

Legal determination of money laundering in a comprehensive approach

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Abstract

This article analyzes the legal determinants of Money laundering referring to international legal acts and the national legislation of selected countries. The proper legal terminology of money laundering is hiding the true nature of the source, location, transferring of the real rights of ownership, having the knowledge that such “wealth” derives from a criminal activity. Money laundering is the process that makes “dirty money” appear legitimate, a criminal activity that encompasses the efforts to hide or camouflage criminal profit. Analyzing the legal dispositions attributable to money laundering, there are no substantial differentiations about this phenomenon. However, different countries do not have a consistent approach regarding Money laundering deriving from all sorts of criminal activity. Some countries criminalize every activity aiming at legitimizing criminal income; other countries have penal responsibility in the cases when money laundering is linked only to legalizing income from certain criminal acts.

Keywords: Money laundering, object, criminal act by product, penal responsibility.

Introduction

The majority of countries have adopted Article 3 point “b” of UN Charter “Against Narcotic Drugs and Psychotropic Substances” of 1988, referred to as Vienna Convention.¹ It does “define Money laundering as transferring of wealth knowing the illicit origin with the aim to conceal the illegal origin.

The Vienna Convention, although it gives a definition for Money laundering, it is limited to income produced by drug trafficking notwithstanding other important illegal activities. The legal definition is completed in other international legal acts i.e. European Convention “On laundering, deputation, confiscation of crime by products” known as *Strasbourg Convention*, date 8.11.1990 and the UN Convention “against International Organized Crime” known as *Palermo Convention*, 12.12.2000, making a thorough definition of Money laundering. According to these conventions the act of money laundering should be considered a penal act on behalf of national penal systems in case of purposely done when:

- (i) Transferring of properties, which, he who acts has knowledge that such properties are product of criminal activities, the origin of which has to be alternated.....;
- (ii) Concealing of the nature, origin, location, disposition, transferring or the real ownership of the property or their rights, which the author is knowledgeable of their criminal origin;
- (iii) Profiting, possession, or use of such properties, which the person that has gained,

¹UN Charter “Against Narcotic Drugs and Psychotropic Substances” (1988). Ratified in Albania with Law No.8723 date 26.12.2000.

possessed or used is in fact knowledgeable of their criminal origin;
(iv) Association in one of the penal acts described by this Article or any association, deal, tentative or collaboration by means of assisting ore advising for their execution.

Legal definitions in some penal codes

Different countries, maintain different considerations of the penal institution of Money laundering deriving from any illicit activities. Certain countries incriminate any activities for legitimating criminal income, i.e. Albania, Italia, etc... In other countries the penal responsibility for Money laundering refers only to legalization of income derived by certain penal acts that are defined as such by law, i.e. United States of America, Germany, etc... However, for the majority of states, Money laundering is a punishable crime with a minimum sentence of generally over 3 years, as there are states that punish only the laundering of profits of narco traffic. More concretely, as follows:

• France

With the law of 13.5.1996 "On combating money laundering and drug trafficking and international cooperation regarding seizure and confiscation of the proceeds of crime" is foreseen the general offense, withholding specifics of money laundering (a) related to drug traffic (Article 222-238 French Penal Code) and (b) the custom system (Wouter, Muller, Kalin, Goldsworth, 2007, 486). Apart from these, the French penal code has a special section for money laundering related to terrorist activities (Article 421-422 French Penal Code). Money laundering must be linked to the main/original penal offense, executed before the laundering process itself. Each penal offense is autonomous. The person who has committed a penal offense may be prosecuted for money laundering that may be linked to the prime/original penal offense. The French penal code states in Articles 324-1, that "*money laundering is the falsification of the origin of the income from a crime or an illegal offense defined by law, as well as the assistance to invest, hide or convert these profits*" (Article 324 French Penal Code).

• Germany

Money laundering is considered as a penal offense in Article 261 of German Penal Code (Wouter, Muller, Kalin, Goldsworth, 2007, 493). This article foresees that any person who withholds an object that is linked to illegal activities defined as theft, fraud, acts of criminal groups or terrorism, or withholds its origin; may be punished from three months to five years imprisonment. From a subjective point of view, to precisely acquire the definition of money laundering, according to the German Penal Code, it is required "prior knowledge of the offense object".

• Italy

Italy is one of the few European states that considers penal offense the money laundering activity that comes from any illegal activity. There are two crimes foreseen in article 648 of the Italian Penal Code, which are directly linked to the activity of money laundering. The first, "riciclaggio", which states that: "*any who with purpose to transfer, alternates money,*

goods or other income of a crime or commits acts linked to these money, goods, products or other income, with the purpose to hide the proper origin, shall be held responsible for the crime of money laundering” (Wouter, Muller, Kalin, Goldsworth, 2007, 533). The second crime, foreseen in article 648 of the Italian Penal Code is named “the use of money, goods or other illegal income” are classified as penal offense.

• Spain

According to article 301 of the Spanish Penal Code penal offense is considered: “embezzlement, convert or possession of property, knowing priory that these derives from illegal activity, or the execution of an act with the purpose to hide the origin of such income or providing assistance herewith” (Wouter, Muller, Kalin, Goldsworth, 2007, 515). Penal offense is also considered hiding the true nature of origin, destination or rights over properties, having knowledge that those are linked to criminal activity, notwithstanding the fact that the penal offense is committed wholly or partly in Spain. From a subjective point of view, the author has penal responsibility even if actions were undertaken by negligence.

• Switzerland

The penal offense of money laundering is part of the Swiss Penal Code since 1990. It penalizes “an act that aims at hiding the identity of the origin or the prosecution, confiscation of crime assets, of which has prior knowledge or could have been knowledgeable of their criminal origin”.² More than 80 crimes are considered, in the Swiss Penal Code, as grave (serious) crimes, extending to membership to a criminal organization, financing terrorism, drug, weapon trafficking, corruption, fraud, etc....

• Austria

The Austrian Penal Code foresees that: “for a person to have penal responsibility for money laundering is necessary that the income must be from criminal activity punishable by more than three years imprisonment” (Wouter, Muller, Kalin, Goldsworth, 2007, 359). Condition for penal responsibility is the prior knowledge of criminal activity of the product which has been hidden.

• United State of America

Money laundering is a federal crime, considering it as a process through which the income from criminal activity appears as legitimate. The US Penal Code foresees, that: “any person who having knowledge of origin that the wealth in subject is linked with criminal activities, execute or attempts to execute such a financial transaction, is considered penal offense” (§1956 of the US Penal Code). So, the federal law against money laundering sets that for a person to have penal responsibility for the crime of money laundering, must be proved that he/she has performed or attempted to perform a financial transaction with income from an illegal activity described in the Law as such and the person has knowledge that the transaction is in part or in its entirely incepted to conceal the nature, location, origin, source or control of criminal income.

²A grave crime (serious) is defined any penal offense punishable with more than three years.

• Albania

The Albanian law³ defines money laundering in article 287 of the Penal Code of the Republic of Albania. According to this article the subject of money laundering must have prior knowledge that the income derives from criminal activity. “From a subjective point of view the offense must have *dolus malus*” (Elezi, 2007, 524). To have penal responsibility, one must prove prior knowledge and intent- according to article 287 of the Penal Code. In the cases that the same person commits the basic penal offense and the laundering of the income form this offense, he will be charged for both offenses. There are foreseen in cases when the penal offense is executed in specific (grave) circumstances, for example when such an penal offense is conducted while performing professional activity, in cooperation or repeatedly..... or when the consequences are grave.⁴

Conclusions

From the above analysis, we conclude that the Penal Code of Albania in its definition of the criminal offense of money laundering, is coherent and maintains the same standard like the international legal acts, regarding the subjective approach, ways of committing the offense, specific circumstances and penal liability. Regarding the objective approach, a better approach should be undertaken in the Albanian Penal Code, describing that the lawmaker must define that the income –which is the object of the penal offense–must be by product of the crime committed not of every crime, because some of the penal offenses like “income hiding”, “tax evasion”, “document falsification” etc., cannot supersede the penal offense of money laundering and as such cannot be conquered.

³ Article 2 of Law Nr.9917, date 19.5.2008 “On prevention of money laundering and financing the terrorism”.

⁴Article 287 of Albania Penal Code, change with Law Nr. 23/2012, defines that “Disposition of this article will be executed even when: a) the penal offense, which products will be cleansed, is done by a person that cannot be taken as liable or cannot be punished; b) penal prosecution of the offense, which product needs to be cleansed is amnestied; c) the person that commits the money laundering process is the same with the person that has committed the criminal offense; ç) for the penal offense, from which the products derives, the penal case has not started or there is no final court decision; d) the penal offense, it’s by products are cleansed, is executed by a person, irrespective of it nationality, out of the territory of Republic of Albania and is punishable both in the foreign country and in Albania.

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