

# MONEY LAUNDERING OR LAUNDERING OF THE PROCEEDS OF CRIME?

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## Abstract

*This paper aims to analyse which of the phrases **money laundering** or **laundering the proceeds of crime** is more appropriate to describe the crime provided by art. 23 of Law no. 656/2002 on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing. In this respect, the article includes a survey of the important international documents in this matter ratified by Romania - United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, The United Nations Convention against Transnational Organized Crime, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. To remove any ambiguities arising from the approach of the money laundering concept and to reach a conclusion, there are also presented the controversial views regarding the use of the expression money laundering in both Title and content of Law, views expressed in specialized literature.*

**Keywords:** concept of money, money laundering, laundering the proceeds of crime, organized crime, subject to a transaction

## Introduction

The common denominator in all acts of organized crime and the most serious crime is the desire to obtain unlawful financial and material profits, what motivates organized groups to be concerned with masking, disguising, concealing, recycling, or investing the profits obtained from crime, all these operations give rise to a legal appearance of illegal income.<sup>1</sup>

In other words, the income derived from criminal activity, in order to be reinvested in other businesses by criminals, must be “cleansed”, “washed” so that it cannot be distinguished from the legitimate income.

It is fundamental in understanding the definition of money laundering the definition of money. Thus, money is any value that can be easily transferred from person to person and that it is accepted by most people as payment for goods, services, debts, etc.

Money, a present concept in the phrase money laundering may be: cash, precious metals and stones, credit cards, money orders, cards, etc., any amount deemed to be subject to a transaction. In order to properly define money laundering it must be taken into consideration that, firstly, money laundering is a complex and dynamic process, conducted in three stages, being the subject to some considerable changes<sup>2</sup>.

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<sup>1</sup> Georgeta Valeria Sabău, *Traficul și consumul ilicit de droguri și precursori. Combaterea traficului și consumului ilicit de droguri și precursori prin mijloace de drept penal*, (Bucharest, Universul Juridic Publishing House, 2010), p. 342.

<sup>2</sup> Mary – Jo Kranacher, Richard Riley and Joseph T. Wells, *Forensic Accounting and Fraud Examination*, (USA, RDC Publishing Group, 2010), p. 94.

### **The Definition Of Money Laundering**

Before clarifying the correct name of the crime we will make a foray into the specialized literature both in Romania and other countries of Europe, in the European Union regulations, the United Nations and of international bodies competent in this matter - group of Financial Action (FAFT / FATF), International Monetary Fund, Interpol, the World Bank, the International Organization of Securities Commissions (IOSCO).

*United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances*,<sup>3</sup> adopted on 19 December 1988 in Vienna, although they do not use terms of *money laundering*, they define this process as: the intention of concealing the origin, nature, disposal, movement or owner of the funds derived from illicit traffic in narcotic drugs, including the movement or conversion by electronic transmission methods, in order to give the appearance that these funds are derived from legal activities.<sup>4</sup>

The provisions of this document, money laundering is, per se, limited to criminal activity involving proceeds of crimes related to drugs.

**Article 6** of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime*<sup>5</sup>, defines money laundering as:

- Processing and transfer of property of which the one who used it knew that they are proceeds of crime, in order to conceal or disguise the illicit origin of goods or for helping any person involved in committing the major crime to escape the legal consequences of his action;
- Concealment and disguise of the nature, origin, location, disposition, movement or real ownership of property or the rights thereof, which the owner knew that the products are proceeds of crime;
- Purchasing, procurement and use of goods, which the person who acquired them, hold or use knew, at the moment of receiving products, that are proceeds of crime;
- Participation in one of the offenses set out previously or any other form of association, attempt, or complicity by providing assistance or advice in order to commit the crime.

*UN Convention against transnational organized crime*<sup>6</sup>, uses both terms laundering of proceeds of crime and money laundering. Thus, article 6 of the Convention called the *criminalization of laundering of proceeds of crime*, calls on states to adopt the fundamental principles of its domestic law, such legislative and other measures necessary to establish the offense, when the act was committed intentionally:

a) (i) change or transfer of property to one who knows they are from crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person involved in committing the offense to evade from the legal consequences of his acts;

(ii) The concealment or disguise the true nature, source, location, disposition, movement or ownership of property or other related rights, whose perpetrator knows that they are proceeds of crime;

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<sup>3</sup> Opened for signature on 20 December 1988 in the framework of the Sixth Plenary Session of the UN Conference in Vienna on Psychotropic Substances. Romania acceded to the Convention by Law no. 118 of 15 December 1992, published in Official Monitor Romania, Part I, no. 341 of December 30, 1992.

<sup>4</sup> Article 3 letter b), c).

<sup>5</sup> Ratified by Romania by Law no. 263/2002, published in the Official Monitor of Romania no. 353 of May 28, 2002.

<sup>6</sup> Ratified by Romania by Law no. 565 / 2002 and published in Official Monitor of Romania no. 813/8.11.2002. Romania has signed on 14 December 2000 in Palermo, the United Nations Convention against Transnational Organized Crime and its two protocols adopted in New York, 15 November 2000.

- Protocol on preventing, suppressing and punishing trafficking of persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime;

- Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime.

b) and subject to the basic concepts of its legal system:

(i) the acquisition, possession or use of property which the one who purchases, possesses or uses them, knows, at the moment of the receive, that they are proceeds of crime;

(ii) participation in one of the offenses provided for under this article or any other association, understanding, attempt or complicity by assistance, help or advice in order to commit it.

**Article 7** of the *UNO Convention against transnational organized crime* uses also terms of money laundering, this article is entitled *Measures to combat money laundering*.

Regarding the different terminology used in this Convention, for the same crime, *the General Assembly of the United Nation* equates the expressions *money laundering* and *laundering proceeds of crime* (A/55/383/Add.1, para. 10).<sup>7</sup>

According to the FATF recommendations, money laundering is *defined as processing the proceeds of crime in order to conceal their illegal origin*.<sup>8</sup>

*Corpus Juris*,<sup>9</sup> incriminates in article 3 money laundering and abetting regarding the offenses under this document. Article 3, al 1 defines money laundering as: *the conversion or transfer of property from a subject crime or a criminal act of participating to such an offense, with the purpose of concealing or disguising the illicit origin of property or of helping any person involved in this activity to avoid legal consequences of his actions*.

We note that, in *Corpus Juris*, it is used the phrase laundering revenue or profits resulted from fraud offenses described in *Corpus Juris*, crimes that affect the financial interests of the European Union (art. 1, 2, 4 and 8).

In the definition of the **World Bank and International Monetary Fund**, money laundering is *the process whereby the assets acquired or generated by criminal activities are moved or disguised in order to conceal their relation to crime*.<sup>10</sup>

**Interpol General Assembly** in 1995 adopted the following definition of money laundering as: *any act or attempt to conceal or disguise the origin of illegally obtained money so that it creates an appearance of legality to their origin*.<sup>11</sup>

**French Criminal Code** in **article 324-1** defines money laundering by the following terms: *the act of facilitating, by any means possible, the false justification for the origin of goods from the perpetrator in order to achieve a profit directly or indirectly. It also represents money laundering the participation of a placement operation, concealment or conversion of direct or indirect proceeds of an offense or crimes*.

**Article 301** of *the Spanish Penal Code* provides that any person is guilty of money laundering if he receives, transforms or transmits property, knowing that they come from a serious crime, or makes any other act to conceal the illicit origin of goods or he helps the person who participated in the offense or crime to evade the consequences of his act (article 301, al. 1).

Also, according to Spanish criminal stipulations money laundering is also the concealment or disguising the true nature, origins, locations, destinations, movements, or property rights over their

<sup>7</sup> Nations Unies, *Guides Législatifs pour l'Application de la Convention des Nations Unies: Contre la Criminalité Transnationale Organisée et des Protocoles s'y Rapportant*, Naciones Unies, 2005, p. 47.

<sup>8</sup> The 40 Recommendations of the Financial Action Group, www.onpcsb.ro.

<sup>9</sup> Concerned with the criminal protection of EU financial interests and the harmonization of criminal law especially regarding community fraud and corruption, a group of experts from the European Council drew up and published in 1997, a document that rules 8 offenses affecting the European Union's financial interests, as follows: article 1 – fraud; article 2 - fraud in the matter of concluding transactions; article 3 - money laundering and abetting offenses relating to the *Corpus Juris*; article 4 - association in order to commit crimes; article 5 – corruption; article 6 – embezzlement; article 7 - abuse of office; article 8 – disclosing service secrets.

<sup>10</sup> Donato Masciandaro, Elod Takats and Brigitte Unger, *Black Finance: the economics of money laundering*, (London, Edward Elgar Publishing, 2007), p. 109.

<sup>11</sup> Bruce Zagaris, *International White Collar Crime: Cases and Materials*, (New York, Cambridge University Press, 2010), p. 508.

assets, knowing that the goods come from committing any acts set forth above or from an act of participation. (article 301, al. 3).<sup>12</sup>

**In the Italian Penal Code, article 648 bis** it is incriminated the act of the person who replaces or transfers money, goods or other utilities that come from crime, or he connects with these operations that prevent the identification of the illegal origin.<sup>13</sup>

**Article 648 ter.** of Italian Penal Code rules the use of money, property or other utilities of illicit origin.

**The German Criminal Code in Section 261** defines money laundering as: the deed of a person who *hides* an object that comes from committing one of the criminal acts under the law (all crimes and certain offenses), *obscuring* the origin or provenance *thwarts or jeopardize* finding, tracing, seizing such asset and also the one who *has* for himself or another or *holds* or *uses* for himself or for another property knowing, at the time of acquisition, that they come from crime.<sup>14</sup>

In foreign specialized literature, money laundering has been defined as the process of integration of crime proceeds in commercial and financial law channel by disguising their illicit origin<sup>15</sup>; disguising the existence, nature, source, owner, location and / or provision of goods from the criminal activity or as a simple formulation, the process by which dirty money is cleaned<sup>16</sup>; the process by which criminals attempt to conceal the origin and ownership of crime proceeds in order to maintain control over them and to "cover" the illicit income.<sup>17</sup> Money laundering is the name given to the process by which money is moved through various transactions so that funds are separated from their criminal source.<sup>18</sup>

Money laundering has been defined as being a wide range of activities and processes intended to obscure the source of illegally obtained money and creating an appearance of legality of the origin of this money.<sup>19</sup>

According to the Romanian doctrine, money laundering has been defined as: a complex economic and fraudulent financial transactions, having as main objective to create conditions for the use and increase, on legal ways, the profits from illicit activities of large transnational organized groups;<sup>20</sup> any action of concealment, camouflage, acquisition, possession, use, investment, movement, storage or transfer of property which the law expressly confers the status of crime in connection with illegal acts and crimes specified in such law and which relate to earnings from other crimes;<sup>21</sup> a criminal action method such as drug trafficking, illegal arms trafficking and terrorism, trafficking in credit card, hide the origin of illegally acquired funds in order to avoid their detection and risk prosecution when they are placed on the market;<sup>22</sup> the process of trying to conceal the origin

<sup>12</sup> Juan Miquel del Cid Gomez, *Blanqueo internacional de capitales: como detectarlo y prevenirlo*, (Barcelona Ed. Deusto, 2007), p. 137.

<sup>13</sup> Pasquale Fava, *Analisi sistematica della giurisprudenza penale – Delitti contra la Pubblica Amministrazione ed il patrimonio*, (Santarcangelo di Romagna, Maggioli Editore Publishing House, 2009), p. 407.

<sup>14</sup> Camelia Bogdan, *Infrafracțiunea de spălare a banilor în legea franceză și germană*, *Revista de Drept Penal* 4 (2006): 128.

<sup>15</sup> Ismail A. Odeh, *Anti – Money Laundering and Combating Terrorism Financing for Financial Institutions*, (Pittsburg, Pennsylvania, Dorrance Publishing, 2010), p. 1.

<sup>16</sup> Mary – Jo Kranacher, Richard Riley and Joseph T. Well, *Forensic*, p. 94.

<sup>17</sup> Doug Hapton, *Money Laundering. A Concise Guide for All Business*, Second Edition, (England, Gower Publishing Limited, 2009), p. 1.

<sup>18</sup> Colin Barrow, *The Global Property Investor's Toolkit: A Sourcebook for Successful Decision Making*, Capstone Publishing Ltd., USA, 2008, p. 156.

<sup>19</sup> IOSCO, Technical Committee, 1992, *Report on Money Laundering*, October No. 25, Ibidem, p. 109.

<sup>20</sup> Georgeta Valeria Sabău, *Traficul*, p. 343.

<sup>21</sup> Ștefan Popa and Adrian Cucu, *Economia subterană și spălarea banilor*, (Bucharest, Expert Publishing House, 2000), p. 60.

<sup>22</sup> Geo Avroae, *Dreptul penal al afacerilor pe înțelesul tuturor sau cum să conduci afaceri fără să-ți pierzi libertatea sau averea*, (Bucharest, Dacoromână Publishing House, 2004), p. 305.

and the real possession of income come from criminal activities;<sup>23</sup> giving a financial product look legitimate or legal of the financial product (money and property) resulting from certain categories of crimes committed by criminals using sophisticated methods and techniques which involve the banking system or other specific entities of the market economy (capital market, insurance companies, casinos).<sup>24</sup>

From the analysis of the above definitions, it results that there is money laundering offense when there are committed with intent of changing or transferring some goods in order to hide or disguise their illicit origin, knowing that they are products of crime; to hide or conceal the real nature of the goods in terms of provenance, ownership, location, movement and rights relating to such property; the acquisition, possession or use of property, knowing that they originate from a criminal action and from any act of participation or support in any form to the actions described above.

In Romania,<sup>25</sup> the **Law no. 656 / 2002** for the prevention and punishment of money laundering, and instituting some measures to prevent and combat financing acts of terrorism<sup>26</sup>, regulates in article 23 the crime of money laundering, as follows: (1) The crime of money laundering is punished with imprisonment from 3-12 years:

- a) *change or transfer of property, knowing that they come from committing crimes, with the purpose of concealing or disguising the illicit origin of property or in order to help the person who committed the offense from which the goods come from, to evade prosecution, trial or execution of sentence;*
- b) *the concealment or disguise of the true nature, source, location, disposition, movement or ownership or rights over their property, knowing that the goods come from committing crimes;*
- c) *the acquisition, possession or use of property, knowing that they come from crime. "*

### **Critical Analysis Of The Phrase "Money Laundering"**

In Romania, on the law governing the designation of the crime, given the controversial opinions that exist in literature, there is required a series of discussions.

Thus, there were **critical opinions** to calling on Law of "preventing and combating money laundering", supporting the fact that the term *money laundering* now reflected in the title of the law and in the name of the crime provided for in article 23 does not match the content of Law no 656 / 2002 nor the crime defined by article 23, al. 1.

In the support of this opinion there were the provisions of article 1 of Law no. 656/2002 according to which "*this Law establishes measures to prevent and combat money laundering.*" It was emphasized that strictly grammatically, *money laundering and laundering of proceeds of crime* are not synonymous, the latter including not only money but also other goods, values, rights, etc. Supporting the same idea it was also mentioned that the material object of this crime, as defined in article 2 al. 1 of Law no. 656/2002 consists of tangible or intangible goods, movable or immovable, and legal documents or instruments that evidence that this title or relating rights, bringing out a much broader scope than just "money".

<sup>23</sup> Dumitru Matis, Cristina Palfi, Răzvan Mustață, *Importanța cunoașterii clientelei în prevenirea și combaterea spălării banilor*, Tribuna Economică 51-52, (2004): 75.

<sup>24</sup> Costică Voicu, et al., *Drept penal al afacerilor*, Publishing House, Bucharest, 2002, p. 203.

<sup>25</sup> Prevention and punishment of money laundering were initially regulated by Law no. 21/1999 on preventing and sanctioning money laundering, published in Official Monitor of Romania, Part I, no. 18 of January 21, 1999, repealed according to article 31 of Law no. 656 / 2002.

<sup>26</sup> Published in the Official Monitor of Romania no. 204 of December 12, 2002, as amended and supplemented by GEO no 53/2008 regarding the amendment of Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures to prevent and combat terrorism financing, published in Official Monitor of Romania, Part I, no. 333 of April 30, 2008, and GEO no 26/2010 for amending and supplementing GEO no 99/2006 on credit institutions, capital adequacy and other norms, published in Official Monitor of Romania no. 208 of April 1, 2010.

The arguments in favor of these criticisms were also from the **historical perspective** on the phase of prevention and combat money laundering, phase exceeded by the current reality, which requires extending the crime of conviction of any proceed which is washed, and those related to the fact that using the words *money laundering* it is affected the preventive law side because it leaves room for interpretation and confusion on the subject of crime and in executing its obligations established by the law in question.<sup>27</sup>

A "*regrettable gap*" between the provisions of Law no. 656/2002 and international and European law in money laundering domain – the European Convention on Laundering, Search, Seizure and Confiscation of crime and the Convention against transnational organized crime of the United Nations, has been reported by other authors as well who have views that the two phrases "money laundering", used by the Romanian legislator and "laundering of proceeds of crime", used by the above mentioned Conventions and that include any other property or values thus money<sup>28</sup>, are not synonymous.

There are separate opinions<sup>29</sup> that the Warsaw Convention by ratifying the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of crime and terrorist financing, although the Romanian legislator has not defined in the Law no. 656 / 2002 the proceeds expression, by the provisions of article 23 of the law it refers to goods coming from committing any crimes. It was also claimed that the Romanian state is not required to replace the incumbent term of laundering proceeds of crime with money laundering because the Strasbourg Convention is ratified by Romania by Law no. 263 / 2002, does not provide this obligation for states, nor the obligation to include references to the material object of the crime in the name of its marginal denomination, given that money laundering is the term used in several laws and the Conventions that contain the obligation to incriminate money laundering establishes the term of "money laundering offense."<sup>30</sup>

Regarding the terminology used in naming the Law no. 656 / 2002 to prevent and combat *money laundering* and establishing measures to combat and prevent terrorist financing, it was claimed that the Romanian legislator has given a broad interpretation of money laundering phrase when he incriminated these facts, given both money and property and other rights on them, the legislator incriminated the act of money laundering that come from the illicit proceeds or of money laundering illegally obtained in other securities or cash.<sup>31</sup>

## Conclusions

As we mentioned before, money is any value that can be easily transferred from person to person and that it is accepted by most people as payment for goods, services, debts, etc. Money, a present concept in the phrase money laundering may be: cash, precious metals and stones, credit cards, money orders, cards, etc., any amount deemed to be subject to a transaction.<sup>32</sup>

Looking from this perspective, we believe that using the phrase *money laundering* to define the offense according to article 23 of Law no. 656 / 2002, is itself improper as a money laundering operation does not actually involve money, there is money laundering every time there is an activity (transaction) that involves any property value, assets, income, that is the product of a crime.

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<sup>27</sup> Valerică Dabu and Sorin Cătinean, *Noua lege pentru prevenirea și sancționarea spălării banilor (Legea nr. 656/ 2002) și Convenția Națiunilor Unite împotriva Criminalității Transnaționale Organizate*, Revista Dreptul, XIV<sup>th</sup> Year, III<sup>rd</sup> Series 6 ( 2003): 24.

<sup>28</sup> Georgeta Valeria Sabău, *op. cit.*, p. 344.

<sup>29</sup> Camelia, Bogdan, *Infrațiunea de spălare a banilor și infrațiunea de tănuire*, in Revista de Drept Penal, no 4/ 2009, ( Bucharest, R.A. Official Monitor, 2009), p. 99.

<sup>30</sup> Camelia Bogdan, *Infrațiunea*, p. 99.

<sup>31</sup> Ioan Lascu, *Spălarea banilor. Actualitate. Realitate socială și incriminare*, Revista Dreptul, XIV<sup>th</sup> Year, III<sup>rd</sup> Series, 6 (2003), p. 7.

<sup>32</sup> Mary – Jo Kranacher, Richard Riley, Joseph T. Wells, *Forensic.*, p. 94.

However, based on international documents in matters of money laundering ratified by Romania (the Vienna Convention, the Strasbourg Convention, the Palermo Convention and the Warsaw Convention) which does not require to states the use of a certain terminology to define the crime of money laundering and the interpretation of article 23 of Law no. 656/2002 from where it clearly results that the Romanian legislator not only limits the incrimination of money laundering, but refers to laundering any good or any tangible or intangible, movable or immovable property derived from any crime, therefore we are not convinced of the necessity to replace money laundering with the phrase laundering of proceeds of crime.

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