Money laundering in the legal instruments of the European Union and Council of Europe

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Abstract:

Money laundering is ranged in the group of international economic crime law as a branch or discipline of international criminal law. Although it is a relatively new notion which has not been yet generally acknowledged as a discipline of international criminal law, it could be nevertheless defined with regard to its subject in narrow and broader sense.

Legal instruments of the European Union and the Council of Europe regulate quite precisely measures for the prevention, detection and prosecution of money laundering. It is important that the mentioned legal acts require from the states, which are bound by these acts, to regulate money laundering in domestic legislation in accordance with definitions of money laundering contained in these acts. That means that the regulation of money laundering in national legislations is very similar, what facilitates the international cooperation, which is for the purpose of prevention and prosecution of money laundering offences particularly important.

Keywords: *money laundering, United Nations, European Union, Council of Europe.*

1. Introduction

Money laundering is ranged in the group of international economic crime law as a branch or discipline of international criminal law. Although it is a relatively new notion which has not been yet generally acknowledged as a discipline of international criminal law, it could be nevertheless defined with regard to its subject in narrow and broader sense. International economic crime law in narrow sense encompasses only those international crimes which can be committed exclusively in the exercise of economic activity with a transnational element or in connection with such an economic activity. On the other hand, international economic crime law in broader terms covers all acts which have a detrimental impact on global economic trends or cause danger to the world economy. Among the acts which belong to this category we can list the following:

transnational organized crime,
money laundering,
corruption,
counterfeiting money,
violations of intellectual property rights,
insider trading,
cyber crime.[1]

[1] Selinšek, L., in the book: Ambrož M. et al.: *Mednarodno kazensko pravo.* Ljubljana, Uradni list Republike Slovenije, 2012, p. 309.

The prevention of money laundering has been a subject of extensive discussions, among others in the United Nations, European Union and Council of Europe which all adopted important legal acts. The United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 1988[2] is considered to be the first international legal instrument which defines the substance of the criminal offence of money laundering, although it does not even mention this notion. The Convention defines money laundering in descriptive form when it requires from the signatory states among other to define as criminal offence the acquisition, possession or use of money or property for which a perpetrator knows that it was acquired by narcotic drug trafficking. The Convention also requires from the signatory states to regulate the seizure and confiscation of property resulting from narcotic drug trafficking or the instruments by which this criminal offence has been committed.[3]

The basic legal instrument of the United Nations which stipulates the obligations of the signatory states in their fight against money laundering is the United Nations Convention against Transnational Organised crime from 2000.[4] This Convention pays particular attention to money laundering in Articles 6, 7 and 10. The Convention binds the signatory states to adopt in accordance with the principles of domestic law legislative and other measures as may be necessary to establish as criminal offences the following acts, when committed intentionally:

- the conversion or transfer of property or property benefit, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property or rights with respect to property, knowing that such property is the proceeds of crime;
- the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
- participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences.

The Convention recommends to signatory states to include in predicate offences as large as possible scope of criminal offences and in particular all serious crimes[5], criminal association, corruption and obstruction of justice.[6]

Money laundering is partially included also in the UN Convention against Corruption from 2003[7], which in Article 14 sets out the measures for the prevention of money laundering, often associated with corruption.[8] In the continuation of the paper I shall focus on money laundering in the legal instruments of the European Union and Council of Europe.

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[2] United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[3] Selinšek L.: *op. cit.,* p. 317

[4] United Nations Convention against Transnational Organised Crime.

[5] As serious crimes are considered those acts that constitute an offence punishable by the sentence of imprisonment for four years or more.

[6] Articles 6, 7 and 10 of the Convention. See also Selinšek L., op. cit, p. 318

[7] United Nations Convention against Corruption.

[8] Selinšek L., *op. cit,* p. 319

2. Money laundering in the legal instruments of the European Union

The European Union has adopted so far three directives concerning the prevention of money laundering. The first one is the Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering.[9] It was followed by the Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending the Council directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering.[10] The third one was the Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the Prevention of the Financial System for the Purpose of Money Laundering and Terrorist Financing[11] which abrogated two previous directives. Now we have a proposal of the Directive of the European Parliament and the Council on the Prevention of the Use of Financial System for the Purpose of Money Laundering and Terrorist Financing[12] which has been already prepared and will substitute the Directive 2005/60/EC, yet it is not possible to foresee when this proposal will be adopted.

The Directive 2005/60/EC that is currently in force consists of a relatively extensive preamble and 47 articles. The preamble contains some statements which deserve our attention. The

European Parliament and the Council state that massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market and that terrorism shakes the very foundations of our society. In addition to the criminal law approach, it is possible to produce results also with the preventive measures of the financial system.

Money laundering and terrorist financing are frequently carried out on the international level. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other actions undertaken on the international level.

In the recent years a tendency has been noticed to modify the definition of money laundering – originally limited only to illicit trafficking with narcotic drugs – which is to contain a longer list of predicate offences. An extended scope of predicate offences would facilitate the reporting of suspicious transactions and also the international cooperation in this field.

Institutions and persons to which this Directive applies, should in conformity with it identify and verify the identity of beneficial owners. In order to fulfil this requirement, it is left to the institutions and persons whether they make use of public records of beneficial owners, ask their clients for relevant data or obtain the information otherwise, taking into account the fact that the extent of such customer due diligence

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[9] Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering OJ L 166, 28. 6. 1991.

[10] Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering OJ L 344, 28. 1. 2001.

[11] Directive 2005/60/EC of the European Parliament and 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 OJ L 309, 25. 11. 2005.

[12] Proposal for a Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing COM/2013/045 Final – 2013/0025 COD.

measures relates to the risk of money laundering and terrorist financing, which depends on the type of customer, business relationship, product or transaction.

The European Parliament and Council further state that perpetrators of a criminal offence of money laundering and persons who finance terrorism are compelled due to reinforced surveillance in financial sector to seek alternative methods for concealing the origin of proceeds of crime. A the same time, these channels can be also used for the terrorism financing, for this reason the mandatory measures against money laundering and terrorism financing should be applied also to life insurance intermediaries and trust and company service providers.

It has often turned out that large cash payments represent a high risk for money laundering and terrorism financing. Therefore in those Member States that allow cash payments above the established threshold, all natural or legal persons trading in goods by way of business should be covered by this Directive when accepting such cash payments.

Legal advice is still protected by the institute of professional secret, unless the legal counsellor is taking part in money laundering or terrorist financing or the lawyer knows that a client is seeking a legal advice for money laundering or terrorist financing purposes.

Money laundering or terrorist financing are international problems and the effort to combat them should be global. Where Community credit and financial institutions have branches and subsidiaries located in third countries where the legislation in this area is deficient, they should, in order to avoid the application of very different standards within an institution or group of institutions, apply the Community standard or notify the competent authorities of the concerned Member State if this application is impossible.

The importance of combating money laundering and terrorist financing should lead Member States to lay down effective, proportionate and dissuasive penalties in national law for failure to respect the national provisions adopted pursuant to this Directive. Provision should be adopted for penalties in respect of natural and legal persons. Since legal persons are often involved in complex money laundering or terrorist financing operations, sanctions should also be adjusted in line with the activities carried on by legal persons.

The Directive contains 7 chapters and 47 articles.

On the basis of Article 1 of the Directive, the Member States have to ensure that money laundering and terrorist financing are prohibited. According to this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:

a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

b) the concealment or disguise of the true nature, source, location, disposition, movement of property, rights or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.

Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.

In this Directive »terrorist financing« means the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

Knowledge, intent or purpose required as an element of the activities mentioned in paragraphs 2 and 4 of Article 1 may be inferred from objective factual circumstances.

In Article 2 is set out a scope of natural and legal persons covered by this Directive.

Article 3 provides definitions of the following notions: »credit institution«, »financial institution«, »property«, »criminal activity«, »serious crime«, »beneficial owner«, »trust and company service providers«, »politically exposed person«, »business relationship« and »shall bank«. »Criminal activity« means any kind of criminal involvement in the commission of a serious crime. »Serious crime« means in accordance with this Directive at least:

(a) acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA;

(b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

(c) the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;

(d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests;

(e) corruption;

(f) all offences which are punishable by deprivation of liberty or a detention order (safety or educational measure) for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

Chapter II which is divided to four sections, regulates in detail the obligations of the institutions and persons covered by this Directive to establish the identity of clients (customer due diligence). Pursuant to Article 6, Member States have to prohibit their credit and financial institutions from keeping anonymous accounts or anonymous passbooks.

Chapter III is divided to two sections and regulates the reporting obligations of the institutions and persons covered by this Directive to report anything suspicious to the competent authorities. Pursuant to Article 20 of the Directive, Member States have to require that the institutions and persons covered by this Directive pay special attention to any activity which they regard as particularly likely to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose.

In accordance with Article 21 of the Directive, each Member State has to establish a FIU[13] in order to effectively combat money laundering and terrorist financing. The FIU

[13] The abbreviation FIU means Financial Intelligence Unit – the central national unit, competent for receiving (and if permitted, requesting), analysing and disseminating financial data to competent authorities.

has to be established as a central national unit. It is responsible for receiving (and to the extent permitted to requesting), analysing and disseminating to the competent authorities the information which concern potential money laundering, potential terrorist financing or any other information which are required by national legislation and for their dissemination to the competent authorities. In order to fulfil its tasks, the FIU shall be provided with adequate resources. Member States have to ensure that the FUI has in time an indirect or direct access to the financial, administrative and law enforcement information that it requires to properly fulfil its tasks.[14]

Member states have to adopt appropriate measures to protect from threats or any other hostile acts the employees of institutions or persons covered by this Directive who report their suspicions of money laundering or terrorism financing, be it to their institution or directly to FIU.

Chapter IV regulates record keeping and statistical data. In accordance with Article 23 of the Directive, Member States have to require that their credit and financial institutions establish systems that enable them to respond fully and rapidly to enquiries from the FIU, or from other authorities, in accordance with their national law, as to whether they maintain or have maintained during the previous five years a business relationship with specified natural or legal persons and on the nature of that relationship.

Chapter V, divided to four sections, provides for the enforcement measures. In Section 4 are laid down penalties. Member States have to ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.[15]

In Chapter VI of the Directive are set out technical criteria for assessing whether situations represent a high risk of money laundering or terrorist financing as well as implementing measures. The last chapter, i.e. the Chapter VII provides for final provisions.

3. Money laundering in the legal instruments of the Council of Europe

Money laundering has been treated also by the Council of Europe which has adopted so far two conventions concerning the prevention of money laundering. The first convention was adopted already in 1990. It was the Convention no. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[16] This Convention was substituted in 2005 by the Convention No. 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[17] The Convention currently in force has a preamble and contains 56 articles and is divided to 7 chapters.

Chapter I contains definitions of notions used by the Convention. Among these notions is also a "confiscation" which is defined by the Convention as a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences and results in the final deprivation of property. Here it should be specially pointed out that it is not a question of the confiscation of property as it was

[14] Article 21 of the Directive.

[15] Paragraph 1 of Article 39 of the Directive.

[16] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Treaty Series no. 141.

[17] Council of Europe Convention on Laundering, Serch, Seizure and Confiscation of the Proceeds from Crime, and on the Financing of Terrorism, European Treaty Series no. 198.

once known in the Yugoslav criminal law and which meant that it was possible to confiscate to a convict practically all his property without indemnity. Here it is rather a question of the measure which enables to a court to confiscate instrumentalities, proceeds from crime or property the value of which corresponds to such proceeds.

Chapter II defines the financing of terrorism. Pursuant to Article 2 of the Convention, each Party to Convention has to adopt such legislative and other possible measures as may be necessary to enable it to apply the provisions of this Convention applying to the financing of terrorism. Each Party has in particular to ensure that it is able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide co-operation to this end to the widest possible extent.

In Chapter III are listed measures to be adopted by Parties on the national level. Among these measures are listed on the first place the measures of confiscation (confiscation). Article 3 of the Convention binds Parties to adopt legislative and other possible measures to confiscate instrumentalities and proceeds or property, the value of which corresponds to such proceeds and laundered property. This provision is very important, because it requires from Parties to adopt such measures as to enable to seize even the legally acquired property in the amount corresponding to a value of unlawfully obtained property benefit. Such a measure can be taken into consideration only in the case when it is not possible to confiscate instrumentalities or proceeds of crime. The second paragraph of Article 3 leaves however a possibility to the Party to establish with a special statement a list of specified offences or a group of criminal offences for which this measures shall be applied, although it is not possible to exclude the use of this measure in totality.

Pursuant to Article 4 of this Convention, each Party has to adopt such legislative and other measures as may be necessary to enable it to rapidly identify, trace, freeze or seize property which is liable to confiscation pursuant to Article 3, in order in particular to facilitate the enforcement of a later confiscation.

Article 5 regulates freezing, seizure and confiscation. Parties have to adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

a) the property into which the proceeds have been transformed or converted;

b) property acquired from legitimate sources, if proceeds have been intermingled**,** in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

Article 7 provides for investigative powers and methods. Each Party has to adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy. The third paragraph of this Article provides for the use of special investigative methods and techniques facilitating the identification and tracing of proceeds and the gathering of evidence related to them. These methods consist, among others, of

observation, interception of telecommunications, access to computer systems and tasks to produce specific documents.

In Article 8 are laid down the obligations of Parties to adopt such legislative and other measures as may be necessary to ensure to the persons, affected by measures under Articles 3, 4 and 5 and other provisions in this Section, to have effective legal remedies in order to preserve their rights.

Article 9 is very important, because it binds Parties to criminalise in domestic legislation money laundering in the way as it is defined in this Article. Money laundering encompasses according to this Convention the following acts, when committed intentionally:

a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

b) the concealment or disguise of the true nature, source, location, disposition, movement, ownership of property or rights to property, knowing that such property is the proceeds of crime;

Taking into consideration their constitutional principles and the basic concepts of their legal systems, Parties have to define as criminal offence also the following acts, when committed intentionally:

c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

d) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this Article.

Paragraph 4 of this Article enables to Parties to set out with a special statement a list of specified predicate offences or a group of predicate offences in which a disposal with proceeds of these offences shall be criminalised as money laundering. It is therefore left to Parties to criminalise as money laundering only the disposal of property, originated from a specific predicate offence or to criminalise as money laundering the disposal of any property without being necessary to establish precisely from which predicate offence it is derived. Slovenia has adopted the second option and established as criminal offence the disposal of property, deriving from whatever predicate offence.

Chapter IV provides a regulation of international cooperation. This chapter is the most extensive and it is divided to 7 sections. In this part are laid down the principles of international cooperation, investigative assistance, provisional measures, confiscation, refusal and postponing of cooperation, notification and protection of rights of third persons, procedural and other general rules. Among the provisions in this Chapter, it seems that the most interesting and perhaps also more questionable are the provisions which regulate provisional measures. The first paragraph of Article 21 binds a Party that at the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, takes the necessary provisional measures, such as freezing or seizing, in order to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request. In the second paragraph is set out the obligation of a Party which has received a request for confiscation pursuant to Article 23 (it regulates the obligation of confiscation) to take upon the request the measures, mentioned in paragraph 1 of this Article in respect of any property which is the subject

of the request or which might be such as to satisfy the request. The provision of this Article is very important, because it requires from one Party, upon the request of another Party, even before the termination of criminal proceedings in the requesting state, to freeze or seize on its territory whatever property which represents an object or proceeds of crime or even a property acquired from legitimate sources, which can be seized up to the assessed value of the proceeds.

In Chapter V is regulated the cooperation between FIUs, in Chapter VI the monitoring mechanisms and settlement of disputes and Chapter VII contains final provisions.

4. Conclusion

Legal instruments of the European Union and the Council of Europe which have been presented in this paper regulate quite precisely measures for the prevention, detection and prosecution of money laundering. It is important that the mentioned legal acts require from the states, which are bound by these acts, to regulate money laundering in domestic legislation in accordance with definitions of money laundering contained in these acts. That means that the regulation of money laundering in national legislations is very similar, what facilitates the international cooperation, which is for the purpose of prevention and prosecution of money laundering offences particularly important.