PART I · NEW INSTRUMENTS IN THE FIGHT AGAINST ACQUISITIVE CRIME: CONFISCATION OF PROCEEDS FROM CRIME AND CRIMINALISATION OF MONEY LAUNDERING

1 The background of the fight against money laundering

The fight against money laundering aims at a more effective enforcement of the criminal law in relation to profit-oriented crime. This chapter seeks to clarify the background of this fight. It will be shown that the introduction of the two main legal devices that are used in the fight against money laundering, the confiscation of the proceeds from crime and the incrimination of money laundering, are closely linked to changes that occurred on a legal and a socio-economic level. These criminal law instruments have, however, created a momentum of their own. The most important example of how the fight against money laundering has separated itself from the background that gave rise to it is the drastic expansion of the application field of the confiscation of the proceeds from crime and the incrimination of money laundering itself. Whereas the scope of these instruments was originally limited to drug offences or offences related to organised crime, it has now been drastically expanded to cover other, if not all, types of offences. In addition, the international fight against money laundering also signifies an evolution of the norm-making process in the field of law enforcement law.

Legal background

Pecunia non olet,[1] money does not stink. For a long time this seems to have been the prevailing attitude of most criminal justice systems and, in a sense, of most societies in general, towards proceeds from crime. Until quite recently, most criminal justice systems – implicitly if not explicitly – allowed offenders to enjoy the fruits of their crimes. This attitude should be set against the backdrop of the type of offences that criminal courts

[1] Statement attributed to Emperor Vespasianus on raising taxes on public toilets (*Concise Oxford Dictionary of Quotations*, Oxford, 1986, 262).

traditionally had to deal with. When an offence had resulted in damages of any kind, the victim of the offence would most probably institute civil proceedings which would normally result in the restitution of any ill-gotten gains. Some criminal justice systems (e.g. those of Belgium and France) even allow the victim (the *partie civile*) to institute civil claims in the course of the criminal proceedings.

In the post-Second World War era, however, legislators increasingly started to make criminal acts which often did not cause any direct harm to an identifiable victim. A great number of commercial, fiscal or environmental offences are crimes without a victim. Even though this type of offence normally does not result in any direct damage to a victim, this does not mean that offenders do not reap any benefits from these crimes. On the contrary, this type of offence often generates huge profits for whose removal the law generally fails to provide adequate legal mechanisms.

Given the absence of identifiable victims, the only legal instrument which could ensure that offenders were deprived of their illegal profits was the confiscation of the proceeds of crime. Whereas the majority of criminal justice systems were familiar with the more traditional forms of confiscation, namely, the confiscation – often known as forfeiture – of the instruments (*instrumentum sceleris*) or the subject of crime (*objectum sceleris*), most of these systems did not provide for the confiscation of proceeds from crime (*producta/fructa sceleris*). This gap in the law often became painfully clear in the course of criminal proceedings against drug traffickers, for example in the English case of *R. v. Cuthbertson* (1981),[2] where criminal courts had to acknowledge their lack of competence to take away the profits from crime.

In other countries, such as Belgium,[3] where the confiscation of proceeds from crime was provided for in respect of drug offences, this possibility did not extend to other offences. In those countries whose legislation provided for the confiscation of proceeds from crime (e.g. Switzerland and The Netherlands), it was perceived that the provisions concerned did not in practice result in an effective deprivation of the proceeds from crime.[4]

[2] [1981] AC 470. In this case the court had to acknowledge that section 27(1) of the Misuse of Drugs Act 1971 only allowed for instruments of crime to be forfeited, and did not extend to profits from drug trafficking.

[3] See the decision of the Belgian Supreme Court of 4 July 1986 (*RDP* (1986), 910) based on Article 4, para. 6 of the Belgian Drug Offences Act of 24 February 1921.

[4] For The Netherlands see L. F. Keyser-Rignalda, *Boef en buit. De ontneming van wederrechtelijk verkregen vermogen* (Arnhem: Gouda Quint, 1994), p. 10. As far as Switzerland is concerned, see C. K. Graber, *Geldwäscherei. Ein Kommentar zu Art.305bis und 305ter StGB* (Berne: Verlag Stämpfli, 1990), p. 95.

One of the first countries to take legislative action in order to fill this gap, was England. Following one of the main recommendations of the *Hodgson Committee*,[5] Parliament empowered courts to confiscate the proceeds of drug trafficking through the Drug Trafficking Offences Act 1986 (DTOA 1986) later replaced by the Drug Trafficking Act 1994 (DTA 1994).

Urged on by the international initiatives that were taken in this respect at the end of the 1980s (the 1988 UN Convention against Illicit Traffic in Narcotic and Psychotropic Substances[6] and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[7]), other countries soon followed suit. Thus the Belgian law of confiscation was changed in 1990,[8] Dutch law in 1992[9] while the Luxembourg[10] and Swiss parliaments amended their legislation in respect of confiscation in 1994.[11]

Criminals who, through their criminal activities, dispose of huge amounts of money, need to give this money a legitimate appearance: they need to 'launder' it. The phenomenon of money laundering is essentially aimed at two goals: preventing 'dirty money' from serving the crimes that generated it, and ensuring that the money can be used without any danger of confiscation. The interest of law enforcement authorities in detecting the link between an offender and the proceeds of the crimes he has allegedly committed, is consequently also twofold: detecting the crimes that were committed in order to bring the alleged perpetrators to trial, and identifying the proceeds from crime so that they can be confiscated.[12]

It is useful to point out that most forms of money laundering eventually

[5] On the establishment and the functioning of this committee, named after its president, Justice Hodgson, and on its recommendations see A. R. Mitchell, M. G. Hinton and S. M. E. Taylor, *Confiscation* (London: Sweet & Maxwell, 1992), p. xii and D. McClean, *International Judicial Assistance* (Oxford: Clarendon Press, 1992), p. 203 *et seq.*

[6] Vienna, 20 December 1988, *ILM* (1989), 493.

[7] Strasbourg, 8 November 1990, *ETS*, No. 141.

[8] Act of 17 July 1990, amending Articles 42, 43 and 505 of the Belgian Criminal Code. See G. Stessens, *De nationale en internationale bestrijding van het witwassen van geld. Onderzoek naar een meer effectieve bestrijding van de profijtgerichte criminaliteit* (Antwerp: Intersentia, 1997), p. 5.

[9] Act of 10 December 1992, amending Article 36e of the Dutch Criminal Code. See Keyser-Rignalda, *Boef en Buit*, p. 83.

[10] Act of 13 June 1994, amending Articles 31 and 32 of the Luxembourg Criminal Code. See D. Spielmann, 'La confiscation en droit luxembourgeois à l'aube de la réforme du Code pénal', *Ann.Dr.Louv.* (1995), 202–207.

[11] See Act of 14 March 1994, amending Articles 58 and 59 of the Swiss Criminal Code. See N. Schmid, 'Das neue Einziehungsrecht nach StGB Art.58ff.', *RPS* (1995), 322.

[12] See E. Nadelmann, 'Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions', *Inter-American L R* (1986), 34.

result in the injection of 'dirty money' into the legal economy. To attain this goal, the co-operation of third persons is necessary. Irrespective of the specificities of the various domestic legislations in this field, the criminalisation of money laundering – which will be discussed later[13] – can be generally defined as a criminalisation aimed at disrupting the co-operation provided by third persons in hiding the proceeds from crime and giving those proceeds a legitimate appearance.

Social-economic background: organised crime and drug offences

The need to confiscate the proceeds from crime and to fight money laundering has nowhere been more prominent than in the context of organised crime, and even more specifically, of organised drug trafficking. As was stated in the Note of the Secretary-General of the United Nations on organised crime: 'The connection between organized crime and illicit drug trafficking has changed both the panorama of organised crime and the way criminal justice seems to react to this phenomenon'.[14]

Organised crime

Though already known in the United States in the 1920s (and maybe even earlier), organised crime has developed enormously in the second half of the twentieth century, and especially in later decades. There have been numerous attempts to define organised crime, but most definitions are criminological. Given the complex and varied nature of the phenomenon of organised crime, it has proved very difficult to elaborate a precise legal definition.[15] Legal definitions of organised crime often function as a kind of password for the use of far-reaching investigative powers or, on an international level, for relaxing the conditions for international co-operation in criminal matters. Thus the American–Swiss Mutual Assistance Treaty

[13] See *infra* pp. 82–129.

[14] Secretary-General of the UN, *Note: Strengthening Existing International Co-operation in Crime Prevention and Criminal Justice, including Technical Co-operation in Developing Countries, with Special Emphasis on Combating Organized Crime. Addendum: Money Laundering and Associated Issues: the Need for International Co-operation* (Vienna: UN, 1992), E/CN.15/1992/4/ Add.5, p. 3. On the link between organised crime, drug trafficking and money laundering, see also L. Krauskopf, 'Geldwäscherei und organisiertes Verbrechen als europäische Herausforderung', *RPS* (1991), 386–7.

[15] See in general on this problem: C. L. Blakesley, 'The Criminal Justice System Facing The Challenge of Organised Crime. Section II: The Special Part', *RIDP* (1998), 73–6.

(1973)[16] and the EU Convention on Extradition (1996)[17] remove some of the obstacles (notably the requirement of double incrimination) if the request for co-operation concerns organised crime.

Whereas legal definitions often comprise an enumeration of criteria for organised crime,[18] criminological definitions tend to underline the danger for society emanating from organised crime. It is impossible to give an overview of all definitions that have been given, but most of them have a number of common denominators. Many definitions emphasise the fact that organised crime activities essentially take place in the context of a group. A good example is the definition given by the United Nations in 1992 of an organised crime group as 'a relatively large group of continuous and controlled criminal entities that carry out crimes for profit and seek to create a system of protection against social control by illegal means such as violence, intimidation, corruption and large-scale theft'.[19] The organised character of this type of crime is also prominent in other definitions.[20]

Another discerning feature of organised crime is the generation of huge profits. The definition of organised crime given by Interpol's first symposium on the subject, correctly pinpoints this as the main objective of organised crime.[21] The enormous turnover realised by organised crime can be explained by various factors, but two of the most important aspects are the following. First, organised crime groups are involved in a crime in

[16] Article 6 of the Treaty on Mutual Assistance in Criminal Matters Between the United States and Switzerland, 25 May 1973, *ILM* (1973), 916 (entered into force on 23 January 1977). See A. Ellis and R. L. Pisani, 'The United States Treaties on Mutual Assistance in Criminal Matters', in *International Criminal Law*, ed. M. C. Bassiouni (New York: Transnational Publishers, 1986), pp. 168–9.

[17] See Article 3 of the Convention relating to extradition between the Member States of the European Union, drawn up by the Council Act of 27 September 1996 (*OJ* C 313, 23.10.1996, p. 11).

[18] See P. Bernasconi, 'La criminalité organisée et d'affaires internationale', in *Changes in Society, Crime and Criminal Justice in Europe: A Challenge for Criminological Education and Research, Volume II: International Organized and Corporate Crime*, C. Fijnaut, J. Goethals, T. Peters and L. Walgrave (Antwerp: Kluwer, 1995), p. 6; M. Pieth, '"Das zweite Paket gegen das Organisierte Verbrechen", die Überlegungen des Gesetzgebers', *RPS* (1995), 228; H. Vest, '"Organisiertes Kriminalität" – Überlegungen zur Kriminalpolitischen Instrumentalisierung eines Begriffs', *RPS* (1994), 125 *et seq.*

[19] *Practical Measures Against Organized Crime, Formulated by the International Seminar on Organized Crime*, held at Suzdal, Russian Federation, From 21 to 25 October 1991, Annex II to Ecosoc Resolution 1992/23 of 30 July 1992 concerning organised crime. For a very similar definition, see resolution 1 of the International Association of Penal Law (*AIDP*), Section I of the XVIth Congress (Budapest, 1999), *RIDP* (1999), 895.

[20] See, e.g., the definition given by Bernasconi, 'La criminalité organisée', 2–5.

[21] Cited by Blakesley, 'The Criminal Justice System', 73.

a structural way in order to make profits. Second, the thrust of their activities is in providing illegal goods and services. Illegal goods and services are often much more expensive than legal goods, especially because the monopoly position of providers of illegal goods and services allows them to make predatory profits. This is not only the case for drug trafficking, but also for arms trafficking, the illegal trade of human organs, child prostitution, etc.

The enormous financial profits from organised crime explain some of the most striking features of organised crime. The egregiously corruptive power of these profits provides organised crime groups with political and economic leverage.[22] The influence organised crime may yield on politicians, civil servants and law enforcement authorities can eventually result in a declining belief in two of the most fundamental pillars of modern society: the rule of law and democratic government. The economic consequences of organised crime can scarcely be gauged. Some of the calculations that have been made regarding the turnover of organised crime will be discussed later,[23] but the economic consequences of organised crime go much further than the profits of organised crime. Given the fact that organised crime does not operate along the rules that apply to the market, organised criminals are often able to outpace their legal competitors. Because of their illegal character, the economic activities of organised criminals tend to escape any kind of government control (tax law, administrative law, etc.).

Apart from its political and economic effects,[24] the sheer amount of profits made by organised crime also accounts for the pressing need to launder these profits. The relatively small profits realised by traditional crime could in most cases easily be consumed or invested in the legal economy without attracting any attention from law enforcement, fiscal or other authorities. This is not possible any more with regard to the enormous gains from organised crime. Without sophisticated money laundering operations, which give these gains an apparently legitimate origin, the amount of profits of organised crime would in itself be an indication of their illegal origin. As was stated by the former American Attorney-General Edwin A. Meese in 1985 in the House of Representatives: 'Money laundering is the life blood of the drug syndicate and traditional organised crime'.[25]

[22] Bernasconi, 'La Criminalité organisée', 2.

[23] See *infra* pp. 87–9.

[24] See in general V. Tanzi, *Money laundering and the international financial system*, IMF Working Paper No 96/55, 14p. and P. J. Quirk, *Macroeconomic implications of money laundering*, IMF Working Paper No 96/66, 33p.

[25] Cited by P. Bernasconi, 'Geldwäscherei und organisierte Kriminalität', in *Finanzunterwelt. Gegen Wirtschaftskriminalität und organisiertes Verbrechen* (Zürich: Verlag Orell-Füssli, 1988), p. 26.

In addition, the increasing globalisation and diversification of organised crime makes it necessary for organised crime groups, just as for legal enterprises, to engage in active financial management. The ability to use legal savings and investing instruments (often through financial institutions) inevitably requires money laundering operations. The need for organised crime groups to manage their cash flow becomes especially pressing from the moment organised crime groups start to make profits which they do not need to reinvest in their criminal activities.

Given the intrinsic link between organised crime and money laundering, the incrimination of money laundering itself should be considered as a new tool, or even a new strategy in the fight against organised crime. As the classic criminal law concepts of complicity and of *association de malfaiteurs*[26] were often inadequate to fight organised crime groups, some jurisdictions chose to establish membership of an organised crime group[27] as an offence, or as an aggravating circumstance, in addition to the common law offence of conspiracy which was already in existence.[28] Irrespective of the practical effects of this type of legislation, it can only result in convictions of members of organised crime groups. In most cases it does not fundamentally affect the structure and the illegal activities of these groups as such, as the activities of imprisoned members are carried on by others. Taking into account the low conviction rate and the lucrative nature of organised crime, the deterrent effect of classic sanctions consisting of deprivation of liberty was generally estimated as being very low, although some have argued that this thesis has never been proven with regard to mafia-type organisations because American law enforcement authorities have never consistently targeted them.[29]

Because the classic tools of the criminal law were perceived to have failed in the fight against organised crime, legislators – with those from the United States in the front rank – considered the confiscation of the proceeds of crime and the incrimination of money laundering as new, more effective tools for tackling the problem of organised crime. These instruments are part of a new strategy against organised crime which is aimed at the structures of organised crime, rather than at deterring individuals from taking part in organised crime. This strategy is directed

[26] Illegal association, see, e.g., Article 322 of the Belgian Criminal Code and Article 450 of the New French Criminal Code.

[27] See, e.g., Article 416bis of the Italian Criminal Code (*associazione per delinquere e di tipo mafioso*), Article 260ter of the Swiss Penal Code and Article 324bis of the Belgian Criminal Code.

[28] On these different legislative approaches towards organised crime, see Blakesley, 'The Criminal Justice System', 73–80.

[29] D. J. Fried, 'Rationalizing Criminal Forfeiture', *J.Cr.L & Crim.* (1988), 367–72.

at the crucial function of organised crime: making money. By taking away the proceeds from crime and by making it more difficult to launder its proceeds, law enforcement authorities not only take away the incentive for organised crime, but, more importantly, seek to disrupt the functioning of organised crime itself. Organised crime groups depend on cash and assets to function just as much as their legitimate counterparts do.

Drug offences

The production, trafficking and consumption of narcotic and psychotropic drugs are one of the biggest problems faced by contemporary society, both on a domestic and an international level. Already at the beginning of the twentieth century, international initiatives were being taken to control the use of drugs. Between 1912 and 1972 no less than 12 multilateral conventions were adopted with regard to the regulation of drugs,[30] submitting the production and selling of drugs to state control and restricting its use to certain, mostly medical, purposes. The 1961 UN Single Drug Convention, supplemented by the 1972 Protocol, consolidated most of the preceding conventions. The 1971 UN Convention on Psychotropic Substances[31] complemented this by establishing an international regulation of chemical and pharmaceutical drugs.[32]

The main purpose behind this international regulation system of drugs was to limit the supply of drugs, and thereby to limit the use of drugs and the drug problem in general. The enormous social dimensions of the drug problem in many countries have, however, undermined this strategy. Whereas drugs were originally seen as an almost exclusively medical problem of drug users, the scope of the production, use and trafficking of drugs is nowadays of such a nature that drugs have come to be seen as a problem for society as a whole. Various factors account for this. In drug producing countries, it is sometimes hard to underestimate the economic and political clout of drug traffickers. In this respect, the terms 'narco-democracies' and 'narco-cracies' have even been coined to denote the

[30] For an overview of these conventions, see M. C. Bassiouni, 'Critical Reflections on International and National Control of Drugs', *Denv.JInt'l L & Pol'y* (1990), 312–3, footnote 3. See also S. Glaser, *Droit Pénal International Conventionnel* (Brussels: Bruylant, 1970), pp. 133–39 and P. Stewart, 'Internationalising The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances', *Denv.JInt'l L & Pol'y* (1990), 388–90.

[31] Vienna, 21 February 1971, *ILM* (1971), 261.

[32] For an explanation as to the lack of an international regulation system regarding chemical and pharmaceutical drugs up till that date see Bassiouni, 'Critical Reflections on Control of Drugs', 314.

influence of drug trafficking.[33] In addition, drug trafficking is often connected to other criminal phenomena, such as corruption and terrorism. All these factors resulted in an increasing awareness for policy makers that drugs cannot be curbed simply by attacking the supply and demand side but also in a third way, by attacking drug trafficking. It was hoped that by attacking drug trafficking, law enforcement authorities would be able to cut the link between the supply and the demand side. Given the huge scale of organised drug trafficking, this fight was directed against the profits of drug trafficking. The legal tools used in this respect are the confiscation of proceeds from crime and the criminalisation of money laundering. The introduction of these two instruments in the legislation of the United States and that of many other countries was initially closely linked to the fight against drug trafficking. The fight against money laundering was not just a new strategy in the fight against crime, but also in the fight against drug trafficking.

This changing awareness with respect to the drug problem was also reflected in the nature of the relevant international conventions. The early drug conventions were basically concerned with the administrative regulation of the production and transport of drugs, but there were no enforcement conventions. The penal provisions featuring in those early conventions were aimed at supporting the administrative regulation established by these conventions. The 1988 UN Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances was in effect the first convention to emphasise the law enforcement aspects of the fight against drugs.[34]

Expansion of the application field to other offences

Although the introduction of the confiscation of the proceeds of crime and the criminalisation of money laundering was part of a new criminal justice strategy aimed at fighting organised crime and, even more specifically, drug trafficking, in many domestic laws the application field of these legal tools has now been drastically expanded. Whereas the criminalisation of money laundering was originally often limited to proceeds from drug trafficking, many legislators have now broadened its application field to the proceeds from many offences (not limited to organised crime), or even all offences. This means that the group of 'predicate

[33] E. A. Nadelmann, *Cops Across Borders. The Internationalization of US Criminal Law Enforcement* (Pennsylvania: The Pennsylvania State University Press, 1993), pp. 251–312, especially p. 271. [34] McClean, *International Judicial Assistance*, pp. 172–4.