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CONFERENCE OF THE PARTIES

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)

Interpretative Note on Article 9(3) of the Warsaw Convention

Directorate General Human Rights and Rule of Law – DGI

INTRODUCTION

At its 11th meeting, held in Strasbourg from 22 to 23 October 2019, the Conference of the Parties to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (COP to CETS n° 198) invited the Bureau to consider interpretative issues related to Article 9, paragraph 3 of the Convention. At the same plenary meeting, the Conference adopted the Thematic Monitoring Report on States Parties implementation of Article 9(3). A number of findings/analysis of this report informed this document as well. This Interpretative Note is scheduled to be further discussed and adopted at the extraordinary COP Plenary meeting in May 2021.

According to recent UN estimates the amount of criminal proceeds laundered annually lies within the range of 2 and 5 percent of the global GDP, or $1.6 to $4 trillion. In addition, the Financial Action Task Force (FATF) regularly publishes consolidated assessment ratings demonstrating that most countries fall significantly behind the satisfactory levels of effectiveness in investigating, prosecuting and convicting for ML offences.

One of the underlying issues in effective prosecution of ML offence is a need to prove *mens rea* – i.e. that the money launderer knew that the proceeds he/she dealt with were proceeds of crime. In complex ML cases, where professional money launderers are involved (i.e. asset managers, bankers, trust and companies service providers, etc.), a defendant commonly denies that he/she had a firm knowledge that the funds he/she dealt with, were proceeds of crime. Consequently, demonstrating that the "mental element" of the defendant has reached the relevant threshold is one of the most challenging tasks in proving the ML offence.

ARTICLE 9 (LAUNDERING OFFENCES)

A number of international standards, such as UN Vienna and Palermo Conventions, provide comprehensive definitions of the money laundering offence. As noted above, these standards require that the perpetrator knew that the proceeds were generated through a criminal activity.

The Vienna Convention as well as FATF Recommendation 3 lay down that the intent and knowledge can be inferred from objective, factual circumstances. However, the evaluations carried out so far suggest that proving the intent or knowledge of the launderer about the origin of proceeds might be a requirement, which many jurisdictions struggle to attain. Mindful of difficulties in proving *mens rea*, the drafters of the Warsaw Convention introduced new elements in its Article 9, where the ML offence is set out. Apart from the elements already embedded in Vienna and Palermo Conventions, Article 9 of the Warsaw Convention, in its paragraph 3, goes a step further establishing that the money laundering offence occurs even when the offender only suspected or ought to have assumed that the proceeds were generated by crime.

Assessed criteria

PARAGRAPH 3 (SUSPICION OR ASSUMPTION THAT THE PROPERTY WAS PROCEEDS)

Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this article, in either or both of the following cases where the offender:
a) Suspected that the property was proceeds,
b) Ought to have assumed that the property was proceeds.

The first issue which merits discussion is the language of paragraph 3. Whilst the possibility to establish the ML offence in case of a lesser mental element of the perpetrator is clearly provided in this paragraph, the words 'Each Party **may adopt**' suggest that this provision is not mandatory – it only provides a possibility for State Parties to introduce one or both elements ('suspected', 'ought to have assumed', or both). Hence, if a Party decides not to apply this paragraph in its internal law, this cannot be raised or criticised during the monitoring process.

Explanatory Report

The Explanatory Report to the Warsaw Convention provides a brief overview of the standard. Paragraph 3.a provides for a lesser subjective mental element and could cover a person who gives the origin of the proceeds some consideration (it is sufficient that he/she suspects the property was proceeds) but does not have a firm knowledge that the property is proceeds. Paragraph 3.b establishes the criminalisation of negligent behaviour where the court objectively weights the evidence and determines whether the offender should have assumed the property was proceeds, whether or not he/she gave any consideration to the matter. Whilst the Explanatory Report concludes that Paragraph 3 criminalises acts other than those designated in the 1988 Vienna Convention, it falls short to give a more illustrative explanation, how this paragraph would actually be applied in practice. Therefore, this Interpretative Note intends to provide concrete examples and case studies on proper application of paragraph 3.

Other international instruments

EU Directive

Recognizing that money laundering, financing of terrorism and organised crime remain significant problems at the Union level which jeopardise integrity, stability and reputation of its financial sector and threaten the internal market and its internal security, a Directive (EU) 2018/1673[1] was adopted on 23 October 2018. Elements of Article 9 of the Convention are part of the Directive - the EU introduced the requirements of the Convention into Article 3 para 2 of the Directive, which states:

"*Member States may take the necessary measures to ensure that the conduct referred to in paragraph 1 is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity*."

The language of the Directive is also non-mandatory. The Conference of the Parties welcomes this development and further encourages all EU member states, including those which have not yet ratified the Warsaw Convention, to apply this principle in their legislation/case law.

ISSUE: How to implement paragraph 3 of Art.9?

The main document providing an answer to this question is the COP Thematic Monitoring Report on Article 9(3)[2] adopted in 2019. The review confirmed that in 23 States Parties legislation establishes the money laundering offence even when a lesser mental element is proven. Seven States Parties criminalised both alternatives under Article 9(3) ('suspected that the property was proceeds' and 'ought to have assumed that the property was proceeds'). Six State Parties introduced in their legal system incrimination of money laundering in cases when the perpetrator

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.284.01.0022.01.ENG
[2] https://rm.coe.int/c198-cop-2019-1rev-hr-i-art9-3-en/1680a12456

had suspicion that the property is proceeds (paragraph 3 a)). Finally, ten State Parties introduced negligent money laundering by adopting the provision which derives from paragraph 3 b). Yet there are 13 State Parties that did not implement Art. 9(3).

It is worth noting that, depending on national legislation and case law, the lesser mental elements of "suspected" or "ought to have assumed" could also be covered by the "*dolus eventualis*" level of mental awareness of the illicit nature of the proceeds. This could even be implicit in the law, without an explicit criminalisation of such activity in the description of the ML offence, provided that it is demonstrable by a sufficiently consolidated practice by the courts. Some examples, described below, can be ascribed to this approach.

1. *Examples of implementation of "suspected that the property was proceeds" (Art. 9 (3a))*

States Parties use different models to implement this provision.

For example, the **Bulgarian** Criminal Code introduced a lesser mental element for the money laundering offence directly in the ML incrimination (Article 253 of the Criminal Code). In line with this provision, the money laundering offence is committed if the perpetrator "**assumes** that the property is acquired through crime".

The same approach was applied by The **Netherlands**. However, the wording used in the Dutch legislation slightly differs - Article 420 of the Criminal Code states that money laundering offence will be committed if the perpetrator **has reasonable cause to suspect** that the object(s) derives – directly or indirectly – from any serious offence.

Maltese legislation incorporated Art. 9 (3) of the Warsaw Convention in Article 373 of the Criminal Code defining money laundering, *inter alia*, as a conversion, transfer, concealment, etc. of property **suspected** to be directly or indirectly deriving from a criminal activity.

On the other hand, **Portugal** adopted a completely different approach in applying a lesser mental element. The money laundering offence is incriminated in Article 368 A of the Criminal Code and is an intentional offence. However, in the General Part of the Criminal Code, intention also includes *dolus eventualis*. *Dolus eventualis* makes it sufficient to establish the ML offence if the offender **considered it possible** that property originated from a predicate offence, and nevertheless accepted that possibility.

These examples clearly suggest that countries use different approaches (i.e. different wordings such as "assumption" "reasonable cause to suspect" or just "suspecting") to establish the knowledge of the perpetrator vis-à-vis the origin of proceeds. This notwithstanding, it can be concluded that all these approaches meet the requirement of paragraph 3 a) of Article 9 of the Warsaw Convention.

2. *Examples of national implementation of "Ought to have assumed" (Art. 9 (3b))*

The 2019 Horizontal Review also noted that several countries implemented option 3b) of Article 9. This provision, in broader terms, could be understood as a negligent money laundering offence. Generally speaking, the negligent behaviour would assume that a perpetrator is aware of the risk of his/her conduct and the results it can produce (i.e. unlawful consequence). With regard to money laundering this would imply that a perpetrator ought to have assumed that property is proceeds of crime. Below are some examples how States Parties have implemented this provision.

In the **Moldovan** Criminal Code, within the incrimination of money laundering offence (Art. 243) it is said that the offence can be established even if the person "**should have known that goods represent illegal incomes".**

On the other side, **Hungarian** legislation explicitly uses the word "negligent" when incriminating money laundering (Art.400 CC) - i.e. money laundering offence is committed if a person neglects ('is unaware by negligence') the origin of proceeds.

State Parties, which opted to implement Art. 9 (3a), did it either by introducing specific provisions in the ML incrimination (i.e. in the article which establishes the offence and which is a part of a specific section of the Criminal Codes) or simply referring to the general part of the Criminal Code where a form of intention known as *dolus eventualis* is defined. On the other hand, States Parties, which opted to implement Art. 9 (3b), did it through a direct introduction of this provision in the definition of ML offence. In other words, 'ought to have known' is an element of an ML offence.

3. Examples where both requirements (9(3)(a) and(b)) are implemented

The 2019 Horizontal Review acknowledged that a number of States Parties implemented both requirements form the Article 9 (3) – a) and b).

In **Denmark,** money laundering is criminalised under article 290 of the CC which requires that the perpetrator had an intention to commit the crime, at the time when the offence was committed. However, according to the Danish legal principles and jurisprudence, the 'intention' manifests either when i) *the perpetrator has specific knowledge/positively intents to commit the crime,* ii) *the perpetrator considers certain circumstances as predominantly probable to exist* or iii) *the perpetrator considers the existence of certain circumstances as possible, and decides to act in a certain manner anyway*. Knowledge or suspicion inferred from the specific circumstances of the case may be enough to establish *mens rea*, and further knowledge about the predicate offences is not necessary. In addition, Denmark has an offence for money laundering involving gross negligence (Art. 303 CC), though this is restricted to a limited set of predicates, namely fraud and offences against property. This offence is used where it is not possible to prove an intent. Thus, if the perpetrator should have known (but did not know) that the property obtained was proceeds of crime, he/she can be charged with money laundering.

A similar approach was applied in **Germany**. Their criminal law system applies the general principle of *dolus eventualis*. This is a conditional intent or 'awareness of the likely outcome of an action', which makes it sufficient to establish an ML offence, if the perpetrator could have known that property originated from a predicate offence and nevertheless accepted that possibility. In addition, section 261(5) of the German Criminal Code provides that it is sufficient for a perpetrator to be 'recklessly unaware that property represents the proceeds of one of the listed unlawful acts'. The principle of *dolus eventualis* and notion of recklessness apply to all professional groups and activities, except for the criminal defence lawyer. For the origin of the lawyer's fee, reliable knowledge is required and may not be established by suspicion or negligence.

ISSUE: Practical implementation of the national provisions

The 2019 Thematic Monitoring Report on Article 9(3) observed that State Parties which implemented Art. 9(3) of the Warsaw Convention achieved better results with regard to the money laundering offence comparing to those that did not apply at least one of the elements ((a) or b) of

paragraph 3). Below are some good practice examples where money laundering convictions were achieved which included a lesser mental element:

- Hungary

A court in Hungary decided that six defendants had committed the money laundering offence, despite the fact that there was no evidence proving that they knew that the proceeds they dealt with were of a criminal origin. Namely, defendants were employed in a travel agency which was also providing currency exchange services. When performing these services, they were subject to the requirements of the AML/CFT regulations. Consequently, they were obliged to report any suspicious transaction on money laundering and/or financing of terrorism. For a two-year period, they exchanged a total of 1.1 billion HFU (around 3 million €) through 296 different transactions. They did not report any of these transactions as suspicious. Whilst noting a presence of a number of "red flags" in these transactions (and examples of these 'red flags' were also provided in the AML/CFT regulation) the court confirmed that, based on (i) the amount of money exchanged, (ii) the frequency of transactions and (iii) personal relationship established with the customers, the defendants ought to have assumed that, in some cases, proceeds/funds were of a criminal origin. Therefore, even in absence of clear evidence that the defendants had a firm knowledge that money derived from crime, the court found, based on objective, factual circumstances, the defendants guilty for negligent ML.

- Republic of Moldova

The large-scale money laundering case involved an ex member of the Moldavian Parliament. He was convicted for negligent ML. In this case, the former politician was a beneficial owner of two companies operating both nationally and internationally. One of the companies was a non-resident company based in the Principality of Liechtenstein. Both companies received money via bank transfers from the companies affiliated to a person involved in the so-called "fraud of the banking system". The pro-forma legal basis for these transfers were consultancy contracts. Money was then used to purchase equipment from offshore companies or for the reimbursement of loans. Whilst the court acknowledged that there was a lack of evidence indicating that the former politician and beneficial owner of two companies had firm knowledge that the origin of money was a banking fraud, it concluded that the defendant 'should have known' that the proceeds were of criminal origin. This decision was based on the fact that all of the companies that defendant had been cooperating with were affiliated to the same person, and that consultancy contracts were rather a formal cover than a real business relationship. In addition, the frequency of transactions made to his companies' accounts was another element, why the defendant should have known that money was proceeds of crime. The court found the former politician guilty for negligent ML. The total amount of the laundered property was around 700.000,00 €

ISSUE: The scope of the mental element and the means of proving it ('inferring the knowledge from objective, factual circumstances")

Both the Warsaw Convention's Article 9 (2c) and the FATF Recommendation 3 (criterion 3.8) provide that the intent and knowledge required to prove the ML offence may be inferred from objective and factual circumstances. However, these provisions must not be confused with the provision under Art.9(3) which specifically refers to the nature and degree of *mens rea* that has to be proven. While the two requirements are obviously different, they are not alternative and can well be simultaneously present in the same legal provisions (and factual circumstances). The lesser knowledge (suspicion) could also be inferred from objective factual circumstances.

Article 9(2) indicates that conviction can be established even in the absence of a confession by a perpetrator, by inferring the required mental element from objective, factual circumstances. However, the intention/knowledge has to be proved. Some delegations argued, in the course of discussion of the Thematic Monitoring Report on Art.9(3) that inferring the knowledge from objective, factual circumstances indicates that the lesser threshold of evidence is required and thus Art.9(3) may be considered applicable though this provision. These explanations were not considered valid. The mental elements in Article 9, paragraphs 2 and 3 are different – the former requires knowledge and the latter requires suspicion/negligence. In both cases, a means to establish a mental element is its inference from objective, factual circumstances (even in the form of *dolus eventualis*).

The convenient way to illustrate an inference of knowledge from objective, factual circumstances is provided in a case study presented below:

A person MM was found guilty for ML. He opened and maintained a bank account with the amount of around 18.000 euros. At the time of the opening of the bank account the person made a false declaration about the origin of money stating that it was acquired through sale of a real estate. The court established that the person had no legal incomes, nor property registered on his name. At the same time, the authorities received information from their foreign counterpart about the illegal financial transactions made by the criminal group, including activities to carry out bank transfers through unauthorized e-banking access to different accounts, including to the account of person MM. The factual circumstances proving that the person MM had knowledge that the money is proceeds of crime are the following: the accused person opened a bank account prior to the transfer of illicit funds; he made a false declaration about the origin of the money received; after receiving the money, he immediately withdrew them in cash.

In this case, the court had to prove *mens rea* – that the perpetrator **knew** that the proceeds were of a criminal origin. The objective factual circumstances helped the court in establishing this fact. In other words, the court did not look for evidence proving that the perpetrator suspected or should have known that the proceeds were of a criminal origin, but for evidence proving that he knew about the illegal origin of the funds. The court succeeded in proving the latter not through a direct evidence, but through circumstantial evidence, establishing the facts by analysing the objective, factual circumstances as listed above. It needs to be emphasised that the Convention does not prevent using the same means to infer the lesser mental element of the notion “suspected or should have known”. Therefore, the difference between the two cases should not be construed to convey that the two aspects (level of knowledge of a perpetrator vs means of proving it) are alternative or opposed to each other.

In contrast, a typical example of ML as established in Article 9(3) of the Convention would exist in case a person uses a bank account of a relative (husband, wife, brother, sister, very close friend or business associate, etc.) upon the approval of the account holder and with a purpose to launder the proceeds. If a person is known to the account holder as someone prone to criminal activity, then there is an assumption that the account holder either suspected or should have known that his/her account could be used for laundering purposes. If, despite this fact, the account holder still approves a person to use the bank account, and a laundering activity occurs, the court then needs to prove that the account holder either **suspected or should have known** that the person who used the holder’s account was generating funds from illegal activities. Then the charges against the account holder for negligent ML could be confirmed. It is important to note the difference between this example and the one above (‘knew that the proceeds were of a criminal origin’ on one side, versus ‘suspected or should have known that the proceeds were criminal’ on the other and as provided by Art.9(3)). Consequently, the scope of the mental

element, extended to “suspicion”, and the range of means for proving it (objective factual circumstances), while of course different, can both concur to determine a broad range of the ML offence and should both be considered during the monitoring procedures.