THE BULGARIAN REGULATION OF MONEY LAUNDERING UNDER THE ANTI-MONEY LAUNDERING MEASURES ACT

Veselina Kanatova Buchkova, South-West University "Neofit Rilski"

ABSTRACT

The article examines the legal framework of money laundering in the Anti-Money Laundering Measures Act, which was adopted by the Bulgarian legislator in 2018 and replaced the previous regulation on the measures against money laundering, imposed administratively by government agencies, operating in the field of national security and financial intelligence. The relationship between the regulation of the act of "money laundering" in the Anti-Money Laundering Measures Act and the Criminal Code is considered, outlining the differences in the concepts and indicating the consequences of the application of the regulation in relation to them. The paper makes a critical analysis of the definition of money laundering according to the Anti-Money Laundering Measures Act and its qualification from an objective and subjective point of view. It is concluded that the regulation of money laundering in the Anti-Money Laundering Measures Act does not correspond to the concept of the term from subjective point of view, despite the efforts of the legislator to specify in detail the acts that constitute money laundering and persons who are potential perpetrators. The article points out that it is not permissible in the legislation to have two separate qualifications of money laundering both from a legislative point of view and from law enforcement point of view. It is concluded that the dualism in the legal regulations leads to inefficiency of the legislation on money laundering and hinders the actual application of the preventive administrative measures established in the Anti-Money Laundering Measures Act.

Keywords: Money Laundering, Crime Activity, Predicate Act, Participants in a Crime

INTRODUCTION

In 2018, the Bulgarian legislator adopted a new Anti-Money Laundering Measures Act with which introduced the requirements of Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering connected with risk assessment and determines the acts for which the persons obliged by law are subject to administrative sanctions. The regulation introduced in the Anti-Money Laundering Measures Act is special compared to the general regulation in the Criminal Code for the acts that constitute the crime of money laundering, and the administrative proceedings under the law are conducted independently or in parallel with the criminal proceedings against persons. In addition, the Anti-Money Laundering Measures Act introduces a separate definition of acts that are considered money laundering, which differs from the provisions of the Criminal Code, and raises the question of the relationship between the Anti-Money Laundering Measures Act and the Criminal Code on the one hand, and on the other hand, the legal admissibility of the existence of two different concepts on one legal institute. In view of this finding, the article also considers the question of whether the definition in the Bulgarian legislation on money laundering complies with international legal standards and definitions.

METHODOLOGY

The systematic, analytical and comparative research method are used in the article. The systematic and analytical method reveals the relationship between existing legal institutes and the specific consequences of their differences, and the comparative method examines the relationship between money laundering in the Anti-Money Laundering Measures Act and the Criminal Code and contributes to legal conclusions.

THE TERM "MONEY LAUNDERING"

Money laundering is a crime that affects all spheres of public life. As a rule, it is related to the commission of other crimes, which are covered up by the secondary act - money laundering. Most often, these are corruption and tax evasion (Achim & Borlea, 2021). Money laundering can be found in the tax sphere, in the usual commercial activity of individuals when concluding contracts, in public procurement, exercising legal or other consulting, in banking and payment services, etc. Modern trends for digitalization of all spheres of public life and the widespread use of computer technology are the social factors that facilitate the perpetrators of crimes, increase the risk of their non-disclosure and the challenges to combat them (Zavoli & King, 2021).

Money laundering is significantly affected by cyber technology and cyber laundering of illegal income has long become a global problem that requires a solution from all states of the world (Nyzovtsev, Parfylo, Barabash, Kyrenko & Smetanina, 2021). Therefore, the prevention of the act of money laundering in all its manifestations is essential for society and the legal framework of prevention should meet modern challenges. Modern money laundering regulations aim to reduce the risk of committing the act, and as prevention is an expensive activity and the positive effects affect the work of various bodies, the legislation can easily be used as a political weapon against "unwanted persons" (Lewisch, 2008). In Bulgaria, before the adoption of the Anti-Money Laundering Measures Act, prevention measures were established in separate special laws. For example, the Credit Institutions Act had rules that required banks and financial institutions to adopt internal rules introducing requirements for customer risk assessment and appropriate measures to prevent money laundering in high-risk customers. In fact, prior to the adoption of the Anti-Money Laundering Measures Act, only banks, credit institutions and insurance companies in Bulgaria had administrative obligations related to the prevention of money laundering, given that cash transactions and cash flows are a significant risk factor for money laundering (Zlyvko, Shkliar, Kovalenko, Sykal & Snigerov, 2021). The general legislation on administrative obligations related to the prevention of money laundering was introduced with the adoption of the Anti-Money Laundering Measures Act. The purpose of the law was to unify the rules for all persons in whose activities there is a potential risk of money laundering, so that to be obliged to disclose to the financial intelligence and national security authorities their clients in case of suspicion or finding money laundering. In this way, the sector-specific rules have become obsolete.

The Anti-Money Laundering Measures Act provided the general legislative framework, indicating the cases in which money laundering occurs, the persons obliged by the law, the measures they should introduce in carrying out their activities, the obligations they have when establishing or suspecting money laundering, as well as the administrative sanctions imposed for non-compliance with these obligations.

Money laundering is a crime under the current Criminal Code of Bulgaria, which is punishable by either imprisonment or a fine within the limits established by the code. The Criminal Code defines money laundering as an intentional act by which the perpetrator performs a financial operation or property transaction or conceals the origin, location, movement or actual rights to property that he knows or suspects was acquired by a crime or another act that is dangerous to the

public. Money laundering is also activity with which one acquires, receives, holds, uses, transforms or assists, in any way whatsoever, property which the perpetrator knows or assumes to have been acquired through crime or other act that is dangerous to the public (art. 253 Criminal Code). The main purpose of criminal activity is to legalize criminally acquired funds or property by investing them in the economy and to frustrate or at least make it difficult for the state authorities to establish the origin of the proceeds of crime. In this regard, money laundering is always a secondary crime. It is related to another act, which is a crime or act dangerous to the public within the meaning of the law. That is why part of the obligatory elements of the composition of the crime is to establish the causal link between the predicate activity and the property subject of money laundering. At the same time, the legislator does not require the predicate act to be proved in an unequivocal and definite manner. It is quite sufficient for the predicate activity to derive benefits that have become the subject of money laundering, and the knowledge or assumption about this is admissible to derive from other objective factual data. In this sense, the predicate activity is the objective side of the crime under Art. 253 of the Criminal Code, and not an element of the executive act or the result of the laundering. The law itself allows, in addition to a crime, the predicate activity to be expressed in an act that is dangerous to the public. The acts that are not crimes according the material law but are dangerous to the public are the administrative violations. The administrative violations constitute illegal acts with a lower degree of public danger and for that reason the perpetrators are sanctioned with administrative penalty under the Administrative Violations and Punishments Act. In this sense, since the objective composition of money laundering includes both predicate offenses and administrative violations, it can be concluded that both acts are constitutive and may lead to the conviction of the perpetrator for money laundering.

Money laundering is a premeditated crime. It cannot be done carelessly - the perpetrator did not foresee the occurrence of the dangerous consequences, but was obliged and could have foreseen them, or when he foresaw them, but thought to prevent their occurrence. When laundering money, the perpetrator is aware or assumes that the subject of his crime is the economic benefit obtained from the predicate offense. In addition, the subjective side involves the pursuit of a purpose by the perpetrator to conceal or disguise the illegal origin of the property. Judicial practice and legal theory in Bulgaria is still poor in the analyses of the money laundering crime which leads to adverse jurisprudence while applying the article 253 of the Criminal Code. Some court decisions accept that the intent to launder money can only be direct, *i.e.*, - the perpetrator directly aims the occurrence of the consequences of the act (Judgment 309 of 11 April 2018 Supreme Cassation Court), other assume that money laundering could be committed both with direct and indirect intent (Judgment 148 of 21 October 2016 Supreme Cassation Court). However, jurisprudence is united around the view that from subjective point the intent of the perpetrator should be derived not from the knowledge or assumption that the acquired property is result of a crime, but from his attitude to the socially dangerous consequences of the act, namely legalization of the acquired benefit or property in the economic, business or financial sphere.

The Anti-Money Laundering Measures Act also gives a legal definition of money laundering. The definition is stated in article 2 of the law. Unlike the provisions of the Criminal Code, the Anti-Money Laundering Measures Act outlines the specific options for criminal activity related to money laundering. It is stated that the definition of money laundering is used for the purposes of the law, *i.e.*, has an independent significance from the qualification of the crime under the Criminal Code. The activities that carry out money laundering within the meaning of the Anti-Money Laundering Measures Act can be divided into three groups. The first group cover the transformation or transfer of possessions acquired through criminal activities or participation in such activity, in order to hide or cover the illegal origin of the possessions or in order to assist a person, participating in perpetration of such activity in order to avoid legal consequences of his/her act. The second group are cases of hiding or covering the essence, the source, the location, the

disposition, the movement of the rights with regard to the possession, acquired through a crime or participation in such activity. The third group are the acts of acquisition, possession, keeping or use of possessions with the knowledge at the moment of receiving that they have been acquired through a crime or from participation in such activity. The Anti-Money Laundering Measures Acts defines the sole participation in any of actions from the three groups, the association to commit, the trial to perpetrate such an act, as well as the assistance, instigation, facilitation of perpetration of such an act or its covering as money laundering as well.

In general, the definition of money laundering under the Anti-Money Laundering Measures Act follows the regulations in international instruments – the United Nations Convention against Corruption, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Financing of Terrorism and the Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. It is noteworthy, however, that in its attempt to cover all possible legal and factual actions of persons involved in money laundering, the legislator has deviated from the abstract legal framework and introduced legislation that is identical to the directive but calls into question its compliance with the rules of criminal law and application in practice. The legal definition of money laundering in the Anti-Money Laundering Measures Act also raises the question of the admissibility of the existence of two separate money laundering regulations in the Bulgarian legislation with different content and the consequences of this legislative decision for the persons who are obliged to follow the rules of the law.

The regulation of money laundering in the Anti-Money Laundering Measures Act regarding the objective side of the crime is more in line with the regulation of the crime in the Criminal Code, despite the use of different terminology which describes the specific forms of the acts. The observed differences are regarding the subjective side of the crime considering the rule in the Anti-Money Laundering Measures Act that despite the perpetrator - the participant, the member of association, the assistant, the instigator, the facilitator, the counselor and the person who covers the unlawful activity are also subjects of the money laundering crime. In that connection, in first place, participation in the commission of acts constituting money laundering is provided for in the law as a separate hypothesis of the crime. Therefore, the legislator's will have been covering all persons involved in the commission of the act, with the exception of the direct perpetrators. The Criminal Code, for its part, outlines three types of crime perpetuation from subjective point of view – perpetration, instigation and facilitation (art. 20 Criminal Code). The perpetrator is the one who participates in the very commission of the crime, while the instigator is the person who intentionally persuades the other to commit the crime. The facilitator is the one who assists the commission of the crime through advice, explanations, a promise to give help after the act, removal of obstacles, obtaining funds or otherwise. The indicated persons in the sense of the criminal law are all participants in the commission of the crime. This means that they are not included in the circle of persons named by the Anti-Money Laundering Measures Act as participants in actions concerning property acquired from criminal activity. On a general basis, the instigator and the facilitator are subject to the crime of money laundering and they can be prosecuted for money laundering together with the direct perpetrator. What is the purpose of the legislator then to explicitly indicate the "participants" in the actions described in the Anti-Money Laundering Measures Act as subjects of the crime? Obviously, their designation is completely unnecessary given the principle of the Criminal Code, which defines them as accomplices in the commission of the crime. The considerations regarding instigation are similar. Its additional inclusion in a separate hypothesis, which explicitly indicates that the actions of the instigator also constitute money laundering, is not only unnecessary, but also introduces ambiguity about the regulation.

The actions of the facilitator are also separately defined as money laundering within the meaning of the law. However, it is further stated that in addition to the facilitators, the persons who

assist the performance of the actions under the law, give advice or cover them up, are subjects of the money laundering crime. At the same time, the Anti-Money Laundering Measures Act establishes the stated hypotheses as alternative - money laundering could be accomplished either by the persons who facilitate the performance of the actions under the law, or the one who give advice in committing such an act. According to the Criminal Code, advising a crime is a form of facilitating the commission of a criminal act and is part of the actions of the assistant. Therefore, the differentiation of a separate category of subjects of the criminal act as advisers is unnecessary and does not comply with the provisions of the Criminal Code. The Criminal Code, for its part, provides for other forms of facilitating the commission of a crime, which the Anti-Money Laundering Measures Act does not specify. Facilitating the commission of a crime is, for example, a promise to provide assistance after the act, or to remove obstacles to its commission, or to raise funds for its accomplishment. These forms of facilitation are not included in the list of entities whose actions, along with the direct perpetrator, the law classifies as money laundering. In this regard, the question arises whether the forms of facilitation of the commission of the crime specified in the Criminal Code fall within the scope of the Anti-Money Laundering Measures Act and constitute money laundering within the meaning of the law? The answer to the question is rather negative, as the regulation in the Anti-Money Laundering Measures Act is detailed and explicit, due to which the list of persons, except for the direct perpetrator, whose actions constitute money laundering within the meaning of the law, is exhaustive. This contradiction with the criminal law not only leads to confusion but also to the ineffective application of the preventive measures against money laundering established by law as a certain category of perpetuators do not fall within its scope.

It should be noted another ambiguity regarding the subjects of the act under the Anti-Money Laundering Measures Act, related to the association for the purpose of committing a crime. An association within the meaning of the Criminal Code exists when three or more persons conspire to commit a crime, which may not be specified. It is enough to conspire to commit a crime in principle. The Anti-Money Laundering Measures Act does not specify what the form of association should be in order to assume that the actions of individuals fall within the definition of money laundering under the law. An association within the meaning of civil law may also arise between two persons. Again, the question arises as to the relationship between the application of the regulation in the general Criminal Code and the Anti-Money Laundering Measures Act and how the differences should be interpreted and applied in practice. Moreover, the introduction of the same legal matter in separate laws violates basic principles of rule-making and leads to contradictory interpretations in practice.

The inaccurate regulation of criminal law terminology in the Anti-Money Laundering Measures Act calls into question the effectiveness of the law and the preventive measures established in it. Therefore, the additional enumeration of the subjects of the act in a law which main purpose is prevention, in addition to being unnecessary, also confuses which specific persons are considered perpetrators of a criminal act defined as money laundering within the meaning of the special law. On the other hand, the correct definition of the concept of money laundering within the meaning of the Anti-Money Laundering Measures Act is essential for the subjects obliged by the law, who should apply the prevention measures established in it and provide information about their clients in case of established money laundering actions or suspicions of such. This is because the persons obliged under the Anti-Money Laundering Measures Act bear personal criminal responsibility when they violate or fail to implement the preventive measures established by the law.

CONCLUSION

The existence in the Bulgarian legislation of two separate definitions of money laundering - one in the Anti-Money Laundering Measures Act and the other in the Criminal Code, raises controversial questions about the assessment of when money laundering occurs and in which cases the obligations for the persons under the Anti-Money Laundering Measures Act arise. The differences of the concepts in the regulation complicate its real application and thus the measures established in the Anti-Money Laundering Measures Act cannot achieve the preventive effect intended by the legislator. Moreover, legislative contradictions make it possible to prosecute persons for purposes other than the prevention of illegal acts, which does not correspond to the spirit and meaning of the law, but also to the principles of the rule of law.

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