

THE CONTROL UPON MONEY LAUNDERING?? A COMPULSORILY NEEDED MEAN FOR A MODERN STRATEGY IN PENAL POLICY

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Abstract

In the Romanian legislation money laundering was not incriminated until 1999. The requirement of the Convention of Strasbourg was that each state adopts legislative measures to confer the character of offence in accordance with the international law to the facts stipulated by the article 6 of the Convention. In this sense, the Romanian Parliament adopted the Law no. 21/1999 for the prevention and sanction of money laundering. The main shortcoming of this regulation was that the definition of money laundering reduce the number of variety of acts that can be considered criminal activities of money laundering. In order to remediate this deficiency, the Romanian Parliament adopted the Law no. 656/2002.

The recent statistical data have shown an increase of the state's efforts in order to prevent and punish the cases of money laundering. This development created tangible benefactor effects upon the country's stability, as well as for the international climate in this domain.

Key words

Penal policy; money laundering.

1. ORGANIZED CRIME AND MONEY LAUNDERING

Organized crime is in close connection with areas of criminal life, both with the ones already present, and with the relatively new ones, such as in the field of informatics, money laundering and banking frauds. Organized crime means performing serious crimes, as indicated by the Romanian legislation: manslaughter, qualified manslaughter, first degree manslaughter, slavery, crimes regarding the laws referring to weapons and ammunition, explosives, nuclear materials or other radioactive materials, forgery of coins or other valuables, unauthorized revealing of the economical secret, embezzlement, procurement, crimes related to gambling, crimes related to drug traffic, crimes related to traffic with persons, immigrants, money laundering, corruption and crimes in direct link to it, smuggling, fraud, crimes committed through informations or communications systems or networks, traffic with human tissues or organs.

At the beginning of the third millennium, the criminal activity manifested itself in more and more sophisticated ways, impacting the field of finance

banking. Thus, the globalisation of capital market had as a consequence the fact that most economies became more open, creating the possibility that huge sums of money could move freely, in search for profit and for the most favourable economical investment.

Criminal groups, through their activity in the field of organized crime, gather enormous amounts of cash, which, considering their source, are called in the specialized literature, "dirty money". Initially, the problem of dirty money regarded only the gains from drug traffic, but later, when criminal activity diversified, all the money from this field was so designated.

Money laundering is made up of many operations of placement, disguise and integration of dirty money in a circuit of transactions, in order to give them a legal appearance, and to dissociate them from their dirty origin. The climax of these operations is the integration of those incomes in the financial banking circuit.

So money laundering is, by definition, a symbol of economical and financial crime.

For the political, financial and judicial authorities, the problem was how to stop these criminals from attempting to do the money laundering, with the purpose of obtaining the consumption of the financial resources of the organized crime (a legal strategy that is called: "Achilles' heal of the octopus").

Money laundering is the symbol of economical and financial organized crime, and it attracts national and international efforts for discovering illicit transfers of goods and confiscating them, but most of all, for the effective prevention of these types of activities.

2. INTERNATIONAL AND COMMUNITY'S DOCUMENTS IN THE FIELD OF MONEY LAUNDERING.

Remarking the danger that this phenomenon represents for the states' security, for the functioning of their economies, an international cooperation was created, on the basis of several international and community's agreements.

Thus, on the international level, the cooperation for the prevention of money laundering led to the Convention of Strasbourg, of November 8th 1990, to which Romania joined through the Law 263 of 28.05.2002.

Money laundering is a trans-national crime.

A trans-national crime is a crime that is:

a) committed both on a state's territory, and outside of it;

b) committed on a state's territory, but the planning, preparation, management or control are exerted from somewhere else, on another state's territory;

c) committed on a state's territory by a criminal group that is active in two or more states;

d) committed on a state's territory, but its results happen on another state's territory.

The convention defines the following terms, which are also valid in the Romanian legislation, adopted following the draft of this Convention. So, the following terms must be understood in the following way:

a) product is any economical advantage obtained through crime. This advantage may consist in any kind of goods, such as this term is defined below;

b) good means a good of any nature, corporate or incorporate, mobile or immobile, as well as the legal documents which attest a title or a right regarding a good;

c) instrument means any object used or destined to be used in any way, totally or partially, in order to commit one or several crimes;

d) confiscation means a measure ordered by the court, following a procedure regarding one or several crimes, measure which leads to the permanent deprivation of that good;

e) main crime designates any crime, the results of which are one of those mentioned in article 6 of the Romanian Law.

Another requirement is that every state should adopt legislative measures able to ensure the feature of being a crime, according to the international law, to the deeds mentioned in article 6 of the Convention. There were two possibilities of answering to this new legislative need: a distinct incrimination or to expand the field of application and redefine a penal rule that already existed.

In the European Union several community's acts were adopted, in order to unify internal legislations and in order to facilitate the prevention of money laundering, such as: the Directive of the European Union 91/308/CEE regarding the prevention of the use of the financial system for the purpose of money laundering, modified by the Directive 97/2001CEE of the Parliament and Council of the European Union, Directive 3 (2005/06CEE), which was already enforced as a law in Romania.

In the EU Report of the Evaluation Mission of March 2006 regarding money laundering, it was decided, that "the main Romanian legislation is adapted completely to the international and EU acquis".

3. EVOLUTION OF THE INTERNAL LEGISLATION

For more than 9 years, the Romanian legislation had no regulations regarding money laundering, which led to the increase of the criminal phenomenon of hiding the profits obtained through criminal activity, as only the authors of the crimes generating money were punished. Practically, whoever facilitated money laundering wasn't sanctioned, although his actions were sometimes more dangerous than the ones of the authors of the crimes. As a result, there is no explicit information regarding the existence and extent of this phenomenon until the moment of its internal incrimination.

In order to respect the international commitments of the Vienna Convention, the Romanian Parliament adopted the Law 21/1999 for preventing and sanctioning money laundering. In article 23 are described its procedures:

- a) exchange or transfer of values, knowing that they come from crimes, drug dealing, crimes against the laws referring to weapons and ammunition, explosives, nuclear materials or other radioactive materials, forgery of coins or other valuables, unauthorized revealing of economical secrets, embezzlement, procurement, smuggling, blackmail, crimes related to gambling, crimes related to drug traffic, crimes related to traffic with persons, immigrants, money laundering, corruption and crimes in direct link to it, crimes committed with the help of the computer, credit card frauds, crimes committed by persons who are part of criminal organizations, disrespect to the dispositions regarding the import of waste, or to the dispositions regarding gambling, with the purpose of concealing their illicit nature, or accommodating or helping the persons involved in such activities, or allegedly involved;
- b) concealing or dissimulating the real nature of the origin, belongings, dispositions, movements of the property of goods or the nature of the right upon them, knowing that these goods come from one of the crimes mentioned on the letter a;
- c) obtaining, possessing or using goods, knowing that they come from one of the crimes mentioned at the letter a;

In the second paragraph of the art. 23 of the law 21/1999 the deed of associating, initiating, joining to or supporting in any way money laundering is sanctioned.

The main problem of this regulation was that the definition of money laundering uses a specific list of crimes, reducing the number and the variety of the deeds that can be considered penal activities of money laundering, a fact which does not correspond to the legislation of the European Union (for example, embezzlement was not covered by this law).

In order to correct these deficiencies, the Romanian Parliament adopted the Law 656/2002 for the prevention and sanctioning of money laundering, and the crime of money laundering received a new rule. Thus the following deeds became penal acts of money laundering.

- a) exchange or transfer of goods, knowing that they come from committing a crime, for the purpose of hiding or dissimulating the illicit origin of these goods;
- b) concealing or dissimulating the real nature of the origin, belongings, dispositions, movements of the property of goods or of the right upon them, knowing that these goods come from committing a crime;
- c) obtaining, possessing or using goods, knowing that they come from committing a crime.

Starting from this particular aspect, it results that the legal objects of this crime are the patrimonial and social relations, the protection of which ensure the legal circulation of money, and the fairness of banking operations.

The material object of the crime is the good itself, an item to which the criminal activity is directed. In this sense, the notion of "goods" means that "corporate or intangible goods, mobile or not, as well as legal acts or documents attesting a title or a right" can constitute a material object of this crime.

Money - the national or foreign currency with power of circulation - hasn't been included in the definition of the notion of goods, as stated in the art. 2, letter b) of the Law 21/1999, substituted by the Law 656/2002. They represent merchandise, which embodies the general value of merchandise, being a measure of value, a mean of circulation, mean of accumulation.

But it already exists, foreseen in our legislation, the offence of concealing, with its aggressive modality incriminated by the Law no. 78/2000.

Together with the regulation of the infraction of money laundering appeared the problem of distinguishing the relationships between money laundering and concealing, seen as infraction.

Concealing permits the sanction of the actions of reception, obtaining or transformation of a good or of the facility of its valorisation, knowing that the good comes from committing an action foreseen by the penal law, if through this has been pursued the obtaining for oneself or for other of a material advantage. The law no. 78/2000 incriminates the concealing of goods resulted from committing it a felony of corruption and of those similar to them. From the analysis of these dispositions it results that, as it was appreciated in the specialized literature, through the Law no. 78/2000 a new offence of concealing, distinct from the one foreseen and sanctioned by

art. 221 Penal Code has not been incriminated but only an aggravated modality of it, in those situations in which it refers to the goods resulted from committing a felony of corruption or assimilated to it. This action is more obvious because the sanction of this modality is made by referring to the punishment foreseen in art. 221 of the Penal code, the maximum of which is increased with 2 years.

In a similar way was incriminated a new normative modality of the felony of money laundering, foreseen in art. 23 intended line 1 from the Law no. 656/2002, through the dispositions of the art. 17 letter c) from the Law no. 656/2002 for preventing, discovering and sanctioning the corruption actions, when money, goods or other values come from the sanction of a corruption felony or assimilated to it.

If we should refer to the judicial object, the concealing jeopardises the social relations with patrimonial features, enabling to disappear the goods resulted from committing some actions foreseen by the penal law. It implies the recovery of these goods and the reconstitution of the patrimony from which they were taken. Concealing also jeopardises the social relations whose protection is made through the insurance of normal achievement of penal justice, because enabling to disappear the traces of the goods resulted from committing some actions foreseen by the penal law prevents the discovery and sanction of delinquents, making more difficult the accomplishment of justice.

On the other hand, the special judicial object of the felony of money laundering is constituted by these social relations with patrimonial features of which the formation, existence and development cannot be conceived without the protection and assurance of the legal circuit – either financial, banking, commercial or civil – of money, values and goods against the attempt to conceal or dissimulate an illicit penal origin of these or to favour the persons involved in this activity or presumably willing to avoid the judicial consequences of their actions.

We can say that, in regard to the material element of the infraction of money laundering, the exchange or transfer of some goods is ascribed to the transformation as a material element of the concealing, hiding or dissimulating of the nature, source, placement, disposition, circulation or origin of goods, and in regard to obtaining, holding or using of goods, these activities are rediscovered in the material element of the concealing, seen under the aspect of receiving or obtaining.

In order to constitute the material object of the infraction of money laundering, the goods must come from committing some offences, as it is foreseen in the legal regulation itself of money laundering. *De lege ferenda*, we consider that, in order to cover all the areas of the actions of money laundering, the legislator should have used a more extended term regarding the source of the goods that form the material object of this felony. So, the legislator should have taken into account the goods that come from

committing any actions foreseen by the penal law, which would allow the sanction of the person who commits money laundering, even if the action generating money would not constitute a felony, and the person that commits it would be not punished. The reason of such a regulation is that the felony of money laundering has a distinct incrimination, completely separated from the basic felony, and in many penal legislations the tendency is to sanction more severely money laundering than the felony which generated illegal incomes, taking into account that many times the effects of the money's "cosmetic treatment" are more noxious than the ones of the actions from which they come.

Money laundering is a more serious form of concealing the values, money or goods resulted from committing an infraction and which, due to reasons of penal policy, the legislator has distinctively incriminated under other designation.

4. ORGANISMS INVOLVED IN THE STRUGGLE TO CONTROL MONEY LAUNDERING IN ROMANIA

Under the conditions of the Law no. 656/2002, established in order to prevent and sanction money laundering, and also to establish some measures able to prevent and react against the financing of acts of terrorism, the central institution in the domain is the National Office of Preventing and Striving Against Money Laundering, which cooperates with other institutions and public or private entities, for which the law foresees expressly attributions in order to struggle against money laundering.

The NOPSML, according to the provisions of Chapter III from the Law no. 656/2002, functions as a specialized organ with judicial personality, subordinated to the Government and under the coordination of the Prime Minister, through the Prime Minister's Office, with the residence in the municipality of Bucharest, having as object of activity the prevention and struggle against money laundering and against the financing of acts of terrorism, purpose in which it receives, analyses, processes information and lets it to be known, when is found out the existence of some solid indications of money laundering or of some suspected operations of financing the acts of terrorism to the Public Ministry attaining to the High Court of Cassation and Justice. In the situation in which would be discovered the financing of some acts of terrorism, the Office immediately informs the Romanian Service of Information regarding these suspected operations.

The organization and functioning of the Office was foreseen from the beginning of its existence as a Unity of Financial Information, respectively a competent authority at national level that coordinates the Romanian system of prevention and reaction versus money laundering.

Alike the competencies established to FIU by the Egmond Group, ONPCSB has among its main "attributions" the competencies:

- to control the conformity of the reporting entities, either independent or connected with the authorities of financial control and prudent surveillance attributions (financial and non-financial institutions) towards the obligations established by the special law;

- to participate in the instruction programmes organized by the reporting entities. According to the legal provisions, the Office receives from the reporting entities three types of reports:

- The report of suspected transactions,

- The report regarding the operations with sums in cash, in lei or in other currency, where the minimal limit represents the equivalent in lei to 10.000 euro,

- The report for external transfers in and from accounts of sums of which the minimal limits are equivalent in lei to 10.000 euro.

In international plan, the National Office of Preventing and Striving against Money Laundering has become a member of the Egmont Group since May 2000”.

So there are institutions with elaboration and/or application attributions of the legislation in the domain of prevention and reaction versus money laundering: Ministry of Justice, Ministry of Public Finances, Ministry of European Integration, Ministry of Administration and Internal Affairs Public Ministry attaining to the High Court of Cassation and Justice, The National Anticorruption Direction, The National Bank of Romania, The Romanian Service of Information; institutions with financial control and prudential surveillance attributions: The National Bank of Romania, The National Control Authority, The Ministry of Public Finances, The Audit Office of Romania, The National Commission of Mobile Values, The Surveillance Commission of Assurances; entities with reporting obligations: the Romanian banks and branches of the foreign banks, financial and credit institutions, assurance – reinsurance societies, economic agents that carry on activities of gambling or pawning, natural or legal persons that give assistance of judicial, notaries offices, book-keeping, financial-banking specialities, post offices, exchange houses and others; professional associations: Romanian Association of the Banks, The National Association of the Societies of Mobile Values, The Lawyers’ Union from Romania, The National Union of the Public Notaries from Romania, Chartered Accountants and Authorized Accountants’ Body from Romania, Association of the Organizations of Casinos in Romania, Romanian Association of Estate Agencies, Real Estate National Union, the Cars’ Producers and Importers’ Association from Romania, The National Association of Tourism Agencies, The Manufacturers’ National Union from Romania.

5. A GENERAL VIEW OF THE PHENOMENON OF MONEY LAUNDERING ILLUSTRATED THROUGH STATISTIC INDICATORS

In the activity report of NOPSML in the year 2006 it was shown that financial analyses realized by this organism in order to identify the appearance of money laundering revealed that the main source felony of dirty money was tax evasion (51,75% of cases, followed closely by fraud (10,89%). Following the control activities of ONPCSB, of the Financial Guard and of the National Bank, in 2006 was noticed a diminution of the number of the ghost commercial societies and also of the number of persons involved in the operations of money laundering.

The number of reports of withdrawals in cash of more than 10,000 euro, received by NOPSML in the period 1999-2006: in 1999 - 4.125, in 2000 - 9.475, in 2001 - 8.665, in 2002 - 8.237, in 2004 - 11.658, and in 2005 - 14.944, as in the year of the pre-adhesion, in 2006, the growth was spectacular to 71.571.

For the situation of the Reports of Suspected Transactions, in the same report it was shown that the number of reports totally received by the Office in 2006 was of 3.196, of which from the reporting entities - 2.720 (respectively, from banks: 2.560, from casinos: 46, from dealers of cars: 2, from notaries: 1, from exchange houses: 3, from societies of money transfer: 8, from assurance societies: 4, from other legal persons: 47, from natural persons: 32, from financial investment' societies: 12, from post offices: 5), and from the control and prudent surveillance institutions and other institutions - 476.

The representatives of ONPCSB have shown that, in 2006, the notifications of the Office to the Public Ministry attaining to the High Court of Cassation and Justice (HCCJ) have been finalized by 23 accusations on money laundering and, under the suspicions of money laundering, have been cancelled five bank transactions and have been suspended 4 such operations.

For 2007, at the same time with the entrance of Romania in the U.E., the habilitated institutions have developed their activities, both on the prevention side, and on the investigation side of the indications and suspicions of money laundering, with unproved international cooperation.

So, the number of reports of withdrawals in cash of more than 10,000 euro, received by NOPSML has overrun the value of the previous year, being recorded 90,123, from which notifications from banks (including the branches of foreign banks) 8.802 reports; and other institutions have sent 81.321 reports of which: societies of services in financial investments 464; societies of administration investments: 10; investment societies: 3; crediting financial institutions: 112; leasing societies: 28; societies of intermediate financial operations: 2; societies of assurances/ reassurances: 68; exchange houses: 1.723; economical agents that develop pawning

activities: 3; economical agents in the domain of gambling: 2.152; agents of sales / emptions of artefacts, precious stones and metals: 1; economical agents that develop tourism activities: 19; cars' dealers: 4.349; treasury: 599; post offices: 216; societies of money transfer: 39; persons that exert free judicial professions, lawyers: 5; persons that exert free judicial professions, notaries: 68.306; courts, natural and legal persons that provide financial consultance, accountants or financial-banking: 4; real estate agencies: 241; associations / foundations: 1; other legal persons: 2.854; natural persons: 1; economic agents in the services' domain: 3; customs: 118.

About the situation of the Reports of Suspected Transactions – the number of reports totally received by the Office, in 2007 has been amounted to 2.574, so in diminution if compared to the previous year. The structure is the following: from the reporting entities have been received 2.096 reports, of which from the banks: 1.861; from societies of financial investments: 6; from leasing societies: 5; from assurances / reassurances societies: 10; from societies of intermediated financial operations: 6; from exchange houses: 2; from societies of money transfer : 23; from lawyers: 7; from notaries: 86; from persons that give fiscal accounting assistance: 1; from consultance societies: 1; from real estate agencies: 3; from natural persons: 39; from other legal persons: 46; from financial control and prudent surveillance institutions have been recorded 177 such reports; Financial Guard: 84; Ministry of Public Finance: 47; National Authority of Customs: 25; National Bank of Romania: 16; National Council of Mobile Values: 5.

In 2007 NOPSML has notified the Public Ministry attaining to the HCCJ, 6 cases of laundering of money, laundering through fraud and fiscal evasion, has suspended a number of 3 suspected financial operations: 3 and the total value of the immobilized sums was of: 476.185 USD and 200.000 EURO.

6. CONCLUSIONS

The more intense activities developed by the habilitated institutions and organisms in the sense of prevention and reaction versus money laundering offers the image of a very dangerous phenomenon, which undermines alone or together with the other manifestations of organized criminality the economic, social and political stability of the world' states, without being avoided in any way. The verification of money's origin is the main obligation of the authorities, and in Romania, the bank's and other professional secrets are not to be invoked in front of the judicial organs, as the possibility exists of placing under surveillance the telecommunications' system or electronics and the bank accounts when there are solid legal indications related to the activities of money laundering.

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