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LEGAL AND ECONOMIC ASPECTS OF MONEY LAUNDERING IN SELECTED EU MEMBER STATES

PRAWNE I EKONOMICZNE ASPEKTY PRZESTĘPSTWA PRANIA BRUDNYCH PIENIĘDZY W WYBRANYCH PAŃSTWACH UNII EUROPEJSKIEJ

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Abstract: The main purpose of the article is to draw attention to the nature and structure of the legal regulations, the essence of which is combating money laundering in selected European Union states (France and Belgium). Therefore, the provisions included in the Penal Codes (art. 324 – 1 of the French Penal Code and art. 505 of the Belgian Penal Code), the basic purpose of which is combating the discussed pathology occurring in the indicated European member states, are presented. The omissions and legal gaps of the regulations referred to above, which should be eliminated by the European legislators in order to ensure a higher level of safety in the functioning of the financial markets and minimise the frequency of specified crime are also highlighted. Moreover, the range of individual sanctions penalising the crime of money laundering in France and Belgium were analysed. The second area of considerations was the analysis of the statistical data relating to the level of suspicious declarations performed by specific entities (e.g. banks, credit institutions, exchange offices, insurance companies, brokerage houses, investment and financial enterprises) in the determined states on individual stages of money laundering realisation (placement, layering and integration). These transactions are mainly aimed at hiding and distributing the financial means of illegal origin, and the determination of their frequency which will support the estimation of the scale of the analysed pathology in individual EU member states.

Keywords: money laundering, suspicious declarations.

Streszczenie: Zasadniczym celem artykułu jest zwrócenie uwagi na strukturę regulacji prawnych, których istotą pozostaje zwalczanie przestępstwa prania brudnych pieniędzy

w wybranch państwach Unii Europejskiej (Francja i Belgia). W opracowaniu zostaną przedstawione zatem rozwiązania prawne, obowiązujące w wybranych kodeksach karnych (art. 324-1 francuskiego k.k. oraz art. 505 belgijskiego k.k.), których celem jest zwalczanie omawianej patologii. Analizie poddane zostaną także określone luki prawne dotyczące analizowanego przestępstwa, które powinny zostać usunięte w celu zapewnienia wyższego poziomu bezpieczeństwa w funkcjonowaniu rynków finansowych oraz zinimalizowania częstotliwości prania brudnych pieniędzy. Drugą płaszczyzną rozważań, które zostaną przedstawione w opracowaniu, będzie analiza danych statystycznych dotyczacych transakcji podejrzanych, wykonywanych przez określone instytucje finansowe we wskazanych państwach na poszczególnych etapach przestępstwa prania pieniędzy.

Słowa kluczowe: pranie brudnych pieniędzy, podejrzane transakcje, rynki finansowe.

1. Introduction

Money laundering is one of the most serious pathologies, occurring at the economic level of integrated state structures. Due to the variety of elements determining the development of the phenomenon, it is necessary to include two categories of aspects in its assessment. First of all, those related to the reaction of the state to its occurrence and spreading at legal level, and also those defining its intensity in statistical terms (Koutouzis and Thony, 2005; Quemener, 2015). According to the definition, money laundering involves the concealment of capital from illegal sources referred to as 'dirty money' and then investing it in legitimate sources of income (TRACFIN). Undoubtedly, however, due to its multifaceted nature, money laundering remains a phenomenon extremely difficult to characterize and to estimate (Pradel, 2007; Pereira, 2011).

Due to the scope and burden of money laundering as an offence and its economic effects, counteracting this phenomenon takes place at normative level in two areas. Firstly, states are required to comply with the regulations contained in the acts issued by the EU bodies, namely the European Parliament and the Council and by the European Union (CFPB). Secondly, citizens are obliged to observe the regulations in internal normative orders, especially penal laws, which provide for certain categories of sanctions (deprivation of liberty and fines), aimed at minimizing the adverse effects of the economic pathology indicated. Combating money laundering was initiated as a priority of state policies more than three decades ago, in the early 1980s, when European states realized that the process of trading and processing money from illegal sources was a real and very serious threat to preserving their economic, financial and even social cohesion (Lepage, Maistre du Chambon, and Salomon, 2015). At that time, the international community decided on the need to develop methods for combating social pathology in the form of money laundering. The threats from the procedure in question, however, were so serious that two-way action, both preventive and repressive, was undertaken.

2. EU normative acts

In the field of European regulation, the recommendations and conventions of the Council of Europe, as well as the directives and regulations of the European Union, should be distinguished (Cutajar, 2016). The most important acts include:

2.1. Council of Europe Recommendation

Council of Europe Recommendation of 27 June 1980, concerned measures intended to combat the transfer and circulation of capital of illicit origin. It covered money laundering from every type of criminal activity (Cutajar, 2010), and recommended that states adopt, within their domestic law, four essential commitments in the framework of financial activity:

- customer identity verification, especially when setting up accounts or deposits, when depositing in accounts or performing financial transactions with extremely high sums of money:
- the limit of the location of strongboxes for natural or legal persons in business relationships with the bank or which are considered trustworthy,
- the establishment of reserves of banknotes whose series may prove to be used for criminal purposes,
- creating a unit within the bank's personnel structures responsible for identifying and detecting suspicious behaviour.

2.2. Council of Europe Convention on Money Laundering, Detection, Arresting and Confiscation of Crime Products

On 8 November 1990, the Council of Europe Convention on Money Laundering, Detection, Arresting and Confiscation of Crime Products was adopted in Strasbourg. The subject of this convention was anti-money laundering regulation, which deals with all forms of activity linked to serious offences (Montebourg and Peillon, 2000; Cutajar, 2016). The main objective of the 1990 Convention was to improve international co-operation, especially in the field of the investigation and confiscation by European states of illicit profits from any serious offence.

2.3. Council of Europe Convention

Another act on combating money laundering from illicit sources and terrorist financing was the Council of Europe Convention, adopted on 16 May 2005 in Warsaw. The Council of Europe had already begun work on the adoption of the Protocol updating the 1990 Convention in 1998. So far there has been no uniform international regulation on counteracting and combating money laundering and terrorist financing (Pradel, 2007). There is a strong need to modify and update the previous Convention, especially given the changing techniques and methods of money laundering and their evolution. On the basis of the mentioned regulation, many countries decided to set up units informing on financial transactions and

analysis of suspicious transactions leading to an enormous number of money laundering proceedings.

2.4. Directive 2005/60 of the European Parliament and of the Council

Meanwhile, Directive 2005/60 of the European Parliament and of the Council of 26 October 2005 is the third directive concerning money laundering. It replaced Directive 91/308 of 10 June 1991 on the prevention of the use of the financial system for capital laundering and Parliament and Council Directive 2001/97 of 4 December 2001. The European Commission began to see the need to strengthen measures to combat organised crime at the financial level, so in May 2005 the Parliament started work on a directive aimed at eliminating money laundering and terrorist financing, which was adopted on 7 June 2005. The preventive measures focused primarily on the functioning of the financial sector, but also on the activities undertaken by: lawyers, notaries, auditors, real estate agents, casinos, trusts, service providers for companies. The field of application, therefore, included all persons dealing in the trade of goods and receiving receivables in cash above 15 thousand euros (Cutajar, 2016). All the entities (natural and legal persons) bound by the provisions of the Directive were obliged to identify and verify the identity of the counterparty. They were required to declare any suspicious transactions indicating money laundering or terrorist financing, to national financial information units. The Directive also introduced requirements and guarantees in the case of high risk situations, for example transactions with non-EU entities.

At present the provisions of two normative acts should be considered as valid: the EU Directive issued by the European Parliament and the Council on 20 May 2015 concerning the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, which repealed the provisions of Directive 2005/60/CE and 2006/70/CE and the Regulation of the European Parliament and of the Council of 20 May 2015 on information accompanying capital transfers, which repealed Regulation 1781/2006/CE.

3. France

In compliance with art 324 – 1 (and art. 324 – 2 to 324 – 4) of the French Penal Code (Code pénal, 2015), money laundering is a behaviour that consists in the facilitation of any hiding of the illegal origin of goods or income coming directly or indirectly from a crime. Any behaviour consisting in participation in the operation of investment, transfer or conversion of income coming directly or indirectly from a crime is also money laundering. The culprit of the indicated crime is subject to the penalty of 5 to 10 years in prison, and from 375 to 750 thousand euros in fines (depending on the type of crime, in the basic type the sanction is clearly lower, while in the process of qualifying it is increased) (Rassat and Roujou de Boubee, 2008). In addition, the offence is also subject to penalties under the international conven-

tions that France has ratified: the United Nations Convention against Narcotic Drugs and Psychotropic Substances of 19 December 1988 and the United Nations Convention against Transnational Organized Crime of December 2000, the Palermo Convention.

When analysing the normative form of art. 324 – 1 of French penal code, it should be emphasized that behaviour subject to penalties means all financial activities aimed at locating, hiding or converting products derived from crime. Moreover, given the nature of the offence, which displays high social harm, the legislator penalizes any form of assistance in the pursuit of financial operations intended to conceal the true origin of illegal capital. In the course of the analysed crime, three main forms can be distinguished (Benissad, 2014; Cutajar, 2016):

1) placement – the deployment of illegal cash by introducing it to the market or its exchange into financial instruments or instrumental goods;

2) layering – the accumulation of various operations to separate the illegal proceeds from their source, and moreover, carrying out a number of financial transactions aimed at extending the flow of illegal cash and camouflage of entities that have carried out such transactions;

3) integration – the desire to obtain the appearance of legality against the achievement of significant resources of unknown origin, as well as investing illegal capital in legitimate business transactions.

Each of the above defined illegal activities is independent of the others, so the perpetrator of the money laundering can be assigned one of them, their chosen configuration, and the cumulation of all the illegal behaviour.

Money laundering takes on the nature of a deliberate offence, the perpetrators of which are aware of its realization and expresses their will to do so. In the case of the analysed offence, it is necessary to prove that the perpetrator was aware that the 'laundered' goods came from the offence, without specifying the category of such a specific offence (e.g. Corruption, Tax or customs fraud). It may be problematic that a specific basic offence has been committed outside of France and it is virtually impossible to evaluate the activities already undertaken (Rassat and Roujou de Boubee, 2008). Looking at the money laundering offence typified in Art. 324 – 1 C.P., it is important to indicate from this perspective, as Rassat points out, that it was not properly named by the legislature, since the extent of the perpetrator's activity is essentially ancillary. Therefore the perpetrator of this crime is not the one who launders illicit capital, but the one who met the elements of the base offence or the third party who it transferred. This term inaccuracy allows to camouflage the origin of the actual offence (Rassat and Roujou de Boubee, 2008).

The crime of money laundering carries the penalty of five years imprisonment and fines of 375 thousand euros if not accompanied by any other additional circumstances. If, however, the offence is combined with the occurrence of specific qualifying features, the penalty is doubled, up to 10 years in prison and EUR 750,000 (Merveille and Levy-Bissonnet, 2009; Quemener, 2015; Broyer, 2000). The above include:

- standard money laundering, according to French jurisprudence, the custom is preserved if the crime has been committed twice and retains its successive character,
- use of privileges resulting from the professional activities facilitating money laundering; such offences may be committed by persons performing specific professions to which the obligation to submit declarations is addressed, related to business activities specified by TRACFIN. French law does not specify the type of activity subject to this regulation, but it is sufficient for it to facilitate money laundering,
- committing money laundering in an organized criminal group, expresses the will of French legislature to combat organized crime of an international nature,
- acting in an organized criminal group. It is emphasized in French doctrine that it is necessary to penalize the preparation for the operation, which consists in hiding the origin of the capital or helping to carry out the indicated procedure by the offending association. If the offences committed by a criminal group are crimes or prosecutions punishable by a minimum of five years imprisonment, as in the case of money laundering in the primary type, then the participation in such a group is punishable by a penalty of five years imprisonment and a fine of EUR 75,000.

The offence of money laundering is also linked to the possibility of applying additional penalties to the perpetrator, including (Lepage, Maistre du Chambon, and Salomon, 2015; Beernaert, 2008; Conte, 2007):

a) complementary penalties, directly related to property, such as:

- confiscation of crime-related products or tools, including items that served or have been used for committing a crime,
- confiscation of certain goods not directly related to the offence (e.g. cars, related to smuggling),
- confiscation of all or part of the sentenced person's property that is movable or immovable (divisible or indivisible),
- penalties depriving of rights or ability to exercise rights, such as:
- prohibition of exercising civil or family rights for five years or more,
- prohibition of performing public functions or professional activities,
- prohibition of commercial or industrial activities, management, administration, control activities on behalf of third persons, on own account or on behalf of other entities,
- prohibition of driving for five years or more,
- prohibition of possession or retention of weapons for a period of five years or more.

4. Belgium

Under Belgian law, money laundering is dealt with on two levels: the provisions of the Belgian Penal Code are applicable, as well as the provisions of the Anti-Money Laundering Act of 11 January 1993 concerning the prevention of the use of the financial system for the purpose of capital laundering or terrorist financing cannot be disregarded (Montebourg and Peillon, 2013).

Moreover, in compliance with art. 505 of the Belgian Penal Code, the following persons are subject to the penalty of 15 days up to five years of imprisonment and a fine in the amount of EUR 26 thousand to 100 thousand, namely:

- persons who hide the objects taken, misappropriated or obtained as a result of a crime, in their entirety or in a part,
- persons who bought, obtained as a result of an exchange or obtained free of charge the possession, supervision or management of the objects provided for in art. 42, 3°, or know the origin of these objects from the beginning of the performed operations,
- persons who performed the conversion or transfer of the objects determined in art. 42, 3°, in order to hide or change their illegal origin or provision of help to any person that is engaged in realising the crime from which these objects originated, in order to avoid the legal consequences of such actions,
- persons who hide or change the nature, origin, location, arrangement, circulation or ownership of the objects determined in art. 42, 3°, i.e. those aware of the origin of the indicated objects from the beginning of the operations realised with their participation.

Looking at the provision, the Belgian Penal Code focuses on the origin of financial gain, regardless of the crime category from which they originate (economic, financial, customs).

In turn, the scope of the already established Law of 11 January 1993, refers to the most serious crimes and ensures the functioning of preventive measures in the field of counteracting the laundering of illegal capital (Spreutels and Gijseels, 1998). Thus, according to the provisions of the regulation, any suspicious transaction or transaction of a suspicious nature is verified by a financial information processing unit (CTIF). Its main objective is to receive and analyse information sent by bodies or persons exercising control by international organisations performing similar functions to those exercised by CTFI within international co-operation and by the anti-fraud unit located at the European Commission (Cesoni, 2013). According to this law, capital laundering is:

- the conversion or transfer of capital or other goods to hide or conceal their illegal origin or assisting any person who is involved in the commission of an offence from which the illegal capital or goods originate, hiding from the legal consequences of their conduct,

- concealing or camouflaging the nature, origin, location, movement or ownership of capital or goods of an illicit origin,
- acquisition, retention or use of capital or goods of an illicit origin,
- participation in one of the above prohibited offences, organising one of such acts, an attempt to commit or to assist in its execution, instigating or advising on the offence or facilitating its execution.

Capital or goods of an illicit origin shall be understood as all income derived from: offences of a terrorist nature, organized crime, drug trafficking, arms trafficking, human trafficking, profiting from prostitution, illicit trade in organs, fraud against the EU financial interests, serious tax evasion, corruption, and financial fraud (Spreutels and Gijseels, 1998).

The sanctions provided by the law are strictly administrative and are carried out by the administrative police (they have no relation to penalties because they are not of a penal-law nature).

5. Selected statistics

The purpose of the statistics below is to illustrate the trends in the frequency of money laundering cases in France and Belgium (Cesoni, 2013), based on the analysis of the level of suspicious financial statements for 2012-2015 submitted by the units concerned, in particular: banks, credit institutions (pawnshops, finance companies, specialised financial institutions and payment institutions) and mints (Vernier, 2013).

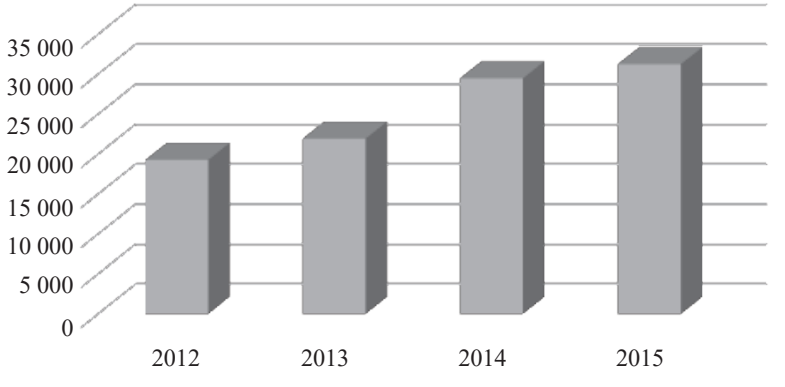

Fig. 1. The number of suspicious declarations in France

Source: (TRACFIN, n.d.).

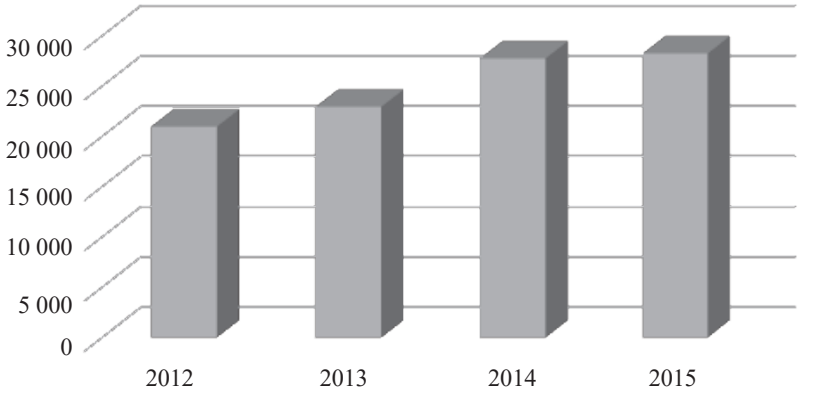

Fig. 2. The number of suspicious declarations in Belgium

Source: (CTIF, n.d. http://www.ctif- cfi.be/website/index.php?option=com_content&view=article&id=153&Itemid=77&lang=fr).

According to the data presented (Figures 1 and 2), the number of suspicious declarations in the period 2012-2015 systematically increased in both countries, with the highest increase recorded between 2013 and 2014 (France by 7 558 and Belgium by 4 801). This trend clearly indicates the intensification of the frequency of illegal transactions involving illicit capital, which is the basis for concluding that the crime of money laundering, in both in France and in Belgium, is progressing steadily (Jonckheere, 2003; Cutajar, 2000).

6. Conclusion

It should be emphasized that the system of protection of economic interests against money laundering in the EU states, including especially France and Belgium, remains very extensive from the legal point of view. In this respect, a specific normative dual plane is visible. The first group of anti-money laundering regulations is the numerous and constantly updated legal acts (regulations, directives and recommendations) issued by the EU authorities – the European Parliament and the Council. In turn, however, as regards to combating the analysed economic pathology, the provisions contained in national statutory regulations, such as penal codes, remain important. National legislators, in this case French and Belgian, are constantly taking action focused on protecting their business turnover against the extremely negative and far-reaching effects of capital laundering from illegal sources. In order to minimize this particularly damaging behaviour, in particular the enforcement of an extensive catalogue of penalties (imprisonment is always accompanied by a fine, and in French law, as well as the confiscation of goods derived from the analysed crime) takes on a deterrent character.

It is also impossible to overlook another manifestation of blocking the spread of the negative consequences of money laundering in the economies and business of French-speaking countries, namely the functioning of special organizations whose primary purpose is to radically counteract all financial operations of illegal origin, with the aim of hiding or placing on the market the means of payment coming from undisclosed sources or transactions. In France such a role is played by the Agency for the Processing of Information and Action Against Illegal Financial Flows, which is a unit of the Ministry of Economy and Finance (GAFI); in Belgium it is the Financial Information Processing Unit (CTFI).

Unfortunately, despite the aforementioned numerous and varied forms of legislative-organizational activity aimed at reducing the analysed pathology, the phenomenon of money laundering and its implications are still active and even has a worrying upward trend, both in the French and Belgian economic system. The number of suspicious financial statements in France and Belgium, whose economic analyses reveal the existence of illegal transactions that are a link in the laundering process of the capital of illegal origin, increases each year (especially in 2012-2015, 31 276 in France, and 28 272 in Belgium in 2015).

Comparing the identified statistical findings with the efforts to combat money laundering, their insufficient efficiency in the discussed countries must be stated. At the same time, in view of the marked upward trend of the indicated procedure, it seems necessary to look for new, more effective forms and methods of counteracting it, especially by blocking financial transactions of unknown origin, tightening the procedures for verifying the origin of capital, or precise controls in entities with particularly high financial transfers.

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