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Legislative Gaps in the Anti-Money Laundering Policy of the Republic of Uzbekistan.

Akhadjon Yuldoshev
Student of the Tashkent State University of Law,
faculty of «Criminal Justice»

Abstract: The present work analyzes some of the gaps in the national policy of the Republic of Uzbekistan in the field of combating the crime of money laundering. The article highlights the negative consequences of the lack of criminalization of insider trading and market manipulation, and some issues surrounding initiating criminal investigation of the crime of money laundering. It is concluded that if the Republic of Uzbekistan aims to have a strong national anti-money laundering policy, it needs to comply with the international standards of the inter-governmental organization FATF (Financial Action Task Force).

Keywords: money laundering, insider trading, market manipulation, crime, law, legalization, mutual legal assistance.

In the modern world, criminals have developed more sophisticated ways of generating income than ever before. As the direct use of income generated from criminal activity can arouse suspicion of the law enforcement agencies, it comes to criminals to clean these proceeds from «dirt», that is, to «launder». Money laundering, the scientific name of which is characterized as «money laundering», is becoming almost mandatory for criminals who have a stable criminal income. They have to look for various ways and schemes for legalizing their income in order not only to be able to use these "clean funds" for personal purposes, but also to finance current criminal activities. In order to counteract this criminal act, each country must have a strong national anti-money laundering system.

This is what the FATF calls for - an inter-governmental organization that sets world standards in the field of combating money laundering and the financing of terrorism. These standards in the form of «recommendations» help the countries to construct their national anti-money laundering and combatting the financing the terrorism (AML/CFT) policies.

In general, the investigation of crimes in the form of money laundering (ML) can be divided into two stages. First of all, we must detect the associated «predicate» offence, which is the initial to the subsequent criminal act - ML, which generates criminal income, which will, consequently, serve as the subject of money laundering. Take drug-trafficking, for example. This is a crime that results in a criminal having the proceeds of crime, which should further be "laundered". Hence, drug-trafficking is considered a predicate offence. Next, after detecting and investigating these proceeds-generating offences, law enforcement agencies conduct a parallel financial investigation to detect signs of money laundering, in accordance with FATF Recommendation № 30.

Further, we may have a question: "Which crimes should be recognized as predicate offence and which ones should not?". So, in accordance with the FATF Recommendation № 3, countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Therefore, countries should recognize as predicate all serious crimes that as a result generate some income.

Many countries use a «threshold» approach to determine whether a particular offense is a predicate offence. For countries applying a minimum threshold, predicate offences should comprise all offences that are punished by a minimum penalty of more than one year's imprisonment. In other words, if the minimum penalty for a particular crime is one year's imprisonment, then that crime would be considered a predicate crime in this country.

In our opinion, absolutely all crimes that generate income should be recognized as predicate. This will expand the range of predicate offenses for which law enforcement agencies are required to conduct a parallel financial investigation, thus making the numbers of criminal investigations on money laundering increase.

However, the FATF has a list of predicate offenses («designated categories of offences») that countries are encouraged to criminalize in their jurisdictions.

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The FATF recommends the countries to find these «designated categories of offences» below as predicate offences in their legislation:

- 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 (for example, criminal harvesting, extraction or trafficking of protected species of wild fauna and flora, precious metals and stones, other natural resources, or waste);
- 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 and indirect taxes);
- extortion;
- forgery;
- piracy;
- insider trading and market manipulation.

The Republic of Uzbekistan considers any crime included in the national Criminal Code as a predicate for money laundering if it results in generating proceeds. It criminalizes all «designated categories of offences» established by the FATF, with the exception of insider trading and market manipulation.

Before proceeding to look at the disadvantages of the lack of criminalization of the above acts, we propose to begin with understanding the essence of insider trading and market manipulation.

The following question may arise: “Who is an insider anyway?” So, as an “insider” we usually think of a person who has “internal” confidential information that is known only to a certain circle of people.

According to International Financial Reporting Standards, insider information means a certain information that is not publicly available at the time of its use and may, when disclosed, have a certain impact on commodity prices.

When it comes to defining the insider trading, it means an operation or a sequence of operations using the insider information, which leads to illegal profit, avoidance of losses or another benefit for the insider.

We propose to examine a trading proceeded with help of insider information in the following example. Let’s say, there are two companies, A. and B., who have been cooperating for many years. The larger company A has decided to terminate the joint contract and the business relationship with the smaller company B. This decision to terminate the relationship is not immediately known. It would be first discussed between representatives of both companies, the solutions would be sought to eliminate problems if such a circumstance served as a reason for terminating relations. In addition to negotiations between representatives, this decision is also discussed within each company by the senior management, top managers, etc. And the information received by these persons during the discussion will be considered insider information. We may have the following question: “And what could this information give an insider?” A board member of the company B., having discovered that company A., with greater market power, is preparing to terminate relations with his company B, will try to sell his shares at the current price, because after the announcement of the news about the termination of relations between companies A. and B., the share price of the smaller company B. may fall. Hence, this insider information would enable the board member of the company B. to avoid potential losses.

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Even information about bringing the head of the company to criminal liability can also negatively affect the share price. In addition, the news about the company's planning for a large transaction can also increase share prices. Transactions using such confidential and yet unknown to the public, information by insiders should be recognized as unlawful. Why? Because insiders make transactions with financial instruments using «private sensitive» information, thereby gaining an advantage over other market participants, especially over the rest of the shareholders of company A., who have not yet had access to this information.

Further, we propose to examine the criminalization of the above acts in foreign countries.

So, insider trading and market manipulation are recognized as crimes in the Russian Federation.

Article 185.6 of the Criminal Code of the Russian Federation criminalizes the deliberate use of insider information with the purpose of executing transactions in financial instruments, foreign currencies and/or commodities related to such information at own expense or at the expense of a third party, as well as the deliberate use of insider information by means of advising, obligating or otherwise disposing third parties to purchase or sell instruments, foreign currencies and/or commodities, in cases when such actions have inflicted large-scale damage on citizens, organizations or the state or are associated with the generation of income or with the avoidance of losses on a large scale.

With regard to the next wrongful act of market manipulation, liability for it is described in the Article 185.3 of the Criminal Code of the Russian Federation, according to which, market manipulation is understood as the deliberate dissemination of information known to be false through mass media, including electronic and information telecommunication networks (for instance the internet) or the realization of transactions in financial instruments, foreign currencies and/or commodities or the other deliberate actions prohibited by the legislation of the Russian Federation on countering the illegal use of inside information and market manipulation if such illegal actions have caused the price of, a demand for, the supply of, or the amount of trading in, financial instruments, foreign currencies and/or commodities to diverge from the level or have been maintained at a level substantially different from the level which would have prevailed without account being taken of aforesaid illegal actions, and also if such actions have inflicted a large-scale actual loss to citizens, organizations or the state or are associated with the receiving of an excessive income or with the avoidance of losses on a large scale

Next, it is worth considering the attitude of the European Union towards these crimes.

In order to ensure the security of the European financial market, on 28 March 2003, there was adopted a Directive 2003/6/EC of the European Parliament and of the Council of the European Union on the use of insider information in the trading process and market manipulation (market abuse), dedicated to two offenses - insider trading and market manipulation - jointly referred to as «market abuse». In our opinion, the objective of the Directive was to increase the level of investor confidence in the market by prohibiting persons possessing insider information from using it in illegal purposes and by prohibiting the dissemination of false information and transactions leading to price deviations from the normal level.

In accordance with Article 1 of the Directive 2003/6/EC, «inside information» shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments»[1].

With regard to market manipulation, the article 2 of the Directive 2003/6/EC defines the concept of «market manipulation», which should be understood as:

a) transactions or orders to trade:

- which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or

- which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;

[1] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) // Official Journal L 096, 12/04/2003. P. 0016-0025

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(b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;
(c) dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed, without prejudice to Article 11, taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.
Having considered the world practice, we can state that acts in the form of insider dealings and market manipulation are criminalized in many countries. We believe that the criminalization of these acts will drastically reduce the risks of market abuse and create conditions for the normal functioning of the market, because these violations impede market transparency and undermine investor confidence in the exchange.

Consequences of the lack of criminalization of insider trading and market manipulation in the Republic of Uzbekistan

The lack of criminalization - the non-recognition of insider trading and market manipulation as criminal acts, poses significant obstacles not only to the implementation of the country's domestic policy in the field of combating money laundering and terrorist financing, but also in the field of international cooperation.
To begin with, let us consider the disposition of Article 243 of the Criminal Code of the Republic of Uzbekistan, according to which, the money laundering means legalization of income received from criminal activities, that is a transfer, conversion, or exchange of property, which has been obtained in result of criminal activities, as well as non-disclosure or concealment of original nature, source, location, way of disposal, movement, genuine rights in relation to the property or ownership thereof in the instance if such property has been obtained as a result of criminal activities.
We can find the vulnerability regarding the lack of criminalization of insider trading and market manipulation in the following norm of the legislation of the Republic of Uzbekistan. According to the clarifications contained in paragraph 2.1 of the Resolution of the Plenum of the Supreme Court «On some issues of judicial practice in cases of legalization of proceeds from crime» on February 11, 2011 № 1, «the subject of the crime of money laundering are proceeds from criminal activity, as well as any profit or benefit derived from the use of such property, as well as converted or converted in whole or in part into other property or attached to property acquired from legal sources»[2].
In other words, in order to initiate a criminal investigation on the legalization of income, it is necessary to establish that the money or other property has been derived from a criminal offence.
Based on this, we can conclude that if the legislation of the Republic of Uzbekistan does not recognize market manipulation and insider transactions as crimes, then the income received from the commission of such acts cannot be recognized as «proceeds from criminal activity», therefore, if a person decides legalize these incomes, then it is impossible to initiate a criminal case on legalization of income (Article 243 of the Criminal Code), since the object of the crime of legalization of income will be absent.
As we noted, the lack of criminalization also negatively affects international cooperation, namely in the field of mutual legal assistance between the Republic of Uzbekistan with foreign states. Mutual legal assistance can be characterized as the performance of certain investigative and procedural actions by the competent authority of one state at the request of the competent authority of the foreign state, such as search, seizure, interrogation, etc.
The procedure for mutual legal assistance is described in the Criminal Procedure Code, in Article 595 of which it is indicated that the court, prosecutor, investigator, interrogating officer execute the request submitted to them in the prescribed manner for the performance of procedural actions received from the relevant competent authority of a foreign state, in accordance with international treaties of the Republic of Uzbekistan or on the basis of the principle of reciprocity.

[2] https://lex.uz/docs/5471384

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As we know, money laundering is a transnational crime which can be committed in two or more countries. For example, a certain person commits a predicate crime in a foreign state, and the proceeds received as a result of committing these crimes for the purpose of legalization transfers through wire transfer to another country - the country for money laundering. This method of money laundering is very common among criminals who have a stable criminal income. Once the proceeds of crime are transferred to the foreign country, a wide range of financial transactions might take place there: funds are invested in long-term assets, the statutory funds of firms opened for nominees could be replenished, and then returned to the country where the predicate offense was committed. «Such a return is usually made in the form of loans to the enterprises of criminals, but by controlled nominees; acquisition of a share in the authorized capital of existing enterprises or the creation of new organizations with the participation of non-residents of the transfer back to the country where the crime was committed»[3]. In the final stage, after laundering, the funds can be invested in the development of legal business in any country in the world, but in the form of foreign investment in the restaurant business, casino, pawnshop, hotel business, etc.

And what will happen if a person commits a crime in the form of insider trading and market manipulation in a foreign state, and transfers the proceeds from these crimes to Uzbekistan for laundering purposes? As we mentioned above, in accordance with FATF Recommendations № 30, when considering cases of predicate offenses, law enforcement agencies are required to conduct, on their own initiative, a parallel financial investigation. In the course of conducting a parallel financial investigation into insider trading and market manipulation, law enforcement agencies of a foreign state will find that the cash flow of criminal proceeds was transferred to a bank account of a bank institution located on the territory of Uzbekistan, which may indicate a money laundering attempt.

To establish the fact of money laundering, law enforcement agencies of a foreign state must conduct criminal prosecution on the territory of Uzbekistan, but as we know, foreign law enforcement agencies do not have jurisdiction to conduct criminal prosecution on the territory of Uzbekistan, they have to send requests to carry out «for them» certain procedural actions as part of a criminal investigation. This is the whole point of the mutual legal assistance – so that countries can help each other in terms of criminal investigation in the most effective way possible.

The basis for fulfilling the request of a foreign state is the criminalization of the act in our state, in connection with which the request was received. That is, a crime for the investigation of which mutual legal assistance is required should be recognized as a crime on the territory of the Republic of Uzbekistan.

But it is worth noting that the legislation of the Republic of Uzbekistan does not contain special conditions for the provision of mutual legal assistance in terms of dual criminalization of the act in connection with which the request was received. In other words, there is no indication of the dual criminalization of an act as a basis for refusing to execute a request.

The only reason for returning a request without execution is the contradiction of the request with the legislation of the Republic of Uzbekistan or if its execution may harm the sovereignty or security of the Republic of Uzbekistan, in accordance with part 7 of an article 595 of the Code of Criminal Procedure of the Republic of Uzbekistan.

At the same time, paragraph 3 of Joint Directive «On further improvement of work in sending requests to foreign countries for the production of procedural actions in criminal cases and the execution of similar requests from foreign countries», adopted by the Prosecutor General's Office, the Ministry of Internal Affairs, the State Security Service, the Supreme Court, the National Guard and the State Customs Committee of the Republic of Uzbekistan № 35/28-21/30kk/4/01-02/17-30/6 of 04.05.2021 establishes that the request of the competent authority of a foreign state in cases where it concerns an act that is not recognized as a crime under the legislation of the Republic of Uzbekistan, the competent authorities must ensure its execution to the extent that the requested assistance is possible **without the use of coercive measures.** Consequently, investigative and procedural actions such as arrest, detention, house arrest, and other actions of a coercive nature cannot be performed.

[3] S.M. Magomedov, M.V. Karataev. «Modern models of money laundering and ways to counter». *ВЕСТНИК РАЕН. Том 17 №1, 2017. – p. 14*

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Therefore, if a person commits crimes in the form of insider trading or market manipulation on the territory of a foreign state, and for the purpose of legalization sends proceeds of crime to Uzbekistan, and in the event of a request from a law enforcement agency of a foreign state to perform procedural actions, the fact that insider trading and market manipulation are not criminalized on the territory of the Republic of Uzbekistan will limit the comprehensiveness and completeness of the execution of the request by the competent authorities of the Republic of Uzbekistan, because, as we noted above, the implementation of some procedural actions is limited if there is no double criminalization of the act.

Issues of initiating a criminal investigation on the crime of money laundering

Article 243 of the Criminal Code prohibits the legalization of income received from criminal activities, that is a transfer, conversion, or exchange of property, which has been obtained in result of criminal activities, as well as non-disclosure or concealment of original nature, source, location, way of disposal, movement, genuine rights in relation to the property or ownership thereof in the instance if such property has been obtained as a result of criminal activities.

A controversial element of an article 243 of the Criminal Code to which we drew attention is the requirement for a criminal to have a criminal conviction for a predicate offense in order for the law enforcement authorities to initiate a criminal investigation.

The rationale for this is the paragraph № 4 of the Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan «On some issues of judicial practice in cases of legalization of proceeds from crime» on February 11, 2011 № 1, according to which, «the conclusion of the court, on the criminal nature of the origin of funds or other property, along with other materials of the criminal case, may be based on:

1) a guilty verdict in the case of the main crime;

2) a decision of the preliminary investigation body or a court ruling to dismiss the case on the main crime on the grounds provided for in Article 84 of the Code of Criminal Procedure (rehabilitating grounds for terminating the criminal case without resolving the issue of guilt), if the materials of the criminal case contain evidence indicating the presence of an event and the composition of the main crimes»[4].

This statement contradicts the Interpretive Note to FATF Recommendation № 3, according to which, «when proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence»[5]. In other words, it is not necessary to have a court conviction in relation to the main predicate (proceeds-generating) offence to initiate a criminal investigation on money laundering.

Based on this, for the most complete compliance with the FATF requirements for combatting money laundering, we would propose the following scheme for changing paragraph № 4 of the Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan «On some issues of judicial practice in cases of legalization of income received from criminal activity» on February 11, 2011 № 1:

Current edition:	**Recommended edition:**	**Rationale:**
The conclusion of the court on the criminal nature of the origin of funds or other property, along with other materials of the criminal case, may be based on: 1) a guilty verdict in the case of the main crime; 2) a decision of the preliminary investigation body or a court ruling to dismiss the case on the	The conclusion of the court on the criminal nature of the origin of funds or other property, along with other materials of the criminal case, may be based on: **1) The presence of an initiated criminal investigation in relation to the main crime;** 2) a guilty verdict in the case of the main crime;	EXPLANATORY NOTE TO RECOMMENDATION 3 (CRIME OF MONEY LAUNDERING): Proving that property is the proceeds of crime should not require a conviction persons for a predicate offence.

[4] https://lex.uz/docs/5471384

[5] FATF (2012-2022), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France,
www.fatf-gafi.org/recommendations.html

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main crime on the grounds provided for in Article 84 of the Code of Criminal Procedure, if the materials of the criminal case contain evidence indicating the existence of an event and elements of the main crime.	3) a decision of the preliminary investigation body or a court ruling to dismiss the case on the main crime on the grounds provided for in Article 84 of the Code of Criminal Procedure, if the materials of the criminal case contain evidence indicating the existence of an event and the elements of the main crime.	

The recommended edition would allow the law enforcement authorities to initiate criminal investigations on money laundering during the investigation of an associated predicate offence.

Our argument can be supplemented by the indications of the experts in the Mutual Evaluation Report of the Republic of Uzbekistan: «The Republic of Uzbekistan should review its practice (with the adoption, if necessary, of the relevant legislative provisions) in order to ensure the possibility of criminal prosecution for money laundering, regardless of criminal prosecution for the predicate offence»[6].

This report is the evaluation of measures taken by the Republic of Uzbekistan to combat money laundering and the financing of terrorism conducted by EAG (Eurasian group on combating money laundering and financing of terrorism) experts from June 14 to July 2, 2021. The report presents conclusions on the compliance of the legislation of the Republic of Uzbekistan with the FATF Recommendations, as well as the effectiveness of the functioning of the national AML /CFT system. The report contains recommendations of experts aimed at improving and strengthening the AML/CFT system of Uzbekistan, increasing the effectiveness of measures taken by the competent authorities to combat money laundering and terrorist financing.

Conclusion

In our opinion, the current practice in qualifying not only makes it difficult to initiate a criminal investigation, but in general is the most noticeable gap in the national policy of the Republic of Uzbekistan to combat money laundering.

The Republic of Uzbekistan needs to comply with the FATF Recommendations to prevent money laundering operations as those operations represent the direct threat to the country's economy, because they may decrease the country's market attractiveness for future investments or worse - turn it into a favorable place for market abusers.

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