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MONEY LAUNDERING. NATIONAL AND EUROPEAN REGULATIONS

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MONEY LAUNDERING. NATIONAL AND EUROPEAN REGULATIONS

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Abstract

The paper presents the Romanian and the European legislation regarding money laundering .

In Romania, until 1989, there were no special regulations in the field of money laundering. In 1999, Law no.21 on the prevention and sanction of money laundering was promulgated. Latter, this act was repealed by Law no. 656 of December 7, 2002 on the prevention and sanction of money laundering, which suffered a series of modifications.

The Directive 2015/849 / EC amends the Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repeals Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. The Directive has come into force on 26 June 2015 and must be transposed into the national laws of the Member States by 26 June 2017.

In conclusion, we consider that the present magnitude of money laundering requires joint efforts of the states and of European and international specialized organizations. This can only be achieved by harmonizing legislation on money laundering worldwide.

Keywords:

money laundering, Law 656/2002, Directive 2005/60/EC, Directive 2015/849/EC,

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Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

1. Preliminary issues regarding money laundering

Money laundering is the process by which criminals attempt to conceal the origin and real possession of income from criminal activities. If it is successful, this activity allows maintaining control over these revenues and, ultimately, provides a legitimate cover for the source of their income. This process is critically important, because it gives the offender the opportunity to benefit from the products of crime without revealing their origin.

When a criminal activity generates substantial profits, the individual or group involved must find a way to control the funds without attracting attention on the activity which they come from or on the people involved. Criminals manage this by hiding sources, changing their form, or directing the funds to a place where they are less likely to attract attention.

Money laundering is a process by which the profits obtained illegally by criminals, who without being compromised benefit subsequently from the amounts obtained, seem legal. It is a dynamic process in three stages, which first of all require- the movement of funds obtained directly from crimes; secondly - covering the tracks of money to avoid any type of investigation; thirdly – availability of money to criminals.

The present magnitude of money laundering requires joint efforts of the states and of international specialized organizations. This can only be achieved by harmonizing legislation on money laundering worldwide.

The most important international Conventions and European Union acts in the field of money laundering are:

UN - Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna), ratified by Law no. 118/1992.

UN - Convention against Transnational Organized Crime (Palermo), ratified by Law no. 565/2002.

UN - International Convention for the Suppression of the Financing of Terrorism (New York), ratified by Law no. 623/2002.

Council of Europe - Convention on Laundering, Search, Seizure and Confiscation of crime products (CETS 141, Strasbourg), ratified by Law no. 263/2002

Council of Europe - Convention on Laundering, Search, Seizure and Confiscation of Crime and Financing of Terrorism (CETS 198, Strasbourg), ratified by Law no. 420/2006)

EU - Directive 2005/60 / EC of the European Parliament and of the Council of October 26, 2005 on the prevention of the use of the financial system for money laundering and terrorist financing.

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

- The 40 Recommendations of the F.A.T.F. on Money Laundering in 1996[3];

2. The regulation of money laundering in Romania

Until 1989, in our country there was no special regulation for money laundering. Only in 1999 it was adopted Law no. 21/1999 on the prevention and sanctioning of money laundering which defined in Article 2 section a money laundering as the facts referred to in Article 23 if committed by the persons mentioned in Article 8. Subsequently, this law was repealed and Law no. 656 for the prevention and punishment of money laundering came into effect starting with 07/12/2002 .This law maintains the same definition of money laundering. In turn, Law no. 656/2002 undergoes a series of changes. The latest amendments to Law no. 656/2002 on preventing and sanctioning money laundering are:

- 02/01/2014 – The amendment provided by Law no. 255/2013 - for the implementation of Law no. 135/2010 on the Code of Criminal

[3] The International Financial Action Group has developed "The 40 FATF Recommendations," which is a comprising guide used to combat money laundering. The area of overage includes the judiciary and law enforcement, the financial system and its regulations and international cooperation.

Recommendations no. 10 and 11 impose the obligation of financial institutions to identify their customers. In this context, the identification of the direct customer means: - direct customer identification - knowledge of the natural or legal person;

- beneficiary identification and control - knowing the ultimate owner or the person who directly controls the customer and the person on whose behalf the transaction was made; -checking the identity of the customer and beneficiary - in conjunction with the information provided above;

- precautionary measures and monitoring - carrying out regular checks on each transaction and the account through the business relationship. However, in some cases, appropriate identification procedures can present some problems. The most sensitive issue is represented by occasional customers;

- electronic transactions and other cases in which face-to-face identification was not carried out;

- existence of commercial law regulations concerning commercial companies that allow the creation of forms of companies in which the anonymity of shareholders is possible or where it is difficult to detect true identity of beneficiaries;

- the risk of improper use of means of using companies and securities bearer.

Currently, FATF efforts aim, in particular, at the development and dissemination of certain principles capable of limiting the risks on the means of using companies. – TRAINING MANUAL ON COMBATING MONEY LAUNDERING AND TERRORIST FINANCING, p. 16, available at http://www.onpcsb.ro/pdf/MANUAL%20INSTRUIRE%20-%20ROMANA.pdf (accessed on 24//06/2015)

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

Procedure and for amending and supplementing certain laws which include criminal procedural provisions (Article 8, Article 26, Article 34, Article 35, Article 36, Article 37)

- 02/01/2014 - Amendment under Law no. 187/2012 - for the implementation of Law no. 286/2009 on the Criminal Code (Article 24, Article 29, Article 31)

- the amendment contained in Law no. 187 / 24.10.2012, as amended by the Corrigendum published in the Official Gazette no. 117 / 01.03.2013 and Law no. 255 / 07.19.2013, published in the Official Gazette no. 515 / 08.14.2013

- Republished under Article IV of Government Emergency Ordinance no. 53/2008 amending and supplementing Law no. 656/2002 published in the Official Gazette of Romania, Part I, no. 333 of April 30, 2008, approved with amendments and completions by Law no. 238/2011 published in the Official Gazette of Romania, Part I, no. 861 of December 7, 2011, giving a new numbering to texts.

Law no. 656/2002 on preventing and sanctioning money laundering, and the establishment of measures to prevent and combat terrorist financing does not define the concept of money laundering. Article 2 section a) of Law no. 656/2002 states that "money laundering is the offence referred to in Article 29". According to Article 29 paragraph 1 the offence of *money laundering* consists of and shall be punished with imprisonment from 3 to 10 years:

a) the conversion or transfer of goods, knowing that they come from committing certain crimes, for the purpose of concealing or disguising the illicit origin of the goods or in order to help the person who committed the offense which the goods come from to evade prosecution, trial or execution of sentence;

b) the concealment or disguise of the true nature of origin, of location, disposition, movement or ownership of the goods or of the rights over them, knowing that the goods originate from the committing of crimes;

c) the acquisition, possession or use of the goods, knowing that they originate from the committing of crimes.

Paragraph 2 of the same article states that the attempt to commit this crime is also sanctioned.

If the deed was committed by a legal person, in addition to the fine penalty, the court shall apply, as appropriate, one or more of the additional penalties provided for in Article 136 paragraph (3) a) -c) of the Criminal Code.

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

The knowledge of the origin of the goods or purpose pursued may be inferred from objective factual circumstances.

Paragraph 5 provides that the provisions of paragraphs (1) - (4) apply irrespectively whether the crime which the good comes from has been committed on the territory of Romania or abroad.

Money laundering is defined in the criminal doctrine (Mocuţa, G.,(2004), : 146) as a complex activity that is conducted in three main phases: the illicit production of riches, turning them into legitimate capital and reinvestment or re-location of the funds obtained in this way. This definition is completed with the provisions of Article 6 paragraph 1 of the 1990 Strasbourg Convention which provides: each party shall adopt the legislative measures and the measures which seem necessary to establish as criminal offences, under its domestic law, the following acts when committed intentionally:

a. the conversion or transfer of goods by a person who knows that such goods are products, for the purpose of concealing or disguising the illicit origin of the goods or to help any person who is involved in the commission of the main crimes evade the legal consequences of his/her facts;

b. the concealment or disguise of the nature, source, location, disposition, movement or real ownership of goods or of the rights with respect to them, about which the author knows that such goods are products and, subject to its constitutional principles and the basic concepts of his/her legal system;

c. the acquisition, possession or use of the goods about which the one who purchases it, possesses it or uses it knows, at the time of acquisition, that they are products;

d. participation in one of the crimes established in accordance with this Article or in any form of association, understanding, any attempt or collusion by providing assistance, aid or advice to its commission.

On this basis, we have defined *money laundering* (Dariescu, N. C., (2005), : 81) as a set of processes, methods, schemes and techniques used by criminals for the purpose of concealing or disguising the illicit origin of the funds resulting from illegal activities. Through these processes, methods, schemes and techniques dirty money is conferred an appearance of legality, legitimacy aiming for their true source not to be discovered.

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

3. The Directive 2005/60 / EC of the European Parliament and of the Council of October 26, 2005 on prevention of the use of the financial system for money laundering and terrorist financing- repealed by The Directive 2015/849 / EC

The Directive 2005/60 / EC aimed to prevent the use of the financial system for the purpose of money laundering and terrorist financing and repealed Directive 91/308/EEC.

The directive describes money laundering as the following conduct, when committed intentionally:

- the conversion or transfer of property derived from criminal activity to conceal or disguise its illicit origin;
- the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property known to have been derived from criminal activity;
- the acquisition, possession or use of property known to have been derived from criminal activity;
- the participation, or assistance, in the commission of any of the activities above.

Money laundering must be regarded as such even if the activities that generated the laundered property were carried out in another EU or non-EU country.

The directive applies to credit and financial institutions, independent legal professions, notaries, accountants, auditors, tax advisors, real estate agents, casinos, trust and company service providers, and all providers of goods (when payments are made in cash in excess of 15 000 EUR). The entities and persons covered by the directive are required to apply customer due diligence measures when establishing a business relationship and when carrying out occasional transactions amounting to EUR 15 000 or more. They must file a suspicious transaction report when there is suspicion of money laundering or terrorist financing, regardless of any exemption or threshold[4].

These diligence measures involve identifying the customer and verifying his/her identity, obtaining information on the purpose and intended nature of the business relationship and, where appropriate, identifying and verifying the identity of the natural person owning or controlling the customer or on whose behalf the activity is carried out. EU

[4] http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_organised_crime/l24016a_ro.htm (accessed on 25.06.2015)

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

countries may allow the entities and persons covered by the directive to call on third parties to execute the customer due diligence measures.

The directive also shows cases in which simplified customer due diligence measures may be used, such as in relation to national public authorities, customers with life insurance policies with an annual premium of no more than EUR 1 000 or electronic money holders.

Where there is a high risk of money laundering or terrorist financing, the entities and persons covered by the directive are required to apply enhanced customer due diligence**,** which involves supplementary measures to verify or certify, for example, the documents supplied when the customer has not been physically present for identification purposes.

Given the crucial importance of the segment of prevention of money laundering and terrorist financing, Directive 2005/60 / EC has introduced in line with new international standards, more specific and detailed provisions relating to the identification of customer and of any real benefit and to the checking of their identity. To this end, it was given a precise definition of certain concepts such as "real beneficiary" or "shell bank" (G. Mocuta. R. (2015) :16) Buica [5].

Recognising that the risk of money laundering and terrorist financing is not the same in all operations, the Directive implementing Directive 2005/60 / EC and hence implementing laws, based on a risk-based approach, brings changes with regard to customer due diligence procedures by introducing three categories of measurement of the degree of awareness - standard, simplified and additional.

4. The Directive 2015/849/EC of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

The Directive 2015/849/EC amends the Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repeals Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

[5] http://www.mpublic.ro/jurisprudenta/publicatii/infractiuni_spalare_bani.pdf (accessed on 27.06.2015)

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

The Anti-Money Laundering Directive has come into force on 26 June 2015 and must be transposed into the national laws of the Member States by 26 June 2017.

This Directive is the fourth directive to address the threat of money laundering. Council Directive 91/308/EEC defined money laundering in terms of drugs offences and imposed obligations solely on the financial sector. Directive 2001/97/EC of the European Parliament and of the Council extended the scope of Directive 91/308/EEC both in terms of the crimes covered and in terms of the range of professions and activities covered. In June 2003, the Financial Action Task Force (FATF) revised its Recommendations to cover terrorist financing, and provided more detailed requirements in relation to customer identification and verification, the situations where a higher risk of money laundering or terrorist financing may justify enhanced measures and also the situations where a reduced risk may justify less rigorous controls. Those changes were reflected in Directive 2005/60/EC of the European Parliament and of the Council and in Commission Directive 2006/70/EC.

The Directive applies to a range of businesses, from banks and other financial institutions to auditors and accountants. The rules will also have to be complied with by any other kinds of businesses involved in making or receiving cash payments for goods worth at least €10,000, regardless of whether payment is made in a single, or via a series of linked, transactions[6].

The new regime brings into force new customer due diligence checking requirements, together with new obligations to report suspicious transactions and maintain records of payments.

EU countries must set up registers to record the ultimate 'beneficial' owners of businesses. The obligation placed upon EU member states to maintain central registers listing information on the ultimate beneficial owners of corporate and other legal entities will enable greater transparency in financial transactions.

Central registers will also make it easier for regulators and prosecutors to identify potential wrongdoing and to identify those businesses who are either intentionally or unknowingly caught up in illicit activity. Certain financial services firms will have access to a wider range of information in order to conduct customer due diligence and there is no doubt that they will have to ensure they take full advantage of this to avoid

[6] http://www.out-law.com/en/articles/2015/june/new-eu-anti-money-laundering-rules-to-take-effect-from-26-june/ (accessed on 26.06.2015)

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

the wrath of regulators for failing to take appropriate steps to prevent financial crime.

In the same time, the central registers raise a number of data protection issues too.

The wider availability of information including an individual's name, month and year of birth, nationality, residency and details on ownership raise significant risks regarding inappropriate access or use of such personal data, in particular, due to the provision that this information will be accessible to people or organisations who can demonstrate a 'legitimate interest'. A balance must be found between addressing the risks of money laundering with the protection of each individual's personal data and right to privacy.

Money laundering and terrorist financing often take place in a transnational context, therefore any action taken solely at national or even Community level, without taking account of international coordination and cooperation, would have limited effects. Consequently, the measures adopted by the European Union in this area are harmonized with the actions taken in other international fora, especially with the recommendations of the Financial Action Task Force (FATF), which constitutes the main international body active in the fight against money laundering and terrorist financing. Given that FATF recommendations were substantially revised and expanded in February 2012, Directive 2015/849/EC envisages precisely these international standards.

The Directive provides in art.1 paragraph 3 that the following conduct, when committed intentionally, shall be regarded as money laundering:

a. the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;

c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;

Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.

d. participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

Conclusion

As a phenomenon, money laundering is synthetically defined in the content of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on December 20, 1988, as "convention or transfer of property for the purpose of concealing or disguising the illicit origin thereof". This definition that manased in a few words to explain the mode of action and purpose of money laundering operations, acquired over time by signing and ratifying the Convention, the character of law in most states of the world.

According to another definition which belongs to the US Federal Bureau of Investigation (FBI), money laundering iw the activity of converting money from illegal activities, such as the trafficking of drugs, in revenues which appear legitimate and the source of which cannot be determined as illegal activities.

In Romania, some authors found that money laundering is a complex process by which the revenue which is believed to arise from a criminal activity are transported, transferred, hidden or the true nature, origin, disposition, movement or ownership of those profits are concealed.

Based on the essence of the phenomenon that we analyze we believe that the new Directive 2015/849/EC provides one of the most complete definition of money laundering because it takes into consideration the multiple forms this offence can have.

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Anitei, N. C., Gardikiotis, C. A. (2015). The legal regime of hiring public goods. Renting parking spaces on public domain. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 13-23.