

Competing Of The Main Criminal Offense With That Of Criminal Products Laundering

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Abstract:- It will be argued in this paper the cases of competing crimes, through a legal – criminal analise of the elements of the main criminal offense and of that of laundring¹ the criminal product. It is given answer to wether a person can be subject of the main criminal offense and at the same time subject of laundring its criminal product. So, can a person be subject for the main offense and be convicted also as a afterwards "launderer". We can give the answer to this problem by explaining if both criminal acts, the main one as well as the one of laundring the criminal products, have the same object, do they violate the same legal criminal relationship, the same legally protected interest, if the actions provided as elements of the criminal act are similar, and through the verification of intent and motive as elements that characterise the laundring of criminal products. Referering as well as to the judicial albanian practice, we can conclude that there is no reason to support the double charge as we can not ask a criminal subject to incriminate oneself. We will as well argue the cases when a person is charged at the same time for the main criminal act and for the criminal act of laundring. In this case no constitutional rights are affected as the lawlessness of the laundry act is beyond that of the main criminal offense and it violates a legal protected interest.

Key words:- Money laundring, main criminal offense, "ne bis is iden" etc.

I. CAN A SUBJECT OF A MAIN CRIMINAL² OFFENSE BE AT THE SAME TIME SUBJECT OF MONEY LAUNDRING?

Council of Europe Convention (article 9 (2) b)³ defines that mouney laundring charges can not be applied to the person committing the main criminal act. It accepts that the Constitutions of some countries may not allow that a person who has committed a criminal offense to be charged later for the laundring of the incomes that this crime has provided. The United Nations Convention against Transnational Organized Crime defines that "If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence"⁴ In this way it aligns with the criterias provided by the Council of Europe Directive, varying from the State and by including the possibility that the person committing the main criminal offense can be charged in the same time for money laundring.

In the comparating legislation, some countries consider the money launder as a common criminal offense, any person can be subjetc to it without the neccesity to fulfill any particular characteristics of the author of the act of laundring. On the contrary, there are legislations that restrict the possible authors of the laundry offense. The basic under the restrict of participants in the laundry offense, stands in the concept that as in the case of hiding the author of the criminal act of laundry can not be considered as the author of the criminal conduct. Argentinian legislation, article 278 of the Criminal Code defines that only those who are not part of the criminal act from which a property derives, can take part in the laundry crime. In Italy, article 648 of the Criminal Code is exclusively applicable "except the cases of multiple criminal acts", which has been interpreted

¹ With "competing crimes" we will understand the case when a person has committed two or more criminal acts at the same time or different time and is being charged for them at the same time.

² Main criminal offense is considered to be any criminal act that has provided criminal products that can be object of the criminal act of money laundring

³ Council of Europe Convention "On Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism", Warshaw, 16 May 2005, ratified with Law No. 9646, date 27.11.2006

⁴ Article 6 (2-e) United Nations Convention, Palermo 2000, "Against Transnational Organized Crime", Law No. 8920 date 11.07.2002 "On the ratification of the United Nations Convention, Against Transnational Organized Crime"

as the authors of the main criminal offenses have no criminal responsibility for the act of money laundering. In other countries like Switzerland, Spain and Albania that do not provide any kind of restrictions in regard with the authors for the act of laundering. In this countries it is provided as a common crime, despite of this the doctrine discusses the possibility that a person could be author of the main criminal offense and at the same time of that of laundering⁵. The criminal act of laundering can be classified through three different legal systems: a) countries that explicitly provide that the author of the main criminal offense can be as well the author of the laundering act⁶, b) countries where it is designed as a separate criminal offense, without providing any explanation whether the author can or cannot be charged at the same time for it⁷, c) countries that explicitly exclude those who take part in the criminal offense and characterize it as a form of hiding⁸

The concept of the autonomy of the money laundering explains if the person responsible for the main criminal offense can be criminally charged at the same time for the criminal act of laundering. The reason of impunity for the author of the main criminal offense as well as for the criminal act of laundry stands in the principal that "*ne bis in idem*", no one shall be twice charged for the same offence, it signifies that the illegality of the first act includes the illegality of the later as well, that of laundering in this case. The author of a criminal offense can not be obliged to surrender before justice, hiding the goods that derive from his act will be considered as acts to avoid his arrest. The impunity of the hiding itself stands as the concept of the cocriminal later act, because there is no new interest to be protected by the law and the criteria that a different behavior is not necessary, respecting so the right of any person not to incriminate oneself. The impunity of the authors or of the participants in a main criminal offense is based on the incrimination of the later act. It is not possible to apply a conviction for two criminal acts for what is considered to be a single action, because the act is the same, in the way provided by the law. The criminalisation of the first act, which is more serious, includes the total dismissal of illegality for the act in general. For those who take this position, it will be applied a double prosecution and thus will violate the constitutional guarantees that no one can be convicted twice for the same crime.

II. OBJECT, THE INTERESTS PROTECTED BY LAW, THAT IS AFFECTED BY MONEY LAUNDERING

International conventions and various national legislations show that one of the interests that are protected by law that are violated money laundering is the administration of justice, as well as socio-economic relations and financial health of the state. One of its basic elements is the link with organized crime. Criminalization and punishment of the offense of money laundering is merely done to protect states from organized crime and activities of criminal organizations, which undermine the legitimate economies and threaten the stability, security and sovereignty of the state. Some criminal organizations engaged in money laundering and other offenses, by their actions do not only undermine the administration of justice, but above all economic and national and international financial order. In this case the effective control of the phenomenon of money laundering requires to be treated not only as a form of concealment of income, but also as a separate offense against economic social order. The interests specifically protected specifically by criminal law which is violated by money laundering are legal relations established to protect the economy and financial system. According to the Albanian Criminal Code, subject of the group are the legal relations set to protect the public order and security. While direct object are criminal legal relations specifically protected by law, who are violated by money laundering.

If we consider that the legally protected interest, affected by laundering, is the administration of justice and socio-economic order, we see that the illegality of the previous act not always cover the entire illegality of the subsequent laundering. Different legally protected interests are affected. Laundering includes an additional element that does not exist when the administration of justice is affected. Following this reasoning, "aimed robbery" as provided by Article 140 of the Albanian Criminal Code, illegal possession of military weapons are formal punishable as a criminal offense, it is an act that is independent of the robbery, although the weapons are used in the attack and aggravate the robbery crime.

Laundering of criminal protects the criminal activities of organized crime and makes them profitable. In this sense it constitutes a separate act and the main participants in the crime go unpunished for the subsequent

⁵ In this regard, article 305 of the Criminal Code of Switzerland, article 505 of the Belgian Criminal Code amended in July 1995, explicitly provide that the authors or collaborators of the main criminal act can be charged also for the laundry crime later.

⁶ Belgium Criminal Code, article 505

⁷ Article 301 of the Spanish Criminal Code, Germany and Switzerland, article 287 e 287/b of the Albanian Criminal Code

⁸ Article 278 of the Albanian Criminal Code

money laundering. However, if we accept that, when with the laundering of income from their illegal activities, organizers and leaders of the criminal organizations seriously harm legally protected interest, socio-economic order, we must recognize that Article 287⁹ of the Criminal Code of the Republic of Albania is applicable for their punishment for this offense. The provisions of this Article shall also be applied when: c) a person who performs the products laundering is the same as the person who committed the offense, from which the products derived¹⁰. Those who follow this line of reasoning realize that the legislator has left open the possibility of punishing the perpetrators of the offense of subsequent profit laundering. To determine the effect of laundering in the economic and social order and the punishment of an indicator the subject of a criminal offense, to be considered is the amount of property values illegally laundered¹¹. In case of violation of the financial and economic health of the state, the state is obliged to punish those that affect and undermine social and economic values. The principle of justice and equality require that any person who touches the interests protected by law should be punished. Therefore, if this illegality is involved in the case when it is considered that the punishment for laundering is applied to its author, it would be arbitrary in similar circumstances for the authors of the previous act that constitutes a misdemeanor. If the interest protected is the same in social terms in the crime and in the clean, twice the author punishment would not be justified. On the contrary, if the interests protected by law are different, socio-economic damages of laundering must be taken into consideration, since they constitute an object protected by a special rate.

Laundering offenses affects other social values and in this case the criminal behavior is always guided by the profit motive that inspires the criminal organization, allowing it to re invest the proceeds of crime, and generate criminal enterprise. From the legal analysis of the offense of laundering turns out that the profit motive and the purpose of criminal activities is a parenthetical element of money laundering. The purpose of laundering is not always included as an element of the criminal offense, for example, in drugs or guns trafficking or other offenses that assure financial profits. The purpose of hiding the illicit origin of the funds constitutes an additional element of illegality and danger. Moreover, it is necessary to analyze whether the criminal offense has a profit motive as an element of the crime and whether it covers the profits lawlessness targeted by the criminal organizations in a form of laundering that consists not only of hiding, but also in the use of criminal profits as a "fuel" for the ongoing crimes aimed to keep the criminal enterprise in action and making it more powerful. This constitutes the very essence of the problem, which revolves around the question of whether to punish the offender for the subsequent laundering of the profits.

The lawlessness of money laundering has an extra element that exceeds the previous crime, a profit motive designed to ensure the survival of the criminal organization, which is not always present in the previous act. Even when the gain is present in a previous behavior, lawlessness and social dangerousness of money laundering goes even further, because it involves performing repetitive actions over time in order to strengthen the structure of the criminal organization to give to it a legal character, which seeks to challenge the existence of the state. Therefore it is clear that these actions, this process, in which the author of the prior act plays an active role, cannot be considered to have been involved in the offense. Thus, the operation is not unique, nor its criminal objective is only one. The state is obliged not only to ensure a due process of law in accordance with the relevant international conventions, but also to protect other interests; it must defend the economic and financial health of the banking system. What we must remember is that the United Nations Convention against Transnational Organized Crime, Palermo, 2000, provides for the criminalization of the offense of money laundering, as one of the crimes to enhance the effectiveness of the fight against organized crime. In conclusion, there is no violation of constitutional guarantees in case of conviction of the author of the prior act for the offense of laundering, after its illegality is more serious than the offense and affects a legally protected interest of a great importance. At the same time there is no reason to support double prosecution because it cannot be required from the person committing it to incriminate oneself.

The same attitude was kept by the Albanian¹² judicial system, laundering of the criminal products does not represent a single act, but it involves a process that aims not only to hide the origin of the product itself, but also to maintain its control. The Court goes on with the argument that the same person cannot be punished at the same time for the offense of "documents forgery done in cooperation" provided by Article 186/2 of the Penal

⁹ Laundering the proceeds of crime or criminal activity

10. Article 287, paragraph (c) of the RA Criminal Code, the Law no. 23/2012 "On some additions and amendments to Law no. 7895 dated 27.01.1995 "Code of the Republic of Albania amended"

11. Blanco Cordero, "El delito de Blanqueo de Capitales," Ed.Aranzadi, 1997, page 501, and Vives Antón and González Cussac, "Comentarios al Código Penal de 1995", T. 2. Available, www.cicad.oas.org/Lavado.../eng/..EnglishVersionACrime.d/.

12 Decision No.1043 of the Tirana District Court, criminal case no. Act 1095, dated 27.06.2011

Code or the crime "fraud" as provided by Article 143 of the Criminal Code and also for the "Criminal product laundering" provided by Article 287/1 point (b), regardless of the charges filed by the prosecution.

III. THE MOTIVE AND PURPOSE AS A SPECIAL ELEMENT OF CRIMINAL PRODUCT LAUNDERING

In the crime of money laundering, the illegality of the action has an additional element that affects other social values. In this case the criminal behavior is always guided by the profit motive that inspires the criminal organization, allowing it to reinvest the incomes of crime, and generate a criminal enterprise. The purpose of laundering is not always included as an element of the criminal offense, for example, in drugs or guns trafficking or other offenses from which they gain financial profits. The purpose of hiding the illicit origin of the funds contains an additional element of illegality and danger.

Moreover, it is necessary to analyze whether the offense has a profit motive as an element of the crime and whether it covers the profits lawlessness targeted by the criminal organizations in a form of laundering that consists not only of hiding, but also in the use of criminal profits as a "fuel" for the ongoing crimes aimed to keep the criminal enterprise in action and making it more powerful. This constitutes the very essence of the problem, which revolves around the question of whether to punish the offender for the subsequent laundering of the profits.

The lawlessness of money laundering has an extra element that exceeds the previous crime, a profit motive designed to ensure the survival of the criminal organization, which is not always present in the previous act. Even when the gain is present in a previous behavior, lawlessness and social dangerousness of money laundering goes even further, because it involves performing repetitive actions over time in order to strengthen the structure of the criminal organization to give to it a legal character, which seeks to challenge the existence of the state. Therefore it is clear that these actions, this process, in which the author of the prior act plays an active role, cannot be considered to have been involved in the offense. In this case, the constitutional guarantees will not be affected, since the act in question and criminal intention is different to that of the offense. The state is obliged not only to ensure a due process of law in accordance with the relevant international conventions, but also to protect other interests; it must defend the economic and financial health of the banking system.

IV. THE ELEMENTS OF CRIMINAL PRODUCTS LAUNDERING ACCORDING TO ARTICLE 287 OF THE CRIMINAL CODE OF THE REPUBLIC OF ALBANIA

Referring to the legal definition of article 287¹³ of the Criminal Code in order for this offense to be considered committed all of the following elements must be proven:

- Exchange or transfer of assets must be made;
- The assets were products of the offense or of the criminal activity;
- The subject was aware that the property was a product of a criminal offense or a criminal activity;
- The subject has committed the laundering of criminal products intentionally and the transfer was done in order to hide or cover up the criminal origin of the property or to help to avoid legal consequences associated with the crime.

i) **The exchange or transferring:** The law does not seem to limit the manner in which the assets are exchanged or transferred. Of course, any type of financial transaction, like buying a receivable check, exchanging of a check to another currency or purchase of goods are in accordance with this definition. Also a non-financial transaction such as movement or delivery of money from one person to another is consistent with this definition.

ii) **Assets were the products of the offense or criminal activity:** According to Article 287, laundering of criminal products is not limited to currency transactions but may also include transfer or exchange of any property that is the product of an offense or criminal activity. The transfer of immovable property acquired through fraud satisfies this element, for example, Article 287 / b of the Criminal Code, "The acquisition of money or stolen goods". In addition, there is no restriction on the kind of crime that should be tested to determine the offense of money laundering. Unlike anti-money laundering laws of many countries, as we have noted above, which require that products come from some "certain criminal offenses" in Albania any offense or criminal activity resulting in illegal profits can form the basis of a prosecution for money laundering. In order to determine whether the assets are the product of a criminal activity it should be proved the link between the crime and the assets. It is not sufficient to show simply that the accused for the offense under this section, has not had the sufficient legitimate sources of incomes or property to justify his financial transactions, but it should also be proven the link between the crime or criminal activity and assets that are the subject of a criminal offense provided by Article 287 of the Criminal Code. As Professor Elezi argues, "*Products, revenues should be determined by a thorough investigation of the criminal activity, if these people are entitled of any kind of*

¹³ Article 287 of the RA Criminal Code, the Law no. 23/2012 "On some additions and amendments to Law no. 7895 dated 27.01.1995 "Code of the Republic of Albania", as amended

permits, licenses, authorizations, concessions and other rights to conduct economic, commercial and professional activities, if they receive contributions, financing or any kind of credits. ¹⁴.

iii) **The subject had knowledge that the property was product of crime or criminal activity:** The knowledge and purpose, provided in this article, are drawn from the objective circumstances. This may be one of the most difficult elements to be determined. Of course, when the subject has been directly involved in a criminal activity it can be proved, and then his knowledge about the origin of the funds is evident. However, associates who help criminals to use, "arrange", structure their assets and most of the time try to protect themselves by claiming they did not know that the property was a product of a criminal act. In such circumstances, law enforcement agencies have to rely on circumstantial evidence. For example, evidence that a business has received large amounts of cash from an individual in suspicious circumstances; or that the person who has given the money or was known to be involved in criminal activities abroad; or that there was series of complicated transactions that are unjustifiable for business, can support the conclusion that the accused of money laundering knew that those money were the product of a criminal activity.

It is already a standard set from the jurisprudence that some objective elements of criminal acts are often enough to convince the judge for the defendant's criminal intent. In the interpretation of Article 287 of the Criminal Code, knowledge of the subject about the criminal origin of can be determined by direct evidence but also by circumstantial ones.

iv) **Hiding or covering the illicit origin of the property:** Proof that the subject is trying to hide or cover criminal assets or help someone else to do it or to help to avoid legal consequences associated with the commission of crime can determined through direct or circumstantial evidence. Direct evidence includes cases when the subject performs transactions using false names or false documents, such as the false invoices or when opening bank accounts for shell companies. Using the names of third persons who allow their names to be used in conjunction with seemingly owned criminal assets is another example. Certainly some of the elements overlap and proof that the subject was aware of the criminal nature of the product will also support the view that certain financial transactions are carried out with the intention to conceal the illicit origin of the property. Other factors supporting the conclusion that products were hidden include: a) secret meetings or financial exchanges in remote locations; b) unusual way in which properties and incomes are structured, transferred or stored as for example hiding money in trading goods, or wrapping the money as if they were presents; c) engaging in business transactions very unusual such as the ones with multiple layers and complicated transactions¹⁵; d) the mixture of legitimate funds with those illegal ones in the same bank account, especially when illicit funds evidently did not come from business activities; e) falsification or lying to third parties on the nature of the transactions or the origin of the funds; f) the exchange of currencies, for example from smaller banknotes to larger banknotes or money exchange of money in euro / dollar. All these and other activities can support the conclusion that the defendant intended to cover the real criminal origin of the properties.

V. CONCLUSIONS

From this analysis we conclude that the same person subject to a criminal offense can be also considered and can be charged with criminal responsibility at the same time laundering products its. So in most cases this act competes with the major criminal offense. There is no violation of constitutional guarantees in case of conviction of the author of the prior act for the offense of laundering, because its illegality is beyond of that of the major offense and the later affects another legally protected interest, motive and purpose from that of the major offense.

The basis of impunity for the main offender and also for an offense of laundering is the principle of "ne bis in idem" (one crime one punishment) that the offender cannot be forced to surrender to justice. Money laundering protects the criminal activities of organized crime and makes them profitable. In this sense it constitutes a separate act.

Laundering offenses affects other social values and in this case the criminal behavior is always guided by the goal of profit motive that inspires the criminal organization, allowing it to reinvest the proceeds of crime, and generate criminal enterprise.

The profit motive and purpose of criminal activities is a crucial element of money laundering. Even when the gain is present in a previous behavior, lawlessness and social dangerousness of money laundering goes even further, because it involves performing repetitive actions over time in order to strengthen the structure of the criminal organization to give it a legal character, which seeks to challenge the existence of the state. Therefore it is clear that these actions, this process, in which the author of the prior act plays an active role, cannot be considered to have been involved in the criminal offense.

14 Prof. Ismet Elezi, Commentary of additions and changes to the Criminal Code, the Law no. 23, dated 01.03.2012. Publishing house "Erik", 2012, page 37

15 Decision Nr.229 of Vlora District Court dated 10.05.2012.

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