

COMBATING LAUNDERING OF THE PROCEEDS FROM CRIME: UKRAINIAN AND FOREIGN EXPERIENCE

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ABSTRACT

Description: The aim of the article is to study the key principles and provisions on which the effective implementation of the fight against laundering of the proceeds of crime in Ukraine and in some countries is based.

The Subject of Study: The subject of the study is key principles and provisions on which the effective implementation of the fight against laundering of the proceeds from crime is based.

Methodology: The methodological basis for the article is a systematic approach, which allowed implementing the principles of a comprehensive analysis of combating laundering of the proceeds from crime in Ukraine and in some other States. To solve the tasks and obtain specific scientific results, the following methods were used: the method of classification and systematization; the method of analysis and synthesis; formalization method; historical and legal method; comparative and legal method; the method of generalization helped to formulate general conclusions and recommendations.

The Results of the Study. Ukrainian legal acts, which enshrine the procedure for the fight against laundering of the proceeds from crime were examined. The legislation of some countries regarding the issue under consideration was investigated. The authors proposed the way to improve the mechanisms to combat laundering of the proceeds from crime in Ukraine.

Practical Implications: The study of the experience of foreign countries in ensuring the fight against laundering of the proceeds from crime led to the conclusion that today domestic legislation mainly meets the modern requirements of international organizations to combat this problem, but there are some issues that need to be improved based on the analyzed data.

Value/Originality. Improving the organization of the national financial monitoring system will contribute to the establishment of Ukraine as a reliable partner in the area of preventing and combating laundering of proceeds from crime in the international arena.

Keywords: Combating, Laundering, Legalization of the Proceeds from Crime, Experience.

INTRODUCTION

According to the UN classification, laundering of the proceeds from crime as a component of economic crime takes the first place. Given this, the laundering of the proceeds

from crime is not only a negative socio-economic phenomenon nowadays, but also a systemic danger that poses a serious threat to the sustainable development of the national economy and negatively affects living standards. Such tendencies, which are inherent in the modern world, actualize an independent direction of research in the field of public administration, related to the prevention and counteraction to laundering of the proceeds from crime. The modern vector of State policy development requires its scientific substantiation and solution of a number of problems, among which improving the effectiveness of State policy of preventing and combating laundering of the proceeds from crime as a factor of national security of Ukraine plays an important role.

MATERIALS AND METHODS

The methodological basis for the article is a systematic approach, which allowed implementing the principles of a comprehensive analysis of combating laundering of proceeds from crime in Ukraine and in some European States. To solve the tasks and obtain specific scientific results, the following methods were used: the method of classification and systematization was applied to analyze scientific literature on the formation and implementation of State policy of Ukraine and some European countries to prevent and combat laundering of the proceeds from crime; the method of analysis and synthesis was helpful in the process of studying the main features of the subject matter of the offense under consideration; formalization method made it possible to establish legal mechanism for implementing the State policy of some countries concerning preventing and combating laundering of the proceeds from crime; historical and legal method was used when considering the process of the development of legislation of Ukraine and some States regulating the investigated issue. Comparative and legal method was applied for examining the legal acts of Ukraine and some European States regulating this problem. The method of generalization helped to formulate general conclusions and recommendations.

The theoretical basis for the research is scientific domestic and foreign literature on the research topic, international legal acts, laws and by-laws of Ukraine and some foreign countries.

RESULTS AND DISCUSSION

Creating an effective system of economic security makes it possible to identify threats to national economic interests in a timely manner and prevent damage to the socio-economic system as a whole.

Improving the economic security system is closely linked to combating the laundering of the proceeds from crime. Given the transnational nature of organized crime, and, as a consequence, the laundering of the proceeds from crime, the world community has encouraged the development of international documents covering key issues of criminal justice and consisting of basic international standards in the area of combating organized crime. The process of legal integration, in which our State is actively involved, determines the adaptation of Ukrainian legislation to the requirements of these standards, their consideration in the development of the national legal system and in the activities of law enforcement agencies in the area of economic security.

Realizing the danger of the penetration of capital of criminal origin into national and international socio-economic relations, determining their dangerous and destructive potential, State governments and international organizations began to develop primarily organizational and legal measures to combat laundering of the proceeds from crime. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime signed on November 08, 1990 in Strasbourg (Council of Europe, 1990), has become an important legal act aimed at pursuing a common criminal policy, protecting the interests of the community, and combating serious offenses, which have become a growing international problem and require the use of modern and effective methods of combating at the international level. Many States that acceded to the Convention immediately made significant additions to their legislation, both to the concept of “*legalization*” and to the provisions regulating the issues of increasing responsibility for crimes.

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Council of Europe, 2005) is the new version of the Convention of 1990 and a comprehensive tool aimed at bringing the national legislatures of the participating States closer to modern international standards in the fight against laundering of proceeds from crime, as well as against the financing of terrorism.

In accordance with the provisions of the Convention, each Party shall ensure its ability to search for, track, identify, block, seize and confiscate property of legal or illegal origin, used or intended to be used in any way, in whole or in part, to finance terrorism or proceeds from this crime, and to ensure the greatest possible cooperation for this purpose.

Each Party shall take such legislative and other measures which can be necessary to enable it to confiscate instruments and means of crime and proceeds or property the value of which corresponds to such proceeds and laundered property.

To implement the provisions of these Conventions the United Kingdom adopted in 1993 the Money Laundering Regulations (UK Statutory Instruments, 1993), which established the system of anti-money laundering and the organization of information support to the competent public authorities by financial institutions in order to detect the legalization of criminal proceeds. The Regulations identified different institutions of the financial system as the actors, which were obliged to apply the following internal control procedures: customer identification, keeping records of suspicious transactions, internal informing authorized employees of the institution about suspicious customer transactions, information exchange, etc. The basis for the application of internal control procedures was the implementation of a financial transaction, which raised reasonable suspicions of its involvement in the legalization of criminal proceeds; implementation by the client of artificially differentiated financial transactions, the relationship between which is obvious; an individual making or receiving simultaneous payment to a specified threshold amount of 10 thousand euros, crediting to the account of such an amount.

Provisions to combat money laundering were enshrined in the Anti-Drug Trafficking Act (1994) (UK Public General Acts, 1994), which finds it an offense for any person to assist another person in concealing the true origin of drug proceeds. The Act identifies another related crime, the essence of which is to obstruct the investigation concerning the employees of financial institutions and other persons, who informed the suspect that an investigation was under way. The Act contains a number of provisions that were new to British law. One such provision establishes the right to confiscate all income from illicit drug trafficking.

In 2002, the Parliament of Germany adopted the Laws on Combating Illicit Drug Trafficking and Other Forms of Organized Crime and the Law on the Prevention of Money Laundering. In this regard, a new corpus delicti-money laundering has emerged in German criminal law; it is enshrined in Art. 261 of the Criminal Code. The priority areas of work of this unit are the fight against money laundering, namely: collection, processing and analysis of reports on suspicious financial transactions; transfer of results to law enforcement agencies and cooperation with other financial intelligence units. The threshold amount that falls under financial monitoring is 15 000 Euros. Crimes related to money laundering are punishable by imprisonment for the period for more than one year (Cherniavskiy, 2010).

The body supervising the activities of financial institutions in Germany is the Federal Office for the Supervision of Financial Institutions (Bundesanstalt für Finanzdienstleistungsaufsicht), which carries out the inspections of banking institutions, insurance companies and the account information systems

France is characterized by an administrative model of financial monitoring, which is determined by continental conservatism and a more liberal nature. It has no statutory requirements for the provision of information on financial transactions if their amount exceeds a certain threshold, and the criteria for examining suspicious transactions are a reasonable suspicion of financial transactions that have signs of legalization of income.

The general offence of money laundering is provided for by article 324-1 of the Penal Code. Special money-laundering offences also exist under the Criminal Code, the Customs Code and the Monetary and Financial Code.

Under article 324-1 of the Penal Code of France (Law of France, 1992) money laundering is facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit. Money laundering also comprises assistance in investing, concealing or converting the direct or indirect products of a felony or misdemeanour. So, it should be first establish that the accused has:

1. Facilitated, by any means, the fraudulent justification of the origin of the property or income of the perpetrator of a crime or an offence, which generated a direct or indirect profit; or
2. That the defendant assisted in the placement, concealment or conversion of the direct or indirect proceeds of an offence.

The central body of the system for counteracting and preventing money laundering and combating the financing of terrorism in France is the Traitement du Renseignement et Action contre les Circuits FINANCIERS clandestins (TRACFIN). TRACFIN is an agency, to which information on bank accounts of individuals and legal entities is provided. French law does not require the provision of information on financial transactions if the amount of the financial transaction exceeds a certain limit.

The ground for financial monitoring entities to provide TRACFIN with information on financial transactions is reasoned suspicion that it is carried out for the purpose of legalizing the proceeds from crime; namely, funds that may be related to: organized crime, drug trafficking, terrorist financing and corruption. Financial transactions worth more than 150 000 euros need special attention if they are confusing or do not make economic sense. Crimes related to money laundering are punishable by up to 8 years in prison and a fine (Kovalenko, 2007).

The United States stands out from the group of developed countries with the highest level of general economic prosperity and the most perfect regulatory framework in the world. Legislation in the financial monitoring system is no exception, as it is no coincidence that the United States has been the main initiator of a total war against money laundering. The problem of combating money laundering, on the one hand, and terrorist financing, on the other hand, the excessive dollarization of the world economy, which threatens the stability of the US dollar, necessitated the tightest control over cash flows both within the United States and around the world. To achieve this goal, the US government is making every effort, primarily to increase the transparency of relations in the financial system. And that is why the American financial monitoring system is considered one of the most brutal, and at the same time, one of the most effective in the world.

Much of the work of gathering and analyzing information, as well as conducting investigations into suspicious commercial transactions in the USA, is provided by organizations that control financial institutions. Along with this, a special role in the fight against money laundering is played by the Federal Bureau of Investigation, which acts as a kind of curator and coordinator in this area. The division of powers of regulatory authorities in the United States when investigating money laundering is related to the investigation of cases of crimes that preceded the commission of money laundering. Thus, according to the relevant US regulations, investigations of the cases related to the breach of tax laws and the Bank Secrecy Act fall within the competence of the Internal Revenue Service; the cases related to smuggling, export/import operations-to the Customs Service; relating to drug trafficking-to the Administration for Monitoring Compliance with Drug Laws. In 1990, the Ministry of Justice signed a Memorandum of Understanding with the Ministry of Finance, which defined the areas of activity of the three above-mentioned organizations in investigating money laundering cases in order to clarify their powers (Ministry of Internal Affairs of Ukraine, 2001).

The US anti-money laundering system creates some difficulties in conducting investigations, as the FBI is quite actively interfering in the activities of financial and law enforcement agencies, which causes dissatisfaction with the latter and a certain duplication of functions. The FBI's activities are also dangerous in terms of violating the rights of citizens and organizations, as a powerful arsenal of tools and a variety of sophisticated methods of work allow a particularly deep penetration into private life. Only certain areas of FBI activity in investigating money laundering cases are subject to control. Thus, in accordance with the existing rules of secret operations, the methods used in the investigation are considered by the Committee on the Analysis of Secret Operations in Criminal Investigations (CUORC), which includes senior officials of the FBI and the Department of Justice.

Within this study it is also necessary to analyze the existing legal framework governing the issue of money laundering in Ukraine, and to make effective proposals to change such a framework, taking into account the tasks of modernization of law enforcement and judicial authorities.

Thus, on April 08, 2020, Ukraine has got new rules to combat money laundering. Amendments were introduced by the Law of Ukraine of December 6, 2019 "*On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction*", aimed at protecting the rights and the legitimate interests of citizens, society and the State, ensuring national security by improving the legal mechanism for preventing and combating legalization (laundering) of

proceeds from crime, terrorist financing and financing the proliferation of weapons of mass destruction. The Law provides for:

1. -Shifting to primary financial risk-based monitoring approach by primary financial monitoring entities, which takes into account the risk criteria associated with its customers, the geographical location of the State of registration of the client or the institution, through which he (she) transfers (receives) assets, type of goods and services that the client receives from primary financial monitoring entities, the method of providing (receiving) services;
2. Delimitation of financial transactions subject to mandatory financial monitoring into threshold financial transactions, which have an amount limit, and suspicious financial transactions (activities) in respect of which there is a suspicion (grounds for suspicion) of their connection with criminal activity or terrorist financing and proliferation of weapons of mass destruction;
3. Increasing the amount of financial transactions subject to mandatory financial monitoring (from UAH 150 000 to UAH 400 000) while reducing the number of features of such financial transactions (from 17 to 4);
4. Transition towards suspicious transaction reporting cases;
5. The possibility of using the results of proper verification, carried out by another subject of primary financial monitoring;
6. Establishing a transparent accountability tool for violations;
7. Reduction of costs of banks and financial institutions for reporting on financial transactions due to the possibility of automating the process of providing information and reducing the frequency of information;
8. Improved procedure for disclosure of ultimate beneficial owners and ownership structure of a legal entity.

This Law also amended Article 209 “*Legalization (laundering) of property obtained by criminal means*” of the Criminal Code of Ukraine (the amendments entered into force on April 28, 2020).

One of the main sources of evidence of criminal activity is financial documents that contain data on the basis of which evidence of laundering of the proceeds from crime is formed, in respect of which it is necessary to take precautionary measures in order to preserve evidentiary information. In this case, we mean first of all the documents that reflect and characterize the operations on customer accounts in banks, financial statements, concluded import/export contracts for specific export/import operations, accounting cards of customs and banking control, and so on. The mismatch of the nature of the business with recoverable income (during mixing legal incomes with criminal ones); imitation of commercial activity in the presence of real income of the organization (conclusion of fictitious contracts); discrepancy of the funds received and transferred under the contract to the provided goods, services (imaginary agreements), etc., are established on their basis. Clearly, even fairly effective measures to detect and combat money laundering at the national level cannot provide the desired result if they are not coordinated, directed and agreed at the interstate and even international level (Harbovskiy, 2018).

Previously the description of the subject of the offence was based on the receipt of funds or other property as a result of committing socially dangerous illegal act that preceded laundering of income. The note to the previous version of the Article 209 of the Criminal Code of Ukraine determined which elements of an act constitute a socially dangerous offence:

“A socially dangerous illegal act that preceded legalization (laundering) of income is an act for which the Criminal Code of Ukraine provides for the main punishment in the form of imprisonment or a fine of more than three thousand non-taxable minimum incomes, or an act committed outside Ukraine, if it is recognized as a socially dangerous illegal act that preceded the legalization (laundering) of income,

under the criminal law of the State where it was committed, and is a crime under the Criminal Code of Ukraine and as a result of which an income was illegally obtained income”.

The new version of the Article 209 of the Criminal Code of Ukraine does not enshrine such features of the subject of the offense. Property can be obtained from any crime. Intention is also added to the mental element of the offense. Thus, the amendments lead to the criminalization of acts under Article 209 “*Legalization (laundering) of property obtained by criminal means*” of the Criminal Code of Ukraine.

In general, Ukrainian definition of laundering of the proceeds of crime organically combines with the definition, provided by the relevant UN International Conventions, which state that crimes are committed through the use of financial transactions or making deal using cash or other property obtained as a result of a socially dangerous illegal act that preceded such legalization, etc. Therefore, one of the mandatory features of the subject matter of laundering is the criminal origin of such funds. At the same time, the purpose of laundering of the proceeds from crime is a criterion according to which this crime should be distinguished from similar acts provided by other rules of criminal law.

For the most part, domestic legislation meets the modern international requirements to combat laundering of the proceeds from crime. But the organization of the financial monitoring system in Ukraine needs to be improved. Today, it operates mainly in the direction of detecting financial transactions that are related to the laundering of criminal funds. However, the analysis of the experience of organizing financial monitoring systems in foreign countries indicates a number of advantages, the introduction of which in Ukraine would increase the effectiveness of the national financial monitoring system.

Therefore, improving the organization of the national financial monitoring system will contribute to the establishment of Ukraine as a reliable partner in the area of preventing and combating legalization (laundering) of proceeds from crime in the international arena (Baranov, 2018).

CONCLUSION

As a result of the study it is found that despite the sufficient number of international organizations that directly deal with the fight against laundering of the proceeds from crime, and a number of adopted international legal instruments, today there is no unified system to prevent and combat laundering of the proceeds from crime. This problem is mostly related to the legal aspects of understanding this phenomenon in each country and, accordingly, to the mechanisms adopted to address it. With this in mind, each State should form its own system, taking into account national specifics and the level of its development.

The study of the experience of foreign countries in ensuring the fight against laundering of the proceeds from crime led to the conclusion that today domestic legislation mainly meets the modern requirements of international organizations to combat this problem. However, there are some issues of legal, methodological, organizational and tactical support for the implementation of the Law of Ukraine “*On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction*” in order to better ensure the economic security of the State.

The main conclusion is that financial monitoring in Ukraine should be aimed not only at documenting the facts of legalization, but also at the detection of other economic crimes. The experience of the United States shows that information obtained through financial intelligence can be effectively used to combat the corruption of officials, to identify misappropriation of property, abuse of office, fraud, etc. In this regard, it is appropriate to reconsider the legal definition of the concept of “*doubtful financial transaction*”. Doubtful should be considered all operations in which there is a suspicion that they are aimed at committing any crime, not just money laundering. This approach to financial monitoring provides greater opportunities for combating organized crime in general, and in particular the offenses in the financial and credit system.

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