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CHAPTER 8
PROOF OF LEGALIZATION (LAUNDERING) OF PROCEEDS OF CRIME

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INTRODUCTION

Ukraine's integration into international legal and economic processes has determined the need to bring its national standards in line with international requirements in these areas. In the conditions of the growth of organized crime, especially in the economic sphere, the improvement of criminal-procedural theory, investigative, operative-search, and judicial practice in one of the key areas of activity of law-enforcement authorities – counteraction to legalization (laundering) of proceeds of crime is of paramount importance. The international experience of the fight in this direction convincingly shows that combating the legalization of criminal incomes is a prerequisite for stabilizing the country's economy, identifying and confiscating the money laundered.

The state of investigation of this category of crimes is significantly influenced by the high latency of this type of crime, the hidden mechanisms of legalization with the corresponding financial operations, the composition of criminal groups specializing in this crime with a differentiated division of roles, the lack of effective mechanisms for tracking "dirty" financial flows abroad, the most acute shortage skilled personnel of law enforcement authorities to fight these crimes, a sharp shortage of appropriate methodological support for the processes of detection and investigation of these crimes. And this is just a part of the problems, which significantly hinder the progress in detecting and disclosing the facts of money laundering.

8.1. Theoretical fundamentals of proof

In light of the adoption of a new Criminal Procedural Code of Ukraine in 2012, the criminal process underwent conceptual changes in the investigation process – the commencement of criminal proceedings, the order of conducting separate investigative (search) activities, secret

investigative (search) activities, investigator's powers, etc. These changes have become the driving force for a new round of scientific research of problems of proof in the criminal process.

The study of evidence and proof problems has always been a central theme in the science of the criminal process. General issues of criminal-procedural proof, from the viewpoint of criminal law and process, criminalistics, criminology, and operative-search activity were investigated in the writings by such domestic scientists as K. V. Antonov, V. P. Bakhin, V. I. Halahan, O. F. Dolzhenkov, V. K. Lysychenko, L. M. Loboiko, Ye. D. Lukianchykov, M. A. Pohoretskyi, M. V. Saltevskyi, L. D. Udalova, and others[1]. However, so far such fundamental issues remain debatable in the science of the criminal process as criminal-procedural knowledge and criminal-procedural proof, the establishment of the content of proof, the time of recognition of a certain object evidence, the importance of criminology in the process of proof, etc., which, in essence, determine the direction of criminal-procedural activity.

The analysis of scientific sources shows that in most cases, the authors understand the process of proof in the criminal process as activities that are carried out in the manner prescribed by law, aimed at the collection, verification, and evaluation of evidence and their procedural sources, as well as the formulation on this basis of certain theses and arguments for their justification[2]. According to Part 2 of Art. 91 of the CPC of Ukraine, the proof is to collect, verify, and assess evidence in order to establish circumstances relevant to criminal proceedings.

The pre-trial investigation and the system of norms governing this institution in civilized countries are based on two models of proving. The first model is clear and based on norms that clearly regulate the procedure for collecting and using evidence, provide explicitly the duty of investigative bodies to comprehensively, fully, and objectively examine the circumstances of the crime. Regardless of the clearness for the investigator (the presence (absence) of the fact of crime and the possibility of obtaining information that gives reason to suspect a person), the investigation under the rules of clear proof is aimed at collecting evidence for trial.

[1] Kovalenko Ye. H. Kryminalnyi protses Ukrainy: Pidruchnyk. / Kovalenko Ye. H., Maliarenko V. T. – K.: Yurinkom Inter, 2004. – S. 325; Kostin M. I. Dokazuvannia i suchasna model kryminalnoho sudochynstva / M. I. Kostin // Ekonomika, finansy, pravo. – 2003. – № 4. – S. 36; Loboiko L. M. Kryminalno-protsesualne pravo. Kurs lektsii : [navch. posib.] / Loboiko L. M. – K. : Istyna, 2005. – S. 54; Udalova L. D. Kryminalnyi protses Ukrainy. Zahalna chastyna : [pidruch.] / L. D. Udalova. – K. : Kondor, 2005. – S. 65.

[2] Udalova L. D. Kryminalnyi protses Ukrainy. Zahalna chastyna : [pidruch.] / L. D. Udalova. – K. : Kondor, 2005. – S. 43.

The second model (France, Sweden, Belgium, Denmark) – a model of free proof, which is essentially a preparation for proving in court, and evidence gathering has been replaced by the search for information carriers that can become evidence only in court proceedings. The purpose of the pre-trial investigation is to determine the probability of establishing facts in court on the basis of data collected during the pre-trial investigation, which have no evidentiary value.

With the adoption of the CPC, the Ukrainian criminal proceeding approximated the second model of pre-trial investigation, in which the evidence gathered during the pre-trial investigation is not taken into account by the court during the trial, with the exception of individual cases. Article 3 of the CPC of Ukraine sets the task of ensuring a prompt, complete, and impartial investigation and judicial review, however, according to Part 1 of Art. 214, "the investigator, the prosecutor immediately, but not later than 24 hours after the submission of the application, notification of a criminal offense, is obliged to enter the relevant information into the Unified Register of Pre-trial Investigations and to launch an investigation." Consequently, it is necessary to comprehensively, fully, and impartially examine all the circumstances of the criminal proceedings set forth in any statement and notification of a criminal offense since any of them is subject to registration and investigation in accordance with the stated principles[3].

8.2. Substantiation of the circumstances to be proved

Part 1 of Article 91 of the CPC of Ukraine establishes circumstances to be proved in a criminal proceeding[4], the totality of which is generally considered to be a general subject of proof, the establishment of which is necessary for the resolution of applications and notices of crime, criminal proceedings in general, or litigation at the execution stage of the sentence, as well for the adoption of procedural preventive measures[5].

[3] Zinchenko Ye. Sproba sumistyty v novomu kryminalnomu protsesualnomu zakoni rizni modeli dokazuvannia mozhe pokhytnuty pryntsypy sudochynstva [Elektronnyi resurs] / Ye. Zinchenko // Zakon i Biznes. – 2013. – Rezhym dostupu do resursu: http://liberal.in.ua/tochka-zoru/sproba-sumistiti-v-novomu-kriminalnomu-protsesualnomu-zakoni-rizni-modeli-dokazuvannya-mozhe-pochitnuti-printsipi-sudochinstva.html.

[4] Kryminalnyi protsesualnyi kodeks Ukrainy : vid 13.04.2012 r., № 4651a-17 [Elektronnyi resurs]. – Rezhym dostupu: http://zakon2.rada. gov. ua/laws/show/4651-17.

[5] Mykheienko M. M. Kryminalnyi protses Ukrainy: Pidruchnyk / M. M. Mykheienko, V. T. Nor, V.P. Shybiko. – 2-e vyd., pererob. i dop. – Kyiv: Lybid, 1999. – S. 132

In a separate criminal proceeding, the circumstances included in the facts to be proven are specified and individualized, that is, there is a specific fact to be proven, which is determined by the general notion of a crime and by the features of particular elements, set forth in one or another article of the Special Part of the Criminal Code of Ukraine. When investigating a particular fact in proof, both an unjustified restriction and an exorbitant expansion of its constituent elements are considered unacceptable. After all, by establishing the range of facts that must be known during the investigation of criminal proceedings, the law thereby prohibits perceiving circumstances not specified in Art. 91 of the CPC of Ukraine by criminal procedural means[6].

During the proof of legalization (laundering) of proceeds of crime, one should pay attention to a number of peculiarities.

First, the mandatory condition is to identify and prove the connection of the legalization (laundering) of proceeds of crime with the main criminal activity. An indication in the wording of Art. 209 of the CC of Ukraine of a criminal way of obtaining legalized proceeds sets for the investigative units a rather difficult task of proving this circumstance. This actually means that criminal proceedings initiated under these articles can be investigated only in conjunction with a criminal proceeding on the substantive (predicate) crime, which resulted in the receipt of money or other property.

The current criminal law of Ukraine provides that the legalization (laundering) of proceeds of crime is a commission of a financial operation or a transaction with funds or other property obtained as a result of the commission of a socially dangerous unlawful act preceding the legalization (laundering) of the proceeds, as well as the commission of actions, intended to conceal or disguise the illegal origin of such funds or other property or possession of them, rights to such funds or property, sources of their origin, location, movement, change in their form (conversion), and also the acquisition, possession or use of money or other property obtained as a result of the commission of a socially dangerous illicit act that preceded the money legalization (laundering).

A socially dangerous unlawful act preceding the money legalization (laundering) in accordance with this article is an act for which the CC of

[6] Ilchenko S. Yu. Lehalizatsiia (vidmyvannia) dokhodiv, oderzhanykh zlochynnym shliakhom: protsesualni problemy dosudovoho rozsliduvannia ta shliakhy yikh podolannia / S. Yu. Ilchenko // Kryminalne pravo Ukrainy. – 10/2006. – № 10. – S. 33.

Ukraine carries basic punishment in the form of imprisonment or a fine of more than three thousand tax-free minimum incomes, or an act committed outside of Ukraine if it is recognized as a socially dangerous unlawful act preceding the money legalization (laundering), under the criminal law of the state where it was committed, and is a crime under the Criminal Code of Ukraine and a consequence of which is illegally obtained income[7].

The above provisions became the cause of a scientific discussion. The analysis of scientific research on this issue and the practice of investigation of criminal proceedings give grounds for distinguishing the following points regarding the procedural importance of the fact of committing a predicate crime for bringing the perpetrators to justice and further investigating the legalization (laundering) of proceeds of crime.

In that way, the first opinion is that there is no need to take into account a predicate crime when bringing to liability for money legalization (laundering). In particular, O. O. Dudorov notes that for the application of Art. 209 of the CC of Ukraine, "awareness of the guilty of the fact that he commits actions with property acquired in a criminal way" is sufficient[8]. The same position is shared by other authors, noting that the current activity on the legalization of shadow incomes is sufficiently separated from criminal activities on extracting such income. In this regard, such an activity may be considered as an independent basis of responsibility irrespective of the responsibility for the offense, which is a means of extracting illegal income. Such a decision has also a preventive role of measures to fight the legalization of shadow incomes in relation to crimes that are the source of illegal income[9].

Another point of view is that the prosecution under Art. 209 of the CC of Ukraine is possible only in the presence of a court sentence, by which a person has been convicted for committing the so-called "substantive" crime, as a result of which the person has got a movable or immovable property, property and non-property rights[10]. Such a position is based on the interpretation of the constitutional principle of the presumption of

[7] Kryminalnyi kodeks Ukrainy vid 5 kvitnia 2001 r. // Vidomosti Verkhovnoi Rady Ukrainy. – 2001. – № 25-26. – St. 131.

[8] Naukovo-praktychnyi komentar Kryminalnoho kodeksu Ukrainy vid 5 kvitnia 2001 roku / Za red. M. I. Melnyka, M. I. Khavroniuka. – Kyiv: Kanon, A.S.K., 2002. – S. 548.

[9] Gryaznye den'gi i zakon // Pravovye osnovy bor'by s legalizatsiey prestupnykh dokhodov / pod obshch. red. E. A. Abramova; sost. B. C. Ovchinskiy. – M: Arsis, 1994. – S. 11.

[10] Alyev V. M. Uholovnaia otvetstvennost za lehalyzatsyiu (otmыvanye) denezhnыkh sredstv yly ynoho ymushchestva, pryobretennыkh prestupnыm putem / V. M. Alyev, Y. L. Tretiakov // Rossyiskyi sledovatel. – 2002. – № 5. –S. 13.

innocence, formulated in Art. 63 of the Constitution and Art. 17 of the CPC of Ukraine. As you know, the main content of this guiding principle is that a person is considered to be innocent of a criminal offense and cannot be subjected to criminal prosecution until the guilt is proved and established by the judgement of conviction of the court, which has become legally valid.

That is why some scholars believe that the proceedings under Art. 209 of the CC of Ukraine must be commenced only subject to the entry into force of conviction for the predicate crime, that is, the "criminal way" of obtaining income must be finally legally recognized in each particular case. This, in particular, is noted by V. M. Popovych[11].

Thus, the supporters of this position believe that the prosecution for legalization (laundering) of proceeds of crime is impossible if there is no conviction in the so-called "substantive" crime, which is a source of income intended for laundering, as it is contrary to the principle of presumption of innocence. However, it is obvious that the requirement of a mandatory conviction for a substantive crime would greatly complicate the termination and investigation of "laundering" [12].

Other scholars believe that in order to prosecute on the fact of legalization, a suspicion of pre-trial investigation bodies in committing a predicate crime is sufficient[13]. Art. 276 of the CPC of Ukraine states that if there is sufficient evidence to suspect a person of a criminal offense, the investigator or prosecutor informs the person about the suspicion of committing a crime. That is, if there is sufficient evidence indicating that a crime has been committed by a certain person, the investigator or prosecutor makes a written notice of an action.

At first glance, the notice of an action may indicate that the investigation of the circumstance in proof in a particular criminal proceeding has been completed. But at the time of notice of suspicion, it is prematurely to assume that the task of criminal proceedings for a full investigation, defined in Art. 2 of the CPC of Ukraine, is done, as the arguments of the suspect have not yet been heard and checked, after that investigation of the circumstances of the criminal proceedings should be

[11] Popovych V. M. Ekonomichno-kryminolohichna teoriia detinizatsii ekonomiky: monohrafiia / V. M. Popovych. – Irpin: Akademiia DPA Ukrainy, 2001. – S. 397.

[12] Arkusha L. I. Lehalizatsiia (vidmyvannia) dokhodiv, oderzhanykh u rezultati orhanizovanoi zlochynnoi diialnosti: kharakterystyka, vyiavlennia, rozsliduvannia : monohrafiia / L. I. Arkusha. – Odesa : Yurydychna literatura, 2010. – S. 227.

[13] Naukovo-praktychnyi komentar do Kryminalnoho kodeksu Ukrainy / Pid zahalnoiu red. Potebenka M. O., Honcharenka V.H. – Kyiv: Forum. – 2001. – U 2-kh chastynakh. – Osoblyva chastyna. – S. 305-307.

continued and, therefore, the decision of the investigator or prosecutor regarding the guilt of the suspect cannot be final. Therefore, the fact of notice of suspicion does not mean that the study of the fact in proof is complete. In view of this, the statement by M. Ye. Shumylo, who observes that proving in the criminal proceedings ends with the verdict of the court, is fair and true. In the opinion of the said author, until the proof is completed, "knowledge of the existence of criminal law relations will be more or less probable, which does not preclude the formation of new knowledge about their absence" [14].

Researchers adhere to another opinion, arguing that a pre-trial investigation of the legalization (laundering) of proceeds of crime is justified when a predicate crime is already being investigated[15]. One of the important arguments in favour of this position is the fact that from the moment of the commission of the crime envisaged in Art. 209 of the CC of Ukraine, the entry into force of a sentence for a predicate crime can take a significant amount of time, which makes it impossible to trace and seize the proceeds of crime.

One of the mandatory conditions for the qualification of an act on the grounds of committing a crime under Art. 209 of the CC of Ukraine is a criminal way of obtaining income. In view of this, it is advisable, in parallel with the investigation of the substantive crime, to investigate the circumstances of the money laundering. A separate investigation of each of these proceedings is a complex and independent process, during which a lot of time is spent on conducting a large number of investigative (search) actions, complex forensic examinations, and execution of requests for legal aid outside the country.

The analysis of criminal proceedings on economic crimes gives grounds for concluding that the legalization of criminal proceeds is a necessary element of certain technologies of criminal enrichment. Organized criminal groups do not commit single crimes but aggregates (complexes) of various, though linked by one purpose, crimes, in which money laundering plays an important role in concealing, preservation from the seizure of illegally gained funds and property (income). Therefore, the investigation of crimes envisaged by Art. 209 of the CC of Ukraine, is

[14] Shumylo M. Ye. Reabilitatsiia v kryminalnomu protsesi Ukrainy: Monohrafiia / M. Ye. Shumylo. – Kharkiv: Arsis, 2001. – S. 135.

[15] Klepitskiy I. A. «Otmyvanie deneg» v sovremennom ugolovnom prave / I.A. Klepitskiy // Gosudarstvo i pravo. – № 8. – 2002. – S. 15.

inextricably linked with the investigation of predicate crimes, that is, should be complex. Technologies of criminal activity combine complexes of interrelated crimes against property, economic, official, "computer" crimes and acquire signs of systemic activity. One of the main factors in the existence of a complex of crimes as a system is the presence of such a connection among crimes that combines them into a single chain of criminal behaviour. This chain is characterized by the presence of substantive (predicate) and accompanying crimes that precede legalization. Moreover, the accompanying crimes act as a form, way or a necessary condition for committing a predicate crime[16]. Taking into account the nature of the links between the predicate and accompanying crimes, there are also technologies of criminal enrichment, in which money laundering is their ultimate goal (the final result).

Thus, in investigating criminal proceedings related to legalization, the main attention is paid to the proof of the commission of the substantive crime. This approach seems to be well-founded, as the study showed, about every second proceeding initiated on the basis of Art. 209 of the CC of Ukraine, signs of crimes are detected during the pre-trial investigation of the facts of committing the substantive crime. Therefore, we believe that bringing to responsibility simultaneously for a crime stipulated in Art. 209 of the CC and the so-called substantive one, which is the source of obtaining criminal incomes, not only does not contradict the principle of presumption of innocence but also promotes the complete and timely establishment of all circumstances of the crime committed. This is explained, firstly, by the fact that Art. 209 of the CC of Ukraine is about the acquisition of rights to income obtained from the commission of a crime that preceded the money legalization (laundering), while in no way it is about the characterization of the person, who legalizes shadow revenues (that is, the person trying to carry out transactions with these incomes is not called "guilty"); secondly, from the criminalistics point of view, the investigation of crimes that are united by a common criminal intention and are in a single criminal chain, as a general rule, should be pursued within the framework of a single criminal proceeding (if there are no grounds for the allocation of criminal proceedings). After all, these acts have a common mechanism of committing and investigative picture, which

[16] Vyiavlennia, rozkryttia ta rozsliduvannia lehalizatsii (vidmyvannia) dokhodiv, oderzhanykh zlochynnym shliakhom (st. 209 KK Ukrainy): naukovo-praktychnyi posibnyk / Yu. M. Domin, O. Ye. Korystin, I. Ye. Mezentseva, S. S. Cherniavskyi. – K.: Natsionalna akademiia prokuratury Ukrainy, 2009. – S. 30.

predetermines the formation of evidence that can establish both the circumstances and the criminal receiving of criminal incomes, and the ways of their legalization. In any case, a pre-trial investigation into the facts of the said crimes (the substantive one, which is a source of shadow revenues, and the accompanying one related to the attempt to legalize them) is usually more qualitative and complete. On the contrary, if one expects the conviction of the substantive crime to be imposed and enforced, then a number of traces of the crime and other evidence, which confirms the fact of money laundering, are objectively lost over time.

8.3. Proof of predicate crime and a list of circumstances to be proved

The second important element that determines the success of proving legalization (laundering) of proceeds of crime is the need to prove the criminal nature of a crime committed before another (substantive) crime. The law obliges to establish the fact that a person receives income in a criminal way. In other words, the fact in proof of legalization (laundering) of proceeds of crime includes circumstances indicating the existence of the purpose of committing legalization – concealing or disguising the illegal origin of funds or other property or possession of them, rights to such funds or property, sources of their origin, location, movement, change of their shape (conversion). More often, when the suspect is convicted, investigators pay attention only to fixing the very fact of the alienation of property acquired in a criminal way, without specifying the circumstances indicating the intention to grant it legal status.

Legalization (laundering) of proceeds of crime includes any actions connected with the commission of a financial transaction or a transaction with assets obtained as a result of committing a crime. Herewith, attention should be paid to the fact that in order to decide on the existence of a crime, provided for in Art. 209 of the CC of Ukraine, it is necessary to prove that a person performs the specified financial transactions in order to provide the lawful appearance of possession of the said assets.

The FATF recommends that the intention and awareness necessary to prove money laundering as a crime comply with the standards of the Vienna Convention and the Palermo Convention, which provide for the establishment of the subjective part of the crime based on the objective factual circumstances of the case. Various types of evidence arising from the objective factual circumstances of the criminal proceedings may be

used to conclude that there is a purpose for money laundering. These types of evidence can prove the intention of money laundering on the basis of actual circumstances: time, place, method, and circumstances of money laundering.

Thus, along with the circumstances envisaged in Part 1 of Art. 91 of the CPC of Ukraine, in combination with all other features of the components of crimes committed prior to the commission of the crime envisaged by Art. 209 of the CC of Ukraine and, taking into account the peculiarities of the criminal-law and forensic characterization of the legalization (laundering) of proceeds of crime, the list of circumstances to be proved in the investigation of the category of criminal proceedings under review can be divided into the following groups:

I. Circumstances belonging to the event of legalization of criminal proceeds:

1. The fact of legalization, that is, the commission of at least one of the acts prescribed by the disposition of Art. 209 of the CC of Ukraine.

2. The subject of legalization. Among the circumstances that belong to the crime, it is very important to establish the subject of a criminal offense. Depending on the subject of legalization – funds or other property – the process of proof has its own characteristics; therefore, the following are to be proved 1) the character (physical nature) of the subject of legalization (money, securities, property rights, other property); 2) the size, value, time of receipt, location of property or legalized funds.

3. Method (technological scheme) of legalization as a concrete reflection of one of the acts envisaged in the disposition of Art. 209 of the CC of Ukraine: 1) the circumstances of the commission of a financial transaction or other agreement, as well as the use of funds or property in business activities; 2) the movement of banking operations used by the offender (how were transactions from the bank of the sender to the bank of the recipient conducted, how it was recorded); 3) the type of financial and economic activity carried out by the organization or entrepreneur, in which the funds were sent; 4) the amount, frequency, periodicity of each financial transaction separately and all in aggregate; 5) the way of receipt of income in possession or disposal of the accused; 6) the method of providing the lawful status to illegally gained funds; 7) the nature of the transactions entered into, where, when, who participated as a party and on what conditions; 8) where, when, by whom, and what exactly financial

legalization transactions were made, which bank accounts were used, whether there was a transfer of cash abroad; 9) where, when, in what manner, and on what terms the transfer of property was carried out for legalization; 10) the procedure for execution of financial transactions and how they were reflected in the initial accounting documents and accounting records; 11) the traces remaining in the documents concerning the concrete actions of the subjects of legalization; 12) the nature of violation by banks of the relevant rules of the organization of production and commercial activities, accounting and reporting of financial and business operations, calculations, etc.

4. Source of origin of funds or other property that is legalized: 1) the nature of a socially dangerous unlawful act, which resulted in obtaining criminal proceeds that are legalized; 2) the presence (absence) in relation to the predicate crime of initiated criminal proceedings, the conviction, the decisions or orders of the court to release from criminal liability, the closure of criminal proceedings for non-rehabilitating grounds; 3) the presence of causal-and-effect relations between the primary (substantive, predicate) crime and legalization; 4) the way of receipt of criminal proceeds; 5) the circumstances in which the proceeds of crime were transferred to the possession or disposal of the accused; 6) documentary sources confirming the facts of carrying out illegal operations and the transfer of money and property, etc.

5. The situation (time, period, place) of legalization: 1) the time of each financial operation or the conclusion of a deed on the legalization of criminal proceeds, during which such criminal actions were committed; 2) the time of the occurrence of property rights for movable and immovable property, which was the subject of legalization; 3) the location of the business entity involved in the legalization; 4) the situation prevailing at a particular enterprise (organization, institution, establishment), which was involved in legalization; 5) the content of legal acts regulating the activities of both the enterprise as a whole and its individual officials; 6) state of control over doubtful financial transactions, internal or obligatory financial monitoring; 7) the legal status of a legal entity involved in legalization, if it is a fictitious enterprise, then on whose name it is registered; 8) observance of the requirements of the current legislation on the registration of business entities; 9) document circulation, the procedure for its registration and compliance with the requirements of

the current legislation; 10) a circle of business entities, with which the enterprise (institution) involved in the legalization had a contractual relationship; 11) establishment of the location of enterprises, institutions, and organizations used by the offender for laundering, including banks, offshore companies, enterprises specially created for legalization.

II. Circumstances proving the guilt of the accused and the grounds for legalization (laundering) of the proceeds of crime by other persons: 1) the fact of awareness of the accused of the unlawful source (nature) of the receipt of income in possession; 2) sources and level of awareness (informedness) of the person, who concluded any transactions or financial operations, about the circumstances of the criminal way of obtaining legalized funds or property, the time of receipt of such information (before or after legalization); 3) information about the owner of the property or funds legalized, the nature of the owner's relations with the direct executor of legalization; 4) analysis of objective circumstances of the commission of a crime (violation of existing instructions and rules of financial transactions, deliberate conclusion of fictitious agreements, obtaining unjustified rewards for actions committed); 5) circumstances, confirming the presence of the purpose of the accused, which is to provide the lawful character of the acquisition, possession or use of funds or other property obtained as a result of a crime (legal origin); 6) the scope of powers of officials regarding the possibilities of conducting financial operations or concluding deeds; 7) the legal capacity of the person who entered into transactions or made financial operations with money of criminal origin; 8) the circle of acquaintances of persons who are suspected of committing legalization; 9) circumstances influencing the degree and nature of the responsibility of each of the accomplices.

III. Type, size, description of proceeds subject to legalization (laundering): 1) losses incurred – first of all, the amount of legalized funds or the value of legalized property; 2) character (physical nature) of the subject of legalization (money, real estate, securities, property rights, other property); 3) the amount, value, time of receipt, the location of legalizing property or funds.

IV. Circumstances characterizing the person accused of legalization of criminal proceeds: 1) age, sex, level of education, professional, business, and moral qualities of persons directly engaged in legalization; 2) determining the way of life of the suspect (inconsistency of the living

conditions with prosperity, obvious inconsistency of personal incomes with expenses (acquisition of real estate, and other arrangements in amounts that are significantly higher than official income)).

V. Circumstances that exclude the criminality of the act and punishment for actions committed, in particular, the receipt of funds from legalization by committing crimes, the presence of physical or mental coercion by the owner of the property acquired in a criminal manner, that is, the lack of a sign of voluntary legalization.

VI. Circumstances that confirm that the proceeds of crime are subject to special confiscation: 1) the sphere (directions) of the use of legalized funds or other property, that is, the final result of legalization; 2) the location of legalized funds or property (in case of being abroad, the possibility of their return to the territory of Ukraine).

VII. Other circumstances, based on the peculiarities of the investigated criminal proceedings. Circumstances that mitigate or aggravate the responsibility.

In addition, not only the admissibility of the fact that funds are illegally obtained but also the desire of the accused to legalize them are to be proved. From the standpoint of criminal law, the person who has an indirect relation to the origin of money or property that this person manipulates is subject to responsibility for legalization. That is, along with the fact of laundering such profits, the investigator investigates separate episodes of criminal activity (primary crimes), during which such profits were received. However, the following specifics should be pointed out. It is known that in order to investigate and prove the person's guilt in the commission of legalization, as well as the involvement of specific individuals, the investigator must prove that the guilty person was aware of the fact that the profits legalized are received as a result of another crime. That is, along with the need to prove a number of crimes, proving the intentions of the person also serves as an important link in the crime investigation[17].

8.4. Means of proof

Establishing the circumstances to be proved during the pre-trial investigation of the legalization of criminal incomes is possible only with

[17] Holovina V. P. Osnovy metodyky rozsliduvannia lehalizatsii (vidmyvannia) hroshovykh koshtiv, zdobutykh zlochynnym shliakhom, z vykorystanniam kredytno-bankivskoi systemy: dys. kand. yur. nauk: 12.00.09 / Holovina Valeriia Petrivna – Kyiv, 2004. – S. 142.

the comprehensive application of means of proof. Meanwhile, the analysis of scientific sources provides grounds for concluding that in the theory of criminal procedure as to the means of proof, there are two main points of view.

Representatives of the first point of view, based on a narrow understanding of the means of proof, attribute only evidence to them[18]. As a follower of this viewpoint, L. D. Udalova notes: "it is incorrect to determine the means of proof simultaneously as the unity of evidence and the ways of obtaining it, and to include methods in the essence of means." When substantiating her position, she states that "investigative action as a combination of actions envisaged by law cannot be a means or method for assessing evidence or substantiating the conclusions of the investigation authorities and the court." Therefore, the means of proof, in her opinion, are not investigative actions as a set of actions through which evidence is collected and verified, and not a form of obtaining evidence, but the evidence itself[19]. Although in another work, L. D. Udalova defines examination precisely as a means of proof[20].

Representatives of the second viewpoint include in this concept means of proof and evidence, and ways of obtaining them – procedural and, above all, investigative actions. Thus, F. N. Fatkullin points out that it is necessary to understand the means of procedural proof as the concrete actual data used to establish the investigated circumstances of the case, the sources of these data and the methods for their receipt, verification, and use. Assuming under the methods of obtaining and using judicial evidence those actions prescribed by law, by means of which the investigating authorities, the prosecutor's office, and the court collect, verify, and evaluate the factual data and their sources, and also substantiate the conclusions in the case, this author describes the methods as one of the means of proof[21]. M. P. Kuznietsov and V. A. Paniushkin believe that the

[18] Strogovich M. S. Kurs sovetskogo ugolovnogo protsessa / M. S. Strogovich. – M. : Nauka, 1970. – T. 2. – S. 287; El'kind P. S. Tseli i sredstva ikh dostizheniya v sovetskom ugolovno-protsessual'nom prave / El'kind P. S. – L. : Izd-vo LGU, 1976. – S. 60.

[19] UdalovaL. D. Teoretychni zasady otrymannia verbalnoi informatsii u kryminalnomu protsesi Ukrainy : dys... doktora yuryd. nauk : 12.00.09 / Larysa Davydivna Udalova. – K., 2006. – S. 252-254.

[20] Udalova L. D. Dopyt yak zasib protsesualnoho dokazuvannia na dosudovomu slidstvi / L. D. Udalova // Problemy pravoznavstva ta pravookhoronnoi diialnosti : [zb. nauk. prats]. – Donetsk, 2002. – №4. – S. 123-126.

[21] Fatkulin F. N. Obshchie problemy protsessual'nogo dokazyvaniya / F. N. Fatkulin. — Kazan' : izd-vo Kazan. un-ta, 1976. – S. 93.

means of procedural proof, in addition to evidence, include methods for obtaining them[22].

Followers of this opinion characterize investigative and judicial actions as a means of obtaining evidence from the sources specified in the law[23] as procedural means for obtaining evidentiary information in criminal proceedings[24], as the main means of gathering evidence[25], as a means of proof[26].

The second viewpoint is most grounded, its representatives understand the procedural means of proof broadly. This point of view has not only theoretical but also practical value[27].

According to the current CPC of Ukraine, the burden of proof is entrusted to the investigator, prosecutor, and also the officer of the operational unit, who, when performing the investigator's instructions, exercises his powers. Thus, in particular, Part 2 of Art. 93 of the CPC of Ukraine provides for methods of gathering evidence, one of which is to conduct investigative (search) actions. At the same time, A. R. Bielkin notes that when speaking of the gathering of evidence, it makes sense to ask the question of exactly how the evidence gathered acquires the status of evidence[28]. Here one should agree with the correct position of M. A. Pohoretskyi, who argues that before the beginning of the criminal-procedural activity, there is no evidence, and when the crime is committed, traces, information, etc. about a criminal offense are formed. Therefore, they collect, check, evaluate not evidence but information, traces, objects,

[22] Kuznetsov N. P. O nekotorykh ponyatiyakh ugolovno-protsessual'nogo dokazyvaniya i razvitii ego protsessual'noy formy / N. P. Kuznetsov, V. A. Panyushkin // Razvitie i sovershenstvovanie ugolovno-protsessual'noy formy. – Voronezh : [B. i.], 1979. – S.115.

[23] Serdyukov P. P. Dokazatel'stva v stadii vozbuzhdeniya ugolovnogo dela : uchebnoe posobie / P. P. Serdyukov. – Irkutsk : IrGU,1981. – S. 81; Karneeva L. M. Istochniki dokazatel'stv po sovetskomu i vengerskomu zakonodatel'stvu / L. M. Karneeva, I. Kertes. – M. : Yurid. lit. ; Budapesht : Kezgazdashagi esh yogi, 1985. – S. 15.

[24] Porubov N. I. Dopros v sovetskom ugolovnom sudoproizvodstve / Porubov N. I. . – Mn. : Vysheyshaya shkola, 1973. – S. 10; Solov'ev A. B. Ispol'zovanie dokazatel'stv pri doprose na predvaritel'nom sledstvii / Solov'ev A. B. . – M. : Yurlitinform, 2001. – S. 4.

[25] Stakhivskyi S. M. Slidchi dii yak osnovni zasoby zbyrannia dokaziv : nauk.-prakt. posibnyk / S. M. Stakhivskyi. – K. : Atika, 2009. – S. 32.

[26] Trusov A. I. Sudebnoe dokazyvanie v svete idey kibernetiki / A. I. Trusov // Voprosy kibernetiki i pravo. – M. : [B. i.], 1967. – S. 25.

[27] Skrypa Ye. V. Slidchi dii yak osnovni zasoby otrymannia dokaziv u kryminalnykh spravakh pro nezakonnu lehalizatsiiu avtotransportu / Ye. V. Skrypa // Borotba z orhanizovanoiu zlochynnistiu i koruptsiieiu (teoriia i praktyka) : nauk.-prakt. zhurnal ; Mizhvid. nauk.-dosl. tsentr z problem borotby z orh. zloch. pry RNBO Ukrainy. – 2010. № 22. – S. 296.

[28] Belkin A. R. UPK RF: nuzhny li peremeny: monografiya / A. R. Belkin. – M.: Norma: NITs INFRA, 2013. – S. 277.

facts of the material world, which may transform into evidence and may not achieve such a status[29].

At the same time, as V. D. Bernaz correctly noted, in order to gather what later may be evidence, it is first of all necessary to identify, find, for example, persons who can bear evidence, and only after that to conduct with them investigative (search) and other actions for the purpose of gathering factual information. Therefore, the structure of proving, which is formulated in the CPC of Ukraine, does not take into account such an essential aspect of the investigative activity as the work on detecting traces, objects with signs of crime, information about the crime[30].

Proving the circumstances of a criminal offense in general is to develop the most effective techniques, tools, methods, forms of search and detection (extraction), verification, and evaluation of factual data and their sources. Further, such factual information and its sources, at their procedural registration and consolidation, verification and evaluation, can be recognized as evidence in criminal proceedings. Proving the circumstances of the crime, in the opinion of V. D. Bernaz, structurally includes the following elements: analysis of primary information; data entry to the URPI; producing versions and determining directions of investigation and corresponding complexes of procedural actions; detecting, fixing, collecting, extracting, verifying, assessing, and consolidating factual information and formulating conclusions about circumstances relevant to criminal proceedings[31].

In procedural literature, it is reasonably stated that the main way of gathering and verifying evidence is investigative actions[32]. Depending on the investigative situation that occurs in the criminal investigation of the legalization (laundering) of proceeds of crime, the circumstances to be proved may be established by various investigative (search) activities. The most widespread among them in this category of criminal proceedings are examination, review of documents, temporary seizure of property, search, appointment and conducting forensic examinations.

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[29] Pohoretskyi M. A. Funktsionalne pryznachennia operatyvno-rozshukovoi diialnosti u kryminalnomu protsesi : [monohrafiia] / M. A. Pohoretskyi – Kh. : Arsis, LTD, 2007. – S. 507.

[30] Bernaz V. Dokazuvannia obstavyn vchynennia kryminalnoho pravoporushennia za chynnym KPK Ukrainy / V. Bernaz // Pravo Ukrainy. – 2013. – № 11. – S. 175-176.

[31] Bernaz V. Dokazuvannia obstavyn vchynennia kryminalnoho pravoporushennia za chynnym KPK Ukrainy / V. Bernaz // Pravo Ukrainy. – 2013. – № 11. – S. 178.

[32] Zhogin N. V. Predvaritel'noe sledstvie v sovetskom ugolovnom protsesse / N. V. Zhogin, F. N. Fatkullin. – M. : Yurid. lit., 1965. – S. 112; Strogovich M. S. Kurs sovetskogo ugolovnogo protsessa / M. S. Strogovich. – M. : Nauka, 1970. – T. 2. – S. 100; Gromov N. A. Ugolovnyy protsess Rossii : [ucheb. posobie] / Gromov N. A. – M. : Yurist", 1998. – S. 285.

CONCLUSIONS

Summarizing the above, we note that legalization is in any case preceded by the commission of another socially dangerous act. Property that is illegally acquired during the commission of the substantive crime becomes then the subject of "laundering". Thus, without evidence of a person's involvement in the commission of the main criminal activity, it is impossible to bring it to criminal responsibility for legalization[33]. A feature of the object of proof of the crimes provided by Art. 209 of the CC of Ukraine is that it is necessary to prove at least two criminal incidents: a crime that resulted in criminal incomes and actually the legalization (laundering) of these incomes. This implies an important provision for investigation, namely: the nature of investigating situations of the initial stage of the investigation of the money laundering is determined by the situation created in the criminal proceedings on a predicate crime.

Procedural means for establishing the circumstances to be proved in criminal proceedings in relation to money laundering are: a) evidence; b) investigative (search) activities, secret investigative (search) activities aimed at obtaining (gathering) evidence; c) other procedural measures (compulsory measures and security measures applied to participants in criminal proceedings and their close relatives) aimed at ensuring the establishment of the circumstances to be proved in the said criminal proceedings and solving the tasks of criminal proceedings.

SUMMARY

Problems of proof of legalization (laundering) of proceeds of crime are investigated. The analysis of theoretical and methodological sources about proof in the criminal process in Ukraine is carried out. The attention is focused on the circumstances to be proved and their systematization. Particular attention is paid to proving a predicate crime indicating the norms of international law. It is noted that along with the need to prove a number of crimes, proving the intentions of the person also serves as an important link in the investigation of a crime. In addition, the establishment of circumstances to be proved during a pre-trial investigation of money laundering is possible only with the comprehensive application of means of proof.

[33] Arkusha L. I. Lehalizatsiia (vidmyvannia) dokhodiv, oderzhanykh u rezultati orhanizovanoi zlochynnoi diialnosti: kharakterystyka, vyiavlennia, rozsliduvannia : monohrafiia / L. I. Arkusha. – Odesa : Yurydychna literatura, 2010. – S. 226.

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