



Newsletter

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Legal Regulation of Controlling Entrepreneur's Activity

Controlling activity of enterprises has become an acute issue recently.

Since the conduct of business in Georgia became possible, the state turned actively interested in the activity of entrepreneurs. Unfortunately, exercising control over entrepreneurs' activity attained inadequate character and it continues up to now. Exactly because of this it is vital to become aware of the scopes of authority of controlling bodies and what is the necessary procedure to be followed from their part in order for the control to be deemed lawful.

Controlling entrepreneur's activity certainly has its positive purpose. It is one of the mechanisms for ensuring rule of law and effectively exercising state governance. However, it is interesting whether this type of control breaches the principle of free enterprise and where the line goes between legal control of an entrepreneur and significance of control. In order to better understand the institute of controlling entrepreneur's activity, it is essential to evaluate legislative grounds of the control.

Article 30 § 2 of the Constitution of Georgia affirms the obligation undertaken by the State to foster condition for the development of free enterprise and competition. The principle of freedom of entrepreneurial activity is endorsed by the independent rights envisaged in Article 10 § 2 of the Civil Code of Georgia, whereby participants in a civil relation may exercise any action not prohibited by law, including any action not directly foreseen by law. Exactly the enterprise subjects are active participants of civil relations. At the same time article 97 § 2 of the Constitution of Georgia determined the obligation of establishing agencies implementing control. Exactly by this the state confirmed its will to exercise certain control over the activity of entrepreneurs. Until 2001 this kind of control exercised by executive bodies has gone beyond all the limits and frequently disregarded the principle of promoting "Free Enterprise".

On 2001, by adoption of the law on "Control of Entrepreneurial Activity", the scope for exercising control by the executive bodies over enterprise subjects has been immensely restrained. This restriction constitutes that control over entrepreneurial activity shall be exercised only based on the order taken by the judge. Pursuant to this rule, the burden of control over entrepreneurial activity was transferred to judicial bodies.

Entrepreneurs, whose activities are controlled by administrative bodies, are enterprises of organizational and legal form (Company of Limited liability, Joint Stock Company, Company of Joint Responsibility, Commandit Company, Cooperative, individual enterprise) as provided by the law on Entrepreneurs; as well as those noncommercial legal persons, carrying out supplementary entrepreneurial activities. As a rule, they are controlled only in this part of their activity.

Administrative bodies are authorized to exercise control over the entrepreneur's activity only within the framework and rules established by law. It is interesting for us what is meant under the control of entrepreneurial activity. Pursuant to the law "Control of Entrepreneurial Activity" it is an activity of administrative bodies that aims at:

- inspecting financial-economic activity of the entrepreneur;
- examining the obligations imposed on the entrepreneur and;
- establishing the compliance of the entrepreneur's activity with the legislation.

These are the means for disclosing specific offences in the activity of the entrepreneur and imposing relevant sanctions.

For instance, control over financial-economic activity of the entrepreneur is carried out by tax and customs bodies. Administrative bodies are not authorized to take any measures being in variance with the legislation. Therefore, any action carried out by abusing the power does not have a legal force and shall be declared as void. Exactly because of this it is crucially significant to find out whether, in the course of implementing entrepreneurial control, the administrative body possessed the right to implement control in accordance with defined circumstances as laid down by the legislation and within the framework of the legislation;

These three components

1. Specific fact;
2. scope of control and;
3. right to control

Shall derive from relevant normative acts.

It is interesting to illustrate this component by a specific example. Tax inspection inspected the entrepreneur not only for checking the compliance of the activity with the tax legislation, but also for examining the compliance with sanitary legislation rules. It is true that the acting legislation of Georgia provides for the possibility of controlling the activity of the entrepreneur by carrying out a sanitary check; however tax inspection is not empowered to enjoy this right. Hence, here we face the violation of the two components mentioned above – scopes for exercising control and authority to exercise control. In this case within the scope of sanitary check the tax inspection abuses its power as set forth by the law.

It is worth considering that according to the acting legislation under entrepreneurial control shall not be meant:

- issuance of license, certificate and permit;
- request of certificate in trade net, which can be followed by drawing up a relevant act;
- observance of international treaties and agreement of Georgia in the field of environment protection;
- exercise of activity by the Ministry of Environmental Protection of Georgia for the purpose of inspection of usage of natural resources;
- activities set forth by the treaties and licenses related to oil and gas resources.

The activity of the entrepreneur shall be controlled:

- only by the controlling body or;
- in the absence of relevant grounds by suggesting the inspection of entrepreneur's activity the other state agency may apply to the controlling body or the court.

Controlling body is any state, local self-government and governmental bodies, as well as other administrative body, which is authorized by law to implement control over entrepreneurial activity.

Controlling body is empowered to control the activity of the entrepreneur, by which it is authorized to enter the enterprise and:

- request documentation;
- suspend the entrepreneurial activity;
- seal the property of the entrepreneur;
- inspect the enterprise;
- check the quality of the product produced by the entrepreneur;
- examine the compliance of the enterprise with legislation on environmental protection.

Any type of control mentioned above, the application of which shall logically derive from the importance of inspection, may be exercised by the controlling body only on the basis of the judge order.

It should be taken into account that Article 5 of the law on "Control of Entrepreneurial Activity" lists seven controlling bodies, which are authorized to implement control in absence of the judge order. These bodies are:

1. Tax and customs bodies. These bodies are authorized under Article 99 § 2 of the Tax Code to take tax control measures. These measures shall attain planned character. Judge order is not required only while these bodies carry out planned inspection; however in other circumstances, when the inspection is not planned the judge order is required.
2. National Bank of Georgia. The aim of supervision and regulation of bank activities is the promotion of stable functioning of the system.
3. The Chamber of Control of Georgia. The Chamber of Control is a constitutional body. Its fundamental function is to supervise the usage and expenditure of state funds and other state material values. However, the Chamber of Control is also authorized to implement control over the subjects of private law and physical persons in part of their activity, which is related to the receive, transfer and usage of budgetary funds and funds possessed by the special state foundations, as well as in the part, which concerns granting to them tax, customs and other privileges.
4. State Supervisory Agency of Insurance. State Supervisory Agency of Insurance exercises control over companies operating in the insurance market within the framework of the law on Insurance and relevant sub-legislative acts.

5. National Commission of Securities. Supervisory status and authority of this Commission derives from the law on Market of Securities [commercial papers] based on which the Commission regulates and controls Market of Securities.
6. Activities carried out by the Independent National Regulatory Commissions, which shall be laid down in the legislation of Georgia. The majority of the Commissions are established as the legal entity of public law and delegation of power to them from the state is deemed to have a positive nature.
7. Ministry of Energy and the State Inspection for Technical Supervision of Georgia.

Despite the above administrative bodies are exercising control in absence of the court's permit, this does not mean that implementation of this function from their part is uncontrolled. Its impeding and hampering factor is the requirement set forth in Article 5 of the law on "Control of Entrepreneurial Activity", whereby entrepreneurial control of an entrepreneurial legal person shall be implemented only based on the administrative act of relevant body. This act as an administrative one shall be issued on the basis of a normative act and in compliance with the requirements established by the General Administrative Code.

It is interesting, what is the procedure for obtaining a permit for implementation of control.

Attention should be drawn to the fact that in case the judge does not issue an order granting the right to inspect the activity of the entrepreneur, the inspection of the entrepreneur can not be conducted.

The controlling body is obliged to submit to the entrepreneur the list of its rights and obligations in written before the implementation of inspection.

Prior to obtaining the judge order, controlling body shall submit an argued petition to him.

Petition of the controlling body represents a procedural action and it shall be submitted to the court before inspecting the entrepreneur. The law on "Control of Entrepreneurial Activity" establishes that the inspection of the entrepreneur can not be implemented without a court order. In spite of this imperative reservation, there is an exception for initiation of the inspection of an enterprise activity without the court order. This may be conducted in circumstances when a direct threat might be posed to:

- State Security;
- life and health of a person, and/or;
- evidences.

In this case controlling body is empowered to suspend the activity of the enterprise in the part of inspection and not the entire activity of the enterprise. Following this the controlling body shall immediately apply to the court with the petition to obtain a judge order for commencing the activity of the enterprise.

Commence of immediate inspection of the entrepreneur is admissible in case, when:

1. it is impossible to suspend the operation of the enterprise;
2. suspension causes considerable damage to the enterprise;
3. an entrepreneur request the inspection.

In these kinds of cases petition shall be filed to the court within 24 hours, where the importance of immediate inspection shall be substantiated. The Court shall examine the case and give an assessment to the relevant activity of the controlling body.

In case the inspection of the entrepreneur is in the course of implementation and the judge waives the issuance of order on inspection, the inspection shall be stopped immediately and the amount paid to the controlling body or state or local budget as well as the property and the documentation submitted shall be returned or fully reimbursed to the entrepreneur unconditionally.

If this is impossible the entrepreneur shall be given adequate and full compensation. The entrepreneur may request the compensation of the damage caused by the unlawful inspection.

Controlling body is authorized to inspect the entrepreneur only on the issues contained in a judge order.

Petition, which is submitted by the controlling body for the purpose of obtaining the court order, shall meet certain standards. This is basically factual information and carries a formal character, in particular, in the petition there should be an indication:

1. exact information of the entrepreneur, whose control is planned, as well as
2. terms, nature and scopes of inspection.

In accordance with the requirements as provided by Article 21³ § 3 of the Administrative Procedure Code, the petition concerning the inspection of the entrepreneur's activity shall contain sufficient grounds for issuing an order. Exactly "sufficient grounds" is the sphere of our interest. This requirement set forth by the Administrative Procedure Code is directly related to the requirement established by Article 3 of the law "Control of Entrepreneurial Activity", in particular, the order regarding the inspection of the entrepreneur's activity based on the petition of the controlling body is issued only if the controlling body submits relevant information with substantiated and reasonable doubt concerning the breach of legislation requirements. Certainly, the approach of the legislator as regards the "substantiation of doubt" is illogical, since there is no doubt that is substantiated. Grounded and reasonable information can not be considered as doubt. Therefore, this kind of approach leads us to suppose that the controlling body may acquire permit for exercising control upon raising any doubt. There is a special court procedure established for examining the petition concerning inspection of the activity of the entrepreneur by the controlling body. A number of characteristics of the procedure for examination and issuance of court act deserves attention, especially terms of examination and appeal, participation of the parties in the examination and etc.

Following submission of the petition the court has 72 for delivering a judgment. Court Administration is obliged to clearly record the date of submission of the petition, since the petition examined not within the time-limit may be dismissed by the court of upper instance. The petition is examined in an open sitting, except for petitions related to operative-investigative activity. The court summons the controlling body and the entrepreneur, whose activity is subject to inspection.

It is worth noting that following submission of the petition not only the court, but the entrepreneur has 72 hours for preparation, which is totally not enough. The entrepreneur shall within this time prepare the arguments against the argumentation presented in the petition, hire a lawyer and realize his/her procedural rights. Nevertheless, if considering that examination of the petition is a prerogative of administrative court, where the court stemming from “Officious Principle” is authorized to obtain evidences on its initiative and acquire additional information, it should be said that this considerably relieves the condition of the entrepreneur. The court is entitled to summon and question a person, who testifies the petition, as well as suggest the parties to submit necessary documentation and evidences for the purpose of examination of the substantiation of the petition. The court is obliged to find out whether the information indicated in the petition contains a substantiated and reasonable doubt concerning the breach of the legislation by the entrepreneur. Involvement of the court in the issues related to the control of the entrepreneur’s activity prevents clearly unsubstantiated implementation of control by administrative bodies.

In the course of examination of the petition in court proceedings, the entrepreneur is authorized to give clarification and present argumentation against the motivation submitted in the petition.

It is vital to draw attention to the court minutes, since the date of initiation of examination of the petition is fixed in these minutes. Control of the terms of examination is vitally important during the examination of the petition on the control of the entrepreneur’s activity. Exactly, the breach of control of terms may be become the basis for invalidation of the court order.

The court of first instance delivers decision on control of enterprise within 72 hours. During the proceedings the judge is authorized to:

- summon and question a person, who testifies the petition;
- request the entrepreneur and the controlling body to submit necessary documentation and evidences.

The representative of the controlling body in the course of proceedings is obliged to answer not only the questions of the judge, but those of the entrepreneur and his/her representative.

The entrepreneur and his/her legal representative during the proceedings are given an opportunity to give clarifications and present argumentation against the motivation submitted in the petition concerning the control his/her activity.

In order for the order concerning the control of entrepreneur’s activity to be issued, existence of formal and factual grounds for inspection of the activity of the entrepreneur is essential. The judge order shall be grounded. There should be indicated the purpose of the inspection of entrepreneur’s activity, terms of inspection, which shall not exceed 15 days. One of the original versions of the order shall be handed to the entrepreneur.

The entrepreneur or his/her legal representative are enjoy the right to request to the same court the annulment of the order concerning the control of the activity in case there are newly discovered circumstances, which practically changes the aim of the order issued on the activity of the entrepreneur. This request is submitted to the same court i.e. the court, which issued an order within 3 days. Counting of the term is started from the date, when the entrepreneur became aware of the newly discovered circumstances.

It is worth noting that the term of the order, which was issued for the purpose of legal implementation of the activity of the entrepreneur, shall not exceed 15 days. Nevertheless, the legislator provided for an exception, whereby the controlling body is entitled with the right to request the time-limit extension of the control by not more than 15 days by means of filing a petition to the same court. While filing the petition the controlling body shall clearly substantiate as to why it was impossible to exercise control within the given time-frame and what are the reasons for extending the time. In the course of examination of the petition on time-limit extension, the entrepreneur shall be summoned before the court proceedings as required by the established rule. The entrepreneur is given an opportunity to present contra-argumentation.

The judge order concerning the control of the activity of the entrepreneur does not immediately go into force. The entrepreneur can appeal this order. The time for appeal is rather short and is 48 hours. The term is counted from the delivery of the order. The order is appealed in the appellate instance; however, the claim that is to be filed by the entrepreneur is submitted to the court of first instance issuing the order. Appeal of the order suspends its enforcement and in the course of the appeal, as well as during the examination of the claim of the entrepreneur before the appellate court, the controlling body is deprived of the right to launch the inspection of the activity of the entrepreneur. The term for examination of the claim of the entrepreneur before the appellate court is not long, it is 3 days. The judgment (order or decision) of the appellate court as regards the control of the entrepreneur's activity is final and can not be appealed in the cassation instance.

Therefore, in order for the controlling body to inspect the activity of the entrepreneur, court permit shall be obtained, which is related to special procedures in short terms. The whole process of obtaining the permit is controlled by the entrepreneur itself. In any event, the legislation stipulates for actual measures in this respect if the entrepreneur applies these legislative privileges.

The entrepreneur is authorized to:

- participate in court examination of the petition concerning the inspection of his/her activity;
- present defending argumentation in the court proceedings;
- file a petition aimed at summoning specific witnesses in case the information of the controlling body is based on the testimonies of third persons and this information is not convincing for the entrepreneur;
- submit evidences or file a petition for obtaining them through the court ;
- have a representative, which is essential in these kinds of circumstances, since it is hard for the entrepreneur to effectively defend his/her interests and especially in short terms;
- appeal within 48 hours in the appellate court the court order;
- request the annulment of order before the same court on the grounds of newly discovered circumstances;
- present contra-argumentation while filing a petition by the controlling body concerning the time-limit extension.

When the entrepreneur becomes aware that the control of his/she activity is planned and he/she receives a court notification, it is desirable that he/she:

- attends the proceedings, since absence of the entrepreneur after being officially summoned will not hamper the examination of the petition, however, he/she will be deprived the opportunity to present defensive argumentation;
- follows the terms for appeal;
- prepares argumentation against the information presented in the petition, which will be grounded and substantiated by specific evidences available for the court;
- supervises that the terms for examination of the petition from the part of the court, which is possible by means of getting to know to the court minutes;
- controls whether the controlling body within the circumstances envisaged by the legislation and within the framework of the legislation possesses the right to exercise control;

Certainly, meeting all these requirements necessitates interactivity and adequacy; however, in the conditions of qualified lawyer the result is achievable.

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