Money Laundering – an Economic Offence

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Preventing and combating money laundering, the product of the transnational organized crime, in general, is one of the most efficient means of stopping this activity, which is a threat for the national or international economic operations.

The penal incrimination and sanction of money laundering is a useful instrument for the accountability of all categories of offenders, but also with the purpose of imposing more severe sanctions for those who commit offences generating dirty money, behind so called legal commercial activities.
Eventually, we shall review the internal regulations on money laundering, and also of the international judicial instruments incriminating this offence, analysing the offence by its constitutive elements.

Keywords: *economic offence; money laundering, international legal instruments, the internal regulation*

The internal regulation of money laundering

In the Romanian legislation, money laundering was regulated for the first time by Law No 21/1999, part of the large harmonization of the national

legislation with the communitarian acquis[1]. Law 21/1999 was abolished on 7 December 2002, when the Romanian Parliament adopted Law 656/2002 on the prevention and repression of money laundering, as well as for setting up some measures for prevention and combating of terrorism financing acts[2]. The national legislative framework is completed by the Decision No 1559/4 December 2008 on the approval of the Regulations for the Organization and Functioning of the National Office for Prevention and Control of Money Laundering[3].

International legal instruments regarding money laundering

The European[4] legislative framework on money laundering is formed by Directive 91/308 of 10 June 1991, adopted by the Council of the European Communities on prevention of the use of the financial system for the purpose of money laundering, Directive No 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending the previous directive on prevention of the use of the financial system for the purpose of money laundering and Directive **2005/60/EC** of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

Internationally, the general framework is formed by the UN Convention against transnational organized crime of 2000[5] and the Recommendations of the Financial Action Task Force[6], adopted at the moment of its formation.

[1] Elise Nicoleta Valcu, *Drept comunitar institutional. Curs universitar*, 2nd Edition reviewed and amended, Sitech Publishing-house, Craiova, 2010, p.25

[2] Official Gazette No 904/12 December 2002, with subsequent modifications and amendments, including those stated by Government Urgent Injunction No 26/2010 (Official Gazette No 208/1 April 2010).

[3] Published in the Official Gazette No 841/15 December 2009

[4] Elise Nicoleta Valcu, *Introducere in dreptul comunitar material. Curs pentru studenti*, Sitech Publishing-house, Craiova, 2010, p.230-231

[5] Ratified by Romania by Law No 565/2002, published in the Official Gazette No 813/8 November 2002

[6] FATF was established in 1989 by the G-7 Summit held in Paris. Today it is formed by representatives of 31 states, to which is added the European Commission. Regarding the

Incrimination of money laundering by the actual legislation

Before starting to analyze this offence, a few statements on its name must be made. The term "money laundering" is said to originate from *Mafia* ownership of Laundromats in the United States in 1920s-1930s. Gangsters were earning huge sums in cash from extortion, prostitution, gambling and alcohol smuggling, earnings which needed legal justification. One of the ways in which they were able to do this was by purchasing outwardly legitimate businesses and to mix both illicit and licit earnings received from these businesses. Laundromats were chosen by gangsters because they were cash businesses, an undoubted advantage to people like Al Capone [7].

As it was previously shown, money laundering is stated by Law No 656/2002 on the prevention and repression of money laundering, as well as for setting up some measures for prevention and combating of terrorism financing acts. Art 23 of the law states three ways for incriminating money laundering:

First way, provided for by Art 23 Para 1 Let a) states that "*the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of property or of assisting any person who is involved in the committing of such activity to evade the prosecution, trial and punishment execution*".

The second way provided for by Art 23 Para 1 Let b) states that "*the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity*".

The third way provided for by Art 23 Para 1 Let c) states that "*the acquisition, possession or use of property, knowing that such property is derived from any criminal activity*".

The *judicial object* of money laundering is represented by the social patrimonial relationships, born and developed in relation to the goods and

recommendations on money laundering of this group, we note that in 1990 were published 40 Recommendations, revised in 1996, to which other 8 special recommendations on financing terrorism were added in 2001, and the Nine Special Recommendation on "cash couriers" adopted on 22 October 2004.

[7] See C. Adochicei, L. Adochilei, *Spalarea banilor*, Criminal Law Magazine, No 1/2003, p.93 and next.

values in financial, banking, economic, commercial or civil circuits, achieved by the institutions stated by Law 656/2002 [8]. Art 23 Let b) has as judicial object the social relationships on the right of property or other real rights. The special judicial object of this offence also comprises social relationships born and developed in relation to justice, the incriminated offences preventing the truth and the achievement of justice [9].

The *material object* of money laundering is represented by goods resulted from the main offence (for instance, fraud in banking) and subjected to laundering. In the category of goods named above are also included payment documents and instruments recognized on the financial, banking, investments and insurances market, attesting property or other rights regarding property. Goods or values must be the result or the "product" of an offence, and not instruments used for that offence. According to the UN Convention of 2000 against transnational organized crime, the offence must have a certain degree of gravity [10], namely the

[8] Art 8 of the Law No 656/2002 states that the provisions of this law shall be applied to the following natural or legal persons:
a) credit institution and branches in Romania of the foreign credit institutions;
b) financial institutions, as well as branches in Romania of the foreign financial institutions;
c) private pension funds administrators, in their own behalf and for the private pension funds they manage, marketing agents authorized for the system of private pensions;
d) casinos;
e) auditors, natural and legal persons providing tax and accounting consultancy;
f) public notaries, lawyers and other persons exercising independent legal profession, when they assist in planning or executing transactions for their customers concerning the purchase or sale of immovable assets, shares or interests or good will elements, managing of financial instruments or other assets of customers, opening or management of bank, savings, accounts or of financial instruments, organization of contributions necessary for the creation, operation, or management of a company, creation, operation, or management of companies, undertakings for collective investments in transferable securities, other trust activities or when they act on behalf of and their clients in any financial or real estate transactions;
g) persons, other than those mentioned in Let (e) or (f), providing services for companies or other entities;
h) persons with attributions in the privatization process;
i) real estate agents;
j) associations and foundations;
k) other natural or legal persons that trade goods and/or services, provided that the operations are based on cash transactions, in RON or foreign currency, whose minimum value represents the equivalent in RON of 15000EUR, indifferent if the transaction is performed through one or several linked operations.

[9] V. Dobrinoiu, *Drept penal, Partea specială*, 1st Volume, Lumina Lex Publishing-house, Bucharest, 2004, p.385

[10] See V. Dabu, S. Ctitinean, *Noua lege pentru prevenirea şi sancţionarea spălării banilor* (Law No 656/2002), UN Convention against organized transnational crime, Dreptul Magazine No 6/2003, p.35

maximum penalty stated by the law for that particular offence must exceed 4 years [11]. If the goods are the result of another illicit act, such as the civilian contract with illicit cause (for instance, selling with frivolous price) or contravention (for instance, illegal exchange of currency) the offender is not liable for money laundering.

The *active subject* is represented by any natural person, without stating any other special quality of the subject. The active subject of money laundering can also be the author of the main offence, or a person specialized in money laundering, without any connection to the main offence.

The *passive subject* is represented, firstly, by the state, as owner of the obligation to ensure and guarantee normal economic-financial and business activities. The passive subject can be any natural or legal person prejudiced by this offence.

The objective side

The material element of money laundering in the first way of incrimination is represented by the action of "exchanging" or "transferring property", knowing that this is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of property or of assisting any person who is involved in the committing of such activity to evade the prosecution, trial and punishment execution.

"Changing" property means the transformation of an asset or a value in another one. For instance, Lei amounts resulted from illegal smuggling of assets, are exchanged in foreign currency through exchange offices. The change can also be physical by subjecting the assets to modifications susceptible of altering their material appearance, without affecting their inner value (for instance, changing the color, series and registration number of a stolen vehicle with the elements from a damaged legally purchased vehicle, which can no longer be used, and is bought by offender for a small price). Another meaning of changing assets refers to the replacement of an asset by another one, or the yielding up an asset to take in return another

[11] According to Art 2 Let b) of the Law 39/2003 on the prevention and combat against organized crime, published in the Official Gazette No 50/29 January 2003, serious offence is that offence for which the law stated the penalty of imprisonment, with a special minimum of at least 5 years.

asset of equivalent value, or of different value [12] (for instance, exchanging anonymous stocks, bonds, payment references or stolen or illegally acquired stock certificates issued to bearer to other legal ones).

The *transfer of assets* – the second way of the material element of money laundering, refers only to the physical movement of the asset from a place to another one and the transfer of money from a bank account to another one at the same bank or from a bank to another.

The transfer of values, in judicial literature [13] and according to Law No 656/2002, should consider the following activities:

- the operation of moving capital under different forms from a country to another, with or without legal appearance;
- moving currency or apparent payment orders for different merchandise or even payments (deductions), buying bonds, script notes, opening commercial credits, bank deposits, credits etc.
- moving currency by speculative buying, re-sales of stock in stock exchanges
- fictive payments, issued by cards
- inter-banking transfers of funds using the Western Union system
- different forms of internal or international deductions: cheques, letters of credit, payment or collection orders.

To invoke money laundering, the purpose of changing and transferring goods must be the concealment or disguise of their illicit origin, as well as for assisting the offender to evade prosecution, trial or punishment execution.

Regarding the "*disguise*", the doctrine [14] showed that it must be considered the fact that the change or transfer of goods was made with the purpose of concealing their illicit origin, the replacement of the illegal features with "fake" ones or true, but have a legal appearance. The change or transfer of assets must be performed with the purpose of disguising the illicit origin, namely to create a valid and verisimilar "legality".

[12] V. Dabu, S. Catinean, *Despre spalarea produsului infractiunilor*, Dreptul Magazine, No 12/2002, p.135
[13] Al. Boroi, M. Gorunescu, I.-A. Barbu, Dreptul penal al afacerilor, 5th Edition, C.H Beck Publishing-house, Bucharest, 2011, p.292
[14] V. Dabu, S. Catinean, *Despre spalarea produsului infractiunilor*, Dreptul Magazine, No 12/2002, p.135

The *immediate consequence* of the analyzed version is the state of danger on the values protected by the law.

Causality – money laundering subsists when there is a causality link between the changing or transfer of goods resulted from offences and the immediate consequence of this action.

The material element of money laundering in the second way of incrimination is represented by the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity. The action does not refer to a good in its materiality, but to the right of property or to other rights with respect to that good [15].

The *concealment or disguise*, as defined by the law, represents the set of actions performed by the active subject with the purpose to "legalize" a good resulted from an offence, namely that the good or value resulted from legal businesses or operations.

The concealment or disguise regard the origin (source, origin, genesis), location (the physical place of the good), property (who has the right to use that good) and circulation of the good (circuits, routes followed by the good).

The concealment or disguise can have the shape of preparation or obtainment by the active subject of false documents regarding the origin, location, property of, circulation or use of the goods. Thus, are forged bills, fictitious transportation documents, companies, buying-selling contracts, donations or credits.

The material element of money laundering in the third way of incrimination is represented by the acquisition, possession or use of property, that such property is derived from any criminal activity.

The acquisition represents the action of a person to obtain, by any means, an asset stated by the law, knowing that is the derived from an offence.

The possession and use represents the action of a person to enjoy an asset, to use it and to exploit it for a determined or undetermined period of time, temporary or continuous, according to its destination, if the person knows that the good is derived from any criminal activity.

[15] The so called incorporable goods

When the object of "laundering" is represented by illicit amounts of money, the offender, namely "the launderer" performs the following activities:

- First of all, the offender receives cash amounts derived from offences (receipt of money)
- Second of all, the launderer establishes a scheme of money laundering (the proper laundering), which, in most cases, is structured on three phases:

1. Placement – the amounts of money derived from any criminal activities are placed in circulation, are actually placed in institutions like those stated by Art 8 of the Law No 656/2002, namely: banks, investment funds, insurance companies etc. Thus, on this phase the illicit funds are crumbled, namely the total amount is divided in amounts smaller than 10.000 EUR (in Lei equivalent), then the small amounts are placed.
2. Sedimentation and stratification represents the separation of the illegal funds from their source. This is achieved by the performance of total or partially fictitious financial or commercial transaction, by the creation of cover-up companies. The launderer prepares fictitious import-export documents, as base for the transfer of money from their initial location to placement (bank) in other bank as payment for the fictitious services or operations.
3. Integration supposes the legalization of funds derived from any criminal actions by reinserting them in the legal financial, banking or commercial circuit.

As one can notice, money laundering is a set of complex and very refined activities, procedures, techniques and methods. Money laundering closes the criminal circuit, which starts with one or more offences, continues with the financial result (dirty money) and is ended by the laundering of this product, using procedures, techniques or schemes, simpler (for instance, placement of money abroad) or more complex (for instance, the use of financial-banking circuits).

The subjective side The guilt by which the offence is committed in all its three deeds stated by Art 23 of the Law No 656/2002, is the direct intention, because the active subjects commits specific actions (changing, transfer etc.), knowing that the goods are derived from any criminal actions.

Preparation actions, though possible, are left by the legislator outside incrimination. According to Art 23 of the Law No 656/2002, the attempt is punished.

Regardless of its means, money laundering is punished with prison from 3 to 12 years.

Procedural aspects

In order to apply the Law No 656/2002, the legal persons stated by Art 8 shall assign one or more persons with such responsibilities. For money laundering, the banking secrecy – professional secrecy for the employees of a bank – shall not by opposable to the prosecution bodies or to the courts of law. Thus the data and information required by the prosecutor or court are communicated by the persons stated by Art 8, upon written request of the prosecution bodies, with the authorization of the prosecutor or the court.

Regarding the situations where there are solid grounds of committing an offence involving money laundering or terrorism financing, for the purposes of gathering evidence or of identifying the perpetrator, the following measures may be disposed: monitoring of bank account and similar accounts; monitoring, interception or recording of communications; access to information systems; supervised delivery of money amounts. Also, the prosecutor may dispose that text, banking, financial, or accounting documents to be communicated to him.

For the situations where there are solid and concrete indications that money laundering has been or is to be committed and where other means could not help uncover the offence or identify the authors, undercover investigators may be employed in order to gather evidence concerning the existence of the offence and identification of authors, under the terms of the Criminal Procedure Code [16].

Conclusions

Very serious, national and international phenomena, money laundering manifests with an increasing speed and under more and more dangerous

[16] Camelia Şerban Morăreanu, *Drept procesual penal*, 2nd Edition, Hamangiu Publishing-house, Bucharest, 2009, p.66

forms, often organized or transnational. This is why the international bodies have recommended to Governments to intensify the combat against money laundering by intensifying and diversifying the means of prevention and combat, including the judicial ones.

Law No 656/2002, as amended and completed by subsequent laws[17], is an efficient mean of combat against money laundering, elaborated according to the European and UN conventions on this matter.

[17] Law No 656/2002 was modified by Law No 39/2003, Law No 230/2005, Government Urgent Injunction No 135/2005, Law No 36/2006, Law No 405/2006, Law No 306/2007, published in the Official Gazette No 784/19 November 2007, Government Urgent Injunction No 53/2008, published in the Official Gazette No 333/30 April 2008.