CRIME OF MONEY LAUNDERING REFLECTED IN THE RECENT MANDATORY JURISPRUDENCE OF THE HIGH COURT OF CASSATION AND JUSTICE

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Abstract

This study represents an in-depth analysis of the rulings of the High Court of Cassation and Justice, by the Panel for clarifying certain legal issues. In actuality, it is about the way in which the Supreme Court ruled when issuing such a decision, respectively the Decision no. 16/2016, the conclusions reached being explained and sometimes criticized. In addition, the study identifies other aspects that receive different classification solutions in the judicial practice, which generates a non-unitary practice in criminal matters.

Keywords: *money laundering, multiple crimes, multiple regulations, the author of the predicate crime*

1. Introduction

We can observe, in a study presented on a similar occasion[1], the history of the definition of the money laundering crime in the Romanian criminal legislation, reaching the conclusion that it appeared in the Romanian legal provisions after our country ratified the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime of 1990[2], European Union Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as well as the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime (2001/500/JAI)[3].

Under the influence of these regulations, the Law no. 21/1999 on the prevention and punishment of money laundering[4] was adopted in the Romanian legislation, which was subsequently repealed and replaced by the Law no. 656/2002[5]. Article 29 (after the republication) of the new law defines the crime of money laundering and this incrimination text, even after 15 years of activity, is far from being protected against controversies and difficulties in its application.

2. In the study mentioned above, we can note that, among the practical application difficulties of the incrimination regulation from Article 29 of the Law no. 656/2002, are the following: the difficulty to set out the crime of money laundering from the crimes of concealment and abetment in crime already existing in the Criminal Code; another practical difficulty is answering to the question if the active subject of the crime of money laundering can also be the author of the main crime.

3. On the recent rulings of the High Court of Cassation and Justice on the subject of the crime of money laundering

Since the publication of our previous study and until the elaboration of this article, the High Court of Cassation and Justice, by the Panel for clarifying certain legal issues, ruled on the issues we have previously presented, but also on other aspects that the judicial practice or the case law identified under different appreciations. It is about the Decision no.16/2016 of the Panel for clarifying certain legal issues within the High Court of Cassation and Justice[6], and the questions the Supreme Court clarified are if:

„1. Do the actions listed in Article 29 paragraph (1) letters (a), (b) and (c) of the Law no.656/2002 on prevention and punishment of money laundering, and on setting out certain measures for prevention and combating terrorism financing, republished, as further amended and supplemented (exchange or transfer, respectively the concealment or dissimulation and, respectively, the acquisition, possession or use) represent different regulatory ways to commit the crime of money laundering or do they represent alternative versions of the material element of the subjective aspect of the crime of money laundering?

2. Can the active subject of the crime of money laundering be the same as the active subject of the crime from which the goods come from, or must it be different from it?

3. Is the crime of money laundering an autonomous crime or is it a crime subsequent to the one from which the goods come?"

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[1] See C. Nedelcu, The Criminal Offence of Money Laundering – a Series of Theoretical and Practical Considerations, in CKS-ebook/2016, p. 91-95, ISSN **2359-9227**,http://cks.univnt.ro/cks_all.html.

[2] Ratified by the Law no. 263/2002 published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2002.

[3] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32001F0500&qid=1458738324354&from=en.

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

[5] Al. Boroi, M. Gorunescu, I.A. Barbu, Dreptul penal al afacerilor, Editura C.H. Beck, București, 2011, p. 367 *(Al. Boroi, M. Gorunescu, I.A. Barbu, B.I. Vârjan Criminal law of business, C.H. Beck Publishing House, Bucharest, 2016, page 367).*

[6] Published in the Official Gazette of Romania, Part I, no. 654 of 25 August 2016.

All these issues were brought before the High Court of Cassation and Justice to be clarified exactly because the interpretation of legal texts included in Article 29 of the Law no.656/2002 has important nuances in the case law, and also in the judicial practice.

The importance of the clarification which the High Court was asked to give cannot be called into question.

The solution of the first issue may in a concrete case, determine the acknowledgment of a single crime of money laundering, or of multiple crimes if an individual commits more offenses constituting the material element of the same crime. A negative to the second question could exclude the hypotheses of multiple crimes acknowledged in the judicial practice for the cases in which the same individual commits the main crime, as well as the crime of money laundering. In the same way, if the crime of money laundering would not be recognized as an autonomous crime, it could never subsist to the extent to which the main crime (from which the goods to be laundered come), due to a reason or otherwise, would lose its criminal nature.

The High Court of Cassation and Justice analyzed in turn the three issues, settling them by way of mandatory jurisprudence.

Thus, with regard to the type of the regulatory methods listed in Article 29 paragraph (1) letters (a), (b) and c) of the Law no. 656/2002 on prevention and punishment of money laundering, and on setting out certain measures for prevention and combating terrorism financing, republished, as further amended (exchange or transfer, respectively the concealment or dissimulation and, respectively, the acquisition, possession or use), the High Court found that they have an alternative character and that they do not justify the acknowledgment of multiple crimes in the case of the same individual, as it often happens in the judicial practice. The Supreme Court correctly highlighted that "money laundering is a crime in which the material element consists of an action that can be performed in seven alternative ways (exchange, transfer, concealment, dissimulation, acquisition, possession or use)". … "Therefore, the performance of several actions representing the material element of the crime of money laundering, for carrying out the same intent, does not affect the criminal unit.

It is often found that it is chosen to acknowledge two crimes at the same time against an individual who committed two of the regulated alternatives from those listed by Article 29 of the Law no. 656/2002, under one of the three letters. Such practice was invalidated by the HP Decision no. 16/2016 of the High Court of Cassation and Justice, which even gives an example: "the individual possessing a good he/she is aware of the fact that it comes from committing a crime commits the crime of money laundering. If, afterwards, this individual transfers this good, this shall represent the same crime, as only a new type of the material type, without legal relevance, is carried out. If the money laundering crime was committed by carrying out more types of the material element pertaining to different variants, this aspect shall be taken into consideration in the legal classification, by acknowledging all these variants".

With regard to the *second issue* brought to the attention of the High Court of Cassation and Justice, we expressed our opinion in the study mentioned above, i.e. the crime of money laundering cannot be committed by the author of the main crime in any hypothesis, the main argument for this purpose being the text. In our opinion, the expression "being aware of the fact that it comes from committing a crime" included in the incrimination regulation of Article 29 of the Law no. 656/2002 means the exclusion of the one who commits the main crime from the circle of the potential active subjects of the crime of money laundering, as the expression appear as useless regarding this individual.

We do not agree with the ruling of the High Court of Cassation and Justice, as the court appreciates that there is no such an incompatibility. The arguments given by the High Court in order to support this ruling are certain arguments related to the history of the incrimination. It was taken into consideration the fact that the incrimination regulation on money laundering appeared in our legislation after Romania ratified the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on financing of terrorism, adopted at Warsaw on 16 May 2005, by the Law no. 420/2006. the Supreme Court shows that, even if the Article 9 paragraph (2) letter (a) of this international legal instrument creates the opportunity that the Member States provide that the "offenses set forth in this paragraph do not apply to the individuals who committed the predicate offense" in their internal legislation. The Supreme Court noted that, at the time of the accession the Warsaw Convention, the Romanian State did not express any reserve, and the Law no.656/2002 "does not provide otherwise in order to hinder the acknowledgment of the crime the goods come from and the crime of money laundering against the active subject, therefore, such multiple crimes are possible from theoretical point of view".

We believe that this method for settling the analyzed legal issue is not in accordance with the need to unify the judicial practice regarding this issue. The High Court preferred to analyze the incrimination history of money laundering, without making available to the professionals facing such cases clear criteria differentiating between the crime of money laundering and of abetment, respectively concealment. We believe that the different solution than the one established by the case law and accepted in practice in the case of the two crimes from the Criminal Code could be only explained this way.

It is true that the High Court showed in its decision that "the crime of money laundering must not be automatically acknowledged against the author of

the crime which the goods come from due to the simple reason that one of the actions of the material element of money laundering was carried out, as this would deprive the crime of money laundering of its individuality". Moreover, the High Court emphasizes that "the legal bodies are responsible for deciding in concrete cases if the crime of money laundering is sufficiently individualized in relation to the crime which the goods come from and if multiple crimes or only one crime must be acknowledged".

The two phrases are in perfect accordance with the rigors of the law, but they shall not lead to the unification of the judicial practice, they shall not give an explanation for the concrete annulment of the abetment and concealment, and they shall not lead to a review of the current circumstances in which the acknowledgment of the multiple crimes, the predicate crime and the money laundering, is almost mandatory for all cases in which, after committing the predicate crime (irrespective if this is about a corruption crime, drug trafficking or tax evasion), the same individual takes various steps in order to be able to use those obtained advantages. There are many cases in which, after committing the main crime, the simple purchase of a good with the money coming from the predicate crime is deemed money laundering. Thus an organized crime is transformed in an unimportant one, even it cannot be said the same for the level to which the special punishment limits rise in the case of this crime.

We believe that this is only a legislative omission that occurred when the international legal instrument generating the obligation for the national legislation to incriminate money laundering had been ratified, i.e. the natural reserve related to the impossibility that the active subject of the predicate crime is also the author of the money laundering had not been formulated. This omission was also accompanied by the impossibility to identify clear criteria with whose help the difference between the crime of abetment, respectively concealment, and the money laundering could be unitary made. In our opinion, the High Court did not settle this legal issue.

With regard to the third issue submitted for clarification, the High Court acknowledged the autonomous nature of the crime of money laundering. The significance of this ruling is that "its existence is not contingent on giving a conviction sentence (postponement of the enforcement of the punishment or withdrawal of the enforcement of the punishment) for the crime which the goods come from". The arguments supporting this solution are also conventional, because Article 9 paragraph (5) of the Warsaw Convention, ratified by Romania by the Law no. 420/2006, provides that: "Each Party shall ensure that a previous or simultaneous conviction for the predicate crime is not a prerequisite for a conviction for money laundering". Besides, an adequate regulation can be also found in Article 29 paragraph (4) of the Law no. 656/2002[7]. Nevertheless, the High Court recognizes the limiting nature of this assumption, showing that "nevertheless, it is obvious that, if there is no conviction for the crime the goods come from, the competent court for the settlement of the case regarding money laundering must not only suspect that the goods come from a criminal activity, but must be certain of this fact".

4. On issues regarding the crime of money laundering which are not yet settled in the case law and jurisprudence

All these rulings are welcome for the unitary interpretation and enforcement of the provisions of the incriminating regulation regarding money laundering. But there are also other issues that are solved differently in practice. One of these issues is that, in the judicial practice, it can be encountered the case in which a tax evasion crime falling under the provisions of Article 9 letter (c) of the Law no. 241/2005 for preventing and combating tax evasion is committed, the method being the following: fiscal invoices are issued by a company for fictitious operations, they are recorded in the books of another company, the pertaining amounts are transferred on the basis of the invoice, these amounts are withdrawn in cash by the representatives of the first company, the amounts are handed over to the directors of the second company, the one helping with this operation retaining a fee. In the judicial practice, this case described above in short is often classified as representing multiple crimes, the tax evasion and the money laundering. Ignoring the debatable nature of the legal classification, which we have mentioned, the courts do not give unitary rulings regarding the case that, by such legal classifications, the money laundering is committed before the predicate crime is committed, nor why the object of the money laundering is larger than the object of the predicate crime.

Our statement takes into consideration the fact that, even if the damages are covered in accordance with Article 10 of the Law no. 241/2005, the courts order the confiscation of the entire rollover between the two companies as representing the object of money laundering. Due to this solution, it can be reached the case in which the amounts resulting from committing the main crime are much smaller than those indicated as representing the object of money laundering. Essentially, the money laundering represents the "whitening" of the product of a crime, and it is abnormal that the product being "whitened" is essentially larger than the result of committing tax evasion. We believe that this very extensive judicial practice from the point of view of the scope is fundamentally wrong, and the High Court should rule on it by means of the previous mechanism for uniting the judicial practice – prior decisions clarifying legal issues, without waiting the creation of a non-unitary

[7] The mentioned text provides that: "The origin of the goods or the pursued purpose can be deducted from the objective factual circumstances".

practice in order to activate the previous mechanism - the referral in the interests of the law.

5. Conclusions

The crime of money laundering is a crime that still generates a number of issues regarding its understanding and enforcement, despite the 15 years of existence of the legal regulation defining it. Even if the High Court of Cassation and Justice tried to settle certain issues by means of mandatory jurisprudence of the decisions for clarifying legal certain legal issues, the given solutions cannot always eliminate the controversies, and other issues have yet to be submitted to this jurisdiction.

References:

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[8] Published in the Official Gazette of Romania, Part I, no. 654 of 25 August 2016.