

Money Laundering and Its Understanding by the Current Romanian Legal System – Origins, Mechanisms and Implications

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Abstract

Money laundering benefits from the evolution of technology. It is developing as a way of financial crime, from both perspectives: the prevention and sanctioning tools that are getting more and more sophisticated, but also the way in which this crime is being committed. Last but not least, having a banking system that encourages money laundering is not only counter-productive for the law enforcement officers and judicial system, but also for the economy system of a developing country, which will fail to attract investors. The purpose of this article is to present the legal framework of the Romanian judicial system when it comes to money laundering, but also to underline its flaws and its perspectives of improvement. It will also focus on the main methods that are being used in Romania for money laundering.

Key words: money laundering, methods, legal framework, legislative proposals

J.E.L classification: K40, K49, P44, E42

1. Introduction

Investigators have found that a happy financial offender is the one who keeps the money in his accounts, he assumes the possibility of bearing the repressive mechanism of the State because he does not care about how the State finishes to execute the form of constraint on his freedom, in order to "re-educate". He will have sufficient resources, which he may perhaps be able to put into the financial circuit, to justify the legal origin of the revenue. (Bjelajac, 2011, p.2)

Happy criminals often receive advice on the criminal schemes they carry out, planning their criminal activity over a minimum period of 10 years. They take and accept the risks of being caught in about the seventh year, statistics show. It is only the unfortunate and uneducated criminals who, at the end of the criminal proceedings, are unable to prove their innocence, and their proceeds of illegal activities are confiscated. The real problem for the legal systems, or society in general, are the happy and educated criminals. (Achim, 2019, p.23)

This is why, It is the Romanian legal system's understanding that starting from the premise of correct understanding of the criminal profile of the financial criminal, attempts are being made, in the field of investigation of these crimes, to phase out traditional theories in which the restriction of individual freedom is the indispensable condition for restoring law and order, of general and special prevention and the implementation of a new policy of social control, focusing not so much on the restriction of individual freedom but rather on the confiscation of fraudulently acquired assets. (Achim, 2019, p.23)

2. Literature review

While money laundering is an intense debatable theme in the international literature, with many authors focusing on its methods (Bullogh, Bjelajac and many others), the Romanian literature has less work in distinguishing between important terms the international literature uses when it comes to money laundering.

The definition and description of trends in the money laundering process cannot be considered as easy operations due to the clandestine of the laundering process. In determining a trend, the analyst should also take into account some indirect indicators, such as information provided by financial

investigation units, judicial authorities or other authorities responsible for the money laundering process.

However, the difficulties involved in using these sources of information to identify the trend toward money laundering do not allow a complete picture of the phenomenon. It has been noted, for example, that the high number of convictions or investigations for money laundering could mean that several people were involved in a washing scheme, where a possible trend of scourge can no longer be analyzed during that time. (Florea, 2016, p.54)

Otherwise, a low number of convictions for money laundering offenses does not necessarily mean that less money laundering activities take place over a period of time, but could allow the influence of factors limiting the investigation of this crime to be observed, such as the difficulty of proving the predicate offense. (Leția, 2016, p. 36-37)

3. Research methodology

In order to establish the future of money laundering within the Romanian legal framework, we must first ask the question: "*What has already been done and what are the problems the current legal system faces?*"

This question ensures there will be an analysis based on the evolution of the incrimination itself, but also it will ensure that the methods used by criminals are underlined so that proper measures are being taken. The current article aims to underline the evolution of the methods used, the incrimination itself, but mostly to offer legal solutions towards the problems the current system in Romania faces.

The legal problems that will be underlined in the present article can be used as the basis for future *de lege ferenda* (or legal proposals) measures that need to be taken by the Romanian legislature.

4. Findings

4.1. The origins of money laundering in the Romanian legal system

The most tangible instrument of this new profit-based paradigm in the area of criminal law is money laundering, because through this process, the assets derived from illicit activities are hidden, while ensuring both control over these assets and the imperative of justifying the appearance of the licit character of their origin. This paradigm has proven to be an excellent instrument of anti-criminal policy aimed at repression of drug trafficking in the United States of America and has been enshrined in the United Nations Convention against illicit traffic in Narcotic Drugs and Psychotropic substances (starting from 1988). (Bjelajac, 2011, p.11)

Gradually, the confiscation of the proceeds of crime has become the central objective of criminal law systems, and the Romanian legal system is still struggling to thereby aim to reduce the proceeds of crime. Efforts made by Romanian authorities have been focused on increasing the effectiveness of legal instruments to detect, seize, confiscate illegally acquired assets, to reduce the motivation of criminals to engage in such criminal activities, and to reduce the operational capital used to continue such activities.

In a plastic way, it was justified in the Romanian doctrine by the special nature of the efficiency of freezing and confiscation in the fight against organized crime, pointing out that the conviction of any member of the group alone does not put an end to criminal activity, since it can be replaced and another group that can continue to carry out its illegal activities. However, confiscation of the proceeds of crime prevents the proceeds of crime from being infiltrated into the civilian system by neutralizing the instrument for committing new offenses, thereby ensuring that crime does not generate further revenue. (Ghinea, 2014, p.62-63)

As regards the criminalization of money laundering, as recommended by the FATF (Financial Action Task force – international reference body for the prevention of and fight against money laundering and terrorist financing), each country must extend the offense of money laundering to all serious crimes, to include it in the widest range of predicated offenses (offenses whose punishment involves in general prison according to their type, a minimum of 1 year imprisonment)

4.2. The methods used

There are a number of international, European and national regulations that criminalize the crime of money laundering, but more important is to analyse the concept of money laundering itself, in order to understand its current context. The attempt to capture current and future trends in the money laundering process was one of the main aims pursued by the experts of the Financial Action Task force on money laundering (FATF or FATF). (Bullogh, 2019, p.29)

The importance of studying methods and techniques for money laundering and terrorist financing, with a view to adopting the most appropriate policies and strategies for combating financial crime, is obvious, but we also need to understand the evolution of these trends over time. Their identification allows relevant methods of money laundering and terrorist financing to be systematically analysed, with an understanding of the context in which some of these methods have been used by financial criminals within a certain period of time.

In-depth knowledge of the process of money laundering typologies allows other methods and trends to be identified in the future, as well as other vulnerable areas to easily infiltrate the money laundering scourge. To this end, a FATF Expert Committee, meeting in Moscow on 6-8 December 2005, defined some basic concepts of the money laundering process to address money laundering typologies and terrorist financing. (Bullogh, 2019, p.30)

In the context of money laundering and terrorist financing, the method is a separate procedure used in the process. The method involves combining techniques, mechanisms and tools and may in some cases be the very typology of money laundering.

The money laundering or terrorist financing **technique** is a distinct action or means by which the above-mentioned criminal activities are carried out. For example, the structuring of financial transactions, the mixing of legitimate and illegal funds, the undervaluation or over-valuation of goods, the transmission of funds through electronic transfers, and so on

The money laundering **mechanism** is a system through which certain activities of the money laundering process are carried out. These are money laundering mechanisms financial institutions, money remittance systems, virtual casinos, corporate entities, etc.

The money laundering **tool** is an object used in the money laundering process. They are money-laundering tools: Checks, letters of credit, precious metals, real estate, guarantees.

The money laundering **scheme** is the specific operation combining different methods, techniques, mechanisms and instruments into a single criminal structure. In some cases, these schemes are confused with money laundering, but in most cases, investigation of the washing process reveals the existence of several criminal schemes.

The money laundering **typology** is the pattern in which money laundering methods or schemes can be found between which there are clear similarities. It is important to note the differences in the scope of concepts used in the money laundering process: Trends, methods and typologies of laundering. The method and typology only refer to a specific washing process regarded in a time-determined unit, while the trend is related to the evolution of the method or typology over time. (Popa, 2016, p.5)

Law no. 656/2002 from the Romanian legal system made for the prevention and sanctioning of money laundering and for the establishment of measures to prevent and combat terrorist financing defines, in the provisions of Article 2, the key terms that are found in the description of the money laundering process. Thus:

- a) money laundering means the offense referred to in article 29;
- b) terrorist financing means the offense referred to in Article 36 of Law No. 535/2004 on the prevention and fight against terrorism;
- c) property shall mean any tangible or intangible, movable or immovable property and any legal acts or documents evidencing title or right in respect thereof;
- d) a suspicious transaction means an operation which appears not to have an economic or legal purpose or which, by its nature and/or unusual in relation to the activities of the client of one of the persons referred to in Article 10, raises suspicion of money laundering or terrorist financing;
- e) external transfers to and from accounts shall mean cross-border transfers as defined in accordance with the relevant national regulations, as well as payment transactions and receipts made between residents and non-residents on the territory of Romania;

As regards the movement of funds through electronic transfers of funds, we see that this can happen:

-From one institution to another;
-From one client's account to another client's account,
-On the basis of instructions given by the customer; - by the transmission of electronic instructions;

-Lead to entry in the records of each institution for the purpose of making funds available, and it is necessary to identify:

- the person ordering the payment,
- the financial institution of the person ordering the payment;
- the financial institution of the beneficiary;
- other financial institutions (correspondent banks),
- the person ordering the payment,
- the financial institution of the person ordering the payment;
- the financial institution of the beneficiary;

• other financial institutions (correspondent banks), distinguishing between simple client-to-client transfer and transfer between correspondent banks known as intermediate or follow-up financial institutions; these become relevant for cross-border transactions where: the bank of the person ordering the payment does not have a branch in a foreign jurisdiction; it may involve the use of two correspondent banks (that of the sender and the recipient of the funds).

f) money laundering through credit institutions as defined by article 7.1. pt.10 from OUG 99/2006

g) money laundering through financial institutions as defined by article 18 from OUG 99/2006

h) money laundering through business relations as defined by article 10 from OUG 99/2006

i) money laundering through operations that seem connected, and by this we refer to single transaction transactions from a single commercial contract or agreement of any kind between the same parties and whose value is fragmented in instalments of less than 15,000 euros or the equivalent in lei, when they are made during the same banking day, in order to avoid legal requirements;

j) through fictitious bank – refers to a credit institution or an institution that carries out equivalent activity, registered in a jurisdiction in which it does not have a physical presence, namely the management and administration of the activity and the records the institution is not located in that jurisdiction, and which is not affiliated with a regulated financial group;

k) money laundering by service providers for companies and other entities or legal constructions - or any natural or legal person providing a professional title as the ones stated by law no. 656/2002

l) by a group of entities, as defined in art. 2 (1) point 13 of the OUG no. 98/2006 on the additional supervision of credit institutions, insurance companies and/or reinsurance undertakings, financial investment services companies and investment management companies in a financial conglomerate, approved with amendments and completions by Law no. 152/2007. Politically exposed people are, according to the provisions contained in art. 3 of Law no. 656/2002, the persons who exercise or have exercised public functions, important members of their families, as well as those who are publicly known as close associates of individuals performing important public functions (as they are defined by the Romanian legal system).

4.3. Practical methods used in the current context and their effects - challenges for the Romanian legislature and Romanian judicial system.

4.3.a. Practical methods used (as the Romanian jurisprudence and literature identifies them):

1) Money laundering through commercial activities - the accounts of ghost companies, whose the real beneficiaries are unknown, they are used only for the purpose of hiding the illicit origin of some funds and "moving some values" under the justification of commercial transactions.

2) Money laundering through mass cash withdrawals from the accounts of some companies, set up specifically for placement, but also stratification of illicit funds obtained from tax evasion.

3) Money laundering through funds of illicit origin, deposited in cash in the accounts of viable trading companies, with proof of loan / company lending, etc., followed by the transfer of the amounts to the accounts of other companies and their final withdrawal, in cash, with the justification of loan / credit repayment.

4) Money laundering through the stratification of funds of illicit origin through the accounts of several companies (ghost or viable), followed by money outsourcing (usually to offshore jurisdictions)

5) Money laundering through Outsourcing of funds of illicit origin, generally to accounts opened with financial institutions in jurisdictions offshore, followed shortly by their reintegration into the Romanian financial system, but at the expense of other individuals or legal entities.

6) Money laundering using the accounts of some resident companies to stratify illicit funds resulting from crimes committed outside the Romanian borders.

7. Money laundering using overvaluation in transactions, whether civil or commercial, of the traded object (real estate, securities furniture, valuables, etc.), part or all of the price paid in return representing in fact funds of illicit origin.

8. Money laundering using the transfer of illicit funds through fast money transfer systems, carried out by persons who apparently have nothing to do with each other and whose financial profile does not justify the amount transferred. (Jurj-Tudoran, 2016, p. 71)

4.3.b. Challenges for the Romanian legislature and Romanian judicial system. Tendencies in the current context.

1) Jurisdiction - from the analysis of the incriminating text of the law we notice that the Romanian legislator wanted to provide as a crime not only the money laundering from serious crimes, as defined in domestic and international regulations in money laundering, but from any offense as well, whether the offense against which the property originated was committed on the territory of Romania or abroad, according to the express provision contained in the provisions of art. 29.5 Law no. 656/2002. Thus raises the problem that not all national legislations recognize the Romanian jurisdiction in returning international criminals in Romania and charges brought against them.

2) The purpose itself – since money laundering needs mainly the use of financial-banking systems, it has an effect over the credibility of the banking system itself, especially in developing countries such as Romania. Having a large number of criminal cases related to money laundering shines a dark light over the financial market, and the whole banking system, and thus investors might have reservations when it comes to investing in a certain country. Romania needs to take act of this, and to urge its process into establishing legal sanctions and prevention for this type of illegalities.

3) The subject of money laundering – distinction within the national legislation must be made between the subject of accomplice to money laundering and accomplice to aiding criminals. These are distinct criminal violations within the Romanian criminal code, that are yet to be clearly distinguished within the legal system.

4) The content of the incrimination itself- the Romanian law no. 656/2002 must clearly state that convicting a person of money laundering is an autonomous crime (meaning in the absence of a conviction previous or simultaneous for other offenses for the alleged offense and without a precise determination of the alleged offense or its author), thus has the illicit origin of the goods involved in a money laundering scheme and is established on the basis of direct or indirect evidence, the intentional element of the money laundering offense needs to be analyzed in light of the corroboration of all objective factual elements.

5) The methods used – need to be specifically underlined as they were previously. Some preparatory acts are still in discussion in order to be incriminated, some are already incriminated. Attempt is however incriminated by the Romanian legislation, but problems still arise when it comes to various acts of money laundering itself. Some acts may prevent the process from taking place, some might nullify it, so the Romanian legislature still has a lot of work to do when it comes to implementing reform policies, from both prevention and sanction point of view.

5. Conclusions

The Romanian system regarding the incrimination of the crime of money laundering still has gaps and is one in the process of being revised.

Over time, more and more methods have been found to constitute the crime of money laundering, as a result of which the legislator has not always been able to keep up with the necessary changes.

In order to eliminate any terminological inaccuracies, we appreciate that the Romanian legislator must to consider whether it would be necessary to replace the phrase "*knowing that they come from committing crimes*" with the phrase "*knowing that they come from committing a criminal activity.*" This approach on behalf of the legislator would facilitate proof of the subjective element of the analyzed crime is being developed.

The legislator should also criminalize money laundering, when the one who commits any of the actions incriminated in art. 29 of law 656/2002. In addition, there needs to be considered that it would be necessary to provide a separate provision as an aggravated variant of the analyzed crime, by committing money laundering from predicate crimes committed by organized criminal groups.

Last but not least, the control bodies must intensify the prevention activity, by developing the mechanisms of cooperation with the national banking system.

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