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A few remarks on federal crime of money laundering in the Unites States

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1. Introduction

The practice of money laundering and financing of terrorism are serious crimes, which threaten the stability of country's financial sector or its external stability more generally. Therefore the effective anti-money laundering and combating the financing of terrorism regimes are essential to protect the integrity of markets as well as of the global financial framework. Combating money laundering and the financing of terrorism thus responds to both: moral imperative and economic need[1].

The money laundering legislation was developed from three otherwise disparate doctrinal threads: an evolving law of conspiracy, forfeiture law, and law enforcement — authorities perceived difficulties with enforcement of the currency transaction reporting requirements of the Bank Secrecy Act (BSA). In 1986 the US Congress for the first time attempted to define and criminalized a category of activity colloquially called as money laundering[2].

[1] M.F. Weismann, *Money Laundering. Legislation, Regulation & Enforcement*, Chicago 2014, p. xviii.

[2] G.R. Strafer, *Money Laundering: The Crime of The '90's*, 27 Am. L. Rev. (1989), pp. 149–150.

2. Money laundering definition

According to 18 United Stated Code (U.S.C.) § 1956 (a)(1)(2012) money laundering is a financial transaction with property that "represents the proceeds of some form of unlawful activity". And according to Interim Report: "money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate"[3]. Thus money launderer's activities are intended to conceal or disguise the original source of the criminally derived proceeds by exploiting loopholes in financial systems which allow for an improper level of anonymity and no transparency in the execution of financial transactions[4]. Laundering criminally derived incomes can be a lucrative and sophisticated enterprise and it is a vital element of organized criminal activities[5].

As an offence, money laundering typically involves a three-step process: placement, when criminally derived money is placed into a legitimate enterprise; layering, when the funds are layered though various transactions to obscure the original source; and integration, when newly laundered funds are integrated to legitimate financial system[6].

3. Money Laundering as a federal crime

In the United States of America, to combat the money laundering phenomenon was passed the Money Laundering Control Act of 1986 (hereinafter: MLCA)[7], which regulates the laundering of monetary instruments crime and which established money laundering as a federal offence. And the Act defines "monetary instruments" as: "(i) coin or currency of the United States or of any other country, travelers' checks, per-

[3] President's Commission on Organized Crime, Interim Report to The President and Attorney General, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 7 (1984), P. 7; Available At: Https://Www.ncjrs.gov/Pdffiles1/Digitization/166517Ncjrs.pdf (access: 2.01.2017).

[4] M.F. Weismann, op. cit., p. 1.

[5] C.L. Hart, *Money Laundering*, 51 Am. Crim. L. Rev. (2014), p. 1451.

[6] P. Nagel, C. Wieman, *Money Laundering*, 52 Am. Crim. L. Rev. 1357, Fall 2015, p. 1359.

[7] 18 U.S.C. §§ 1956–1957 (2012)

sonal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery"[8]. It is important to notice that until implementation of MCLA, money laundering itself was not a crime. Thus money laundering is fully criminalized for over 30 years. Besides criminalizing money laundering MLCA also: criminalized helping money launderers, outlawed structuring or 'smurfing' operations, extended criminality to persons knowingly engaging in financial transactions with 'dirty' money generated by certain crimes, and persons who are "willfully blind to" such unlawful activity, as well as mandated compliance procedures to be required of banks[9]. The MLCA also directs financial institutions to establish and maintain adequate procedures to comply with the BSA's recordkeeping and reporting requirements[10].

The 18 U.S.C. § 1956 contains a comprehensive definition of monetary instruments of laundering, comprising four methods of money laundering criminally derived proceeds: promotional, concealment, structuring and tax evasion, which are also referred to as specified unlawful activities. These activities are committed or attempted in relation to laundering involving certain domestic financial transaction, laundering involving international transfers or laundering being a part of a string operation[11].

At this point it is essential to explain two fundamental terms, which are 'monetary instruments', 'financial transaction' as well as 'transaction' by itself, and very often used by the legislator term 'specified unlawful activity'. Hereby monetary instruments are defined as: "coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery"[12]. 'Financial transaction' is defined as "a transaction which in any way or degree affects interstate or foreign commerce involving the

[8] 18 U.S.C. § 1956 (c)(5)

[9] Office of Technology Assessment, Congress of the United States, *Information Technologies for the Control of Money Laundering*, Washington D.C. 1995, p. 36.

[10] J.R. Boles, *Financial Sector Executives as Targets for Money Laundering Liability*, 52 Am. Bus. L.J. (2015), p. 378.

[11] M.F. Weismann, op. cit., pp. 24–25.

[12] 18 U.S.C. § 1956 (c)(5).

movement of funds by wire or other means, or involving one or more monetary instruments, or involving the transfer of title to any real property, vehicle, vessel, or aircraft," or on the other hand "a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree"[13]. The term 'transaction' is understood as "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected". As the definition mentioned above seems to be clear and understandable, the term of 'specified unlawful activity' is more complicated and it is impossible to cite the whole statutory definition, cause it is very comprehensive. Simplifying it slightly a specified unlawful activity is understood as a widely extended group of crimes divided into seven categories: act or activity listed in 18 USCS § 1961 (1) (with one exception); a specified offence against a foreign nation; any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act[14]; one of over several variety offences from USCS and U.S.C.; environmental crimes; any act or activity constituting an offense involving a Federal health care offense; as well as other act[15]. It is very important to notice that criminalized are only those transactions that actually involve the proceeds of a specified unlawful activity, ie. specified an extensive list of crimes, including for example murder, kidnapping, extortion, and bribery. Although the money laundering regulations were originally intended to combat the use of money derived from drug-related crimes offences, the list of unlawful activities also includes numerous non-drug related crimes[16].

Section 1956 (a)(1) indicates as a domestic money laundering crime to conduct a financial transaction involving "dirty money" in a way it appear "clean" or to be only slightly more technical, in a way that conceals or

[13] 18 U.S.C. § 1956 (c)(4).
[14] 21 U.S.C. 848.
[15] See 18 U.S.C. § 1956 (c)(7) for more details.
[16] P. Nagel, C. Wieman, op. cit., pp. 1372–1373.

disguises the source, nature, location, ownership, or control of the "dirty money". This type of monetary instruments laundering is called "concealment money laundering". The other type of such an offence is "promotion money laundering", which occurs when a perpetrator uses "dirty money" to commit or facilitate another specified unlawful activity offence, or to continue the scheme which generated the dirty money in the first place[17].

More precisely, Section 1956 (a)(1)(A) refers to any perpetrator, who knowingly conducts or attempts to conduct a financial transaction which involves the proceeds of specified unlawful activity with the intend to promote the carrying on of specified unlawful activity or with the intend to engage in conduct constituting a violation of Section 7201 or 7206 of the Internal Revenue Code of 1986[18]. While Section 1956 (a)(1)(A) refers to the same perpetrator's illegal behavior knowing that the transaction in whole or in part is designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement under State or Federal law. In addition the legislator indicates that as a financial transaction involving the proceeds of specified unlawful activity is also considered a financial transaction, when its part or a set of parallel or dependent transactions involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

Section 1956(a)(2) indicates three separate offences related to the transportation, transmission or transfer of criminally derived proceeds into or out of the United States, which are: "the intent to promote the carrying on of specified unlawful activity,"; "the transportation of a monetary instrument that represents the proceeds of some form of unlawful activity designed 'to conceal or disguise' that instrument", and the transportation of the monetary instrument that represents the proceeds of some form of unlawful activity designed "to avoid a transaction reporting requirement under State or Federal law"[19].

More precisely, according to Section 1956(a)(2) as money laundering offence is considered any perpetrators activity consisting of international

[17] S.D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offences*, 7 Buff. Crim. L. Rev (2004), p. 612.

[18] 26 U.S.C. § 7201 or § 7206.

[19] C.L. Hart, op. cit., p. 1456.

transport, transmit, or transfer, or attempt to such transport, transmit, or transfer a monetary instrument or funds with the intent to promote the carrying on of specified unlawful activity, or with knowledge that involved monetary instrument or funds represent the proceeds of any form of unlawful activity and also knowing that such transportation, transmission, or transfer is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement under State or Federal law.

Section 1956 (a)(3) provides the criminal liability for laundering as a part of string operation. This provision stays that any perpetrator who conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, with the intent to promote the carrying on of specified unlawful activity, to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or to avoid a transaction reporting requirement under State or Federal law, shall be liable for a 'string' money laundering.

To secure a money laundering conviction under § 1956, the government needs to establish five elements, which are: financial transaction that affects interstate commerce, knowledge or scienter requirement, the existence of a specified unlawful activity, the money involved are the proceeds of specified unlawful activity and the intend[20].

In 18 U.S.C. § 1957 which also regulates money laundering, the legislature intended the knowledge requirement to have a narrow and unusually limited meaning. According to P. G. Wolfteich, though knowledge of circumstantial evidence might satisfy, mere suspicion about illegally derived money or that the person involved is a criminal does not suffice. A defendant must have a knowledge of, or be willfully blind to, the illegal derivation of the money[21]. 18 U.S.C. § 1957 regulates money

[20] J.H. Hecht, *Airing the dirty laundry: the application of the United States Sentencing Guidelines to white collar money laundering offence*, 49 Am. U. L. Rev. (1999), pp. 298–299.

[21] P.G. Wolfteich, *Making criminal defense a crime under 18 U.S.C. section 1957*, 41 Vand. L. Rev. (1988), p. 847.

laundering on transactions involving property exceeding 10.000 USD derived from the specified unlawful activities. Legislator indicates precisely that a perpetrator shall be criminally liable for a money laundering in the circumstances such as: committing an offence in the United States or in the special maritime and territorial jurisdiction of the United States; or committing it outside the United States and such special jurisdiction by a United States person[22], knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value exceeding 10.000 USD and is derived from specified unlawful activity.

The other type of analyzed offence is stated in 18 U.S.C. § 1956(h) money laundering conspiracy, which occurs when a perpetrator conspires to commit any offence defined in Section 1965 or Section 1957.

The different type of federal money laundering is operating an unlicensed or unregistered money transmitting business under 18 U.S.C. § 1960, which simply occurs when a perpetrator knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business. Thus to violate the statute, the perpetrator must conduct, control, manage, supervise, direct or own a money transmitting business without a state license, or fails to register with FinCEN[23], or transmits or transports funds known to be derived from a criminal offence or with the intension to promote an unlawful activity[24].

It also needs to be added, that MLCA additionally prohibits structuring transactions to evade currency transaction report and it provides both: civil and criminal forfeiture for BSA violations. It likewise orders banks to create and maintain procedures to ensure and monitor compliance with the reporting and keeping record requirements of the BSA[25].

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[22] It is defined in 18 USCS § 3077, but excluding the class described in paragraph (2)(D).

[23] United States Department of The Treasury, Financial Crimes Enforcement Network, which was created in 1990 to support federal, state, local, and international law enforcement by analyzing the information required under the Bank Secrecy Act (BSA), one of the nation's most important tools in the fight against money laundering. See more at: https://www.fincen.gov/ (access: 3.01.2017).

[24] M.F. Weissmann, op. cit., p. 108.

[25] Ibid., p. 96.

4. Penalties

It is important to notice, that MLCA provides both: civil and criminal penalties. The civil penalty is imposed on the value of the property, funds, or monetary instruments involved in the transaction, or up to 10.000 USD per offence, while the criminal penalties are varied and can be imposed as imprisonment, fine and/or forfeiture.

For money laundering offences specified in Section 1956 (a)(1) can be imposed a penalty of a fine of not more than 500.000 USD or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both penalties. Also the money laundering offence specified in Section 1956 (a)(1) can be imposed to the same fine or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. And for money laundering stated in Section 1957 also the same a fine (but the court has the possibility to impose an alternate fine of not more than twice the amount of the criminally derived property involved in the transaction), or imprisonment for not more than ten years, or both.

The other type of such offence, a money laundering conspiracy specified in Section 1956 (h), is subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. And a money laundering offence known as operating an unlicensed or unregistered money transmitting business under 18 U.S.C. § 1960 shall be similarly fined, or imprisoned for up to 5 years, or both.

Courts may also order the forfeiture of the criminal proceeds from money laundering under 18 U.S.C. § 983 (a)(1)(2012)[26]. In the US federal criminal statutes the forfeiture of assets may be imposed as part of the punishment when a defendant is convicted of an offence. In money laundering cases the statutes are broader and authorizing the forfeiture of any "property involved" in the offence[27]. And the federal government may seize and subject to forfeiture any property involved in the federal money laundering statutes violations[28].

[26] P. Nagel, C. Wieman, op. cit., p. 1382.

[27] S.D. Cassella, *The Forfeiture*..., p. 585.

[28] S.D. Cassella, *Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases*, 39 N.Y.L. Sch. L. Rev. (1994), p. 163.

5. Conclusion

MLCA made it a federal offence to conduct a financial transaction involving the proceeds of different illegal activity. The amendments from 1988, 1992, as well as 2001, expanded the coverage of the statute to add forfeiture of any property involved in the money laundering practice or a conspiracy to commit it. The substantive and conspiracy money laundering offences liability is provided at accordingly 18 U.S.C. §§ 1956, 1957, and 1960[29]. Considering the current economic downturn, the impact of money laundering on global society should be considered. Moreover, as with the expansion of the Internet and increased globalization, the methods of money laundering continue to become increasingly complex and difficult to detect[30]. It is no doubt that in XXI century the threat posed by money laundering phenomenon indicates the fact that it became a global practice, beyond the US borders.

Summary

The phenomenon of money laundering is, generally speaking, the practice of using a business to conceal cash or other assets that are the products of other criminal activity. The money laundering legislation was developed from perceived difficulties with enforcement of the currency transaction reporting requirements of the Bank Secrecy Act (BSA). In 1986 the US Congress for the first time attempted to define and criminalized an activity nowadays commonly known as money laundering. This paper presents some of the most essential aspects of federal crime of money laundering in the Unites States, indicating such types as: laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, and unlicensed money laundering business, respectively stated under 18 U.S.C. §§ 1956, 1957, and 1960.

Keywords: money laundering, United States Code, federal crime, criminal liability, offence.

[29] M.F. Weissmann, op. cit., p. 96.

[30] K.M. Finklea, *Organized Crime in the United States: Trends and Issues for Congress*, Congressional Research Service, Washington D.C. 2010, p. 21.