

CONSIDERATIONS REGARDING THE INCRIMINATION AND INVESTIGATION OF THE CRIME OF MONEY LAUNDERING IN ROMANIAN LAW

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Abstract

The study performs an analysis of the crime of money laundering, provided by the Article 49 of the Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing normative acts. Also, this study analyzes some aspects related to the forensic investigation of the crime of money laundering.

Key Words: *money laundering; Law no. 129/2019; forensic investigation; financial intelligence units.*

JEL Classification: [K14]

1. Introduction

The crime of money laundering is provided by Article 49 of Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing normative acts. The legal text states:

”(1) It is the crime of money laundering and is punishable by imprisonment from 3 to 10 years:

- a) the exchange or transfer of goods, knowing that they come from the commission of crimes, in order to hide or conceal the illicit origin of these goods or in order to help the person who committed the crime from which the goods come to evade prosecution, trial or execution of the sentence;
- b) disguising or concealment of the true nature, provenance, location, disposition, movement or ownership of the goods or of the rights over them, knowing that the goods come from the commission of crimes;
- c) the acquisition, possession or use of goods by a person other than the active subject of the crime from which the goods come, knowing that they come from the commission of crimes”.

The crime of money laundering refers to the concealment of the true origin of the profits obtained illegally by the offenders as well as of their true identity in order to later benefit from the amounts obtained illegally (The World Bank, 2009: 4) (Leslie, 2014: 10) (Apan, 2021: 14).

The crime of money laundering refers to the existence of another crime, ie a main crime (for example, cybercrime, drug trafficking, human trafficking, organized crime, smuggling, counterfeiting coins or other valuables, illegal deprivation of liberty, etc.) which results in illegal income and consists of any action that uses income, derived from that principal offence (Leslie, 2014: 9).

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2. The pre-existing conditions

2.1. *The object of the crime*

The special legal object of the crime of money laundering is a complex one, its content including the social relations that refer to the administration of justice, as well as those of a patrimonial nature, in terms of the legal circulation of goods. Thus, money laundering offences affect not only the legal circuit of goods, but also the administration of justice, as it hinders the activity of restoring the rule of law, violated by committing these crimes.

In the specialized literature it was appreciated that the crime of money laundering has a main legal object, as well as a secondary legal object (Hotca, Gorunescu, Neagu, Pop, Sitaru, Geamănu, 2019: 71). Thus, the main legal object of the crime of money laundering is the activity of administering justice, and the secondary legal object of this crime refers to the legality of the legal circuit of goods.

The material object of the offence of money laundering is the goods on which the material element of the crime is exercised. According to the provisions of Article 2 (c) of the Law no. 129/2019, the goods that are the object of the crime of money laundering are understood to be assets of any kind, tangible or intangible, movable or immovable, tangible or intangible, as well as legal documents or instruments in any form, including electronic or digital, attesting a title or a right or interests in them.

2.2. *The subjects of the crime*

The active subject of the offence of money laundering can be any person who fulfils the general conditions provided by the law for criminal liability. Criminal participation is possible in all its forms: co-author, incitement and complicity.

The perpetrator and co-author of the main crime, the accomplice and the instigator of the main crime can also be active subjects for the crime of money laundering.

We emphasize the fact that the legal person can also have the quality of active subject of the money laundering crime provided by article 49 of Law no. 129/2019, only if the conditions regarding the criminal liability of the legal person are met.

The conditions for the criminal liability of the legal person contained in the Article 135 of the Romanian Criminal Code provide as follows:

“(1) The legal person, except for the state and the public authorities, is criminally liable for the crimes committed in the accomplishment of the object of activity or in the interest or on behalf of the legal person.

(2) The public institutions are not criminally liable for the crimes committed in the exercise of an activity that cannot be the object of the private domain.

(3) The criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act”.

Therefore, if the deed was committed by a legal person, in addition to the penalty of the fine, the court applies, as the case may be, one or more of the complementary penalties provided by Article 136 (3) (a) –(c) of the Romanian Criminal Code. According to the provisions of Article 136 (3) (a) –(c) of the Romanian Criminal Code, the complementary punishments are: “a) dissolution of the legal person, b) suspension of the activity or one of the activities of the legal person for a period from 3 months to 3 years, c) closure of some working points of the legal person for a period from 3 months to 3 years”.

The crime of money laundering has a main passive subject and a secondary passive subject object (Hotca, Gorunescu, Neagu, Pop, Sitaru, Geamănu, 2019: 83).

The main passive subject of the crime of money laundering is the state. The crime of money laundering also has a secondary passive subject, in the situation where a social value belonging to a natural or legal person is harmed.

The passive subject of the offence of money laundering is the owner of the electronic payment instrument used unlawfully or the person to whom the identification data used belongs. The secondary passive subject is the legal holder of the electronic payment instrument, for example, the issuing financial institution.

3. The constitutive content

3.1. *The objective site*

The material element of the crime of money laundering is carried out in several alternative actions, which are grouped into three variants, each with several modalities, provided by the Romanian legislator in the Article 49 (1) of the Law no. 129/2019: the exchange or transfer of goods, knowing that they come from the commission of crimes, in order to hide or conceal the illicit origin of these goods or in order to help the person who committed the crime from which the goods come to evade prosecution, trial or execution of the sentence; disguising or concealment of the true nature, provenance, location, disposition, movement or ownership of the goods or of the rights over them, knowing that the goods come from the commission of crimes; the acquisition, possession or use of goods by a person other than the active subject of the crime from which the goods come, knowing that they come from the commission of crimes.

The exchange action is an activity by which the replacement of an asset derived from the commission of an offence by another asset of lawful origin is performed.

The transfer action refers to an operation of transfer to another person of some goods, which come from the commission of a crime. The transfer action can also be done by handing over some goods or by transferring some money from one bank account to another bank account.

The act of hiding or concealment the true nature, origin, location, disposition, movement or the ownership of the goods or the rights over them, knowing that the goods come from the commission of crimes consists in masking the origin of these goods through legal, economic or financial operations. The hiding or concealment

of the location of an asset arising from the commission of offences refers to the masking of its location (Hotca, Gorunescu, Neagu, Pop, Sitaru, Geamănu, 2019: 91). Also, the hiding or concealment of the disposition of a good refers to an operation by which certain prerogatives specific to legal acts are hidden over a good that results from the commission of an offence object (Hotca, Gorunescu, Neagu, Pop, Sitaru, Geamănu, 2019: 92).

The act of acquiring an asset by a person other than the active subject of the crime from which the asset come, refers to the activity by which a person takes possession of an asset resulting from the commission of an offence.

The act of possession of an asset of a criminal nature by a person other than the active subject of the crime from which the asset come, refers to the possession of that asset which results from the commission of an offence.

The action of using a good by a person other than the active subject of the crime from which the good come, is an activity through which some benefits are obtained from the use of this good.

The crime of money laundering also presents an aggravating variant, stipulated by Article 49 (2¹) of the Law no. 129/2019, namely "it constitutes an aggravating circumstance the commission of the crime of money laundering by one of the reporting entities provided by Article 5, in the exercise of his professional activity".

Among the reporting entities, provided by the Article 5 of Law no. 129/2019, we can list the following (Article 5 (1) of the Law no. 129/2019): Romanian legal entities credit institutions and branches of foreign legal entities credit institutions; Romanian legal entities financial institutions and branches of the foreign legal entities financial institutions; the administrators of voluntary and/or occupational pension funds, in their own name and for the optional pension funds and/or occupational pension funds they manage; gambling service providers; auditors, chartered accountants and certified accountants, certified appraisers, tax consultants, financial, business or accounting consultants, other persons who engage to provide, directly or through other persons with whom that person is affiliated, material assistance, assistance or advice on fiscal, financial, as a major economic or professional activity; public notaries, lawyers, sheriff's officers and other persons practicing the liberal legal professions, if they provide assistance in drawing up or completing transactions for their clients regarding the purchase or sale of real estate, shares or elements of goodwill, administration of financial instruments, securities or other assets of customers, operations or transactions involving a sum of money or a transfer of ownership, establishment or administration of bank accounts, savings or financial instruments, organization of the process of underwriting the necessary contributions for the establishment, operation or administration of a company; providers of exchange services between virtual currencies and fiat currencies; digital wallets providers; other persons who, as professionals, sell goods, only insofar as they carry out cash transactions whose minimum limit represents the equivalent in Romanian lions of 10,000 euros,

regardless of whether the transaction is executed by a single operation or by several operations that have a connection between them.

Immediate consequence

The immediate consequence of the money laundering offence is different. Thus, in the case of the variants provided by Article 49 (1) (a) and (c) of the Law no. 129/2019, the immediate consequence is the change of the legal situation of the goods that are the object of the money laundering offence, while in the case of the variant contained in the Article 49 (1) (b) of the Law no. 129/2019, the immediate consequence consists in creating an appearance of legality of the origin of the good.

At the same time, the crime of money laundering can have an immediate consequence consisting in material damage.

Causality link

There must be a *causality link* between the activity of the offender and the consequence that results from the materiality of the crime.

3.2. The subjective side

The offence of money laundering is committed only with direct intention. In order to have the crime of money laundering, provided by Article 49 (1) of Law no. 129/2019, it is necessary for the active subject to know that the goods that are the object of this crime come from the commission of another crime.

4. The forms of the offence

The preparatory acts are possible, but they are not criminalised and thus they are not punishable.

The attempt is possible and is punished according to the Article 49 (2) of the Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing normative acts.

The consumption of the crime of money laundering takes place when the actions that constitute the material element of the money laundering crime are carried out. Therefore, the offence of money laundering is consumed when the material element is carried out and the socially dangerous result is produced.

The exhaustion of the offence of money laundering occurs at the time of committing the last act criminalised by law. We highlight the fact that the crime of money laundering is exhausted at the same time as the consumption stage.

The offence can be committed in continuous form.

5. Modalities

The offence of money laundering presents the following normative modalities, according to the provisions of the Article 49 (1) of the Law no. 129/2019: the exchange or transfer of goods, knowing that they come from the commission of crimes; disguising or concealment of the true nature, provenance, location, disposition, movement or ownership of the goods or of the rights over them, knowing that the goods come from the commission of crimes; the acquisition,

possession or use of goods by a person other than the active subject of the crime from which the goods come, knowing that they come from the commission of crimes.

To these normative modalities may correspond various fact modalities.

6. Sanctions

The punishment provided for the offence of money laundering stipulated by the Article 49 (1) of the Law no. 129/2019 is imprisonment from 3 to 10 years.

7. Procedural and criminal investigation aspects

The criminal prosecution initiates *ex officio*.

The offence of money laundering, stipulated by the Article 49 (1)-(4) of the Law no. 129/2019 shall apply regardless of whether the offence from which the good originates was committed in the territory of Romania or in other Member States of the European Union or third countries (Article 49 (5) of the Law no. 129/2019).

The provisions of the Article 49 (1) - (4) from the Law no. 129/2019 shall apply to money laundering offenses committed outside the territory of the country by a Romanian citizen or by a Romanian legal person even if the deed is not provided as a crime by the criminal law of the country where it was committed (Article 49 (6) of the Law no. 129/2019).

In the case of money laundering and terrorist financing offences, the provisions regarding the confiscation of property from the Romanian Criminal Code. If the goods subject to confiscation are not found, their equivalent in money or the goods acquired in their place shall be confiscated. The incomes or other material benefits obtained from the goods are confiscated. If the goods subject to confiscation cannot be individualized in relation to the legally acquired goods, goods shall be confiscated up to the value of the goods subject to confiscation. The provisions of the Law no. 129/2019 shall apply accordingly to income or other material benefits obtained from the goods subject to confiscation, which cannot be individualized compared to the legally acquired goods (Article 51 of the Law no. 129/2019).

Romania's financial intelligence unit is the National Office for Preventing and Combating Money Laundering, which has a leading role in the process of investigating money laundering crimes (Article 1 (2) of the Law no. 129/2019).

The National Office for Preventing and Combating Money Laundering represents the public institution which ensures coordination of the assessment of the risks of money laundering and terrorist financing in Romania and cooperates with the following authorities and institutions (Article 1 (1)(3) of the Law no. 129/2019): the criminal investigation bodies; the public authorities and institutions with regulatory, information and control attributions in the field, such as the financial information unit of Romania, authorities with financial/fiscal control attributions or authorities with fiscal control attributions, customs authority; state

bodies specialized in the information activity; the autonomous administrative authorities and institutions with the role of supervision and control of reporting entities, such as the National Bank of Romania, the Financial Supervision Authority, the National Gambling Office.

We emphasize that the National Office for Preventing and Combating Money Laundering coordinates the national response to the assessed risks, in cooperation with the authorities and institutions mentioned above, and shall inform the European Commission, the European Supervisory Authority and the Member States accordingly.

The knowledge of the origin of the goods or the aim pursued must be established from the objective factual circumstances (Article 49 (4) of the Law no. 129/2019).

According to the provisions of Article 4 (1) of the Law no. 129/2019, the real beneficiary means “any natural person who ultimately owns or controls the client and/or the natural person in the name or in whose interest a transaction, operation or activity is carried out, directly or indirectly”.

According to the provisions of Article 6 (1) of Law no. 129/2019, the reporting entities stipulated by the Article 5 of Law no. 129/2019 are obliged to submit a report for suspicious transactions exclusively to the National Office for Preventing and Combating Money Laundering if they know, suspect or have reasonable grounds to suspect that: the goods come from the commission of crimes or are related to the financing of terrorism; or the information that the reporting entity holds may be used to enforce the provisions of the Law no. 129/2019. Reporting entities consider the transaction to be carried out to be suspicious if the Office so requests and submit the report for suspicious transactions.

According to the provisions of Article 23 (1) of Law no. 129/2019, corresponding to the nature and size of the activity carried out, the reporting entities have the obligation to designate one or more persons who have responsibilities in the application of this law, specifying the nature and limits of the entrusted responsibilities, with the approval of the entity management. The documents drawn up for this purpose shall be kept at the premises of the reporting entity.

Article 6 (4) of the Law no. 129/2019 stipulates that the National Tax Administration Agency shall immediately submit a report for suspicious transactions to the National Office for Preventing and Combating Money Laundering when, from the data held, it knows, suspects or has reasonable grounds to suspect that the assets/funds are the result of criminal offences or are related to terrorist financing or the person has breached obligations, established by Regulation (EU) 2018/1.672 of the European Parliament and of the Council of 23 October 2018 on the control of cash entering or leaving the European Union.

According to the provisions of Article 34 (1)(2) of Law no. 129/2019, the National Office for Preventing and Combating Money Laundering shall analyze and process the information and, where evidence of money laundering or terrorist financing is established, shall immediately inform the Prosecutor's Office attached

to the High Court of Cassation and Justice. Moreover, the National Office for Preventing and Combating Money Laundering shall immediately inform the Romanian Intelligence Service about suspicions of terrorist financing.

The money laundering process is done in three separate and distinct stages, which can occur simultaneously or even overlap (Turner, 2011: 8) (Leslie, 2014: 16-17).

The first stage of the money laundering process is the *physical placement* of proceeds of crime in financial systems in order to separate funds from illicit sources, which could be overseen by law enforcement agencies (Madinger, 2012: 259). This stage of money laundering is accomplished by depositing cash in bank accounts (Moise, Stancu, 2017: 74).

After the funds have entered the financial systems, the second stage of money laundering is performed, *the stratification* that represents the process of moving money between different accounts in order to hide their origin (Turner, 2011: 9). Within this stage, the separation of illicit revenues from their source takes place, by creating complex layers of financial transactions, intended to avoid control over illegally acquired goods, ensuring the anonymity of these transactions.

The third stage of money laundering, the *integration* refers to the return of funds in the legal economic circuit, the criminals aiming to give an appearance of legitimacy on the origin of the illegally acquired goods. Integration is achieved by investing funds in the real estate market, in luxury goods or other financial assets (Madinger, 2012: 260) (Moise, Stancu, 2017: 75).

Conclusions

We noticed that the provisions of Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing normative acts adapted to the provisions of the European Union instruments in the field of preventing and combating money laundering, such as the Directive 2015/849/EU on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing.

We also highlight the very important role that the National Office for Preventing and Combating Money Laundering plays as a financial intelligence unit in the fight against money laundering crimes.

We believe that the National Office for Preventing and Combating Money Laundering should cooperate permanently in the process of investigating money laundering offences with the law enforcement agencies, such as the Prosecutor's Office attached to the High Court of Cassation and Justice, as well as with other bodies which have fiscal and financial control and monitoring attributions and fight against money laundering, such as National Tax Administration Agency, the National Bank of Romania, the Financial Supervision Authority and the National Gambling Office.

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