ON THE ISSUE OF THE USE OF LEGAL MEASURES BY UKRAINE ON COMBATING THE LEGALIZATION (LAUNDERING) OF THE ILLEGAL PROCEEDS

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The issues of legalization of proceeds, obtained as a result of illegal activities, are at the intersection of research in legal and economic sciences. As for jurisprudence, the interest is to determine the limits of legal regulation of this phenomenon, to create legal mechanisms to prevent its development, to establish responsibility for violations of such norms, to develop a process of proving the relevant guilt, which means the fact that the issue of offshores is a jurisdictional object of criminal law, criminal process, civil law, financial law and international private law, the aspect of which will be considered in this article. The purpose of the article is to analyze the current national legislation the combating the legalization of illegal proceeds; to investigate the standards of the Financial Action Task Force (FATF) and the possibility of their implementation in the regulatory and legal field of Ukraine; providing own recommendations on the harmonization of the legislation of Ukraine and the European Union (hereinafter referred to as the EU) on the issue under consideration; to suggest the vision of dispositions and sanctions of legal norms of Ukrainian legislation that will meet the standards of the Financial Action Task Force (FATF). We also aim to analyze Ukraine's international cooperation in the field of combating the legalization of illegally obtained proceeds. The novelty of the work consists in the change of approaches to the analysis of legislation, the violation of a fairly new topic and an attempt to draw a scientific conclusion from a scientific issue that has not been investigated in our area. In the course of the study, the conclusions have been formulated that these days the issue of harmonization of the legislation of Ukraine and the EU is extremely relevant. One of the necessary and important elements is opposition to the creation of offshore companies. It is noted that the Law of Ukraine «On Prevention and Counteraction of Legalization (Laundering) of Illegally Obtained Proceeds, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction» is a fairly exemplary legal act, as its provisions correspond to the norms and standards of international private law, with the exception of certain formal deficiencies. The analysis of the norms of the Tax Code of Ukraine has made it possible to reach conclusions about the successful efforts of Ukraine to prevent the creation of offshore companies by our citizens by introducing controlled foreign companies taxation. Clear and understandable criteria for determining a legal entity, controlled by a foreign company, have been provided, the necessary duties and taxes have been established. It has been emphasized that cooperation at the international level in the field of combating money laundering is also at a fairly high level, which undoubtedly contributes to the country economic development.

Keywords: offshore, harmonization of the legislation of Ukraine and the European Union, legalization of illegal proceeds, special economic zones, harmonization of legislation in the field of combating the legalization of proceeds.

Formulation and relevance of the problem

Despite the extremely difficult circumstances of these dayas, our state hasn't abandoned the course for EU membership and

continued to take all necessary measures to achieve this aim. On June 22, 2022, a fateful decision was made to grant Ukraine the status of a candidate for EU membership. However, in order to begin negotiations for full membership, we are to meet a number of requirements, including ensuring compliance of anti-money laundering legislation with Financial Action Task Force (FATF) standards. Accordingly, the relevance of our work has a high level, since a detailed analysis of this issue by scientists will make it possible to create an appropriate legal framework, which will become one of the components of the full functioning of the domestic economy and the future membership of Ukraine in the EU.

Analysis of recent research and publications

The dynamism of development and the research nature of the issue of legalization of proceeds obtained as a result of illegal activities forces us to analyze, firstly, the studies conducted no earlier than 2020 (normative legal acts do not fall under this characteristic); secondly, publications and research on offshore issues by specialists in the field of economics; thirdly, a study of financial law professionals who focused on the offshore issue. In our opinion, the research of individual domestic scientists regarding the issues under consideration is worthy of attention. In particular, A. Yeremieiev paid considerable attention to the nature of economic and legal offshore trusts (A. Yeremieiev, 2021). As well as V. V. Habela considers the process of de-offshoreization of the economy as a key to ensuring the economic security of Ukraine as a whole, which cannot be disagreed with, since offshores have greatly weaken the national economy (V. V. Habela, 2021). O. P. Podra and H. B. Stambulska consider offshore mechanisms as a way to reduce the tax load (O. P. Podra, H. B. Stambulska, 2022). Analyzing publications on the issues raised by us, we have come to the conclusion that the issue of harmonization of Ukrainian and EU legislation in the field of offshore prevention is not sufficiently researched, however, it is worth emphasizing that the economic and legal nature of offshore instruments is deeply studied by some domestic scientists.

Determination of the research purpose

The research purpose is to analyze the current national legislation regarding combating of legalization of proceeds obtained as a result of illegal activities; to study the standards of the Financial Action Task Force (FATF) and the possibility of their implementation in the regulatory and legal field of Ukraine, to provide our own recommendations on the harmonization of the legislation of Ukraine and the EU on the issue under consideration; to present the vision of dispositions and sanctions of legal norms of Ukrainian legislation that will meet the standards of the Financial Action Task Force (FATF). We also aim to analyze Ukraine's international cooperation in the field of combating the legalization of illegally obtained proceeds.

Presenting the main material. Before starting the legal aspect of our research, we would like to point out that it is worth characterizing the history and economic nature of the analyzed phenomenon, the mechanism of its action, the main principles and methods of creation, and other principles of offshore operations.

Offshore (from the English language, offshore — «beyond the shore/in front of the coast, in the coastal zone of the water area») is a country or territory with special trade conditions for foreign companies. These ideas may include low or no taxes, simplified reporting and business administration rules, and the ability to hide the true business owners. Companies register in an offshore country and transfer their capital there. There are more than 50 offshore zones in the world. In this context, offshore companies are often used to commit criminal offenses such as money laundering, state corruption, fraudulent operations, etc.

The term «offshore» is quite new in the modern science. It was first used in 1950 in one of the newspapers in the USA. The article was about a financial organization that avoided state financial control through geographic selectivity, that is, by constantly moving its operations to countries with a more favorable tax climate. It should be noted that the offshore activity itself is not new enough, because history has known examples that vividly illustrate

the origin of these processes. They have been used since ancient Athens, when a two percent import and export tax was introduced. In order to avoid paying taxes, Greek and Phoenician merchants began to bypass the territory of Athens twenty miles away. Later, nearby small islands acted as tax havens, where contraband goods were brought in without paying customs duties and taxes.

In our opinion, it is worth highlighting the following types of offshore zones in the world:

1) island offshore. Geographically, they are located in the Pacific and Indian oceans, as well as in the Caribbean archipelago. Their appeal lies in the fact that complete anonymity and confidentiality are ensured, there are no accounting and tax loads, and fixed payments are low. However, it is worth noting that companies, registered in offshore islands, suffer reputational and image losses, as they do not inspire confidence in other business and economic entities (the Cook Islands, the Seychelles, the Bermudas, the Virgin Islands);

2) the territory of Europe. In terms of reputation and prestige, they occupy one of the leading positions, but they cannot be called offshore in the classical sense of the word. Why? First of all, there is the tax load. Indeed, it is somewhat smaller, but it exists; secondly, accounting reports are kept; thirdly, an audit is conducted regularly. A logical question arises: why do they belong to offshore zones? The corresponding classification is made taking into account the available possibility of obtaining information about the final resident. The procedure exists, but it is very complicated, so de facto obtaining information is almost impossible. Also, in our opinion, the presence of accounting reports is not a determining factor in refuting the existence of offshore companies, since it is necessary for the full functioning of the system itself, and the reporting itself is not public, and the mechanism of its publication is very complicated (Switzerland, Liechtenstein, Malta, Gibraltar) ;

3) separate administrative and territorial units. In some regions, there is a special legal regime for regulating financial activities, which in fact is very attractive for foreign residents. For instance, such territorial units are some states in the USA, Labean in Malaysia.

Main characteristics of offshore companies are the following ones:

1) are non-resident in relation to the country where they are registered, which means that its control and management center is located abroad. Commercial operations of offshore companies are conducted outside the jurisdiction where it is registered;

2) exempt from most taxes;

3) have a simplified procedure for company registration and management;

4) for the offshore of the country of incorporation, currency control is simplified or absent, financial reporting requirements are reduced to a minimum, audits, with some exceptions, are not required at all.

5) management takes place on an anonymous basis, although in today's realities it is impossible to open an offshore company without information about the final beneficiary.

At this stage of the research, in our opinion, it is necessary to draw a distinction between the concepts of «offshore zone» and «free economic zone». A free economic zone (hereinafter referred to as the FEZ) is a part of the country's territory, separated from the general customs border of the state, which has complete freedom in the regime of economic issues, with a special management regime and favorable conditions of activity, tax benefits for local entrepreneurs and foreign firms. Let's illustrate the main differences of the offshore zone from the FEZ with the help of a table.

Analyzing the experience of Ukraine, it should be noted that we have made attempts to create various types of free economic zones, among which it is worth highlighting the special FEZ «Crimea», provided for by the Law of Ukraine «On the Establishment of a Free Economic Zone «Crimea», free economic zones in the Donbass and in the Western Ukraine. Until recently, the creation of free economic zones was regulated by the Law of Ukraine «On the General Principles of the Creation and Functioning of Special (Free) Economic Zones», but now all these legal acts are invalid, therefore there is no legal regulation of the relevant processes.

Legal stage of the research. We would like to do the legal aspect of the research of this issue by the method of comparative analysis.

Currently, the issue of legalization of proceeds is regulated by the Law of Ukraine «On Prevention and Counteraction of Legalization (Laundering) of Proceeds Obtained Through Criminal Means, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction» (hereinafter - the Law). We suggest analyzing this Law through the lens of FATF recommendations according to the following scheme: FATF recommendation → FATF recommendation → provisions of the Law → an option to amend the legislation (if necessary).

Recommendation 1. Risk assessment and use of a risk-oriented approach. This recommendation provides that states should regularly conduct forecasts and audits of relevant risks, and have an appropriate body that will deal with this. According to Art.6 of the Law provides for a system and subjects of financial monitoring, which is divided into primary and state one. According to part 3 of Art. 6 of the Law, the subjects of state financial monitoring are the National Bank of Ukraine, the central body of the executive power, which ensures the formation and implementation of state policy in the field of prevention and countermeasures against the legalization (laundering) of proceeds obtained through crime, the financing of terrorism and the financing of the proliferation of weapons of mass destruction, the Ministry of Justice of Ukraine, the National Securities and Stock Market Commission, the Ministry of Digital Transformation of Ukraine and a specially authorized body. Therefore, recommendation 1 is fulfilled, as there is an authorized body in Ukraine that assesses the necessary risks — the National Bank of Ukraine, as well as the Ministry of Justice of Ukraine and the National Securities and Stock Market Commission.

*Table**

Offshore zone	FEZ
It has the advantages of geographical separation. Territorially, offshores are located mainly in countries with a low level of legal regulation of the financial sector	Creation of conditions for the development of the national economy.
Offshore creation is the result of gaps in the legislation of the resident state and the illegal activities of the beneficiary	Increasing the level of employment of the population, creating new job positions, combating unemployment
Creation of conditions for personal enrichment of certain individuals	Increasing the efficiency of the use of capacities and infrastructure of conversion complexes
Used for criminal purposes (legalization of illegal proceeds)	Use of international advantages of geographic division of labor and international circulation of capital, which as a result will lead to the expansion of the export of different goods, rational import and the creation of an import-substitution mechanism of production
The activity is aimed at causing damage to the state in which the final beneficiary is located	Creation of a layer of highly qualified workforce due to the study and implementation of the practice of world experience in the field of organization, management, finance; education of management culture, which is oriented towards world standards regarding management technology
	Liquidation of the monopoly of foreign trade by providing access to various forms of foreign economic activity to all enterprises and organizations of the FEZ

** Made by the authors according to: I. I. Lashchyk, P. I. Viblyi, I. S. Rybchynchuk, 2021.*

Recommendation 2. Acknowledgement of money laundering as a crime. Countries are to criminalize such actions under the Vienna and Palermo Conventions. The Criminal Code of Ukraine has a provision provided for in Art. 209-1, which is aimed at preventing intentional violation of the requirements of the law on combating the legalization of illegal proceeds. The provision of Part 1 provides for liability for intentional non-submission, untimely submission or submission of unreliable information that is the subject to financial monitoring, and thus causing significant damage to the rights and interests protected by law. According to our way of thinking, this provision of the article does not meet the recommendation, since the composition of the crime, namely the objective and subjective aspects, are not sufficient for a full-fledged mechanism of criminal prosecution. We would like to offer our vision of the disposition and sanctions of Part 1 of Art. 209-1 of the Criminal Code of Ukraine:

«Deliberate actions directly aimed at violating legislation in the field of combating and countermeasures against the legalization (laundering) of illegal proceeds, the financing of terrorism, and the financing of the proliferation of weapons of mass destruction.»

We also consider it necessary to have a supplement of the Article 209-1 of the Criminal Code of Ukraine with part 3 of the following content:

«The same actions provided for in part one and part two, which caused significant damage to the rights, freedoms or interests of individual citizens, state or public interests or the interests of individual legal entities protected by law...».

We believe that this formulation of the disposition and sanction will ensure compliance of the legislation with the recommendations and will help launch a real mechanism of criminal prosecution.

Recommendation 3. Reliable customer verification. The FATF draws countries' attention to the need to establish adequate supervision over customer verification. Such essential points are: identity verification, whether this person really exists (whether it is a fake name and surname or not), as well as the prohibition of opening anonymous accounts.

To enable the implementation of the relevant recommendation, we are able to use Art. 11 of the Law, which clearly indicates the ban on opening anonymous accounts and accounts to banks cooperating with shell banks. One part of the sentence, part 1 of Art. 11 of the Law causes reasonable concern: "it is prohibited... to establish correspondent relations with shell banks" (italics - Zh. Ch., V. K.). It is seen that only correspondent relations cannot be with shell banks, but this idea gives space for all kinds of frauds in the field of legalization of proceeds. In our professional opinion, it is to be replaced in the provision of Part 1 of Art. 11 and put into the following words: "it is forbidden to establish any relations with shell banks". We believe that this formulation would significantly reduce the number of opportunities to circumvent the law. There is also a certain remark to Paragraph 2, Clause 4, Part 13 of Article 11 of the Law, which states that if a politically significant person ceases to perform valuable public functions, the subject of primary financial monitoring must continue to take into account the ongoing risks and take measures for at least twelve months... In our judgment, the period of 12 months is too small, because the experience of the development and formation of the political system in Ukraine proves that the influence of political figures on corruption and offshore schemes is significantly longer than 12 months, therefore, we consider it necessary to set a period of 10 years.

We must state that the Law of Ukraine «On Prevention and Countermeasures Against the Legalization (Laundering) of Proceeds of Crime, the Financing Oo Terrorism and the Financing of the Proliferation of Weapons of Mass Destruction» has a fairly high level and is an effective safeguard against the creation of offshore companies in Ukraine.

We also aim to analyze the provisions of Art. 39-2 of the Tax Code of Ukraine. This article contains the concept of a controlled foreign company. The legal norm defines a controlled foreign organization as a legal entity registered in a foreign state or territory that is recognized as being under the control of an individual - a resident of Ukraine or a legal entity - a resident of Ukraine in accordance with the rules defined by this Code. Features of a controlled foreign organization and methods of taxation are established.

We would point out the requirements for the information that the company is to submit to the regulatory body:

1) on each direct or indirect acquisition of a share in a foreign legal entity or the beginning of actual control over a foreign legal entity, which may lead to the recognition of such an individual (legal) entity as a controlling entity in accordance with the requirements of the law;

2) on the establishment, creation or acquisition of property rights to a share in the assets, proceeds or profit of education without the status of a legal entity;

3) on each alienation of a share in a foreign legal entity or termination of actual control over a foreign legal entity, which leads to the loss of recognition of such an individual (legal) entity as a controlling entity in accordance with the requirements of the law;

4) on liquidation or alienation of property rights to a share in assets, income or profit of education without the status of a legal entity.

We would tend to believe that the relevant change to the tax legislation is quite rational and necessary. Firstly, such actions are really aimed at preventing the creation of offshore companies by citizens of Ukraine; secondly, such a norm meets the requirements of the EU, which directly brings us closer to the future membership of Ukraine in the EU; thirdly, the specified mechanism aims to introduce taxation of the relevant companies, making it possible to fill the budget of Ukraine and raise the standard of living in the country.

However, Ukraine did not stop at improving its activities aimed at preventing the creation of offshore companies in Ukraine. The Verkhovna Rada of Ukraine adopted the Law of Ukraine «On Amendments to Certain Laws of Ukraine on Improving the Legal Basis of Conducting Audit Activities in Ukraine.» This legislative act, defined as European integration, implements the provisions of the Directive of the European Parliament and the Council (EU) of May 17, 2006 No. 2006/43/EU, which, in particular:

1) the norms on the information provided in the auditor's report based on the results of the mandatory audit of the company's financial statements have been improved;

2) the norms of European legislation on ensuring the unambiguity of the content of the auditor's report, preventing the influence of regulators on the content of the auditor's report on the audit of financial statements have been implemented;

3) the composition of prohibited non-audit services, etc., has been specified;

4) the role of professional organizations has been increased by delegating certain powers (professional training and quality control), etc.

We would strongly believe that Ukraine's international cooperation in the field of combating the legalization of illegally obtained proceeds is also to be analyzed.

The press service of the State Tax Service of Ukraine reported that on September 5, 2022, in Brussels, the Minister of Finance of Ukraine and the European Union Commissioner for Economy signed the Agreement between Ukraine and the European Union on the participation of Ukraine in the EU program for cooperation in the field of taxation «Fiscalis». The signing of this Agreement strengthens the cooperation of the State Tax Service of Ukraine with the tax administrations of the EU member states, including in terms of the exchange of tax information, support for the development of tax policy measures and the implementation of EU legislation on taxation, combating tax evasion and improving processes tax administration, as well as the use of modern European IT systems in the field of taxation. The EU program «Fiscalis» is aimed at supporting tax authorities in the field of improving the internal market functioning, promoting competitiveness and fair competition in the EU. We would tend to believe that such cooperation will significantly strengthen the possibilities of countering offshore, however, we would emphasize that some EU countries are offshore (Liechtenstein), so we cannot claim that the existence of such relations will give a 100% guarantee that our State Tax Service will be able to receive all the necessary information, however, in any case, the level of resistance will increase significantly.

We would also mention Ukraine's participation in the Organization for Economic Cooperation and Development (hereinafter

referred to as OECD). The purpose of this Organization is to promote significant sustainable economic growth and poverty reduction by spreading the principles and values of the OECD throughout the world – a commitment to democracy, market economies and open, regulated, non-discriminatory trade and financial systems supported by effective leadership. The OECD conducts a systematic and in-depth analysis of the tax legislation of the participating countries and provides recommendations on the legislation reform. A corresponding benefit is also available for Ukraine, since it was with the help of the OECD recommendations that tax supervisions were established in the field of combating the legalization of proceeds obtained illegally.

Conclusions and prospects for the further research

These days, the issue of harmonization of the legislation of Ukraine and the EU is extremely relevant. One of the necessary and essential elements is opposition to the creation of offshore companies. In our professional opinion, the Law of Ukraine «On Prevention and Counteraction of Legalization (Laundering) of Criminal Proceeds, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction» is a sufficiently exemplary legal act, as its provisions correspond to the norms and standards of international private law, but with the exception of some certain formal deficiencies. The analysis of the norms of the tax legislation has made it possible to reach conclusions about the successful and fundamental efforts of Ukraine to prevent the creation of offshore companies by our citizens by introducing taxation of controlled foreign companies. Clear and understandable criteria for determining a legal entity by a controlled foreign company are given, the corresponding necessary duties and tax rates are established. Cooperation at the international level on countering the legalization of proceeds is also at a sufficiently high level, which undoubtedly contributes to the economic development of the country. In our professional opinion, the main reason for the spread of offshore Ukrainian citizens is the imperfection of anti-corruption legislation and its enforcement. The prospect of the further research is in the fact that it is worth considering changes to anti-corruption legislation, which may indeed help to stop the possibility for our citizens to create offshore companies abroad.

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Статтю присвячено питанню природи та регламентації механізмів офшорної діяльності, які перебувають на стику галузей права та економіки. Для правничої спільноти інтерес полягає в тому, щоб визначити межі правового регулювання офшорів, створити юридичні механізми запобігання їх розвитку, встановити відповідальність за порушення таких норм, розробити процес доведення відповідної провини, тобто питання офшорів предметом дослідження кримінального права, кримінального процесу, цивільного права, фінансового права та міжнародного приватного права, аспект якого й буде розглянуто в цій статті. Метою статті є аналіз наявного національного законодавства про запобігання легалізації доходів, отриманих внаслідок незаконної діяльності; дослідження стандартів Групи з фінансових заходів (FATF) та можливість їх впровадження в законодавство України; наведення власних пропозицій щодо гармонізації законодавства України та Європейського Союзу (далі – ЄС) із розглядуваного питання; пропонування свого бачення диспозицій та санкцій правових норм українського законодавства, що відповідатимуть стандартам Групи з фінансових заходів (FATF). Маємо на меті також проаналізувати міжнародну співпрацю України у сфері протидії офшорів, отриманих незаконним шляхом. У ході дослідження сформульовано висновки, що на сьогодні питання гармонізації законодавства України та ЄС є надзвичайно актуальним. Одним із необхідних та важливих елементів є протидія створенню офшорів. Зазначено, що Закон України «Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення» є досить зразковим нормативно-правовим актом, оскільки його положення відповідають нормам та стандартам міжнародного приватного права, за винятком певних формальних недоліків. Аналіз норм Податкового кодексу України дав змогу дійти висновків щодо успішних намагань України запобігати створенню нашими громадянами офшорів шляхом впровадження оподаткування контрольованих іноземних компаній. Наведено чіткі та зрозумілі критерії визначення юридичної особи контрольованою іноземною компанією, встановлено відповідні необхідні обов'язки та розміри податків. Наголошено, що співпраця на міжнародному рівні у сфері протидії легалізації доходів також перебуває на досить високому рівні, що, безперечно, сприяє економічному розвитку країни.

Ключові слова: офшор, гармонізація законодавства України та Європейського Союзу, легалізація незаконних доходів, спеціальні економічні зони, наближення фінансового законодавства.