

The Offence of Money Laundering and its Constitutive Characteristics in China

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1. Introduction

Illegal arms sales, smuggling, embezzlement, insider trading, bribery, computer fraud schemes and the activities of organized crime can generate huge illegal profits for the individual or group that carries out the act. The substantial profits are likely to attract the attention of investigation authorities. In order to benefit from these profits and continue criminal activities without jeopardizing their sources, criminals must find a way to disguise the illegal origin, change the form, or move the illegal profits to a place where they are less likely to be exposed. The processing of these criminal proceeds is money laundering¹.

Money laundering often involves a complex series of transactions. Generally it includes three basic steps: placement, layering and integration. Launderers introduce their illegal profits into the financial system in the initial or placement stage of money laundering by breaking up large amounts of cash into less conspicuous, smaller sums. They then deposit the money directly into bank accounts, or purchase a series of monetary instruments (cheques, money orders, etc.) that are then collected and deposited into accounts at other locations. In the layering stage, launderers engage in a series of conversions or movements of the funds to distance the dirty money from its source by channeling it through the purchase and sales of investment instruments, or wiring them through a series of accounts at various banks across the globe. In the integration stage, launderers choose to re-enter the legitimate economy by investing the funds into real estate, luxury assets, or business ventures, etc.

Money laundering can bring about devastating social consequences. It may erode the integrity of a nation's, even the world's, financial institutions. According to a 1996 International Monetary Fund estimate, money laundered annually amounts to 2-5% of world GDP (between 800 billion and 2 trillion US dollars in today's terms). The lower figure is considerably larger than an average European economy, such as Spain's².

The purposes of money laundering activities and anti-money laundering campaign are contrary. Money launderers want to get the illicit funds back to themselves without being traced by investigative agencies. The purpose of an anti-money laundering program is to give such proceeds back to the legal owners and to prevent such proceeds from being used in future criminal activities and from affecting legitimate economic activities³. There have been constant efforts from many governments for many years in order to fight money laundering. The main international agreements addressing money laundering are the United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and

¹ There are various definitions available which describe the term "money laundering". Article 1 of the draft European Communities (EC) Directive of March 1990 defines it as: the conversion or transfer of property, knowing that such property is derived from serious offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious offence. A concise working definition was adopted by the Interpol General Secretariat Assembly in 1995, which defines money laundering as: "Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate source."

² See more from: "Money Laundering in A Changed World", www.Arbango.com.

³ See more from: The Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF). The FATF currently consists of 29 countries and two international organizations. Its membership includes the major financial countries of Europe, North and South America, and Asia. It is a multi-disciplinary body - as is essential in dealing with money laundering - bringing together the policy-making power of legal, financial and law enforcement experts.

Psychotropic Substances (the Vienna Convention) and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Offence. And the role of financial institutions in preventing and detecting money laundering has been the subject of declarations made by the Basle Committee on Banking Supervision, the European Union, and the International Organization of Securities Commissions. At the same time, China has witnessed more and more money laundering activities since its reform and opening in 1978. It is said that there are hundreds of billions of US dollars illicitly transferred abroad⁴. Chinese government actively targets the offence of money laundering and takes active measures to prevent the rampancy of money laundering.

2. The concept and constitutive characteristics of the offence of money laundering in China

Like other countries in the world, China has a long history of money laundering⁵. But the term is not familiar to the Chinese people. It was a term brought in from abroad⁶. There was no legislation on the offence of money laundering in the Criminal Code 1979⁷. Until China acceded to the UN Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)⁸, it did not enact any anti-money laundering legislation. On December 28, 1990, the Standing Committee of the National People's Congress adopted the Resolution on prohibition of drugs. Article 4 of the Resolution stipulates that one who conceals or disguises the true nature and resource of the proceeds obtained from illegal drug sales, shall be sentenced to a fixed-term imprisonment of not more than seven years, criminal detention or public surveillance, and may also be fined. The revised Criminal Code 1997, article 191, expands the definition of the offence of money laundering. The specific stipulation is: however, while clearly knowing that the funds are proceeds illegally obtained from drug-related offences or from offences committed by mafias or smugglers and gains derived therefrom or commits any of the following acts in order to cover up or conceal the source or nature of the funds, shall, in addition to being confiscated of the said proceeds and gains, be sentenced to a fixed-term of imprisonment of not more than five years or criminal detention and shall also, or shall only be fined not less than five percent but not more than 20 percent of the amount of the laundered money; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than five but not more than 10 years and shall also be fined not less than five percent but not more than 20 percent of the amount of money laundered: (1) providing fund accounts; (2) helping exchange property into cash or any financial negotiable instruments; (3) helping the movement of capital through transferring accounts or any other form of settlement; (4)

⁴ See more from: "Chinese Finance—Anti-Money Laundering Campaign is going," <http://www. Qinlunews.htm>.

⁵ In "Lords of the Rim" Sterling Seagrave explains how, in China, merchants some 2000 years before Christ would hide their wealth from rulers who would simply take it off them and banish them. In addition to hiding it, they would move it and invest it in businesses in remote provinces or even outside China.

⁶ The term is reputed to have originated from the 1920s, when the likes of Al Capone and Bugsy Moran quite literally opened up laundry companies in Chicago in order to clean their "dirty" money. They mixed the "dirty" money and "clean" money together to make up a day's turnover. In this way, the "dirty" money seemed "clean".

⁷ There have been two criminal codes in China since 1949 when the country became an independent state. One is the Criminal Code 1979, the other is the Criminal Code 1997. Before the Criminal Code 1979, the Chinese government placed more emphasis on criminal legislation. Not a few separate regulations on criminal crimes were promulgated. As early as 1950, the Chinese government began to enact the criminal code. 33 drafts came into form. But the Cultural Revolution made the project stop. When the Cultural Revolution ended, the government restarted the project. Thus the Criminal Code 1979 came into force and became the first systematic criminal code in Chinese history since 1949. It contributed to a large extent to the prevention and punishment of criminal activities. But the code came into force at the beginning of reform and opening policy. At that time the market economy was not formed. It could not satisfy the new circumstances of the market economy. The Criminal Code 1997 appeared. It was revised on the basis of the Criminal Code 1979. It is the code in effect now.

⁸ The Chinese government signed the convention on December 20, 1988, handed over the instrument of accession on December 25, 1989. The convention went into effect in China on November 11, 1990.

helping remit funds to any other country; or (5) covering up or concealing by any other means the nature and source of the illegally-obtained proceeds and other gains derived there from.

The code also provides the penalty clause for offences committed by units⁹: here a unit commits any of the offences mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offence shall be sentenced to a fixed-term of imprisonment of not more than five years or criminal detention. In December 2001, Article 7 of the Chinese Criminal Code Amendment 3 adds terrorist offences as one kind of the predicate offences. This is one of the reactions to the events of September 11 in Chinese criminal law. According to the regulation, the offence of money laundering in China has the following main constitutive characteristics:

2.1 The infringed object

The offence of money laundering infringes mainly on the normal management order of the state financial system¹⁰. It is a threat to the good functioning of a financial system. A large amount of laundered money enters into the financial system surreptitiously and unexpectedly. It is so unpredictable and uncontrollable that the injection may crowd out legitimate and foreign capital. The potential to cause serious macroeconomic distortions and misallocate capital and resources increase the risks of the financial system and hurt its credibility and integrity. Once the financial system is in disorder, the public will lose their confidence in financial institutions. So, one of the most valuable assets, a reputation for integrity of financial system, will collapse at once. This is a threat to the regime. It cannot be accepted by any government.

At the same time, the offence of money laundering obstructs the administration of public order and impairs judicial administration. Money laundering provides the fuel for drug dealers, terrorists, arms dealers, etc, to operate and expand their illicit operations. All offences that generate significant proceeds have to resort to money laundering, since it can make all of the illegally obtained proceeds from the offences seem legitimate and difficult to trace. Successful money laundering looks like a shelter, which gives criminals a sense of safety. The sense of safety encourages criminals to commit more offences with money support, such as robbery, burglary, kidnapping, larceny, fraud, etc. These offences undoubtedly bring terrible unease to the administration of the public order. Furthermore, money laundering refers to the transformation of illegally obtained currency into that which appears legitimate. In essence, it is the concealment of the illegal source of the income or its applications. To make funds derived from, or associated with, illicit activity appear legitimate, money launderers will leave no stone unturned to cut off the clue for the police to pursue the criminal act and hinder the normal activities of judicial organs. This throws many obstacles in the judicial organs' investigation and interrogation. It makes it much more difficult for the judicial organs to solve a case, which drives up the cost of law enforcement.

Therefore, what the offence of money laundering infringes are complicated objects including the control of the financial system, the administration of public order and judicial administration.

⁹ "Corporate offence" is the concept that is universally accepted. The Chinese Criminal Code 1997 adopts the concept of "unit offence" instead of "corporate offence" because it is used in the previous criminal code and the accessory criminal law. It is entirely for the sake of succession.

¹⁰ Though China has an open policy, it is still a socialist state with Chinese special characteristics. There the financial institutions are thoroughly controlled by the government. Private units or persons are not allowed to deal in banks, stock exchanges, bonds, insurance, etc.

2.2 Objective constitution

Considered from the objective point of view, we can see that the offence of money laundering in China is an act to cover up or conceal the source or nature of the proceeds illegally obtained from drug-related offences, or terrorist offences or offences committed by mafias or smugglers and gains derived therefrom. The act can be understood from the following three aspects:

2.2.1 There must be an act aimed at covering up or concealing the source or nature of the proceeds illegally obtained from drug-related offences or from offences committed by mafias or smugglers and gains derived therefrom. The thought of money laundering alone cannot constitute an offence of money laundering because criminal law does not punish thought.

2.2.2 An act aimed at covering up or concealing must be the source or nature of the proceeds illegally obtained from drug-related offences, or terrorist offences, or offences committed by mafias or smugglers and gains derived therefrom. That is, only the proceeds and gains from the very three kinds of offences can be the targets of an offence of money laundering. Though we know that large amounts of proceeds and gains from bribery, embezzlement, robbery, etc, may enter into the process of circulation to be washed, they are not the targets of the money laundering offence regulated in the Chinese Criminal Code 1997. So the prerequisite of an offence of money laundering is the existence of the very four kinds of predicate offences: drug-related offences, terrorist offences, offences committed by mafias and offences of smuggling¹¹.

Nowadays, in the Chinese criminal law research field, two opposite views hold their own positions firmly on the scope of the money laundering predicate offences. Some scholars think that the present scope of predicate offences is neither too narrow nor too wide. It is apt to the criminal situation in China because the law stipulates the offence of money laundering, other serious profit-generating offences and offence of concealing, transferring, purchasing or helping to sell illegally acquired goods¹². It is unnecessary to include all the serious profit generating offences in the scope of the money laundering predicate offences. Others think that all the serious profit generating offences should be included in the scope of the money laundering predicate offences. They maintain that the same money laundering activities should not be classified into different offences just because the illegal proceeds come from different illicit sources. I consider the latter opinion is acceptable. No matter from which offences the dirty money comes, money laundering is a criminal act. The harmfulness of money washing is the same to society.

¹¹ The scopes of the predicate offences can be generally divided into three categories: (1) Narrow scope of predicate offences. An act to conceal or disguise the true nature and source of the proceeds of mere drug-related offences and gains derived therefrom is an offence of money laundering, i.e., the predicate offences can only be drug-related offences. This can be found from the UN Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The narrow scope of the predicate offence is criticized for being too narrow and cannot satisfy the practical anti-money laundering combat any more. The states in the world have gradually given up such legislation. For example, after China acceded to the Convention in 1989, it adopted the Resolution on prohibition of drugs that limited the proceeds illegally obtained from drug-related offences and gains derived therefrom to target the offence of money laundering. At that time, such legislation was progressive because it was the first time the Chinese government prohibited money laundering activities by law. Since the Criminal Code 1997, the predicate offences have been enlarged from drug-related offences. (2) Wide scope of predicate offences. All serious offences can be predicate offences. For example, the Criminal Code in Switzerland has such a wide scope. It stipulates that whoever clearly knows that he/she is acting to conceal or disguise the true nature and source of the proceeds of all offences, no matter wherever the offences take place, commits an offence of money laundering. America, Italy and some other countries are also bearing the same trend. (3) Medium scope of predicate offences. This type of legislation limits the predicate offences to certain offences including drug-related offences. For a long time, Italy adopted this type of legislation. Its Criminal Code stipulated that the offence of money laundering had three predicate offences: armed robbery, blackmail and hostage-taking. The Chinese Criminal Code 1997 also belongs to the same category.

¹² Article 312 of the Chinese Criminal Code 1997 regulates: "Whoever knowingly conceals, transfers, purchases or helps to sell illegally acquired goods shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined.

And the criminal dangerousness is also the same. Same act, same harmfulness and same dangerousness of the person should bear the same charges and get the same punishment. At the same time, FATF requires countries to consider introducing an offence of money laundering based on all serious offences and/or on all offences that generate a significant amount of proceeds¹³. Countries have a measure of flexibility rather than a need to prescribe every detail according to the Forty Recommendations. But the Forty Recommendations have come to be recognized as the international standard for anti-money laundering programs. A number of non-FATF Member countries have used them in developing their efforts to address the issue. As money laundering is a global problem, only one country's effort against it is far from enough. While the FATF Member countries and non-FATF Member countries use the Forty Recommendations as their legislative guidelines to criminalize money laundering activities, it is certainly necessary for China to enlarge predicate offences based on all serious offences and/or on all offences that generate a significant amount of proceeds.

Here it is worth noting that the very four kinds of offences are category offences. The drug-related offences and offences of smuggling are written in section 7 of chapter 6 and section 2 of chapter 3. There are in total over 20 offences¹⁴. The prerequisite of the offence of money laundering is the proceeds illegally obtained and gains derived there from. All the offences of smuggling can produce illegal proceeds and gains. It is not the same for all the drug-related offences. Among the drug-related offences, offences of smuggling, trafficking in, transporting or manufacturing opium are the main offences that can produce illegal proceeds and gains, while some of the offences, such as offence of illegally possessing narcotic drugs, offence of illegally possessing the seeds or seedlings of mother plants of narcotic drugs, etc. can only keep the illegally obtained proceeds and gains. Thus all the offences of smuggling and the drug-related offences that can bring about illegal proceeds and gains can be the predicate offences of the offence of money laundering.

The offences by mafias usually have the exterior appearance of robbing, stealing, blackmail and so on. But no matter what kind of criminal methods criminals utilize, only the act with the characteristics of blackmarket society will be the offences by mafias. Thus the exterior appearance of robbing, stealing, blackmail and so on may be the offences by mafias if they have the characteristics of blackmarket society.

As for the terrorist offences, they are stipulated in chapter 2. Prior to the Chinese Criminal Code Amendment 3, there were three sorts of terrorist offences. They are the offence of forming, leading or actively participating in a terrorist organization, the offence of hijacking any aircraft, a ship or motor vehicle, and the offence of violent endangering air safety. Without financial support, terrorist offences can be carried out. But with financial support, terrorists can be a very dangerous to the world. Facing the terrible attack of terrorism, the Chinese Criminal Code Amendment 3 adds the offence of supporting terrorism.

2.2.3 The following five methods stipulated in the Code are the acts of covering up or concealing the source or nature of the illegally obtained proceeds and gains: (1) Providing fund accounts. It can be understood that an owner of an account or account-opening unit provides his/its legal fund account, or draws up a new account in the financial institution for the three kinds of illegally obtained proceeds and gains derived therefrom to be deposited¹⁵. (2) Helping exchange property into cash or any financially

¹³ See the detail from the content of Recommendation 4 and Interpretative Note to Recommendation 4 to the Forty Recommendations.

¹⁴ See more from the Chinese Criminal Code 1997. I have refrained from giving the definite number of offences because the Code does not regulate accusations (names of offences). According to the accusations promulgated by the Supreme People's Court, there are 12 drug-related offences and 12 offences of smuggling.

¹⁵ In China, some scholars think that "providing fund account" means that an owner of an account or account-opening unit provides only his/its presently existing account in the financial account for the three kinds of illegally obtained proceeds and gains derived therefrom, excluding drawing up a new account. The other scholars hold the opposite view. They maintain that "providing fund account" includes both the presently existing account and the newly drawn up account. I agree with the

negotiable instruments. It means that convenient conditions are provided for a relevant criminal to transfer certain illegally obtained property to cash or any financially negotiable instruments. For example, to sell or help sell the three kinds of illegally obtained movables and immovables; to buy or find someone to buy the three kinds of illegally obtained proceeds and gains derived there from; to buy and sell for cash through securities market. Here it includes both transferring property to cash or any financial negotiable instruments and transferring cash to any financial negotiable instruments or any financial negotiable instruments to cash. (3) Helping transfer capital through transferring accounts or any other form of settlement. It means the settlement of the certain illegally gained capital by transferring accounts or payment through banks and other financial agencies. Legal capital and illegal capital can be co-mingled. The trace of the certain illegally obtained capital is hard to follow. (4) Helping remit funds to any other country. It means the illegally obtained funds are transferred from the accounts of Chinese banks or other Chinese financial agencies to the accounts of the banks or other financial agencies of other countries through banks or other financial agencies. In China, as for fund transferring abroad, only the persons and units who are franchised have the right to transfer foreign currency and might help remit the certain illegally obtained funds to any other country. Common persons or units cannot commit such an offence. or (5) By any other means covering up or concealing the nature and source of the illegally obtained proceeds and gains derived therefrom. "By any other means" mainly indicates investing the illegally obtained proceeds or gains derived therefrom in show business, real estate, the stock market, gambling, etc. Such fields of work need large quantities of money. You can become a millionaire from a beggar overnight. Once the proceeds or gains derived therefrom are flowing into such works or field, we can not absolutely say it is impossible to identify their illegality, but it really creates many difficulties for the investigative agencies to trace them.

In practice, money laundering activities in one circulation are not simple. Usually more than two methods are utilized. The more methods money launderers utilize, the more complicated the circulation is. And the more complicated the circulation is, the more difficult the investigative work is. The more difficult the investigative work is, greater the possibility is for money launderers to escape punishment. Lack of staff and financing at investigative agencies, imperfectness of anti-money laundering laws, attraction of substantial illegal profits, etc., may be the reasons why money laundering becomes more and more rampant. But ease at escaping punishment is one of the indispensable explanations money launderers commit such offences.

2.3 Subject of offence

The subject of the offence of money laundering can be both a natural person and a unit. Any company, enterprise, institution, State organ, or organization, that commits the offence of money laundering, shall bear criminal responsibility. A natural person with criminal capacity who has reached the age of 16 and commits the offence of money laundering shall bear criminal responsibility¹⁶.

2.4 Subjective aspect

The offence of money laundering is a kind of offence with a definite criminal purpose. It can be easily seen from the usage of the term "in order to cover up or conceal the source or nature of the funds." Indirect intention does not have criminal purpose according to the universally accepted opinion. Thus

opinion including both because either an old or a new account can be used by a criminal to wash his money.

¹⁶ Criminal responsibility in the Chinese Criminal Code 1997 is regulated: if a person who has reached the age of 16 commits a offence, he shall bear criminal responsibility; if a person who has reached the age of 14 but not the age of 16 commits intentional homicide, intentionally hurts another person so as to cause serious injury or death of the person, or commits rape, robbery, drug- trafficking, arson, explosion or poisoning, he shall bear criminal responsibility.

indirect intention cannot constitute an offence of money laundering. The subjective aspect of the offence of money laundering can only be the direct intention. The mere fact that a money launderer clearly knows that his money laundering activities will entail harmful consequences to society but wishes such consequences to occur constitutes the offence of money laundering. It does not constitute an offence of money laundering if a person clearly knows that the ongoing money laundering activities will entail harmful consequences to society but allows such consequences to occur.

Here we must pay attention to the understanding of clearly knowing. Two points need to be emphasized. One is the content of clearly knowing. The other is the degree of clearly knowing.

There are two different academic arguments on the content of clearly knowing. The first considers that if only the person who handles proceeds knows they are coming from criminal activities or has the possibility to know they are coming from criminal activities will it constitute clearly knowing. According to the argument, the requirement of the content of clearly knowing is the proceeds coming from criminal activities, and is not limited to certain categories of crimes. The second point of view is that the requirement of the content of clearly knowing is limited only to proceeds illegally obtained from drug-related offences or from offences committed by mafias or smugglers and gains derived therefrom. The second academic argument is acceptable in the light of the code. If the person clearly knows that the proceeds are coming from some other criminal activities, the criminal act will be an offence of concealing, transferring, purchasing or helping to sell illegally acquired goods¹⁷.

As for the degree of clearly knowing, there are five different arguments. The first is knowing certainly. The second is knowing possibly. The third is knowing or knowing condignly. The fourth is doubt with sufficient reason. The fifth is knowing certainly and knowing possibly; knowing certainly is surely clearly knowing. But having doubt about the proceeds coming from the three certain predicate offences with sufficient reason is also a kind of clearly knowing. So the first argument is too narrow. The second argument seems reasonable. But knowing possibly only shows possibility. It indicates that the proceeds may come from the three certain predicate offences or from some other offences. If the proceeds come from the three certain predicate offences, the act is an offence of money laundering. If not, the act is another offence. Conviction and sentencing are based completely on a kind of possibility. It is against legislation and makes concrete judicial practice difficult. The fourth is incomprehensive because clearly knowing includes knowing certainly and doubt with sufficient reason cannot cover knowing certainly. The fifth is actually the addition of the first and the second. Thus it has the shortage of both the first and the second. It is not a good choice. Only the third knowing or knowing condignly is advisable. If the person knows the proceeds are coming from the three certain predicate offences, his act constitutes an offence of money laundering. If he is not quite sure about the source of the proceeds coming from the three certain predicate offences, but he has sufficient reason to doubt the proceeds are therefrom, his act can also constitute an offence of money laundering.

¹⁷ See the detail from article 312 of the Criminal Code 1997.