

DOI: [10.55643/fcaptive.5.52.2023.4176](https://doi.org/10.55643/fcaptive.5.52.2023.4176)
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Received: 12/09/2023

Accepted: 26/10/2023

Published: 31/10/2023

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CURRENT PROBLEMS OF IMPLEMENTATION OF AUTHORITIES BY SUBJECTS OF PRIMARY FINANCIAL MONITORING (ON THE EXAMPLE OF ADVOCACY ACTIVITIES)

ABSTRACT

This article aims at studying the national legislation, recommendations of international organizations (intergovernmental bodies), as well as the opinions of scholars and practitioners on the implementation of financial monitoring in the practice of law. The authors define the achievement of this goal by fulfilling the tasks set and answering the question of the correlation between the obligation to conduct financial monitoring and the attorney-client privilege. This article is of undoubted relevance due to Ukraine's active implementation of European integration processes and transformation of legislation in the field of prevention and counteraction to money laundering and terrorist financing. Along with this development is the independent status of the attorney-at-law and the practice of law, the maintenance and provision of which are constantly relevant in the State. The authors draw attention to the current legal regulation of financial monitoring in the practice of law, as well as to the FATF recommendations, emphasizing the importance of such a legal phenomenon as financial monitoring. The authors define the area of functional responsibility of law firms, law firms and attorneys-at-law who practice law individually as specially designated subjects of primary financial monitoring. In addition, this article emphasizes the peculiarities of financial monitoring in the practice of law and expresses concerns about certain peculiarities. At the same time, the authors outline the lack of unity in the attitude toward the purpose of financial monitoring, as well as the presence of scepticism and both constructive and unjustified criticism by practising attorneys at law of financial monitoring in the practice of law, namely its legal regulation. The authors determine that the most important result of this study is the emphasis on the need for a balanced ratio of the objectives of financial monitoring and the preservation of the independence of the legal profession. Summarizing, the researchers argue that financial monitoring is a challenge of the time, the achievement of which should not be declarative, but real. The reality of the goals of financial monitoring should be achieved by all subjects of the latter, including attorneys-at-law. At the same time, the combination of the status of an advocate and a subject of primary financial monitoring should be balanced, taking into account independence as a principle of the practice of law.

Keywords: legislative regulation, financial monitoring, subjects of primary financial monitoring, financial operations, lawyer, lawyer activity, risk-oriented approach, lawyer's secrecy, FATF, FATF recommendations

JEL Classification: G28, K39, K40

INTRODUCTION

Financial monitoring is gaining momentum every year in its development, improvement and globalization. Scientists, not only domestic ones, are interested in and studying this issue, offering various variations of improving the financial monitoring system.

Financial monitoring in the practice of law is not a novelty of national legislation and recommendations of intergovernmental organizations, but the topic of this article is relevant both because of the stable changes in the legislation on prevention and counteraction to money laundering and terrorist financing, and because of the stability of the

principles of the practice of law and the rules of attorneys' ethics which form the status of an attorney. Therefore, it seems appropriate to consider the issue of financial monitoring in the legal profession and confirm whether or not there are grounds for discussion, and, if possible, to emphasize the nature of these grounds.

LITERATURE REVIEW

It is undeniable that the issue of financial monitoring, both in terms of its objects and its subject composition and content, has been a topical issue for more than a decade and remains important today. The importance of understanding and awareness of this legal phenomenon applies to a wide range of people: from any individual conducting any financial transactions to public authorities, banks, financial institutions, lawyers, etc.

The issue of financial monitoring has been studied for a long time by different scholars. For example, such national scholars as Glibko S.V. (Glibko, b.d., pp. 23-29), Vnukova N.M. (Vnukova, b.d., pp. 10-16), Dmytryk O.O. (Dmytryk & Vnukova, 2017, p. 400). These authors examine financial monitoring as part of the whole system of preventing and counteracting money laundering or in relation to individual objects of financial monitoring. In addition, scholars analyze financial monitoring as a tool to combat threats to the financial security of the state. They also consider financial monitoring as an element of the financial services market. The above-mentioned scholars have studied financial monitoring, as a rule, as a whole as a legal phenomenon in a certain integral system, or its structural elements.

Pukala, R., & Chmutova, I have devoted an entire monograph to the study of financial monitoring, in which they explore the risk-based approach as one of the principles of financial monitoring. The authors have studied the risk-based approach systematically, starting with international standards for regulating this principle of financial monitoring, its changes in the context of the digitalisation of financial relations, and the application of this principle by banks in the course of financial monitoring (Pukala & Chmutova, 2020, c. 1-177).

Authors such as Ponomarenko, V. S., Vnukova, N. M., Kolodiziev, O. M., & Achkasova, S. A. also pay attention to the risk-based approach in the financial monitoring system and the impact of state regulation on such a system (Ponomarenko et al., 2019, Abstract). Lyeonov, S., Yarovenko, H., Koibichuk, V., Boyko, A., & Kravchyk, Y. study financial monitoring from the point of view of its implementation through screen forms of automated information systems, namely the development of such systems (Lyeonov et al., 2022, Abstract). Vovchak, O. D., Kantsir, V. S., & Kantsir, I. A., in turn, consider financial monitoring as an economic and legal method of combating terrorism. The authors paid attention to the intersection of the categories of "terrorism" and "finance", etc (Vovchak et al., 2019, Abstract).

For example, some scholars pay attention to predicting financial intermediaries for money laundering. Authors such as Lyeonov, S., Kuzmenko, O., Bozhenko, V., Mursalov, M., Zeynalov, Z., & Huseynova, A. have examined at least twenty banks for the risk of their involvement in shadow financial activities (Lyeonov, Kuzmenko et al., 2020, Abstract).

Of course, the issue of financial monitoring is being studied not only in our country, as this legal phenomenon is global in scope and is moving towards maximum globalization in all aspects. For example, Claudio Reginaldo Alexandre and João Balsa in their work investigate and reveal the characteristics of a multi-agent system that includes machine learning and risk assessment components to identify and flag suspicious bank customers. In other words, these scientists describe a machine-based risk identification system as part of a financial monitoring system and draw attention to the fact that such a system is also intended to assist human experts in analyzing suspicious customer behaviour (Alexandre & da Silva, 2023, Abstract).

Pavlo Tertychnyi, Mariia Godgildieva, Marlon Dumas, and Madis Ollikainen, in turn, also propose a machine learning-based anti-money laundering monitoring system that meets three requirements: generating accurate and non-redundant alerts; generating timely alerts; and providing explanations and risk assessments for each alert (Tertychnyi et al., 2022, Abstract). Henry Ogbeide, Mary Elizabeth Thomson, Mustafa Sinan Gonul, Andrew Carstairs Pollock, Sanjay Bhowmick, and Abdullahi Usman Bello, for example, assessed money laundering risks through the lens of direct risk assessors. These authors considered the issue of protection of money laundering risk assessors from cognitive biases (Ogbeide et al., 2023, Abstract).

The analyzed works once again confirm that the issue of financial monitoring, both in general and in partial terms, is of interest to scientists and is subject to comprehensive research. The conclusions of these authors can be analyzed and applied by financial monitoring entities in Ukraine as one of the sources of training in the field of financial monitoring. Among such subjects are attorneys-at-law.

In this article, we want to focus on the implementation of financial monitoring in the practice of law. Therefore, first of all, let us refer to the Law of Ukraine "On the Bar and Legal Practice" No. 5076-VI dated 05.07.2012 (hereinafter - Law No. 5076-VI) (On the Bar and Legal Practice, 2023) and the Law of Ukraine "On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction" No. 361-IX dated 06. 12.2019 (hereinafter - Law No. 361-IX) (On Prevention and Counteraction to Legalization (Laundering) of the Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction, 2023).

The content of these laws in this study is important in terms of legal regulation of the practice of law and the principles of its implementation in relation to the performance of duties as a subject of financial monitoring. While analyzing the national regulatory framework, it is important to pay attention to the bylaws, in particular, the Order of the Ministry of Justice of Ukraine "On Approval of the Regulation on Financial Monitoring by Primary Financial Monitoring Entities, State Regulation and Supervision of Which is Carried Out by the Ministry of Justice of Ukraine" of 10.09.2021 No. 3201/5 (hereinafter - Order No. 3201/5) (On Approval of the Regulation on Financial Monitoring by Primary Financial Monitoring Entities, State Regulation and Supervision of Which is Carried Out by the Ministry of Justice of Ukraine, 2021). The latter specifies the procedure for conducting financial monitoring by subjects of primary financial monitoring, including attorneys, at the level of central executive authorities, as regulated by Law No. 361-IX.

In addition to the study of national regulation, it is worth considering the Guidance for a risk-based approach for legal professionals from the Financial Action Task Force on Money Laundering (hereinafter - FATF) (Guidance for a Risk-Based Approach Guidance for Legal Professionals, b. d.). Since the Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body that develops and implements measures and standards to combat money laundering at the international level, it is worth considering the standards for financial monitoring by lawyers set by this intergovernmental body.

Regarding the issue of financial monitoring in Ukraine, in particular, but not exclusively, take into account the opinion of the Ukrainian National Bar Association, set forth in the Decision "On Approval of Clarification on Certain Issues of Performance of Duties by an Attorney as a Subject of Primary Financial Monitoring" dated 03.07.2021 No. 51 (hereinafter - Decision No. 51). In the mentioned decision, the bar self-government body in Ukraine explains to advocates their status as a subject of primary financial monitoring in response to a request. (On approval of clarification on some issues of performance of duties by an advocate as a subject of primary financial monitoring, b. d.).

At the same time, the opinion of legal practitioners who use the Internet to share their personal interpretations of national legislation on financial monitoring and thus publish scientific and journalistic articles is important in the study of this issue. Since the issue under study in this paper cannot be called purely theoretical, it seems necessary to pay attention to the opinion of domestic practitioners. For example, as Nadiia Tarasova (attorney-at-law, corporate governance advisor at VODAFONE Ukraine, etc.) (Impact of the Law on Financial Monitoring on the Activities of an Attorney-at-Law: Nadiia Tarasova, b.d.), who speaks about the current state of financial monitoring in Ukraine, the impact of the status of a subject of primary financial monitoring on the advocacy activities. Leonid Lazebnyi (editor-in-chief of the information and legal platform Lex, attorney, and co-founder of the company "Activlex") also explores the issue of attorneys as a subject of financial monitoring in his publication in the All-Ukrainian professional legal edition "Yurydychna Gazeta online" (Attorney as a subject of financial monitoring - Yurydychna Gazeta, b. d.).

However, we should not forget about the opinion of scholars who study financial monitoring in the practice of law. Not too many scholars have paid much attention to the study of the current state of financial monitoring in the practice of law, but in 2019 V. Shkurko made a general analysis of the legal regulation of financial monitoring in the practice of law.

Therefore, taking into account the reviewed layer of various sources of information on the issue under study, we proceed to the formulation and implementation of the tasks of this article.

AIMS AND OBJECTIVES

The purpose of this work is to study the national legislation, recommendations of international organizations (intergovernmental bodies), as well as the opinions of scholars and legal practitioners on the implementation of financial monitoring in the practice of law. First of all, this paper aims to define the legal regulation of financial monitoring by attorneys-at-law, namely, to outline their rights, duties and responsibilities in this area. In addition, for a broader understanding of the implementation of financial monitoring in the practice of law, the FATF recommendations for lawyers will be considered.

The latter is important because it forms the basis of national legislation and the directions of its development. In addition, it is important to explore the opinions of scholars and lawyers on financial monitoring in the practice of law.

The tasks set out in this article are aimed at achieving the above goal, and also at drawing attention to the issue of correlation between the obligation to conduct financial monitoring and the obligation to maintain the attorney-client privilege (to comply with the principle of confidentiality).

METHODS

In order to achieve the goal of this study, the empirical methods used are description and comparison. The use of the latter is aimed at describing the national legal regulation and recommendations of international organizations on financial monitoring in the practice of law. To outline the opinions of scholars and lawyers on this issue. In addition, it is important to compare the national legal regulation of financial monitoring in the practice of law with certain recommendations of international organizations. Along with the above, in order to accomplish the tasks, set out in this article, it will be necessary and logical to compare the opinions of scholars and lawyers both among themselves and with regard to the content of the regulatory framework for the issue under study.

Undoubtedly, in this publication, it is important to use the methods of structural and functional analysis in order to study the implementation of financial monitoring in the practice of law as part of the whole and as a separate legal phenomenon in statistics and dynamics. In connection with the subject matter of the study, it is necessary to apply formal legal and logical legal methods, which, in turn, are mandatory and special for the study of law. With the help of the latter, we will study the legal provisions governing the implementation of financial monitoring by specially designated subjects of primary financial monitoring.

The application of these research methods will make it possible to achieve the purpose of this article and fulfil all the tasks outlined. And also, to answer the question regarding the correlation between the obligation to carry out financial monitoring and the obligation to maintain the attorney-client privilege (to comply with the principle of confidentiality).

RESULTS

Advocates, individually or through the establishment of a bureau or association, carry out the practice of law. According to Law No. 5076-VI, such activity is defined as an independent professional activity of an advocate to provide defence, representation and other types of legal assistance to a client (On the Bar and Practice of Law, 2023, clause 2, article 1).

It is no coincidence that the above legislative definition states that the practice of law is an independent professional activity. Independence, according to Article 4 of Law No. 5076-VI, is one of the principles of such activity (On the Bar and Practice of Law, 2023, Article 4). In addition, Article 5 of Law No. 5076-VI states that the Bar is independent of state authorities, local self-government bodies, their officials and employees (On the Bar and Practice of Law, 2023, Article 5). In other words, when providing defence, representation and other types of legal aid, advocates act in accordance with the procedure and on the basis of the law, and they are independent in their activities. Such independence implies the freedom of each advocate from any external influence, pressure or interference in his or her activities, in particular from public authorities, local self-government bodies, their officials, other advocates and, of course, their personal interests.

However, it is important to note that in addition to the principle of independence of the Bar, there are other principles, including the rule of law and legality. According to these principles, lawyers, guided by the provisions of Article 8 of the Constitution of Ukraine (Constitution of Ukraine, 2020, Article 8) and Article 4 of Law No. 5076-VI (On the Bar and Practice of Law, 2023, Article 4), carry out their professional activities in accordance with the provisions of the Constitution of Ukraine and other laws and, accordingly, are responsible for their violation.

The brief mention of the principles of the practice of law is not accidental, since one of the final tasks of this work is to determine the correlation between the obligation to conduct financial monitoring and the obligation to keep the attorney-client privilege (to comply with the principle of confidentiality) and, accordingly, the correlation between the principles of independence of the bar and the rule of law and legality. That is why we emphasize the fundamental basis of the practice of law in order to draw attention to the controversial status of an attorney as a subject of initial financial monitoring. At the same time, we consider it necessary to pay attention to the issue of direct performance by law firms, law firms and attorneys who practice law individually of their duties as specially designated subjects of primary financial monitoring.

According to subparagraph "d" of paragraph 7 of part 2 of Article 6 of Law No. 361-IX, law firms, law firms and lawyers practicing as attorneys individually are specially designated subjects of primary financial monitoring (On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction, 2023, subparagraph "d", paragraph 7, part 2, Article 6). In other words, attorneys-at-law individually or by establishing a bureau or association are subjects of initial financial monitoring, but with certain peculiarities of its implementation. These peculiarities are set out in Article 10 of Law No. 361-IX and include the following:

- purchase and sale of real estate or property management in the financing of housing construction;
- purchase and sale of business entities and corporate rights;
- management of funds, securities or other assets of the client;
- opening and/or managing a bank or securities account;
- raising funds necessary for the establishment of legal entities and funds, ensuring their operation or management;
- establishment, operation or management of legal entities, funds, trusts or other similar legal entities." monitoring (On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction, 2023, Article 10).

Thus, the exhaustiveness of the grounds for the obligation to carry out initial financial monitoring for an attorney (law firm or association) is obvious. Therefore, in all other cases not specified in Article 10 of Law No. 361-IX, an attorney (law firm or association) does not have the status of a subject of initial financial monitoring, and, accordingly, the obligation to carry out such monitoring and the threat of liability for the contrary.

In addition, part 2 of Article 10 of Law No. 361-IX defines restrictions for advocates as subjects of primary financial monitoring, in particular, with regard to the obligations set forth in Article 8 of Law No. 361-IX:

- firstly, regarding the identification, registration and storage of information on threshold financial transactions (paragraphs 2, 7, 18 of part 2 of Article 8 of Law No. 361-IX);
- secondly, the possibility of agreeing on the terms for submitting the requested information in accordance with the procedure established by the central executive body responsible for the formation and implementation of state policy in the field of preventing and combating money laundering, etc. in case of impossibility to comply with the statutory deadlines;
- finally, the specially authorized body must be notified of threshold financial transactions of politically exposed persons, their family members and/or persons related to politically exposed persons; on threshold financial transactions if at least one of the parties to the financial transaction is registered, resides or is located in a state that carries out armed aggression against Ukraine and/or in a state (jurisdiction) that does not implement or improperly implements the recommendations of international or intergovernmental organizations, involved in combating money laundering, etc. (including a diplomatic mission, embassy, consulate of such a state), or if one of the parties to a financial transaction is a person who has an account with a bank registered in the said state (jurisdiction); on threshold payment transactions for the transfer of funds abroad (including to states classified by the Cabinet of Ministers of Ukraine as offshore zones); on threshold financial transactions with cash (deposit, transfer, receipt of funds) for monitoring (On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction, 2023, part. 2, Art. 10).

We would like to draw your attention to the fact that the legislator in Law No. 361-IX provided for the possibility of the so-called choice, rather than the direct absence of the obligation of an attorney (law firm or association) to perform financial monitoring. In particular, part 3 of Article 10 of Law No. 361-IX contains the following provision: "...law firms, law firms, lawyers who practice law individually ... may not fulfil the obligation to carry out due diligence of the client and not inform the specially authorized body of their suspicions in case of providing services for the protection of the client, representation of his or her interests in the judiciary and in cases of pre-trial settlement of disputes or providing advice on the protection and representation of the client." (On Preventing and Counteracting the Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing the Proliferation of Weapons of Mass Destruction, 2023, Part 3, Article 10).

In other words, the legislator allows the advocate (law firm or association) to choose whether or not to carry out a proper check or not or to notify a specially authorized body of its suspicions when such an advocate (law firm or association) provides services for the defence of the client, representation of his or her interests in the judiciary and in cases of pre-trial settlement of disputes or provision of advice on the defence and representation of the client.

This makes one question whether such a legislative possibility of choice is not a threat to the guarantee of attorney-client privilege - first, it is not. And, secondly, whether such norms of domestic legislation are not the reason for the decrease in the level of clients' trust in lawyers. It seems that there are more reasons for further discussion in the course of the study.

In its Decision No. 51, the Ukrainian National Bar Association in its clarification established that indeed an attorney (law firm or association) is a subject of primary financial monitoring in exceptional cases and with the rights and obligations defined by Law No. 361-IX (On Approval of Clarification on Certain Issues of Performance of Duties by an Attorney as a Subject of Primary Financial Monitoring, b. d.). At the same time, the Ukrainian National Bar Association emphasizes that if an advocate does not participate in the preparation and implementation of an exhaustive list of transactions, he or she is not obliged to register with the State Financial Monitoring Service of Ukraine and fulfil all other requirements of Law No. 361-IX (On Approval of Clarification on Certain Issues of Performance of Duties by an Advocate as a Subject of Primary Financial Monitoring, b. d.).

Certainly, Decision No. 51 outlines the duties of attorneys as subjects of initial financial monitoring, as provided for in Law No. 361-IX and detailed in Order No. 3201/5, namely:

"Also, the duties of an advocate under Law No. 361-IX include the implementation of due diligence of new clients, as well as existing clients, which includes the following measures:

- identification and verification of the client (his/her representative);
- establishing the ultimate beneficial owner of the client or his/her absence, including obtaining the ownership structure in order to understand it and data that allows to establish the ultimate beneficial owner, and taking measures to verify his/her identity (if any);
- establishing (understanding) the purpose and nature of future business relations or financial transactions;
- monitoring on an ongoing basis the client's business relations and financial transactions carried out in the course of such relations, regarding the compliance of such financial transactions with the information available to the subject of primary financial monitoring about the client, his or her activities and risk (including, if necessary, the source of funds related to financial transactions);
- ensuring the relevance of the received and existing documents, data and information about the client." (On Approval of Clarification on Certain Issues of Performance of Duties by an Attorney as a Subject of Primary Financial Monitoring, b. d.).

The Ukrainian National Bar Association in its Decision No. 51 summarizes the following:

- an advocate may perform the duties of a specially designated subject of financial monitoring only after establishing a business relationship with a person (client);
- an advocate may become a specially designated subject of financial monitoring and must fulfil the established duties only if a number of conditions are met: an agreement on the provision of legal assistance is concluded between the advocate and the client; the client's request concerns specific transactions (a certain list of transactions); the exceptions provided for by the relevant law do not apply (On Approval of Clarification on Certain Issues of Performance of Duties by an Advocate as a Subject of Initial Financial Monitoring, b. d.).

In addition, it is proposed to note that at the beginning of this paper, the principles of advocacy such as independence, the rule of law and legality, as well as confidentiality were mentioned. Concerns were also expressed about the debatable nature of maintaining a balance in the ratio of these principles in the course of financial monitoring. Therefore, the Ukrainian National Bar Association in its Decision No. 51 refers to the Rules of Attorneys' Ethics approved by the Reporting and Election Congress of Advocates of Ukraine on June 09, 2017 (Rules of Attorneys' Ethics, b. d.) and reminds of their binding effect on every lawyer. In particular, but not exclusively, we are talking about Articles 6 and 7 of the Rules of Professional Conduct, which approve the principles of independence and observance of the law (Rules of Professional Conduct, b. d.).

This reference to the rules (principles) of attorneys' ethics in Decision 51, however, is seen as a so-called declarative reminder to attorneys of their duties. In addition, the Ukrainian National Bar Association in its Decision No. 51 does not mention the principle of confidentiality as one of the fundamental principles in the practice of law.

From the above analysis, it is clear that the Ukrainian National Bar Association recognizes the possibility of an attorney (law firm or association) being a subject of initial financial monitoring in cases determined by law. In addition, the Ukrainian National Bar Association does not focus on the possible contradiction between the status of an advocate and the status of a subject of initial financial monitoring.

It is interesting what practitioners think about this. For example, Leonid Lazebnyi notes: "The role of an advocate as a subject of primary financial monitoring (PFM) of his client has emerged not so long ago and has not yet become a common component of the advocate's life" (Advocate as a subject of financial monitoring - Yurydychna Gazeta, n.d.). As we can see, the lawyer, first of all, draws attention to the fact that the role of an attorney as a subject of primary financial monitoring is still an unrooted component of the national legal system. In addition, in his work, the author pays more attention to the sources and their quality that should be used by specially designated subjects of financial monitoring in the course of the latter, namely the application of a risk-oriented approach (Attorney as a Subject of Financial Monitoring - Yurydychna Gazeta, b. d.).

In applying the risk-based approach, the subjects of primary financial monitoring are guided by the risk criteria defined in Law No. 361-IX, as well as those determined by the subjects of state financial monitoring. Analyzing them, Leonid Lazebnyi provides a certain algorithm for applying the risk-based approach by attorneys with further consideration of the status of an attorney as a specially designated subject of financial monitoring (Attorney as a Subject of Financial Monitoring - Yurydychna Gazeta, b. d.).

In the mentioned lawyer's work, it is worth noting his emphasis on rather large fines provided for in Article 1669 of the Code of Administrative Offenses (Code of Ukraine on Administrative Offenses (Articles 1 - 212-24), 2023, Article 1669), which are a measure of administrative liability for violation of legislation on prevention and counteraction to legalization (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction. In particular, Leonid Lazebnyi emphasizes the possibility of the State Financial Monitoring Service to "go wild" in its discretionary powers to hold attorneys liable for failure to comply with the obligation to "denounce" a client. However, by using completely non-legal vocabulary and expressing his indignation at the requirements of the law, the author allegedly inadvertently hints at the possibilities of evasion hidden in the complex wording of the law (Lawyer as a subject of financial monitoring - Yurydychna Gazeta, b. d.).

Therefore, the lawyer provides the following conclusion: "... despite the fact that liability for failure to fulfil the obligation of the subject of primary financial monitoring by an attorney-at-law portends a serious penalty, the likelihood of its imposition is rather low due to the limited list of transactions where these obligations must be fulfilled, attorney-at-law immunity from their fulfilment in the case of defence or representation, and short terms of prosecution in the context of wide possibilities for delaying the consideration of administrative cases in courts." (Attorney-at-law as a subject of financial monitoring - Yurydychna Gazeta, b. d.).

The analyzed opinion leads to the conclusion that the status of an attorney-at-law as a subject of primary financial monitoring can be characterized by many issues requiring scientific and practical discussion. However, the author, while mentioning the so-called "denunciations" of attorneys-at-law against clients, does not reveal the issues of such a phenomenon or such an assessment of the legal phenomenon of financial monitoring. That is, from the analysis above, it is obvious that there is a sceptical attitude to the fulfilment by the attorneys-at-law of the duty of the subject of primary financial monitoring. This sceptical attitude seems to be due to the fact that the combination of the status of an attorney and the status of a subject of financial monitoring contradicts the principles of the practice of law and does not ensure the guarantee of attorney-client privilege.

We would also like to draw attention to the opinion of attorney Nadiya Tarasova. In her scientific and journalistic article, the latter expresses the following thoughts on the content, and purpose of Law No. 361-IX and its impact on the activities of attorneys-at-law:

- firstly, in the author's opinion, the logic of Law No. 361-IX is to increase tax revenues by strengthening control over monetary transactions and destroying tax optimization schemes;
- secondly, the author emphasizes the recommendatory nature of the acts that the subjects of primary financial monitoring should use in the course of financial monitoring (FATF recommendations, typological studies of the State Financial Monitoring Service);
- thirdly, the author uses the content of Decision No. 51 and, accordingly, agrees with the opinion expressed therein (Impact of the Law on Financial Monitoring on the Activities of Attorneys at Law: Nadiia Tarasova, b. d.).

In view of the above, it does not seem that the only logic of Law No. 361-IX is to increase tax revenues by strengthening control over monetary transactions and destroying tax optimization schemes. As for everything else, attorney Nadiya Tarasova seems to adhere to the opinion of the Ukrainian National Bar Association, set forth in Decision No. 51.

In order to fully fulfil the purpose of this paper, it is worth reviewing what the FATF suggests to lawyers when conducting financial monitoring and, in particular, applying a risk-based approach. The FATF Guidance for a Risk-Based Approach for

Legal Professionals states that it is intended for legal professionals, countries and their competent authorities, including legal profession supervisors, as well as legal practitioners whose clients are legal professionals (Guidance for a Risk-Based Approach Guidance for Legal Professionals, b. d.).

The purpose of this Guide is to assist legal professionals in developing effective measures to manage money laundering/terrorist financing risks when establishing or maintaining business relationships. In particular, it explains the obligation of legal professionals to identify and verify information about beneficial owners and provides examples of simplified, standard and extended customer due diligence measures (Guidance for a Risk-Based Approach Guidance for Legal Professionals, b. d.). It should be noted that the FATF Guidance for a Risk-Based Approach Guidance for Legal Professionals is optional, i.e., it is a recommendation.

DISCUSSION

Having analyzed the legislation, recommendations of the intergovernmental body, the bar self-government and the opinion of practicing lawyers, as well as the works of scholars on financial monitoring, the following should be emphasized.

Firstly, there is no denying the controversial nature of the topical nature of such a legal phenomenon as financial monitoring. Both the intergovernmental body and individual countries (legislative and executive authorities), including scholars and practitioners, are interested in and study the issues of legal regulation of financial monitoring and its practical implementation.

Since the global goal of financial monitoring is to fight crime at both the national and international levels, it is not surprising that it is being studied globally and that attempts are being made to improve the ways and means of its implementation. Therefore, one of the most interesting issues under discussion today is the use of a multi-agent system that includes machine learning and risk assessment components to identify and flag suspicious banking customers, in other words, the development of a financial monitoring system based on machine learning methods.

Getting back directly to the purpose of this study, we emphasize that the analysis of both mandatory and soft law provisions on financial monitoring in the practice of law does not provide an unambiguous answer to the question of the correlation between the obligation to conduct financial monitoring and the obligation to maintain the attorney-client privilege (to comply with the principle of confidentiality).

This conclusion is based on the fact that an advocate (law firm or association) as a subject of primary financial monitoring is specially defined and such status arises in exceptional cases, and the legislator also establishes certain possibilities for choosing an advocate in the performance of the relevant duty. However, such a certain limitation in the status of the subject of primary financial monitoring, as it seems, to some extent threatens the guarantee of compliance with the principle of confidentiality (preservation of attorney-client privilege). In view of the above, it is logical and debatable whether such status of an attorney is not the reason for the decrease in the level of clients' trust in attorneys.

Obviously, lawyers should not carry out financial monitoring in respect of each client, but only in exceptional cases. In the case of providing services for the protection of the client, representation of his or her interests in the judiciary and in cases of pre-trial settlement of disputes or providing advice on the protection and representation of the client, law firms, law firms, attorneys-at-law, attorneys-at-law practicing individually may not fulfil the obligation to conduct due diligence of the client and not notify the specially authorized body of their suspicions. The legislator's use of such a choice seems to be an example of the discretion of the advocate as a subject of financial monitoring, but at the same time, it indicates the absence of a guarantee for the client that the advocate will keep the attorney-client privilege.

CONCLUSIONS

To summarize, financial monitoring in the practice of law is limited and is carried out with due regard for legislative peculiarities. The purpose of this article is to study the national legislation, recommendations of international organizations (intergovernmental bodies), as well as the opinions of scholars and practitioners on whether the implementation of financial monitoring in the Attorney's practice of law has been fulfilled within the scope of the tasks set.

We are convinced that financial monitoring in the legal profession is a challenge of the times and is aimed at fighting crime - these are declarative slogans. However, the real opinions of practitioners are more sceptical, criticizing both the goal of preventing and combating money laundering and terrorist financing and the measures to achieve it. Nevertheless, it seems appropriate to strive not for declarative slogans, but for their transformation into real ones. For this reason, when studying

financial monitoring in the practice of law, it is necessary to pay attention, first of all, to the issue of correlation between the objectives of financial monitoring and the preservation of the independence of the practice of law. This is the key to the simultaneous achievement of both the goals of financial monitoring and the objectives of the Bar.

ADDITIONAL INFORMATION

AUTHOR CONTRIBUTIONS

All authors have contributed equally

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СУЧАСНІ ПРОБЛЕМИ РЕАЛІЗАЦІЇ ПОВНОВАЖЕНЬ СУБ'ЄКТАМИ ПЕРВИННОГО ФІНАНСОВОГО МОНІТОРИНГУ (НА ПРИКЛАДІ АДВОКАТСЬКОЇ ДІЯЛЬНОСТІ)

Стаття спрямована на дослідження вітчизняного законодавства, рекомендацій міжнародних організацій (міжурядових органів), а також думок науковців і практикуючих правників щодо реалізації повноважень суб'єктами первинного фінансового моніторингу на прикладі адвокатської діяльності. Автори визначають досягнення цієї мети шляхом виконання поставлених завдань та надання відповіді на питання співвідношення обов'язку здійснювати фінансовий моніторинг із адвокатською таємницею. Ця стаття має беззаперечну актуальність у зв'язку з активною реалізацією Україною євроінтеграційних процесів і трансформації законодавства у сфері запобігання та протидії легалізації доходів і фінансування тероризму. Поряд з указаним розвитком є незалежний статус адвоката та адвокатської діяльності, підтримання й забезпечення якого в державі є актуальним постійно. Науковці звертають увагу на актуальне правове регулювання фінансового моніторингу в адвокатській діяльності, а також на рекомендації FATF, наголошуючи на важливості такого правового явища як фінансовий моніторинг. Автори визначили царину функціональної відповідальності адвокатських бюро, адвокатських об'єднань та адвокатів, які здійснюють адвокатську діяльність індивідуально, як спеціально визначених суб'єктів первинного фінансового моніторингу. До того ж у цій статті наголошено на особливостях фінансового моніторингу в адвокатській діяльності та висловлено занепокоєння щодо окремих особливостей. При цьому автори окреслюють відсутність єдності в ставленні до мети фінансового моніторингу, а також наявність скептицизму та й конструктивної, і безпідставної критики адвокатами-практиками фінансового моніторингу в адвокатській діяльності, а саме його правового регулювання. Автори визначають, що найважливішим результатом цього дослідження є акцент на необхідності збалансованого співвідношення цілей фінансового моніторингу та збереження незалежності адвокатської діяльності. Підсумовуючи, науковці стверджують, що фінансовий моніторинг є викликом часу, досягнення цілей якого має бути не декларативним, а реальним. Реальність цілей фінансового моніторингу має досягатися всіма суб'єктами останнього, зокрема й адвокатами. При цьому поєднання статусу адвоката та суб'єкта первинного фінансового моніторингу має бути збалансованим, ураховуючи незалежність як принцип адвокатської діяльності.

Ключові слова: законодавче регулювання, фінансовий моніторинг, суб'єкти первинного фінансового моніторингу, фінансові операції, адвокат, адвокатська діяльність, ризик-орієнтований підхід, адвокатська таємниця, FATF, рекомендації FATF

JEL Класифікація: G28, K39, K40