniversary* (Sept. 29, 2008), <<http://ssrn.com/abstract=1275444>> (accessed June 18, 2014).

³ See Barry Donnelly & Zoë Fuller, *The Chronicles of the JSC BTA Bank Litigation*, In-House Lawyer (Dec. 3, 2012), <<http://www.inhouselawyer.co.uk/index.php/litigation-a-dispute-resolution/10037-the-chronicles-of-the-jsc-bta-bank-litigation>> (accessed June 18, 2014).

⁴ The whole story is available at <http://rapsinews.com/trend/borodin_04052011/> (accessed June 18, 2014).

⁵ These are cases without directly declared 'political motivations' for prosecution but which nevertheless attract significant publicity due to publicly important issues raised during the investigation or trial. One such example entails interest in road accidents involving 'monks [from the Russian Orthodox Church] in sports cars' as the public is eager to know whether the monks will be prosecuted like any other wrongdoers or avoid prosecution because of their connection with the Orthodox Church.

⁶ See Резник Г. Наши суды не ведают сомнения [Reznik H. *Nashi sudy ne vedayut somneniya* [Henry Reznik, *Our Courts Have No Doubts*]], *Novaya Gazeta* (Dec. 14, 2013), <<http://www.novayagazeta.ru/society/61467.html>> (accessed June 18, 2014).

⁷ All investigatory bodies, including the Ministry of Internal Affairs, FSB and Investigatory Committee. The status and rights of these bodies may be significantly different but they can be ignored for the purposes of this article. The bulk of economic and financial cases is conventionally investigated by the Ministry of Internal Affairs (MVD).

⁸ See Fraud Act 2006, sects. 1–4.

conclusions of the research, with certain exceptions, are applicable to every other Russian investigation.

For the purpose of this research, it is also assumed that Russian investigations permanently experience problems with effectiveness, quality and fairness as portrayed conventionally by the international media.⁹ This research aims neither to challenge this assumption nor to prove that it is significantly incorrect; instead, it focuses primarily on how the Russian business community contributes to the failures and deficiencies of investigations, and then it highlights what should be done by the business community to improve the situation.¹⁰

2. Russian Investigations: Internal Sins and External Obstacles

As mentioned previously, there are several common presumptions regarding the role of Russian investigators and their position in the contemporary Russian judicial system. It is not difficult to find these references in articles or commentaries concerning recent Russian investigations and sentences brought by the Russian courts¹¹ and, in fact, these presumptions have become almost *de rigeur* and widely accepted by the public and the media alike.¹² Moreover, any other investigation of significant public importance is usually viewed and assessed through the 'prism' of these presumptions.¹³ In brief, these opinions can be grouped under three headings: problems with the quality of investigations at federal and regional levels; investigations and corruption; and, involvement of investigators in 'political investigations.' Each of these will be considered over the following pages.

In terms of the first group, public and professional complaints about the work of investigators are very common in Russia. Mostly, they concern high-profile cases

⁹ See, regarding Russian investigations, Kirill Ershov, *Russian Federation's Law No. 87-FZ: Political Machination or Procedural Reform?*, 1 Pace Int'l L. Rev. 1 (2010); Jonathan D. Greenberg, *The Kremlin Eye: the 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 Stan. J. Int'l L. 1 (2009); Jason Bush, *No Justice for Business in Russia*, BusinessWeek (June 23, 2009), <<http://www.businessweek.com/stories/2009-06-23/no-justice-for-business-in-russiabusinessweek-business-news-stock-market-and-financial-advice>> (accessed June 18, 2014); Alexandra Orlova, *Russia's Anti-money Laundering Regime: Law Enforcement Tool or Instrument of Domestic Control?*, 11(3) Journal of Money Laundering Control 210 (2008).

¹⁰ See Волков В. Как работают суды общей юрисдикции в России (Volkov V. *Kak rabotayut sudy obshchei yurisdiktсии v Rossii* [Vadim Volkov, *How General Jurisdiction Courts Work in Russia*]), Polit.ru (Oct. 13, 2013), <<http://www.polit.ru/article/2013/10/13/volkov/>> (accessed June 18, 2014).

¹¹ See Ethan Burger & Mary Holland, *Law as Politics: The Russian Procuracy and Its Investigative Committee*, 2 Colum. J. E. Eur. L. 143 (2008); Greenberg, *supra* n. 9.

¹² See European Parliament Resolution of 13 September 2012 on the political use of justice in Russia (2012/2789(RSP)).

¹³ See Petr Antonov, *Russian Political Prisoners in the Russian Federation*, Occidental Observer (Aug. 6, 2013), <<http://www.theoccidentalobserver.net/2013/08/russian-political-prisoners-in-the-russian-federation>> (accessed June 18, 2014).

which represent just the 'tip of the iceberg'.¹⁴ Complaints usually concern particular procedural omissions, professional negligence, qualifications of the investigators and the general low quality of investigation.¹⁵ These factors render virtually impossible fair and objective trials with all the safeguards provided by Russian criminal procedural legislation and the European Convention of Human Rights [hereinafter ECHR], even if it could be assumed that Russian courts complied strictly with the best international standards and were absolutely independent.¹⁶ Problems with the 'quality' of investigations are interrelated with the issue of the quality of Russian justice and cannot be assessed separately.

One of the most widely known cases from the group of high-profile litigations which significantly undermined public trust in the quality of investigations was the 'Second Yukos case,' where prosecutors had to prove that one of the biggest Russian private companies, with tens of thousands of employees, had been involved in a wholesale fraud and money laundering operation.¹⁷ Ultimately, the investigators and prosecution failed to present to the court a properly argued case which explained how an outstanding feat of fraud had been committed and billions of dollars laundered under the watchful eye of different controlling bodies. Detailed analysis of the serious omissions made by investigators – and subsequently approved by the Russian courts – can be found in different European Court of Human Rights [hereinafter Eur. Ct. H.R.] judgments and reports published by various human rights bodies.¹⁸ Public opinion simply believes that investigators are unable to investigate any complicated case and prefer either to fabricate evidence or to put pressure on judges, thereby forcing them to approve badly drafted and evidenced charges.¹⁹ Ultimately, the entire criminal process appears to be a deeply rooted conspiracy involving investigators and judges and this totally undermines public trust in justice and sends negative messages to the international business community.²⁰

¹⁴ See Reznik, *supra* n. 6.

¹⁵ See Human Rights Bureau of Democracy, and Labor, U.S. Dept. of State, *Country Reports on Human Rights Practices in Russia*, <<http://www.state.gov/documents/organization/204543.pdf>> (accessed June 18, 2014).

¹⁶ See William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33(1) Rev. Cent. & E. Eur. Law 25 (2008).

¹⁷ See Dmitry Golobov, *The Yukos Money Laundering Case: A Never-Ending Story*, 28 Mich. J. Int'l L. 711 (2007).

¹⁸ See Silvia Borelli, *The Impact of the Jurisprudence of the European Court of Human Rights on Domestic Investigations and Prosecutions of Serious Human Rights Violations by State Agents* 7, 44–47 (DOMAC 2010), <http://www.domac.is/media/domac-skjol/DOMAC_7-ECHR-SB.pdf> (accessed June 18, 2014).

¹⁹ Burger & Holland, *supra* n. 11.

²⁰ See Куликов В. Тюремный покой [Kulikov V. *Tyuremnyi pokoj* [Vladislav Kulikov, *Prison Solience*]], *Rossiiskaya Gazeta* (May 17, 2010), <<http://www.rg.ru/2010/05/17/proverka.html>> (accessed June 18, 2014).

As for the second group, corruption amongst criminal investigators in Russia is often discussed by academics and experts as an important problem for the Russian authorities to deal with.²¹ When addressing prosecutors and investigators in the course of an extended meeting of the Collegium of the General Prosecutor's Office, President Vladimir Putin stated that:

MVD, FSB, FSCD, the Investigatory Committee and the prosecutors are, of course, special, but public organisations, and there are many different people work with them. All the problems of our society are reflected in these organisations like in a drop of water . . . I want you to think about this problem.²²

Unfortunately, the trust of the population in fair and effective investigation of criminal cases is low.²³ One of the most disastrous recent scandals, which clearly demonstrates the significant involvement of high-level prosecutors and investigators in highly organised illegal activities, was the case of the so-called 'prosecutors' illegal casinos,' in which it was alleged that a group of high-ranking prosecutors from the Moscow region effectively controlled a network of illegal casinos and provided them with immunity from raids and investigations (a well-known Russian term, *krusha*).²⁴ Moreover, the investigation, initiated by the Investigatory Committee – the dedicated rivals of the General Prosecutor's Office – almost collapsed and all the suspects were ultimately released on bail or even without charge.²⁵ The corruption investigation against the Russian Minister of Defence, Mr. Serdyukov, which attracted tremendous publicity, was unexpectedly terminated and he was granted amnesty as a person involved in military actions. Such unexpected collapses of large-scale investigations against prosecutors, investigators and other important persons create great confusion for the public and the media and provoke extensive speculation about corruption. All these high-profile scandals have effectively undermined the reputation of Russian investigators.

²¹ See Ethan Burger & Rosalia Gitau, *The Russian Anti-Corruption Campaign: Public Relations, Politics or Substantive Change*, 1 New J. Eur. Crim. L. 218 (2010).

²² Расширенное заседание коллегии Генпрокуратуры [*Rashirennoe zasedanie kollegii Genprokuratury* [Extended Meeting of the Collegium of the General Prosecutors Office]], Kremlin.ru (March 5, 2013), <<http://www.kremlin.ru/news/17631>> (accessed June 18, 2014).

²³ See Борисов Т. В тюрьму за 15 миллионов [Borisov T. V tyurmu za 15 millionov [Timofei Borisov, To Jail for 15 Millions]], *Rossiiskaya Gazeta* (Jan. 14, 2014), <<http://www.rg.ru/2014/01/14/vzatka-site.html>> (accessed June 18, 2014).

²⁴ For detailed information see Скандал с казино [*Skandal s kazino* [Casino Scandal]], *Gazeta.ru* (July 2, 2013), <http://www.gazeta.ru/subjects/skandal_s_kazino.shtml> (accessed June 18, 2014).

²⁵ See «Игровое дело» свободно [*Igornoe delo' svobodno* [Casino Case' is Free]], *Gazeta.ru* (July 2, 2013), <<http://www.gazeta.ru/social/2013/07/02/5404545.shtml>> (accessed June 18, 2014).

In relation to the final group of opinions, there is a strong assumption by the public that legal arguments and procedural norms in some Russian large-scale investigations are undermined by political interests.²⁶ As a result of rich and powerful people ‘pulling the strings of jurisprudence,’ many cases have lost their credibility during subsequent trials and this, in turn, has attracted the attention of the international community and been scrutinised stringently by human rights organisations, including Human Rights Watch and Amnesty International.²⁷ The list of allegedly ‘politically-motivated’ trials organised with the assistance of Russian investigators, according to the media, is sufficiently long.²⁸ In fact, any investigation or trial in which the media or the general public can detect even the slightest injustice can easily be declared ‘political’ or at the very least ‘unjust.’ As a result, Russian investigatory bodies find themselves in a legal and logical trap because, due to a lack of trust and poor credibility, they have no way of building a decent reputation. Even if a case has been investigated properly, nothing prevents defendants and their lawyers from declaring the case political and unjust.²⁹ Moreover, ‘politicisation’ of criminal cases is strongly supported by Western lawyers interested in expensive extradition procedures and VIP clients.³⁰ This approach to high-profile cases has become popular in Russia. The term ‘political’ is widely used by advocates and political activists involved in Russian criminal investigations but very few experts understand what this term actually means in the Russian context. There is only one recent Russian large-scale case which legally can be called ‘political,’ mainly because the Eur. Ct. H.R. was able to clearly establish the presence of ‘the other motives of prosecution’ in accordance with Art. 18 of the ECHR. This case is related to the biggest Russian media empire formerly controlled by Vladimir Gusinskiy. In *Gusinskiy v. Russia* the court accepted that the applicant’s liberty was restricted, inter alia, ‘for a purpose other than those mentioned in Article 5.’³¹ It should be noted that, in spite of the highest possible publicity, Eur. Ct. H.R. has

²⁶ See Greenberg, *supra* n. 9, at 24–28.

²⁷ See Kenneth Rapoza, *Political Trials Add to Negative Perception of Russia*, Forbes (Apr. 24, 2014), <<http://www.forbes.com/sites/kenrapoza/2013/04/24/political-trials-add-to-negative-perception-of-russia>> (accessed June 18, 2014); Jim Heintz, *Politics Colors Russian Criminal Cases*, Yahoo! News (Dec. 25, 2013), <<http://news.yahoo.com/politics-colors-russian-criminal-cases-082416022.html>> (accessed June 18, 2014).

²⁸ See Antonov, *supra* n. 13.

²⁹ For a hypothetical prosecution of Prof Guriev, see Gregory L. White & Alexander Kolyandr, *Prominent Russian Economist Flees Country*, Wall Street Journal (May 29, 2013), <<http://online.wsj.com/news/articles/SB10001424127887323855804578511452388926008>> (accessed June 18, 2014).

³⁰ See Jim Armitage, *The Latest Twist in the Case of Mukhtar Ablyazov: French Court Orders Fugitive Millionaire Tycoon to be Extradited to Russia*, The Independent (Jan. 9, 2014), <<http://www.independent.co.uk/news/world/europe/the-latest-twist-in-the-case-of-mukhtar-ablyazov-french-court-orders-fugitive-millionaire-tycoon-to-be-extradited-to-russia-9050149.html>> (accessed June 18, 2014).

³¹ *Gusinskiy v. Russia*, *supra* n. 1, at ¶¶ 73–78.

not identified any violations of Art. 18 of the European Convention in a bundle of the Yukos-related cases.³²

Therefore, from the legal point of view, the nature and extent of 'political prosecutions' is not clear in Russia,³³ that creates an attractive opportunity to declare middle or high-level cases 'political' without proper legal reasoning.³⁴ There have been several attempts to rationalise and limit this practice by replacing the term 'political prisoner' with the more legally feasible term 'illegally or unfairly sentenced individual'.³⁵ The new Russian human rights ombudswoman, Ms. Pamfilova, emphasised in her first interview that the term 'political prisoner' should be used with extreme caution.³⁶ However, many political activists still prefer to use the old terminology, which is often very misleading.

Of course, the impact of negative factors on Russian investigations cannot be overestimated. However, an attempt to answer the question why Russian investigators are unable to investigate Russian economic crimes effectively and then present proper cases to further legitimate court consideration should not be limited to these conventional negative factors only. It is not disputed that a small number of high-profile and publicly important cases in Russia represent just a tiny fraction of the overall number of criminal investigations.³⁷

In the economic sphere, the proportion is even more pronounced; however, very often, conclusions which have been made and accepted by experts and the community in respect to high-profile cases with a strong leaning toward political

³² See *OAO Neftyanaya Kompaniya Yukos v. Russia*, ¶¶ 663–66, no. 14902/04 (Eur. Ct. H.R., Sept. 20, 2011); *Khodorkovskiy v. Russia*, ¶ 16, no. 5829/04 (Eur. Ct. H.R., May 31, 2011).

³³ *Russia: Misrule of Law*, The Guardian (July 11, 2013), <<http://www.theguardian.com/commentisfree/2013/jul/11/russia-navalny-misrule-law-editorial>> (accessed June 18, 2014) ('Russia does not have political prisoners. That was so last century. It does, alas, retain the unedifying spectacle of show trials').

³⁴ See *Former MP's Suit against Human Rights Activist Dismissed by U.S. Court*, RAPS (Aug. 2, 2012), <http://rapsinews.com/judicial_news/20120802/264061039.html> (accessed June 18, 2014). (The lawsuit concerned an article written by Zalmayev which stated that the US should not grant political sanctuary to a businessman whom Russia had placed on the international wanted list for his involvement in several major illicit transactions. Zalmayev was supported by the head of Moscow Helsinki Group, Lyudmila Alexeyeva, Lev Ponomaryov and other human rights activists.)

³⁵ Романова О. Нет политических заключенных, есть несправедливо осужденные [Romanova O. *Net politicheskikh zaklyuchennikh, est' nespravedlivo osuzhdennye* [Olga Romanova, *There Are No Political Prisoners, There Are Only Unfairly Sentenced*]], Echo SPb (Nov. 11, 2013), <<http://www.echomsk.spb.ru/blogs/OlgaRomanova/17992.php>> (accessed June 18, 2014).

³⁶ See Брынцева Г. Эмма Памфилова: Нужно выстраивать целостную систему защиты детства [Bryntseva G. *Emma Pamfilova: Nuzhno vystraivat' tselostnuyu sistemu zashchity detstva* [Galina Bryntseva, *Emma Pamfilova: We Need to Build a Comprehensive System for Protection of Children*]], Rossiiskaya Gazeta (March 21, 2014), <<http://www.rg.ru/2014/03/21/pamfilova-site-anons.html>> (accessed June 18, 2014).

³⁷ See Reznik, *supra* n. 6.

motives are applied without proper grounds to the bulk of 'casual' cases.³⁸ This approach is clearly irrational and misleading, especially in respect to economic and financial investigations which are, mostly, quite complex.

The most obvious solution to the systemic failure of economic and financial investigations is not simply to put all the blame on the shoulders of the investigators as this will not significantly improve the quality of investigations. Understanding 'who is responsible' is just the first part of what is possibly the most famous Russian refrain saying. The second part of the refrain saying, 'what to do?,' should not be forgotten either. In order to improve the results of investigations and make them look convincing to experts and the public, it is necessary to analyse objectively which factors might influence the quality and effectiveness of economic and financial investigations. The business community is the primary beneficiary of this approach as economic and financial crimes are committed not external to but within the business community, and members who prefer fair play should be interested in stringently enforced rules. Russian businessmen should not be mere spectators at the show – they need to be active participants. Conventionally, they praise the quality, independence and effectiveness of investigations in the most developed EU countries and in the US; however, Russian entrepreneurs prefer to ignore the fact that this level of quality can only be reached under the influence of several extremely powerful corporate, administrative and legal factors that are promoted and supported by Western community and business societies. Therefore, in order to improve Russian economic and financial investigations, it is quite important to understand at least the most powerful of these factors and to see how they could be promoted in Russia.

3. Who Should Love Russian Laws?

The most painful greatest area of conflict between investigators and the Russian business community concerns both the certainty authority and the enforcement of Russian laws. It is a double-edged sword in that many businessmen in Russia do not respect the law and, as a consequence, many of them do their best to abuse it when possible. Investigators have to deal with entrepreneurs who not only want to avoid criminal responsibility for their wrongdoings but also want to use criminal law and the investigatory powers of the state to attack their business competitors.

One of the key problems concerning the enforcement of Russian law is that many informal quasi-legal practices and economic crimes are traditionally considered to be publicly permissible for those who conduct their business in the Russian economic environment. Respectively, the attempts of investigators to interfere with such

³⁸ Kathryn Hendley, *'Telephone Law' and the 'Rule of Law: The Russian Case*, 1(2) Hague Journal on the Rule of Law 241 (2009) (generalizing from politicised cases with high stakes for everyone involved, including the state, is, however, problematic).

practices very often result in allegations that the investigations are trying to suppress normal business practices.

3.1. Russian Money Laundering

There is a strong public assumption that money laundering charges are widely used by investigators to make other economic charges against entrepreneurs (*e.g.*, embezzlement or misappropriation) look more authoritative to the courts.³⁹

However, recently published reports and actions undertaken by the Central Bank of Russia show that a significant number of banks are just criminal enterprises, used by their managers and owners for laundering illicit funds.⁴⁰ Of course, the existence of big banking 'laundering machines' contravenes not only Russian laws on money laundering and terrorism financing but also the main international conventions ratified by Russia.

For decades, the Russian 'grey' and 'black' economies were based on the extensive use of legal and illegal cash.⁴¹ Extensive use of cash is the logical and economic result of the widespread corruption in Russia and many businesses would not survive if they were unable to use large sums of cash, not only for illegal deals but also for bribing public officials.⁴² Of course, a public dispute has been ongoing for years over who is ultimately responsible for this situation: corrupt public officials or entrepreneurs who willingly bribe public officials. Historically and logically, it appears to be the classic 'chicken and egg' problem and, evidently, it cannot be stopped by the efforts of the business community.

3.2. Ownership and Control

Non-transparency of ownership and control has remained an essential characteristic of Russian business since the rise of the first cooperatives⁴³ and there are at least several factors which make hidden ownership attractive to the Russian business community.

³⁹ See Olga Sher, *Breaking the Wash Cycle: New Money Laundering Laws in Russia*, 22 *NYL Sch. J. Int'l & Comp. L.* 627 (2003); Gololobov, *supra* n. 17; Orlova, *supra* n. 9.

⁴⁰ See Alexander Kolyandr & Andrei Ostroukh, *Russian Bank Closed Over Alleged Money Laundering*, *The Wall Street Journal* (Nov. 20, 2013), <<http://online.wsj.com/news/articles/SB10001424052702303653004579209643168586818>> (accessed June 18, 2014); *Russia's Central Bank Revokes Licences from Two Moscow Banks*, *Reuters* (Feb. 11, 2014), <<http://www.reuters.com/article/2014/02/11/russia-cbank-licences-idUSL5N0LG07S20140211>> (accessed June 18, 2014).

⁴¹ See Andrei Yakovlev, *'Black Cash' Tax Evasion in Russia: Its Forms, Incentives and Consequences at Firm Level*, 52(1) *Europe-Asia Stud.* 33 (2001).

⁴² See Pavel Usanov, *Russian Money Laundering: How Does It Work?*, *oDRussia* (Apr. 9, 2013), <<http://www.opendemocracy.net/od-russia/pavel-usanov/russian-money-laundering-how-does-it-work>> (accessed June 18, 2014).

⁴³ See Lucy Chernykh, *Ultimate Ownership and Control in Russia*, 88 *J. of Fin. Ec.* 169 (2008).

Firstly, it is necessary to examine criminal responsibility. There are numerous, widely known cases where the real owners of companies or their shadow directors have tried to avoid criminal responsibility by concealing their ownership or participation in the management of corporate structures. The *Airport Domodedovo* case⁴⁴ in which it was absolutely impossible to establish the ultimate owners of one of the largest Russian airports, compelled the government to introduce new legislation to regulate the owners of airports and their affiliates in Russia.⁴⁵

The second factor is tax optimisation goals. It is still accepted practice to conduct all major business deals abroad. The fairly recent acquisitions of Sibneft by Gazprom, and TNK-BP by Rosneft, demonstrate that even the state sometimes has to play according to these rules.⁴⁶ It is highly unlikely that these practices will be eliminated even by a stringently enforced programme of 'de-offshoreritisation' of Russian business recently introduced by the government.⁴⁷

Thirdly, many rich businessmen conceal their real wealth in order to avoid the negative consequences of divorce. Several recent divorce cases have demonstrated that a bad divorce may be more ruinous for a rich businessman than even a conflict with the state.⁴⁸ For example, one of the 'old oligarchs,' Vladimir Potanin, openly declared that his former wife, who is currently attempting to chase pursue his assets in the US courts, will never find them.⁴⁹

As a result, although some big Russian companies and corporate groups show their dedication to international principles of transparency and disclosure, many others and their real owners prefer to stay in the shadows.⁵⁰ Of course, an unclear ownership structure can be a serious obstacle to investigating complex economic crimes.

⁴⁴ See Joe Nocera, *How to Steal a Russian Airport*, NY Times (June 6, 2011), <http://www.nytimes.com/2011/06/07/opinion/07nocera.html?_r=0> (accessed June 18, 2014).

⁴⁵ See *Putin Calls on Moscow Airports to Reveal Owners Identities*, RIA Novosti (July 3, 2013), <<http://en.ria.ru/russia/20130703/182036477.html>> (accessed June 18, 2014).

⁴⁶ See Irina Filatova, *Russian Investors Flock to Virgin Islands after Cypriot Crisis*, Moscow Times (Aug. 18, 2013), <<http://www.themoscowtimes.com/business/article/russian-investors-flock-to-virgin-islands-after-cypriot-crisis/484719.html>> (accessed June 18, 2014).

⁴⁷ Scott Rose & Olga Tanas, *Putin Tells Russian Business Using Offshores to Pay Tax at Home*, Bloomberg View (Dec. 12, 2013), <<http://www.bloomberg.com/news/2013-12-12/putin-tells-russian-business-using-offshores-to-pay-tax-at-home.html>> (accessed June 18, 2014).

⁴⁸ See Alexei Barrionueko, *Divorce, Oligarch Style*, NY Times (Apr. 5, 2012), <<http://www.nytimes.com/2012/04/08/realestate/big-deal-dmitry-rybolovlevs-divorce-oligarch-style.html?pagewanted=all>> (accessed June 18, 2014).

⁴⁹ See *Potanin Gives Away Assets Prior to Divorce*, Moscow Times (Feb. 10, 2014), <<http://www.themoscowtimes.com/business/article/potanin-gives-away-assets-prior-to-divorce/494156.html>> (accessed June 18, 2014).

⁵⁰ See Roman Shleynov, *Elites Undermine Putin Rail against Tax Havens*, ICIJ (Apr. 4, 2013), <<http://www.icij.org/offshore/elites-undermine-putin-rail-against-tax-havens>> (accessed June 18, 2014).

3.3. Corruption and Abuse of Criminal Laws

One of the most important issues facing the business community is the use of criminal law against business competitors. The recently appointed head of the Russian business ombudsman, Boris Titov, highlighted some interesting figures when commenting on the statistics on complaints filed by Russian entrepreneurs with his office. In particular, he said that at least half of the complaints had been filed, not to prevent illegal prosecution, but to ask the ombudsman to urge investigators to prosecute other businessmen.⁵¹

Therefore, it is possible that a significant part of the Russian business community is concerned with potential illegal prosecution but, at the same time, they see criminal investigations as an effective instrument for dealing with their business competitors.⁵²

This inevitably raises the question over how many illegal criminal investigations have been launched, not by corrupt investigators, but by unscrupulous entrepreneurs. Unfortunately, this type of statistic is not available now and will most likely not be available in the future as it potentially implicates some respectable Russian entrepreneurs, possibly even some in the Forbes Top 100.⁵³

These brief observations of several acceptable business practices does not cover many other informal or criminal practices, such as tax evasion, the smuggling of electronic goods, false invoicing and other undesirable activities. However, it does show that regardless of many political and legal innovations, such as the business ombudsman, the public chamber, presidential council for human rights and different organisations set up to protect small businesses and oligarchs, 'good old-fashioned' methods of conducting business in Russia are still popular, albeit they are better structured and concealed.⁵⁴

In the 1990s and early 2000s, the prosecution of entrepreneurs was very often seen as unfair and illegal because Russian laws were not policed and enforcement was mainly arbitrary and politicised. Disputes over whether this situation has actually changed still continue to this day. However, key signs that the international perception of Russian laws and investigations has changed significantly can be seen in the results of recent extradition proceedings concerning 'new political and economic

⁵¹ *Титов Б. Даже трогать эти дела нам не надо* [Titov B. *Dazhe trogat' eti dela nam ne nado* [Boris Titov, *We Should Not Even Touch These Cases*]], *Delovaya sreda* (Sept. 12, 2013), <<http://journal.dasreda.ru/power/3609-boris-titov-dazhe-trogat-takie-dela-nam-ne-nado>> (accessed June 18, 2014).

⁵² *See* *Вернутся ли заказные дела против бизнесменов?* [Vernutsya li zakaznye dela protiv biznesmenov? [Will Pre-ordered Cases against Businessmen Come Back?]], *Kommersant* (Oct. 21, 2013), <<http://www.kommersant.ru/doc/2309516>> (accessed June 18, 2014).

⁵³ *See* *Opposition-Backed Businessman Kozlov Released from Prison*, *RIA Novosti* (June 3, 2013), <<http://en.ria.ru/russia/20130603/181489826.html>> (accessed June 18, 2014).

⁵⁴ *See* Alena Ledeneva & Stanislav Shekshina, *Doing Business in Russian Regions: Informal Practices and Anti-Corruption Strategies* (NIS Center 2011).

refugees.⁵⁵ Several years ago, the principle that the West did not extradite Russian refugees even if they had allegedly been involved in different, purely economic and financial wrongdoings looked absolutely sound and unchallengeable.⁵⁶ Many experts were certain that this trend would continue for decades, until significant political change occurred in Russia.⁵⁷ However, for several reasons, among which, of course, should be noted the more palpable and transparent 'playground rules' for businessmen and amendments to Russian criminal laws, the position of Western and international courts has significantly changed.

Several remarks made by the Eur. Ct. H.R. in its judgment in the case of *Khodorkovskiy v. Russia (no. 1)* can be considered as powerful contributing factors to the changing attitude of international judicial instances to new Russian economic refugees.⁵⁸ These remarks mostly concern the problem of 'politicised' prosecutions and trials in general but they may find extensive subsequent application in Russia and the Commonwealth of Independent States (CIS). For example, while commenting on the allegations of a violation of Art. 18 of the ECHR,⁵⁹ the Eur. Ct. H.R. noted that:

[A]ny person in the applicant's [Khodorkovsky's] position would be able to make similar allegations. In reality, it would have been impossible to prosecute a suspect with the applicant's profile without far-reaching political consequences. The fact that the suspect's political opponents or business

⁵⁵ See Guy Dinmore, *France Agrees to Extradite Former Kazakh Banker Abylazov to Russia*, Financial Times (Jan. 9, 2014), <<http://www.ft.com/cms/s/0/7285d458-7927-11e3-b381-00144feabdc0.html#axzz2uUrbFKcD>> (accessed June 18, 2014); *Austria Turns Over Russian Banker Sought for \$60 Mln Embezzlement*, RAPS (Dec. 12, 2013), <http://rapsinews.com/judicial_news/20131212/270074274.html> (accessed June 18, 2014); Jim Armitage, *French Court Orders Alexey Kuznetsov to be Extradited to Russia Facing Criminal Charges*, The Independent (Jan. 23, 2014), <<http://www.independent.co.uk/news/business/news/french-court-orders-alexey-kuznetsov-to-be-extradited-to-russia-facing-criminal-charges-9080710.html>> (accessed June 18, 2014).

⁵⁶ See Кобыкин С. С. Лондона выдачи нет (Kobyakin S. S. *Londona vydachi net* [Sergei Kobyakin, *No Extradition from London*]), *Moskovskii Komsomolets* (March 26, 2009), <<http://www.mk.ru/social/justice/article/2009/03/26/244894-s-londona-vyidachi-net.html>> (accessed June 18, 2014); *UK Harboring Yukos Case Suspects, Tycoon Berezovsky – MP*, RIA Novosti (March 24, 2006), <<http://en.ria.ru/russia/20060324/44764017.html>> (accessed June 18, 2014).

⁵⁷ See Ben Brandon & Edward Grange, *Red Flag to Russia: Extradition Judge Signals Halt to Russian Extraditions unless Prison Conditions Improve*, The World of Extradition (Apr. 8, 2013), <<http://worldofextradition.wordpress.com/2013/04/08/red-flag-to-russia-extradition-judge-signals-halt-to-russian-extraditions-unless-prison-conditions-improve/>> (accessed June 18, 2014) ('It is likely that the UK court will not extradite to Russia in future cases unless the Russian Federation either demonstrates that there has been a significant improvement in prison conditions or provides specific, positive assurances about the conditions in which the person whose extradition is sought will be held.'). See also *Russian Top Prosecutor Reports 'Breakthrough' in Extradition with UK*, RIA Novosti (Jan. 12, 2012), <<http://en.ria.ru/russia/20120112/170722024.html>> (accessed June 18, 2014).

⁵⁸ See *Khodorkovskiy v. Russia*, *supra* n. 32.

⁵⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

competitors might directly or indirectly benefit from him being put in jail should not prevent the authorities from prosecuting such a person if there are serious charges against him. In other words, high political status does not grant immunity.⁶⁰

However, it must recall that political process and adjudicative process are fundamentally different. It is often much easier for a politician to take a stand than for a judge, since the judge must base his decision only on evidence in the legal sense.⁶¹

Therefore, economic refugees have been deprived of a powerful argument used extensively in the past.⁶² Any rich and well-connected person could allege in the extradition proceeding that his prosecution was a political game,⁶³ and political evidence, which may look quite persuasive to journalists and political activists, may appear insufficient to a judge.⁶⁴

In *Khodorkovskiy and Lebedev v. Russia (no. 2)* the Eur. Ct. H.R. had to deal with another important issue, namely, with the question of the authority of certain Russian tax laws of the late 1990s and early 2000s.⁶⁵ Ruling on this case, the Eur. Ct. H.R. did not, in substance, create any new jurisprudence but effectively repeated the approach previously highlighted in several cases.⁶⁶ When answering the question as to whether the prosecution of the Yukos officials had been based on an unprecedented and novel interpretation of Russian criminal law, the Court stated the following:

The Court recognises that the applicants' case had no precedents. However, the Court reiterates that Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence

⁶⁰ See *Khodorkovskiy v. Russia*, *supra* n. 32, at ¶ 258.

⁶¹ *Id.* at ¶ 259.

⁶² See Peter Binning, *Serious Extradition Risks for International Business People*, 8 Bus. L. Int'l 148, 149 (2007).

⁶³ See *France Mulls Extradition of Embezzlement Suspect Kuznetsov*, *Moscow Times* (Sep. 20, 2013), <<http://www.themoscowtimes.com/news/article/france-mulls-extradition-of-embezzlement-suspect-kuznetsov/486400.html>> (accessed June 18, 2014).

⁶⁴ See *Khodorkovskiy v. Russia*, *supra* n. 32, at ¶ 260.

⁶⁵ *Khodorkovskiy & Lebedev v. Russia*, ¶¶ 869–85, 897–909, nos. 11082/06 and 13772/05 (Eur. Ct. H.R., July 25, 2013).

⁶⁶ See *Liivik v. Estonia*, ¶¶ 101–04, no. 12157/05, (Eur. Ct. H.R., June 25, 2009); *Radio France and Others v. France*, ¶¶ 18–20, no. 53984/00 (Eur. Ct. H.R., March 30, 2004); *Soros v. France*, ¶¶ 55–62, no. 50425/06 (Eur. Ct. H.R., Oct. 6, 2011).

and could reasonably be foreseen. The applicants may have fallen victim to a novel interpretation of the concept of 'tax evasion,' but it was based on a reasonable interpretation of Articles 198 and 199 and 'consistent with the essence of the offence.'⁶⁷

In agreeing with the prosecution of the Yukos managers, the Eur. Ct. H.R. has allowed, in general terms, the creative interpretation of Russian criminal law which in turn may have unpredictable consequences especially in respect to economic and financial crime.

A further step in separating criminal law from political issues was made in the famous UK case, *BTA Bank*, which represents a series of lawsuits filed with the UK courts by the Kazakh BTA Bank against its former general manager and alleged shadow-controlling shareholder, Mr. Mukhtar Ablyazov and his allies.⁶⁸ In several claims, the claimant successfully proved allegations of large-scale commercial fraud committed by an organised criminal group comprising bank shareholders and managers.⁶⁹ At the same time, a series of criminal investigations against former employees and managers of BTA Bank was launched in Kazakhstan, Russia, Ukraine and a number of other countries.⁷⁰

The lawsuits filed in the UK and other courts around the world were supplemented by freezing injunctions and disclosure orders which were the result of allegations made in criminal charges brought against Ablyazov's group.⁷¹ Mr. Ablyazov fought desperately to prove that all the allegations against him were politically motivated and that the financial claims should not be considered by the UK courts.⁷² However, the political defence did not work and the UK courts summarily decided to proceed with BTA Bank's claims.⁷³ The defendant, in his application to the Queen's Bench Division, sought to strike out the case because one of his co-defendants had alleged that the President of Kazakhstan had persuaded BTA Bank's directors to sue Mr.

⁶⁷ *Khodorkovskiy & Lebedev v. Russia*, *supra* n. 65, at ¶ 821.

⁶⁸ See Donnelly & Fuller, *supra* n. 3; see also Katy Dowell, *BTA v. Ablyazov: The Secret Billionaire*, *The Lawyer* (Febr. 6, 2012), <<http://www.thelawyer.com/bta-v-ablyazov-the-secret-billionaire/1011246.article>> (accessed June 18, 2014).

⁶⁹ Dowell, *supra* n. 68.

⁷⁰ See The General Prosecutor's Office of the Republic of Kazakhstan, *Speech of the Official Representative of Prosecutor General's Office Nurdaulet Suindikov on the Briefing Concerning the Detention of M. Ablyazov in France*, <<http://m.prokuror.kz/eng/news/press-releases/speech-official-representative-prosecutor-generals-office-nurdaulet-suindikov>> (accessed June 18, 2014).

⁷¹ See Donnelly & Dowell, *supra* n. 68.

⁷² See Isabel Gorst, *Mukhtar Ablyazov at Centre of Fight over Kazakhstan's BTA Bank*, *Financial Times* (July 5, 2013), <<http://www.ft.com/cms/s/0/23571482-e584-11e2-ad1a-00144feabdc0.html#axzz2ugjJwjiO>> (accessed June 18, 2014).

⁷³ See *JSC BTA Bank v. Ablyazov & Ors.* [2011] EWHC 202 (Comm) 58.

Ablayzov and other defendants for the purpose of eliminating him as a political opponent. On that argument the judge ruled that:

[T]he claimant must be regarded as having two purposes for commencing and pursuing these proceedings against the first defendant [Mr. Ablayzov]. First, it has brought these claims against him to recover the losses for which he is thought to be responsible. It would be *unrealistic to suppose in circumstances where the claimant was insolvent that the proceedings were not brought, at least in part, for the purpose of recovering those losses for the benefit of the claimant and its creditors*. Second, the claimant has, arguably, been persuaded by the President of Kazakhstan to bring these claims for the purpose of eliminating the first defendant as a political opponent of the President of Kazakhstan. The first of those purposes is certainly legitimate and accordingly, for the reasons I have given when considering the law, the proceedings are not an abuse of the process of this court . . .

53. Collateral purpose: At first sight the elimination of the first defendant as a political opponent would appear to be clearly illegitimate because it is far removed from the remedy which the law gives for misappropriation of assets and appears not to be 'reasonably related the provision of some form of redress' for his alleged wrong. *However, the elimination of the first defendant as a political opponent is said to be the consequence of undermining and damaging his reputation and facilitating the expropriation of his assets worldwide*. If the claimant succeeds in its actions, which are essentially for fraud, the first defendant's reputation is likely to be undermined and damaged and his assets are likely to be seized in order to execute the judgment. *Thus those consequences cannot be an illegitimate purpose of the proceedings.*⁷⁴

Ultimately, the court stated that if one of the two purposes for starting the process against Mr. Ablayzov were legitimate, it seemed right that a claimant should be entitled to proceed with his claim. Even if a secondary, collateral purpose was the elimination of Mr. Ablayzov as a political opponent, this did not prevent BTA Bank (even if its directors had to fulfil the orders of the Kazakh President) from recovering its losses.

Yukos and BTA-type cases have demonstrated that arguments based on either 'quasi-political' prosecution or consequences (the presence of some other motive for prosecution, or some other legal challenge) do not work effectively to restrain contemporary business crime.⁷⁵ Moreover, any significant legal action against a powerful and rich person may have significant political implications and political beneficiaries but it should not have any impact on the course of legal action.

⁷⁴ *JSC BTA Bank v. Ablayzov and Ors. (No 6)* [2011] 1 WLR 2996, 3011–12 [emphasis added].

⁷⁵ See Binning, *supra* n. 62.

4. The Mystery of Russian Gatekeepers

An effective 21st century system of white-collar crime prevention and investigation cannot function without a developed system of gatekeepers⁷⁶ but such a move would not be popular in Russia.⁷⁷ Sometimes, it seems as if Russia is yet to sign and ratify numerous international conventions on money laundering, fraud, tax crimes, terrorism financing and corruption, many of which aim at imposing certain responsibilities on lawyers, accountants, auditors and other professionals who, by endorsing particular financial transactions or providing legal or other professional opinions, certify that particular funds may enter the financial system.⁷⁸ Therefore, the problem of direct or indirect financial transaction certification is a problem that is centred on professional services, including accounting, legal services, auditors and independent appraisers. Many licensed individuals and organisations conventionally comprise a special group of persons named 'gatekeepers' whose key role is to monitor the entry of money into the financial system and certify its legitimacy.⁷⁹

An idea called the Gatekeeper Initiative was proposed by the G7 in 2001 and it was initially related to anti-money laundering initiatives and directed specifically at certain professionals, such as lawyers, accountants and auditors. The aim of this initiative was to fight money laundering and the funding of terrorism following the disastrous attack on New York's World Trade Center on September 11, 2001.⁸⁰ This concept has been modified significantly since its inception. From its original genesis it has progressed from mere anti-money laundering and terrorism funding norms to a comprehensive concept of gatekeeping through the professional certification of particular groups of financial transactions in order to tackle fraud, corruption, insider dealing, etc. The Gatekeeper Initiative crystallized into a general principle

⁷⁶ See William Dorton, *Corporate Gatekeepers: An Examination of the Transactional Lawyer's Role*, 99 Ky L.J. 555, 558 (2010–2011); Nancy Reichman, *Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy*, in *White Collar Crime Reconsidered* (Kip Schlegel & David Weisburd, eds.) (Northeastern University Press 1992).

⁷⁷ Used almost ten years ago in Sergei Guriev, *Enron, Yukos and the Gatekeepers*, *Moscow Times* (Dec. 2, 2004), <<http://www.themoscowtimes.com/stories/2004/12/02/005.html>> (accessed June 18, 2005).

⁷⁸ See FATF Report. *Global Money Laundering and Terrorist Financing Threat Assessment* (FATF/OECD 2010), available at <<http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf>> (accessed June 18, 2014).

⁷⁹ *Id.*

⁸⁰ See Danielle Kirby, *The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight against Money Laundering and Terrorist Financing*, 37 *Hofstra L. Rev.* 261, 273–92 (2008–2009); Blake Goodsell, *Muted Advocacy: Money Laundering and the Attorney-Client Relationship in a Post 9/11 World*, 34 *J. Legal Prof.* 211, 212–14 (2009–2010); Kevin Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for US Lawyers*, 37 *ACTEC L.J.* 1, 8–11 (2011).

which provides that lawyers and other gatekeepers have to investigate or report suspicious client activity.⁸¹

Without doubt, lawyers are the key gatekeepers in Russia and in the rest of the world. The importance of their role can be explained by the fact that they 'may be positioned to detect and deter money laundering or facilitate the crime.' Lawyers' duties, in this respect, can be formulated generally as follows:

At root, it is a good thing for lawyers to screen client misconduct. It keeps lawyers, themselves, honest. It serves societal interests in preventing harm. It enhances judicial administration. And it makes lawyers think about the morality and legality of clients' conduct as well as their own, thus encouraging them to help clients recognize and pursue appropriate behavior. All of these are valid functions for lawyers, and they have always been understood to play a part in the lawyer's everyday dealings with clients.⁸²

Therefore, lawyers, and to a certain extent other gatekeepers, are called upon not only to be watchdogs and whistleblowers of their own clients but also moral guardians. However, complying with gatekeeping requirements is extremely complicated and costly. FATF Guidance for Legal Professionals describes three areas of major concern common, to a certain extent, to all gatekeepers: (a) customer/client due diligence; (b) legal firms' internal control systems; and (c) the approach of oversight/monitoring of certain transactions.⁸³ The system is based on several legal and administrative pillars among which the most important are: the risk-based approach, suspicious transactions identification, suspicious transaction reporting, record keeping, not prejudicing investigations (no tipping-off) and training.⁸⁴

Furthermore, the responsibility of lawyers as gatekeepers is supplemented by their responsibility not to conspire with clients, aid, abet or participate directly in clients' crimes or fraudulent activity.⁸⁵ In other words, 'half of the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop.'⁸⁶

⁸¹ See Bruce Zagaris, *Gatekeepers Initiative: Seeking Middle Ground between Client and Government*, 16(4) *Crim. Just.* 26, 31 (2001–2002); Shepherd, *supra* n. 80.

⁸² See Fred Zacharias, *Lawyers as Gatekeepers*, 41 *San Diego L. Rev.* 1387, 1404 (2004).

⁸³ See RBA Guidance for Legal Professionals (FATF/OECD 2008), available at <<http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf>> (accessed June 18, 2014).

⁸⁴ See FATF Report, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (FATF/OECD 2013), available at <<http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>> (accessed June 18, 2014).

⁸⁵ See American Bar Association, *Model Rules of Professional Conduct* <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html> (accessed June 18, 2014); see also Zacharias, *supra* n. 82.

⁸⁶ Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* 76 (Harvard University Press 1996).

However, in essence, the contemporary system of anti-money laundering, anti-corruption, anti-fraud and many other controls is so complicated and so demanding on financial and human resources that even in the most developed European countries it is still under permanent legal and administrative reconstruction,⁸⁷ and sometimes gatekeepers have to spend more time on paperwork than on their main professional duties. In principle, this should not preclude Russia from exerting its best possible effort in creating at least a low-level system of gatekeeping. However, the progress in the creation of gatekeepers in Russia has been minimal.

There are many difficulties involved in promoting a contemporary system of gatekeepers in Russia but the most important is a well-concealed conspiracy between the state and the gatekeepers: gatekeepers do not want to be overregulated and see their duties as completely nominal, while the state does not want to create a powerful system of alternative controls which may highlight the real level of financial and economic crime in Russia. How this conspiracy works can be seen in examples of the way the legal profession in Russia is regulated.

The long-standing regulatory difficulty with lawyers in Russia is that in parallel with a comparatively small group of advocates⁸⁸ that are regulated by the special law⁸⁹ and controlled by their own professional bodies, there exists an army of unregulated lawyers whose criminal and civil responsibilities are limited only by the general criminal and civil law.⁹⁰ Unregulated lawyers are in-house lawyers of different corporations, lawyers who work for the state, lawyers employed by different legal firms and many others. They do not have any codes of professional conduct, any compulsory or recommended ethical norms or any special rules for financial transactions and client accounts.⁹¹ There are also no laws or even recommendations on aspects such as how to regulate the creation, conduct, record-keeping and data preservation of legal firms established by unregulated lawyers or even individuals

⁸⁷ See Kirby, *supra* n. 80, at 292–305.

⁸⁸ See American Bar Association, *Moscow Conference Addresses Challenges for Advocates*, <http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/russia/news/news_russia_advocates_conference_1209.html> (accessed June 2014, 2014).

⁸⁹ Федеральный закон от 31 мая 2002 г. № 63-ФЗ «Об адвокатской деятельности и адвокатуре в Российской Федерации» // Собрание законодательства Российской Федерации. 2002. № 23. Ст. 2102 [Federal'nyi zakon ot 31 maya 2002 g. No. 63-FZ 'Ob advokatskoi deyatel'nosti i advokature v Rossiiskoi Federatsii' // *Sobranie zakonodatel'stva Rossiiskoi Federatsii*. 2002. No. 23. St. 2102 [Federal Law of 31 May 2002 No. 63-FZ on Advocates' Practice and the Advokatura in the Russian Federation, 2002(23) Collection of Legislation of the Russian Federation, Art. 2102]] (as amended through July 23, 2008).

⁹⁰ See Dmitry Shabelnikov, *The Legal Profession in the Russian Federation*, OSCE (Oct. 1, 2008), <<http://www.osce.org/odihr/36312>> (accessed June 18, 2014); The Russian Legal Profession (Harvard Law School 2011), available at <http://www.law.harvard.edu/programs/plp/pdf/Russian_Legal_Profession.pdf> (accessed June 18, 2014); Andrey Goltsblat, *A 360 Degree View of the Legal Industry in Russia*, EuropeanCEO (July 16, 2010), <<http://www.europeanceo.com/finance/a-360-degree-view-of-the-legal-industry-in-russia>> (accessed June 18, 2014).

⁹¹ *Id.*

without any legal background.⁹² These unregulated legal firms are not even obliged to retain lawyers with valid diplomas to undertake legal work. Of course, this army of unregulated lawyers cannot conduct any gatekeeper functions; moreover, it is an unavoidable fact that this army will permanently produce new lawyers who are not only willing to assist criminals but also see this type of assistance as a good option for earning a living. It should be added that, from a regulatory standpoint, unregulated lawyers are not lawyers at all. The FATF states that:

Lawyers are members of a regulated profession and are bound by their specific professional rules and regulations . . . Lawyers have their own professional and ethical codes of conduct by which they are regulated. Breaches of the obligations imposed upon them can result in a variety of sanctions, including disciplinary and criminal penalties.⁹³

The other difficulty with the actual implementation of the Gatekeeper Initiative in Russia is the weak and inconsistent regulation of advocates. The role played by regulated advocates in the promotion of the rule of law, legal ethics and client compliance with legislation does not reach the gatekeeping standard as it is understood by internationally recognised standards and EU directives.⁹⁴ For example, there are special recommendations for advocates⁹⁵ which represent an unsuccessful attempt to copy and paste certain aspects of anti-money laundering regulations from different European states. It is evident that regulations which specify advocates' responsibilities to client due diligence in a couple of paragraphs can hardly be regarded as a piece of legislation that may have a significantly adverse impact on the money laundering strategies of the clients. This assumption can be confirmed by the fairly recent FATF Mutual Evaluation report on Russia. Amongst other important issues, the report mentions the following problems in Russia.

⁹² Shabelnikov, *supra* n. 90.

⁹³ RBA Guidance, *supra* n. 83, at 5–6.

⁹⁴ See Шашкова А. Участие адвоката в проведении финансово-правовой оценки при противодействии легализации незаконных доходов // Адвокат. 2011. № 7. С. 11, 16–17 [Shashkova A. *Uchastie advokata v provedenii finansovo-pravovoi otsenki pri protivodeistvii legalizatsii nezakonnykh dokhodov* // *Advokat*. 2011. No. 7. S. 11, 16–17 [Anna Shashkova, *The Lawyer's Participation in the Financial and Legal Assessments in the Anti-money Laundering Process*, 2011(7) *Lawyer* 11, 16–17]].

⁹⁵ Рекомендации по организации исполнения адвокатами требований законодательства о противодействии легализации (отмыванию) доходов, полученных преступным путем, и финансированию терроризма [*Recomendatsii po organisatsii ispolneniya advokatami trebovaniy zakonodatel'stva o protivodeistvii legalizatsii (otmyvaniyu) dokhodov, poluchennykh prestupnym putem i finansirovaniyu terrorizma*] [Recommendation on Implementation of the Legislation on Fight with Money Laundering and Terrorism Financing] (Federal Chamber of Advocates of the Russian Federation, Sept. 27, 2007), <http://www.fparf.ru/zazhita_prav/terror_i_prava.htm> (accessed June 18, 2014).

- monitoring of lawyers is remote and not specific to AML/CFT;⁹⁶
- lawyers/notaries/accountants have no requirement to keep records except for those relating to ID;⁹⁷
- lawyers/notaries have filed very few suspicious transaction reports that give rise to concerns over effectiveness of the system;⁹⁸
- doubts exist about effectiveness, given the lack of AML/CFT supervision of lawyers and accountants and lack of information about supervision of notaries;⁹⁹
- there are no provisions relating to politically exposed persons (PEPs), which is an area of special concern in Russia;¹⁰⁰
- no actual sanctions have been applied in respect of lawyers. Lawyers and notaries can be disbarred for breaches of their respective codes, but no such sanctions have been used for direct breaches of the AML/CFT law.¹⁰¹

All of these deficiencies just confirm the fact that anti-money laundering regulations for advocates have been drafted and approved with the sole purpose of demonstrating to the FATF and other international control bodies that Russia is generally a complying country without any serious money laundering problems.¹⁰² The system is definitely not designed to either fight money laundering or create barriers to corruption, tax fraud and other financial crimes. However, the periodic prosecution of advocates and unregulated lawyers, which definitely represent just a tiny fraction of actual wrongdoing, shows that the weakness of the system is effectively abused by both professions.¹⁰³

Russia does not even have a basic functioning system of gatekeepers; it exists formally but it does not help either with crime prevention or with the identification and investigation of actual wrongdoing. This situation is blindly accepted by professional communities and, collaterally, by the state whose efforts to promote

⁹⁶ FATF 6th Follow-up Report, *Mutual Evaluation of the Russian Federation* (FATF/OECD 2013), available at <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Russian-2013.pdf>> (accessed June 18, 2014).

⁹⁷ *Id.* at 17 (R12 (Deficiency 5)).

⁹⁸ *Id.* at 8 (R16 (Deficiency 1)).

⁹⁹ *Id.* at 19 (R16 (Deficiency 7)).

¹⁰⁰ *Id.* at 14 (R6 (Deficiency 1)).

¹⁰¹ *Id.* at 16 (R12 (Deficiency 1), R12 (Deficiency 2), 23, R25 (Deficiency 3), 20, R17 (Deficiency 6)); see also FATF Second Mutual Evaluation Report on Russian Federation, *Combating Money Laundering and Financing of Terrorism* (FATF/OECD 2008), available at <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Russia%20ful.pdf>> (accessed June 18, 2014).

¹⁰² Money Laundering and Terrorist Financing, *supra* n. 84, at 5.

¹⁰³ Бастрыкин: за год на скамье подсудимых оказались 4 судьи, 24 прокурора и 89 адвокатов [Bastrykin: za god na skam'e podsudimyykh okazalis' 4 sud'i, 24 prokurora i 89 advokatov [Bastrykin: 4 Judges, 24 Prosecutors and 89 Advocates Were Prosecuted Last Year]], Pravo.ru (Febr. 27, 2014), <<http://pravo.ru/news/view/102261>> (accessed June 18, 2014).

this system are not sufficient. As a result, the effectiveness of investigations into economic and financial crime is significantly undermined. It would, therefore, be a miracle if effective investigations were successfully conducted without the dedicated assistance of 21st century gatekeepers.

5. Is There Any Whistleblowing in Russia?

It is difficult to imagine contemporary business without whistleblowing because, in international corporations, it is a recognised method of preventing and investigating corporate crimes. The emergence of whistleblowing as an institution is considered one of the most significant developments in corporate governance in the last fifty years.¹⁰⁴ Over the past several years, many fraud and bribery scandals have come to light because of whistleblower tip-offs.

As business and governmental organisations increase in size and complexity, and work within them becomes more specialised, it becomes increasingly more difficult to discover, prevent and correct mistakes and wrongdoing.¹⁰⁵ Information and technology revolutions have compounded this phenomenon by increasing opportunities for significant fraud and other illegal and harmful acts.¹⁰⁶

Commonly, whistleblowers are defined as those 'who report illegal or wrongful activities of their employers or fellow employees.'¹⁰⁷ Miceli, Near and Dworkin define whistleblowing as follows: '[W]hen current or former employees disclose illegal, immoral, or illegitimate organizational activity to parties they believe may be able to stop it.'¹⁰⁸ The goal of the legislation on whistleblowers and their protection is, respectively, 'to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.'¹⁰⁹

However, the rise of whistleblowing in the West has had a very limited impact on Russian companies. There are, evidently, several reasons behind this finding. Firstly, informers and whistleblowers have been held in very low regard by Russians for

¹⁰⁴ Matt Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act Bounty Hunting*, 45(2) Conn. L. Rev. 483, 485 (2012–2013).

¹⁰⁵ See Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64(3) Soc. Inq. 322, 328 (1994).

¹⁰⁶ See Terry Dworkin, *Whistleblowing, MNCs, and Peace*, 35 Vand. J. Trans'l L. 457, 462 (2002).

¹⁰⁷ See Jenny Lee, *Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 Brook. L. Rev. 303, 306 (2011–2012).

¹⁰⁸ Marda Miceli et al., *A Word to the Wise: How Managers and Policy-Makers Can Encourage Employees to Report Wrongdoing*, 86 J. Bus. Ethic. 379, 379 (2009).

¹⁰⁹ US Senate Report (2010) No. 111-176, *The Restoring American Financial Stability Act of 2010* 110.

many centuries¹¹⁰ and, therefore, Russia has no clear tradition of the practice.¹¹¹ In terms of civilian oversight, whistleblowing took on especially negative connotations towards the end of the Soviet era. Not only did the Russian public possess a deep-seated mistrust of the government but it also had a fear of organised crime which meant that, during Yeltsin's presidency, 'informancy' was an 'impossible proposition for the average Russian.'¹¹² Nothing much has changed since Russian corporations began introducing corporate governance rules. However, not avoiding clear, comprehensive and workable whistleblowing provisions would help to fight internal frauds and corruption.¹¹³

Secondly, Russian companies conventionally play their own corporate games by formally accepting advanced corporate governance standards to attract investors but, at the same time, limiting their application to real corporate life. Nobody could ever imagine that a Rosneft employee would inform an authorised statutory body about any misconduct inside the company.¹¹⁴

Thirdly, the state provides no real protection for whistleblowers, whose protection is essential to encouraging the reporting of misconduct, fraud and corruption.¹¹⁵ Although the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected,¹¹⁶ according to the latest report by the Russian branch of the anti-corruption NGO, Transparency International,

¹¹⁰ See Никулина Е.А., Куркин И.В. Повседневная жизнь тайной канцелярии XVII века [Nikulina E.A., Kurkin I.V. *Povsednevnyaya zhizn' tainoi kantselyarii XVII veka* [Elena A. Nikulina & Igor V. Kurkin, Day-to-day Life of the Secret Office in XVIII Century]], ch. 4 (Molodaya Gvardiya 2008).

¹¹¹ See Катасонов В. Финансовое доносительство в Америке и России [Katasonov V. *Finansovoe donositel'stvo v Amerike i Rossii* [Valentin Katasonov, Financial Whistleblowing in the US and Russia]], *Russkaya Narodnaya Liniya* (Sept. 5, 2012), <http://ruskline.ru/analitika/2012/09/05/finansovoe_donositelstvo_v_amerike_i_rossiya/> (accessed June 18, 2014).

¹¹² Jasmine Martirosian, *Russia and Her Ghosts of the Past*, in *The Struggle Against Corruption: A Comparative Study 100* (Roberta A. Johnson, ed.) (Palgrave 2004).

¹¹³ See Черкаев Д.И. Доносительство и сигнализирование: зло или благо для российских компаний? // Акционерное общество. 2006. № 3(22) [Cherkaev D.I. *Donositel'stvo i signalisirovanie: zlo ili blago dlya rossiiskikh kompanii?* // *Aktionernoe obshchestvo*. 2006. No. 3(22) [Dmitry Cherkaev, *Whistleblowing and Informing: Good or Bad for Russian Companies?*, 2006(3) Corporation]], available at <<http://www.incorporate.ru/ru/materials/our/korp/material27.html>> (accessed June 18, 2014).

¹¹⁴ See Company Policy on Combating Involvement in Corruption Activities No. P3-11.03.01 P-01 (approved by the Rosneft Board of Directors, Minutes No. 24 dated May 30, 2012; Introduced by Order No. 441, dated August 23, 2012) ¶¶ 4, 10, <http://www.rosneft.com/docs/information-en/documents/Company_Policy_on_Combating_Involvement_in_Corruption_Activities.pdf> (accessed June 18, 2014) (the company guarantees confidentiality to all employees and other persons that report any violations in good faith).

¹¹⁵ Yulia Krylova, *The Nature of Corruption and Multilateral System of Anti-Corruption Regulation in the Transition Economy of Russia*, 65(1) Eur. J. Sci. Res. 79, 88 (2011).

¹¹⁶ G20 Anti-Corruption Action Plan. Action Point 7: Protection of Whistle-blowers <<http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/G20%20-%20study%20on%20whistleblowers.pdf>> (accessed June 18, 2014).

entitled 'Protection of corruption whistleblowers,' there is virtually no legal protection for whistleblowers in Russia in the existing legislation.¹¹⁷

The protection of participants in criminal judicial proceedings is regulated by Federal Law No. 119- FZ, dated 20 August 2004, 'on state protection of victims, witnesses and other participants of criminal procedure.'¹¹⁸ However, Transparency International emphasises that a whistleblower, as understood in international documents, is 'not a witness in the traditional sense, as described in the Criminal Procedure Code.'¹¹⁹ Therefore, criminal procedure rules which may be suitable for those in witness protection or suspects, and for accused who make a pre-judicial co-operation agreement, are not suitable for the protection of corporate whistleblowers.

Fourthly, it is necessary to consider the possibility that Russian whistleblowers, multinational corporation employee whistleblowers and other persons with evidence of Russian government corruption can work confidentially through US Foreign Corrupt Practices Act and UK Bribery Act violation lawyers to expose government corruption and recover large financial rewards for reporting illegal conduct.¹²⁰ However, recent attempts to use these mechanisms have demonstrated their weakness and ineffectiveness. For example, extensive publications about the commercial activities of the First Vice-Prime Minister Mr. Shuvalov (*shuvalogeit*) have not resulted in any investigation in Europe or the US.¹²¹

In an era of complex economic and financial investigations and in an environment where corporate whistleblowers are gaining more and more public recognition and legislator protection,¹²² what kind of responsibility can be placed realistically on Russian investigators? When investigations cannot obtain an early warning about financial wrongdoing or are informed about the offence years after it has been committed, it is difficult to support public demand for high quality and effective investigation.

¹¹⁷ Russia – Whistleblowing Protection, <<https://blueprintforfreespeech.net/document/russia>> (accessed June 18, 2014).

¹¹⁸ Vera Shaftan & Alexey Borodak, *Corporate Crime, Fraud and Investigations in Russian Federation: Overview*, <<http://uk.practicallaw.com/4-520-5669#a973430>> (accessed June 18, 2014).

¹¹⁹ Alternative to Silence: Whistleblower Protection in 10 European Countries, Transparency International (Nov. 15, 2009), <http://www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries> (accessed June 18, 2014).

¹²⁰ See Jason Coomer, *International Efforts to Help Expose & Prosecute Bribes and Illegal Kickbacks to Russian Government Officials & Other Government Corruption by Foreign Corrupt Practices Act*, <<http://www.internationalwhistleblower.com/russiabribewhistleblowers.htm#sthash.hK3QTJUK.BJ7w3DGV.dpuf>> (accessed June 18, 2014).

¹²¹ See Leonid Bershidsky, *Shuvalov Tests Russia's Corruption Laws*, Bloomberg View (Apr. 4, 2012), <<http://www.bloomberg.com/news/2012-04-04/shuvalov-tests-russia-s-corruption-laws-leonid-bershidsky.html>> (accessed June 18, 2014).

¹²² For example, the fairly new Dodd-Frank Act which, amongst other things, provides lucrative benefits for whistleblowers. See Vega, *supra* n. 104.

6. Conclusion

As mentioned above, this article does not aim to provide a comprehensive and all-encompassing explanation of the actual failure of economic and financial crime investigations in Russia. There is no doubt that the primary responsibility for this failure remains with state institutions; however, merely stating this fact is not enough to modernise the system and sift out the old inquisitional investigatory paradigm and replace it with a new, independent investigatory approach.

Russian businessmen are willing to deal with Russian investigators on a level playing field and they certainly do not want investigators in the 21st century to play according to obscure and unpleasant rules that were established at the time of the GULAG. Moreover, Russian professionals do not want to bear the significant burden resulting from professional and ethical Western-style regulations which are complex and costly to implement. However, this position strongly contradicts the old maxim 'no pain – no gain.' Twenty-first century investigations of economic and financial crime, accompanied by all of the Western-style benefits of fairness, independence and legality, are possible only in Western-style corporate, business and professional environments, including, amongst many other things, a properly developed system of gatekeeping, law-enforcement and whistleblowing.

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