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PROCEDURAL PARTICIPATION OF BANKS IN COVERT INVESTIGATIVE (SEARCH) ACTION «BANK ACCOUNTS MONITORING»

Abstract. The concept of financial monitoring as a set of measures carried out by the entities of primary and state financial monitoring in the field of prevention and counteraction to separatist funding (article 110^{-2} of the Criminal Code of Ukraine), legalization (laundering) of criminally obtained property (article 209 of the Criminal Code of Ukraine), and terrorism funding (article 258^{-5} of the Criminal Code of Ukraine) is developed and proved.

The relationship between the categories of «terrorism» and «finance» is determined in the following areas: money paid to terrorists for refusing to commit violence acts; covert funding of terrorist organizations by certain states, non-governmental organizations, and criminal groups; «money laundering» and its introduction into legal circulation; creation of own groups in commercial, credit and financial institutions by terrorist organizations; 'launderingof money' obtained as a result of criminal activity.

The risks in the system of prevention of terrorism and counteraction to legalization of criminally obtained proceedsare outlined. They were defined as the following: non-transparent funding of political parties; the share of cash resources addressed to the mentioned criminal activity; «outflow» of capital; absence of a clearly defined sectoral risk assessment of the entities of primary financial monitoring in the field of prevention and counteraction to legalization (laundering) of criminally obtained proceeds.

It is offered to include the risk of terrorism and separatism funding through deposit-taking corporations tobanking risks.

An attempt has been made to accumulate the majority of the latest achievements (as legislative, theoretical and research aswell as applied ones) on the issues of legal regulation of the studied procedural, financial and legal relations, on the basis of which scientific views are proved and proposals for improving regulations in this area are worked out.

Keywords: monitoring, banks, covert investigative actions, bank accounts monitoring, terrorism funding, banking risks, financial and legal relations.

JEL Classification E42, E52, G28, K13, K14

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ПРОЦЕСУАЛЬНА УЧАСТЬ БАНКІВ У ПРОВЕДЕННІ НЕГЛАСНОЇ СЛІДЧОЇ (РОЗШУКОВОЇ) ДІЇ «МОНІТОРИНГ БАНКІВСЬКИХ РАХУНКІВ»

Анотація. Розроблено та обґрунтовано концепцію фінансового моніторингу як сукупності заходів, що здійснюються суб'єктами первинного і державного фінансового моніторингу у сфері превенції та протидії фінансуванню сепаратизму (стаття 110^{-2} КК України), легалізації (відмиванню) майна, одержаного злочинним шляхом (стаття 209 КК України), та фінансуванню тероризму (стаття 258^{-5} КК України).

Визначено дотичність категорій «тероризм» і «фінанси» у таких площинах: грошові кошти, що виплачуються терористам за відмову від намірів учинення насильницьких дій; негласне фінансування терористичних організацій окремими державами, недержавними

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структурами, злочинними угрупованнями; «відмивання грошей» та їх введення в легальний обіг; створення терористичними організаціями власних структур у комерційних, кредитно-фінансових установах; «відмивання доходів», отриманих унаслідок злочинної діяльності.

Окреслено ризики в системі запобігання проявам тероризму та протидії легалізації доходів, одержаних злочинним шляхом. Такими платформами, зокрема, визначено: непрозоре фінансування політичних партій; питома вага готівкових ресурсів, адресованих для згаданої злочинної діяльності; «відплив» капіталів; відсутність чітко визначеної секторальної оцінки ризиків суб'єктів первинного фінансового моніторингу у сфері запобігання та протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом.

Запропоновано віднести до банківських ризиків ризик фінансування тероризму і сепаратизму опосередком депозитних корпорацій.

Зроблено спробу акумулювати більшість новітніх здобутків (як законодавчих, теоретико-дослідних, так і прикладних) щодо проблематики правового регулювання досліджуваних процесуальних, фінансово-правових відносин, на основі чого обґрунтовані наукові бачення та розроблено пропозиції щодо вдосконалення регламентації в цій сфері.

Ключові слова: моніторинг, банки, негласні слідчі розшукові дії, моніторинг банківських рахунків, фінансування тероризму, банківські ризики, фінансово-правові відносини.

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Introduction. Undermodern conditions, terrorist activity of organizations, groups and individuals is acknowledged to be one of the main sources of threats to Ukraine's national security in the sphere of territorial integrity.

In order to prevent and counteractthe legalization of criminally obtained proceeds, terrorism and separatism funding, the development and substantiation of the concept of financial monitoring, in addition during certain investigative (search) actions, becomes especially important. One of the tools of primary financial monitoring is a compliance risk, introduction of its unified assessment algorithm requires further scientific and applied studies.

Research analysis and problem statement. The issues of financial monitoring as a tool of prevention and counteraction to legalization (laundering) of criminally obtained proceeds, terrorismfunding, and conducting of relevant procedural actions were under consideration of such scientists as: L. I. Arkusha, N. M. Akhtyrska, A. V. Bazyliuk, O. I. Baranovskyi, O. O. Balanutsa, B. S. Boloskyi, V. A. Zhuravel, N. V. Iveruk, V. R. Kralich, O. Y. Korystin, O. V. Pustovit, O. S. Starenkyi, D. B. Sergeieva, O. V. Khalin, S. S. Cherniavskyi, and others.

However, the issue of a comprehensive economic and legal approach to determining the functions of financial monitoring and the implementation of compliance in the risks of the entities of primary financial monitoring, was considered partially or within economic and procedural legal sphere separately and requires further research.

Methodology and research methods. The paper is based on general and special methods of scientific research. On the basis of the general scientific dialectical approach, the social and legal character of financial and economic crime in the context of counteraction to money laundering (terrorism funding) is considered. With the help of the formal legal analysis of the current legislation, the content was clarified and the existing drawbacks of legal regulation were revealed; the systematic functional method was used to study the main aspects of the procedural regulation of the participation of banks as entities of primary financial monitoring in terrorismfunding counteracting; formal logical — to identify the peculiarities of legal regulation; special legal (comparativelegal) — to clarify common and distinctive features of legal regulation of financial monitoring and bank accounts monitoring; the method of legal interpretation, technical and legal analysis — to interpret the provisions of procedural law, disclose the content of the concepts, which allowed to find certain gaps in legal regulation of relations and institutions under study.

The purpose of the paper is an attempt to conduct namely economic and legal research of the sources and financial mechanisms of terrorism counteraction, working outsuggestions for

improving the system of financial monitoring whileperforming certain investigative (search) actions.

Results of the research. In the globalized world, the issue of financial and economic crime is becoming more acute, because finance is a platform of opportunities. Financial and economic crime is a set of specific types of offenses defined by current legislation, which, in particular, include: illicit cash flow; legalization (laundering) of criminally obtained proceeds; tax evasion; pushing to bankruptcy (insolvency); fraud with financial resources; smuggling; counteraction to lawful economic activity, and other criminal offenses.Factors that induce to the commitment of these mentioned above illegal acts are the financial and economic crisis, economic competition (using, as a rule, unfair competition and criminal methods of economic fight).

The dominant vulnerabilities, characteristic for modern realities of Ukraine, which contribute to the spread of financial and economic crime in the context of financing and outspread of terrorism and separatism, are the following:

— insufficient control over migration flows of individuals and materials and supplies inventory from / to the territory of ORDLO (temporarily occupied territories of the Donetsk and Luhansk regions);

— significant turnover and use of cash; possibility of registration of business entities on «fictitious» persons;

— insufficient regulation of the non-profit sector;

— simplicity in use of payment systems;

— shadow economic activity; illegaldrugs, weapons, and human trafficking;

— spreading of anti-government and anti-state sentiments among the population [1, p. 78].

The definition of the term «terrorismfunding» comprised in the Law of Ukraine «On Preventing and Countering to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction» [2], corresponds to the structure of Article 258-5 of the Criminal Code of Ukraine [3] (terrorism funding) and foresees provision or collection of assets meaning their full or partial use:

— for any purpose by an individual terrorist, terrorist group or terrorist organization;

— for organizing, preparing and committing a terrorist act, engaging in a terrorist act commitment, public appeals to commit a terrorist act, creating a terrorist group or terrorist organization, facilitating a terrorist act, conducting of any other terrorist activity, as well as attempts to commit such acts.

The main element in the anti-money laundering (AML) and terrorism funding (TF) is the necessity to monitor the systems of states for their compliance with international standards [4]. Mutual evaluation conducted by the FATF and relevant regional organizations as to the working out of financial measures to combat money laundering, as well as evaluations conducted by the International Monetary Fund and the World Bank, is an essential mechanism to ensure effective implementation of the FATF Recommendations by all countries [5].

Financial monitoring for counteracting to terrorism funding and legalization (laundering) of criminally obtained proceeds should be considered in the context of:

— the system of measures of financial, administrative, criminal and operative-search character; as a system of state regulation;

— mechanism of permanent monitoring of financial transactions.

The National Bank of Ukraine is an entity of the state financial monitoring, which regulates and supervises prevention and counteraction of legalization (laundering) of criminally obtained proceeds, terrorismfunding, and financing the proliferation of mass destruction weapon by non-banking financial resident-institutions. They are payment organizations and/or members, participants of payment systems in terms of providing financial services for the funds transferon the bases of relevant licenses, including the National Bank of Ukraine (except for postal operators in terms of their funds transfer), branches of foreign banks.

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Banks, as it was already mentioned, are the entities of primary financial monitoring. In fact, they are entrusted with the function of combating money laundering and terrorism funding which is stipulated by local regulations.

The National Bank of Ukraine, during the supervision of banks, inspects them for compliance with the legislation requirements that regulates relations in the field of prevention and counteraction to legalization (laundering) of illegally obtained proceeds, terrorism funding and financing the proliferation of mass destruction weapon, sufficiency of measures to prevent and counteract the legalization (laundering) of illegally obtained proceeds, and terrorismfunding [6].

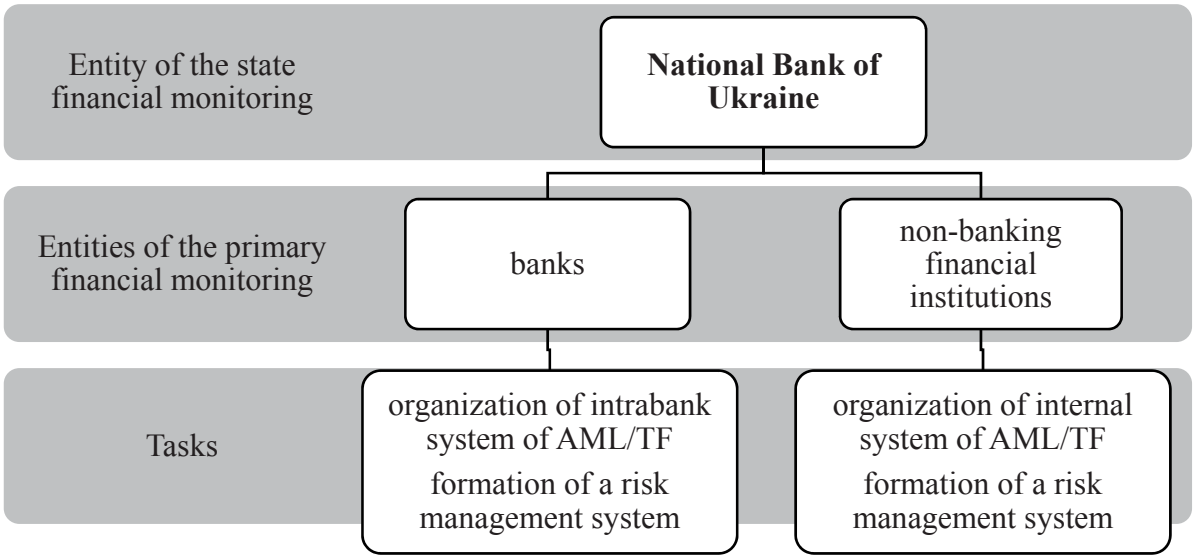

Fig. 1. **Hierarchy of financial monitoring entities**

Note: worked out on the basis of [7; 8]

It is regulated by law [2] that the entity of primary financial monitoring independently develops and implements the rules of financial monitoring and internal documents that regulate its conduct, guided by regulations and local legislative acts.

Working out of internal documents on financial monitoring for their further approval and implementation in its activities by the entity of primary financial monitoring,it should be taken into account that prevention and counteraction are based on the principles of giving priority to measures of anti-money laundering, terrorismfunding, and financing the proliferationof mass destruction weapon over their countermeasures, application of a risk-based approach during financial monitoring and the coordination of interaction among participants of the system of prevention and counteraction [2].

In our opinion, this is rather dubious initiative, because banks are endowed with the privilege of autonomy and independence (if agreed by the National Bank of Ukraine) to choose the policy of AML/TF. Thus, analyzing the international experience of AML/TF, it is possible to state the fact of increase of illegal banks transactions, with a significant share of the state in the authorized capital. In particular, according to Reuters [9], Britain's financial regulator has started a criminal action against NatWest (the state's share in the authorized capital is over 60%) over allegations it failed to detect suspicious activity by a customer depositing nearly 400 million pounds ($ 553 million) over five years, mostly in cash.

Due to the high competition between banks, which is constantly growing, traditional transactions bring less and less profit. That is why banks are active to introduce the latest products and services and offer their customers innovative financial tools. This becomes the reason for the increasing diversification of banking transactions, but such an expansion of the product range can have negative consequences. Quite often the latest and insufficiently studied tools are used for

speculative actions in order to make profit, hide the real value of objects, tax evasion, as well as for laundering of illegally obtained money [10].

Taking into accountthe criminals' way of thinking, to hide the illegal source of financial assets, it is necessary to invest them into real economy, by opening «one-time» bank accounts by one-day firms, thus, spraying cash flows and «laundering» funds.

One of the widely used methods of money laundering obtained from criminal activity is to accrue payments through a bank in the form of wages or some remuneration (financial aid, compensation or interest-free credit) for the benefit of an individual or organization. Due to such transactions, with the help of banking institutions, significant amounts of money can be laundered or hidden from taxation. It is clear that such actions of criminals significantly undermine economic stability of the country and hamper its development [11]. Besides, payment for services is one more rather popular tool of money laundering, as service is an intangible asset,that is whyreceiving it from one-day firm is procedurally difficult to prove. Under modern conditions, criminals resort to increasingly creative ways of money laundering, that requires permanent improvement of forms, methods and tools of procedural measures.

In fact, in the context of procedural interaction between law enforcement agencies and deposit-taking corporations, a covert investigative (search) action «Bank accounts monitoring» is carried out.

According to article 269-1 of the CPC (Criminal Procedure Code) of Ukraine, in case of reasonable suspicion that a person commits criminal acts using a bank account, or for the purpose of search or identification of property subject to confiscation or special confiscation, in criminal proceedings under the jurisdiction of the National Anti-Corruption Bureau of Ukraine, the prosecutor may apply to the investigating judge in order prescribed by articles 246, 248, 249 of the CPC of Ukraine, to make a decision on bank accounts monitoring [12].

The validity of the decision of the investigating judge on the monitoring of bank accounts is limited to two calendar months. General period of bank accounts monitoring may not exceed the maximum terms of pre-trial investigation.

According to the investigating judge decision on the bank accounts monitoring, a bank is obliged to provide the National Anti-Corruption Bureau of Ukraine in the current mode with the information on transactions carried out on one or more bank accounts. The investigating judge informs the head of the banking institution in the decision on bank accountsmonitoring about the obligation not to disclose the information about the conduct of this investigative action and about criminal responsibility. On the basis of the decision of the investigating judge, the head of a banking institution is obliged to notify in written form all its employees involved in bank accounts monitoring of the obligation not to disclose information about the conduct of this investigative action and criminal responsibility [13, p. 159]. This decision allows banks to disclose bank secrecy as to their customers.

Information about transactions carried out on bank accounts must be brought to the notice of the National Anti-Corruption Bureau of Ukraine before the relevant transaction is performed, and in case of impossibility — immediately after its performance.

Taking into account unity of the procedural form and the expediency of adhering to the principle of a single status of the investigator, regardless of his/her affiliation to a particular investigative unit, the investigative action of «bank accountsmonitoring» should be attributed toinvestigators competence of all departments. Separately, it is expedient to regulate, as a measure to ensure criminal proceedings, the suspension of banking transactions, and as an investigative action — the seizure of bank documents and arrest of bank accounts [14, p. 107].

Drawbacks of the procedural regulation of bank accounts monitoring, as a covert investigative action, are the following:

— insufficient regulation of the procedure;

— uncertainty of recording of the identified evidence base;

— absence of the actions algorithm of the officials.

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Conclusions. Thus, it is advisable to introduce as a measure to ensure criminal proceedings the suspension of banktransactions, and the seizure of bank documents and arrest of bank accounts — as an investigative (search) action.

It is expedient to introduce a unified legal framework for combating money laundering and terrorismfunding, as local regulations lead to the modification of risk assessment methods, assigning to it somewhat volatile nature.

Taking into account the recommendations of MONEYVAL [15], it is essential to create a single state statistical register for combating money laundering and terrorism funding.

In order to increase the effectiveness of financial monitoring in the field of counteracting terrorism and separatism, it is necessary to carry out operational supervision over the functioning of payment and settlement systems and the nature of financial transactions [16]; introduce an effective mechanism to disrupt financing of terrorist organizations through affiliates; increase the amount of financial sanctions for criminal offences connected with money laundering and terrorismfunding.

In the procedural process, it is necessary to ground and «prescribe» the algorithm and methodology of the bank's participation as a mandatory participant of the covert investigative (search) action of «bank accounts monitoring».

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