

CONFISCATION AS AN ESSENTIAL TOOL IN THE FIGHT AGAINST THE CRIME OF MONEY LAUNDERING AND OTHER CRIMINAL PROCEEDS

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ABSTRACT

The paper deals with the relationship between the measure of confiscation and the crime of money laundering and other proceeds of crime. Since this crime belongs to the group object of protection - public finances, payment transactions and economy, it follows that processing is carried out at a higher level, that is, confiscation - financial crime.

The paper provides a detailed presentation of money laundering as a criminal behavior, covering its characteristics, stages of realization and harmful effects.

In the further part of the paper, the Macedonian penal-legal solution is elaborated, which sanctions money laundering as a crime, both in its basic form and in its more serious forms. This elaboration is also accompanied by statistical data from competent institutions that have competences in relation to the criminal prosecution of money laundering and other criminal proceeds.

The paper deals in detail with the material and formal approach to confiscation according to the Macedonian legislation, i.e. first presents the grounds and method of confiscation, and then deals with the procedure for confiscation, confiscation by third parties and extended confiscation. Particular attention is paid to the special procedure for confiscation, as well as to the new legal solution or the new instrument for confiscation known as confiscation of property in civil proceedings.

The last mentioned solution is the result of the state's efforts to protect the public interest and the rule of law and to confiscate property or other benefit acquired by committing a crime if, through the provisions of the penal legislation, there are no possibilities to succeed in the confiscation of such property.

The paper emphasizes that financial crime knows no state borders and that it uses all the technological resources that have been created in modern society, and therefore the importance of international criminal legal assistance and the need for quick and efficient cooperation in the fight against financial crime is emphasized.

Keywords: crime, property gain, confiscation, corruption, public interest,

Introduction

Criminal law as a branch of law seeks to establish and maintain order in society, to protect values, relationships and interests that are significant for both, the state and the individual, to enable the smooth functioning of the system. For this purpose, criminal acts are prescribed, that is, punishable behaviors that protect the defined values.

One of the important segments of the functioning of the state is the finances, which are the basis for the regulation of numerous relations and therefore it is necessary to foresee criminal acts for the protection of the financial sector and economic relations. Modern countries consider the crime of money laundering to be particularly harmful.

By definition, money laundering is understood as the transformation of illegal money into legal, i.e. their inclusion in the legal financial system, i.e. illegally acquired money through financial institutions where it is presented as legal, enters the legal financial system and represents legally acquired property of the perpetrators of criminal activities. Namely, money laundering involves a series of financial transactions for the purpose of concealing the true origin of money and other forms of capital in the market, i.e. financial operations that ultimately result in dirty money from crime becoming clean money, which can be used for legitimate business activities.

In modern conditions, money laundering expands its dimensions using the intensive processes of globalization and technological transformation. Namely, the perpetrators of this crime use modern advanced technologies for criminal purposes, which allow for a relatively short period of time to transfer the financial benefits gained by committing crimes over large distances.

The emergence of money laundering in international frameworks is perceived as a phenomenon and problem that threatens the integrity of the global financial system, and the same applies in national frameworks as a serious threat to the national financial system. Namely, the capital market loses its function and value orientation if "dirty money" acquires the status of legally acquired capital.

In essence, by committing the crime of money laundering, a parallel system of gray economy is created, which acts destructively on the national financial system, creating numerous harmful consequences. At the same time, the problem of money laundering is complicated if there are suspicions of corruption of key persons in financial institutions or from control institutions, that is, their involvement in the execution of the crime.

Numerous actions are possible to suppress this crime, but the key is the confiscation of the property acquired through the commission of the crime. Namely, the reaction of the state will be incomplete if the perpetrator of the crime is sentenced to prison for a certain period of time and the property acquired from the crime is not confiscated. The point is that the acquisition of the illegal property benefit is the motive for committing the crime of money laundering and that should be answered with a counter motive, that is, the confiscation of all the property acquired by committing the crime and an appropriate prison sentence.

In the following, there will be a presentation of the Macedonian regulation for the suppression of the crime of money laundering and other criminal proceeds, as well as of confiscation as an essential tool for the protection of the public interest.

1. Criminal law approach against Money laundering in Macedonian legislation

The incrimination of the crime Money Laundering in the Macedonian penal legislation as well as the regulation for the confiscation of criminally acquired property is connected with the adoption of several international legal acts: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention, 1988), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention, Council of Europe, 1990), as well as the United Nations Convention against Transnational Organized Crime (Palermo Convention, 2000), Convention of the Council of Europe against money laundering, search, seizure and confiscation of proceeds of crime and financing of terrorism (Warsaw Convention, 2005), as well as the UN Criminal Convention against Corruption (2003).

In 1993, Macedonia ratified the Vienna Convention, and as a result, the criminal offense - "Money laundering and other proceeds from a criminal offense" was introduced into the Criminal Code, provided for and punishable in accordance with Article 273 of the Criminal Code.

According to the Vienna Convention, money laundering is the process by which the proceeds, which are reasonably believed to derive from criminal activity, are transported, transferred, transformed, converted or incorporated into legal financial flows, with the aim of concealing their origin, source, movement or ownership.

The essence is that the infiltration of money or property benefits, acquired by committing criminal acts, is carried out in legal businesses, i.e. in payment transactions, banking and financial operations, that is, the criminal origin is concealed and "dirty money" is included in legal money flows.

It is quite logical to say that the capital market loses its function and value orientation if "dirty money" acquires the status of legally acquired capital.

Money laundering is a continuation of a previous criminal activity, that is, it is related to a previous crime (accessory nature), the crime exists regardless of whether the perpetrator will be held accountable for the previous crime (related crime, accessory), the inclusion of illegally acquired capital in the financial system is punishable.

In fact, the incrimination of money laundering is the capture of the last stage of previous criminal activities as well as in their material result.

Money laundering is more than a simple criminal act, through the execution of this act in reality several disadvantages are presented, such as:

- the irregularities of the system,
- insufficient incrimination of human activities,
- the lack of mechanisms and
- the needs for changes in a state system

Operationally analyzed, during the execution of this crime, three phases appear, mutually intertwined, but with a specifically defined goal - bringing into the legal financial system the money acquired through the commission of crimes, namely:

1. Placement, i.e. release of criminally acquired money into a legal financial process, mainly their division and routing in different directions.
2. Concealment, that is, the concealment phase is crucial in the entire process, as this is where the documentary trail intersects with the origin of the money. The focus is placed on jurisdictions that have a more liberal policy for investigating the origin of money, with higher guarantees for bank secrecy, or offshore companies.
3. Integration, this stage means that the previous stages have been successfully completed, the criminally acquired money has been entered into the financial system and the perpetrator gets it back as legal money and can now work with it without problems.

The successful implementation of the three above-mentioned phases indicates a failure for the institutional system for preventing money laundering of a specific country, as well as non-implementation of the legal framework that exists to regulate this matter.

In the Macedonian penal legislation, money laundering as a crime is incriminated in article 273 of the Criminal Code as a separate crime under the title Money laundering and other proceeds from a criminal offense, systematized in a separate chapter of the Criminal Code which has a group object of protection - Public finances, paid transactions and economy.

In paragraph 1 of the said article, it is stated that the person who puts into circulation, receives, takes over, exchanges or distributes money or other property that he obtained through a criminal offense or which he knows was obtained through a criminal offense, or by converting, changing, transmission or otherwise disguises its origin from such source or conceals its location, movement or ownership, shall be punished with imprisonment from one to ten years.

From the above, it can be concluded that enforcement actions are various actions that enable money or property from criminal sources to be found in banking, financial or other business operations.

The object of the action is money or property obtained by committing a crime (drug trade, arms trade, robbery, human trafficking, abuse of official position and authority, etc.), while the subjective nature of the crime consists in intent.

Paragraph 2 states that anyone who owns or uses property or objects that he knows were obtained by committing a criminal offense or by falsifying documents, failing to report facts or in any other way will conceal that they originate from such a source, or will conceal their location, movement and ownership will be punished with a prison sentence of one to ten years.

In the specific case, the act of execution is the possession or use of value acquired through the commission of a crime.

Paragraph 3 states that if the actions from the previous two paragraphs are carried out in banking, financial or other business operations or if the duty to report is avoided by dividing the transaction in the cases determined by law, the perpetrator will be punished with imprisonment for at least three years.

In this paragraph, the focus is on the protection of banking and financial operations and it is treated as a specific object of protection. In addition, emphasis is placed on the separation of the transaction, thus emphasizing the increased criminal will and determination to commit the crime.

In paragraph 4, the subjective side also includes negligence, i.e. the person who commits the crime from the previous paragraphs, and was obliged and could have known that the money, property and other proceeds were obtained through a criminal act, will be punished with a fine or imprisonment up to three years.

There is an increased danger if the crime is committed through an organized group that is actually engaged in the commission of the crime and this requires a more serious sanction, so in paragraph 5 it is stated that he will commit the crime as a member of a group or other association that deals with money laundering, illegal acquisition of property or other proceeds of a criminal offense, or with the help of foreign banks, financial institutions or persons, will be punished by imprisonment for at least five years.

The law seeks to cover as wide a range of subjects as possible who come into contact with the problematic matter in their daily operations, so in paragraph 6 it is stated that an official, a responsible person in a bank, an insurance company, a company engaged in organizing games of chance, exchange office, stock exchange or other financial institution, lawyer, notary or other person who exercises public powers or works in the public interest, which will enable or permit a transaction or business relationship, contrary to his legal duty or will carry out a transaction contrary to the prohibition issued by a competent authority or a temporary measure determined by a court or fails to report the laundering of money, property or property benefits, which he learned about in the performance of his function or duty, shall be punished by imprisonment for at least five years.

Paragraph 7 is particularly significant, which states that an official, responsible person in a bank or other financial institution, or a person who performs work of public interest, who according to the law is an authorized entity for the application of measures and actions to prevent money laundering and other proceeds of a criminal offense, who unauthorizedly discloses to a client or

an uninvited person data relating to the procedure of examining suspicious transactions or the application of other measures and actions to prevent money laundering, shall be punished by imprisonment from three months to five years .

It is a crime that is committed with intent and has the character of "delicta propria" because the perpetrator of the crime has a special character, that is, the perpetrator of the crime can be a person who should implement the policies to prevent money. In the mentioned provision, an enforcement action is the unauthorized disclosure of data.

It should be emphasized that the provisions of paragraphs 6 and 7 are in close correlation with the Law on Prevention of Money Laundering and Financing of Terrorism, as "lex specialis" which regulates the matter of prevention of money laundering.

2. Confiscation of property and property benefit

- Material-legal approach

"No one can keep the indirect or immediate property benefit obtained by a criminal act." This is the position of the legislator, contained in art. 97 paragraph 1 of the Criminal Code , that no one may acquire property benefit in a criminal way because by doing so are being destroyed as the basic economic principles that rule in a society and are threatening, i.e. hurting the most important values in society.

Confiscation of property and property benefits and confiscation of objects are fiscal measures that seek to prevent the enrichment of persons through crime.

Confiscation of property and property benefits can only be carried out by a court decision that establishes the execution of the criminal act. For this purpose, the court and other authorities before which the procedure is conducted are obliged to collect evidence and examine the circumstances that are important in determining the property benefit acquired by committing a criminal offense.

If the confiscated property was acquired by committing a criminal offense abroad, then under conditions determined by a ratified international agreement, and especially under the condition of reciprocity, the confiscated property can be returned to another country.

The state must at all costs strive to confiscate the criminally acquired, thereby making it known to the perpetrator of the crime that confiscation is only part of its reaction to criminal behavior, and on the other hand it will generally affect other citizens, that crime does not it pays off. Thus, all property benefits acquired by the committed criminal offense will be confiscated from the offender, namely: money, movable or immovable objects of value, as well as any other property or assets, tangible or intangible rights, but if their confiscation is not possible from the perpetrator will be confiscated other property in the value of the obtained property benefit.

In order to prevent possible abuses by transferring property from one person to another, the legislator points out in article 98 paragraph 2 of the Criminal Code: "property benefits are

confiscated from third parties." However, if it comes to objects that have been declared cultural heritage and natural rarities, or objects to which the victim is personally bound, then confiscation is carried out by third parties, regardless of whether they were transferred to them with adequate compensation.

The confiscated property is returned to the victim, but if the victim cannot be identified, then it becomes the property of the state. This is carried out within 30 days from the day the court judgment for confiscation becomes final. The execution is carried out over the property and property benefits determined by the court decision, but if this is partially or completely not possible, then the execution is carried out from the remaining property of the person to whom the measure was imposed.

Just as it is immoral and inadmissible to enrich physical persons through criminal activity, legal persons may also not increase their wealth by committing criminal acts, thus, in article 100 of the Criminal Code, it is emphasized that if the criminal act has obtained property benefit for legal person then it will be confiscated from legal person.

- Procedural-legal approach

The property and property benefit obtained by committing the crime are determined in criminal proceedings. In doing so, the public prosecutor is obliged during the procedure to collect evidence and investigate the circumstances that are important for determining the property and the property benefit and to propose measures to secure the property, that is, the burden of proof is on the public prosecutor.

In case of confiscation of property and property benefit obtained by a criminal act, the person to whom the property benefit was transferred, as well as the representative of the legal entity, are examined in the preliminary procedure and at the main hearing.

The representative of the legal entity is examined at the main hearing after the accused. The person to whom the property benefit has been transferred is treated in the same way, if he is not called as a witness.

The person to whom the property interest has been transferred, as well as the representative of the legal entity, are authorized in connection with the determination of the property interest to propose evidence and, upon the authorization of the president of the council, to ask questions of the accused, the witnesses and expert witnesses.

When, during the main hearing, it is determined that there are conditions for the application of the measure of confiscation of property and property benefits, the public prosecutor will propose to stop the main hearing and call the person to whom the property and property benefits have been transferred, as well as the representative of the legal entity.

The public prosecutor, in collecting the necessary evidence for determining the amount of the property and property benefit obtained by a criminal act, may request necessary notifications from

other state authorities, financial institutions and other legal entities and citizens who are obliged to submit them without delay . If there is a suspicion that the property is located abroad, the court is obliged to issue an international warrant or declaration.

With the amendment to the Criminal Code of 2009, extended confiscation was introduced into the Macedonian legislation. Namely, by the perpetrator of a crime committed within the framework of a criminal association with which property benefits are realized and for which a prison sentence of at least four years is prescribed, as well as a crime related to terrorism from articles 313, 394-a, 394-b, 394-c and 419 of the Criminal Code for which a prison sentence of five years or a heavier sentence is prescribed or is related to the crime of money laundering for which a prison sentence of at least four years is prescribed , the property acquired before the conviction shall be confiscated, which the court determines according to the circumstances of the case, but no longer than five years before the commission of the crime, when based on all the circumstances the court is reasonably convinced that the property exceeds the legal income of the perpetrator and originates from such a crime, that is, extended confiscation.

The court will issue a measure of extended confiscation if the accused cannot prove within one year from the day of the main hearing that the property or property benefit was legally acquired.

In order to transfer the burden of proof to the accused, it is necessary to fulfill several assumptions, namely:

- the public prosecutor should present sufficient evidence on the basis of which he bases his reasonable suspicion that the accused is a perpetrator or engaged in the commission of criminal acts,
- the public prosecutor should present before the court sufficient evidence about the type and amount of the accused's property,
- the public prosecutor should present to the court sufficient evidence that the property is the result of income from the accused's criminal activity, that is, at least clues on the basis of which it can be reasonably assumed that the accused acquired the property by engaging in criminal acts.

Only after the fulfillment of these assumptions, the burden of proof actually shifts to the accused, who can prove the origin and method of acquisition of the property that the court reasonably believes was acquired by committing crimes.

The procedure for confiscation is quite sensitive and requires speed of action in order to prevent the concealment of property acquired by crime, for this purpose the public prosecutor has at his disposal the initiative to determine temporary security measures.

Thus, when the legal conditions for confiscation or extended confiscation of property and property benefits are met, the court will order temporary security measures at the proposal of the public prosecutor. These measures can also be applied to third parties who are suspected of having been

transferred property and property benefits obtained through a criminal act without adequate compensation.

Pursuant to Article 536 of the Law on Criminal Procedure, the court may impose the measure of confiscation of property benefit in the verdict in which the accused is declared guilty, in the decision for a judicial reprimand or in the decision for the application of an educational measure, as well as in the decision that imposes the measure of safety. In the sentence of the judgment or the decision, the court should specify which property or object, that is, the amount of money, is confiscated.

According to Article 541 of the Law on Criminal Procedure, the confiscation of property and property benefit is carried out within 30 days after the judgment becomes final. The execution order is issued by the court that issued the first-instance judgment. The execution is carried out over the property and the property benefit determined by the court decision, and if this is partially or completely not possible, the execution is carried out from the remaining property of the person to whom such a measure has been imposed.

Legal acts concluded after the commission of the crime, with the intention of reducing the value of the property subject to confiscation, are invalid.

- Special confiscation procedure

When there are factual (escape of the accused) or legal obstacles (statute of prosecution) for conducting criminal proceedings against the perpetrator of a crime, the court, on the proposal of the public prosecutor, will conduct a special procedure for the confiscation of property and property benefits and confiscation of objects, if the requirements of the Criminal Code are met. In the procedure, at the proposal of the public prosecutor, the necessary evidence will be presented.

The court will issue a decision confiscation of property and property benefit and confiscation of objects if it is proven that it is property or property benefit acquired by a criminal offense or objects that were used or resulted from the commission of a criminal offense or should be confiscated according to the provisions of the Criminal Code.

3. Implementation of the provisions in practice

The incrimination Money laundering and other proceeds from a criminal offense, punishable under article 273 of the Criminal Code, is closely related to the Law on Prevention of Money Laundering and Terrorist Financing, as *lex specialis* in this area, in the direction of ensuring control of money flows and turnover, through imposition a series of obligations of the entities for reporting transactions.

According to the data of the Financial Intelligence Unit (FIU), as a specialized institution for the prevention of money laundering and financing of terrorism, during 2023 a total of 5275 entities were registered in North Macedonia in charge of taking measures and actions to prevent money laundering and financing of terrorism.

The group of subjects includes: banks, exchange offices, sub-agents for quick money transfers, real estate agencies, accounting firms, lawyers and law firms, notaries, bailiffs, organizers of games of chance (casinos, betting clubs, slot machine clubs), legal entities whose activity is the purchase and sale of new vehicles, service providers related to virtual assets and other entities that perform financial services.

The Law on Prevention of Money Laundering and Financing of Terrorism prescribes several obligations for entities, namely:

- drawing up an assessment of the risk of money laundering and terrorist financing and its regular updating,
- introduction and application of programs for efficient reduction and management of the identified risk of money laundering and financing of terrorism,
- customer analysis,
- reporting and submission of data, information and documentation to FIU, both from regular operations and Suspicious Activity Report – SAR,
- storage, protection and record keeping of data (up to 10 years),
- appointment of an authorized person and his deputy and/or establishment of a department (over 50 employees) for the prevention of money laundering and financing of terrorism,
- tracking transactions,
- implementation of internal control (at least once a year) and other measures according to the law.

According to the law, the aforementioned entities have an obligation to report on a daily basis about regular financial transactions of their clients, but also about suspicious transactions, that is, in which there are elements of money laundering determined according to the prescribed indicators.

According to the FIU data for 2023 , during the year the subjects submitted to the FIU a total of 191 STRs (suspicious transaction reports), of which 188 STRs were submitted with suspicion of money laundering and 3 STRs with suspicion of terrorist financing.

Subjects	Number of STRs submitted in 2023
Banks	131
Notaries	23
Fast money transfer service providers	31
Lawyers	2
Insurance companies	3
Post office	1
In total	191

Furthermore, during 2023, FIU has submitted a total of 21 reports to competent institutions (Public Prosecutor's Office, Ministry of Internal Affairs, Financial Police) of which:

- 15 reports with suspicion of money laundering and
- 6 reports with suspicion of terrorist financing.

According to the data of the State Statistics Office , in 2023 in North Macedonia, a total of 3 people were accused, while 2 people were convicted for committing the crime of money laundering and other criminal proceeds.

The above data lead to two conclusions, the first is that the crime of money laundering and other criminal proceeds is not committed in North Macedonia, while the second is that the crime is committed but the investigative activities of the competent institutions are weak, i.e. there are difficulties in documenting and representing of such charges before the courts.

4. Confiscation of property in civil proceedings

Although the emphasis of this paper is the criminal-legal approach in the fight against money laundering and on that basis the confiscation of criminally acquired property, it should be noted that from the middle of September 2024 the Law on confiscation of property in civil proceedings came into force .

The purpose of the law is to prevent the disposal of property and property benefits that cannot be proven to have been acquired from legal sources.

The confiscation procedure refers to property in or outside of North Macedonia that is owned by physical persons - citizens of North Macedonia, foreign citizens with residence in North

Macedonia, stateless persons with residence in North Macedonia or legal entities registered in or outside North Macedonia.

A condition for starting the procedure for determining property whose acquisition cannot be proven to be from legal sources is if:

a) there is a reasonable suspicion that there is property whose acquisition cannot be proven to be from legal sources and

b) there is a disproportion between the net value of the property and the available legal and reported income for the acquisition of the property, expressed as a cumulative difference that exceeds 13,000 euros, calculated annually for a period of time not exceeding 10 years before the acquisition of the property that is the subject of the procedure.

When the public prosecutor suspects a crime but there is not enough evidence for criminal prosecution or the criminal prosecution did not lead to a conviction, and he considers that there is a reasonable doubt that the property was not acquired from legal sources, he is obliged to submit an initiative to the Financial police office, together with the entire provided documentation, i.e. data on the sources and ways in which the property was acquired.

In addition to the public prosecutor, the procedure for examining the origin of property can be initiated by state institutions, as well as physical and legal persons.

The State Attorney is an authorized plaintiff to handle property confiscation cases, by filing a lawsuit to determine property whose acquisition cannot be proven to be from legal sources.

The lawsuit seeks to establish that the property, the subject of the lawsuit, was not acquired from legal sources, to confiscate it and transfer it to the ownership of North Macedonia.

The burden of proving that the property was acquired from legal sources is on the party sued in the proceedings.

Conclusion

The motive for committing a financial (economic) crime is the material benefit for the perpetrator of the crime, that is, money or other benefit. Such a motive should be answered with a counter-motive, that is, confiscation of the property benefit acquired by committing a crime, and of course, a prison sentence for the perpetrator.

Laundering money and other proceeds from a criminal offense is one of the financial crimes provided in the Macedonian Criminal Code. Statistics show that despite suspicions of committing this crime, very few people are convicted of this incrimination by the courts.

The reasons for this result are different, but still the key element is that in order for a person to be convicted, it is necessary for the prosecutor to provide evidence, as a basis for accusation, and then based on such evidence to pass a conviction.

As a new solution in Macedonian legislation, but with elements of civil law, is the law on confiscation of property in civil proceedings. This is a solution that involves the whole society in the fight against illegal enrichment, and the leading institutions are the Financial Police Office and the State Attorney. This is a solution that creates some hope, but it remains to be seen how this instrument will be used in practice.

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