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Operative and search counteraction to crimes committed in the sphere of activity of institutional investors in Ukraine

Оперативно-розшукова протидія злочинам, що вчиняються у сфері діяльності інституційних інвесторів в Україні

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
Abstract


The purpose of this study is to analyze the methods, means and possibilities of operative and search counteraction to crimes committed in the sphere of activity of institutional investors. To achieve this goal, it is necessary to solve the following tasks: analyze the dynamics of crime in the sphere of activity of institutional investors; to characterize the concept and structure of operative and investigative countermeasures against crimes; determine the content of operative and investigative prevention, detection, and documentation of crimes in the field of activity of institutional investors. As a result of the research, it was possible to establish that in the structure of operational and investigative countermeasures against crimes in the field of activity of institutional investors, we distinguish

Анотація


Метою цього дослідження є аналіз способів, засобів та можливостей оперативно-розшукової протидії злочинам, які вчиняються у сфері діяльності інституційних інвесторів. Для досягнення цієї мети необхідно вирішити такі завдання: проаналізувати динаміку злочинності у сфері діяльності інституційних інвесторів; охарактеризувати поняття та структуру оперативно-розшукової протидії злочинам; визначити зміст оперативно-розшукового попередження, виявлення та документування злочинів у сфері діяльності інституційних інвесторів. В результаті дослідження вдалося встановити, що у структурі оперативно-розшукової протидії злочинам у сфері діяльності інституційних інвесторів ми виділяємо попередження,

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prevention, detection, and documentation of criminal offenses.

Keywords: investment activity, institutional investor, operational and investigative countermeasures, crime prevention.

JEL Classification: E22, E44, G24, K14, K23, K42.

Introduction

The activity of institutional investors is one of the risky types of economic activity, as it involves the management and disposal of other people's funds of citizen-depositors. A responsible investor always puts the public interests of all investors above the private interests of individuals (Toporetska, & Vazhynskiy, 2023). But in the case of conflicts between the interests of the institutional investor (his officials) and the interests of the depositor, if the institutional investor puts his private (business, selfish) interest or the interest of individual officials above the public interest (Vazhynskiy, 2023), it thus encroaches on public values and interests.

Such encroachment is manifested in the preparation or commission of criminal offenses. Such actions also encroach on the economic security of the state and the public's trust in the state. After all, the economic sphere permeates all spheres of public administration, and other spheres of national security depend on its level (Vazhynskiy et al., 2023).

The activity of institutional investors is a complex mechanism, intervention in which leads to destabilization of the activity of not only an individual institutional investor, but also its counterparties, affects the economic well-being of individual investors and, in general, public trust in the financial system of the state.

The question of the economic security of the state in terms of the activities of institutional investors has not been considered in Ukraine until now. At the same time, considering the involvement of a significant number of citizen-investors and the risk of public resonance, such criminal offenses are characterized by high latency, and therefore it is extremely difficult to detect and stop them by public methods. All these criminal offenses are very diverse, and therefore effective operational and investigative countermeasures are an important issue for effective countermeasures.

The purpose of this study is to analyze the methods, means and possibilities of operative

виявлення та документування кримінальних правопорушень.

Ключові слова: інвестиційна діяльність, інституційний інвестор, оперативно-розшукова протидія, попередження злочинів.

and investigative counteraction to crimes committed in the sphere of activity of institutional investors. To achieve this goal, it is necessary to solve the following **tasks**: analyze the dynamics of crime in the sphere of activity of institutional investors; to characterize the concept and structure of operative and investigative countermeasures against crimes; determine the content of operative and investigative prevention, detection, and documentation of crimes in the field of activity of institutional investors.

Theoretical Framework

Several works by the authors of this article, which became the basis for the preparation of this article, are devoted to the issue of operational and investigative countermeasures to crimes in the economic sphere in Ukraine. In particular, the work is based on the system of operative and investigative counteraction to criminal offenses, which was proposed by A.M. Cherniak and M. L. Hribov and includes measures to prevent, detect and respond to crimes (Hribov, Cherniak, 2018). Proposals regarding specific operative and investigative measures within the scope of OSA, which allow to prevent, detect and document criminal offenses in the field of activity of institutional investors, are based on the fundamental work of Prof. M. A. Pohoretskyi regarding the functional purpose of OSA (Pohoretskyi, 2007), as well as taking into account the already developed proposals of M. Pohoretskyi, A. Cherniak, D. Serhieieva, R. Chernysh, & Z. Toporetska regarding cybercrime investigations (Pohoretskyi et al., 2022), financial fraud investigations (Pohoretskyi et al., 2019). Several works helped to establish the peculiarities of the ways of committing a criminal offense in the field of activity of institutional investors, which are important objects of search from the point of view of the implementation of OSA. In addition, the works of such Ukrainian scientists as V.I. Vasylynchuk, M.L. Hribov, O.M. Dzhuzha, I.O. Krepakov, D.Y. Nikyforchuk,

I.G. Proskurnyak, V.D. Pcholkin, V.V. Cherny and others.

Methodology

The methodological basis of the study was made up of general scientific methods of cognition: the dialectical method of cognition of the phenomena of the surrounding reality and the comparative-legal method for establishing the mechanism of activity of the institutional investor and the mechanisms of criminal activity in the sphere of activity of institutional investors, methods of logic (analysis, synthesis, induction, deduction, analogy), economic analysis, absolute and comparative advantages and statistical methods for analyzing the dynamics of crime in a certain area, analyzing methods of criminal activity and providing proposals. In accordance with the system-structural approach, an assessment of the possibilities of operative and investigative activity, means and methods of countering this category of criminal offenses was carried out.

The dialectical method of cognition of the phenomena was used to learn the mechanism of criminal activity that takes place in the field of institutional investors, to build operational and investigative characteristics of this category of criminal offenses and to identify objects that are of operational interest for the purposes of OSA. The comparative legal method was used to study the legal basis of the activities of institutional investors to demystify the methods of legal activity and the methods of illegal activity. The methods of logic (generalization, induction, deduction, analysis, synthesis) were used during the generalization of the practice of making OSAs, determining the effectiveness of specific methods and measures, and formulating specific proposals for operative and investigative counteraction to this category of offenses. The system-structural method made it possible to formulate specific proposals for a comprehensive system of operational and investigative countermeasures against crimes committed in the sphere of activity of institutional investors.

Results and Discussion

Dynamics of crime in the sphere of activity of institutional investors

According to the results of the Global Economic Crime and Fraud Survey, 47% of organizations in the world have been affected by fraud in the last two years. According to the results of the study, 51% of Ukrainian organizations suffered

from fraud in the last two years. This figure is higher than the global average (47%) and increased from 48% in 2018. In Ukraine, the leaders among the economic crimes that have affected organizations are misappropriation of property (47%), as well as bribery and corruption (47%), customer fraud (31%), cybercrime (31%) and fraud shared the second place in the field of procurement (31%) (Economic Truth, 2020).

Frauds with financial resources, which are often committed in the sphere of activity of institutional investors, are the most dangerous, as they significantly undermine the confidence of investors in such institutional investors and in the sphere of investing in general (Pohoretskyi et al., 2019). In the criminal legislation of most EU countries, the following types of financial fraud are distinguished: insurance - fraud committed in order to obtain the insurance amount; banking - fraud aimed at illegally obtaining bank loans, other loans or property preferences; criminal bankruptcy - fraud involving the creation of signs of insolvency or illegal actions in the event of enterprise liquidation; tax - cheating the state and its bodies, which consists in illegally reducing the amount of taxes payable or refunding VAT under export schemes; stock - fraudulent actions on the securities market and in stock exchange trading (Proskurnyak, 2016; Cherniei, 2014).

We suggest that criminal offenses in the sphere of the institutional investor's activities be divided into criminal offenses committed by other persons and directed against the institutional investor (external: clients, agents, other related business entities, who may or may not be in collusion with the employees of the institutional investor) and internal criminal offenses committed by employees of the institutional investor.

External criminal offenses usually involve the commission of various types of fraud (Article 190 of the Criminal Code of Ukraine) and forgery of documents (Article 258 of the Criminal Code of Ukraine). Internal criminal offenses can be committed by employees or with the participation of employees of an institutional investor and include: fraud (Article 190 of the Criminal Code of Ukraine), seizure of property (Article 191 of the Criminal Code of Ukraine), legalization of property obtained through criminal means (Article 209 of the Criminal Code of Ukraine) and are aimed at direct acquisition of the institutional investor's funds, which are accounted for in the investor's accounts.

A separate group of offenses consists of criminal offenses committed by officials of the institutional investor and destabilizing the entire economic activity of the institutional investor. These are: fraud with financial resources (Article 222 of the Criminal Code of Ukraine), Forgery of documents submitted for state registration of a legal entity and individual entrepreneurs (Article 205-1 of the Criminal Code of Ukraine), Bringing a bank to insolvency (Article 218-1 Criminal Code of Ukraine), Bringing to bankruptcy (Article 219 of the Criminal Code of Ukraine), Violation of the procedure for maintaining a database of depositors or the procedure for forming reports (Article 220-1 of the Criminal Code of Ukraine), Falsification of financial documents and reports of a financial organization, concealing the insolvency of a financial institution or grounds for revocation (cancellation) of the license of a financial institution (Article 220-2 of the Criminal Code of Ukraine), Manipulation in organized markets (Article 222-1 of the Criminal Code of Ukraine), Forgery of documents submitted for registration of the issue of securities (Article 223-1 of the Criminal Code of Ukraine), Production, sale and use of counterfeit securities (except state securities) (Article 224 of the Criminal Code of Ukraine), Concealment of information about the activity of the issuer (Article 232-2 of the Criminal Code of Ukraine) (Law No 2341-III, 2001). Such actions are often accompanied by official crimes, such as official forgery, official abuse, receiving or transferring illegal benefits.

Frauds committed by institutional investors are also widespread, which are divided into frauds during the attraction of funds and frauds during the investment of funds. Frauds during the attraction of funds are committed with the aim of seizing the funds of citizen-investors without the intention of investing them, usually this is the creation of so-called financial pyramids.

Investment fraud is committed in a variety of ways, but is usually combined with the business crimes we mentioned above. Usually, investment scams end in permanent insolvency or bankruptcy of the institutional investor. In this case, an important source of information will be all the documents drawn up during the implementation of the economic activity of the institutional investor. It is the documents that will make it possible to identify "weaknesses" in the activities of an institutional investor and to identify subjects of operational interest.

The concept and structure of operative and search countermeasures against crimes

We share the position of M. L. Hrybov and A. M. Chernyak, who propose to include crime prevention, crime detection, and crime response units in the crime prevention system (Hrybov & Cherniak, 2018).

The operational-investigative characteristics of the crime are the starting point for the formation of a system of operational-investigative response to a certain group of criminal offenses. Giving the operational and investigative characteristics of this category of criminal offenses, we suggested including the following elements in it: an object of operational interest; subject of operational interest and conduct or event of operational interest. All these objects are important for various forms of implementation of OSA. We believe that the object of operational interest - the entire activity of an institutional investor - is important primarily for the prevention of criminal offenses in the field of activity of institutional investors, including for operational investigative prevention. The subject of operational interest comes to the fore during operational development, while the central object of an operational search is the conduct or event of operational interest, because it is this that is important for the detection of criminal offences.

Operative and search prevention of crimes in the sphere of activity of institutional investors

We propose to highlight the following areas of prevention of criminal offenses in the field of activity of institutional investors:

- a) identification of the reasons for committing criminal offenses in the field of activity of institutional investors and conditions that contribute to their commission, implementation of measures to eliminate or neutralize them;
- b) identification of persons who can be expected to commit criminal offenses in the field of activity of institutional investors, application of measures to prevent them from committing offenses;
- c) prevention of specific criminal offenses committed in the sphere of activity of institutional investors at the stage of preparation or attempt to commit them.

Thus, we propose to consider the prevention of criminal offenses by operational investigative units as a type of individual operational prevention, which consists in identifying the causes and conditions that contribute to the commission of certain criminal offenses, and their elimination or neutralization, preventing the

criminal activity of certain persons (identification of persons, who are trying to commit a criminal offense, and the implementation of certain measures against them with the aim of preventing the implementation of their ideas, plans, preventing the transition from intention and planning to the stage of preparation for the commission of a criminal offense), as well as stopping the commission of criminal offenses (and the stage of preparation or attempt) with the use of opportunities, forces and means of operative and investigative activities is usually done secretly.

Prevention of criminal offenses by operational and investigative units, which involves operational work to prevent the commission of a criminal offense by a specific person (at the stage of the emergence of the intention to commit a crime and planning its commission), that is, the prevention of the transition of a person from the process of forming the intention to commit a certain criminal offense to the realization of a criminal intent (commitment preparatory actions for its commission, attempt or commission of a criminal offense) and always has its object of influence.

Operational investigative detection and documentation of crimes in the sphere of activity of institutional investors

Information about persons and facts of operational interest, as a rule, is the property of a limited circle of persons who are interested in hiding this information and for this purpose use various methods of masking. Therefore, the intensity of receiving primary information depends on the correct implementation of a number of organizational and tactical measures related to the determination of the direction of the operational search, the provision of this area of work with the necessary forces and means, the organization of clear interaction of various police services in the performance of this task. Operational workers do not have specific, predetermined information about the object of operational search. The process of detecting crimes and the persons who prepare or commit them is based on the knowledge of the event of the crime by isolating from the environment the changes that occurred in connection with its preparation or implementation. These changes can be detected by traces left on elements of the environment, such as documents, objects, as well as persons in whose consciousness information about the crime event is stored.

Factual data about a committed criminal offense in the field of activity of an institutional investor is obtained by the subjects of the OSA during an operational search, which is one of the main forms of the implementation of the OSA, the essence of which is to identify persons and facts that are of operational interest to the subjects of the implementation of the OSA (Pohoretskyi, 2009).

So, if a criminal event and the traces formed by it are objective categories that do not depend on their knowledge, then actual data (information about them) is a subjective category, since these data (information, data about a criminal offense) are perceived by a specific person (subject). The same thing happens in operational and investigative activities, where the perception of data about a criminal offense is carried out by the relevant subjects of the OSA. Therefore, the perception by any person (subject) of objective circumstances (factual data about a criminal offense) is always subjective (Pohoretskyi, 2008).

Therefore, employees of operational divisions must: have knowledge of the provisions of regulatory acts that regulate the implementation of financial activities, investment activities, banking, insurance activities, etc.; to have an idea of the goals and tasks of an operational search in the specified field; have knowledge about objects of operational search.

To identify such facts, it is very important for operational units to cooperate with the State Financial Monitoring Service of Ukraine and obtain factual data from it that may indicate the illegal activities of certain individuals or criminal organizations. For example, according to the data of the State Financial Monitoring, for 9 months of 2023, the State Financial Monitoring sent 870 materials (477 generalized materials and 393 additional generalized materials) to law enforcement agencies, in particular to: Security Service of Ukraine – 264 materials (146 generalized materials and 118 additional generalized materials); National Police of Ukraine – 228 materials (174 generalized materials and 54 additional generalized materials); National Anti-Corruption Bureau of Ukraine – 131 materials (37 generalized materials and 94 additional generalized materials); Bureau of Economic Security of Ukraine – 99 materials (61 generalized materials and 38 additional generalized materials); prosecutor's office – 68 materials (18 generalized materials and 50 additional generalized materials); State Bureau of Investigation – 80

materials (41 generalized materials and 39 additional generalized materials). In the specified materials, the amount of financial transactions that may be related to the legalization of funds and the commission of a criminal offense amounts to 85.3 billion hryvnias (Public Service Financial Monitoring Of Ukraine, 2023).

The materials of the State Financial Monitoring Service usually do not become a reason for the registration of criminal proceedings, because such materials are not a notification about the commission of a criminal offense but are information about possible illegal activity. In accordance with paragraph 4 of the first part of Article 6 of the Law of Ukraine "On operational and investigative activities", the basis for conducting an OSA is the availability of generalized materials of the central executive body that implements state policy in the field of prevention and countermeasures against the legalization (laundering) of proceeds obtained through criminal means, or financing of terrorism, received in accordance with the procedure established by law.

The objects of operational search (sources of factual data) are persons and objects containing certain traces. The object of an operational search among individuals is persons (who think that they are preparing and have committed a crime or are involved in it; who commit illegal actions; who have information that is important for fighting crime; able to systematically provide assistance in fighting crime). Here we can include the management and employees (including former) of the institutional investor, the management and employees of the counterparties of the institutional investor, the communication circle of certain managers and employees who are of operational interest; individual citizens-investors, persons who have a certain risk of illegal behavior, because they were held to certain types of responsibility for committing offenses in the field of investment activity (financial, disciplinary, administrative, criminal).

As for the subjects that are the objects of an operational search, this includes primarily documents that reflect the course of the institutional investor's economic activity, including electronic documents (primary documents, reporting, accounting, financial documents, including payment, financial business contracts), as well as information carriers on which these documents are stored, unofficial documents (notes, notebooks), personal belongings of persons of operational

interest; funds, securities, other valuables or other property that were obtained as a result of illegal activity.

Traces of operational interest include directly the traces of a person of operational interest and traces of his illegal activities (usually these are electronic traces that remain in the banking system or in the electronic system of an institutional investor), traces on documents (traces of material and intellectual forgery of documents).

The next stage of an operational search is to recognize the signs of a crime. Comparison of detected search objects with search features of objects of operational interest. This stage of operational search is always subjective in nature because it depends on the operational worker who perceives the search objects found because of operational search.

The analysis of the received information involves searching the found objects for signs of a criminal offense in the field of activity of the institutional investor. Here, first, a search is made for factual data that may indicate the commission of a criminal offense, in particular, the following are studied:

- features of tools for attracting assets from individual investors for the purpose of detecting suspicious transactions: the promise of unreasonably inflated income from investments, the attraction of supposedly satisfied investors to the advertising of an institutional investor, demonstrative advertising raffles and various incentives for investing funds, a very limited time for making an investment decision "tomorrow % will be much lower, you can invest money only today" etc.;
- studying the peculiarities of investing the funds involved: studying the areas of investment and business reputation and the peculiarities of cooperation with counterparties, studying the reality of operations (detecting signs of fictitious withdrawal operations under the guise of investing in companies with a dubious reputation or related companies), studying the criteria for selecting counterparties in order to identify atypical counterparties and suspicious transactions; studying the experience of previous deals with counterparties. Search signs can be the inconsistency of the business activity of the counterparty with the publicly stated investment goals, the fictitiousness of the

counterparty's activity, the newly created counterparty and the lack of information about its business reputation, the counterparty's financial problems, the delay in the implementation of investment projects that were started earlier, the lack of clear information about the purpose of the investment, expected profit and guarantees of fulfillment of obligations, the presence in business documentation of objections of officials regarding the allocation of funds within the limits of a certain contract, the conclusion of contracts with only one counterparty; overestimated cost of certain works or services;

- study of data and documents of financial and economic activity: accounting, financial (including bank payment documents); documents on the placement of securities, documents on investment in certain projects, documents that would indicate the inappropriate spending of investors' funds (overpriced advertising, unreasonable costs for providing consulting assistance in a certain area, purchase of goods or services that are not typical for the activities of an institutional investor, etc.). Search signs can include frequent current repairs, unjustified capital repairs, purchase of expensive equipment or computer equipment, detection of inconsistencies between financial and primary documents, detection of signs of non-marketability of financial transactions, tax fraud ("optimization" of tax obligations), the presence of dubious payment documents that did not meet the general purpose of the activity, inconsistency between the content and form of individual documents, signs of material or ideal (intellectual) forgery of documents;
- analyzes materials of audits by supervisory bodies, materials of the State Financial Monitoring of Payments, information on the implementation of supervisory activities in relation to institutional investors in order to identify gaps and "weak" places in security or in other sectors of the institutional investor's activity;
- reveals unprofessional connections of certain employees of the institutional investor with counterparties, employees of regulatory bodies, etc.;
- reveals the "risky behavior" of certain persons (employees of the institutional investor or its "suspicious" counterparties): negligent performance of official duties, taking possession of the institutional investor's funds, communication with a certain criminal environment, the presence

of significant debts or other problems (alcoholism, drug addiction, gambling addiction), which negatively affect the conscientious performance of official duties by them; an unmotivated payment of a bonus or a significant difference in the salary of certain employees may indicate the loyal attitude of the institutional investor's management to certain persons and their connection with illegal activities, the imposition of disciplinary sanctions on certain employees.

Examining documents regarding abuses by officials of an institutional investor must be done with the utmost care (encrypted or through cooperation with trusted employees of the institutional investor) so that the officials do not learn about the audit and do not destroy evidence against themselves, do not bias potential witnesses to false testimony.

The information discovered during the operational search must be properly documented. Documentation forms the basis of proof. During the proof, documentation performs the function of recording information in procedural documents, which are then used in proof in criminal proceedings. Documentation in the OSA is not only intended for recording the information obtained because of the implementation of the OSA. It provides for the process of collecting documented information regulated by departmental regulations, its verification, assessment and use in solving the tasks of the OSA, and in criminal proceedings - in accordance with the procedure established by the Code of Criminal Procedure.

Conclusions

The activity of institutional investors is a significant part of the state's economy, and therefore illegal encroachments on their activity harm, including, the economic security of the state, as they undermine citizens' trust in financial instruments and the state's ability to protect the public interest.

Crimes in the sphere of activity of institutional investors are of a very high latent nature, therefore, it is precisely the operative and investigative countermeasures against this category of criminal offenses that are effective. In the structure of operational and investigative countermeasures against crimes in the field of activity of institutional investors, we distinguish prevention, detection, and documentation of criminal offenses. In the article, the authors

analyzed the methods, means, and capabilities of operational units in each of the directions of countermeasures.

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