THE CRIMINAL OFFENCE OF MONEY LAUNDERING – A SERIES OF THEORETICAL AND PRACTICAL CONSIDERATIONS

Constantin NEDELCU[*]

Abstract

The paper at hand addresses the extremely complex and sensitive matter relating to one of the most controversial offences in the criminal laws of Romania – in particular, the criminal offence of money laundering. This paper bears both theoretical and practical interest, in that it points out specific instances of court case-law which were given different constructions by various judiciary authorities.

Keywords: *money laundering, concealment, aiding and abetting, concurrence of offences, concurrent regulations.*

1. The criminal offence of money laundering as reflected in international legal instruments

The criminal offence of money laundering is reflected in international legal instruments, and this as a result of the particularly high degree of social jeopardy that is attached to the criminal offence in question.

Thus, the recitals of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the European Council[1], state that this legal instrument was adopted in the context of all signatory states being convinced of the need to pursue a common criminal policy aimed at the protection of society, considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale, believing that one of these methods consists in depriving criminals of the proceeds from crime, and the shared conclusion that for the attainment of this aim a well-functioning system of international co-operation must be established.

In accordance with Article 6 of the above-mentioned Convention, called: "Laundering offences", such criminal offences shall consist of the following, 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, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system: 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 2 of the same article also includes several clarifications as to the manner in which the provisions incriminating laundering offences are to be implemented or applied in the domestic law of the signatory states. They will appraise whether: a) the predicate offence was subject to the criminal jurisdiction of the state Party; b) the offences do not apply to the persons who committed the predicate offence; c) knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

In addition, paragraph 3 of the same article further states that each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender: a) ought to have assumed that the property was proceeds; b) acted for the purpose of making profit; c) acted for the purpose of promoting the carrying on of further criminal activity.

Under the aegis of the European Union, other legal instruments were also enacted aimed at penalizing offences of money laundering, in testimony to the fact that this phenomenon is deemed to be extremely severe, all Member States expressing the need to fight against it. The onset was that, if certain coordination measures are not adopted at the level of the Community, then money launderers or terrorism financers could attempt to take advantage, in facilitating their criminal activities, of the free movement of capital and of the freedom to provide

[*] Lecturer PhD, "Nicolae Titulescu" University (e-mail: **constantin.nedelcu@univnt.ro**).

[1] Ratified by means of Law No 263/2002 published in Official Gazette of Romania, Part I, No 353 of 28 May 2002.

financial services relating to the integrated financial area[2].

With a view to addressing these concerns in the field of money laundering, Council Directive 91/308/EEC was adopted on 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. This legal instrument requires Member States to prohibit money laundering and force the financial sector, including credit institutions and a wide range of other financial institutions, to identify their clients, to keep appropriate records, to set forth internal procedures concerning personnel training and money laundering and report any money laundering suspicions to the competent authorities.

Another legal instrument adopted under the coordination of the European Union is the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA)[3] which, in its recitals, refers to the European Council in Tampere of 1999, pointing out that money laundering is at the very heart of organized crime and should be rooted out wherever it occurs. In this respect, it is further stated that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime". In this context, Article 2 of Framework Decision No 2001/500/JHA stipulates as follows: "Each Member State shall take the necessary steps consistent with its system of penalties to ensure that the offences referred to in Article 6(1) (a) and (b) of the 1990 Convention, as they result from the Article 1(b) of this framework Decision, are punishable by deprivation of liberty for a maximum of not less than 4 years." By means of this legal instrument, an obligation undertaken at the level of the European Council was assimilated in the Community law of that date.

Setting out from the objective reality that money laundering often takes place in an international context, the European Union acknowledged that any measures adopted exclusively at national or even Community level, without having regard to international coordination and cooperation, would only achieve limited results. For this reason, the measures adopted by the Commission in this field should be in line with endeavors undertaken by other international authorities. In particular Community actions ought to continue to take into account the recommendations of the Financial Action Task Group (herein after referred to as FATF), which is the main international body fighting against money laundering and terrorism financing[4].

These considerations led to the enactment of Directive 2005/60/EC of the European Parliament and of 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.

In the very first article of the directive, it is laid down that Member States shall ensure that money laundering and terrorist financing are prohibited.

At the same time, 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, rights with respect to, 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."

The same text indicates that 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, while knowledge, intent or purpose required as an element of the activities of money laundering may be inferred from objective factual circumstances.

In close connection with the phenomenon of money laundering, the Directive further defines the concept of "serious crime" which shall mean, at least: "acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA on combating terrorism; 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; the activities of criminal organizations 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 organization in the Member States of the European Union; 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; corruption; all offences which are punishable by deprivation of liberty or a detention

[2] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32005L0060&from=EN#ntr5-L_2005309RO.01001501-E0005
[3] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32001F0500&qid=1458738324354&from=en
[4] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32005L0060&from=EN#ntr5-L_2005309RO.01001501-E0005

order 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".

2. Considerations on the evolution in Romanian law

Under the influence of such regulations, in the Romanian legal system, Law No 21/1999 was enacted for the prevention and penalizing of money laundering[5]. In Article 23(1) of the said law, the criminal offence of money laundering was defined as follows: "**a)** the exchange or transfer of valuables, knowing that they derive from the commission of criminal offences: trafficking in narcotic drugs; failure to comply with the arrangements for weapons and ammunitions, in an aggravating form; failure to comply with the arrangements for nuclear materials or other radioactive materials; failure to comply with the arrangement for explosives; counterfeiting currency or other valuables; procurement; smuggling; blackmail; illegal deprivation of liberty; swindle in the banking, financial or insurance systems; fraudulent bankruptcy; theft and concealment of motor vehicles; failure to comply with the protection arrangements for certain goods; trafficking in animals protected in their country of origin; illicit trade in human organs and tissue; criminal offences committed by means of computers; criminal offences committed by means of credit cards; criminal offences committed by persons forming part of criminal groups; failure to observe the regulations governing the import of wastes and residues; failure to observe the regulations governing gambling; for the purpose of concealing or disguising the illicit source thereof, and also for the purpose of concealing or abetting persons involved in such activities or presumed to evade the legal consequences of their actions; **b)** concealment or disguise of the true nature, source, disposition, movement or ownership of property, knowing that such property is proceeds of one of the criminal offences referred to in letter a); **c)** the acquisition, possession or use of property, knowing that such property is proceeds of one of the criminal offences referred to in letter a)".

Therefore, it may be noticed that the Romanian law-maker opted for the alternative of expressly indicating the criminal offences which may be regarded as predicate offences in relation to money laundering, as this offence is obviously connected with the phenomenon of organized crime and of serious crime.

Upon repealing Law No 21/1999 and its replacement with Law No 656/2002, the Romanian law-maker's option changed, the current Article 29 in the new regulation no longer lists the criminal offences which may be regarded as predicate offences in light of the offence of money laundering. As compared to the previous form of this criminal offence, the new text broadly maintains the wording, the relevant doctrine stating that when the object of "laundering" consists of illicit money, in fact, the author of the money laundering offence performs the following activities[6]:

I. first of all, he gets (receives) the cash originating from the commission of criminal offences (*reception of money*).

II. second of all, the money launderer devises a money laundering *scheme* (*laundering itself*), which, in most cases, is structured in *three stages*:

- the first stage – *placement* – this is the stage when the money deriving from illicit activities is placed in circulation, is actually placed with institutions falling in the category of those referred to in Article 8 of Law No 656/2002, more specifically: banks, investment funds, insurance companies, etc. Therefore, in this first stage, illicit proceeds are *scattered*, which means that the overall amount is divided into portions smaller than EUR 15,000 (in RON equivalent) and then actually *placed*;
- the second stage – *sedimentation or stratification* – involves the separation of illegal proceeds from their source. This is achieved through the creation of totally or partially fictional financial or commercial transactions, by setting up "shell" companies. The money launderer draws up fictional import-export documents, in reliance upon which money is transferred *from the initial placement institution (bank)* as payment for fictional export services or operations, to another bank;
- the third stage – *integration* – involves the legitimization of proceeds derived from the commission of criminal offences, by re-entering them in the legal financial, banking or commercial circuit.

The wording of Article 23(29) of Law No 656/2002 also underwent other amendments, as compared to its form upon the effective date of the law. The text was supplemented with three other paragraphs, which set forth that: if the offence was committed by a legal entity, in addition to the penalty of fine, the Court shall impose, as the case may be, one or more complementary sentences, as stipulated in Article 136 (3) a)-c) of the Criminal Code.

[5] Published in Official Gazette of Romania, Part I, No 18 of 21 January 1999. Currently repealed by Law No 6556/2002.

[6] Al. Boroi, M. Gorunescu, I.A. Barbu, *Dreptul penal al afacerilor* [Criminal Business Law], C.H. Beck Publishing House, Bucharest, 2011, p. 367.

From the perspective of the subjective side, paragraph (4) in Article 29 of Law No 656/2002 expressly lays down that: "knowing the source of property or the pursued purpose may be inferred from objective factual circumstances".

Paragraph (5) of the legal text extends the scope of the above-mentioned provisions, being irrelevant whether the criminal offence from which the property derived was committed in the territory of Romania or abroad.

3) Practical difficulty in enforcing the incriminating regulation set forth in Article 29 of Law No 656/2002 on the prevention and fight against money laundering and terrorism financing

As already indicated herein above, upon repealing Law No 21/1999 and replacing it with Law No 656/2002, the Romanian law-maker's option changed. Thus, Article 23 of this new legislative enactment[7] defined the criminal offence of money laundering, with no reference to the type of criminal offence which may become predicate offence in relation to it. Not even the technique of reference to the concept of serious offence was used, which was defined at that time by the relevant laws in force. Under such circumstances, separation between the criminal offence of money laundering and the criminal offence of concealment and abetting, already existing in the Criminal Code, became even more burdensome. The doctrine attempted to explain the difference between money laundering and the two classical criminal offences within the meaning that the regulation governing money laundering should only apply to the cases where concealment and abetting relate to the phenomenon of money laundering, and also in the instances where "concealment" refers to a real estate asset. In all other cases, the texts referring to concealment or abetting, as applicable, shall apply[8].

Another opinion is that, in fact, no distinction is possible between the three criminal offences, the intervention of the law-maker being required, within the meaning of indicating once again the offences which may be regarded as the predicate offence in relation to the criminal offence of money laundering[9]. Another vivid controversy existing in the legal practice and appropriately reflected in court practice refers to the active agent of the criminal offence of money laundering. As regards this constituent element, it was stated that the active agent of the criminal offence of money laundering may be the author of the predicate offence, but also a person specialized in money laundering, not related in any manner whatsoever to the predicate offence. In legal practice[10], it was specified that the author of the criminal offence of bribe taking exchanging the money received for "*his activity*" into foreign currency and depositing it to the bank in the name of his mother will also be held liable for the criminal offence of money laundering, a solution which both the undersigned, and the relevant literature[11], adhere to. In another view, it is deemed that the active agent of the criminal offence of money laundering is always different from the active agent of the criminal offence from which the property originates[12].

In a yet more radical opinion, it is stated that the principle *ne bis in idem* would be infringed, should the author of the predicate offence be penalized for money laundering, as he is penalized twice for committing the same offence because, in certain factual hypotheses, he automatically commits the criminal offence of money laundering, too. For instance – in the hypothesis described in letter c), the author of the criminal offence of theft takes possession over the property immediately after consummation of the predicate offence, thus automatically and simultaneously committing the criminal offence of money laundering.

In line with this last opinion, we also believe that the criminal offence of money laundering may not be committed by the author of the predicate offence, in any circumstances whatsoever. We also deem that the phrase "knowing that such property is proceeds" included in the incriminating rule set forth in Article 29 of Law No 656/2002 should account as an exclusion, from the category of potential active agents in the criminal offence of money laundering, of the person having committed the predicate offence, because the phrase would seem futile otherwise in respect of the latter.

3. Conclusions

The criminal offence of money laundering is an offence which was traditionally connected to the phenomenon of organized crime, the criminal offences from which money or property to be laundered originated being expressly and restrictively stipulated by the regulation defining this criminal offence. In line with the new legislative realities, the criminal offence left the area of

[7] Which became Article 29 after re-publication in Official Gazette of Romania, Part I, No 702 of 12 October 2012.

[8] P. Munteanu, *Câteva elemente de distincţie între spălarea de bani, tăinuire şi favorizare* [A series of distinctions between money laundering, concealment and abetting], published in *Caiete de Drept penal* [Criminal Law Notebooks] No 1/2008, p. 50.

[9] M. A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R.F. Geamănu, *Infracţiuni prevăzute în legi speciale* [Criminal offences set forth in special laws], C.H. Beck Publishing House, Bucharest, 2013, p. 124.

[10] The High Court of Cassation and Justice, Criminal Division, Criminal Decision No 1386/2004, *Dreptul* [Law Magazine] No 2/2005, p. 247.

[11] Please see Editor's note G. Antoniu to article *Subiectul activ al infracţiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], author: C. Bogian, R.D.P. [Criminal Law Magazine] No 1/2007, p. 74.

[12] D. Ciuncan, A. Niculiţă, *Subiectul activ al infracţiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], R.D.P. [Criminal Law Magazine] No 2/2006, p. 105 *et seqq*.

plurality, constituting and being constantly mistaken for other criminal offences regulated under the Romanian criminal law, such as concealment or aiding and abetting. Although the doctrine repeatedly requests legislative interventions to help clarify these matters, but also others in connection with the capacity of active agent, all amendments brought so far have not led to such clarification, and the case-law also faces difficulties of interpretation and enforcement when it comes to the incriminating regulations in the field of money laundering.

References:

- Al. Boroi, M. Gorunescu, I.A. Barbu, *Dreptul penal al afacerilor* [Criminal Business Law], C.H. Beck Publishing House, Bucharest, 2011, p. 367;
- P. Munteanu, *Câteva elemente de distincție între spălarea de bani, tăinuire și favorizare* [A series of distinctions between money laundering, concealment and abetting], published in *Caiete de Drept penal* [Criminal Law Notebooks] No 1/2008, p. 50;
- M. A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R.F. Geamănu, *Infracțiuni prevăzute în legi speciale* [Criminal offences set forth in special laws], C.H. Beck Publishing House, Bucharest, 2013, p. 124;
- G. Antoniu Editor's note to article *Subiectul activ al infracțiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], author: C. Bogian, R.D.P. [Criminal Law Magazine] No 1/2007, p. 74;
- D. Ciuncan, A. Niculiță, *Subiectul activ al infracțiunii de spălare a banilor* [Active agent of the criminal offence of money laundering], R.D.P. [Criminal Law Magazine] No 2/2006, p. 105 *et seqq.*