

Anti-Corruption and Anti-Legalization Role of the General Prosecutor's Office of Ukraine Through the Prism of International Standards



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Abstract. *This article explores the role of the General Prosecutor's Office of Ukraine and its activities through the prism of international standards. A number of scientific literatures have been analyzed and the main international organizations in the sphere of combating money laundering and combating corruption have been reviewed, as well as positive obligations of the state to them have been highlighted. The author provided statistical materials for a better understanding of the activities of the Prosecutor General's Office of Ukraine, indicated problems of interaction between the GPU and other law enforcement agencies and courts, and suggested ways to improve the situation.*

Keywords: *anti-corruption; anti-money laundering; international standards; MONEYVAL; FATF; law enforcement agencies.*

Problem statement

The issues of countering money laundering and corruption are on the agenda of Ukraine and are in the focus of attention of national law enforcement agencies, in particular General Prosecutor's Office of Ukraine. Such crimes as legalization of criminal proceeds and corruption are the scourge of our times and penetrate the social, political and economic structures of Ukraine. That is why our community try to uproot it at all levels.

The work of our law enforcement agencies, in particular, the General Prosecutor's Office of Ukraine, is no exception. An integrated approach to solving such complex issues is a formula for success that is why Ukrainian authorities make its best. Interdepartmental cooperation is as important in the fight against money laundering and corruption as international cooperation, which includes cooperation with the competent authorities of other countries, as well as compliance with international practices to combat these crimes and adopt best practices. An important role in this scope plays organizations such as the Financial Action Task Force (FATF) – an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system; Committee of Experts on the Evaluation of Anti-Money laundering Measures and the Financing of Terrorism (MONEYVAL) – a permanent monitoring body of the Council of Europe entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems.

Critically endangered evidence due to the dominance of corruption in some countries and in the globalization dimension recently were discussed at anti-corruption summit in London. London anti-

corruption forum, held with the participation of Heads of State and representatives of law enforcement agencies, considered it necessary as follows: first of all, to expose real corruption more actively and effectively; secondly, significantly strengthen the criminal responsibility of the VIP-officials for corruption and offshore shadow schemes.

Offshore areas are havens where wealth can be hidden from tax not only by oligarchs and big business owners, and as it is turned high ranked civil servants.

Offshore of the far countries gives an opportunity to hide corruption achievements and to keep financial capital and actives beyond the national control. Chain offshore corruption – civilization evil that is clearly confirmed by the Panamanian documents which also confirmed active participation of Ukrainian politicians and civil servants in the offshore.

According to international estimates annual losses of Ukraine from offshore activity equals to 12 billion. USD, which is equal to the amount of loans received by our state from IMF in 2014–2015. In general, since independence offshore leak of Ukraine (assessment made by Tax Justice Network) equals to 167 billion USD. This is 2% of the country's annual GDP [8].

The Prosecutor General's Office of Ukraine (PGO) has established a list of assets worth \$5,5 billion, which were acquired for the funds withdrawn from PrivatBank (Kyiv) [3].

On December 7, 2017, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) approved the 5th round mutual evaluation Report of Ukraine. On January 30, 2018, the Report was published on MONEYVAL's web-site (<https://rm.coe.int/fifth-roundmutual-evaluation-report-on-ukraine/1680782396>) [2].

Analysis of recent research and publications.

The analysis of scientific literature and data received from the mass media and according to the abovementioned Report, the work of the Prosecutor's Office of Ukraine is in need of improvement.

The most popular researches of the problem were considered by the following scientists and researches: N. Akhtyrskaya, S. Bychkova, V. Filatova, T. Fulei, H. Khembach, M. Loshytskyi, S. Minchenko, D. Pavlov, O. Yanovska and other scholars.

Presentation of the main research material.

Based on a robust legal and institutional framework, and despite an increasing resource strain, the Financial Intelligence Unit (FIU) produces good quality operational analysis. Effective mechanisms are in place to generate financial intelligence originating from a broad range of sources, including the very high number of reports filed by Reporting Entities (REs).

The spontaneous dissemination of cases from the FIU regularly triggers investigations into money laundering (ML), associated predicate offences or financing of terrorism (FT) by law enforcement agencies (LEAs). Most LEAs also regularly seek intelligence from the FIU to support their own investigative efforts. Cooperation among competent authorities is facilitated by a number of institutional

mechanisms allowing for the timely and confidential exchange of financial information and intelligence with the relevant authorities.

Strategic analysis produced by the FIU supports the annual update of the reporting criteria, as well as LEAs investigative efforts.

The ongoing efforts aimed at emphasizing the suspicion-based nature of reporting, resulting in a smaller number of better-focused reports, should contribute to alleviating the abovementioned resource strain issues.

The number of ML investigations initiated by law enforcement compared with the increasing number of significant proceeds-generating offences is small, and ML indictments are declining.

Money laundering (ML) is still seen by most interlocutors met onsite primarily as an adjunct to a predicate offence. While investigations may be opened for ML in certain circumstances without a conviction for the predicate offence, it is essential to have a conviction for the predicate offence to take a ML case to court. Some interlocutors considered that an acquittal for the predicate offence means that ML cannot go ahead.

Most ML cases brought to court either involve self-laundering or 3rd parties on the same indictment as the author of the predicate offence. Prosecuting contested autonomous

ML cases, on the basis of underlying predicate crime being inferred from facts and circumstances, has still not been tested.

Before 2014, ML prosecutions rarely confronted one of Ukraine's highest ML risks (top level corruption and theft of state assets). Since March 2014, complex pre-trial investigations are actively being taken forward against senior officials of the former regime. They appear to have resulted so far in one conviction for ML in very significant amounts. The Specialized Anti-Corruption Prosecutor's Office (SAPO) is also now taking action against current senior politically exposed persons, which includes ML.

The sentences for ML are almost always less than for the predicate offences and not dissuasive. Some defendants serve no prison sentence at all for the basic ML offence due to the operation of Articles in the Criminal Code of Ukraine (CC) aimed at reform of convicted persons.

The confiscation legal regime has been updated and improved since the last evaluation through the introduction of special confiscation aimed at proceeds, though confiscation as an additional penalty remains available for many grave offences. It is difficult to assess systematically whether the new system has bedded down in practice in all proceeds-generating cases. It is unclear how regularly the new provisions (as opposed to confiscation as an additional penalty) are being used by the judges and how many significant final special confiscation orders have been made, as most information on this is anecdotal. Not all ML cases appeared to result in confiscation orders.

There appear to be some problems in conducting financial investigations and a lack of resources for them across the board. In practice, thorough financial investigations in major proceeds-generating offences are few and far between, though considerable efforts are made in the biggest cases.

Since 2014, officials from the previous regime and current top officials and politically exposed persons are being investigated and made suspects in cases and their assets are being restrained with a view to confiscation. Credit is given for the determined work that is now ongoing to restrain and confiscate funds in

cases of top level corruption and theft of state assets, in line with national ML risks. At the time of the onsite visit there was a considerable gap between obtaining significant restraints and the achievement of final confiscation orders. More final confiscation orders, including those using the new special confiscation provisions, are necessary.

There is not yet a consistent evidential standard for establishing whether alleged proceeds came from crime, when the special confiscation issue is raised after conviction [2].

The purpose of the article is to analyze the anti-corruption and anti-legalization role of the General Prosecutor's Office of Ukraine through the prism of international standards and development strategies of a system of prevention and counteraction to legalization (laundering) of the criminal proceeds, terrorism financing, and financing of proliferation of weapons of mass destruction, as well as the MONEYVAL Fifth Round Mutual Evaluation Report.

The Criminal Procedural Code sets out a suitably comprehensive legal framework for mutual legal assistance (MLA), which enables the authorities to provide a broad possible range of assistance in relation to investigations, prosecutions and related proceedings concerning ML, associated predicate offences and FT. MLA is to be provided in accordance with the requirements set out in international treaties and domestic legislation. The General Prosecutor's Office of Ukraine (PGO) to the extent of procedural action within a criminal proceeding pertaining to the legalization (laundering) of proceeds of crime, terrorist financing or the financing of the proliferation of weapons of mass destruction [5].

The Ministry of Justice (MoJ) and the PGO are the central authorities for the receipt, processing and allocation of Mutual legal assistance (MLA) requests. During the investigation stage, the competent authority for incoming and outgoing MLAs is the PGO, who disseminates the requests to the relevant LEA in accordance with the subject-matter of the request. At the stage of the court review, the competent authority is the MoJ for both incoming and outgoing MLA requests.

When deciding on the range of offences to be covered as predicate offences under each of

the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences. *Designated categories of offences* means: participation in an organized criminal group and racketeering; terrorism, including terrorist financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; (including in relation to customs and excise duties and taxes); tax crimes (related to direct taxes and indirect taxes); extortion; forgery; piracy; and insider trading and market manipulation [3].

In order to determine how embedded confiscation and particularly the new special confiscation provisions are in the general criminal justice system the authorities were invited to provide the evaluators with a statistical overview of convictions and associated confiscation orders for predicate offences in the CC 2014–2016. An extract from the statistics provided on 158 offences in the CC is set out beneath [11].

On the investigation of financial transactions related to corruption, including acts conducted with the participation of the former President of V. Yanukovich, his close persons and officials of the former government, state authorities and local self-government bodies.

In 2016 the SFMS submitted 172 cases (38 case referrals and 134 additional case referrals), related to suspicion of conducting corruption activity to the following law enforcement agencies:

- National Anti-Corruption Bureau of Ukraine – 71 case referrals;
- prosecution authorities of Ukraine – 81 case referrals;
- internal affairs authorities of Ukraine – 9 case referrals;
- Security Service authorities of Ukraine – 10 case referrals;

– fiscal service authorities of Ukraine – 1 case referral.

The abovementioned case referrals content information regarding financial truncations related to legalization (laundering) or commitment of other criminal offenses, amounting to UAH 4,4 billion.

In 2016 the FIU continued active work regarding investigation of the acts of laundering of the proceeds from corruption, embezzlement and misappropriation of state funds and property by the former President of Ukraine Viktor Yanukovich, his close persons, former government officials, associated entities and persons involved in the intentional mass murder.

particular attention is paid to tracking and suspension of funds and assets of all of the abovementioned individuals in banks and other financial institutions of Ukraine.

Thus, as the result of taken measures in Ukraine, the FIU has identified (March 2014 – December 2016) accounts of 103 individuals and blocked funds on 565 bank accounts amounting to UAH 340,7 million, USD 30,5 million, EUR 5,0 million, RUB 21.7 million, precious metals (gold and silver) with a total value of UAH 6.8 million as well as securities with a total value of UAH 1,1 billion.

The FIU blocked funds totalling USD 1,4 billion, USD 303,1 million, EUR 13,6 million, GBP 2,3 thousand and securities with a total value of UAH 2,3 billion and USD 1.0 billion on 96 bank accounts of 42 legal entities (including 21 non-resident companies) associated with the abovementioned individuals.

Overall, corruption permeates all the sectors of the economy. Corruption leads to significant losses for a country. Such losses may contain financial, quantitative, qualitative and political components [2].

Basic consistent patterns which increase “desire” to commit corruption offenses are:

- embezzlement of state funds and accepting bribes, to a greater extent, occur in those areas of the economy which have strategic importance to the country (defence, fuel and energy complex, healthcare, public administration), because of substantial cash flows allocated for them;

- a large amount of funds involved in projects at the expense of state or local budgets, at the state and local levels;

- complex mechanism for determining the value of goods and services, constant changes in market conditions to determine the real value of acquired assets;

- public procurement sphere is not transparent and characterized by high competition, which could create conditions for backroom conspiracies.

The main tools of laundering of the proceeds from corruption are:

- fictitious services;

- usage of affiliates to provide fictitious services;

- advance payment for goods and services to controlled entities, followed by non-delivery/non-compliance;

- undervaluation of goods by a state-owned enterprise during sale to the companies-intermediaries for subsequent disposal to accumulate profits;

- conclusion of a knowingly unlawful agreements for the purchase of goods at prices, set for social needs, followed by its subsequent disposal;

- usage of enterprises with fictitious features;

- “trading” of public services regarding distribution/registration permits;

- usage of bank accounts, open abroad;

- rejection of competitive tender participation applications in favour of applications from controlled enterprises which offer much higher prices [1].

The most common ways to launder the proceeds from corruption are:

- engagement of people who do not have close family ties with a “corrupt official”, while others links are present (distant relatives, drivers, assistants);

- receiving a bribe in cash with its subsequent transfer to cashless form;

- obtaining the proceeds from corruption in Ukraine with the subsequent legalization abroad;

- repeated inheritance from persons, who are not members of the same family;

- purchase of property abroad;

- purchase of corporate rights.

Investigation of laundering of proceeds from corruption obtained in the defence and industrial sector. Realisation of the anti-terrorist operation in the eastern Ukraine significantly increases the volume of costs for reforming and development of the defence and industrial sector, which in turn, increases the risk of committing corruption crimes in this area.

For example, the tendering process can be less transparent due to the fact that the subject of procurement/works in most is confidential, as it concerns national security and its confidentiality is protected by the legislative and regulatory requirements.

Also it should be noted that public procurement in the defence and industrial sector is mainly not addressed to the providers or producers of services, but conducted through a chain of intermediaries, which in turn significantly increases the cost of the tender proposal as “the service value” for government relations of certain entities is influenced by profitability established by each party [6].

Conclusions

Consequently, after analyzing scientific literature and data from open sources and MONEYVAL 5th Round MER, we can conclude that the work of Prosecutor’s Office of Ukraine is significant and efficient but have some difficulties and problems. So our aim was to analyze these issues and to highlight these areas. The data and statistics given above shows us how should the law enforcement agencies cooperate, what challenges they face, in particular through the prism of international standards; we have found out agencies and bodies that cooperate with General Prosecutor’s Office of Ukraine, the state of affairs in cases that they have investigated and the issues that arise during the investigation process. The same problematic issues were found in the MONEYVAL 5th Round MER. What is more, we have considered the predicate offences, their type and specific features and we have provided the definition and classification of predicate offences from the FATF Glossary.

We can state that fight against corruption and money laundering is our global problem and it is currently on the agenda of Ukraine. But we should gather all the strength of our LEAs and with the help of interdepartmental cooperation at all levels do our best to counter all the challenges. In the view of our article we propose the following.

Stop the decline in the number of ML indictments by ensuring that prosecutors advise LEAs to proactively follow the money in major proceeds-generating offences with a view to identifying how and by whom the proceeds are laundered. Identify specialized prosecutors dealing with ML to guide their colleagues in handling these cases (where they are not handling them themselves) and to advise as necessary on appeals against inappropriate sentences.

Ensure that the personnel and budget resources allocated to the FIU, in particular to its analytical function, are consistent with its workload.

Conduct prosecutorial and law enforcement agencies' trainings covering the FATF standards on ML criminalisation (and Ukraine's obligations under the Warsaw Convention).

Develop short and clear mandatory instructions for prosecutors on when and how to direct law enforcement authorities to pursue financial investigations in major proceeds-generating cases.

There should be developed between the Judiciary and the PGO a workable policy on the level of evidence needed to determine whether assets were the proceeds of crime, after conviction for proceeds-generating criminal offences. This policy should be consistently applied by the courts. To ensure that confiscation is always raised at the conclusion of trials for proceeds-generating offences, the PG should issue directions to all prosecutors in this regard. In the longer term, the authorities should decide whether the law needs amending to include a clause on the confiscation issue in the indictment.

The PGO should ensure that all supervising prosecutors in proceeds-generating cases are trained in modern financial investigative techniques and are capable of directing investigating officers in financial investigations where necessary. More focused guidance on the importance of early restraint and confiscation of proceeds should be issued to all prosecutors.

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