ТЕОРЕТИЧНІ ПРОБЛЕМИ ПРАВОЗНАВСТВА

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CRIMINAL LEGAL MEASURES AGAINST LEGALIZATION (LAUNDERING) OF PROCEEDS FROM CRIME IN UKRAINE AND FOREIGN COUNTRIES

The article provides an overview of the criminal law measures against legalization (laundering) of proceeds from crime. The author makes an international analysis of the criminal law provisions aimed at preventing legalization (laundering) of proceeds from crime and proposes the areas of its use in Ukraine.

Keywords: legalization (laundering) of proceeds; prevention; international experience; Ukraine.

Розглянуто питання кримінально-правових заходів протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом. Автором проведено аналіз міжнародних кримінально-правових норм з протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, та запропоновано напрями його застосування в Україні.

Ключові слова: легалізація (відмивання) доходів; попередження; міжнародний досвід; Україна.

Рассмотрены вопросы уголовно-правовых мер противодействия легализации (отмыванию) доходов, полученных преступным путем. Автором проведен анализ международных уголовно-правовых норм по противодействию легализации (отмыванию) доходов, полученных преступным путем, и предложены направления его использования в Украине.

Ключевые слова: легализация (отмывание) доходов; предупреждение; международный опыт; Украина.

Study of international experience in the criminal law measures of preventing legalization (laundering) of proceeds from crime becomes of especially contemporary significance as Ukraine has only begun building the legislative and administrative foundations for efficient functioning of the appropriate system.

Every nation has own particularities in the legal regulation and organization of the system of preventing legalization (laundering) of proceeds from crime. If we'll take a look at the countries of Europe on the whole, they could be conditionally classified into three groups of states from the viewpoint of socioeconomic and legal conditions bearing upon the criminals' choice of money laundering methods:

– European Union states which have not only developed appropriate legislative and regulatory acts but also created conditions for their implementation and have substantial experience in applying them;

– Central and Eastern European states which recently acceded to the European Union and have developed the appropriate legislative framework regulating this sphere but have insignificant experience in applying it;

– ex-Soviet republics which brought their legislations into conformity with requirements of international organizations and the European Union but have imperfect legislation application mechanisms.

According to the world practice, there are basically four approaches to legislative definition of the list of offenses generating proceeds that require laundering:

1) this list was narrowed down and includes only the offenses associated with illicit drug trade (Singapore) or the subject matter of legalization (laundering) is limited to cash, securities, or other tangible assets (Aruba, Netherlands Antilles);

2) this list was substantially enlarged and includes all offenses provided by the criminal law (Iceland, Turkey) or almost all offenses (Portugal, Finland);

3) the list of offenses which may generate proceeds requiring legalization is limited to: serious crimes (Spain); felonies only and does not include misdemeanors (Netherlands); felonies punished by hard labor (Switzerland);

4) in some countries (United States, Italy), the list of offenses provided by law is exhaustive and compiled by referring to their specific types or numbers of articles in the Criminal Code or other codes [1; 2; 3; 4].

Foreign experience shows that every nation, although taking into account (to a certain degree) international legal recommendations, nevertheless chooses own way of improving its national legislation combating legalization of proceeds from crime and often narrows down the list of predicate offenses vis-à-vis provisions of the 1990 Convention of the Council of Europe [5; 6].

According to part 4, § 165 of the Criminal Code of Austria (paragraph title: 'Money laundering'), elements of property are considered illicit if they were gained by committing an offense and intended for commitment of an offense or if they contain the value of acquired or gained tangible valuables.

Under Article 324-1 of the French Penal Code, laundering means, in particular, any operation involving investment, hiding, or conversion of direct or indirect proceeds from crime or misdemeanor. The same interpretation is used in the American judicial practice.

For example, the United States Money Laundering Control Act of 1986 provides for two types of offense: 1) laundering of monetary instruments via financial transactions or by transporting, transmitting, or transferring these instruments; 2) engaging in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity.

The aforementioned activities include not only illicit drug business but also other serious crimes: contraband, money counterfeiting, banking frauds, bank and post office robberies and thefts, espionage, etc.

§ 261 of the German Criminal Code deals with hiding proprietary objects, concealing their origin and obstructing or endangering the investigation of their origin, them being found, confiscated, their deprivation or them being officially secured. At the same time, § 261 of the German Criminal Code contains the exhaustive list of unlawful acts representing the source of proprietary objects that constitute the subject of money laundering. They include: felonies (indent 1, § 12 of the German Criminal Code mentions, in particular, murder, human trafficking, taking hostages, counterfeiting of banknotes and euro checks, arms trade); drug-related criminal acts mentioned in a separate Law on Narcotics; certain criminal misdemeanors (in particular, tax-related) committed, as a rule, as a trade or by a member of a gang; misdemeanors committed by a member of a criminal organization. These criminally-punishable acts are regarded as the most significant and characteristic signs of the organized crime. Therefore, liability for laundering is linked to specific offenses, not their seriousness.

The Italian Criminal Code which sets the penalty for legalization of money and other property in the form of imprisonment for a term between 4 and 12 years and fine in the amount between 2 and 30 million lire and also contains the exhaustive list of predicate offenses: robbery and extortion under aggravating circumstances, kidnapping for extortion purposes, crimes related to production and sale of narcotic drugs and psychotropic substances.

Article 301 of the Spanish Criminal Code which provides liability for acquisition, transformation, transfer, and other forms of handling the criminally-gained property and for concealing its true nature, origin, location, purpose, or rights with respect to it stipulates that said property must be gained by committing a serious crime. Under Articles 13 and 33 of the Spanish Criminal Code, crimes punishable by imprisonment for more than three years are considered serious.

The matter is handled similarly in Austria, but § 165 of this country's Criminal Code includes to predicate offenses, in addition to crimes, the misdemeanors under § 304 to 308 of the Criminal Code (receiving gifts, bribery) and also smuggling and customs duty evasion.

Article 305 of the Swiss Criminal Code (Article title: 'Money laundering') provides liability for certain acts with assets originating from a felony. At the same time, Article 9 of the Swiss Criminal Code distinguishes between such criminally-punishable acts as felonies and misdemeanors, defines the felonies as offenses that carry the strictest custodial sentence – hard labor

prison. Duration of this punishment which differs from an ordinary imprisonment is between one and twenty years.

According to § 284 of the Danish Criminal Code, sources of illicit property include crimes against property (theft, robbery, embezzlement, fraud (including computer fraud), abuse of trust) and certain other attempts (in particular, contraband).

Legislations of other countries, in particular, Andorra, Belgium, United Kingdom, Greece, Canada, China, Luxembourg, also contain concretized lists of the predicate offenses.

Documents of the Council of Europe tellingly envisage a possibility of amending the list of predicate offenses. Thus, according to Article 13 of the Council of Europe Criminal Law Convention on Corruption of 1998, each Party to said Convention may make a reservation or a declaration with respect to the criminal offences established in accordance with Articles 2 to 12 of this Convention (active and passive bribery in the public and private sector, trading in influence), not considering them the predicate offenses for the purposes of the Council of Europe Convention of 1990. The FATF Recommendations also stipulate that every state shall define the felonies (mentioning in other places the serious crimes or crimes generating substantial proceeds) the proceeds from which, if laundered, are considered criminal.

According to Article 209 of the Criminal Code of Ukraine, the person who uses for legalization other persons not criminally punishable by law for this act must be held liable as the perpetrator. Thus, behavior of a company director who orders a subordinate unaware of the true meaning of matter to carry out a financial transaction with the monetary proceeds from crime shall be considered perpetration through an innocent intermediary.

According to Article 6 (2) of the Strasbourg Convention, each national lawmaker of the Party to the Convention may decide whether or not to consider the persons who committed the predicate offense a subject to criminally-punishable legalization (laundering) of proceeds from crime.

It is worth noting that experience of foreign legislation as regards the subjects of legalization is ambiguous. For example, in Switzerland a criminal who laundered own money is liable for both the legalization and the predicate offense. In Germany, under the law of 1998 a person who laundered proceeds from own-committed crime could be held liable for the predicate offense only. Today, this person will not be charged with laundering if he was already sentenced for participation in the previous act [7].

In the Russian Federation, prior to the entry into force of legislative changes the judicial and investigation practice used to apply Article 174 of the Criminal Code of the Russian Federation to persons legalizing not own criminally-gained proceeds but moneys or other property on behalf of other persons. Today, persons not involved in committing predicate offenses are dealt with by a separate norm of law – the revised version of Article 174 of the Criminal Code of the Russian Federation referring to large-amount financial transactions or other operations with property deliberately gained by other

persons by committing a crime in order to attach legality to the possession, use, and disposition of that property. In other words, the problem of the subject of laundering has found a clear solution in legislation.

One of the typical particularities of the criminal law of many countries with developed market economy is existence of the institute of corporate criminal liability. At first, this institute was typical for countries with the Anglo-Saxon (common) law system, but subsequently it was also adopted by many countries of continental Europe (the Netherlands, Finland, Portugal, France, Denmark, Luxembourg, and other).

Under U.S. law corporations may be held liable for various offenses of the very broad range. As far as economic crimes are concerned, the American researches Marshall Clinard and Peter Yeager have discovered six main types of the corporate crime [8: violation of administrative acts and directives, e.g., noncompliance with the government directives to recall defected goods or refusal to build treatment plants; violation of environmental protection directives (air and water pollution, contamination of land with oil or chemicals); financial crimes (illegal subsides to political organizations, bribing politicians, violation of foreign exchange law, et al); failure to comply with labor safety and accident prevention norms (actions contradicting labor and wage regulations, including discrimination of hired workers on the basis of race, gender, or religion); production offenses (manufacture and sale of unreliable and life-threatening motor vehicles, aircraft, automotive tires and devices, foods and drugs harmful to human health); unfair trade practice (violation of competition conditions, setting prearranged prices, and illegal division of market spheres of influence).

Therefore, according to the U.S. law, corporations are responsible for actions of their agents (representatives), if the latter were acting within the scope of their powers under labor agreement ('within the scope of their position') and intended to benefit the corporation, although that motive could've been combined with other motives and the very fact of the corporation receiving benefits is not indispensable. In the U.S. law, theoretical substantiation of holding a corporation liable for the actions of its agent is provided by the 'respondeat superior' doctrine [9].

As for the European criminal law, back in 1929 the International Congress on the Criminal Law held in Bucharest spoke in favor of introducing criminal liability for corporate entities, and today, the majority (although not all) of the European Union member states have appropriate provisions in their national legislations [10].

Recommendations of the Committee of Ministers of the Council of Europe member states regarding corporate liability for offenses committed in the course of business activities, adopted on 20 October 1988 at the 420th conference of assistant ministers, stipulate the following grounds for liability: increased number of offenses committed by companies in the course of their business activities, which inflicts substantial damages upon individuals and the society on the whole; desire to apply liability in the cases when benefits were obtained as a result of unlawful activities; difficulties in identifying particular

persons who must be held liable for offenses, stemming from a company's complex organization; the need to punish companies for unlawful activities to prevent further offenses and collect damages.

According to these recommendations, corporate entities must be charged with liability for offenses committed in the course of their activities, even if an offense is unrelated to a company's business objectives. A company must be held liable regardless of whether or not a particular individual whose actions contained the elements of crime was identified. If said individual was identified, charging a company with liability should not relieve the person guilty of offense from liability, and vice versa. In particular, a company's administrative staff must be held liable for defaulting on their job responsibilities, if that led to the commitment of an offense.

The Committee of Ministers has recommended to provide for the following measures with regard to corporate entities guilty of committing an offense: warning, reprimand, obligation recorded in a judicial protocol; decision ruling a liability without application of penalties; fine or another financial penalty; confiscation of property which was used to commit an offense or gained as a result of unlawful activity; imposition of bans on engagement in certain activities, revocation of financial benefits and subsides; ban on advertisement of goods and services; license revocation; dismissal of the management, imposition of provisional administration by courts; closure or liquidation of company; collection of compensations and (or) restitutions in favor of the aggrieved party, restoration of the previous state; publication of resolution on application of penalties, or other measures.

The European criminal codes which incorporated this idea have done it with various degree of specification. This, the Dutch Criminal Code has Article 51 dedicated to this matter, stipulating that criminally-punishable acts may be committed by both natural persons and legal entities. If a criminally-punishable act was committed by a legal entity, the ensuing criminal case may contain resolutions regarding punishment and enforcement measures.

In Ukraine, the problem of introduction of the institute of corporate criminal liability is currently in the solution phase. It stems not only from integration processes of foreign countries which take measures to combat economic crimes. There are also intra-national factors: today, use of the legal entity form became an indispensable condition for commitment of the majority of qualified crimes in economic sphere, which requires adequate criminal law measures of counteraction.

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