Shall the Offender or the Participant in the Predicate Offense Be Held Criminally Liable if He/She Performs the Laundering of the Proceeds from the Committed Offense?

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Abstract:

Money launderer is the name used in several specialty works in order to designate the person who commits the offense subsequent to the offense which the criminal proceeds originate from.

The following question often emerges within the doctrine and the case law: May the offender or the participant in the predicate offense be a launderer of the proceeds originating from the committed offense?

There can be two answers to this question. We will hereby present several points of view and we will try to express our opinion on this legal matter.

Keywords: *money launderer; money laundering, predicate offense (deliquens principale), subsequent offense (delinquens subsequens).*

1. Introduction

The expression of *money laundering* is not very old, its occurrence being related to the famous gangster Al Capone[1], who in 1920, in times of prohibition[2] and crisis, invaded Chicago with laundries used in order to camouflage the criminal origin (from alcohol smuggling, human trafficking, arms trafficking, etc.) of his money and to appear that all the return registered in the accounting was legal[3].

In fact, the criminal origin money was recorded in the accounting and declared as income originating from the performance of economic activities, although only one part of the declared income was gain following the services rendered to the people.

One of the first employments within a public document of the expression of *money laundering* dates from 1973 and it is awarded to The Guardian newspaper, which used it during *Watergate scandal*[4].

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[1] In 1920-1933, the gangsters such as famous Al Capone or Bugs Moran opened laundries where they „mixed" (recorded in the accounting) black money earned following the commission of an offense with the money earned from clothes washing and cleaning, therefore succeeding in introducing within the legal circuit very large amounts of dirty money (M. Mutu, *Spălarea banilor – aspecte juridico-penale, teză de doctorat, (Money laundering – legal and criminal matters) PhD thesis*, Chișinău, 2005, p. 19). In 1931, Al Capone was convicted for tax evasion and prostitution.

[2] USA prohibition occurred between 1920 and 1933, when the sale, manufacturing, consumption and transport of alcohol and alcoholic drinks were prohibited.

[3] M. Mutu, *op. cit.,* p. 9.

[4] The former American president, Richard Nixon was involved in this scandal. He subsequently resigned due to several allegations (money laundering included). According to The Guardian, the Committee for the reelection of President Richard Nixon ordered the transfer of certain funds in

The integration of the financial system and the optimization of the communication technologies encouraged the disappearance of the territorial barriers, therefore those interested in carrying out activities on the laundering of dirty moneys acquired new tools, such as the fictitious moving of the economic office in *offshore* areas or the use of the internet for remote bank transfers[5]. Beyond the undeniable social and economic benefits, the globalization brought major benefits to the organized criminal groups specialized in money laundering activities[6].

Nowadays, the ***whitening*** of the proceeds earned following the commission of offenses is a very harmful practice for each and every state, but it can be devastating for young democracy countries, such as Romania, due to the affect it may destroy the basis of the market economy[7]. The laundering of black money – illegally earned – is a strong barrier for the identification of its illicit origin.

Due to its extension and forms, the importance of the prevention and control of money laundering is the priority of any legislation, due to the fact that, by means of this offense the ***fuel*** necessary for the existence and operation of the organized crime and for terrorism financing is produced.

Following the ***whitening*** (laundering) of the money, by any means having this scope, criminal origin money can become dirty again by means of financing the primary offenses (for example, drugs trafficking, human trafficking, tax evasion etc.). As the doctrine provided, „*we can speak about a vicious circle of money laundering or about the effect of the snowball which picks up more and more snow as it rolls along, becoming larger*"[8].

The dimensions of the recycling process of criminal origin proceeds are difficult to establish due to the fact there is no reliable data to enable their measurement. According to economist James Henry, the richest people in the world had at the end of 2010 at least 21,000 billion dollars in tax havens, namely the gross domestic product of United States and Japan together[9].

De lege lata, the actions of money laundering are deemed offenses and are provided for by Law no. 656/2002. According to art. 29 of Law no. 656/2002:

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banks of din Mexico, and these funds were subsequently transferred to a company of Miami (see J. Robinson, Laundryman, Ed. Pocket Books; 2nd edition, 1998).

[5] See C. Adochiței, I. Adochiței, *Spălarea banilor*, Revista de Drept Penal (Money laundering, Criminal law journal) no. 1/2003, p. 97.

[6] For a work discussing this matter, see J. Robinson, The Merger - *How Organized Crime is Taking Over The World*, Ed. McClelland & Stewart, 2000.

[7] US Federal Bureau of Investigation defines money laundering as a process (a series of connected actions for a well defined purpose) whereby the existence, source and use of the illegal income is hidden, by pursuing the creation of a legal appearance and the avoiding of the discovery and punishing of the offenders, as well as the confiscation of the assets or the taxation of the income. For the scopes of money laundering, see P. Ciobanu, Prevenirea și combaterea infracțiunii de spălare a banilor, Revista română de drept al afacerilor (Prevention and control of money laundering, Romanian Journal of Business Law) no. 6/2003, Bucharest, Rosetti Publishing House, p. 45.

[8] S. Nițu, *Protecția penală a sistemului financiar-bancar împotriva infracțiunii de spălare a banilor, rezumat teză de doctorat (Criminal protection of financial and banking system against money laundering offense, PhD. thesis abstract*), 2010, p. 7 (www.univnt.ro).

[9] See article Tax havens: Super-rich 'hiding' at least $21tn, published by BBC (http://www.bbc.co.uk/ news/ business). James Henry stated that private property held offshore is a huge black hole in the global economy, and the good news is the that the world located a huge financial wealth which can be used in order to solve some of the most pressing global issues.

„The following shall be deemed money laundering offense and shall be punished by imprisonment for a term between 3 to 10 years:

a) the exchange or transfer of proceeds, knowing that they originate from crime, for the purpose of concealing or disguising the illicit origin of these proceeds or for the purpose to help the person who committed the offense the proceeds originate from to evade prosecution, trial or imprisonment;

b) the concealment or disguise of the true nature of the source, location, disposition, movement or ownership of the proceeds or of the rights over the proceeds, by knowing that the proceeds originate from the commission of offenses;

c) the acquisition, possession or use of proceeds„by knowing that the proceeds originate from the commission of offenses".

2. Is money laundering a qualified subject offense?

The active subject of money laundering offense (**money launderer**) is not expressly qualified in the indictment rule.

In many cases the persons performing dirty money laundering activities are deemed to carry out a professionally criminalized activity, as a job, therefore, at least in these cases, those persons could be called **money launderers,** without the risk the expression being deemed a wrong expression. The expression is also employed in official documents or normative acts. For example, the expression is employed in Directive 2001/97/EC, paragraph 14 of the Preamble[10]. Furthermore, the expression of money launderer is frequently used in the foreign literature. For example, Jeffrey Robinson wrote a paper entitled ***Laundryman*[11].**

In our opinion, the offender or the co-offender who committed the predicate offense, the accomplice or instigator to the commission of the predicate offense (*delictum principale* – the dirty money originates from) cannot be the active subject of the money laundering offense (*delictum subsequens*).

In what concerns the offender who commits the predicate offense, in respect of the circumstance of having the capacity of active subject of the first offense, we can say that it became the holder of the proceeds by committing the main offense[12]. The accomplice and instigator, as secondary parties of a joint enterprise, should have the same legal *fate* as the offender and the co-offender who committed the offense the proceeds originate from.

Furthermore, we consider that the *ne bis in idem* adage according to which a person can be prosecuted only once for the same offense, would have been violated. Furthermore, there are certain modalities of the material elements, especially those provided for by art. 29 par. (1) letter c), which are basically involved in the predicate offense. For example, the thief holding the stolen asset.

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[10] According to the text, among the money launderers there is the increase tendency of performing non-financial activities. This ascertainment is confirmed by the GAFI activity on the money laundering techniques and typologies.

[11] J. Robinson, *Laundryman,* Ed. Pocket Books; 2nd edition, 1998.

[12] *Ibidem.* See M. Mutu, *op. cit.,* p. 117. For example, the law of Liechtenstein provides that the proceeds can be laundered only be the person who did not take part in the predicate offense. The person who committed the predicate offense can be held liable only for this offense, and not for other subsequent actions on the proceeds gained following the commission of the predicate offense. For a similar opinion, see D. Ciuncan, A. Niculiță, *Subiectul activ al infracțiunii de spălare a banilor (The active subject of money laundering offense)*, R.D.P. no. 2/2006, p. 107-108.

In what concerns the potential violation of the *ne bis in idem* principle*,* by means of Decision no. 73/2011, the Constitutional Court noted the following: „the criticized legal provisions were subject to the constitutional control from the point of view of a similar criticism. Therefore, on the occasion of the pronouncing of Decision no. 299 of March 23rd, 2010, published in the Official Journal of Romania, Part I, no. 295 of May 6th, 2010, and Decision no. 889 of October 16th, 2007, published in the Official Journal of Romania, Part I, no. 771 of November 14th, 2007, the Court noted that "the criticism according to which art. 23 par. (1) (currently art. 29 – n.n. M.A.H.) of Law no. 656/2002, would prejudice the provisions of art. 4 paragraph 1 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which lays down *non bis in idem* principle cannot be noted, due to the fact that, in order for this principle of criminal procedural law to become applicable, the person in question must have been convicted, acquitted, or the cessation of the criminal proceedings against the respective persons must have been ordered for the offense on which the person is again prosecuted or sentenced. In case of multiple offenses, the offender shall be applied a main penalty, under the observance of the provisions of art. 4 paragraph 1 of Protocol no. 7 to the Convention"[13].

The reasons of the Constitutional Court are appropriate in respect of the criminal procedural law, namely if we strictly discuss in terms of the formal incidence of *ne bis in idem* principle*.* However, in what concerns money laundering offense we cannot rely on the procedural possibilities of the above mentioned rule, but on the substantive criminal law according to which **nobody can be held criminally liable twice for the same offense**.

The doctrine provided the following: „*the ne bis in idem principle is violated by means of the possibility of the effective prosecution of those who have committed the offense the dirty money originates from and the money laundering offense in the normative version provided for by art. 29 par. 1 letter c) of Law no. 656/2002 when the money laundering offender acquires the proceeds following the commission of offenses, if the acquisition of proceeds is not followed by a subsequent action for the purpose of disguising the illegal origin of the proceeds*"[14].

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[13] Under the same decision, the constitutional court noted that: „In what concerns the provisions of art. 23 par. (5) (currently art. 29 – n.n. M.A.H.) of Law no. 656/2002, criticized in terms of lack of predictability, it is ascertained that they establish objective criteria for the assessment of the criminal type of the offenses committed in relation to the proceeds or the amounts originating from an offense. Furthermore, the doctrine of the European Court of Human Rights ruled that the legal regulation must be sufficiently accessible and predictable so that to enable the citizen to own information on the legal regulations applicable in a given case and to be able to reasonably foresee the consequences that may arise. Therefore, under Resolution of August 25th, 1998, pronounced in case Hertel against Switzerland, The European Court of Human Rights noted that the predictability of the law does not need to be accompanied by absolute certainties. The certainty, even if desirable, is sometimes accompanied by excessive rigidity or the law must be able to adapt to changes. There are many laws which, by the nature of the things, use more or less uncertain formula of which interpretation depends on the jurisprudence, as in case of the Romanian judge. Under Resolution of November 25th, 1996, pronounced in case Wingrove against Great Britain, the European Court of Human Rights decided that the relevant domestic law which includes both the written and the unwritten law, must be formulated with sufficient accuracy so that to enable the interested persons who can resort, if necessary, to the expert advice, to reasonably foresee, under the circumstances of the case, the consequences that may result from a determined act. Therefore, a law which assigns the power of appraisal (as the case of the authorities called to apply the law) does not violate this requirement".

[14] C. Bogdan, *Infracțiunea de spălare a banilor. Autonomie. Subiect active (Money laundering offense. Autonomy. Active subjects),* www.juridice.ro.

Neither the American law (USA) punishes the person who committed the predicate offense (§1957) and, according to a part of the doctrine, neither the German law incriminates the offense of the person who committed or caused the commission of the predicate offense, except the accomplice, who can be punished if it is punished more severely for the predicate offense[15].

The French judicial practice (on January 14th, 2004) issued a decision whereby the Court of Cassation considered that the offender who committed the predicate offense may also be an active subject of the money laundering offense[16]. In the case which led to the aforementioned decision, a natural person convicted for clandestine labor and tax fraud, who was prosecuted for the offense of participation in the disguising of the proceeds, was also convicted for the abroad clandestine transfer of the proceeds[17]. This decision was criticized by the French doctrine[18].

In the Russian Federation, according to the decision of the Supreme Court of the Russian Federation, the predicate offense and the money laundering offense are deemed multiple offenses[19].

In an opinion recently expressed, it is noted the following *„the possibility of the effective prosecution of those who have committed the offense the dirty money originates from and the money laundering offense must be assessed depending on the case, under the observance of the rule on the strict construction of the law"*[20]. The same author showed that: *„The legislator itself outlines the impossibility of the effective prosecution of those who have committed the money laundering offense and the offense the proceeds originate from in the normative version provided for by art. 29 par. 1 letter a) 2nd thesis of Law no. 656/2002* (*exempli gratia, the transfer in order to help the person who committed the predicate offense*)"[21].

Within the national doctrine, there are authors who believe that the active subject of the predicate offense can also be the active subject of the offense provided for by art. 29 of Law no. 656/2002. In the reasoning of this point of view, it is shown that the expression *„knowing that the proceeds originate from crime can be construed in relation to the mental position of the person committing the predicate offense, meaning that it is necessary that the person is not wrong on the criminal nature of the committed offense, because, on the contrary, the unlawfulness of money laundering offense and of the predicate offense would be removed"*[22].

As in the doctrine, in the jurisprudence, there are different points of view regarding the active subject of the money laundering offense.

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[15] M. Mutu, *op. cit.,* p. 33.

[16] W. Jeandidier, *Droit pénal des affaires, Précis,* Dalloz, 2003, no. 21.

[17] See: L'arrêt de la Cour de Cassation de la France du 14 janvier 2004. Chambre criminelle, Recueil Dalloz, 2004, nr. 19, p. 1377; *Le blanchiment de soi-même. Droit pénal* (éditions du Juris-Classeur), April 2004, p. 10, apud M. Mutu, op. cit., p. 118.

[18] See: C. Chantal, *L'auteur de l'infraction principale et le blanchiment*, Recueil Dalloz, 2004, nr. 19, p. 1377-1381; M. Haritin, *La répresion du blanchiment d'argent,* Revue de Droit Bancaire et Financier, 2002, no. 6 (novembre/decembre), p. 362-365; V. Malabat, *Droit pénal spécial,* Dalloz, 2003, apud C. Bogdan, R.D.P. no. 4/2006, p. 128.

[19] M. Mutu, *op. cit.,* p. 44; C. Bogdan, *op. cit.*, p. 129.

[20] C. Bogdan, *op. cit.,* p. 506.

[21] C. Bogdan, *Infracțiunea de spălare a banilor. Autonomie. Subiect active (Money laundering offense. Autonomy. Active subjects),* www.juridice.ro.

[22] P. Munteanu, *op. cit.,* p. 44. See the note of prof. G. Antoniu la D. Ciuncan, A. Niculiță, *op. cit.,* p. 108.

Therefore, by means of Decision no. 147/2011, the High Court of Cassation and Justice noted the following *„The subsequent nature of the money laundering offense emerges from the fact that the offense results from another offense, which is the predicate offense. Therefore, the active subject of the two offenses cannot be the same person*"[23].

Instead, under Decision no. 836/2013, the Supreme Court noted that *„the money laundering offense may be attributed to any person and the active subject of the offense is not qualified, this capacity being held by any natural person who meets the general conditions of the active subject of the offense, and therefore, the participant in the predicate offense cannot be the active subject of the offense (...).*

The expression „knowing that the proceeds originate from crime can be construed in relation to the mental position of the person committing the predicate offense, meaning that it is necessary that the person is not wrong on the criminal nature of the committed offense.

The lack of the explicit intervention of the legislator in order to establish that the person who committed the offense the proceeds originate from is excluded from the category of the persons who may be subject of the money laundering offense proves that the legislator believed that any person may hold this capacity (the High Court of Cassation and Justice also ruled in respect of the aforementioned reasoning, under criminal decision no. 5966/2003)"[24].

We believe that the arguments in favor of the opinion according to which the offender and the participant in the predicate offense cannot be the active subjects of the money laundering offense are stronger than those made in support of the contrary opinion.

In our opinion, the expression ***knowing that the proceeds originate from crime*** is used by the legislator, firstly, **in order to exclude** from the category of the active

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[23] www.scj.ro. See T. Neamț, Sentința penală nr. 31/2011 (Criminal judgment no. 31/2011). In the reasoning of this resolution, the following is noted: „The active subject of money laundering offense is always different from the active subject of the offense the money or assets originate from, as shown from the review of the content of the law.

The European Convention on laundering, search, seizure and confiscation of the proceeds from crime deems as money laundering offense the acquisition, possession or use of property knowing at the time of the receipt that such property was proceeds from crime (art.6 letter c). It can be noted the intention of the Romanian legislator to take over almost entirely the provisions of the European Convention, being clearly noted the distinction between the money laundering offender and the person involved in the commission of the offense the proceeds originate from.

The convention distinguishes between the predicate offense the proceeds originate form and the money laundering offense, and the money laundering offender must presume that the property is proceeds of the predicate offense.

Therefore it must be a distinct offender who knows the illegal origin of the proceeds in the absence of which there could not be the money laundering offense. The expression "*knowing that the proceeds originate from crime"* is used by the legislator in order to exclude from the category of the active subjects the persons involved in the commission of offenses the proceeds subject to money laundering originate from. If this expression had been used in order to include in the category of active subjects the persons who committed the predicate offense, the expression would have been unnecessary, due to the fact the person who committed the offense the proceeds originate from knows that the respective act is an offense" (Details: http://legeaz.net/spete-penal/infractiunea-de-spalare-a-banilor-31-2011).

[24] www.scj.ro. See Ș. Tudor, Spălarea banilor. Practică judiciară adnotată (Money laundering, Annotated judicial practice), Hamangiu Publishing House, Bucharest, 2013, p. 40 (see also the notes of the cases) in order to review a case where the issue on the capacity of active subject of the money laundering offense.

subjects **the persons involved in the commission of offenses the proceeds subject to money laundering originate from**. If we believed that this expression is used in order to include in the category of active subjects the persons who committed the predicate offense, the expression would be unnecessary, due to the fact the person who committed the offense the proceeds originate from knows that the respective act is an offense.

If the person does not know that the respective act is an offense, the person cannot be an active subject of the predicate offense, in which case the person may acquire the capacity of active subject of the money laundering offense if it subsequently becomes aware of and at the time of the offense it knows that the proceeds originate from an offense.

Another argument in support of our opinion is that the **concealment or disguise** are essentially **intentional activities**, therefore the note on the knowledge of the origin of the proceeds was not necessary due to the fact that the legislator's intention is to disguise the criminal origin of the proceeds. The concealment or disguise of the (criminal) origin of the proceeds implies the fact that the person is aware of it. In the absence of the knowledge (intention), we cannot discuss about concealment or disguise, therefore the note is again unnecessary.

Any way, the note on the knowledge in respect to the origin of the proceeds was not necessary, due to the fact that, according to art. 19 par. (2) of the Criminal Code, there is guilt when the acts that resides in an action are committed with intent.

Furthermore, the legislator uses a similar language in case of the offense of concealment and nobody claimed that the person who committed the offense the concealed proceeds originate from may be an active subject of the offense of concealment. Furthermore, the recent jurisprudence claimed that the person who participated as accomplice in the offense the proceeds originate from cannot be deemed fence[25].

Therefore, we believe that the scope of the expression *knowing that the proceeds originate from crime* is to exclude from the area of the active subjects the persons who committed the offense the laundered assets originate from.

The reasoning of the draft bill on the enforcement of the new Criminal Code cannot be an argument in supporting the opinion contrary to the one claimed by us, due to the fact that the definitive version of the law (see Law no. 187/2012) did not keep the form proposed by the authors of the draft bill (the note that in case of letter c the offender cannot be the offender or the participant who is involved in the commission of the predicate offense)[26].

The money laundering offence **may subsist**, **even if the person who committed the predicate offense is not held criminally liable**, if it is ascertained that the predicate offense meets the conditions of an offense. For example, a case which excludes the criminal liability or the execution of the criminal penalties is deemed to be incident.

3. Conclusions

By taking into account the aforementioned arguments, we reinforce our opinion according to which *de lege lata* the offender, co-offender, accomplice or instigator to the commission of the offense the laundered proceeds originate from cannot have the

[25] I.C.C.J., S.U., dec. nr. 2/2008.

[26] For the reasoning supporting the contrary opinion, see A.A. Dumitrache, op. cit., p. 251.

capacity of active subjects of the money laundering offense, due to the fact that it would be drawn the unjustifiable conclusion that this offense may be committed by any person holding proceeds originating from other offenses. For example, thief, robber etc. Furthermore, the scope of the offense of concealment or the abetment in crime would be limited or excluded.

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