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Problematic Issues of Legalisation (Laundering) of Proceeds from Crime and Improvement of Counteraction to This Phenomenon in Ukraine

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Abstract

Based on the analysis of the current legislation and professional literature, considering the world experience, the general and problematic issues of legalisation (laundering) of proceeds from crime in Ukraine were described and ways to solve them to minimise the latency of money laundering were suggested. The methodological basis of the study consists of general and special methods of scientific cognition of socio-legal phenomena and processes, in particular: historical-legal, dialectical, formal-logical, system-structural, statistical, etc. The theoretical foundation was the papers of Ukrainian and foreign researchers on the examination of legalisation (laundering) of funds obtained by criminal means and improving the effectiveness of countering this phenomenon in Ukraine in the current conditions. The relevance of the study lies in the fact that for the first time the status and results involvement of Ukraine in intergovernmental bodies aimed at developing standards and promoting the effective application of legislative, regulatory, and operational measures in the fight against money laundering are investigated. It also provides data on official statistics for recent years regarding the exposure of legalisation by law enforcement agencies and general state financial control bodies. In addition, the interpretation of the concept of "legalisation (laundering) of proceeds from crime" has been further developed. The laundering of "dirty" money is a complex economic and legal phenomenon that has no borders. The use of international experience of state mechanisms for preventing and countering the legalisation (laundering) of proceeds from crime will provide an opportunity to develop a set of effective national levers of state regulatory influence to counteract this type of crime, and the procedure for interaction and coordination of subjects of countering the legalisation (laundering) of proceeds from crime, to increase the ability of the financial system of Ukraine in particular and public administration in general to resist the laundering of "dirty" funds

Keywords:

money laundering; predicate act; acquisition of funds; subject of legalisation; latency; organised crime; MONEYVAL; FATF; EAG; financial transactions; counteraction

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Introduction

The urgent issue that causes cognitive dissonance among the world community is the need for the total destruction of the shadow sector of the economy as a component of the origin of "dirty" funds and strengthening measures to counteract the legalisation of income of criminal origin.

The establishment of holistic and progressive ideas about the purpose, organisation, and functioning of the system of preventing and countering the legalisation (laundering) of corruption proceeds necessarily requires achieving a full understanding of the essence of the legalisation (laundering) of proceeds from crime, and the consequences of manifestations of this phenomenon [1].

According to the statistics of the official website of the Office of the General Prosecutor of Ukraine, for 12 months of 2018, the number of criminal offences in which pre-trial investigation was conducted by investigators of the prosecutor's office is 175 proceedings, in particular: 20 offences for which the pre-trial investigation was completed in the reporting period, 13 of which were sent to court with an indictment (Art. 291 of the CPC of Ukraine). 54 persons who committed them were identified, but the proceedings were stopped in the reporting period on the following grounds: under paragraph 2 of Art. 280 of the CPC of Ukraine in connection with the failure to establish the location of the suspect in 28 proceedings; under paragraph 3 of Art. 280 of the CPC of Ukraine to perform procedural actions within the framework of international cooperation in 5 materials of the pre-trial investigation. The amount of legalised funds and property is UAH 851.148.271. The property of UAH 38.680.000 was seized. In addition, 64 criminal offences preceded (predicate criminal offences) the legalisation (laundering) of proceeds from crime (Art. 209 of the Criminal Code of Ukraine), of which: 48 were in the field of official activity, 15 were an abuse of power or official position (Art. 364), 1 criminal offence regarding bribery (Art. 368-370), 32 other criminal offences committed in the sphere of official activity [2]. According to the results of 12 months of 2019, the number of criminal offences in which the pre-trial investigation was conducted by investigators of the prosecutor's office is 149 proceedings, in particular, 16 criminal offences for which the pre-trial investigation was completed in the reporting period, 12 of which were sent to the court with an indictment (Art. 291 of the CPC of Ukraine). The amount of income obtained by criminal means (under indictments) is 233,173 UAH. The proceeds obtained by criminal means in the amount of 219,730 UAH were seized. The number of persons who committed criminal offences is 49, but the proceedings were stopped in the reporting period on the following grounds: in respect of 16 persons – under paragraph 2 of Art. 280 of the CPC of Ukraine – due to failure to establish the location of the suspect, in respect of 4 persons – under paragraph 3 of Art. 280 of the CPC of Ukraine to perform procedural actions within the framework of international cooperation. 47 criminal offences preceded (predicate criminal offences) the legalisation (laundering) of proceeds from crime (Art. 209 of the Criminal Code of Ukraine): abuse of power or official position (Art. 364) – 13, criminal offences regarding bribery (Art. 368-370) – 1, other criminal offences committed in the field of official activity – 31.15 persons who committed criminal offences as part of an organised group and a criminal organisation involved in the legalisation (laundering) of proceeds from crime were identified, including 6 with corrupt connections, 5 in government and administration bodies, 1 with interregional connections, 5 in the budget sector [3].

According to judicial statistics, the number of persons brought to criminal responsibility in 2018, court decisions against which entered into legal force, is 14 people, and in 2019 – 16 people [3].

In the world, according to experts of the International Monetary Fund, the annual volume of money laundering is almost 500 billion USD [4].

The purpose of the study is to investigate the concept, content, and essence of money laundering, and to characterise financial instruments for money laundering. The following tasks were performed to achieve this goal: the involvement and activities of Ukraine in international institutions developing measures to combat money laundering were analysed, the impact of individual factors on the spread of legalisation was considered, and appropriate proposals were developed to improve effective methods in combating money laundering.

Therewith, the intensification of global economic relations and the constant development and improvement of monetary circulation are factors indicating that a number of problems are not covered in scientific works, and the issues of combating the legalisation of "dirty" funds require further research [5].

Results and Discussion

According to the resolution of the Plenum of the Supreme Court of Ukraine "On the practice of application by courts of legislation on criminal liability for the legalisation (laundering of proceeds from crime" of April 15, 2005, No. 5, the legalisation (laundering) of proceeds from crime, in accordance with the paragraph e of Art. 1, Art. 2 of the Law of Ukraine "On preventing and countering the

legalisation (laundering) of proceeds from crime or the financing of terrorism" of November 28, 2002, No. 249-IV (249-15) and dispositions part 1 of Art. 209 of the Criminal Code of Ukraine (2341-14) is the commission of actions aimed at concealing or masking the illegal origin of funds or other property or possession of them, the rights to such funds or property, the sources of their origin, location, movement, and the acquisition, possession or use of funds or other property to give a legitimate appearance to the possession, their use or disposal, or actions aimed at concealing the sources of their origin, and the commission of a financial transaction with such funds or other property or the conclusion of an agreement in respect of them, provided that the person is aware that they were received by criminal means [6].

Money laundering is the act of concealing sources of income obtained in the course of criminal activity, and such income is given the characteristic of legality [7]. The best approach to combating money laundering is one that strikes a fair balance between protecting the financial system from money laundering and promoting financial inclusion [8]. Amendments to the legislation on preventing and countering the legalisation (laundering) of proceeds from crime, the financing of terrorism and the financing of the proliferation of weapons of mass destruction came into force on April 28, 2020. The history of the international introduction of measures to combat money laundering is briefly repeated below to understand the background of this crime. Thus, in the late 80s, this issue was raised in the UN Convention "On the suppression of illicit trafficking in narcotic drugs and psychotropic substances", which began its operation in Ukraine on November 27, 1991. However, the document referred exclusively to the laundering of funds received from the sale of drugs. Subsequently, the explanation of the term "laundering" at the international level was recreated in the Council of Europe Convention "On laundering, search, seizure, and confiscation of proceeds from crime, and on the financing of terrorism" (effective in Ukraine since June 1, 2011) [9].

By the Law of Ukraine "On amendments to the Criminal and Criminal Procedure Codes of Ukraine" of January 16, 2003, No. 430-IV, to enter data in the Unified Register of pre-trial investigations under Art. 209 of the Criminal Code of Ukraine, the investigator had to establish the fact of committing a predicate act, and only then state the fact of money laundering obtained as a result of committing such an act [10].

The essence of transformations regarding compliance with Ukrainian legislation is briefly considered below. The Law of Ukraine "On preventing and countering the legalisation (laundering) of proceeds from crime, the financing of terrorism, and the financing of the proliferation of weapons of mass destruction" of December 6, 2019, No. 361-IX amends Art. 209 of the Criminal Code of Ukraine, aimed at improving and clarifying certain norms of legislation on preventing and countering the legalisation (laundering) of income, and coordinating and improving the provisions of changing legislative acts, ensuring the implementation of the provisions of new international standards in the field of countering money laundering [11]. This refers to the fact that in the wording of the amended article there is a reference to the commission of a predicate act as a mandatory element of the corpus delicti. Criminal proceedings under Art. 209 of the Criminal Code of Ukraine will be opened if "factual circumstances indicate that it (property) was obtained by criminal means". In addition, there is no note that prescribes the signs of a predicate act. The new version of Art. 209 of the Criminal Code of Ukraine makes it extremely easier for law enforcement agencies to document illegal activities since it is not necessary to canonise the fact of committing a predicate act, but it will only be sufficient to certify the existence of factual circumstances that will prove that the property was obtained by criminal means, and the subjective side of the crime is reflected in the form of intent – illegal actions were committed by a person intentionally to give a legitimate appearance to the possession, use, disposal of such funds or property, their acquisition, or to hide the sources of their origin. The previous version of Art. 209 of the Criminal Code of Ukraine did not contain any mention of the subjective side.

Legalisation (laundering) of proceeds from crime is a typical conventional crime, that is, an act criminalised in connection with the entry of Ukraine into the list of parties to the relevant international legal acts [12].

Since Ukraine is a member of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, the new Law is aimed at implementing the recommendations indicated in the report of experts of this committee, provided based on the results of the 5th round of mutual assessment of Ukraine in the field of anti-money laundering/terrorist financing, approved at the 55th plenary session of MONEYVAL. The first progress report was submitted and approved in July 2019 at the 58th meeting of the MONEYVAL committee. The second report was approved as part of MONEYVAL's intersessional consultations in June 2020 and published on MONEVAL's official website on August 28, 2020. It states that Ukraine was one of the first countries to report on its MONEYVAL

progress online under the so-called written review and decision-making procedure, which was applied in view of the COVID-19 pandemic and the restrictions imposed in this regard. According to the conclusions of the international experts of the FATF (group for the development of financial measures to combat money laundering, which issued the so-called "40 recommendations", which became the standard for anti-money laundering), Ukraine substantially implemented the norms on countering the financing of terrorism, and increased sanctions for violating the requirements of legislation in the field of countering money laundering and terrorist financing (hereinafter-AML/CFT), defining them as appropriate, convincing, and such that they will have a deterrent effect to the standards. According to Art. 32 "liability for violation of the requirements of legislation in the field of prevention and counteraction" of the Law of Ukraine "On prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction" of December 6, 2019, No. 361-IX increased the maximum fine for violation of legislation in the field of AML/CFT to 135 million UAH (4.5 million EUR) and substantially increased the amount of fines for various violations in the field of AML/CFT (in 10, and in some cases even in 100 times). However, certain shortcomings remained: 1) only one measure of influence can be applied for one violation; 2) it is not clear how "twice the amount of benefits received by the subjects of primary financial monitoring as a result of the violation" will be determined.

Another international institution where Ukraine has been granted observer status since October 2004 is The Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG). The main area of the Working Group on Typologies and Countering the Financing of Terrorism and Organised Crime is to conduct typological studies to identify key threats and vulnerabilities inherent in the Eurasian space. Thus, in 2014, a typological study "Cybercrime and money laundering" was conducted in relation to the Ukrainian state, in 2013 – "Tax crimes and money laundering", in 2012 – "Vulnerabilities of operations with intangible assets (in particular, intellectual property) that allow them to be used for money laundering and terrorist financing" [13].

The public danger of spreading "dirty money" for the Ukrainian state lies in the high share of the cash component in the structure of the total money supply that is in circulation and, accordingly, the prospects of malefactors to legalise their illegal profits using cash. Both cash and non-cash funds serve as means of payment, which gives them a key role. In many countries, the amount of cash is clearly limited by law, and its amount in the process of performing various operations should not exceed the threshold (amount) determined by law. It is clear that the turnover of non-cash funds is easier to control than the turnover of cash. Funds transferred from account to account can be controlled by bank institutions, regulatory and law enforcement agencies, but cash is the most convenient due to the lack of strong legal control over them. In fact, legalisation is a process by which the funds received merge with the legal circulation of money, and the real sources and channels of receipt of these funds are scrupulously hidden from external views [14].

Notably, the composition of the crime of Art. 209 of the Criminal Code of Ukraine differs from others in its unpredictability, latency, and the use of a substantial number of financial transactions. Unpredictability is manifested in the use of various non-causal ways to achieve criminal goals. Offenders are quite adept at hiding traces of illegal actions – among the mass of banking operations conducted, it is quite difficult to identify the initial source of funds received. Notably, some criminal methods by which funds were obtained do not affect the qualification of a crime under Art. 209 of the Criminal Code of Ukraine, but they create so-called "obstacles" for rapid investigation by law enforcement agencies. Legalisation contributes to the growth of organised crime and its penetration into the legal economy, and in addition, it is most often practiced by organised criminal groups, which, accordingly, increases its latency, since such groups have a well-functioning apparatus for neutralising social control, which ensures the effectiveness of committing criminal offences. Professor V.V. Sukhonos [15] rightly notes that such crimes are committed mainly by organised groups operating in the cross-border space. They criminally pump resources out of the Ukrainian economy and launder them abroad, in offshore zones. Subsequently, the capital is returned to Ukraine, but the criminals are already foreign investors [15].

The high latency of legalisation is due to a number of reasons. This is mainly due to the fact that there is no aggrieved party that could report harm to interests [16]. Detection of crimes and their prevention in the financial and banking system, in foreign economic activity, in the field of computer Information, fuel, and energy complex, agro-industrial complex, in the market of metals and minerals is exceedingly difficult. The process of criminalisation of the credit-financial system is directly related to the lack of effective legislation and control over banking operations by regulatory organisations and, especially, law enforcement agencies. In the

context of confusion in the accounting and control system, it becomes difficult or even impossible to establish channels and methods of theft of state and other property. Therefore, it is logical that it is quite difficult for one state structure to overcome this phenomenon, which is why it is necessary to combine the intellectual and organisational efforts of many state institutions that can not only expose, but also stop illegal financial transactions and disguising the criminal origin of funds or other property. The reason for the increase in latency is also the growing corruption. Corruption and money laundering are inextricably linked. Corruption offences such as illegal profit or theft of public funds are usually committed for the purpose of obtaining private benefits. Money laundering is the process of concealing illegal income obtained as a result of criminal activities.

The implementation of financial transactions. According to the risk criteria for legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction, approved by the order of the Ministry of Finance of Ukraine "On approval of risk criteria for legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction" dated July 8, 2016, No. 584, a financial transaction has the risk of legalisation (laundering) of proceeds from crime, if it has a confusing or unusual character, or it is a set of related financial transactions that do not have a clear economic meaning or legitimate purpose, and also, in case of detection of the facts of repeated financial transactions, the nature of which gives grounds to believe that the purpose of their implementation is to avoid the procedures of mandatory financial monitoring or identification (verification) provided for by law [17]. The National Bank of Ukraine (hereinafter referred to as the NBU) regularly checks financial monitoring and compliance with the requirements of currency legislation concerning the conduct of financial transactions by clients of banks/non-bank financial institutions, the nature or consequences of which give grounds to believe that they may be related to the withdrawal of capital, legalisation of criminal proceeds, conversion (transfer) of non-cash funds into cash, implementation of fictitious entrepreneurship, tax evasion, etc., which may indicate organised criminal activity. This information is sent to law enforcement agencies. Thus, in 2018, the NBU sent to law enforcement officers information about suspicious transactions of clients of 50 financial institutions [18], in 2019 – the NBU provided law enforcement officers with 24 letters with information about suspicious financial transactions of clients of banks and non – bank financial institutions totalling almost 29.2 billion UAH, 98.0 million USD; currency supervision – 18 letters about large-scale transactions of bank clients in relation to financial transactions totalling about 1.4 billion UAH, 1.12 billion US dollars, 51.1 million euros, 69.6 million Russian rubles.48 million zlotys. Therewith, during 2019, 4 reports of suspicious financial transactions were sent to the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU) [18]. In the first quarter of 2020, the NBU continued to provide law enforcement agencies with information that may indicate organised criminal activity. Thus, as of March 31, 2020, 6 letters were sent to law enforcement agencies with information about suspicious financial transactions of clients totalling over 13.5 billion UAH; currency supervision – 3 letters about large-scale transactions totalling almost 111.2 million USD, 13.6 million EUR; 2 notifications to the NABU [19]. In the second quarter of 2020, as of June 30, 2020, 4 letters were sent with information about suspicious financial transactions totalling about 4.6 billion UAH and 1 notification to the NABU totalling about 24.9 million USD [20]. In the third quarter of 2020, as of September 30, 2020, 5 letters were sent with information about suspicious financial transactions of bank clients totalling over 7.36 billion UAH and about 24.9 million USD, and 5 letters were sent on currency supervision issues that may indicate organised criminal activities and large-scale operations of bank clients totalling over 133 million USD and 0.84 million EUR [21].

Therefore, it can be argued that the phenomena of money laundering do not occur spontaneously. Ultimately, groups of people who have experience in this activity and are closely connected with financial institutions are involved in legalisation. Many financial transactions are used to mask traces of the illegal origin of income by changing the owners of funds, their physical movement, and withdrawing them in cash. It is known that criminals tend to keep their assets in liquid forms. The effectiveness of the system of countering the legalisation (laundering) of proceeds from crime can be achieved only with the coordinated functioning of the criminal-legal control mechanism and the financial monitoring mechanism.

The scientific originality of the study lies in the need to conduct a theoretical and practical analysis on countering the legalisation (laundering) of proceeds from crime in Ukraine.

Conclusions

The analysis of current practices in Ukraine regarding the prevention, investigation, and punishment of crimes related to the legalisation of illegal income

shows that there are issues that will lead to an effective fight against these crimes on the territory of Ukraine.

Thus, given the above, it is necessary to perform the following actions:

1. Conduct training of specialists who will master various technologies for investigating crimes related to the legalisation (laundering) of illegal income, in particular, the ability to search and identify funds located in offshore zones according to the developed algorithm.

2. Borrow the best practices of interdepartmental cooperation on tools for countering the commission of economic crimes and money laundering from such crimes.

3. Optimise the interaction between bodies of the general state and special bodies that conduct financial control.

4. Bring the national financial system closer to international legal standards of transparency.

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Проблемні питання легалізації (відмивання) доходів, одержаних злочинним шляхом, і вдосконалення протидії цьому явищу в Україні

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Анотація
На підставі аналізу чинного законодавства, фахової літератури та з огляду на всесвітній досвід схарактеризувати загальні й проблемні питання легалізації (відмивання) доходів, одержаних злочинним шляхом, в Україні та запропонувати шляхи їх вирішення для мінімізації латентності легалізації злочинних доходів. Методологія. Методологічну основу дослідження становлять загальнонаукові та спеціальні методи наукового пізнання соціально-правових явищ і процесів, зокрема: історико-правовий, діалектичний, формально-логічний, системно-структурний, статистичний тощо. Теоретичним підґрунтям цієї публікації стали праці вітчизняних та іноземних учених щодо питань дослідження легалізації (відмивання) коштів, одержаних злочинним шляхом, і вдосконалення ефективності протидії цьому явищу в Україні в умовах сьогодення. Наукова новизна публікації полягає в тому, що вперше досліджено статус і результати участі України в міжурядових органах, які мають за мету розроблення стандартів і сприяння ефективному застосуванню законодавчих, регуляційних та оперативних заходів у боротьбі з відмиванням грошей. Також наведено дані офіційної статистики за останні роки щодо викриття легалізації правоохоронними органами й органами загального державного фінансового контролю. Окрім цього, набуло подальшого розвитку трактування поняття «легалізація (відмивання) доходів, одержаних злочинним шляхом». Висновки. Відмивання «брудних» грошей є складним економіко-правовим явищем, що не має кордонів. Використання міжнародного досвіду державних механізмів запобігання та протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, надасть можливість розробити комплекс ефективних національних важелів державного регуляторного впливу з протидії цьому виду злочинності, а також порядок взаємодії та координації суб'єктів протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, підвищити здатність фінансової системи України зокрема та державного управління загалом протистояти відмиванню «брудних» коштів

Ключові слова:
легалізація доходів; предикатне діяння; набуття коштів; предмет легалізації; латентність; організована злочинність; MONEYVAL; FATF; ЄАГ; фінансові операції; протидія