

APPROACHES REGARDING MONEY LAUNDERING

Associate professor **Mioara-Ketty GUIU**¹

Abstract

From a comparative law perspective, the present paper is a synthetic presentation of the issues raised by the criminalization of the money laundering offence.

Key words: money laundering, concealment, real favouritism.

JEL Classification: K14

1. Money laundering - Concept and charaterisation.

This money laundering crime is defined in the Act no. 656 from 2002² on prevention and punishment of money laundering, an Act which transposes into national legislation the provisions of the directive no. 2005/60/EC of the European Parliament and Council³.

According to the 23rd article from the Act no. 656/2002, money laundering consists in: a) the exchange or transfer of goods, knowing their origin is of criminal nature, with the purpose of hiding or covering up their illegal origin or with the purpose of helping the person who committed the crime in order to avoid criminal proceedings, trial or punishment execution; b) the hiding or the covering up of the true nature, the origin, the location, the circulation or the ownership of goods or the rights in respect to them, knowing their origin is of criminal nature; c) the acquisition, the tenure or the usage of goods, knowing their origin is of criminal nature.

The above mentioned definition adds up to the conclusion that the crime of money laundering is a correlative one, subsequent to another one - named "main crime" - from which the "laundered" goods derive (correlative crimes did not always have autonomy, those actions being punished as *posterior complicity acts*).

The definition mentioned above also involves the idea that the crime of money laundering is a commissive and formal crime⁴.

Moreover, from the above mentioned definition it is obvious that the acts punishable as money laundering can be mistaken both for the acts punishable by the 221st article from the Criminal Code, known as concealment⁵, and for the acts punishable by the 264th article from the Criminal Code, known as real favouritism⁶. In other words, according to the present legislation, it is possible that an identical action should receive three different legal classifications, for which there are different punishments stipulated - a fact that contravenes both the equality in rights principle (Article 16 from the revised Constitution) and the determination of the criminal law

¹ Mioara-Ketty Guiu, „Alexandru Ioan Cuza” Police Academy, Bucharest, Associate Researcher of Romanian Academy, e-mail mioarakettyguiu@yahoo.com.

² The latest amendments to the Act no.656/2002 were performed by Emergency Ordinance no.26 from 31 March 2010 and Act no. 238 from 5 December 2011.

³ The directive 2005/60/CE suffered some consecutive amendments by Directive 2007/64/CE, Directive 2008/20/CE, Directive 2009/110/CE and Directive 2010/78/CE.

⁴ See also G. Fiandaca, E. Musco, *Diritto penale, Parte speciale*, vol. II, Zanichelli Editore, Bologna, 1996, p. 222.

⁵ Under Art.221 from the Criminal Code in force, the crime of concealment consists in receiving, acquiring or changing of a good or facilitating its capitalization, knowing that good is provided through committing a crime if it was aimed at obtaining some material benefits for himself or for a third party.

⁶ Real favouritism is the support shown to a criminal, without an agreement established before or during the offence, in order to provide the offender with the benefit or the proceeds of crime.

principle, which represents a consequence of the principle of legality and which imposes that the legislator should confer each crime its own individuality⁷.

2. Legal object (damage value)

Regarding the legal object of money laundering there is not a common point of view, and, as a consequence, the legislators of criminal codes have shown different options in including money laundering in a certain group of crimes- for example, while the Swiss Criminal Code includes money laundering in the group of crimes against justice (article 305 bis), the Italian Criminal Code includes the same crime in the group of crimes against property (article 648 bis), as does the French Criminal Code (article 324-1 and the following).

The most accurate approach is that of the Swiss legislator. Just as is the case with concealment or real favouritism, by punishing money laundering protection is ensured either to the precepts that regulate civil liability (the obligation to make amends), either to the precepts that regulate the special forfeiture, therefore, the Swiss legislator, in a rightful manner, considered that money laundering should be included in the group of crimes against justice.

We make reference to the fact that not even concealment is a crime against property- as it can be inferred from some criminal codes (the Italian one, the Romanian one etc.), which have included concealment in the group of crimes against property; actually, concealment is by excellence a crime that hinders the carrying out of justice⁸.

Regarding the legal object of money laundering we also make reference to the fact that in Romania, the prevalent opinion is that money laundering is a white-collar crime- or at least this is the conclusion to which some statements add up to, such as “*money laundering protects the legal source of money and their just circulation in banking operations*”⁹. Disproof of this opinion, it can be noticed that the class of white-collar crimes is vague (these crimes do not have precise criteria of classification); and, supposing that we confined the group of white-collar crimes to those which hinder commercial law precepts, it would be obvious that money laundering does not breach any commercial law precepts.

3. Material object

Similar to the case with concealment or with real favouritism, money laundering has always had a material object. This object consists in the acquired, changed or transferred goods, knowing their source is of criminal nature.

Nevertheless, at first sight, it seems that the group of goods that can be classified as being the material objects of money laundering is wider than that of those which can be classified as being material objects to concealment. According to the prevalent specialist opinion, “*the goods that can be the material object of concealment are only movable ones (assets, animals, money etc.), and not those which are immovable, which cannot be concealed (hidden)*”¹⁰; in the same way as the goods that can be the material object of a concealment act are only tangible ones, (material) and not those which are intangible¹¹. On the other hand, with regards to the goods that can be classified as material object of money laundering, the Act no.656/2002 (article no.2 b.)

⁷ In this respect more decisions of the Constitutional Court of Rome, ie., Decision of April 9, 1981.

⁸ See also F. Antolisei, *Diritto penale, Parte speciale*, Giuffrè Editore, Milano, 1996, vol. I, p. 416.

⁹ I. Lascu, *Money Laundering, „Law”*, no. 6, 2003, p.5.

¹⁰ V. Dongoroz, *Theoretical approach*, vol. III, Special part, The Romanian Academy Publishing House, Bucharest, 1971, p.570.

¹¹ Michel Véron, *Droit pénal spécial*, Armand Colin, Paris, 1999, p. 249; Jean Pradel, Michel Danti-Juan, *Manuel de droit pénal spécial*, Cujas, Paris, 2001, p.601.

states that these can be “*tangible or intangible goods, movable or immovable, and legal documents or papers that stipulate a title or a right regarding them*”.

But if we approach the subject in a more serious manner, we reach the opposite conclusion, namely that regarding the nature of the material object, there is no difference between the money laundering and the concealment crime.

Firstly, with regards to the thesis that immovable goods can be the material object of a money laundering crime we take notice of the fact that this thesis is a consequence of the erroneous definition of this crime, and more precisely of the fact that it has been stipulated that one of the ways it can be committed is by “*covering up the true title*”- because only committed in this manner the crime of money laundering can have an immovable good as the material object. The matter in question is that money laundering committed in this manner appears to be a complex crime, which covers another one, a forgery crime- which is logically impossible. As it had been noticed for a long time¹², all forgery in documents crimes are, with no exception, obstacle-crimes (designed to prevent the perpetration of other crimes, subsequent ones that can cause prejudices), and obstacle-crimes always maintain their autonomy, they never include other crimes and are never included by other crimes.

Secondly, with regards to the thesis that intangible goods can be the material object of a money laundering crime, we, alongside with other authors¹³, observe that the alleged classification of goods in tangible and intangible is not stipulated in any law, and, moreover, this classification, having the basis in the ancient differentiation between assets (“tangible goods”) and rights (“intangible goods”), ignores the fact that these two categories –goods and rights- have a different nature, and they cannot be considered parts of the same whole and cannot be taken into account as elements of the same classification. In other words, it is wrongfully stated that the crime of money laundering can have intangible goods as material object.

In conclusion, money laundering, as is the case with concealment, can only have tangible goods as its material object.

4. Active subject

The crime of money laundering, does not have a circumstantial direct active subject, so that the crime can basically be attributed to any person held criminally liable.

However, as it is the case with the concealment, the favoring or other correlative offence, the offence of money laundering can not be attributed to the main offender (the proprietor). Likewise, it may not be attributed to any participant in the main offence - because all the participants in the main offence become “owners of the property by participation in that act”¹⁴.

This rule is supported by most European criminal law specialists¹⁵ and it is enshrined explicitly in art.648-bis of the Italian Criminal Code, entitled “Recycling” - text that begins with the exclusion of the main offence participants in the field of the direct active subject of the recycling crime (“*Except the participants, anyone changing or transferring money, goods or other benefits originating from an intentional crime ... shall be punished ...*”).

Therefore, our supreme court has wrongly ruled that the defendants’ crime - the accomplices to the crime of bribery- to change money in Euros by committing this act, and to deposit it in the bank on behalf of close relatives meet all the constituents of the offence of

¹² Donnedieux de Vabres, *Essai sur la notion de prejudice dans la théorie generale de faux documentaire*, Paris, 1943, p. 31.

¹³ M. Planiol, G. Ripert, *Traité pratique de droit civil français*, tome III, Paris, 1926, p.59-60; Gh. Beleiu, *The general theory of the civil law*, Bucharest, 1980, p.170.

¹⁴ V. Dongoroz, cited work, p. 571.

¹⁵ M. Véron, cited work, p. 269; Ph. Conte, *Droit pénal spécial*, Litec, Paris, 2005, p. 376.

money laundering, stipulated in the article 23 of Act no.656/2002¹⁶. Since the "possession" of money began the very moment when the main crime was committed,- because the money was acquired through acts of connivance in the crime of bribery - subsequent actions, such as the exchange of currency in Euros and depositing it on the name of close relatives was entirely irrelevant. Therefore it could not result in liability for the subsequent offence of money laundering.

Money laundering can also be committed in ventures, showing more possible forms (co-authorship, abetting or complicity).

5. Passive subject

Basically, the offense of money laundering has got only a general passive subject - the state. However, in the event that the asset which constitutes its material object comes from a patrimonial crime, the offence of money laundering will also have a special passive subject, represented by the injured natural or legal person ("the launderer" is civilly liable, for the value of goods "laundered").

6. Constitutive content

If we exclude the form stipulated in the Article 23 paragraph 1 letter b of the Act no.656/2002 (which has no meaning or substantiation), we can observe that in its other forms (exchange, transfer, acquisition, possession or use), the acts of money laundering are similar to those of concealment. However, terms that describe the objective (material) element of the offence of money laundering have an identical meaning to those which describe the objective element of concealment. For example, "exchanging" goods, which is a particular method of money laundering, may mean the "transformation" of property (changing its appearance) or its "capitalization" (replacing it with another good, of an equal or higher value). The above mentioned are considered forms of the objective (material) element of concealment, or, "receiving" property (referred to as a form of concealment) necessarily involving the "possession" (provided as a *modus operandi* of money laundering).

Moreover, according to some authors¹⁷, the magistrates prefer to indict the offence of concealment, notwithstanding all the indictments named "Money laundering" (rom.), "Whitening" ("Blanchement" - fr.) or "Recycling" ("Riciclaggio" - it.) - which of course would not be possible if the two offences had a different content. Therefore, the present article does not approach the essential conditions of money laundering, but it is based on the already known theoretical explanations, regarding the constituents of the crime of concealment.

However, we emphasize that in terms of concealment, at least two paradigm changes are to be noticed.

A first change aims at the meaning of the term 'possession'. According to Professor Philippe Conte¹⁸, the latest years, case law has broadened considerably the scope of its provisions without formally giving up the traditional view, according to which the acts of concealment necessarily involve the material contact with the goods. For example, it was decided that if the concealer gave the thing to a third party who was in charge to transport it, he is later held liable

¹⁶ High Court of Cassation and Justice, The criminal Section, Decision no.1386 from 11.03.2004, published in *Cassation Bulletin*, 2005, p. 12-13.

¹⁷ O. Jerez, cited work, p. 242-243; F. Lengart, *Criminalité financière*, Editions d'Organization, Paris, 2002, p. 235-236.

¹⁸ Ph. Conte, cited work, p. 368.

for concealment himself, even if he does not have access to the goods that he transported¹⁹. Likewise, the one who has provided a con with one's bank account, thus helping him to transfer amounts resulted from the crime²⁰, or the middleman who purchased stolen art objects²¹. Briefly, case law no longer conceives concealment as the purely physical possession of the good, but it shows that in order for this crime to exist, it is enough that the agent has the power to make use of the good, even if for a short time.

A second change tackles the issue of whether the crime of concealment remains in effect if the agent had not been aware of the illicit origin of the goods from the very beginning, and only later did he find it out. In this respect, as the same author²² shows, there has been a sudden change for the better, because if case law has long proved severity, considering that the one who still keeps the good, after learning that it originates from a crime²³ is also held liable for concealment, since the 1970s case law has adopted a totally opposite view, considering that in order to establish the existence of concealment, it is imperative that the agent be aware from the very beginning, of the true origin of the good.

Another fact that needs to be underlined is that, while some legal systems (Romanian, Italian, German, etc.) make difference between the acts of concealment and of real favouritism, being considered two independent crimes, other legal systems classify them as one criminal offence (in France, for example, there is only the crime of concealment)²⁴. More specifically, concealment and real favouritism are two separate offences in those legal systems in which it is considered that the concealer's purpose to secure a material benefit for oneself or for another would confer a special configuration to concealment, establishing the clear difference from real favoritism (which is performed in order to ensure the offender with product or the benefit of the crime). As far as we are concerned, we believe that such a distinction might be forced, and, furthermore, starts from a wrong premise - because, actually, in real life cases the one who favours and the concealer pursue a common goal, namely helping a criminal. The only difference is that the concealer also seeks simultaneously, to reach his own goal (to get profit), which is not the case with the acts of favoritism. In other terms, it should be noted that, on the one hand, the concealer seeks both an immediate purpose (to get profit) and a mediated purpose (to provide products or services to the offender); On the other hand, the mental position of the concealer varies according to the goal aimed at: According to the immediate goal the concealer acts with direct intention (seeking profit), compared to the mediated goal when the concealer acts with an indirect intention (he agrees to help the offender).

Finally, without getting into detail on whether it is justified or not to distinguish between concealment and real favouritism, we only make the point that in the legal systems which enshrine this distinction, the crime of money laundering is confused in fact, with the the crime of favoring the offender - because in order to establish the existence of the crime of money laundering, the offender does not intend to get profit.

7. Forms

Article 23 paragraph 3 of the Act no.656/2002 stipulates that "the attempt is punishable", but this provision creates an error, as it becomes evident, as soon as we try to determine the

¹⁹ Cass. Crim., 1 oct. 1986 (The decision is quoted by Ph. Conte, p. 369).

²⁰ C.A., Paris, 13 feb. 1990 (The decision is quoted by Ph. Conte, op. cit., p.370).

²¹ Cass. Crim., 14 feb. 1991 (The decision is quoted by Ph. Conte, op. cit., p.370).

²² Ph. Conte, cited work, p. 606.

²³ See also Nicoleta Iliescu, *Theoretical explanations of the Romanian Criminal Code*, vol. IV, Special part, Romanian Academy Publishing House, Bucharest, 1972, p. 221.

²⁴ See art.321-1, art.434 -6, art.434 -7 from the French Criminal Code (they indict the concealment of goods, people and corpse).

specific activities described as attempt, namely those prior activities, performed before committing the crime.

Thus, if we exclude many unnecessary words used in the incrimination rule ("change", "transfer", "hide" etc..) and limit the objective element to the „possession” of the good (classification which covers the others), we may notice that the term “possession” involves duration and consequently, we should classify money laundering as a continuous permanent crime. In this case the attempt is not possible.

On the other hand, we may notice that among the *modus operandi* of money laundering, there is also the “acquisition”, and in this case money laundering is an anticipated consumed crime, whose attempt was assimilated to its consumed form of the crime. More precisely, if we want to provide the term “acquisition”, with a different meaning, in which case the “acquisition” is no longer mixed up with “possession” (as it is obvious, in order to avoid a redundant term), then we should admit that as far as “acquisition” is concerned, the crime of money laundering consists in a simple deal (convention, agreement) to take over the good and therefore an act prior to possession. That shows again, that according to the purchase, money laundering offence is classified as an anticipated consumed crime. And the criminalization of its attempt is a nonsense (especially, that one cannot infer any slight agreement).

However, in our opinion, giving up only to the criminalization of attempt is not enough - because, as long as money laundering continues to exist, simultaneously, both as a continuous offence and an anticipated consumed offence, one could still not tell which is the time when the crime was committed, in the conditions, when the moment of performance of the crime varies according to the manner of committing the crime: In the "possession" modus, the offence starts as soon as the good was taken hold of and it lasts until exhaustion. In the "acquisition" modus, the offence is consumed instantly, the very moment the agreement to take possession of the good is made. Or according to our opinion, it is unacceptable that such different facts regarding seriousness and content be classified under the same name and the same penalty. Moreover, such treatment is deeply illegal and it violates the principle of equality before the law. Therefore, we believe that the legislator should abandon all the provisions of article 23 of Act no.656/2002 and grant the name of "money laundering" to acts of real favouritism, taking for granted the fact that these acts be criminalized separately from the acts of personal favouritism.

Bibliography

1. G. Fiandaca, E. Musco, *Diritto penale, Parte speciale*, vol. II, Zanichelli Editore, Bologna, 1996
2. F. Antolisei, *Diritto penale, Parte speciale*, Giuffrè Editore, Milano, 1996,
3. I. Lascu, *Spălarea banilor*, „Dreptul”, n. 6/2003
4. V. Dongoroz, *Explicații teoretice*, vol. III, Partea specială, Romanian Academy Publishing House, Bucharest, 1971
5. Michel Véron, *Droit pénal spécial*, Armand Colin, Paris, 1999
6. Jean Pradel, Michel Danti-Juan, *Manuel de droit pénal spécial*, Cujas, Paris, 2001,
7. Ph. Conte, *Droit pénal spécial*, Litec, Paris, 2005
8. F. Lengart, *Criminalité financière*, Editions d' Organization, Paris, 2002,
9. Nicoleta Iliescu, *Explicații teoretice ale Codului penal român*, vol. IV, Romanian Academy Publishing House, Bucharest, 1972