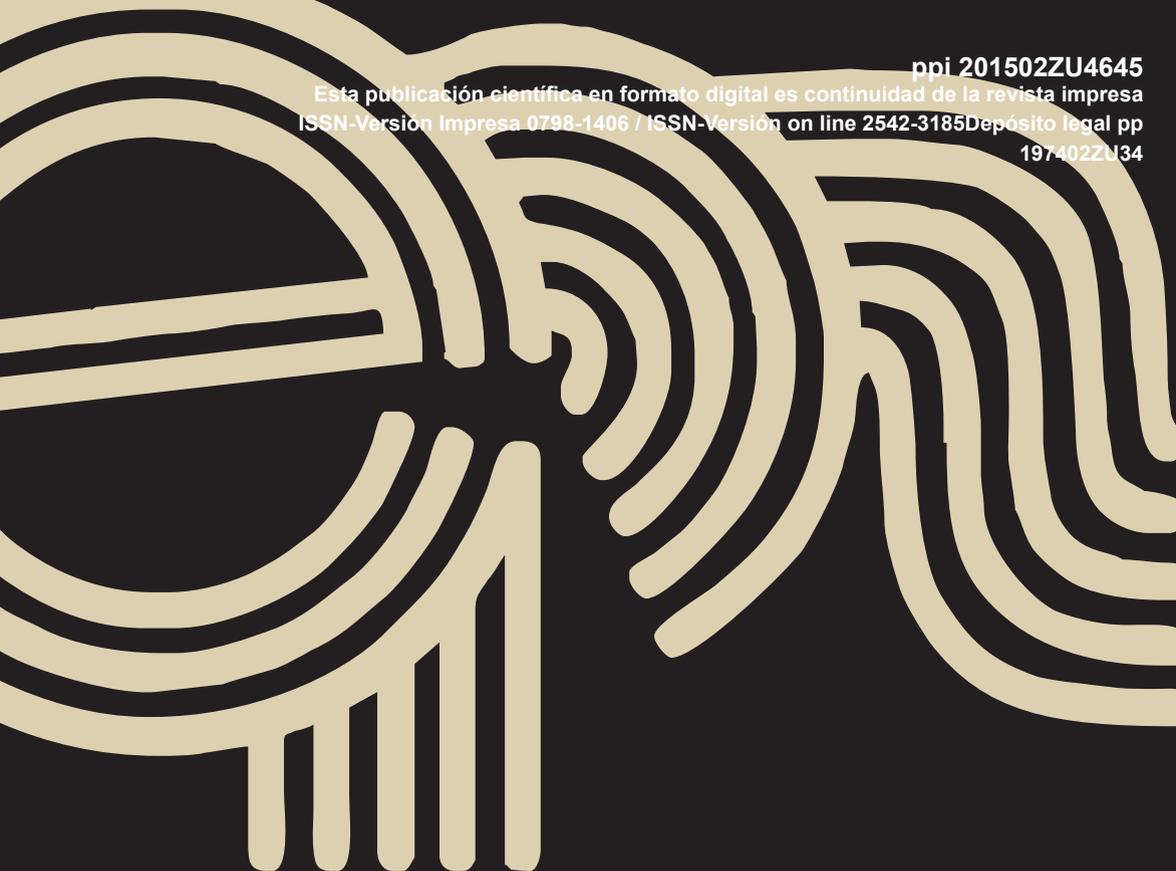


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Procedure in absentia in criminal proceedings for legalization (laundering) of taxes derived from crime

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Abstract

The article was aimed at analyzing the characteristics of the procedure for conducting a special investigation (in absentia) in criminal proceedings concerning the legalization (laundering) of criminally obtained taxes. Attention is drawn to the fact that the concepts of “special criminal procedure”, “special pre-trial investigation”, “special court procedure” are not formulated by the legislator, but the legal norms concerning their practical implementation are found in various parts of the Criminal Procedure Code of Ukraine. It is understood that in the procedural decision to clarify the concept of “special criminal procedure” it is necessary to be guided by the general concept of “criminal procedure” with characteristic features for the special criminal procedure. It was concluded about the imperfection of the legislative provisions regulating the matter under consideration, in particular, the basic concepts establishing the basis for their application, what procedural acts should be performed in the absence of the accused? What is the procedural term of such an investigation? This question is not defined. The proposed changes to the legislation are aimed at improving the procedural order of a pre-trial investigation in criminal proceedings related to the legalization of taxes obtained by criminal means.

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Keywords: procedural default; money laundering; tax laundering; special criminal procedure; special pre-trial investigation.

Procedimiento en rebeldía en procesos penales por legalización (blanqueo) de impuestos procedentes de delitos

Resumen

El artículo tuvo por objeto analizar las características del procedimiento para la realización de una investigación especial (en rebeldía) en los procesos penales relativos a la legalización (blanqueo) de impuestos obtenidos por vía delictiva. Se llama la atención sobre el hecho de que los conceptos de “procedimiento penal especial”, “investigación previa al juicio especial”, “procedimiento judicial especial” no están formulados por el legislador, pero las normas legales relativas a su implementación práctica se encuentran en varias partes del Código de Procedimiento Penal de Ucrania. Se entiende que en la decisión procesal de aclarar el concepto de “procedimiento penal especial” es necesario guiarse por el concepto general de “procedimiento penal” con rasgos característicos para el proceso penal especial. Se concluyó acerca de la imperfección de las disposiciones legislativas que regulan el asunto en consideración, en particular, los conceptos básicos que establecen las bases para su aplicación, ¿Qué actos procesales deben practicarse en ausencia del imputado? ¿Cuál es el plazo procesal de tal investigación? Esta cuestión no está definida. Los cambios propuestos a la legislación tienen como objetivo mejorar el orden procesal de una investigación previa al juicio en los procesos penales relacionados con la legalización de impuestos obtenidos por medios delictivos.

Palabras clave: rebeldía procesal; lavado de activos; blanqueo de impuestos; procedimiento penal especial; investigación especial previa al juicio.

Introduction

Abuses in the field of public finance are very dangerous, as they cut the economic possibilities of the country, financial welfare of the people and build an unlovable image for Ukraine in the international arena (Sukhonos *et al.*, 2021).

The problem of legalization (laundering) of money obtained by criminal means has become particularly important in Ukraine during the last decade, since the criminalization of the economy has become one of the key threats to the economic security of our State. As Reznik et al. (2021) correctly stress, money laundering is extremely difficult to investigate and prosecute; besides, the social danger of this phenomenon has recently been revealed in new aspects.

A few years ago, the majority of criminal offenses of this category were committed with the aim of further using the received income in entrepreneurial and other economic activities for profit. Subsequently, funds or other property of criminal origin began to be used to finance terrorism, illegal arms trafficking, organization of contract killings, financing of marginal separatist groups and other serious and especially serious crimes.

Therefore, in order to ensure quick, complete and impartial investigation, bringing guilty persons to justice, pre-trial investigation agencies and courts increasingly turn to “new” procedural forms, in particular, special pre-trial investigation (in absentia). The legal nature of such an investigation is extremely complex and was considered by many foreign and Ukrainian scientists at the level of dissertation studies, in monographs, educational and methodological publications, a number of scientific articles and other publications.

However, due to modern changes in the legislation, seeking new “technological” and more socially dangerous methods of criminal activity for the state and its citizens by offenders, the increase in the borders of temporarily occupied territories and the number of criminals hiding in them in order to avoid criminal liability, a targeted study requires a special pre-trial investigation (in absentia), regarding specific types of criminal offenses specified in Part 2 of Article 297-1 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012).

Thus, the purpose of the article is a theoretical and practical analysis of the procedural order of a special pre-trial investigation (in absentia) in criminal proceedings regarding the legalization (laundering) of taxes obtained through criminal means.

1. Methodology

The complex of general scientific and special research methods was used to achieve the set goal, fulfill the stipulated tasks and ensure scientifically based research results, which, complementing each other, provided an objective analysis of the research subject, taking into account the specifics of the chosen topic. Thus, the following methods were applied:

Historical and legal approach helped to study the genesis of the institution of special pre-trial investigation (in absentia) in general and in the investigation of certain crimes in the field of official and economic activity in particular.

Logical and normative method was useful for substantiating and formulating amendments and supplements to the relevant provisions of the Criminal Procedure Code of Ukraine.

Comparative analysis approach was used when summarizing the views of scientists on the procedure of special pre-trial investigation of criminal offenses “in absentia”, in particular legalization (laundering) of property obtained through tax evasion

The method of systematic analysis made it possible to analyze legal norms governing the procedure for performing special pre-trial investigation.

With the help of statistical method, the number of pre-trial investigation into the legalization (laundering) of property in different years and the quantity of indictments sent to court were revealed.

Formal and dogmatic method was applied for researching the concepts of the criminal procedural legislation of Ukraine, namely “special criminal proceedings”, “special pre-trial investigation”, “special court proceedings”, “hiding from investigative bodies and trial” and “evasion of criminal responsibility”.

2. Literature Review

In the research by Piestsov (2012) it is noted that because of improper procedural development of the proceedings in absentia the criminal process of Ukraine and with the aim of improving the legal regulation of this institution, it is necessary to supplement the Criminal Procedure Code of Ukraine.

Matviivska (2013), taking into account the needs of law enforcement practice and the protection of the rights and legitimate interests of the victim and the civil plaintiff, stressed on the need to expand the existing grounds for the application of the in-absentia procedure and regulatory consolidation, in particular, of the accused (defendant) stay outside Ukraine and evasion of summons.

Nahorniuk-Danyiuk (2016) analyzed the signs and grounds for special pre-trial investigation and certain features of criminal proceedings in the absence of the accused in a criminal trial in certain European countries and countries participating in the Commonwealth of Independent States.

Malenko (2019) investigated the procedural and legal characteristics of special pre-trial investigation as a form of in absentia criminal procedure and its improvement.

Anne Schneider (2019) studied the solutions that were developed in the EU to solve the problem of different standards of in absentia proceedings in cross-border criminal proceedings with particular regard to the implementation of the European arrest warrant issued to enforce a decision arising from in absentia proceedings.

The researcher Lorena Bachmaier Winter (2019) analyzed the provisions of criminal proceedings in absentia, enshrined in the EU Directive 2016/343 of March 9, 2016 on strengthening certain aspects of the presumption of innocence and the right of persons to be present during criminal proceedings, in order to assess their impact on the protection of fundamental rights in the EU countries and solve the issue of establishing a higher standard of human rights requirements in the EU than that implemented in the ECHR practice.

In turn, Serena Quattrococo and Stefano Ruggeri (Billis and Gkaniatsos, 2019) investigated the influence of European legislation, which includes the practice of the ECHR, framework decisions and EU directives on the domestic national legal regulation of criminal proceedings in absentia.

3. Results and Discussion

The instability of the macroeconomic situation in Ukraine, periodic crisis in the economy contribute to the formation and development of a strong shadow sector in the national economy. Its fictitious component, which lies in the withdrawal of significant financial funds from the legal economic sector by illegal means, redistribution of billions of profits in favor of individual business entities and the outflow of capital abroad, has now become global. All this contributes to increasing the threat to the economic security of the State, strengthening the already existing socio-economic recession. Such crises have not spared taxation.

Taxes, fees (mandatory payments) are the most important tool of the State, which guarantees the existence of society; accordingly, the further development of the economy of Ukraine depends on the effectiveness of legislative acts ensuring the legal regulation of the use of this tool. The problem of legalization (laundering) of property obtained through tax evasion has acquired particular significance for Ukraine during the last decade, as it is associated with the commission of criminal offences of varying severity and consequences, with the presence of offshore zones, with sophisticated tax evasion schemes, which has a devastating effect on

both the development of the national economy and the implementation of global international programs.

Precisely because of this, a component of the goal of enshrining the possibility of carrying out special pre-trial investigation (in absentia) in is to increase the effectiveness of the investigation of certain crimes, in particular, in the field of official and economic activity, since the scale of legalized (laundered) capital is currently so significant that it is about the threat to the stability of the entire international financial system. Thus, according to UN data, 37 trillion dollars were found in offshore zones, of which 11.5 trillion dollars (31%) belong to individuals.

This gives reason to conclude about the annual non-payment of about 250 billion dollars of taxes. In particular, according to the Office of the Prosecutor General of Ukraine (2022), in 2014, pre-trial investigation into the legalization (laundering) of property was conducted in 296 proceedings and only 14 indictments were sent to court; in 2016 – 159 (24); 2017 – 243 (42); 2018 – 242 (54); 2019 – 283 (68); 2020 – 348 (73) (+ 23% compared to 2014); 2021 – 395 (103); 2022 – 437 (146). Besides, during the analyzed period, employees of the State Fiscal Service of Ukraine ceased the illegal activities of 297 conversion centers, which converted 81.9 billion UAH, and the damage from their activities amounted to more than 14.7 billion UAH.

However, this type of crime is characterized by the stealth of the various ways in which it is performed under the guise of official financial transactions (Arkusha, 2012), the preservation of a “secret” for a long period of time, a limited circle of participants in criminal activity who do not allow the detection and termination of the committed act, which causes a significant share of latent criminality, and in the case of identification of persons involved in this event, it turns out that a significant part of them is hiding in the temporarily occupied territory of Ukraine, or in the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state.

The procedure of special pre-trial investigation of criminal offenses “in absentia” is designed to overcome the deliberate absence of a suspect accused in criminal proceedings, and further prosecution of the perpetrator in accordance with the rules of substantive law. As Kopersak (2021) successfully pointed out, this proceeding is the result of centuries-old attempts to establish an absentee investigation and conviction of persons guilty of a crime.

The ECHR recognizes proceedings in absentia as a means of protecting legal order, if the human rights guaranteed by the European Convention on Human Rights are respected. That is, the procedure itself does not contradict the Convention, and its implementation must take place without violating the Convention’s guarantees. At the same time, along with the recognition of the in absentia procedure, the ECHR consistently adheres

to a firm position regarding the State's duty to ensure that the rights of the suspect and the accused are respected. However, legal regulation of special criminal proceedings in Ukraine has significant gaps, contradictions and fragmentation, as well as inconsistency with the modern development of ideas about human rights.

The concepts of "special criminal proceedings", "special pre-trial investigation", "special court proceedings" are not formulated by the legislator, but the corresponding norms regarding practical implementation of the main components of this institution are enshrined in different parts of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012).

It is understood that in the procedural decision to clarify the concept of "special criminal proceedings" it is necessary to be guided by the general concept of criminal proceedings, which shall mean pre-trial investigation and court proceedings, procedural actions connected with commission of an act specified in the Ukrainian law on criminal liability (Par. 10, Article 3 of the Code of Criminal Procedure of Ukraine) with characteristic features for special criminal proceedings defined by this Code. In view of this, we offer to supplement Art. 3 (Definition of the main terms of the Code) with clause 10-1 of such content:

Part 10-1. Special criminal proceeding is a special order of criminal proceedings that includes specific pre-trial investigation and court proceeding and provides for the procedure for their implementation in cases provided for by the Criminal Procedure Code of Ukraine regarding the exclusive list of crimes, in relation to a suspect (accused), except for a minor, who is hiding from the investigative authorities and the court on the temporarily occupied territory of Ukraine, on the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state with a view to avoiding criminal responsibility and/or being sought internationally, subject to the general principles of criminal procedure for the purpose of ensuring quick and effective protection of the individual, society and the State from criminal offences.

It is not considered appropriate to highlight special pre-trial investigation as a form of pre-trial investigation along with a pre-trial investigation and an inquiry, since it is covered by the concept of "pre-trial investigation", but not identical to it, because although it is carried out according to its rules, but given the unique nature of special pre-trial investigations.

The data by experts and the results of the operatives' survey indicate that the facts of legalization (laundering) of property obtained through tax evasion become known: from the materials of tax inspections (79%); based on the results of operational and search activities (46%); from materials of other criminal proceedings (21%); from official appeals by law enforcement

agencies (17%). The data obtained in this way mostly contain information: on the use of fictitious companies (63%), carrying out of commodity-free transactions (45%), artificial formation of tax credit (35%).

The procedure of special pre-trial investigation (in absentia) is regulated by a separate chapter of the Criminal Procedure Code of Ukraine (24-1 “Features of special pre-trial investigation of criminal offenses” of Chapter III “Pre-trial investigation”) (Law of Ukraine No. 2465-IX, 2012), and in criminal proceedings regarding the legalization (laundering) of taxes derived from criminal activities is possible only in relation to the person who has acquired the status of a suspect, i.e., in relation to a person whose suspicion has been duly reported in accordance with the procedure provided for in Art. 276 – 279 of this Code; or a person against whom a report of suspicion has been made, but it has not been handed over for lack of locating, but measures have been taken to serve it in the manner provided for by the criminal procedural legislation.

In this regard, Tatarov (2014) reasonably emphasizes the fact of reporting suspicion by e-mail, fax, telephone, or telegram does not guarantee delivery of the notification personally, therefore, a report of suspicion cannot be sent in this order.

In practice, if it is not possible to serve a notification of suspicion in person, the method of notification by mail with a declared value with a description of the attachment and a notice of delivery is widely used (Alenin and Glovyuk, 2014). The possibility of sending a notification in this way is also confirmed by judicial practice; as for the procedure for sending summons, then, according to Part 1, Art. 297-5 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012), summons are sent to the suspect at the last known place of residence or stay with mandatory publication in the mass media of national sphere of distribution and on the Prosecutor General’s Office official website. The suspect is considered to be properly acquainted with the content of summons from the moment of its publication.

It should be noted that the procedure for carrying out special pre-trial investigation (in absentia) in criminal proceedings regarding the legalization (laundering) of taxes received from criminal means is possible only in relation to fugitives from investigation and trial in temporarily occupied territory of Ukraine, in the territory of the state recognized by the Verkhovna Rada of Ukraine as an aggressor state with a view to avoiding criminal responsibility and/or being sought internationally.

There is no legal definition of such concepts as “hiding from investigative bodies and trial” and “evasion of criminal responsibility”. However, the Grand Chamber of the Supreme Court in the decision of the case No. 598/1781/17 (2020) noted that evasion of investigation or trial should

be understood as any deliberate act by a certain person with the aim of avoiding of criminal responsibility for the committed crime, forcing law enforcement agencies to take measures aimed at locating and detaining the perpetrator (Case No. 5-1ks15, 2015).

Regarding conducting special pre-trial investigation into the declaration of a suspect for the international search, we should note that an international search is a procedural form of international cooperation implemented within the framework of the functioning of the International Criminal Police Organization (Interpol), the main task of which is to search for a specific object or a person (Interpol, 1956).

In our opinion, due to the fact that the presence of a suspect in an international search warrant is the basis for conducting special pre-trial investigation, during the consideration of a petition for conducting a special pre-trial investigation, the investigating judge is obliged to establish this fact and indicate how this is confirmed. Moreover, it is the fact that the suspect has been made public in an international search, and not the fact of applying for such a declaration.

On September 22, 2020, the Instruction on the procedure for the use of the information system of the International Criminal Police Organization - Interpol by law enforcement agencies of Ukraine entered into force, which does not include as a reference that it is through the channels of Interpol that the international search is carried out, and the concept of international search in general (Order No. 613/380/93/228/414/510/2801/5, 2020).

The analysis of the provisions of Part 2, Art. 297-1 of the Criminal Code of Ukraine (Law of Ukraine No. 2465-IX, 2012) allows to state that special pre-trial investigation (in absentia) in criminal proceedings regarding the legalization (laundering) of taxes received from criminal means cannot be carried out against a minor suspect. Without analyzing the legal nature of criminal proceedings against minors in detail, while taking into account the content of the provisions of Chapter 38 "Special Procedures of Criminal Proceedings" of the Criminal Procedure Code of Ukraine, as well as the views of scientists on this issue (Trofimenko 2012), it can be stated that criminal proceedings against minors from the position of differentiation of criminal procedural form is an example of its complexity, that is, it refers to proceedings with enhanced procedural guarantees.

In view of the above, we agree with the view by Piestsov (2012) that pre-trial investigation without the suspect cannot be carried out in cases of crimes committed by minors, because minors are the subjects of proceedings, which strengthens their procedural guarantees, while the implementation of a special pre-trial investigation, on the contrary, involves the simplification of the procedure for its implementation.

It should be added that if the legalization (laundering) of taxes received from criminal means is investigated along with other types of criminal offenses (not specified in Part 2, Article 297-1 of the Criminal Procedure Code of Ukraine) (Law of Ukraine No. 2465-IX, 2012), then they may be investigated together with those, in respect of which the implementation of a special pre-trial investigation is allowed, since any pre-trial investigation can be attributed to those that may negatively affect the completeness of pre-trial investigation based on a subjective approach of the prosecutor.

However, in any case, the implementation of special pre-trial investigation (in absentia) in criminal proceedings regarding the offense under consideration, requires the investigative judge to issue a separate procedural decision (resolution), without which it is impossible, as well as mandatory participation of defense counsel in criminal proceedings.

Attention should be paid to the fact that, in contrast to the requirements that are put forward to the motions by investigator, (prosecutor) on the application of preventive measures, Art. 297-2 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012) does not include the duty of the investigator to confirm that the suspect has been served with a copy of the application and materials' justifying the need for special pre-trial investigation, i.e., the defense counsel is not entitled to examine the content of the petition and the materials attached to it.

The above makes it impossible for counsel to form a defense position prior to the commencement of the defense, and therefore, in our opinion, it is necessary to provide for the mandatory provision of such materials not later than 3 days before the application is considered (by analogy with Part 8, Article 135 regarding summons).

In accordance with this, Part 1, Art. 297-3 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012) (consideration of the motion on conducting special pre-trial investigation) should be supplemented with Par. 3, which we propose to amend to read as follows: copy of the application and materials justifying the need for special pre-trial investigation shall be provided to the suspect's defense counsel not later than three days before the application is considered.

Moreover, according to Clause 8, Part 2, Art. 52 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012), the participation of a defender is mandatory in criminal proceedings against persons who are subject to special pre-trial investigation or court proceedings, from the moment the corresponding decision is made. At the same time, the consideration of the request for special pre-trial investigation takes place with the mandatory participation of a defense attorney. Thus, there is a clear inconsistency with the provisions of Clause 8, Part 2, Art. 52 with the provisions of Part 1, Art. 297-3 of the abovementioned legal act in

defining the moment from which the participation of the defense counsel is mandatory.

Taking into account the fact that special pre-trial investigation is linked to the grounds clearly defined in the abovementioned legal act and is possible in relation to the person who has already acquired the status of a suspect, that is to say, there are no grounds for conducting special pre-trial investigation against the person at the time of notification, we consider it incorrect to link the moment from which the participation of the defender in the case of a special pre-trial investigation is required with the moment of notifying the person of the suspicion.

In order to ensure legal certainty, there is a need to bring the provisions of Clause 8, Part 2, Art. 52 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012) in line with the provisions of Part 1, Art. 297-3 of the said Code of Ukraine by enshrining mandatory participation of a defender in special pre-trial investigation from the moment the investigating judge receives a request to conduct it.

It should be added that in accordance with Part 6, Art. 297-4 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012), information on suspects in respect of whom the investigating judge has ruled to conduct a special pre-trial investigation shall be entered into the Unified Register of Pre-Trial Investigations immediately, but not later than 24 hours after the effective date of the ruling.

However, the implementation of these legislative prescriptions in practice faces significant difficulties, since there is no technical possibility to make a corresponding mark in the Unified Register of Pre-Trial Investigations; that is why judges often return the indictment to the prosecutor after considering a request for a special trial, owing to the fact that the pre-trial investigation register does not contain information on the entry of information about special pre-trial investigation into the Unified Register. By the way, this also applies to other types of criminal offenses, of which the procedure in absentia is possible.

If the suspect, in respect of whom the investigating judge issued a decision to carry out special pre-trial investigation, is detained or voluntarily appeared before the pre-trial investigation body, further pre-trial investigation is carried out in accordance with the general rules provided for by the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012). We established that almost 80% of the initiative to commit the crime came from the leaders of business entities.

The number of members of such criminal groups is determined in accordance with the need for the distribution of roles, taking into account the technology of specific criminal activity. The formation of such groups is usually performed at the initiative of the organizers (68%). In 22% of cases,

criminal schemes involved fictitious persons as nominal owners of business entities, secretaries and customer service managers who were not aware of the plans of the organizers, but provided relevant services for one-time remuneration (bonuses) or under the pretext of employment.

Conclusions

Inefficient work of investigative and operative units along with objective difficulties, is also associated with the lack of scientifically based methods of investigation, including in the part of the implementation of the procedure in absentia. The investigation of such crimes involves planning of this activity as the main method of organizational and managerial activity in criminal proceedings, which determines the ways, methods, means, forces and terms of successful achievement of the previously set goal and the mandatory creation of an investigative and operational group.

Obtaining evidence from material sources is carried out by conducting a search, temporary access to things and documents (Chapter 15 of the Criminal Procedure Code of Ukraine) (Law of Ukraine No. 2465-IX, 2012), initiating the requisition of documents, audit conclusions and inspection reports (in accordance with Part 2, Article 93 of this Code), investigative inspection, interrogation, examinations, etc.

The procedure for carrying out special pre-trial investigation (in absentia) in criminal proceedings regarding legalization (laundering) of taxes received from criminal means is regulated by a separate chapter of the Criminal Procedure Code of Ukraine and is performed after separate procedural decision (resolution) by the investigating judge with the mandatory participation of the defense counsel against an adult who has acquired the status of a suspect and is hiding from the investigation and trial authorities in the temporarily occupied territory of Ukraine, in the territory of the country recognized by the Verkhovna Rada of Ukraine as an aggressor state for the purpose of evading criminal responsibility and/or who was put on international wanted list, and also provides for a special summons procedure for and delivery of procedural documents.

Along with the establishment of the above-mentioned grounds for initiating in absentia procedure at the initial stage of the investigation of legalization (laundering) of taxes received from crime, it is necessary to establish, in particular: a) the fact of criminal actions (evasion, funds in the form of a budgetary reimbursement of VAT, the implementation of a financial transaction aimed at providing a legitimate type of ownership, use and disposal of this property); b) documents (tax and accounting, economic, registration, electronic; authorizing persons to dispose of financial resources, etc.).

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