Modifications of the Provisions of the Hungarian Criminal Code Related to Money Laundering and Compliance with International Requirements of Combating Money Laundering

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Abstract:

From the mid 1990-ies – during the preparation progress of joining the European Union –, alongside with the establishment of market economy and recovery of the country's international relations Hungary was forced to implement the system of criminal instruments of combating money laundering. In this study I shall introduce developments and progress of the Hungarian jurisdiction related to money laundering from the first incorporation of the offense until present days. I shall hereby compare the provisions of the related international treaties and recommendations of European Union's Directives on money laundering to the settlement and measures of the Hungarian Criminal Code. The study shall introduce characteristics of the Hungarian legislative progress – originating in the laws and principles of our jurisdiction -, and it shall point out the Hungarian measures altering from international expectations, notwithstanding the legislative virtues and deficiencies of the subject. Finally, I shall also specify progress possibilities of the provisions of the Hungarian Civil Code on money laundering in compliance with Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.

Key words: *criminal law, new Hungarian Criminal Code, economic crimes, obligations under international law, money laundering.*

1. Introduction

As the result of the political and economic changes in its system Hungary has developed market economy at the beginning of the 1990-ies and has initiated its integration to the Euro-Atlantic co-operation (to the NATO and the European Union). Since the 1980-ies, this international community has joined forces in combating organised crime, drug trade and terrorism, whereas it has implemented and obliged its members to adopt the instruments and measures pursuing a policy to fight against transnational criminal actions and money laundering as well. "Organized crime is an increasing threat to the society we live in and wish to preserve."[1]

During the course of transformation, being inexperienced in market economy jurisdiction and having a rather weak economy, Hungary has become the target of international criminal groups. Since significant foreign capital support was required to transfer the country to a market economy, this need for financing had sometimes

[1] Dávid Tóth, István László Gál, László Kőhalmi: Organized Crime in Hungary, Journal of Eastern-European Criminal Law no. 1/2015. Page 23.

appeased criminal organisation from all over the world who aimed to legalize their illicit proceeds.

The international community pursued the policy that Hungary must implement the measures and methods applied in international combat against money laundering. It was obvious, that incorporation of the instruments and requirements of the European Union and other international organisations related to money laundering was condition to the integration.

In this study I aim to introduce the establishment and progresses of the jurisdiction on money laundering from the circumstances of first incorporation until recent days, as well as the reflections of the Hungarian legislations to the international community's requirements.

2. Incorporation of the offense of money laundering in Hungarian Criminal law

The amendment and modification of the old criminal codex incorporated the independent statutory definition of money laundering to the Criminal Code[2] in 1994[3]. Incorporation of money laundering amongst the criminal offenses was necessary due to Hungary's undertakings under international law by joining Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[4]. This Convention was the first – multinational – treaty that specified statutory rules for its member states on penalization of money laundering related to organized crime and on the definitions of the offense.

The 1st Money Laundering Directive[5] of the European Council of 1991 has also effected the definition of the offense of money laundering recommending the member states to extend the objective effects of the Directive in their legislation to incomes originating from criminal activities other than drug trade.

At the implementation of section 303 of the Criminal Code legislators extended the prohibitions of laundering illicit money to the proceeds of smuggling arms and terrorism related offenses in compliance with the provisions of the 1st Money Laundering Directive.

Nevertheless, by definition of the Hungarian Criminal Code money laundering could only be attached to a 'predicate offense' committed by another person (for example a drug trader who legalized his illicit proceeds by money laundering could not be adjudicated for money laundering). As for money laundering, the Criminal Code defined the so called 'predicate offense' as in every felony punishable for more than five years of imprisonment and few other offenses with lower scale punishment rates expressly stipulated in the Act.

Personal effect of perpetrators defined in subsections (1)-(2) of section 303 of the Criminal Code has aimed to comply with the provisions of the 1st Money Laundering Directive and the Vienna Convention, nevertheless, certain alterations still remained:

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[2] Act IV of 1978 on the Criminal Code has been incorporated during the socialist era, and though it has been modified for more than 90 times after the change of the regime it stayed the criminal codex of Hungary for almost 25 years until June 30, 2013.

[3] Act IX of 1994 has modified the Criminal Code and incorporated the independent statutory definition of money laundering to section 303.

[4] In Act L of 1998 Hungary has announced Vienna Convention and incorporated its provisions

[5] Council Directive of 10 June 1991 on prevention of the of the use of the financial system for the purpose of money laundering (91/308/EEC) *Official Journal of EC issue L166 28.06.1991 p 0077-0083*

- according to the Criminal Code the perpetrator must be aware of the (illicit) origins of the financial assets subject to transfer or trade, nevertheless, the Act did not require the special state of consciousness (motive) projected to reveal the illicit nature of the assets or assistance provided to the perpetrator of the 'predicate offense' to avoid the legal consequences of the felony, which intent is rather hard to be proved in the criminal procedures.

- the Hungarian Act expressly specified the conducts of safeguarding, handling and trading the assets or conducting financial or bank transactions with the asset. As the matter of fact, penalization of these conducts exceeded over the requirement if the international community.

However, the Act has failed to meet the international jurisdictional requirements to penalize the conducts of co-operative, supportive, assistance, advocating and offering criminal actions of money laundering.

Similarly, the Hungarian legal regulation ignores the recommendation on implementing the explanatory principle according to which identification of the knowledge, intent or purpose – referred as elements of the conduct hereto – must be conducted upon proper evaluation of objective, factual consequences.

As for prevention of money laundering, the old Criminal Code penalized failure to report on money laundering, meaning, that the person employed as fiscal officer who failed to fulfil his obligation – specified in separate statutory regulations – to report suspicious transactions had fallen under criminal liability. The criminal act of failure to report on money laundering could be committed both intentionally and by criminal negligence.

1994's amendment of the old Criminal Code established the two pillars of combating money laundering existing until today as part of the Hungarian criminal regulations by penalizing money laundering, furthermore, by criminalizing failure of reporting suspicious transactions attempted to stipulate 'hostile environment' for money laundering.

Despite of four minor modifications in the meantime, significant amendment of the money laundering rules of the old Criminal Code did not take place until December 2001. Nevertheless, we must take note that the amendment executed in 1999 has extended the group of 'predicate offenses', and by these means 'legalization' of the proceeds originating from intentional criminal activities of any third party punishable by imprisonment were considered money laundering. This provision has exceeded the requirements stipulated in the international recommendations on specifications of 'predicate offenses'.

Modifying the old Criminal Code Act LXXXIII of 2001[6] had closed the first phase of the development of regulating money laundering, but more essentially it has aggravated other – non-criminal law – measures of combating money laundering. This statutory regulation has definitely been adapted to the pressure of the international community, since Hungary has been enlisted to 'NEOT' (non-co-operative countries and territories) of Financial Action Task Force (FATF – intergovernmental body set up to combat money laundering) working alongside OECD, however, despite of several notifications, Hungary hesitated to meet certain recommendations of the international organisation (for example termination of anonymity of specific bank deposits).

[6] See Act LXXXIII of 2001 on Aggravation of Rules on Combating Terrorism and Money Laundering and on Further Prohibitions

Being enlisted at 'NEOT' resulted in significant economic and financial disadvantages, so it was crucial for Hungary to comply with the requirements of the international community in reasonably short time. The demand for coherent international co-operation after September 11, 2001 further shortened the time frame for action, and required more aggravated and integrated regulatory systems to confine money laundering as a basis of financing terrorism. In compliance with the international requirements the Act essentially aggravated the legal regulations of both financial and civil law, for example it has removed bearer (anonymous) deposits from the legal system and terminated anonymous public shares as well. Nevertheless, the regulations modifying the Criminal Code have eventually eased the regulations, namely, after the modification supplying false information on the assets related to the 'predicate offense' to the authorities could not apply to all authorities, but only to financial service providers (bank, insurance company etc.) or customs authorities. This provision has actually narrowed the scope of punishable conducts of money laundering.

3. Changing perspectives of the criminal regulatory systems

Unprecedented in the practice of the previous Hungarian jurisdiction the Hungarian Parliament has modified the Criminal Code's provisions on money laundering again, in only three weeks after passing Act the LXXXIII of 2001 on aggravation of the rules of combating money laundering, whereas Act CXXI of 2001 has fundamentally changed the criminal regulations.

The most important change implemented was that the amendment has ordered to penalize money laundering of the assets acquired by a self-committed crime, thus from that point on not only the money laundering connected to an 'predicate offense' committed by a third party was deemed as criminal action.

Above terminating the supplementary nature of the criminal act, after more than ten years of hesitation the amendment has finally incorporated the recommendations of the 1st Money Laundering Directive on penalization of the associate and co-perative conduct of money laundering by penalizing collaboration on money laundering. Criminalization of negligent conduct – money laundering in connection with criminal action committed by others – is further sensation of the modification in accordance with the international recommendations. Nevertheless, the effects of the above intentions were been significantly weakened, whereas the amendment has narrowed the scope of criminal acts that could be taken into consideration as money laundering activities, by these means only the usage of illicit proceeds of business activities and 'legalization' of illicit assets through financial institution were considered money laundering, furthermore, judged as unnecessary on dogmatic grounds the modification terminated the punishment of several acts formerly prohibited (for example acquisition or usage of illicit financial assets). Another problematic provision of the modification has also narrowed the scope of the personal effect of penalizing the failure to comply with the reporting obligation related to suspicious transaction to the employees of financial service providers.

Uniquely interesting aspect of the incorporation of Act CXXI of 2001 that the European Parliament and the Council has implemented Directive 2001/97/EC on amending Council Directive 91/308/EEC on the prevention of the of the use of the financial system for the purpose of money laundering on the same day[7]. Obviously, the

[7] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 on amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the

Hungarian government has been informed about the preparation and objected content of the Directive, nevertheless, they have ignored such recommendations at the implementation of the Criminal Code's modification. The 2nd Money Laundering Directive[8] has significantly extended the variety of the economic actors to whom it has established various obligations (client identification, reporting obligations related to suspicious transactions, other data supplying obligations, etc.). By these means, real estate traders, auditors, bookkeepers and tax advisors, notary publics and other independent legal experts, traders of gemstones, precious metals and pieces of fine art and persons involved in cash-businesses above a certain limit value[9] have become obligors under the new money laundering rules.

Whilst 2nd Money Laundering Directive has widened the scope of combating money laundering by extending the scale of persons subject to reporting obligation related to money laundering – suspicious transactions, whereas the modification to the Hungarian Act provided opposite effects, it's no wonder that international organisations have defined their concerns on the amendments almost immediately. Act XV of 2003 on the next amendment of the Criminal Code has partially repaired the deficiencies by extending the scope of actors obliged to comply with the statutory reporting obligation on suspicions cases.

The joint study of the International Monetary Fund / the World Bank / MONEYVAL on Hungary conducted in 2005 has disapproved that the elements of money laundering stipulated as typical forms of criminal action both in the 1st and 2nd Money Laundering Directives[10] of the EU, further in the Vienna Convention[11] and in the Strasbourg Convention[12] are missing from the independent statutory definition of money laundering (these elements have been removed at the implementation of Act CXXI of 2001).

Act XXVII of 2007 has modified the independent statutory definition of money laundering again, due to the requirements stipulated in the recommendations of the international anti-money laundering organisations implemented upon the survey concluded in 2005 on the one hand, and due to the provisions of the 3rd Money Laundering Directive[13] implemented on October 26, 2005 specifying further recommendations to the amendment of the measures and institutions of combating money laundering on the other hand. Basically, Act XXVII of 2007 has corrected former jurisdictional bungling, and partially it has resulted in compliance with the provisions of the 3rd Money Laundering Directive of the EU.

As stated in the (Ministry's) Commentaries to the Act: *'the amendment implies the perpetrator's conducts formerly removed by Act CXXI of 2001 to entirely cover the criminal*

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purpose of money laundering – Commission Declaration *Official Journal of EC issue L344 28.12.2001 p 0076-0082.*

[8] See footnote 7.

[9] For cash-transactions over EUR 15,000.

[10] See footnotes 4 and 6.

[11] Act L of 1998 on the Announcement of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances held of 20 December 1988, Vienna.

[12] Act CI of 2000 on the Announcement of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990, Strasbourg.

[13] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the of the use of the financial system for the purpose of money laundering and terrorist financing *Official Journal of EC issue L309/ 15http://eur-lex.europa.*

*action expressly specified in the **Convention**, yet, keeping the integrity of the local legal terminology and securing that there are no inconvenient recurrences or overlaps.'*[14]

Until the implementation of the new Criminal Code[15] there have been only a few insignificant, mainly technical modifications related to the independent statutory definition of money laundering, whereas Act CLXII has specified further aggravated cases and Act LXXX of 2009 has modified measures of punishment.

4. Statutory regulations of money laundering from the new Criminal Code until recent days

Implementation of the new Criminal Code did not bring progressive changes in the instruments and measures of anti-money laundering regulatory system. (The Ministry's) Commentaries refer to the fact that at the incorporation of the independent statutory definition of money laundering legislative action has taken into consideration the provisions specified in article 9 of the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism concluded on May 16, 2005 in Warsaw[16], and furthermore, it is in compliance with the provisions stipulated in article 3 of the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances held on December 20, 1988, furthermore, article 6 of the Palermo Convention[17] held on December 14, 2000[18].

The new Criminal Code has kept the two pillars of anti-money laundering regulatory structure, namely the independent statutory definition of money laundering and the independent statutory definition of failure of compliance with the reporting obligation related to money laundering.

Basically the structure of the independent statutory definition of money laundering has not changed. The legislator has defined four independent versions of money laundering in subsections (1)-(2) and (3) of section 399 and in subsection (4) of section 400 of the Criminal Code. The Act penalizes: a) laundering the illicit income obtained by another person either to the benefit of the perpetrator of the 'predicate offense' or to the benefit of the person not involved in the 'predicate offense'; b) 'cleaning' the illicit income obtained by the perpetrator himself; c) collaboration in the commission of money laundering and d) negligent money laundering. Despite of the fact that the structure the independent statutory definition of money laundering has not changed the terminology became more specific in several aspects. Legislators have compensated the regulative deficiencies of two decades for money laundering conducted in relation to the proceeds of 'predicate offense' committed by another person, whereas they implemented a new element of conduct – as in confuting the criminal procedure held against the perpetrator of the 'predicate offense' – besides the possible intents (motives) of the perpetrator of money laundering to conceal or convert the true origins of the assets.

Important progress specified in the new Criminal Code is that the negligent perpetrator of money laundering who voluntarily reports to the authorities or initiates

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[14] Ministry's Commentaries to Act XXVII of 2007.

[15] Act C of 2012 on the new Criminal Code replaced Act IV of 1978 on July 1, 2013 after 33 years of being in force

[16] Announced and incorporated by Act LXIII of 2008.

[17] See Act CI of 2006 on the Announcement of the United Nations Convention against Transnational Organised Crime of 14 December 2000, Palermo.

[18] See the Commentaries on sections 398-399 of Act C of 2012.

such report might be exempted from prosecution for money laundering. (According to the provisions of the previous Criminal Code such benefits were available for the person committed the criminal act intentionally.) Narrowing the possibilities of referring to such exemption definitely pointed towards the aggravation of the statutory regulations.

The other pillar of anti-money laundering provisions, namely, the stipulations on failure of compliance with the reporting obligation related to money laundering have remained unchanged in the new Criminal Code[19].

In accordance with the Ministry's Commentaries on the new law legislature has finally taken into consideration the provisions of the three principle anti-money laundering international agreements of the past two decades and enacted in compliance with their requirements, nevertheless, studying the provisions of the law we must establish that we have only come closer to approached objectives, yet, there's still plenty to do. Out of the three international documents especially provisions of articles 6 and 9 of the Warsaw Convention deserve special attention, since these stipulations determine the path of progress for criminal law's anti-money laundering legal and regulatory systems without setting the exact forms and defining contents.

For example, the above-mentioned provisions of the Convention oblige member states to enact and enforce the establishment of the legal framework that allows penalization of money laundering even in case if the conviction for the 'predicate offense' adjudication has not taken place or in case exact stipulation of the 'predicate offense' is not possible. Point b) of section 2 of article 9 expressly specifies that it shall not be relevant, whether the 'predicate offense' falls under the competence and authority of the member state (willing to complete the criminal procedure on money laundering) or not.

I find that the independent statutory definitions related to money laundering stipulated in the Hungarian Criminal Code are able to meet the requirements of the afore-mentioned standards, however, in the form of an explanatory provision it would beneficial to stipulate that lack of adjudication of the 'predicate offense' or lack of competence and authority in the 'predicate offense' shall not object adjudication of money laundering.

Article 10 of the Convention defines detailed requirements regarding the liabilities of legal entities in money laundering (corporate liability).

In accordance with the principles of Hungarian criminal law criminal courts may only adjudicate criminal liabilities of natural persons. Act CIV of 2001 established quasi criminal liability of legal entities – without allowing actual conviction of the legal entity – by entitling the criminal court to take sanctions against the incriminated legal entity in case the criminal act has been conducted to the benefit of the legal entity, or by a person related to the legal entity (for example its member, employee or officer) in its business pattern by using such legal entity[20].

In combating money laundering this aspect of regulatory background shows the most significant difference between the Hungarian jurisdiction and the requirements of the international community. Comparing the provisions of Act CIV of 2001 and section 1 of article 10 of the Warsaw Convention we find that at the present indication of criminal procedure against the legal entity is not possible for money laundering if it's been conducted by the owners (but not officers) of the legal entity to the benefit of the legal

[19] See section 401 of Act C of 2012.

[20] See (1)-(2) of section 2 of Act CIV of 2001 on criminal sanctions against legal entities.

entity, or in case money laundering was conducted by other person (not even under the titulus of assignee) acting independently from and to the benefit of the legal entity. In such cases only the natural person's criminal liability can be adjudicated and even sanctions can not be held against the legal entity.

Regrettably, for nearly two decades, the Hungarian legislation has failed to adopt the explanatory provision (otherwise) included in all anti-money laundering – related international treaties to its statutory regime. According to this explanatory provision '*...'knowledge, intent or purpose required as an element of an offense ... may be inferred from objective, factual consequences'*[21] On the other hand the Hungarian criminal law acknowledges and for several criminal acts applies the definition of 'manifested purpose (motive)', however, this principle is not expressly stipulated in the Criminal Code. Nevertheless, in this case legislation could further approach international recommendations and standards without any significant difficulties.

Defining the regulatory structure of anti-money laundering provisions has not been closed in the Hungarian criminal law yet. First, further specification is required regarding the afore-mentioned subjects, and second, economic, social and political changes urge the international community to adopt new and even more sufficient measures in combating money laundering. As one of the last stands of this progress was implementation Directive (EU) 2015/849[22] by the European Parliament and the Council on May 20, 2015 on the prevention of the of the use of the financial system for the purpose of money laundering or terrorist financing, known by professionals as the 4th directive on Money Laundering.

The Directive simultaneously rationalizes and aggravates the system of instruments and measures of the combat against money laundering. On the one hand, it allows member states to adopt less rigorous provisions, nevertheless, on the other hand it extends the personal effects of anti-money laundering regulations to some high-risk personnel, such as the public actors of politics.

Provisions on the objectives of the Directive specify that the European Union has recognised dangers that chain-like or cross-owner possession structures of legal entities – hiding the actual beneficial owner – represent in money laundering and terrorist financing, and the Directive stipulates the demand for disclosure of the identity of the actual beneficial owner. The Directive modifies and modernizes the anti-money laundering measures and instruments of administrative and financial law that might have an indirect effect on criminal law policies as well. For example, involving trusts or gambling service providers under the personal effects of the Directive shall extend the scale of subjects of the offense failure to comply with reporting obligations related to money laundering.

5. Final remarks

I find that until the effect date of the Directive (June 26, 2017) legislators should not only review the provisions referring to administration law or financial law, but in compliance with the principles of the Directive they should also consider to modify

[21] See point c) of section 2 of article 9 of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005, Warsaw.

[22] *See Official Journal of EC issue L141/73 http://eur-lex.europa.eu/legal-content6HU/TXT/?uri= CELEX:32015L0849.*

(especially) the provisions of Act CIV of 2001 on the criminal sanctions applicable to legal entities together with the modification of the Criminal Code. I agree with the statement: „In recent decades it has been proved that without witness protection we cannot take a stand efficiently against national and international crime during the investigation."[23] The regulations of the (Hungarian) criminal proceeding law should be reviewed with the aim to raise the protection of the witnesses and persons reporting money-laundering.

Even if the recommendations on integration of the legal systems can not be adopted in the national jurisdictions – likely, not into the Hungarian legal regulations – entirely, approaching the integration of legislative measures and instruments is the interest of both the international community and Hungary, at least to the extent that eliminates possible hindrances due to references to public order clause upon differences in legal provisions, objecting transnational co-operation in settling actual money laundering cases.

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[23] Endre Nyitrai: *Fight Against Organized Crime in Light of Witness Protection,* Journal of Eastern-European Criminal law no. 1/2015, page 71.

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