

Laundering of Crime Proceeds in Albania: Effectiveness of Legal Framework Amendments; Theoretical and Practical Analyze

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Abstract

Organized crime is constantly trying to hide its consequences (income and other assets), turning them into legitimate wealth by hiding their sources and continuing in this way the illegal activity. The study focuses in Albanian case, by presenting a general approach to laundering of crime proceeds (especially money laundering) and by analyzing what this offence represents in criminological aspect. Also, it presents the evolution of domestic law and the way the objective and subjective elements of the offence are materialized. The study concludes that actually there have been proper legislative amendments, but for an effective fight against crime proceeds laundering, the executive institutions should be focused on the criminal activity from which the dirty money and assets come such as trafficking, corruption, tax evasion etc. and on law implementation. To arrive at this conclusion, it was necessary to analyze laws and law amendments, and the decisions of the Court of Appeals in Tirana, Criminal College of Supreme Court as well as the unifying decisions of Supreme Court.

Keywords: organized crime, laundering of crime proceeds, money laundering, corruption, punishment, prevention.

1. Introduction

One of the thorniest problems that countries are facing today, in both national and international level, is the organized crime activity which threatens the economy and security. Laundering of crime proceeds is closely related to other crimes such as corruption, financing of terrorism, trafficking, drug and weapons, smuggling, tax evasion etc. Organized crime tries continuously to hide its material consequences and to give them a lawful source, so it can continue its activity "without being disturbed". This phenomenon is much more spread in countries with sociological, economic and political issues like Albania. The danger this type of criminality presents to Albania is huge due to the serious consequences and subjects which are involved in this illicit activity. For this reason, a concrete assessment of the situation, harmonization and proper implementation of laws, and notably the investigation and punishment by court of politicians and other high level state officials constitutes a great need for stability. In Albania, the term money laundering has been used in the 90s with the powerful changes from the centralized political, economic and social system to an open one and vulnerable to criminality. Albania is a suitable place for money laundering because of the corruption, cash transactions and the informal economy. The construction sector, creating commercial companies, and opening casinos and gambling are the main means of money laundering in Albania. These methods appear to be less sophisticated than in countries which have developed financial markets and where money laundering is done through complex financial transactions. In Albania, money laundering is closely related to corruption which is used as a link between legal and illegal structures. State interests, are considered by law as the object of this crime (Elezi, 2007). Influencing public administration, politicians, tax and custom administration, criminal justice system, through the use of bribery, clientelism, nepotism, family relations, relations with the "politically exposed persons" (Law no. 9917, 2008), have been the main tools used by criminal organized groups to access the legal sector.

2. Dirty Money and Money Laundering

Any amount of money derived from criminal or illegal activities which directly or indirectly is flowed or reflowed, circulated, transferred, transformed or disposed in products and wealth, constitutes "dirty money" (Bank of Albania, http://www.bankofalbania.org/web/pub/broshura_pastrimi_parave_1017_1.pdf).

UN Convention "Against Narcotic Drugs and Psychotropic Substances" of 1988, known as the Vienna Convention defines money laundering. Other international acts have contributed to a better definition of money laundering, such as the European Convention "On Laundering, Search, Seizure and Confiscation of products derived from crime", known as the Convention of Strasbourg of 1990 and the UN Convention against Organized Crime, known as the Palermo Convention of 2000. Under these conventions, each State Party should adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- I. The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- II. The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime:
 - i. Subject to the basic concepts of its legal system;
 - ii. The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - iii. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

Albania seems to have adopted now the necessary legal framework after the ratification of the UN Convention "Against International Organized Crime" and its protocols (Law no. 8920, 2002), and the Council of Europe Convention "For Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism" (Law no. 9646, 2006). Within the conventional explicit forecast, according to which countries should take measures to combat and penalize the proceeds of crime, Albania has amended the relevant legal framework as it is analyzed below.

3. Albanian Legal Framework for Laundering of Crime Proceeds

Referring to the Albanian post-communist legislation, the Criminal Code of 1995 provided in article 287 the "Alienation of property": *"Alienation, transfer, harboring or disappearance of nature, source of the property derived from crime, is punishable from three to ten years of imprisonment."* By Law no. 8175, dated 23.12.1996 "On some additions and amendments to Law no. 7895, dated 27.01.1995 "The Criminal Code of the Republic of Albania", to this provision (Article 287) is added confiscation beside the imprisonment. However, for the first time in Albanian criminal legislation, the issue of money laundering was legally arranged by Law no. 8610, dated 17.05.2000 "On prevention of money laundering", which in article 2 stipulates that: *"...Money laundering is the flow and reflow of money derived from criminal activity, hereinafter referred to as dirty money ..."*.

Meanwhile, due to the circumstances and requirements dictated by international cooperation, the Albanian Criminal Code was further amended. In 2001, to the Criminal Code was added article 287/a "Money laundry" which provided: *"Conducting financial transactions or other economic actions aimed money laundering, known to be derived from criminal activity, also reflowing and using this money in entrepreneurial or economic activity of any kind, shall be punished from five to ten years of imprisonment."*

The same act, if committed in collaboration or more than once, shall be punished from seven to fifteen years of imprisonment and when the consequences are severe not less than fifteen years of imprisonment." (Law no. 8733, 2001) In 2003 (Law no. 9086, 2003) and 2004 (Law no. 9275, 2004), since the Criminal Code was subject to further amendments after signing the Convention against transnational organized crime, it became possible to complete the relevant legal framework, to fully provide money laundry as a criminal offense and to create legal facilities for tracking, detection and suppression of this kind of crime. Article 287 is titled "Laundering of crime proceeds", and provides that:

1. *Laundering of crime proceeds committed through:*
 - a. *exchanging or transferring assets, that are known to be crime proceeds, for hiding or concealing the illegal origin of the assets or giving assistance to avoid the juridical consequences related to the criminal offence*

- commitment;
- b. *hiding or covering the nature, source, position, location, shift of property or other rights related to the asset that is a crime proceed;*
 - c. *performing financial activities and fragmented transactions to avoid reporting according to the money laundering law;*
 - d. *gaining, possession or use of an asset when it is known that it is a crime proceed;*
 - e. *counseling, encouraging and public call to commit any of the offences specified above; dh) Using and investing in economic or financial activities money or objects that are crime proceed; are punished from three to ten years of imprisonment and with fine from five hundred thousand up to five million Lek.*
2. *When this offence is committed during the exercise of a professional activity, in cooperation, or more than once, it is punished from five to fifteen years and with a fine form eight hundred thousand Lek up to eight million Lek, while when there are grave consequences, it is punished not less than fifteen years of imprisonment and with a fine from three million to ten million Lek.*
 3. *Dispositions of this article are also applied in the cases when the person who has committed the offence from which come the crime proceeds, cannot be taken as a defendant, cannot be punished, exists a cause which obliterates the criminal offence or when one of the penal proceeding conditions for such a criminal offence is missing.*

Actually, Albania in its definition of money laundering is based on Article 287 of the amended Criminal Code of the Republic of Albania. In addition, with the changes of 2013, to the article 287 and article 287/a it is repealed the fine as a main punishment next to imprisonment (Law no. 144, 2013).

4. Constituent Elements of "Laundering of Crime Proceeds"

The criminal law theory has recognized that in order to consider the laundering of crime proceeds committed, these proceeds should be consequence of the conducted criminal activity. To better understand this offense, it is necessary to analyze its objective and subjective elements.

4.1 The object and the objective aspect of the crime (actus reus).

The object of this crime is considered those legal values established by law to ensure the safety of state interest from laundering crime proceeds. Paragraph 1 of article 287 (letters a-dh) provide all means by which this crime violates the object and displays its objective aspect. These means consists in illegal active actions and/or omissions (Elezi, Kacupi & Haxhia, 2006). The legislator has listed these means, however practice and executive institutions which are involved in the fight against money laundering give their contribution for clarifying what constitutes money laundering in the meaning of article 287. Some acts or omissions considered to be part of money laundering process are:

- Sharing or transfer assets, knowing that they are crime proceeds;
- Deliberate concealment of illicit origin of the property or the provision of assistance to persons involved in the commission of offenses;
- Deliberate concealment of information relating to the identification of properties which are known or should be known that they are crime proceeds;
- Acquisition, possession or use of assets which are known or should be known that they are crime proceeds;
- Concealment, fraud and actions which assist and participate in tax evasion;
- Operations related to trafficking of narcotics;
- Operations related to other activities of organized crime and financing of terrorism;
- Possession and use of assets derived from criminal activity committed outside the territory of the Republic of Albania (Bank of Albania, http://www.bankofalbania.org/web/pub/broshura_pastrimi_parave_1017_1.pdf).

As for the consequence, as a sub-element of the objective aspect of the crime, it is indispensable for these consequences to be a result of criminal activity. Article 287 shall apply for laundering of proceeds derived from crime only. As for the proceeds derived from criminal offenses, the article 180 of the Criminal Code "Concealment of income" shall apply. Thus, these two provisions are two different ones and should not be confused to each other. In general, the consequences of money laundering affect almost all sectors, especially:

1. Economic sector. Partial or total declaration of property unlawfully acquired creates a negative impact on the state budget, affects fair competition and creates economic and financial instability.

2. Political sector, since money laundering is closely related to corruption, safety, reliability and stability of the state institutional activities.
3. Social sector. Society is threatened by instability caused by criminality which concentrates in the hands of criminals many areas of life.

Money laundering is usually based on three phases:

1. Placement. Represents the means by which direct crime proceeds are channeled into financial systems, mainly in cash. Money is taken and placed in financial institutions.
2. Layering. At this stage we have a flow of money through several financial transactions to erase any connection between the allocated capital and its criminal origin, turning money into other movable or immovable assets. At this stage it is very difficult to identify the source or sources of income.
3. Integration. This phase represents the crime proceeds investment mainly in real estate, valuable objects, business capital etc (CARPO, 2005). The aim of this stage is the inclusion of criminal income in legal transactions where the source becomes legitimate. At this stage it is almost impossible to understand if the source is legal or not.

Moving from one phase to the next one, detection and identification of the illicit source of assets become very difficult. In the third phase this becomes almost impossible.

Other objective sub-elements such as time and place are not part of the first paragraph of article 287, but they are part of the specified circumstances as the second paragraph provides. Specific circumstances of the second paragraph are:

1. committing the criminal act during the exercise of a professional activity;
2. committing the criminal act in cooperation (Article 25 of the Criminal Code) or more than once (when the act is committed two or more times provided that the previous act/acts are not convicted by a final court decision);
3. When the criminal act brings serious consequences (this is assessed on a case by case basis).

4.2 The subject and the subjective aspect of the crime (*mens rea*).

The subject of the crime is any person who meets the requirements for criminal liability which are the age and accountability (Articles 12 and 17 of the Criminal Code). Active subject can be an individual, as well as a legal person. Here it is necessary to analyze the accountability of the subject.

Are we dealing with two different offenses (the main criminal act and laundering of criminal proceeds)?

Is it possible for a person to be processed and found guilty under article 278, even if he is not found guilty for the main crime?

When can a person be punished twice?

Answering the last question, we may arrive to the previous answers. A person shall be punished twice if he has committed at the same or different time two different offenses, recalling here the important principle of criminal law *ne bis in idem* (no one can be punished twice for the same offense). Different crime offenses have different objects. So, if the main act has a different object from laundering the crime proceeds, then the subject cannot be punished just for the main act and left without being punished for the act which violates the state's interests. Consequently, we will have the so called "competition of offenses" which means that the subject will be criminally responsible for the main criminal act as well as for laundering the crime proceeds.

Let's examine a practical case of the Criminal College of the Albanian Supreme Court. This College notes that referring to the charge "Falsification of documents", it was not proved that the defendant B.K. committed it. Based on this reasoning, if it results that the defendant has not committed the falsification then he cannot be found guilty for the offense of "Laundering of the proceeds of crime" (Criminal College of Supreme Court, 2012). It is necessary to prove the existence of the crime, from which financial income have arisen and will be laundered. If there is not a main crime from which the money and other assets derive, then there cannot be criminal responsibility under article 287 of the Criminal Code. Also, the existence of the main crime must be proved by a final court decision which provides guilt. The court decides whether there is a crime, if the defendant will be found guilty and if the property will be confiscated pursuant to article 36 of the Criminal Code.

For the person to be criminally responsible of this crime, an essential element is its subjective aspect (*mens rea*). The subject should commit the crime willingly (Elezi, 2007). The aim is to create the conditions to enjoy the proceeds as if they were legitimate benefits, and also to avoid criminal liability.

5. Punishment and Prevention

The applied policies for addressing this crime are punishment and prevention. Albanian Criminal Code in article 287 provides the punishment under the relevant paragraphs. According to the first paragraph, the punishment is from three to ten years, while according to the second paragraph (specific circumstances) the punishment is from five to ten years of imprisonment. Simultaneously with the penalties provided in article 287, Criminal Code provides in article 30 the "additional penalties". In paragraph 2, article 30 provides confiscation of the tools used to commit the offense and the confiscation of the crime proceeds. Moreover, article 36 of the Criminal Code makes a more accurate reflection regarding the proceeds of crime subject to confiscation. This article includes every kind of asset and documents, or legal instruments, which put under evidence titles, or other interests of the property that is derived or obtained, directly or indirectly, from the commission of the criminal offense. Even if these products are partially or fully transformed into other assets, they are subject to confiscation. Also products which are united with legitimate wealth are considered subject to confiscation, but only to the value of:

- crime proceeds,
- income or other benefits from the crime proceeds,
- asset derived from crime proceeds transformation or from wealth with which they are mixed.

The aim of these articles is to punish the offender and to stop taking more advantage of the crime they committed.

The legal framework, beside the Criminal Code as the basic criminal law, is supplemented by other relevant criminal laws which focus their attention to the effectiveness of the prevention of money laundering. Law no. 9917, dated 19.05.2008 "On prevention of money laundering and terrorism financing" abrogated Law no. 8610, dated 17.05.2000 "On the prevention of money laundering", which constituted the first legal regulation of money laundering. With the 2012 amendments, this law is fully aligned with the Directive of the European Parliament and the Council no. 2005/60/KE, dated 26 October 2005 "On the prevention of the financial system use for money laundering and terrorist financing". The law makes a pretty good legal text for the prevention money laundering. It gives the definition of property rights and has introduced more useful procedures like the so called "customer enhanced due diligence", which aims to create enough security to verify and assess the customer's identity; to understand and test customer profile, business and operations of his bank accounts; to identify important information and to assess the potential risk of money laundering/terrorist financing.

Another preventive law against money laundering is Law no. 10 192, dated 03.12.2009 "On prevention and fight against organized crime and trafficking through preventive measures against property", which was passed as a more specialized law than its predecessor. This law or "anti-mafia law" which entered into force in January 2010, created the necessary space for legal prosecution, seizure and confiscation of illegal income resulting from criminal activities. It increased the value of assets seized in 2011 by 2.1 times more than in 2010 (VKM no. 663, 2003). This law abrogated Law no. 9284, dated 30.09.2004 "On prevention and fighting organized crime". It is necessary to emphasize two important moments:

1. the deterrent character of law against the property, and
2. the seizure and confiscation process based on indications.

It has no aim to punish the persons who used to commit criminal offenses, but only to prevent (Court of Appeal, 2003).

In terms of this law, "preventive measure" is considered any preventive measure applied to the property, for which the court decides in a judicial proceeding through seizure and confiscation of assets; economic, trade and professional activity.

Preventive measures provided by this law, can be applied after a criminal proceeding has begun, or even after its completion. The implementation of these measures is related with the existence of sufficient data, which constitute the reasonable doubt for the commitment of one of the criminal offences provided in article 3 of Law no. 9284, dated 30.09.2004, or even with the proof of guilt for committing these offenses (United Colleges of the Supreme Court, 2007).

6. Conclusions

Albania is a suitable place for laundering of crime proceeds. These proceeds derive from crimes committed in Albania or in other countries. Cash transactions and corruption makes this phenomenon much easier. Constructing sector (especially in coastal areas), creating commercial companies, and opening casinos and gambling are the main means of money laundering in Albania. These methods are less sophisticated in comparison with other countries that have

developed financial markets. By influencing public administration, politicians, tax and customs administration, criminal justice system, etc through the use of bribery and other corruption means, criminal organized groups create bridges to the legal sector. Thus, they avoid prosecution and continue their benefit from crime activity. The legislation seeks to effectively fight laundering proceeds of crime through punishment and prevention policy. There is an adequate legal framework, which have been amended recently in March 2014. This legal framework provides the persons who can be subject to prosecution, seizure and confiscation proceeding, the institutional innovations and facilitation. Here it is emphasized the great importance of the latest law achievements. Thank to these changes the value of assets seized and confiscated is continuously increased. The highest priority is given to law implementation, especially referring to the subjects that represent high levels of the Albanian state officials.

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