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## “CRITICAL INFRASTRUCTURE OF THE FINANCIAL SECTOR OF UKRAINE”: IDENTIFICATION OF CONTENT AND ESSENCE OF THIS LEGAL CONCEPT

**Abstract. Purpose.** The purpose of the article is to reveal the content and essence of the legal concept of "critical infrastructure of the financial sector of Ukraine" in order to confirm or refute the statement that it is possible or not to define this phenomenon from the perspective of the object of administrative and legal protection. **Results.** The article reveals the content and essence of the legal concept of "critical infrastructure of the financial sector of Ukraine" in order to confirm or refute the statement that it is possible or not to define this phenomenon from the perspective of the object of administrative and legal protection. The term "critical infrastructure" is defined as the main element in this phrase, and the term "financial sector" is defined as the dependent element. The author specifies that from the economic perspective, the financial sector of Ukraine's economy is characterised by a set of financial transactions of state or commercial entities in the form of intermediary activities that objectify the distribution of financial capital in the economy. In legal discourse, it is defined by the existence of certain institutions (participants in legal relations) that, through compliance with the established rules of economic or regulatory activities, meet the public demand for the provision of quality financial and related services. It is found that according to the legislative provisions in the context of critical infrastructure of the financial sector, there are two types of objects of protection within it: 1) those determined by the National Bank; 2) those determined by the Ministry of Finance of Ukraine. **Conclusions.** It is concluded that the legal concept of "critical infrastructure of the financial sector of Ukraine" refers to the range of social relations which arise due to the need to ensure the smooth functioning of certain components of the financial sector which are critical in terms of the State's ability to meet its needs and develop towards autonomy and self-sufficiency, as well as to assert itself as a legal, democratic, sovereign state that properly fulfils its social purpose in the discourse of guaranteeing everyone the inviolability of their rights and legitimate interests. This interpretation does not give rise to any doubt or discussion that the state should create all conditions necessary to ensure that all critical components of the financial sector are protected, that is, provided with the ability to make an adequate, appropriate, permissible, necessary and effective response to factors, causes, circumstances, events, etc. that are potentially or actually capable of or have a negative impact on the functionality of their work.

**Key words:** administrative and legal protection, banking sector, critical infrastructure, legal concept, financial sector, financial services.

### 1. Introduction

The statement by L. Soroka that the term "concept" is not yet very widespread in legal science is worthy of note (Soroka, 2020). It is used mainly in philosophy, linguistics (here, most of all) and cultural studies (Kharytonov, Kharytonova, 2014), and any attempt to comprehend its essence leads to the realisation that a number of related concepts and their designations exist (Sadovnikova, 2014).

It is interesting to note H. Sadovnikov's suggestion that one of the options for interpreting the concept is to understand it as a global unit of mental activity that belongs to the world of consciousness and serves as a means of stor-

ing and exchanging information. They arise in the process of building information about objects and their properties, and this information may include both objective data about objects and assumptions about their qualities and properties. By contrast to a notion, a concept has no clear boundaries; it is dynamic and in constant motion. Moreover, it reflects not just the essential features of an object or phenomenon sufficient to understand its essence, but all those features that in a particular language group are filled with knowledge about the world around us (Sadovnikova, 2014).

Candidate of Philological Sciences V. Liti-aha also notes that a critical analysis of mod-

ern approaches to the definition and analysis of the concept has revealed the complexity of this concept and the ambiguity of its interpretation (Litiaha, 2019), because in addition to identifying them with notions (which is logical, since the term "concept" itself comes from the Latin conceptus - "thought", "idea"), scientists correlate them with the meanings that a person operates with in the process of intellectual development of the world, which characterise our consciousness and our memory. Moreover, only some of the concepts are related to linguistic structures (Litiaha, 2019), which indicates the need for a balanced and accurate use of it by scientists to describe a particular phenomenon.

We agree with L. Soroka that a concept is formed by elements that generate a qualitatively new semantic load of a separate structure, explaining the essence of its independent units, and in an abstract form provides an idea of it, describing not only the essential features and all possible factors that affect its content without directly changing the form (i.e., the name of the phenomenon). This means that a notion or term denotes phenomena, processes or actions of one semantic dimension, the essence of which is based on one stable characteristic that forms the core of its understanding. A concept, on the other hand, combines several different features by nature and direction, but denotes one specific reality that is directly described. Accordingly, the concept (as a category of administrative law science) should be understood as a number of independent categories which have their own characteristics, but together form a qualitatively new legal construct (Soroka, 2020).

With this in mind, it seems logical to conclude that the phrase "critical infrastructure of the financial sector of Ukraine" can be justifiably defined through the conceptual expression of its essence, that is, presented in the form of a legal concept explaining the specifics of independent categories united by common content and describing the phenomenon which is likely to be the object of administrative and legal protection.

Therefore, the purpose of the article is to reveal the content and essence of the legal concept of "critical infrastructure of the financial sector of Ukraine" in order to confirm or refute the statement that it is possible or not to define this phenomenon from the perspective of the object of administrative and legal protection.

The issue of identifying the content and essence of critical infrastructure as an object of administrative and legal protection is of considerable scientific interest due to the existing risks and threats both under normal conditions of national security and in the period

of exacerbation or emergence of new crises. Therefore, the relevance of these and related issues is obvious and especially noticeable in the context of the ongoing hostilities on the territory of Ukraine. For example, in this context, the works by the following scholars are thorough and reveal important aspects of critical infrastructure protection in Ukraine: D. Biriukov, S. Kondratov, V. Kosynskyi, V. Krykun, L. Soroka, O. Sukhodolia, S. Telenyk.

However, it should be noted that the issue of studying the critical infrastructure of the financial sector of Ukraine is a rather narrow area for research, which has been addressed by domestic scholars only indirectly.

## **2. Regulatory and legal framework for the operation of critical infrastructure of the financial sector of Ukraine**

As a follow-up to the issues raised, we believe that it is appropriate to consider the legal concept of "critical infrastructure of the financial sector of Ukraine" through the prism of syntactic analysis.

In this context, the term "critical infrastructure" is, in our opinion, the main element in this phrase, and the term "financial sector" is the dependent element. The first, respectively, is also formed by combining the meaning of two words: "critical" and "infrastructure". But there is an important clarification: the formation of the term "critical infrastructure" is not a mechanical combination of two known elements, but a kind of inseparable formula borrowed from other languages in its inherent fusion (Telenyk, 2019).

According to Kosynskyi, traditionally, the notion of infrastructure primarily includes major motorways, roads, bridges, public transport networks, airports, water supply networks, waste treatment and disposal, hazardous waste management, electricity generation and supply, and telecommunications. However, this list should not be limited to this. In a situation where states are ready to wage hybrid and proxy wars, asymmetric wars and wars that are now called "conflict" on land and at sea, in the air, space and cyberspace, the very notion of "infrastructure" and "critical infrastructure" is changing, or rather, being filled with new content. Therefore, when classifying infrastructures, it is now customary to divide them into two types: "hard infrastructure" - the physical networks necessary for the functioning of a modern nation; and "soft infrastructure" - the institutions necessary to support the socio-economic system, such as the health, cultural and social standards of the country, as well as the financial system, education, healthcare, public administration and law enforcement, and emergency services (Kosynskyi, 2020).

In general, the meaning of the term "critical infrastructure" differs somewhat from country to country, but these differences are not significant (Biriukov and Kondratov, 2011). Most often, it refers to: "systems and facilities, physical or virtual, so vital to the state that the incapacitation or destruction of such systems or facilities undermines national security, the economy, public health or safety, or results in any combination of the above" (Biriukov, Kondratov, 2012; Sukhodolia, 2015). Moreover, the World Bank defines the term "critical infrastructure" in terms of areas that require enhanced protection, namely energy, transport, water, information and communication technologies, healthcare and finance. Some economies include education, economic and manufacturing sectors as critical areas (Financial Protection of Critical Infrastructure Services, 2021). In general, the issue of classifying certain objects as critical is considered by many authors, both domestic and foreign, in different variations, and at the same time, they have much in common, which is probably related to the target content of such objects (Kosynskyi, 2020).

An important aspect is that the definition of critical infrastructure should not be static, and its revision can be a response to the dynamic national and international landscape of risks. For example, Switzerland is currently reviewing and simplifying its definition of critical infrastructure as a process, system and assets that are essential to the functioning of the economy and the well-being of the population, respectively. This simplification enables the scope of its critical infrastructure programme to be more easily adapted to changing conditions than before, when the definition was more prescriptive. Similarly, in the UK, the definition has evolved to include an impact on national security, national defence or the functioning of the state among the criteria for defining critical national infrastructure (Kosynskyi, 2020).

In the domestic discourse, the Law of Ukraine "On Critical Infrastructure" describes the sectors of critical infrastructure by referring to their content as "vital functions and/or services". Moreover, the national legislator does not name any specific list of critical infrastructure facilities, and most references to them are contained in the provisions of bylaws. For example, in order to determine the mechanism for compiling the list of information and telecommunication systems of the state's critical infrastructure, the Cabinet of Ministers of Ukraine adopted the On approval of the Procedure for forming the list of information and telecommunication systems of critical state infrastructure objects by Resolution No. 563 of 23 August 2016. The regulation defines critical

infrastructure as a set of state facilities that are most important for the economy and industry, the functioning of society and public safety, and the failure or destruction thereof may affect national security and defence, the environment, and lead to significant financial losses and human casualties. This attempts to define critical infrastructure objects through their approximate list: enterprises and institutions (regardless of ownership) in such sectors as energy, chemical industry, transport, banking and finance, information technology and telecommunications (electronic communications), food, healthcare, utilities, which are strategically important for the functioning of the economy and security of the state, society and population (Resolution of the Cabinet of Ministers of Ukraine On approval of the Procedure for forming the list of information and telecommunication systems of critical state infrastructure objects, 2016). Due to the adoption of the Resolution of the Cabinet of Ministers of Ukraine "Some issues of critical information infrastructure objects" No. 943 of 9 October 2020 (Resolution of the Cabinet of Ministers of Ukraine Some issues of critical information infrastructure objects, 2020), the above legal instrument was declared invalid. Although this Resolution of the Cabinet of Ministers of Ukraine approved the Procedure for the formation of critical information infrastructure objects to determine the mechanism for the formation of national and sectoral lists of such objects (Resolution of the Cabinet of Ministers of Ukraine Some issues of critical information infrastructure objects, 2020), the essence of the latter is not disclosed (Krykun, 2021).

The Resolution of the Cabinet of Ministers of Ukraine No. 1109 "Some Issues of Critical Infrastructure Objects" of 9 October 2020 is more informative, as it contains a list of critical infrastructure sectors, including the financial sector.

It should be noted that domestic legislation lacks a clear definition of the legal category "financial sector of Ukraine". For example, the Comprehensive Programme for the Development of the Financial Sector of Ukraine until 2020, approved by Resolution of the Board of the National Bank of Ukraine No. 391 dated 18 June 2015 (Resolution of the Board of the National Bank of Ukraine on the approval of the Comprehensive Programme for the Development of the Financial Sector of Ukraine until 2020, 2015), refers to the segments of the financial sector: banking sector, non-banking financial institutions, stock market and capital market.

3. European experience in regulating critical infrastructure of the financial sector

It should be noted that under the European instruments, the financial sector means a sector consisting of one or more of the following entities: (a) a credit institution, a financial institution or a company providing ancillary services within the meaning of Article 4(1), (5) or (21) of Directive 2006/48/EC (the so-called "banking sector"); (b) an insurance company, a reinsurance company or an insurance holding company within the meaning of Article 13(1), (2), (4) or (5) or Article 212(1)(f) of Directive 2009/138/EC (i.e. the "insurance sector"); (c) an investment firm as defined in Article 3(1) (b) of Directive 2006/49/EC (the "investment services sector") (Directive 2002/87/EC of the European Parliament and of the Council, 2002).

Furthermore, the draft Strategy for the Development of the Financial Sector of Ukraine until 2015 (prepared by a working group composed of representatives of the State Commission for Regulation of Financial Services Markets of Ukraine, the National Bank of Ukraine, and the State Commission on Securities and Stock Market (Kremen, Semenoh, 2013)) provided for the financial sector to be the financial market that ensures the accumulation and distribution of investment resources, and the interaction of producers and consumers of financial services under the rules established by the state and its regulatory authorities. The components of the financial market are the monetary market, the insurance market, the stock market, the market of collective investment services, private pension services and other financial services markets (Strategy for the development of the financial sector of Ukraine until 2015, 2008). This definition has been criticised by the national scientific community, as the authors of the document identify it with the financial market, which is not entirely legitimate (Shkolnyk, Semenoh, 2013).

According to the English-language sources, the financial sector consists of banks, investment organisations, insurance companies, real estate brokers, credit companies, mortgage lenders, and real estate investment funds (Financial Sector, 2020). The term is defined as a segment of the economy composed of companies and institutions that provide financial services (Financial Sector, 2020).

Some domestic scholars are inclined to believe that the term "financial sector" is a generalised term for the totality of all organisations whose main purpose is financial intermediation (the banking system, which includes monetary authorities, depository banks and other financial institutions, including pension funds, insurance companies, mutual funds, credit unions) (Mishchenko, 2009). According to

some of them, in the context of market restructuring of the national economy, the financial sector not only performs the functions of cash and settlement support, but also mobilises and transforms free savings into investment resources for expanded economic reproduction, meets the needs of entities for financial services and thereby ensures economic growth (Shkolnyk, Semenoh, 2013).

The definition according to which the financial sector is a purposeful self-organising subsystem of the financial system and is a set of financial institutions that provide financial services and are connected with other sectors of the economy is considered more reliable (Diachenko, 2010). Such institutions perform the functions of mobilising savings, managing risks and debt obligations, providing a transparent information field, monitoring financial transactions, exercising corporate control, and ensuring specialisation of financial services (Shkolnyk, Semenoh, 2013).

Therefore, from the economic perspective, the financial sector of Ukraine's economy is characterised by a set of financial transactions of state or commercial entities in the form of intermediary activities that objectify the distribution of financial capital in the economy.

However, the legal discourse on these issues requires determination of this phenomenon from a different perspective. It should be noted that any legitimate social relations from the moment of their emergence, existence and until their termination are influenced by a significant number of legal provisions which may belong to a wide variety of branches of law. Moreover, one of the most numerous among them will be the rules of administrative law, which have a regulatory (Krykun, 2021), supporting, protective or defensive effect on almost every sphere of public relations or affect it in one way or another. Specifically, in the course of studying the specific features of the classification of administrative and legal regimes, V. Bielievtseva reasonably notes that "the current blurring of the boundaries of regulatory framework of administrative law does not mean that it is dissolved in other branches, on the contrary, a careful analysis reveals that many new complex branches which are still being formed are in fact a large-scale administrative and legal regime, and in fact should be characterised from the perspective of administrative law as its structural and functional integral part. (Bielievtseva, 2009). Due to the influence of administrative law, the relevant social relations can already be considered as an object of law, that is, an object subject to administrative and legal regulation (Krykun, 2021), provision, protection or defence.

Accordingly, in this discourse, financial sector can be considered by the existence of certain institutions (participants in legal relations) that, through compliance with the established rules of economic or regulatory activities, meet the public demand for the provision of quality financial and related services.

Noteworthy are the provisions of the Law of Ukraine "On Critical Infrastructure", which provide that: "infrastructure objects, systems, their parts and their aggregate essential for the economy, national security, and defence, the disruption of which would cause damage to the vital national interests" shall be protected (Law of Ukraine On Critical Infrastructure, 2021). It is found that according to the legislative provisions in the context of critical infrastructure of the financial sector, there are two types of objects of protection within it: 1) those determined by the National Bank; 2) those determined by the Ministry of Finance of Ukraine.

In the case of the former, these are: a) the banking system (provision of banking services, storage of cash reserves of the NBU by banks and transactions with them); b) the market for non-bank financial services, except for capital markets and organised commodity markets (provision of electronic trust services in the banking system, provision of non-bank financial services); c) the market for payment services (provision of payment services) (Resolution of the Cabinet of Ministers of Ukraine Some issues of critical infrastructure objects, 2020).

As for the latter, these are: "planning, implementation and monitoring of budget execution; cash and settlement services for managers and recipients of budget funds; control over the receipt of taxes, fees and payments to budgets and state trust funds; prevention and counteraction to legalisation (laundering) of proceeds of crime, terrorist financing and financing of the proliferation of weapons of mass destruction; ensuring the functioning of the system of guaranteeing deposits of individuals and withdrawal of banks from the market; control over the receipt of customs payments to the state budget, currency control, and the passage of goods and vehicles across the customs border of Ukraine" (Resolution of the Cabinet of Ministers of Ukraine Some issues of critical infrastructure objects, 2020).

#### 4. Conclusions

To sum up, the legal concept of "critical infrastructure of the financial sector of Ukraine" refers to the range of social relations which arise due to the need to ensure the smooth functioning of certain components of the financial sector which are critical in terms of the State's ability to meet its needs and develop towards auton-

omy and self-sufficiency, as well as to assert itself as a legal, democratic, sovereign state that properly fulfils its social purpose in the discourse of guaranteeing everyone the inviolability of their rights and legitimate interests.

This interpretation does not give rise to any doubt or discussion that the state should create all conditions necessary to ensure that all critical components of the financial sector are protected, that is, provided with the ability to make an adequate, appropriate, permissible, necessary and effective response to factors, causes, circumstances, events, etc. that are potentially or actually capable of or have a negative impact on the functionality of their work.

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## «КРИТИЧНА ІНФРАСТРУКТУРА ФІНАНСОВОГО СЕКТОРУ УКРАЇНИ»: ІДЕНТИФІКАЦІЯ ЗМІСТУ ТА СУТНОСТІ ЯК ПРАВОВОГО КОНЦЕПТУ

**Анотація. Мета.** Метою статті є розкриття змісту та сутності правового концепту «критична інфраструктура фінансового сектору України» задля підтвердження чи спростування тезису про можливість чи відсутність такої щодо визначення цього явища з позиції об'єкта адміністративно-правового захисту. **Результати.** Стаття присвячена розкриттю змісту та сутності правового концепту «критична інфраструктура фінансового сектору України» задля підтвердження чи спростування тезису про можливість чи відсутність такої щодо визначення цього явища з позиції об'єкта адміністративно-правового захисту. Опорним елементом у цьому словосполученні визначено термін «критична інфраструктура», залежним – «фінансовий сектор». Уточнено, що з економічної точки зору фінансовий сектор, власне економіки України, характеризується через сукупність операцій фінансового характеру державних чи комерційних суб'єктів у вияві посередницької діяльності, яка об'єктивує розподіл фінансового капіталу в економіці. З правового дискурсу його визначено з боку наявності певних інституцій (суб'єктів правових відносин), які у спосіб дотримання встановлених правил здійснення господарської чи регулятивної діяльності забезпечують суспільний запит на надання якісних фінансових та пов'язаних з ними послуг. Виявлено, що згідно законодавчих положень у контексті критичної інфраструктури фінансового сектору йдеться про два різновиди об'єктів захисту у його межах: 1) ті, що визначаються Національним банком; 2) ті, що визначаються Міністерством фінансів України. **Висновки.** Узагальнено, що правовий концепт «критична інфраструктура фінансового сектору України» позначає коло суспільних відносин виникнення яких обумовлено необхідністю забезпечення безперебійного функціонування окремих складових фінансового сектору, які є критично важливими в аспекті спроможності держави обслуговувати свої потреби і розвиватись у руслі автономності та самодостатності, а також утвердження як правової, демократичної, суверенної держави, яка належним чином виконує своє соціальне призначення з дискурсу гарантування кожному непорушності його прав та законних інтересів. Така інтерпретація не зумовлює виникнення сумнівів чи дискусій щодо того, що держава має створити усі необхідні умови задля того, щоб усі критично важливі складові фінансового сектору перебували у стані захисту, тобто були забезпеченими можливістю здійснення адекватної, належної, допустимої, необхідної та ефективної реакції на фактори, чинники, обставини, події тощо, які потенційно чи реально здатні або завдають негативного впливу на функціональність їхньої роботи.

**Ключові слова:** адміністративно-правовий захист, банківський сектор, критична інфраструктура, правовий концепт, фінансовий сектор, фінансові послуги.