

## ESSENCE AND CONTENT OF CATEGORY “FINANCIAL INVESTIGATIONS” AND CONCEPT DEVELOPMENT AMID EUROPEAN INTEGRATION

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**Abstract.** The article carries out analysis of essence and content of financial investigations as one of the main countermeasures to shadowing the economy and, in particular, anti-money laundering. Features of the implementation of the FATF Recommendations and other international organizations regarding the legal and institutional support of conducting financial investigations in Ukraine and other European Union countries are determined. Systematization of scientific views on the definition of “financial investigation” and the practice of carrying out the relevant activities both in foreign countries and in Ukraine allowed formulating approaches to the unification of the term “financial investigation” in the national scientific format. *The methodological basis of the research* consists of general scientific and special methods and techniques of scientific knowledge, which are used as a single set, namely, the logical-semantic method, the method of convergence, and also the formal-logical method are chosen to define the concepts of “financial investigation”, “analytical research”, “anti-money laundering”, “interaction of subjects of the national system of anti-money laundering”, etc. The comparative legal method is used to study the positive foreign and domestic experience of institutional and legal provision of financial investigations in the fight against money laundering, as well as to analyse and characterize the requirements of international organizations regarding the implementation of European Union legislation in the domestic legislation on issues of the legal framework for anti-money laundering. *Practical implications* of the paper are to reveal and systematize problems to be solved by improving the domestic legal and regulatory framework for organizing financial investigations in the system of anti-money laundering measures, while the new principles of its formation proposed by the authors can be implemented in practical terms and result in improving the information and spatial format and enhancing the interaction of the subjects of ensuring national economic security.

**Key words:** economic security, financial security, state security, legal regulation, shadowing of economy, fight against corruption, legalization (laundering) of illegally obtained income.

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### 1. Introduction

The organization of the work of subjects of national systems for combating crime and other economic offenses, in particular, the legalization (laundering) of illegally obtained income, terrorism financing, and proliferation of weapons of mass destruction, is constantly monitored and controlled by the Committee of Experts of the Council of Europe on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism – MONEYVAL. Experts of MONEYVAL determine the criteria for evaluating the technical compliance with each of the FATF Recommendations and the results, indicators, data, and other factors used to assess the effectiveness of implementing the FATF

Recommendations (FATF Recommendations dated 16.03.2012) by a country that is undergoing a certain round of mutual evaluations. In this case, the maximum compliance with the above recommendations for the introduction of measures to counteract the legalization (laundering) of illegally obtained income is required. Among such measures, an important place belongs to financial investigations.

In accordance with these recommendations, the term “financial investigations” means the study of financial affairs related to criminal activities for the purpose of: determining the extent of criminal networks and/or crime rate; establishing and tracking illegally obtained income, terrorist funds, or any other assets, which

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are subject to or can be subject to confiscation and submission of evidence that may be used in the course of criminal prosecution (FATF Recommendations dated 16.03.2012).

As scientists point out, financial investigations include measures to counteract plundering of state funds, cybercrime, corruption, tax evasion, money laundering, terrorist financing, trade in arms, drugs, people, etc. (Cherniei, 2017). Striving to ensure compliance with the obligations of countries regarding European integration, one should listen to Eberhard Schmidt-Aßmann's warning regarding the interpretation in accordance with the current law of European communities, in particular, the EU directives, which has already been recognized, however, given it, the preconditions and implications are still rather an uncertain instrument. It should cover all national legislation, and not only laws specifically adopted for the purpose of implementing a directive, and should also be binding not only for judges but also public administration bodies of the member states. All this makes sense in the policy of integration. However, here too, one cannot ignore some of the warning processes. These warnings relate to the fact that constitutional European law often uses very broad and uncertain in this sense terms. Instead, being bound by the law, in any case, implies a certain degree of justification. One cannot ignore the threat that the uncertain provisions of directives will be transposed to the national legislation and will cause the formation of discretionary powers of the subjects of law enforcement (Eberhard Schmidt-Aßmann, 2009).

## 2. The concept "financial investigation" in theory and legal acts

The concept "financial investigations" has come into a modern lexicon and practice. As a general rule, it is a specific activity related to the study of documents and other sources in order to find out information about the turnover of funds, origin and establishment of property, etc. Such activity is carried out by various entities: financial intelligence, control and supervisory bodies, law enforcement agencies, consulting companies. So, putting one or another content in this concept, it is used by ordinary citizens, representatives of mass media, scientists, practitioners, it is mentioned in draft laws and regulations, which propose to determine the status of special subjects that will specialize in the specified types of investigations.

Some scientists believe that "financial investigations" as a procedural activity should be understood as the collection, consolidation, comprehensive consideration, study of essential data relevant to the case, the circumstances of the committed violation associated with the encroachment on the relations regarding the formation, distribution, redistribution, and use of monetary funds (financial resources) of subjects

of economic relations. Combining in this definition "procedural activity" which is a certain "hybrid" of financial control and work of law enforcement bodies with the classical definition of finance, we consider "violation in the financial sphere" as a movement of money outside the legal framework (Pimenov, 2003).

Other scholars point out that financial investigations should be considered as a practical (procedural) activity and as a scientific direction. Under the financial investigation as a procedural activity, they understand the collection, comprehensive consideration, study of the essential circumstances of the committed violation in the field of monetary relations that arise in the process of distribution and redistribution of the value of gross social product and a part of national wealth in connection with the formation, distribution, and use of monetary funds. At the same time, under financial investigations, they consider the direction of scientific research on violations in the financial sector that aims to develop an effective methodology, methods of prevention, detection, and investigation of these violations, as well as recommendations for building an effective financial system that basically prevents committing violations (Kondrateva, Goriunov, 2003).

Periodically, proposals are made, in particular, for the Action Plan of Ukraine to improve the national financial monitoring system by the results of Round 5 of the MONEYWAL assessment regarding the definition of the term "financial investigations" in national legislation. At the same time, certain members of the said Council on the Prevention and Counteraction of the Legalization (Laundering) of the Proceeds from Crime, Terrorist Financing, and Financing of the Proliferation of Weapons of Mass Destruction, objected to this proposal, substantiating this with the fact that one of the elements of the pre-trial investigation today is conducting investigative (search) actions, which in their content actually are a "financial investigation". In this regard, the separation of the obligation to support financial investigations of pre-trial investigations is superfluous (Materials of the 5th Convocation of the Council meeting, 2018). These arguments are not indisputable, in particular, taking into account the experience of legal regulation of financial investigations by countries with the post-Soviet past.

For example, in the Republic of Lithuania, measures are actively being implemented to implement anti-money laundering standards and in Order of the Prosecutor General of the Republic of Lithuania No. I-73 as of 19 March 2013 "Recommendations for Financial Investigations", the definition of the concept of financial investigation is proposed.

In accordance with the said legal act, a financial investigation is disclosed as a process of collecting information about the property of any form belonging to a person or related individuals and legal entities, agreements and financial transactions in order to find property possibly

obtained by a criminal or other illegal means or property of an appropriate value to ensure possible confiscation or extended confiscation or a possible civil claim, and to collect other information relevant to the investigation related to property transactions and financial transactions (Order of the Prosecutor General of the Republic of Lithuania, 2013). The same Order stipulates that a financial investigation shall be related and carried out in such types of investigation as: pre-trial, criminal intelligence, or other, in accordance with the law. Moreover, in contrast to the provisions of Ukrainian legislation, in which the concept of financial investigation and its relation to other criminal proceedings in general are not defined separately, the Order determines that the financial investigation is conducted in parallel with the pre-trial investigation, while the principles of procedural interaction of subjects who conduct a financial investigation and a prosecutor – procedural leader of the pre-trial investigation (Order of the Prosecutor General of the Republic of Lithuania, 2013).

In this approach, a reasonable understanding of the ratio of financial investigation and criminal proceedings is formed. It is recognized that these activities differ in content, direction (by object and purpose), and methodology, respectively, the concepts of “financial investigation” and “criminal proceedings” are not identical.

By formulating and consolidating the concept of financial investigations, one should consider the experience of countries where there is the active practice of financial investigations and their scientific and methodological substantiation within the scope of activities of economic entities. In particular, the service “financial investigations” is quite common in the field of consulting. Many consulting and audit companies have specialized financial investigative units, so-called “forensic” groups (Efimov, Bushueva). Financial investigations are carried out in the form of a retrospective verification of the company’s activities, estimation of losses and lost profit, a search of guilty persons, and collection of evidence by private organizations (Tylchuk, 2017). In particular, Kreston GSG is a representative of an international network in the field of audit and consulting services with resources of over 20,000 professionals in 108 countries around the world. It is appropriate that financial investigations involve the detection of facts of bribery and other corruption manifestations, misappropriation and dispossession of assets, falsification of financial reporting, theft of information, negligence.

It is equally important to understand the concept of “financial investigation” to clarify the concept used sometimes as synonymous to “forensic accounting”, which is revealed with a reference to the Webster Dictionary by combining the concepts of accounting and forensic medicine. As a result, this activity is disclosed as by methodologies in the field of accounting used for the application of the system of documentation and analysis of economic and financial transactions for resolving legal issues (Dedkov, 2004).

It should be considered that financial investigations are not tasked to cover the entire set of financial flows and financial information for verification, established rules and regulations. There is a task before financial investigations – by conducting a specialized study to identify and fix the financial component of the criminal activity. It may differ from the deviations found during the financial control, special complexity, intent, and concealment of traces of illegal activity. All of this implies the presence of a special methodology in the financial investigations, and also the active use of additional information sources, such as extended databases, results of operational-search and investigative measures (law enforcement agencies), the results of private detective activities and the practice of purchasing the necessary restricted information (company security and consulting services).

In this regard, interesting is the experience of the Republic of Belarus, where the Decree of the President of the Republic of Belarus as of 23.10.2012 “On Some Measures to Prevent Illegal Minimization of Amounts of Tax Obligations” is in force, which regulates the systematic conduct of measures to terminate pseudo-structures, include them to a special register, and bring their clients to the responsibility prescribed by law. This Decree discloses the concept of the Register of commercial organizations and individual entrepreneurs with an increased risk of committing offenses in the economic sphere, as well as criteria for assigning business entities to this register (Decree of the President of the Republic of Belarus as of 23.10.2012). Unlike this country, in Ukraine, until now, no decision was made on the compulsory general electronic declaration, the introduction of which was announced in March 2018. This would significantly contribute to narrowing the range of opportunities for money laundering.

### **3. Features of financial investigations in the study of intangible assets**

International experience shows that regulatory authorities should have sufficiently wide powers to exercise control over financial institutions, collect and transmit information about suspicious transactions. The effectiveness of combating money laundering is closely linked to the ability of regulators to access the necessary information, even if the law contains provisions on commercial and banking secrecy. Money laundering schemes are constantly being improved, and the reaction to the emergence of new forms of legalization through the length of the legislative process will be constantly late.

For example, money laundering schemes using such an instrument as intangible assets are usually quite confusing and intangible assets in such cases serve as a convenient tool for redistributing cash.

Since intangible assets are not physical, and the definition of their value is imperfect and non-

transparent, so operations with them can be a convenient tool for achieving various goals, including those used in various schemes for the legalization of illegally obtained income:

- in order to create the visibility of the legality of income (royalty) of individuals;
- for the withdrawal of funds to foreign jurisdictions;
- to reduce the tax burden on business entities.

In fact, the main weakness of intangible assets in such cases is the subjectivity of their pricing and their actual availability. In some cases, offenders complicate the schemes of money laundering with intangible assets, using financial instruments that mask the very nature of transactions or several additional intermediaries. It should be noted that such operations can be related directly to the very predicate crime and to money laundering.

Analysing this issue, it is necessary to pay attention to another instrument of money laundering, this is the establishment of facts of using the mechanisms of financial assistance to conceal illegally obtained income, here problematic issues appear in the course of collecting evidence base to establish the origin of funds legalized in the activity of economic entities of the real sector of the economy by providing financial assistance. It is advisable to provide for the possibility of prosecution not only for money laundering, even in the absence of a sentence for a predicate crime, as recommended by experts, but also for actions aimed solely at providing the legalization of illegal income that may be obtained in the future.

#### 4. Conclusions

The analysis of theoretical developments, as well as the provisions of certain laws and regulations regarding the definition of “financial investigation”, allows us to state that there is no single approach to its formulation. This can be explained by the following basic circumstances: a) features of national economic and legal doctrines; b) features of the formation of the national procedural, in particular, criminal procedural law; c) the selection of certain means of interpreting international FATF standards and their implementation into national legislation; d) branched sphere of practical application by many subjects with different legal status.

In this connection, financial investigation in countries with legal systems close to Ukrainian one is formulated as: criminal proceedings in cases of crimes committed in the sphere of economy and finance (i.e., criminal proceedings) or as an economic category used to designate measures of ensuring economic and financial security of enterprises, consisting of: due diligence, assets recovery, judgement enforcement, litigation services, bankruptcy fraud, corporate fraud investigation, forensic accounting and fraud.

Establishing the ratio of financial investigation and criminal proceedings, it is worth recognizing that these activities differ in content, direction (by object and purpose), and methodology, respectively, the concepts of “financial investigation” and “criminal proceedings” are not identical because depending on the purpose of conducting “financial investigation” it may include criminal procedural activities.

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