

---

## LEGISLATIVE NEWS

### Anti-Money Laundering System in Georgia

DAVID BAZERASHVILI\*

NINO CHOKHELI\*

#### 1. Introduction

During the last decade the international community has been fighting against not only hidden criminally earned proceeds (by trafficking in arms, drugs, people, etc.) but also against terrorist financing. This problem is rather pressing for Georgia and is preconditioned by several factors. In Georgia, where, according to official statistics the share of shadow economy is about 60 per cent, the problem of evasion of taxes and smuggling is very crucial. The level of corruption is very high and Georgia is situated on the crossing point of Europe and Asia where the route for flow of arms and drugs runs. All this is a source for the accumulation of huge illegal property followed by its concealment and legalisation. At the same time, there is high possibility of using this property for the commitment of new crimes. However, it is hard to say that there is a high awareness of money laundering by the government and of the threat it creates for the economy, public order and for the state in general. Thus the state's interest in solving this problem (which revealed in the adoption of the Law on Support of Prevention of the Legalisation of Illegal Proceeds) is not the produce of the government's independent political will. This question like many other progressive ideas was put on the agenda under the influence of western developed countries. Both the Council of Europe's<sup>1</sup> and International Monetary Fund's requirement was to establish a preventive legislative framework and take relevant measures in the field of fighting against the legalisation of illegal proceeds. In addition, the introduction of anti-money laundering mechanisms was to some extent accelerated by a threat to include Georgia in the list of so-called non-cooperative countries<sup>2</sup> defined by the Financial Action Task Force on Money Laundering (FATF)<sup>3</sup>.

---

\* GEPLAC Legal Expert.

<sup>1</sup> Georgia signed the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, under which it assumed the obligation to adopt anti-money laundering preventive legislation and take appropriate measures against legalisation of illegal proceeds.

<sup>2</sup> One of the key initiatives of FATF is to define the countries and territories where the anti-money laundering systems have serious shortcomings which serve as obstacles to international co-operation in this area. After being qualified as a non-cooperative country the FATF Members can restrict, bring under strict control or even prohibit financial operations (transactions) with such countries and thus isolate the financial institutions of non-cooperative countries.

<sup>3</sup> Financial Action Task Force on Money Laundering (FATF) is an intergovernmental international organisation established by the G-7 Summit in 1989 whose purpose is development and promotion of anti-money laundering policies both at national and international levels.

The law on Support of Prevention of Legalisation of Illegal Proceed was elaborated by a special interagency commission. The commission took into consideration the requirements of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Strasbourg Convention), the provisions of FATF Forty Recommendations (1996)<sup>4</sup> and the EU Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering (EU Directive). However it would be an exaggeration to say that the law precisely reflects the standards of these international acts. In addition, some principal questions are completely ignored. The outcome is that the law establishes quite a "mild" anti-money laundering regime and leaves a number of loopholes allowing money launderers to circumvent the prescribed mechanisms. Moreover, several criminal law institutions that are crucial for the imposition of adequate punishment and prevention of the further crime are disregarded. Maybe the reason for this is the government's approach that holds that under the conditions of a developing economy Georgia can not afford to be highly selective with regard to sources of capital invested in the country and that it is early to establish institutes that were recently implemented in states with longer legal traditions. However, it should be noted that such an approach is not far-reaching and disregards the fact that a late reaction to this problem will encourage the increase of organised crime. In an ineffective anti-money laundering system organised crime can easily access financial institutions and large economic sectors might come under its control. If a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime, it damages not only the integrity of individual financial institutions but also depresses foreign direct investment. Ultimately this criminal influence seriously undermines the process of transition to market economy and democratic principles.<sup>5</sup>

Below we will focus on some key issues regulated by the Law on Support of Prevention of Legalisation of Illegal Proceeds and on those criminal law mechanisms, which are vital for the effective functioning of the system and for the achievement of the goal on which the law is oriented. We shall try to give an overview of these problems in the light of international standards.

---

<sup>4</sup> The FATF Forty Recommendations of 1990 (fundamentally revised in 1996) set out the framework for anti-money laundering efforts and are designed for universal application. They provide a complete set of countermeasures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

<sup>5</sup> FATF Document "Basic Facts about Money Laundering".

## 2. The Concept of Legalisation of Illegal Proceeds

Article 2(a) of the Law on the Support of Prevention of Legalisation of Illegal Proceeds gives the definition of the concept of illegal proceeds. According to this definition it means a property that a person “acquired as a result of a criminal act provided for by the Criminal Code of Georgia (including trading in arms, narcotic crime, trafficking, terrorism), except crimes committed in the areas of tax and customs”. This provision deserves attention first of all for its incompatibility with the criminal act referred to in Article 194 of the Criminal Code. In other words the law does not fully reflect the nature of the act which is deemed as criminal and for reveal and prevention of which it is adopted.

When elaborating the above mentioned article the so-called “all offences” approach was applied i.e. this article applies to legalisation of the property which is acquired from any criminal offence. Although this article itself needs clarification (because the concept “illegal” has quite a broad meaning and together with criminal offence covers also administrative misdemeanour), if we presume that under the concept “illegal” the authors of Criminal Code meant “criminal”, such an approach should be deemed as quite progressive. FATF encourages countries to refer to all offences when describing the so-called predicate offence<sup>6</sup> of money laundering<sup>7</sup> and many developed countries follow this approach (however there is also a different approach, when the range of predicate offences are limited by certain criteria, e.g. reference is made to the threshold of penalty of imprisonment applicable to the predicate offence).

Proceeding from the above, Article 2(a) of the Law on the Support of Prevention of Legalisation of Illegal Proceeds, which on the one hand tries to clarify the provision of the Criminal Code by saying that proceeds are illegal if a person has acquired them “as a result of a criminal offence provided for by the Criminal Code of Georgia”, but on the other unfairly limits the range of these offences by excluding the proceeds acquired from the offence committed in the areas of tax and customs from the scope of this regulation. Considering the scale of tax evasion and smuggling in Georgia, such a restriction is not reasonable, more so that under the FATF Forty Recommendations (2003) smuggling falls within the designated categories of predicate offences<sup>8</sup>.

In this context, the listing of offences in brackets – such as trading in arms, narcotic crimes, trafficking and terrorism – in the same article of the law is also unjustified. If we presume that the range of predicate offences, the suspect of a link with which causes starting a control mechanism should be limited to such offences only, than such a restriction is not acceptable and reflects only a very small part of the designated categories of predicate offences under the FATF Forty Recommendations (2003). It would be

<sup>6</sup> Pursuant to Article 1(e) of the Strasbourg Convention “predicate offence” means any criminal offence as a result of which proceeds were generated that may become the subject of an offence (money laundering) as defined in Article 6 of this Convention.

<sup>7</sup> Interpretative Notes to the Forty Recommendations (2003), interpretative note to Recommendation 13.

<sup>8</sup> Ibid, Recommendation 1.

more reasonable to presume that the listing is made for demonstrative purposes, and once again underlines that offences in the areas of tax and customs are not deemed as predicate offences for the purposes of the law. We believe that the emphasis made in the law is unnecessary, firstly because it does not fall within the scope of the law, and secondly, in terms of legislative technique it is not a frequently used and justified method. Moreover, when exercising control as prescribed by the law, the exerciser of control is not aware by which offence the legalised proceeds were acquired. Suspiciousness of transaction lies right in the unknown source of origin proceeds. There might be only a suspect that needs to be double-checked and certainly it would not be justified to terminate control because the suspect is the customs or tax offence. Such an approach is unreasonable because even with respect to the proceeds received from the offences (e.g. trading in arms or narcotics) used as examples, it is less presumable that the criminal pays legitimate taxes and undergoes customs control.

The *actus reus* of offence of legalisation of illegal proceeds (Article 2(c)) is also regulated in a different way from Article 194 of the Criminal Code. However, neither Article 194 of the Code nor this provision of the law fully reflect the *actus reus* of offence of money laundering as referred to in the Strasbourg Convention<sup>9</sup>. For instance, the law lacks such physical elements envisaged by the Strasbourg Convention as concealment or disguise of the true nature, source, location, disposition, movement of property (although all these acts are prescribed by Article 194 of the Code) as well as possession of illicit property (the latter is lacking in both the Code and law).

Article 2(c) of the law states that the attempt to commit the acts listed in this paragraph shall be deemed as legalisation of illegal proceeds. Pursuant to Article 19 of the Criminal Code, any act intending to commit a crime is qualified as an offence and causes criminal liability. Thus reference to the attempt of committing a crime is absolutely unnecessary in the law.

As for mental element of the offence, unlike the Code, the law is precise in stating that a perpetrator must know that the property is the proceed of a crime. Thus the law considers a perpetrator's intention as a necessary element of the *corpus delicti* and excludes liability for the same act committed with negligence. However Article 194 of the Criminal Code does not concretise the form of *mens rea* and thus excludes liability for the act committed with negligence<sup>10</sup> and leads to the same legal consequence (construction).

The Law on the Support of Prevention of Legalisation of Illegal Proceeds, when giving the definition of an offence – legalisation of illegal proceeds – lacks legal and logical meaning, because the grounds for criminal responsibility is a wrongful and guilty act provided for by the Criminal Code (Article 7) and consequently, when a question of

<sup>9</sup> Article 6 of the Strasbourg Convention.

<sup>10</sup> According to Article 10.4 of the Criminal Code of Georgia, "a negligent act shall be deemed as an offence only in the event when such is prescribed by the relevant article of this Code".

responsibility raises, the court and investigative bodies should be guided only with the definition given in the Code. Thus, the definition of the law, by narrowing the definition of offence under the Code, does not lead to any consequence in terms of legal responsibility. At best it repeats without any legal meaning the provisions of the Code or groundlessly limits the scope of application of mechanisms that it itself envisages for the revelation and prevention of the offence of legalisation of illegal proceeds (here it would be a mistake to distinguish “legalisation of illegal proceeds” as an offence under the Criminal Code from “legalisation of illegal proceeds” as any other phenomenon envisaged by this law).

### 3. Application of the Law according to Group of Persons (Monitoring Entities)

For anti-money laundering measures to have an actual and efficient effect, it is important to define the group of persons imposed with the duty of monitoring<sup>11</sup> by this law. Article 3 lists the monitoring entities, namely:

- Commercial banks, foreign exchange offices and non-bank depository institutions;
- Brokerage companies and registrars of securities;
- Insurance undertakings and persons establishing non-state pension schemes;
- Persons organising lotteries and other gambling;
- Persons engaged in activities related with precious metals, precious stones and products thereof as well as antiquarian goods;
- Customs authorities;
- Persons giving grants and charitable aid;
- Notaries;
- Post offices.

Since money laundering typologies in Georgia are not fundamentally studied, it is likely that the authors of the law elaborated the group of persons on the basis of international standards and the experience of western countries.

It is unarguable and FATF Reports on Money Laundering Typologies also prove that financial institutions face a major risk of being used for money laundering purposes. Besides, the concept of financial institution is quite broad and includes many institutions, other than banks, insurance undertakings and securities brokers, not provided for in the law. These are collective investment undertakings, financial leasing companies, money transmission/remittance institutions and others whose principle activity is some financial service. Such a gap is quite understandable because the develop-

<sup>11</sup> As per Article 2(d) of the Law, monitoring means identification of persons involved in transaction subject to monitoring, recording and systematisation of information on transaction and reporting to the Georgian Financial Monitoring Service by persons prescribed by the Law.

ment of Georgia's financial market does not match western financial markets and the law can not cover entities that are absent on the market. However, rapid development of financial services market might lead to the appearance of such institutions soon and the gap existing in the law might be used as an "asylum" for money launderers. To avoid such negative consequences and not leave financial activities (or institutions) bearing potentially high risk of money laundering it would be useful to make reference not to particular legal entities but to activities when defining the monitoring entities. Such an approach is envisaged in the EU Directive<sup>12</sup> as well as the Forty Recommendations of FATF of 2003<sup>13</sup>. The FATF considers that the advantage of defining financial institutions by reference to financial activities is that it focuses on what is done rather than on the legal form of entities. This gives a more comprehensive coverage than the named-entities approach and minimises the risk of substantial financial activity being outside the scope of the FATF framework.<sup>14</sup>

In countries where money laundering has a long history and where anti-money laundering mechanisms were introduced in financial institutions and are effectively functioning, money launderers have started to seek alternative ways of concealment. New methods were established and use non-financial institutions and certain professions. Reports of FATF experts on Money Laundering Typologies have been pointing out for several years that the role of suppliers of professional services and some non-financial sectors is increasing in money laundering schemes. Lawyers, notaries, accountants and representatives of other professions who are rendering financial advices have become necessary elements of complicated schemes of money laundering.<sup>15</sup> Money launderers' interest in casinos and other gambling institutions, real estate agents and dealers in precious stones and metals is also apparent.<sup>16</sup> The international community has reacted and both FATF as well as the European Union began to implement countermeasures. Consequently the EU Directive was amended in 2001 and a revised version of the Forty Recommendations of FATF was adopted in 2003. Anti-money laundering regime (customer due diligence and record keeping) established by these documents are now applicable to all above mentioned activities and professional services.

As shown from Article 3 of the law, the drafters partly took this into account and imposed a monitoring duty among the listed non-financial institutions and professions only on persons organising lotteries and other games (we should presume that under games is meant also casino), persons engaged in activities related with precious metals, precious stones and products thereof as well as antiquarian goods and notaries. As for lawyers, accountants and other independent advisors, these activities were considered less risky in terms of money laundering. Perhaps such a

---

<sup>12</sup> see Article 1(a) of the Directive.

<sup>13</sup> see Glossary of FATF Forty Recommendations (2003); definition of "Financial Institution".

<sup>14</sup> FATF Consultation Paper "Review of the FATF Forty Recommendations", 2002, 5.

<sup>15</sup> FATF 2001 Report on Money Laundering Typologies.

<sup>16</sup> FATF 1996-1997 Report on Money Laundering Typologies.

view is not groundless because the involvement of these is typical for most modern, sophisticated schemes and Georgia here as in many other fields is way behind western developed countries and our launderers probably use older, simpler methods of concealment. However, it would not be appropriate to push this idea because as it was said the money laundering technique and methods have not been studied in Georgia.

There is one more thing worth of being taken into account. The imposition of a monitoring duty on relevant persons can not as such ensure the successful functioning of an anti-money laundering regime because these very persons may themselves be involved in money laundering. Using some of them for money laundering purposes is hard to imagine without their collaboration. For example, the legalisation of illegal proceeds is less possible with lotteries and grants unless this legalisation is performed by the organisers of lottery or grant themselves. Neither the Forty Recommendations of FATF nor EU Directive refer to these activities. It is inadequate to impose a monitoring duty on these persons.

To this very end the Forty Recommendations of FATF underline that the business of persons falling within its scope must be subject to adequate regulation and supervision. With regard to financial institutions, FATF considers that competent authorities should take necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.<sup>17</sup> Our legislation more or less regulates these questions in the field of banking and securities, and lays down strict standards for managers and members of supervisory board of banks and regulated participants of securities market (in the case of banks these standards apply also to qualifying shareholders). In the insurance industry, however, there are serious shortcomings. There is no criteria prescribed to be met by manager or shareholder of an insurance undertaking and consequently this sector is rather vulnerable to money laundering.

The Forty Recommendations of FATF set similar regulatory and supervisory requirements on non-financial institutions. Namely, all non-financial institutions and representatives falling under the FATF-regulated regime should be subject to effective systems of monitoring to ensure their compliance with the requirements to combat money laundering and terrorist financing. This may be performed by a governmental authority or by an appropriate self-regulatory organisation, provided that such an organisation can ensure that its members comply with their obligations to combat money laundering and terrorist financing.<sup>18</sup>

FATF designates casinos and sets additional requirements. Casinos at a minimum should be licensed and competent authorities should take necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner

<sup>17</sup> Recommendation 23 of the FATF Forty Recommendations (2003).

<sup>18</sup> Ibid, Recommendation 24(b).

of a significant or controlling interest, holding a management function in, or being an operator of a casino.<sup>19</sup>

It is obvious that issues such as licensing or setting certain standards for shareholders or managers are not the topic of the law we are discussing. However, for the purposes of having the appropriate result of this Law and actual and perfect operation of anti-money laundering mechanisms, it is very important to create legal barriers for persons with a suspicious reputation from accessing such institutions or becoming shareholders. Otherwise it is unrealistic to expect institutions, being themselves under the influence of criminals, to monitor suspicious transactions.

#### 4. Customer Identification Measures

The scrutiny of customers by financial institutions is the cornerstone of anti-money laundering legal regime. All institutions that face the risk of being used for money laundering purposes must have adequate controls and procedures in place so that they know the customers with whom they are dealing. This is the universally recognised principle “know your customer”. It must be strictly followed by all financial institutions so that they can recognise when financial activity is unusual – and, therefore, potentially suspicious and/or derived from or intended for use in criminal/terrorist activity – and to have sufficient accurate records available to assist with investigations.<sup>20</sup>

Presumably this principle was meant in Article 6.1 of the law that states that a monitoring entity is obliged to identify the person (its representative and principal) being in a business relationship with it.<sup>21</sup> However, the wording of this provision makes questionable how well the principle is understood. The term “person being in business relationship” is quite broad and together with customers covers all other persons with whom this institution has a business relationship (including relations deriving from lease, work or sales contracts). It is unjustified to broaden the scope of this article (duty of identification) in such a manner and moreover we do not believe that it was the intention to have such a legal consequence.

The wording of Paragraph 2 of the same article deepens our doubt concerning the comprehension of the principle “know your customer” given in Article 6.1. Under Paragraph 2, banks are obliged to identify all persons opening a bank account and of all their representatives authorised to open or dispose an account as well as of third persons on

<sup>19</sup> Ibid, Recommendation 24(a).

<sup>20</sup> FATF Consultation Paper “Review of the FATF Forty Recommendations”, 2002, 9.

<sup>21</sup> According to Article 2(k) of the Law, identification of a person means verifying the identity of an individual by means of identity document having a legal power, and/or verification of legal grounds, organisational structure and persons authorised to representation of legal person by means of documents certifying its establishment and registration.

whose behalf the account is opened. It is interesting what is meant under the duty of monitoring entity, and in this particular case of the bank, to identify the person being in business relationship with it, if not identification of the person opening an account. Does not Paragraph 1 of Article 6 regulate this relationship and if so why should this duty be regulated with regard to banks separately?

To clarify this issue and explain who, when and to what extent should the monitoring entity identify, it is enough to refer to FATF Forty Recommendations (2003). Paragraphs 5-12 of the Recommendations concern customer due diligence, pursuant to which a financial institution should undertake due diligence measures, including identifying and verifying the identity of their customers, when:

- Establishing business relations;
- Carrying out occasional transactions: (i) above the applicable designated threshold<sup>22</sup>; or (ii) that are wire transfers;
- There is a suspicion of money laundering or terrorist financing; or
- The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

Due diligence measures are not limited to identifying a customer's identity. The financial institution should obtain information on the purpose and intended nature of the business relationship. In addition, the institution should conduct ongoing due diligence and scrutinise transactions undertaken throughout the course of that relationship in order to ensure that the transactions are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Where the financial institution is unable to comply with measures of customer identification and due diligence, it should not open the account, commence business relations or perform the transaction, or should terminate the business relationship and consider making a suspicious transactions report in relation to the customer.<sup>23</sup>

After establishing a general regime for due diligence, the Forty Recommendations of FATF deals with several issues that need special regulation. Investigations, studies and researches carried out on money laundering cases throughout the world in recent years have shown that all these issues bear higher risk in relation to money laundering and measures against them are inadequate.

First of all it concerns the issue of politically exposed person<sup>24</sup>. As a result of corruption and abuse of public funds, some government leaders and public sector officials ac-

<sup>22</sup> According to Interpretative Note to Recommendation 5 of the FATF Forty Recommendations, this threshold is USD/EUR 15 000.

<sup>23</sup> Recommendation 5 of the FATF Forty Recommendations (2003).

<sup>24</sup> Under the Glossary of the FATF Forty Recommendations (2003), "politically exposed persons" are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives

quire enormous illegal wealth and the proceeds of corruption are typically transferred to a number of foreign jurisdictions and concealed through private companies, trusts or foundations under the names of relatives and close associates of politically exposed persons. The corrupt acquisition of state assets or wealth causes both social and financial damage to countries many of which are poor. At the same time, there is a risk (e.g. reputational risk) posed to banks and financial systems that handle such proceeds.<sup>25</sup> This is why the FATF Forty Recommendations establishes stricter due diligence requirements with regard to politically exposed persons. Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

- Have appropriate risk management systems to determine whether the customer is a politically exposed person.
- Obtain senior management approval for establishing business relations with such customers.
- Take reasonable measures to establish the source of wealth and source of funds.
- Conduct enhanced ongoing monitoring of the business relationship.<sup>26</sup>

As seen from the definition<sup>27</sup> it is directly recommended to apply stricter due diligence on politically exposed persons who are representatives of foreign countries. However FATF encourages countries to extend these requirements to individuals who hold prominent public functions in their own country.<sup>28</sup>

The next issue the FATF Forty Recommendations focuses in relation to customer due diligence and imposes additional obligations on financial institutions deals with cross-border correspondent banking relations. In addition to performing normal due diligence measures, financial institution should gather sufficient information about a respondent institution and its business; to determine from publicly available information, the reputation of the institution and the quality of supervision; assess the respondent institution's anti-money laundering and terrorist financing controls.<sup>29</sup>

Finally, FATF Forty Recommendations deal with new or developing technologies that favour anonymity.<sup>30</sup> The latter covers business relations or transactions with a cus-

---

of state owned corporations, important political party officials. Business relationships with family members or close associates of politically exposed persons involve reputation risks similar to those with politically exposed persons themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

<sup>25</sup> FATF Consultation Paper "Review of the FATF Forty Recommendations", 2002, 12.

<sup>26</sup> Recommendation 6 of the FATF Forty Recommendations (2003).

<sup>27</sup> See footnote 24.

<sup>28</sup> Interpretative Note to Recommendation 6 of the FATF Forty Recommendations.

<sup>29</sup> Recommendation 7 of the FATF Forty Recommendations (2003).

<sup>30</sup> Recommendation 8 of the FATF Forty Recommendations (2003).

tomers without face-to-face contacts. The evolution of financial services combined with technological developments leads to the provision of more services that do not require the physical presence of a customer, such as the internet, ATM machines, telephone banking. These services are more and more enhancing and since such automated and dematerialised operations are especially fast, easily accessible and less transparent it may provide additional favourable opportunities for money laundering. To this end such services should be addressed and measures implemented to prevent potentially higher money laundering risk. Such measures could be for example: to require face-to-face verification for any new customers falling into a certain category (e.g. whose assets exceed a specified sum, or who reside in jurisdictions that are renowned money laundering risks); to provide sophisticated application forms for account opening which enables the institution to acquire information about the customer.<sup>31</sup>

Customer due diligence obligation also applies to non-financial institutions. In the case of casinos and dealers in precious metals and precious stones they should undertake this obligation only if the transaction is above a designated threshold. The threshold set by FATF for casinos is USD/EUR 3 000, for dealers in precious metals and precious stones USD/EUR 15 000.

Against the background of reviewing the provisions on customer due diligence of FATF Forty Recommendations, it is clear that the duty of identification provided for by Article 6.1 (which is quite vague) unless accompanied by all above mentioned measures which provides the institution to know its customers better is ineffectual.

## 5. Transactions Subject to Monitoring

Article 5 of the law contains provisions with regard to transactions subject to monitoring. To understand what a transaction subject to monitoring means, first of all it should be clarified what is meant under the term of monitoring. According to the definition given monitoring involves a set of measures starting with the identification of a person involved in the transaction and finishes with a suspicious transaction reported to the Financial Monitoring Service.

Paragraph 1 of Article 5, states that to monitor a transaction several conditions should be met. (1) The transaction value should be above the threshold laid down (for in cash settlements – 20 000 GEL and for non-cash settlements – 40 000 GEL), (2) the transaction should be suspicious and (3) should be one of the transactions provided for by the law. Thus, it is a situation when the duty of monitoring (and of reporting) does not apply to a transaction that is suspicious, belongs to one of the standard transactions provided for, but its value is lower than the threshold laid down by the Law. Alternatively it does not apply on a transaction that is above the set threshold, is suspicious

---

<sup>31</sup> FATF Consultation Paper "Review of the FATF Forty Recommendations", 2002, 17-18.

but is not one of the types of transaction that are envisaged by the law. This unreasonably limits the scope of transactions that should be subject to monitoring and allows money launderers to escape monitoring measures through various tricks, such as, for example, structuring illegal proceeds and allotting them to various institutions without reaching the threshold laid down for monitoring. The suspicious character of a transaction should be the only necessary criterion to determine whether or not to apply the duty of monitoring.<sup>32</sup>

In this context the definition of the word “monitoring” given in the law shows that the monitoring procedure begins with person’s identification. So the duty of identification is regulated by two articles of the law defining two different grounds for application of this duty. In one case it is the establishment of business relations with a person and in other one the set of conditions (transaction cost, type and suspicious nature) which means a repeated procedure (e.g. person, already identified during the establishment of business relations between him and the relevant institution, should be identified on the basis of Article 6.1 if the transaction he carries out falls within the criterion under Article 5.1) where the first identification becomes pointless. Instead, it would be logical to distinguish between the establishment of business relations and occasional transactions when defining the grounds for identification (and not in the context of monitoring, whose ultimate and necessary stage is the reporting). In the case of occasional transactions, identification would be necessary depending on the value of the transaction as stipulated in Recommendation 5 of the FATF Forty Recommendations.

Article 9.1 of the law is also unclear. The article states that “if during monitoring the monitoring persons have a substantial presumption that the monitored transaction is suspicious ... they shall notify the Georgian Financial Monitoring Service in writing”. Considering that under Article 5.1 of the Law the transaction subject to monitoring in itself implies a suspicious character, it is not clear what is under suspicion in article 9.1 and if there is not a suspicious transaction would there be a monitoring procedure at all? The terminology in this article needs clarification and what was meant here was identification and not monitoring. Such mistakes are unjustifiable where each word has a principal legal meaning.

## 6. Confiscation

Preventive money laundering legislation lacks one of its major functions and objectives unless there is a mechanism to confiscate criminal property. According to the Strasbourg Convention and FATF Forty Recommendations, countries shall adopt such legislative and other measures as may be necessary to enable them to confiscate instrumentalities and proceeds or property, the value of which corresponds to such proceeds. Confiscation aims at reinstatement of legitimacy – an offender having no legitimate right to the corre-

<sup>32</sup> Recommendation 13 of FATF Forty Recommendations and Article 3.8 of the EU Directive.

sponding property should be deprived of this property. Consequently, it is reasonable to revise the methods of seizure and confiscation prescribed by our legislation to bring it into compliance with international standards.

The Georgian Criminal Code does not provide for confiscation as applied almost in all countries. In Georgia, confiscation is understood as a violation of the property right granted by the Constitution, which is a wrong approach. This form of sanction means the deprivation of property acquired from criminal activity and is imposed only on a criminal's property. The Constitution does not protect illegal proceeds and neither considers it as a property even if laundered, because legalisation of illegal proceeds is a crime and assets acquired this way is not the property rights that is protected by law.

One should distinguish between the so-called absolute confiscation prescribed by the Criminal Law of the Soviet Union and confiscation here. At that time confiscation used to be a supplementary punishment with regard to property, despite the source (whether legally or illegally) of its acquisition and extent (full confiscation of property). This measure was applied on an offence not contextually related with the criminal's proceeds or property. Today, confiscation is applied only to economic crimes (including offences related to the financing of a crime) and concerns the property only as far as it is acquired through criminal activity.

## **7. Corporate Criminal Liability**

When discussing the entities of money laundering one should keep in mind that this offence is mostly exercised through legal persons. A legal person, i.e. a kind of "legal fiction", has been developing and gaining significance worldwide. For any economic goal (including through criminal activity) people often prefer to coordinate efforts and create corporate bodies whose legal status is a legal person. The main entities of free market economic relations are limited liability or joint stock companies – legal persons. Consequently, national laws study these entities in detail and treat them equally to natural persons in terms of their rights as well as duties. This is quite natural because the concept of a legal person is not just a legal definition on paper (as for instance "active capacity" or "passive capacity") but an independent entity of public relations. Thus, its legal relations are similar to the ones of a natural person. For example, a legal person is established as a result of relations between individuals, it can create other legal persons, may be liquidated and perhaps it would not be right not to presume that a legal person might commit a crime. A legal person has its own rights, duties and especially – liability. It is independently liable for its failure to perform duties or for the violation of others' rights.

Together with civil liability of legal persons, applicable in the countries of continental Europe, criminal liability of legal persons is applied mainly by the common law countries (UK, USA, Australia, New Zealand, and Canada). Such a form of liability is being

introduced in “written” law countries as well. However, there are some obstacles, which are caused by the specifics of legal technique and not resisted by public relations. Some scholars believe that a legal person cannot be sapient and thus no mental element may appear in its offence (person’s mental attitude towards his/her action – intention, negligence), and that individuals standing behind it are the ones liable for its activity. A legal person’s liability does not exclude its members’ liability according to the extent of guilt, but considering the principal under which liability should be adequate to the public threat deriving from the taken action, a legal person should, at least formally, bear criminal liability. Civil liability is not enough and adequate for the purpose of liability neither in theory nor in practice. A person should be made criminally liable in accordance with criminal procedure, in our case civil liability can not insure justice for all – that should be the general objective of legal liability.

When illegal proceeds are legalised and people commit crimes on behalf of legalpersons, it does not always mean that they use this legal person for their personal goals. Often the result of such activity is the interest of the legal person itself and its members are just accomplices. A legal person has its own property and obligations over this property can not be related with its worker’s property accountability. Consequently, if a juridical person is engaged in a criminal activity and receives proceeds, its worker’s liability can not insure justice. Illegal proceeds remain with the legal person and might be reinvested in the crime again.

Almost all national criminal laws including Georgia’s Criminal Code recognise the legalisation of illegal proceeds as an offence. The perpetrator may be a natural as well as legal person. A legal person has its own income which legally is different from a natural person’s income. This income may be illegal which is legalised mainly by legal persons. In such cases, by legalising the illegal property, a legal person formally commits a crime and should become liable. People standing behind a legal person shall be liable within the limits of their part in the crime but their share might be too conditional and limited to other *corpus delicti*. In case of liability for economic crime, property accountability is important. In our case property accountability of a natural person does not lead to a desirable result. It is not and can not be an adequate measure against crime because a person can not be liable with another’s (legal person’s) property. Criminal proceeds are received by a legal person (e.g. bank which “launders money” through bank transactions and gets relevant income) and in order to confiscate this proceeds, it must be a person committing a crime.

Naturally this raises the question whether there is a *corpus delicti* in a legal person’s activity, namely its mental element (guilt – intention or negligence). This issue is regulated under civil law. A legal person has an active capacity and passive capacity so it

can independently define the meaning of its activity and concludes transactions that shall be independently liable. Such an approach is certainly conditional. Unlike a natural person, a legal person has no mind. Its mind could be the representative body making decisions but the member(s) (natural person(s)) of this body are not liable before third parties. A legal person itself is liable for wrongful act of its "mind". The question is even more complicated in criminal law. In countries where corporate liability applies, there are diversified theories with regard to guilt. For instance, under US federal legislation, a company is liable for the culpable conduct of all its workers occurring within the company's jurisdiction (*respondent superior*). Great Britain applies a different approach. A company is liable for wrongful acts of not all its workers but of only competent officials believed to be the company's "mind". There are other modern theories too that bind corporate liability with the company's usual practice of decision-making (Australia).

These opinions are formal and it is natural for it basis upon existing reality. A legal person is a fictitious creation created on such formal discussions to simplify economic relations. Consequently, the introduction of formal legal institutes should be the countermeasure against a legal fiction's criminal activity (actually available).

Today international treaties and conventions are already in place and provide for criminal liability of legal persons. They are dictated by general specificity and to prevent crimes on which corporate criminal liability is imposed. Mostly such crimes are terrorism funding, trading with drugs, legalisation of illegal proceeds (money laundering), trafficking, and bribery in international business transactions related with criminal economic activities, and have its influence on an international level. These international treaties are urgent for Georgia (at least due to its geographic location) and their incorporation in national legislation is very important.

Financial sanctions are the key element in these crimes. This is why and how a legal person should be made liable. Traditional sanctions applied against natural persons (deprivation of liberty or even deprivation of property) can not insure the prevention of crime. Illegal property still remains at the legal person's disposal. One person is replaced by other and the system carries on. To weaken criminal companies and completely prevent their activity, it is necessary to confiscate this illegal capital. The latter is just a criminal penalty and can not be applied through civil or administrative procedures.

Some countries having signed these conventions tried to combat such companies through administrative liability. However, administrative fines are limited to precise amounts. Consequently, it is impossible to confiscate illicit incomes through such procedures because illicit proceeds are far more than an administrative fine (e.g. ten or even thousand times the minimum wage) and can not be an adequate measure. For this reason, continental European countries are gradually introducing corporate criminal liability – this unusual element for their law system. Confiscation of criminal pro-

ceeds or adequate property being part of such liability is the most effective measure against detection of organised crime. Even liquidation of legal persons can not guarantee desirable results without the confiscation of property. In case of liquidation, the company's property goes not to state (public) funds but to the ownership of partners, shareholders of the company, which to some extent means its legalisation or a new crime.

## 8. Conclusion

The adoption of the Law on the Support of Prevention of Legalisation of Illegal Proceeds should definitely be considered as a progressive step. However, the law's shortcomings, which probably will be demonstrated in practice, should be the topic of further discussion. In particular, the principles of customer due diligence, inflexibility of criteria determining the transaction subject to monitoring, lack of additional legal barriers and inadequate supervision that can not ensure the filtration of relevant sectors of the economy from criminals are the questions that need revision and appropriate regulation. A national anti-money laundering system must be flexible enough to be able to detect and respond to new money laundering schemes. Moreover, money launderers have shown themselves to be extremely imaginative in creating new schemes to circumvent a particular government's countermeasures.

For efficient anti-money laundering measures, the government as well as private sector should properly acknowledge this phenomenon. In addition particular attention should be paid to training personnel performing the various tasks as prescribed under the law.

Furthermore, attention should be drawn to the issue of confiscation and corporate liability, which though not falling within the scope of the current law is undoubtedly crucial within the context of anti-money laundering regime. We can not support the opinion that it is still early to introduce institutes in Georgia that are new even in countries with longstanding legal traditions. Corporate criminal liability, which will be formal without confiscation, today is more pressing for Georgia than Germany or France. Moreover, the introduction of this institute would overcome the legal barriers hindering the ratification of international treaties signed by Georgia. Political will, assumed under the UN Convention against Transnational Organised Crime, Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances and other international treaties, require first of all a legal background. More so that the criminal activity of legal persons is not only a possible danger but already exists.