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CRIMINAL AND LEGAL ASPECTS OF MONEY LAUNDERING IN LAW SYSTEM OF REPUBLIC OF SERBIA

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Abstract. *Within the structure of national, but also of international crime, crimes aimed at damaging the property of natural and legal persons (even states) are prevailing whereas the aim of individuals, groups and whole organizations when committing crimes is illicit property gain. But it is not sufficient, so they try to legalize money or some other property gained in such manner, i.e. by putting them into legal flows and operations. On the other hand the perpetrators of such crimes try in every possible manner to conceal the true origin of money or profit gained in such manner. Some states, and even the whole international community have become aware of the danger of the crimes committed by individuals and groups whose aim is laundering and concealing money and other profit gained by criminal activities. Therefore the international law as well as some national laws include money laundering as a crime which is punishable by sever penalties in order to prevent and repress these socially dangerous activities.*

Key Words: *criminal offence, money, property gain, concealing the origin, to put into circulation, responsibility, penalty*

MONEY LAUNDERING AS PROBLEM IN LAW SYSTEM

By passing the Law on Prevention of Money Laundering in 2005[1], Serbia joined a large number of states which have united in their effort to prevent and repress the most dangerous forms and types of organized crime related to property as a very serious security problem which knows no borders between states or even between continents. Crime in general, and organized crime in particular, crosses the borders of some states and becomes an international security problem of wide proportions with a tendency to penetrate further into all spheres of society[2].

Individuals, groups and organizations have only one aim – gaining illicit property gain or unlawful profit. Property gained in such manner has to be legalized in order to be used

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[1] Official Gazette of Republic of Serbia, No.107/2005 and 117/2005
[2] D.Jovašević, Criminal law, General part, Belgrade, 2006, page 378

within legal financial flows in the country but also abroad. However, the legalization of money does not neutralize the motives and aims of criminal activities which represent the basis of security endangering.[3] In such a way, these persons undertake various measures and activites aimed at 'laundering' illicitly gained money and other values (securities, value markings, and so on) with the assistance of financial, investment, banking, stock exchange and other organizations and institutions and thus acquire a healthy and legal basis.

MONEY LAUNDERING AS CRIMINAL OFFENCE IN INTERNATIONAL LAW

In order to repress these unlawful activities on the international level, certain states have set legal norms and obligations in an atempt to undertake adequate measures, means and procedures for prevention and repression of money laundering. Many international laws have been passed which precisely state unlawful activities and certain types and forms of money laundering as well as measures and procedures in national legislations in repression of these occurrences. In European law money laundering has been given the status of independent criminal offence, but this crime has been known by many other national criminal legislations[4].

The term 'money laundering' originated in America in the middle of last century. The term involves various activities by criminals and criminal groups aimed at legalization of money gained by criminal activities.[5] The criminals launder money by various financial activities, financial transactions, investments and stock exchange activities in order to conceal the true origin of the money and thus make it a legal part of capital market. In this way, they have the possibility to use the unlawfully gained money normally and freely and market it in business relations and commercial business in general both in their country and abroad[6].

The international community has realized the amount of social danger of money laundering operations early enough and has therefore undertaken a large number of activities in order to prevent and repress the unlawful activities as efficiently as possible. In the 1980s the intensifying of the fight against illicit production and trafficking of narcotics brought about the ideas of coordinated activites on the international level in order to repress money laundering. Namely, the aim of these activities was directed at disabling, prevention and interrupting the undertakings and activities of some crime organizations involved in illicit trafficking of narcotics, primarily the Columbian cartel.

Having realized the real danger of organized crime with the international character which recognises no political, state and ideological borders between nations, states and continents, the international community has begun developing a strategy for general fight against the most dangerous types of crime – trafficking of narcotics, people, weapons, etc. - all connected closely to money laundering. Many international legal acts have been passed to this effect[7]. These are:

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[3] Lj. Jovanović, D. Jovašević, Criminal Law, General Part, Belgrade, 2002

[4] J.R. Richards, Transnational Criminal organisation, Syber crime and money laundering, London, 1999, page 44

[5] D . Jovašević, Lexicon of Criminal Law, Belgrade, 2006, page 481-482; V. Đurđić, D. Jovašević, International Criminal Law, Belgrade, 2003, page 92

[6] W.R. Schroeder, Money laundering, Law Enforcement, No. 70/2001, page 2

[7] FATF, Report on Money laundering, Typologies for 2000-2001, Paris, 2002, pp. 3-10

1) UN Convention against illicit trafficking of narcotics and psychotropic substances passed in 1988 in Vienna,

2) Convention on laundering, search and confiscation of criminally gained profit dated November 8, 1990, Strasbourg,

3) Directive for prevention of use of financial system for money laundering in 1991,

4) 1993 Cyprus Communique and

5) UN Convention against transnational organized crime passed on December 12-15, 2000, in Palermo.

These international acts establish a legal basis for governing incriminated behaviour related to money laundering in national criminal legislation and regulation of criminal sanctions.[8] It is therefore very important how individual national legislations deal with criminal and legal aspect of money laundering, all the more so as many solutions included in the mentioned international legal acts are incorporated in the solutions of national criminal legislations.

The 1988 UN Convention against illicit trafficking of narcotics and physchotropic substances (known as Vienna Convention), which was accepted by more than a hundred states, Serbia being one of them[9], obliges the signatory countries to incriminate many activities connected to drug trafficking within their national legislation as well as to treat the laundering of the money earned this way as a criminal activity. Article 3 of the Convention defines the concept of money laundering as a criminal offence. According to the definition this crime exists when the following activities are premeditated:

1) conversion or transfer of property knowing that the property is the result of a committed crime in order to conceal the illicit origin of the property;

2) assistance to any person involved in committing of such a crime in order to avoid legal consequences of these activities;

3) hiding or concealing the true nature, source, location, availability and movement of derived ownership rights or property knowing that the property is the result of a committed crime;

4) gaining, possession or use of goods or things or values knowing at the time of their receipt that they are the result of illicit trafficking of narcotics;

5) collusion in order to commit, attempt, assist, instigate, facilitate or advise to commit crime of trafficking of narcotics including money laundering.[10]

In this way, the money laundering crime has been defined by many activities including preparatory activities, attempt and even complicity (instigation, assistance or organization of criminal association) as criminal activities. This extends the sphere of punishable behaviour making it equal to committing the crime. Knowledge, consciousness, intention or purpose as subjective elements of psychological nature have to exist as important constituent elements of this crime. The Convention does not define the kind and amount of penalty but leaves such matters to national legislations.

The other important act in this field is the Convention on laundering, search, seizure and confiscation of profit gained by criminal activities which was passed by the Council

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[8] D. Jovašević, Commentary of Criminal Code of the FR Yugoslavia, Belgrade, 2002, pp. 268-271

[9] Official Gazette FRY – International agreements, No.14/1990

[10] W.C.Glimore, International Initiatives in the Field of Money Laundering, Butterworths Journal of International Banking and Financial Law, 1995, page 260

of Europe on November 8, 1990, in Strasbourg.[11] This Convention also obliges the signatory countries of this international organization to include the crime of money laundering in their respective national legislations. The characteristics of this crime are defined in the identical manner to that in the Vienna Convention with a difference that in this case there is a tendency to take away and confiscate the complete property gained not only by unlawful activities related to narcotics, but also related to terrorism, traficking of people, weapons and criminal acts through which great profit is made.

Article 6 of the Convention defines the concept and characteristics of the crime of money laundering which consists of intentional undertaking of one or more of the following activities:

1) conversion or transfer of property knowing that the property is the result of a committed crime in order to conceal or present falsely the origin of property or assisting an individual involved in committing the mentioned crime in order to avoid legal consequences for their acts;

2) concealing or false representation of legal nature, source, location, use, movement of rights or property in relation to the property knowing that the property is the result of a committed crime;

3) gaining, possession or use of property knowing at the time of receipt that it is the result of criminal activities;

4) participation, collusion or conspiracy in order to commit, try to commit and assist, instigate or facilitate and advise any crime.

The problems of undertaking efficient measures for prevention and repression of money laundering were also included in the UN Convention against transnational organized crime with two additional protocols: the Protocol for prevention, repression and punishment of people trafficking, especially women and children and the Protocol against smuggling of migrants by land, sea or air. The latter international legal acts were passed at the Conference sponsored by the United Nations in December 2000 in Palermo.[12]

Article 6 of this Convention entitled "Criminalization of criminally gained profit laundering" defines the concept and characteristics of the crime of money laundering which all signatory countries are obliged to include in their national criminal legislation.

Article 7 of the Convention also provides for the measures for fighting against money laundering and defines the subjects, activities and procedures related to competent national authorities regarding prevention and repression of various forms and types of money laundering.

CRIME OF MONEY LAUNDERING IN COMPARATIVE LAW OF SOME COUNTRIES

Based on these international legal acts, a large number of countries has in the recent years included in their national legislations the crime of money laundering carrying severe penalties.

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[11] This Convention was ratified by the Fedearl Assembly FRY in their Session on July 2, 2002. The text of the Convention was published in the Official Gazette of FRY, International Agreements, No. 7/2002, July 3, 2002

[12] This Convention with additional protocols was ratified by the Federal Assembly in their Session on June 22, 2001. The text of the Convention and additional protocols was published in the Official Gazette of FRY, International Agreements, No. 6/2001, June 27, 2001

The Republic of Slovenia first passed a separate Law on prevention of money laundering[13], and then in their Penal Code[14], Art. 252, included the crime of money laundering. This crime takes several forms. The basic crime is committed by a person who takes, exchanges, holds, makes available or uses in commercial activities or puts otherwise in circulation the money for which they know it was gained by committing a crime. Thus the various manners of putting "dirty money" into legal circulation are incriminated. The prescribed penalty for this form is a prison sentence of up to three years.

If a large amount of money is concerned (in each particular case the court has to establish what a large amount is taking into account all circumstances of the crime and the perpetrator's personality), the law prescribes the penalty of imprisonment of up to eight years and a cumulative fine. In cases of several individuals colluding in order to commit one or several activities aimed at money laundering we have the most serious form of this criminal offence for which a penalty of one to ten years imprisonment is prescribed and a cumulative fine. These offences are of particular social danger, that is why the law prescribes much more serious penalties.

In all of the above mentioned both basic and more serious forms, there is premeditated undertaking of certain activities forbidden by law. However, the criminal law provides for the responsibility and punishability of up to two years imprisonment even if an individual does an activity aimed at money laundering without knowing, but could have known, that the money is the result of a crime. In case of committing any of the above mentioned crimes the Slovenian law provides for a safety measure – obligatory dispossession of the subject of the money laundering crime.

The Republic of Macedonia[15] also passed a new Criminal Code in 1996 which includes a separate crime named "Money laundering and other illicit property gains' within the group of crimes against economy listed in Article 273. According to the description that this law introduces, the crime of money laundering can take on several forms. The basic crime carrying the penalty of one to ten years imprisonment appears when a person in banking, financial or some other economic business transaction puts into circulation, takes, hides, exchanges or changes the money for which they know that it is the result of illicit trading with narcotics or weapons or other crimes or conceals otherwise the origin or source of such money. The same penalty is prescribed for a person who puts on the market or otherwise offers for sale property, valuable objects or other goods knowing that they are the result of trafficking drugs, weapons or any other crime. This is in fact the incrimination of activities related to legalization of money and other property gains which are the result of legally precisely defined organized crimes.

In case if one of the activities of the basic form of this crime is done by a person who did not know the real origin of the money or other illicitly gained property, but was obliged and could have known the circumstances, there is a less serious form implying a fine or imprisonment of up to three years.

The most serious form of this crime appears when some of the activities aimed at money laundering are done by a person as a member of a group, gang or some other form

[13] Official Gazette of the Republic of Slovenia, No. 36/1994

[14] Kazenski zakonik Republike Slovenije z uvodnimi pojasnili Boštjana Penka in Klaudija Stroliga in stvarnim kazalom Vida Jakulina, Ljubljana, 1999, page 193

[15] Official Gazette of The Republic of FYR of Macedonia, No. 37/1996

of association founded with the objective of laundering money or for the purpose of some other property gain. For this crime there is a penalty of imprisonment of at least five years. The Criminal Code of Macedonia includes implicitely the obligatory pronouncing of safety measure – dispossession of indirect or direct property gain which is the subject of this crime.

The Republic of Croatia took the same path passing the new Criminal Code in 1997.[16] This Code provides for the crime entitled "Concealing illicitly gained money" in Article 279. This crime also takes many forms. The basic form of the crime is committed when a person in banking, monetary or some other economic business transaction deposits, takes, exchanges or otherwise hides the true source of money or things or rights gained by the money known to be the result of a crime for which the penalty of five years imprisonment can be pronounced or the crime committed by a group or other criminal organization or by a person who takes such money, things or rights for themselves or other person or has them in their possession or puts them in circulation. What we have here is concealing of illicit gain through the most serious organized crime. For this crime there is a prison sentence of six months to five years.

A more serious form of this crime which carries the prison sentence of one to ten years appears when the concealing of illicitly gained money is done by a person as a member of a group or criminal organization.

The law provides for a less serious form of this crime which implies the prison sentence of three months to three years. This form of crime is committed by a person who undertakes some of the above activities related to money laundering being negligent regarding the origin or source of the money, things or rights. It is interesting that this law includes this crime even when the money, objects or rights are the result of a crime committed in a foreign country. The money and things which are the result of a committed crime are bound to be taken away pronouncing the appropriate safety measure. And finally, this Code provides for the possibility to release the perpetrator for criminal or political reasons on condition that they voluntarily contribute to discovering the crime of concealing of illicitly gained money.

The Russian Federation passed the Criminal Code in 1996[17]; Article 174 of this Code includes a separate crime named "Laundering of money or other illicitly gained property". This crime takes three forms. The basic criminal offence refers to financial operations and other business transactions with money or other property which was acquired illicitly as well as the use of the said means for enterprising or other economic activities. There is a fine for this crime amounting from 500 to 700 minimum labour costs or salaries or other wages of a convicted person for the period of time from five to seven months or four years of imprisonment with the fine of one hundred minimum amounts of labour cost or salaries or other wages of a convicted person up to one month or without it.

More serious form of this criminal act appears if the basic crime was committed by a person as a member of a group after a previous agreement or many times (therefore, in case of repeated offense by a person who was already convicted for the same crime) or by a person who abused his authority. The penalty for the more serious form of this crime is

[16] Official Gazette of the Republic of Croatia, No. 110/1997

[17] Skuratov J.J., Lebedov V.M., Commentary of the Criminal Code of the Russian Federation, Norma, Moscow, 1996, pp. 218-220

four to eight years of imprisonment with or without confiscation of property. The most serious form of the crime of money laundering which carries the prison sentence of seven to ten years with or without confiscation of property appears when the basic crime was committed by organized groups or to a large extent (in each particular case the court has to establish what the large extent or the amount of laundered money or other property gain is).

The presented comparative legal analysis shows that all considered laws (or codes) include the crime of "laundering (or concealing) money or other illicit gains" in their special parts. This crime takes several forms. The provisions of international legal acts make their basis. It should be said, however, that various activities of putting illicitly gained money into legal circulation, but also the various forms of collusion (instigation, assistance in some other manner or criminal organization), as well as preparatory activities are considered the committing of this crime. These crimes imply the penalty of imprisonment and most often cumulative fines. In addition to this, the law prescribes the obligatory pronouncing of safety measure – dispossession of subject of criminal act as a specific criminal-law measure.

MONEY LAUNDERING AS CRIMINAL OFFENCE IN THE LAW OF REPUBLIC OF SERBIA

The Law on prevention of money laundering passed in 2005, defines the concept of money laundering, the manners, procedures, activities, forms and types of manifestations and includes many measures, procedures and approaches which should be taken by competent authorities or persons having an obligation to detect, prevent and supress the activities by natural and legal persons related to concealing of unlawfully gained money and other property gain. The money laundering includes depositing of money gained by performing illicit activities in accounts with banks or other financial organizations or institutions or otherwise putting such money into legal financial operations. According to law, this crime may be commited in two manners as follows:

- by depositing money in the account and
- by putting money into legal financial operations.

Several cummulative conditions must be fulfilled in order for this criminal offence to exist according to the new Criminal code of the Republic of Serbia[18] from the year 2005. The money has to be either deposed in accounts with banks or other financial organizations or institutions or otherwise put into legal financial operations. In order to be legally relevant, these activities have to refer to the money which may appear in one of the following forms: as cash, effective foreign currency or other finances. What is important is the fact that the money was gained by performing illicit, unlawful activities such as: grey economy, illicit trade in arms, narcotics or psychotropic substances and other illicit activities.

The perpetrators of these incriminated activities according to law may be domestic or foreign natural or legal persons.

In addition to the legally specifically stated activities by which the criminal offence of money laundering can be committed, but also other illicit gains, the activities on assisting

[18] D. Jovašević, The Criminal code of the Republic of Serbia with commentary, Belgrade, 2007, pp. 189-192

with money laundering are also incriminated. These activities include all actions and procedures by which one provides for, contributes, facilitates, makes conditions or assumptions for money laundering as a criminal offence (as provided in article 231 of the Criminal code). The activities enabling money laundering include the following:

1) conceiling or hiding the origin of money or place where it was deposited or concealing the purpose of use of property and all rights resulting from performing illicit activities;

2) exchange or transfer of property resulting from performing illicit activities;

3) acquiring, possession or use of property resulting from performing illicit activities, and

4) concealing of illicitly gained public property or public capital on the occasion of property transformation of a company.

In order to be able to deal with money laundering or enable it in any of the specified manners, we need to have the activities undertaken and directed at the money which was illicitly gained. Illicitly gained money is the money gained in an unlawful manner either as cash money or cash equivalent in domestic or foreign currency, stocks and bonds and other payment facilities in domestic or foreign currency as well as property (rights and things) bought with such money.

The Law on prevention of Money Laundering includes a range of general, specific and special measures and activities aimed at detecting and preventing money laundering on the occasion of taking, exchanging or changing money or when concluding business transactions regarding property or during any other dealings with money or property which can create the opportunity for money laundering. All those various dealings with money are called transactions by law. The transactions at that do not include specifically the following activities: withdrawing cash from the current or giro account, savings account or some other account, or withdrawing effective foreign currency from foreign currency account or foreign currency savings account.

The Law on prevention of money laundering also defines the subjects of detecting and preventing money laundering. It defines them as persons having an obligation. These are: legal persons and their responsible persons. Persons having an obligation to perform various measures and activities of money laundering prevention are: banks and other financial organizations, postal, telegraphic and telephone traffic companies, other companies and cooperative societies, government agencies, organizations, funds, institutes, institutions as well as other legal persons financed partially or completely by public revenues, the National Bank of Serbia, insurance companies, stock exchange, stock brokers and other subjects involved in transactions with money, stocks and bonds, precious metals and precious stones, exchange offices, pawn-shops, casinos, poolrooms, slot-machine clubs and organizers of prize games and other games of chance, as well as other legal and natural persons who purchase and sell debts and claims or deal with financial transactions.

According to this law the criminal offence of 'money laundering' takes three forms: basic, specific and serious. This solution is found in the law of the Republic of Serbia. The Republic of Montenegro passed the new Criminal Code[19] in December of 2003. Similarly this Criminal Code includes a special criminal offence: Money laundering in Article 268.

[19] Official Gazette of the Republic of the Montenegro, No.70/2003 and 10/2004

The basic form of this criminal offence carries a prison sentence of six months to five years. It appears when one of the mentioned activities which are contrary to the provisions of this law is undertaken and through which money is deposited with a bank or other financial organization or institution or is otherwise included into legal financial circulation in order to do legal economic or financial activities if the money is the result of a criminal activity. The awareness, knowlegde of a perpetrator that the money is the result of a criminal activity is the basis for criminal liability of this person. Even an attempt to comit this crime (in case of intentional start of any activity directed at money laundering) is punishable by law.

The specific form of this crime which carries the imprisonment of up to three years appears in the case when a perpetrator did not know that the money was the result of a crime, but could have known or was obliged to known that. In this case, therefore, there is a lower degree of culpability when the perpetrator acts negligently regarding the origin of the money which is subject to this criminal offense.

The most serious form of this criminal offense carrying a prison sentence of one to ten years appears when the amount of laundered money exceeds 1, 500. 000 dinars. Therefore, the amount of 'laundered' illicitly gained money which is subject to this crime represents qualifying circumstance for this criminal offense. In any case regardless of the form of the criminal offence the court pronounces the obligatory safety measure of dispossession of the money or profit which are subject to this crime in addition to the sentence (imprisonment and/or fine).

The perpetrator of the crime of money laundering can be a natural person (domestic or foreign citizen), but also a responsible person as a legal person who knew or was obliged to know or could have known that the money is the result of criminal activities.

And finally regarding the efforts undertaken recently in order to root out the money laundering, our country has passed the Law on organization and jurisdiction of state institutions in supression of organized crime.[20] This law governs establishing, organization, jurisdiction and powers of special government bodies – the Belgrade District Court, Special Prosecutor's Office, Special Service for suppression of organized crime established as a part of the Ministry of Interior and Special Detention Unit within the Department of Execution of Penal Sanctions of the Ministry of Justice in order to detect and prosecute perpetrators of criminal offences having the elements of organized crime where money laundering is included as well.

CONCLUSION

The increase of new and various forms of criminal offences has been noticed recently especially of those which include the international element, i.e. the element of organized crime. The crimes when perpetrators have the purpose to obtain an illicit property gain for themselves or for some other person constitute a special part. This gain, however, is not the purpose in itself but has to be legalized or laundered by putting money or other property into legal circulation. The international community, as well as individual countries, are faced with the problem of suppression of the money laundering or concealing the origin or money gained by committing a crime. Serbia has joined these tendencies and in 2005 passed a special Law on prevention of money laundrering.

[20] Official Gazette of the Republic of Serbia, No. 42/2002, 27/2003 and 39/2003

This law dealing with money laundering in our country provides for a wide range of preventive measures and procedures directed at detection, prevention and suppression of various activities of money laundering or assistance with money laundering and this law is supposed to lead our country into a circle of other contemporary states which are trying to put a stop to this dangerous social evil by organized, systematic and continuous activities of various social subjects. It is certain that in this fight the repressive measures – sanctions for criminal offences, economic torts and torts - cannot be completely efficient.

The preventive measures take special place here especially those trying to remove the conditions which lead to situations where illicitly, i.e. unlawfully gained money is put into legal financial and economic flows in various manners through various financial and other transactions. Naturally, this is the fight where every country should count on the assistance of other countries, even the whole international community, in the same way as crime does not know the borders between countries.

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KRIVIČNOPRAVNI ASPEKTI PRANJA NOVCA U PRAVNOM SISTEMU REPUBLIKE SRBIJE

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U strukturi nacionalnog, ali i internacionalnog kriminaliteta danas preovladava kriminalitet upravljen na štetu imovine drugih fizičkih i pravnih lica (pa čak i čitavih država) pri čemu pojedinici, grupe i čitave organizacije postupaju u vršenju svoje kriminalne aktivnosti vođeni namerom pribavljanja protivpravne imovinske koristi. No, to nije dovoljno, pa tako pribavljeni novac i druge imovinske koristi ova lica pokušavaju da legalizuju, odnosno da ih stave u legalni promet, opticaj (da im pribave legalni osnov sticanja). S druge strane, učinioci ovakvih kriminalnih dela imaju potrebu da prikriju i pravo poreklo ovakvog novca ili koristi. Stoga su ne samo pojedine države, već i čitava međunarodna zajednica uvidele opasnost od ovakvih kriminalnih delatnosti pojedinaca i grupa koje imaju za cilj pranje i prikrivanje novca i druge imovinske koristi stečene vršenjem krivičnih dela. Tako međunarodno pravo, kao i u pojedina nacionalna zakonodavstva predviđaju krivičnu odgovornost za pranje novca kao krivično delo zaprećeno strogim kaznama čiji je cilj sprečavanje i suzbijanje ovakvih društveno opasnih delatnosti.

Ključne Reči: *krivično delo, novac, imovina, imovinska korist, prikrivanje porekla, legalni osnov, stavljanje u opticaj, sud, krivica, kazna*