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Peculiarities of Criminal Liability for Drug Money Laundering in Ukraine

The article is devoted to the genesis and peculiarities of criminal liability for the use of proceeds derived from illicit drug trafficking. The existence in the Ukrainian criminal law of two norms that foresee liability for actions related to the use of proceeds derived from criminal activity requires an explanation of this situation in the historical plan of its occurrence. The arguments are given in the article underline that the norms intended to protect legal relations related to the use of proceeds derived from criminal activities, in particular from illicit drug trafficking, were not made under influence and as a result of significant and unexpected changes in the political, economic or social situation, the emergence a new group or a substantial change in existing relations that are taking place in economic or technical progress, but as a result of the necessity for the country to fulfill its obligations under international agreements. During the formation of the norms, the experience of other countries and the methodological recommendations of international organizations were used. These norms are conventional by nature. The Art. 306 of the Criminal Code of Ukraine was developed and implemented under the influence of the provisions of the Vienna Convention of 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and therefore, counteracts the use of funds derived from narcotic drugs and psychotropic substances. Later, when together with the development of criminal legislation in other the countries, another norm was introduced in the Criminal Code (Art. 209 of the Criminal Code of Ukraine), which provides for liability for legalization (laundering) of proceeds from any type of criminal activity, the articles 306 of the CC of Ukraine was left unchanged in the code. This in some way puts crimes in the field of drug trafficking in a privileged position, before other serious crimes, such as trafficking in human beings and human organs, weapons, etc. The general trend in development of this kind of norms suggests their unification regardless of the source of criminal proceeds. Reconsidering existing norms in the Ukrainian criminal legislation on combating the use and legalization of criminal assets, their components and objects of legal protection will help in the formulation of proposals aimed at improving the national criminal law and its application in practice.

Keywords: criminal liability; money laundering; illegal drug trafficking; United Nations Convention of 1988.

Problem statement. It's no secret that the criminal codes of most of the post-Soviet countries are based on Soviet criminal law, from which the criminal law of independent states originated.

Sometimes, despite the aforementioned common sources, the criminal law may have peculiarities not typical for the laws of other countries of this group. This feature in the Ukrainian criminal law is a separate article that provides for criminal liability for the use of proceeds from trafficking in narcotic drugs, psychotropic substances, their analogs and precursors.

Undoubtedly, that criminal law of any of these countries provides for liability for laundering, or legalization, or conversion, or use (the terms may differ) of the funds that were obtained as a result of illegal acts with drugs. But, as a rule, this offence is either incorporated into the text of a criminal article on money laundering, or, on the whole, the legislator do not focus on it, including crimes in the sphere of drug trafficking in the list of predicate crimes to the article on money laundering.

An unusual approach to this issue in the Ukrainian legislation sometimes leads to the fact that many foreign researchers of criminal law in the field of combating money laundering derived from criminal activity, using in their works a comparative analysis of the legislation of the countries of the post-Soviet space, do not even mention the existence of this article in the Criminal Code of Ukraine. Art. 306 of the Criminal Code of Ukraine is interesting not only for its specific crime subject, but also because it actually represents a special norm to the general norm provided for in Art. 209 of the Criminal Code of Ukraine, it also contains an unusual alternative form of committing a crime – the use of proceeds to continue illicit drug trafficking [1].

Ukrainian scientists as P. Andrushko, V. Bilous, V. Borisov, S. Balin, M. Bondareva, B. Bolotsky, V. Golovin, A. Dudorov, E. Ivanov, A. Korystin, Yu. Korotkov, V. Lavrov, V. Lazarenko, A. Music, V. Navrotsky, V. Popovich, B. Rozovsky, Yu. Staruk, O. Stolyarsky, O. Striltsiv, N. Khrupa and others in their works in varying degrees concerned the problems of Art. 306 Criminal Code of Ukraine.

In general, describing the features of the article, its constituent parts (object, subject, objective and subjective sides), while agreeing with the convention nature of its origin, practically no analysis was made of the factors that influenced the formation of a separate norm of criminal law regulating relations in the field of countering money-laundering of proceeds originated from drugs. Therefore, the genesis and formation of this criminal norm represent, in our view, is of a certain interest for researchers in the development of criminal law in general.

Tracing the development of Ukrainian money laundering legislation, researchers are usually divided it into two periods: Soviet and post-Soviet. In the Soviet Union, under the conditions of a totalitarian regime where the entire economy and production were monopolized by the state, and there was no free movement of capitals, there were no prerequisites for the legal existence of criminal capitals. The use of savings accounts of the USSR Savings Bank also had its risks. Undoubtedly, there were primitive forms of laundering «unearned income»[*], for example, buying up winning lottery tickets.

Only before the collapse of Soviet Union, during the Gorbachev's Perestroika and liberalization of some forms of management [2], some conditions appeared for «investing» proceeds received outside the framework of socialist management. However, mechanisms to counteract this phenomenon in the Soviet era were not developed because of its poor knowledge. The same situation continued in the first years of the independence of Ukraine.

The criminal liability for the legalization (use) of income derived from the illicit traffic in narcotic drugs, psychotropic substances, their analogues or precursors (hereinafter – drugs) in Ukraine was established in accordance with the recommendations of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

The Law of Ukraine «On Amendments and Additions to Certain Legislative Acts of Ukraine in Connection» with the Adoption of the Law of Ukraine «On the Traffic in Ukraine of Narcotic Drugs, Psychotropic Substances, Their Analogues and Precursors» [3] and the Law of Ukraine «On Measures to Counter Illicit Trafficking in Narcotic Drugs and Psychotropic Substances and precursors and their abuse [4] The Criminal Code of Ukraine of 1960 was supplemented by articles 229^{12} «Use of proceeds from trafficking in narcotics, psychotropic substances, their analogues and precursors». Undoubtedly, the decision of the Verkhovna Rada (parliament) of Ukraine to criminalize the use of proceeds obtained from illicit drug trafficking was of a purely conventional nature, other

[*] «Unearned income» in the narrow sense – individual income, not related to personal work. However, in the USSR and some other socialist countries the expression «unearned incomes» was understood much broader and was used to prohibit any economic activity of citizens outside the control of the state.

words, the fulfillment of our state obligations under the above-mentioned convention.

If we analyze the statistical data of that period, the bulk of the drug offenses fell on the possession of drugs, the share of the facts of drug sales did not exceed 10 % of all crimes of this category. Drugs were mainly plant-based (poppy straw and marijuana) that were grown in the country. The first seizure of cocaine was in 1994 (6.4 kg), heroin – in 1995 (1.4 kg). During this period, no organized criminal group was identified that would operate in the sphere of manufacturing, smuggling and sale of drugs. «Drug dealers» at that time were sporadic groups of drug addicts who united for the joint cooking and use of artisanal drugs and who, in order to maintain their «business», sold a certain part of the potion or involved freshmen with financial resources into the groups. All these data indicate that in the country at that time there were no prerequisites for criminalizing the laundering of money received from illicit drug trafficking.

Considering the problem of the appearance in 1995 of a criminal norm, which had to counter money laundering, a number of reasonable questions arise. First, how did it happen that in the modern Ukrainian criminal law there are (were prepared) two separate special criminal law norms that regulate the counteraction to money laundering? Secondly, why, preparing the norm on combating money-laundering, the legislators went through the preparation of a legal norm that provided for liability only for the use of funds derived from illicit drug trafficking, although at that time there already existed the provisions of the Strasbourg Convention of the Council of Europe [5] and the recommendations of the FATF Group, which noted the need to apply the concept of the crime of money laundering to all significant offenses? Thirdly, how it turned out that to more or less typical forms of money laundering, such as placement in the financial and banking system, or acquisition of objects of privatization, the second, form the use of property in order to continue illicit drug trafficking, was added?

The analysis of accompanying legislative documents, as well as interviewing among staffs of the central office of the Ministry of Internal Affairs, who participated in the development of the law draft to supplement the Criminal Code of Ukraine with the Art. 229^{12} of, lead us to such conclusions.

In the first half of the 1990s, during the first years of the existence of our state, the main potential of creative thought was

aimed at the preparation and adoption of legislative acts that determined our statehood, or were extremely necessary for the moment. Priority had Constitutional norms and norms which were responses to existing threats to society, such as criminal law provision on counteraction to racketeering. Despite the importance of the provisions of international agreements on combating money laundering, the reaction to their signing, ratification and implementation was somewhat belated. There were problems with the authentic translation of documents into Ukrainian language, because it was necessary to translate the entire array of international documents adopted in previous years. Unlike the Strasbourg Convention and the FATF Recommendations, the Vienna Convention of 1988 was signed by the Ukrainian Soviet Socialist Republic on April 25, 1991, when Ukraine was a part of the Soviet Union, but was a separate member of the United Nations. After the proclamation of independence with the Law of Ukraine «On the Succession of Ukraine» [6] our state confirmed the validity of the international treaties of the USSR, which did not contradict the Constitution of Ukraine and the interests of the republic, and thus confirmed the validity of the Vienna Convention signed in 1988.

The Strasbourg Convention of the Council of Europe of November 8, 1990 «On Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime» was signed only on May 29, 1997, and ratified on January 26, 1998. The Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF) [7] were adopted only in 2003. Thus, at the time of raising in the Verkhovna Rada of Ukraine in 1994 the issue of the need and development of a legal standard for the prevention of money laundering, at the disposal of Ukrainian experts of the Vienna Convention of 1988 and the Model Law on Money Laundering from Drugs [8], the official translation of which is dated 1 January 1995. Undoubtedly, under such circumstances, the draft was prepared only in the framework of combating the laundering of proceeds originated from illicit drug trafficking – the main task outlined by Vienna Convention of 1988.

The draft content of the article of the Criminal Code of Ukraine caused a very lively discussion and debate among the working group, as its content was not based on real materials, where the basis for criminalization was significant and sudden changes in the political, economic or social situation, the emergence of a new group

or significant changes in existing relations, which are due to economic or technical progress, but on the experience of other countries (due to the need to fulfill obligations under international agreements). This was reflected in the text of the article itself. First, the disposition of the article is descriptive, where it is clearly defined what actions constitute a crime, in contrast to Art. 209 of the Criminal Code, where they have a general character – «Effecting financial transactions and other deals involving money or other property known to be proceeds from crime». Secondly, in the vocabulary of the article is clearly imprinted the socio-economic situation of the state at that time, namely, in the phrase «acquisition of property objects with these proceeds that are subject to privatization». At the time when more than 62 % of the property belonged to the state [8], and the country was immersed in the first wave of privatization, that approach was understandable. However, if you follow the letter of the law, whether the acquisition for drug money property that has already been privatized (private, not public property) and therefore not essentially «subject» to privatization, constitute the offence? By the way, in this case, the Ukrainian scholar Dudorov [9] suggests using Art. 209 of the Criminal Code, which has a broader scope of actions, referring to other legislative acts. Thirdly, to alternative forms of money laundering that are typical in the world practice, such as placing funds in banks and financial institutions, acquiring objects and property, one more form is added. Experts do not take to refer it to typical money laundering. The placing of this third form in the article influenced the title of the article. At that time, terms and «legalization» and «money laundering» were already widely used, at least the term «conversion» could be used, borrowing it from the text of the convention or a model law. However, in this case, the title of the article would go into conflict with the essence of the third form, therefore a compromise, neutral option was found – «use».

As the staffs of the Ministry of Internal Affairs of Ukraine, who took part in the development of the article, noted during the interview, the third form, namely the use of money and property for the purpose of continuing illicit drug trafficking, arose not by chance. During the preparation of the article, practitioners, based on their experience and relying on available statistics, pointed out that organized crime, despite the gradual expansion of drug abuse in the country, did not gain such positions as in developed countries, most of the traffickers were drug addicted unemployed persons and profits

were used for further drug needs, the suppliers were not centralized, even at regional levels. The tough economic situation in the country reduced the purchasing power of «consumers» and did not contribute to the significant importation of drugs from abroad. All this made impossible for superprofits to appear and subsequent need for their laundering. There can be no question about international criminal groups and money laundering abroad using the banking or financial system. In this sense, the article, outlined in the content habitual for the Western countries, and being focused only on the laundering of the proceeds from drugs, remained for some time, inoperative, declarative. The analysis carried out in 2006 in the Ministry of Internal Affairs of Ukraine evidenced the rightness of this assumption. For 10 years of the article application, all criminal cases were initiated only on the facts of using criminal proceeds to continue illicit drug trafficking [10]. According to the member of the working group, the article had to be «revived». What, in fact, was done, referring to article 3 (v) of the Vienna Convention of 1988: «financing of any of the offences enumerated in i), ii), iii) or iv) above[*]», the text of the article was set forth in the following «... or use of such money and property for the purpose of continuing illicit trafficking in narcotic drugs, psychotropic substances, their analogues or precursors».

The working group decided that the use of money to continue illicit drug trafficking can be considered as a separate offence that complicates the crime related to the sale of drugs. They hoped that over time the article might be reformed and led to generally accepted standards basing on experience in disclosure and investigation of this category crimes and the facts of revealed money placing in the financial and banking systems. When preparing and adopting the new Criminal Code of Ukraine in 2001, Art. 229^{12} was transformed without changes into Art. 306. Evidently, absence of significant changes in the drug scene and absence of the facts of disclosing typical examples of money laundering played a decisive role.

At the same time, based on the latest international agreements signed by Ukraine during that period, the Art. 209 «Legalization (laundering) of criminally obtained money and other property» was added to the Criminal Code of Ukraine.

[*] It is said about manufacturing, extracting, selling, supplying, smuggling, transporting, importing or exporting any narcotic, cultivating, storing or purchasing them under any conditions.

The following conclusions from our small analysis of the genesis and development of Art. 306 of the Criminal Code of Ukraine may be done:

1. Art. 306 of the Criminal Code of Ukraine is of a conventional nature and has emerged as a result of Ukraine's compliance with its international obligations both in a sphere of countering illicit drug trafficking and in countering the laundering of proceeds from this trafficking.

2. The existence of two norms in the Ukrainian criminal law, the general and special ones, regulating relations in the field of countering the laundering of criminally obtained money and other property is the result of the historical peculiarities of the development of criminal legislation in the limited time frames for the formation of the legislation of an independent state.

3. The global development of criminal legislation on counteraction to money laundering rarely tends to allocate the offence of using proceeds from drug trafficking as a separate one in the range of AML offences. In this regard, we see the possibility for reforming of the criminal legislation of Ukraine with the aim of its simplification and unification.

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Особливості кримінальної відповідальності за відмивання наркогрошей в Україні

Висвітлено генезис та особливості кримінальної відповідальності за використання коштів, здобутих від незаконного обігу наркотиків. З'ясовано, що наявність в українському кримінальному законодавстві двох норм, які передбачають відповідальність за дії, пов'язані з використанням коштів, здобутих від злочинної діяльності, потребує роз'яснення цієї ситуації в історичному контексті. Доведено, що норми, покликані захищати правові відносини, пов'язані з використанням коштів, здобутих унаслідок кримінальної діяльності, зокрема від незаконного обігу наркотиків, виникли не під впливом чи внаслідок значних і несподіваних змін політичної, економічної або соціальної обстановки, виникнення нової групи чи змін наявних відносин, якими означений економічний або технічний прогрес, а як результат реалізації країною своїх зобов'язань за міжнародними угодами. У межах формулювання норм використано досвід інших країн і методичні рекомендації

міжнародних організацій. Обґрунтовано конвенційний характер зазначених норм. Стаття 306 Кримінального кодексу України було розроблено та впроваджено під впливом положень Конвенції Організації Об'єднаних Націй про боротьбу проти незаконного обігу наркотичних засобів і психотропних речовин (1988), присвяченої протидії використанню коштів, здобутих від наркотичних засобів і психотропних речовин. Із розвитком кримінального законодавства в інших країнах у Кримінальний кодекс України було введено іншу норму (ст. 209), яка передбачала відповідальність за легалізацію (відмивання) коштів, здобутих від будь-якого виду злочинної діяльності. Проте ст. 306 було залишено в Кодексі без змін. Це певним чином ставить злочини у сфері обігу наркотиків у пріоритетне становище перед іншими тяжкими злочинами, як-то торгівля людьми й органами, зброєю. Загальна тенденція в розвитку таких норм свідчить про їх уніфікацію незалежно від джерела злочинних доходів. Переосмислення наявних в українському законодавстві норм щодо протидії використанню та легалізації злочинних коштів, їх складових та об'єктів правового захисту сприяє формуванню пропозицій, спрямованих на вдосконалення національного кримінального законодавства та його застосування на практиці.

Ключові слова: кримінальна відповідальність; відмивання коштів; незаконний обіг наркотиків; Конвенція ООН 1988 року.