

首届全球化时代犯罪与刑法国际论坛文件

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## 论文集



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2009年10月24-26日

Документ по I Международной форуму  
по проблемам преступности и уголовного  
права в эпоху глобализации  
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# Liability for money laundering under the Russian Criminal Code and under UN Convention against Transnational Organized Crime

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## **1. Problem discussion**

The article below addresses three main statements:

(i) Penalization of money laundering and improvement of persecution forms indeed one of the most important areas of crime combating. In Russia, this activity is supported by well developed organizational and methodological basis, which contributes to the positive results of crime combating.

(ii) Combating crime in Russia and other countries shall be based on national legislation and international agreements.

(iii) In order to effectively combat money laundering it is necessary to establish a system of constant monitoring of the respective processes, which would allow to establish new trends and interrelation with organized crime. The criminal law theory can represent important tool for combating money laundering.

## **2. Legal basis for penalization of money laundering in Russia**

The said legal basis is formed by the Russian Constitution, universally recognized principles and rules of international public law, Russian Criminal Code, and vast number of regulations applicable to finance, banking and other areas.<sup>①</sup> Important role in combating

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<sup>①</sup> Project on Counteraction to Legalization of Illegal Proceed and Financing of Terrorism in the Russian Federation (MOLI-RU 2), funded by European Union and implemented by Council of Europe in partnership with Federal Service for Financial Monitoring of Russian Federation, Nizhniy Novgorod Academy of Interior of Russian Federation, Chamber of Commerce of Nizhniy Novgorod Region, Law School of Nizhniy Novgorod Branch of State University – The Higher School of Economics, Nizhniy Novgorod Research Centre «Juridical Techniques».

money laundering has the "Concept of national strategy to combat money laundering and financing terrorism", which was approved by the President in June 2006. Same applies to the court practice, the main principles of which are summarized in the Ordinance of Supreme Court of the Russian Federation Plenum "On court practice on illegal enterprise and illegally acquired money and other profits legalization" dated November 18, 2004, No. 23.

The UN Convention against Transnational Organized Crime came into effect on June 25, 2004 for Russia, in accordance with Federal Law dated April 24, 2004, No. 26-FZ.

Russian Criminal Code, as amended in 2001, 2003 and 2004, contains two articles, which set out criminal penalties for money (illegal proceeds) laundering. Art. 174 of the Criminal Code provides for penalization of laundering money (illegal profits) gained by third parties, i.e. for financial and other transactions performed with the aim of giving such profits legitimate appearance. Art. 174.1 of the Criminal Code provides for criminal penalties for the persons who gained profits as a result of illegal activity and used such profits in their business or other commercial activities.

In other words, this means that: (a) criminal liability is established for persons engaged in laundering their own profits, as well as for persons engaged in laundering third parties' profits; (b) the law does not set out specific thresholds for money laundering to be assessed as crime, but provides for increased liability in case of large scale money laundering (i.e. over RUR 1 mln); (c) two interdependent actions shall be proved: gaining illegal profits and legalization thereof; (d) both actions shall be proved to have been committed intentionally.

The criminal prohibition of money laundering has significant prevention effect. One may draw a conclusion that this may be the reason, why the number of cases prosecuted under Art. 174 and Art. 174.1 is relatively small.

The detailed analysis proves that the Russian legislator and respective court practice have managed to give effect to the main provisions of the UN Convention. In particular, recommendations under Clause 6 of the Convention ("*Criminalization of the laundering of proceeds of crime*") regarding criminalization of intentionally committed offenses described in subparagraphs (a) and (b) of paragraph 1 and domestic law adjustments recommended in paragraph 2 of the said Clause 6 (which, *inter alia*, provides that each state should endeavor to apply paragraph 1 of this Clause 6 to possibly wide range of predicate offenses) were implemented and realized in Russian domestic criminal law.

At the same time, it can be easily established that Russia, in line with provisions of paragraph 1(b) of Clause 6, has preserved the basic principles of its legal system – and this is true in relation to both money laundering and other criminal offenses, – which also is in

compliance with the Russian Constitution and Russian criminal law policies.

As regards development of money-laundering prevention, in Russia (as in many other countries) it is acknowledged that the concept, goals and logic of money-laundering depends on various objective and subjective factors of external and internal nature. The materials and papers of the 1<sup>st</sup> session of International Forum "Crime and Criminal Law in the Era of Globalization", signed by prof. Khe Binsun, head of Center for Research of Terrorism and Organized Crime at China Institute of Politics and Law, reasonably emphasize the following thesis: "Globalizations made it obvious that various countries have specific environment, which differs one from the other, the organized criminal formations are engaged in specific activities typical for particular countries and have specific level of influence; accordingly, variety of organized crime structures and their internal organization and connections between various criminal groups are specific". It is also correctly pointed out that "we have to keep in mind the specifics of our countries when planning thorough analysis of developments in organized crime, so that the essence of the phenomenon of organized crime could be investigated".

Russia may claim rather significant achievements in this area: the domestic system of money-laundering prevention was established and is constantly improved; the international rating of Russia improved; but most importantly the effective prevention mechanisms for money-laundering have been created.

### **3. Combating money-laundering discussion in Russian legal literature.**

This issue was extensively discussed both in Russian and foreign legal books and on many occasions became the main subject arguments among scientists and researchers. It would be impracticable though to try to provide a comprehensive summary of such within this article. It is worth, however, mentioning the following authors: V.M. Aliev, V.M. Baranov, B.V. Volzhenkin, I.A. Klipitsky, V.S. Komissarov, A.P. Kuznetsov, V.I. Mikhailov, P.S. Yani, and others. These and other scientists have expressed various points of view regarding improvement of money-laundering prevention.

Despite this variety, most of Russian lawyers believe that:

(a) in the course of still on-going reform in economics the issue of money-laundering should rather remain subject of scientific research and monitoring, and requires further development;

(b) criminal liability for money-laundering is the most severe and straightforward, but though necessary response to infringing behavior, and as such it may contribute to money-laundering prevention and to the certain extent determines such prevention;

(c) penalization of money-laundering shall be inevitable, predictable, yet not

unnecessarily severe, when imposing restrictions on actors of the commercial market;

(d) criminal prosecution of money-laundering requires resource-intensive measures in connection, *inter alia*, to the functionality of the money-laundering prevention system.

#### **4. Scientific research in the field of combating money-laundering.**

Importance of scientific research in this field is unarguable and can be derived from the social and economic aspects of this problem, as well as from the real danger of slowing down economic development by unwise and excessive use of criminal prosecution. This article will only mention some conditions for obtaining reliable information about the process of combating money laundering:

(a) criminal legal evaluation and recommendations should be formulated only on the basis of socio-historical context of the problem, assessing the real risk of this type of offenses at national and international levels, as well as their connection with other types of socially dangerous behaviors, their social harm, and intolerance;

(b) it is necessary to take into account the variability of social processes, while assessing the actual problems of comparative legal analysis in criminal law, since it more than any other branch of law reflects the historic traditions of individual countries and their state of legal thought;

(c) it is principally necessary that the efforts in combating money laundering are analyzed from the standpoint of internal and external interests of the individual country and other countries, taking into account both their sovereignty in the field of criminal law, and their role in the international arena;

(d) views and proposals as to how to combat money laundering shall involve an analysis of political and other consequences of the criminal law, in particular, it shall include such effects as the redistribution of powers, restrictions on private law, slowing economical turn-over, social expenses, etc.

#### **5. Criminal law policy and strategies to combat money-laundering.**

Criminal law policy in this case shall be considered as conscious, albeit controversial, legitimate activity of a state, separate branches of authorities, public legal institutions, society and smaller social groups, which allows to develop a unified basis for combating money-laundering. Evaluation of the objectives and content of criminal policy in the country always should precede the discussion of issues of criminal law and its application. Evaluation of the objectives and contents of the criminal law policy of a particular country shall always precede the discussion of issues in the criminal law and its enforcement.

The state and condition of the criminal law policy can be, and shall be, evaluated at

several dimensions, including, *inter alia*, its acknowledgement within the society' legal consciousness, elaborated scientific research, availability of appropriate legislation and organizational infrastructure, focus on international cooperation when protecting national interests, e.g. national sovereignty and protection of fundamental rights and interests.

A special assessment criterion is the harmonization of criminal law policy and the real state of socio-economic processes and common economic behavior in the broadest sense of the word.

In general, it can be argued that the objectives of the criminal law policy in Russia correspond to the current social situation and the existing social contradictions. As elsewhere we see more complications when implementing the goals. Either way, the general condition of each single parameter and criminal law policy in this area require a separate assessment on the basis of special research.

The elements of the public legal awareness that correlate with the problem in focus are the following: the real behavioral and verbal assessment thereof by society and individual social groups, the harm caused by money-laundering, and socio-psychological readiness of individuals and communities to implement measures to combat money-laundering. Based on the assessment of these elements of criminal law policy, on-going process of criminal law improvement and fine-tuning should be pursued, as well as resource staffing for its implementation should be ensured.

#### **6. Contentious issues of the current criminal law implementation.**

It is necessary to make some preliminary remarks about the difficulties of applying Article 174 and 174.1 of the Russian Criminal Code. First of all, one should admit that the provisions of these articles, although correspond to the Russian Constitution, still generate some risks in criminal law implementation.

The problem here relates to (i) significant divergence of judicial practice, particularly in cases of primary customs and tax offenses, white-collar crime, and (ii) risks generated by the criminal law prohibitions that lead to multiple checks and inspections for small and medium-sized businesses. This problem is indicated also by the numerous governmental initiatives relating to removal of excessive administrative barriers.

Further, there is a problem associated with certain underdevelopment of law enforcement and judicial system and its unreadiness to tackle such difficult multi-dimension cases as money-laundering offenses or other offenses in commercial field. This problem may come up in various aspects: investigation proceedings are extremely long in time, the information received is often insufficient, e.g. the mechanics and scheme of money-laundering cannot be



established or investigation results are not convincing, which makes one think hard about the correct approach to predicate offenses.

Finally, the essential role has the condition of criminal law doctrine and, above all, evaluation of the criminal law provisions relating to money laundering by the professionals engaged in law enforcement. Such evaluation should be given special attention, because the proper technique and quality of the criminal law-making depend not only on the state of criminal law policy and social situation, but sometimes also on juridical and technical factors.

Therefore, any criminal law research, following the traditions established in Russian science, should be based on a preliminary assessment of the current legislation relevant to the issue, which is contained in the criminal law dedicated works from different countries.

In Russian criminal law dedicated works, there is no general objection to the criminalization of the offenses aimed at concealing of the illicit origin of proceeds of crime. On the contrary, in the book on crimes in the sphere of commercial activities by B.V. Volzhenkin, the relevant section begins with the following phrase: "For several years, the absence of legislation preventing the laundering of proceeds of crime made the situation in Russia favorable for illegal business, large-scale financial frauds, money-laundering in connection with drug trafficking and illegal arms trade, racketeering, prostitution and other organized criminal activities".<sup>①</sup>

But still, it should be noted that the contents and the technical level of criminal law prohibitions relating to money-laundering remain the subject of active discussions. Some of the controversial issues will be discussed below.<sup>②</sup>

#### **7. Certain problems of investigating offenses relating to money-laundering.**

The problems here are associated with the aim of increasing determinacy of the criminal law (Art. 3 of the Criminal Code), ensuring equality of citizens before the law (Art. 4 of the Criminal Code) and with the principles of justice and humanity (Art. 6, 7 of the Criminal Code). These problems can mainly be solved with the use of juridical techniques and tools, and one can notice their significant influence on the criminal law practice.

Defining the addressees of criminal law provisions: the main addresses are obviously the offenders, as defined in Art. 174 and 174.1 of the Criminal Code, as well as the persons designated by the criminal and related legislation (directly or indirectly) to perform duties in connection with prevention of money-laundering, whose failure to perform triggers respective

<sup>①</sup> Волженкин Б.В. Преступления в сфере экономической деятельности по уголовному праву России. СПб.: Юридический центр Пресс, 2007. С. 267.

<sup>②</sup> See also: Лопашенко Н.А. Уголовная политика – М.: Волтерс Клувер, 2009.

liability.

This statement raises a number of problems in connection with ensuring equality and fairness of the criminal responsibility. Such problems, in particular, can be the following:

-- necessity for legitimization of Article 174.1 of the Criminal Code, which establishes the responsibility of the acquirer of illicit proceeds, and elimination of the very possibility of incurring criminal liability twice for the same offense, as was on many occasions discussed by researches;

-- conflict of duties in certain situations relating to distribution of illicit proceeds and the related problem of determining the range of specific offenders, for example, with respect to counsels in criminal proceedings;

-- extended criminal risks for professionals involved in transactions with cash.

With regard to Article 174 and 174.1 of the Criminal Code, another issue should be addressed: this is the question of money-laundering by (i) persons who did not gain proceeds as a result of crime, but are engaged in money-laundering on behalf of other persons, and (ii) persons who committed offense and gained illicit profits therefrom and purport to conceal or disguise the origin of such profits. The range of offenders here substantially differs from concepts employed in criminal law systems of a number of other countries.

E.g., under § 261 of the Criminal Code of Germany, the addressee of the regulation and person that can be held liable for the breach thereof is only the person who have not committed the original (predicate) crime(s), i.e. third person only. This is directly expressed in Part 9, Par. 2, § 261 of the Criminal Code of Germany, according to which no criminal liability arises for the person held liable for the original (predicate) crime.

Therefore, the problem in question involves great disadvantages for citizens of some countries as opposed to the others.

The author of this article has always believed that imposing criminal liability for money-laundering onto persons that initially gained respective illicit proceeds or participated in the original crime is erroneous, and that is due to the following two reasons. First, such approach discriminates against citizens of certain countries in their participation in international traffic. Secondly, this approach entails duplicated criminal liability for the same act, which is at least contrary to Part 2 of Article 6 of the Russian Criminal Code (*"The principle of justice"*).

The legislator's position is although different, and the law should be enforced as it is. The court practice, however, demonstrates ineffectiveness of Article 174.1 of the Criminal Code, which establishes liability for "self money-laundering". The fact is that this article of the

Criminal Code is being quite naturally applied along with the respective articles, which set out criminal liability for the original crimes. However, Article 174.1 cannot really have any preventing effect in terms of money-laundering, its application just results in increased penalty. But such increase, if required, can rather easily be ensured within the penalties set out by the appropriate article setting criminal liability for the acquisition of illicit proceeds. Article 174.1 of the Criminal Code purports to achieve this in ineffective manner, which in fact merely conceals the real situation. At this point the unreasonable and ineffective disposal of public resource occurs, which reduces the effectiveness of the criminal law policy.

Art. 174 of the Criminal Code, which sets out criminal liability for persons involved in money-laundering on behalf of other persons, also creates some uncertainty, as it does not indicate the exact scope of persons who can be accused thereunder. The only thing, which is clear, is that the respective *corpus delicti* implies that the offender shall not have been engaged in committing the original crime. In this regard, there is a risk of wrongful identification of the specific offender.

Some people, particularly the defenders in criminal cases when receiving their fees, cannot check the origin of such fees and, moreover, are bound by the regime of confidentiality and privilege. Any other person basically would not have sufficient knowledge to be intentionally involved in money-laundering, and accordingly, the actions performed by such person should be deemed to be outside of the context of money-laundering; only in the extreme cases they can be considered as concealment of illicit proceeds that was not arranged in advance, and as such it shall be penalized when it goes about particularly dangerous crimes only, whereas the limitations imposed by the note to Art. 316 of the Criminal Code shall be applied.

If there is a pre-promised concealment or aiding, prosecution for that under Art. 174 of the Criminal Code is meaningless. Thus, certain situations arise when distinction between the general and specific offenders cannot be dealt with by application of the "abuse of office" criterion, which in the context of Article 174.1 of the Criminal Code, most likely, is meaningless.

One of the complex problems relating to determination of the appropriate range of actors under §261 of the German Criminal Code was considered by the Constitutional Court of Germany. The Constitutional Court decided that a lawyer in a criminal case can be prosecuted under §261 of the Criminal Code of Germany only in case he/she at the time of the fee receipt was to a certain degree aware of, and such awareness was undoubtful, as to what the origin of the fee payment was.

Another issue that needs to be settled is the problem of interrelation between professional duties and liability. It appears that the criterion of abuse of office/position should be abandoned and removed from the respective article, and a new approach should be undertaken in establishing liability in case of negligence, circumstances that eliminate the criminality of offense, grounds for exempting a person from criminal responsibility, etc. In our opinion, this can be only achieved in conjunction with the elaboration of the so called objective side of the *corpus delicti*.

The problems related to legal risks relate to the objective side of the money-laundering. The problem is that, in the current Article 174, 174 - 1 of the Criminal Code there is no substantive response actions, as well as no evidence one way or another, express a socially dangerous act. The current wording of Art. 174 and Art. 174.1 does not contain description of the goods affected, similarly no criteria of the social dangerousness of the offense is given.

This situation can to a certain extent, but though not sufficiently, be mitigated by the application of the criteria set out for the origin of the proceeds: such proceeds shall have been obtained as a result of a crime or by criminal means. However, there is no clarity as to whether forgery of documents, submission of fraudulent documents, failure to disclose certain information – i.e., not an actual financial or other transaction, – constitute money-laundering. This issue is particularly difficult to solve if we follow the exact language of Art. 174, according to which a financial transaction is a type of transactions in the context of civil law.

Similarly, the criterion of "giving the proceeds of illicit origin appearance of legality" is only nominal. It does not characterize the substance of the offense, but refers to the so called subjective side, or (if speaking not from the viewpoint of the traditional dogma) to the target, to which the objective side of the offense applies. How should then we assess the situation when a bank clerk "gives appearance of legality of proceeds" when issuing a bank account passbook to an individual or receiving money from an individual?

It is absolutely not necessary to employ any complex concepts to explain and establish in the law the said criterion. There are, however, undoubtful reasons to provide for a more substantive description of the offense and identify its social danger. This requires a separate study, a prerequisite for which should be publication of the available court judgments in this type of cases.

Exceptions from the predicate offenses: usually, the law dedicated literature discusses political and legal correctness of the exclusion of Art. 193, 194, 198, 199, 199.1, 199.2 from the Criminal Code, i.e. tax and other financial crime. At the same time, it was repeatedly emphasized that it is unwise to remove the lower limit established for money-laundering, so

that a sale of stolen bag of potatoes for the purchase of a bottle of vodka would be considered money-laundering.

It is still advisable to limit the scope of the predicate offenses by exclusion therefrom those crimes that usually cannot lead to concentration of funds and, therefore, the need for their legalization. This is especially important considering the real share of rather casual and low-income crime in the overall criminal statistics. In addition, it is generally not advisable to put the persons whose behavior is considered criminal under the Russian Criminal Code in a worse position in comparison to other persons outside of Russia. Of course, it is the privilege of each legislator to determine the rigidity of its domestic criminal law, but this should not lead to the situation when the citizens are exposed to conditions less favorable than the citizens of other countries are exposed to. Again, we would like to point out that in our view the lower value limit for money-laundering should be established.

This, to a certain extent refers also to the concept of "gaining proceeds by means of a crime". The problem here involves, *inter alia*, evaluation of *bona fidae* by purchase, exact identification of the property acquired by means of a crime and delimitation thereof from other property; and a number of other issues. Generally, there is a need for a unified approach to the definition of property in the sense of Art. 174, 174.1 and the property in the sense of Art. 104.1 ("*Confiscation of property*") of the Criminal Code.

The solution of these and some other issues in connection with money-laundering, undoubtedly, requires further research aimed at improving the certainty of the criminal law and its effectiveness in combating organized crime through the prevention of money-laundering. For this reason, holding of this Forum shall be commendable and deserves international support.