



Money Laundering and the Legislation of the Republic of Serbia

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1. Introduction

During the past two decades, the anti-money laundering efforts of the international community have been intensified. A series of international legal instruments has been adopted wherein norms and standards in regard of treating the problem of money laundering have been laid down by the United Nations, the Council of Europe and the European Union.¹ In addition, the United Nations has initiated a global program against money laundering within the UN Office on Drugs and Crime whose goal is extending support to the Member States in adopting appropriate laws on the prevention of money laundering and developing mechanisms for combating this form of crime.²

The Republic of Serbia is a party to the most relevant International Conventions. Efforts on the domestic front are demonstrated by the introduction in 2005 of a new Law on the Prevention of Money Laundering,³ the introduction of a new Criminal Code⁴ and the new Criminal Procedure Code,⁵ both containing articles relevant for money laundering. These reforms have substantially innovated Serbian legislation in this field and they are in compliance with numerous International Conventions ratified by Serbia.⁶

The aim of this paper is to analyse the Serbian legislation regarding money laundering, its evolution and compliance with international obligations and standards.

For the purpose of this paper only those international conventions, which relate to money laundering and ratified by Serbia have been analyzed. These are: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);⁷ the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990);⁸ the UN Convention for the Suppression of the Financing of Terrorism (1999);⁹ the Council of Europe

¹ More about some documents of the United Nations, Council of Europe and European Union can be found in: Ilčić, D. (2005) „Documents of international organizations on the prevention of 'money laundering' as sources of rights“, Belgrade: *Pravni život*. No. 9: pg. 903-923.

² More information may be found on the web site of the UN Office for Drugs and Crime: http://www.unodc.org/unodc/en/money_laundering.html

³ Official Gazette of the RS, No. 107/2005, 117/2005.

⁴ Official Gazette of the RS, No. 85/2005, 88/2005, 107/2005.

⁵ Official Gazette of the RS, No. 46/2006.

⁶ Pursuant to the Constitution, ratified international agreements and generally accepted rules of international law are parts of the domestic legislation and can be directly implemented.

⁷ Official Gazette of the SFRY – International agreements, No. 14/90.

⁸ Official Gazette of the FRY – International agreements, No. 7/2002, Official Gazette of Serbia and Montenegro – International agreements, No. 18/2005.

⁹ Official Gazette of the FRY – International agreements, No. 7/2002.

Convention against Corruption (1999);¹⁰ the UN Convention against Transnational Organized Crime (2000),¹¹ and the UN Convention against Corruption (2003).¹²

These international conventions require ratifying countries to take appropriate measures for the prevention and suppression of money laundering. The main issues defined in these international instruments are the following:

- the definition of the concept of „money laundering” and its criminalization, encompassing complicity, particularly aiding, organizing or incitement;
- measures for the prevention and detection of money laundering;
- investigative techniques.

The relevant domestic legislation analysed in this paper is listed below:

- Law on the Prevention of Money Laundering (the new Law – *Official Gazette of the RS*, No. 107/2005, 117/2005 and the old law- *Official Gazette of the FRY*, No. 53/2001, *Official Gazette of the RS*, No. 85/2005),
- Criminal Code of the RS as well as provisions of the material criminal legislation, which was previously in force (Criminal Code of the RS¹³ and General Criminal Code¹⁴),
- Criminal Procedure Code of the RS (*Official Gazette of the FRY*, No. 70/2001, 68/2002, *Official Gazette of the RS*, No. 58/2004, 85/2005, 115/2005), as well as new Criminal Procedure Code
- Law on Organization and Competence of the State Authorities in the Suppression of Organized Crime (*Official Gazette of the RS*, No. 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004, 45/2005, 61/2005),
- Law on the National Bank of Serbia (*Official Gazette of the RS*, No. 72/2003, 55/2004, 85/2005),
- Law on Banks and Other Financial Organizations (*Official Gazette of the RS*, No. 107/2005),
- Law on Payment Transactions (*Official Gazette of the FRY*, No. 3/2002, 5/2003, *Official Gazette of the RS*, No. 43/2004),
- Law on Tax Procedures and Tax Administration (*Official Gazette of the RS*, No. 80/2002, 84/2002, 23/2003, 70/2003, 55/2004, 61/2005, 85/2005),
- Foreign Exchange Law (*Official Gazette of the FRY*, No. 23/2002, 34/2002, *Official Gazette of the RS*, No. 101/2005),

¹⁰ Official Gazette of the FRY – International agreements, No. 2/2002, Official Gazette of Serbia and Montenegro – International agreements, No. 18/2005.

¹¹ Official Gazette of the FRY - International agreements, No. 2/2001.

¹² Official Gazette of Serbia and Montenegro – International agreements, No. 12/2005.

¹³ "Official Gazette of the SFRY", No. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, "Official Gazette of the FRY", No. 35/92, 16/93, 31/93, 37/93, 24/94, 61/2001, "Official Gazette of the RS", No. 39/2003.

¹⁴ "Official Gazette of the SFRY", No. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, "Official Gazette of the FRY", No. 35/92, 16/93, 31/93, 37/93, 24/94, 61/2001, "Official Gazette of the RS", No. 39/2003.

- Law on the Tax on Extra Profit and Extra Property Obtained by Using Particular Favours (*"Official Gazette of the RS"*, No. 36/2001, 37/2001, *"Official Gazette of the FRY"* No. 17/2002, *"Official Gazette of the RS"* No. 18/2002).
- Relevant by-laws: decisions of the Governor of the National Bank of Serbia on the supervision of payment transactions performed by banks (*"Official Gazette of the RS"*, No. 57/2004), on opening, maintaining and closing bank accounts (*"Official Gazette of the RS"*, No. 33/2005), and on detailed conditions and manner of conducting supervising function of the National Bank of Serbia (*Official Gazette of the RS*, No. 100/2003, 133/2004, 88/2005).

2. Money laundering – definition and sanctions in Serbian Legislation

The new regime in Serbia has significantly amended and improved the previous one with specific regards to the definition of money laundering as an act and as a criminal offence; sanctions (penal and non penal); prevention, detection and proving. Before engaging in an in-depth, comparative analysis of these aspects it would be appropriate to highlight that the first innovation is a systematic reordering of the “competences” of the actors involved in the prevention and fight against money laundering and the harmonisation of the various acts/provisions pertaining to money laundering so as to avoid conflicts and overlap.

It may be recalled that the 2001 Law on the Prevention of Money Laundering was an Act of the Federal Republic of Yugoslavia, an entity that formally ceased to exist in 2003. This act aimed at comprehensive regulating the issue of money laundering, including the legal definition and related crimes and sanctions. It was a choice dictated by the apparent absence in the Criminal Codes (FRY and RS) of any specific provisions on money laundering. Nevertheless, the old Criminal Code of the Republic of Serbia did contain a provision – art. 184 on Concealment – that was relevant to money laundering. The sanctions for concealment (art. 184) were similar (1-5 years) with those stipulated for money laundering (6 months - 5 years) in the 2001 Law. The 2001 Law on the Prevention of Money Laundering also stated that “if the amount of deposited money exceeds 1 million RSD the offender will be punished with 1 to 10 years imprisonment”.

2.1. The old regime

The two most relevant laws of the past regime dealing with money laundering are:

- A) The 2001 Law on the Prevention of Money Laundering**
- B) Criminal Code of the Republic of Serbia, art. 184 on concealment**

- A)** The 2001 Law on the Prevention of Money Laundering determined both the definition of the crime of money laundering and the applicable sanctions. Unfortunately it must be said that the definition provided by Art.2 and Art. 27 (related to penal sanctions) was not clearly worded and fraught with interpretative uncertainties.

- It was quite problematic to determine from the wording of Art. 2 Par. 1 what was to be considered a predicate offence, a necessary element for the crime of money laundering to exist. The definition given by the articles mentioned was based on the quite obscure wording: ‘illegal activities’, followed by a list that leads to several interpretation issues, such as:
 - the question of the reach of the Law: whether the terms ‘illegal activities’ should be interpreted to include only activities falling within Serbian domestic jurisdiction or whether one could argue in favour for a more “universal” interpretation. With regards to this issue, it should be highlighted that the 1990 Strasbourg Convention upholds the principle of the irrelevance of territorial jurisdiction¹⁷, though one should also note that the 2001 Law had entered into force before the Convention was ratified by Serbia;
 - in addition, it was unclear whether the phrase ‘illegal activities’ was to be interpreted to include all activities that are *contra legem* as a whole (thus including commercial, civil and administrative law violations) or only those activities that are sanctioned by penal law. The latter solution would seem to make more sense but, unfortunately does not appear to be supported by the actual wording of the phrase. Hence, one could reasonably conclude that any illegal activities (whether criminal or not) could be considered predicate offences;
 - the reasoning above needs to be qualified by a conditional: the words “illegal activities” are immediately followed by a list of activities. Normally one should conclude that the issue is resolved in the sense that “illegal activities” as predicate offences underlying money laundering, are the only ones included in the list. Unfortunately the list is also open ended in a manner that it is difficult to determine whether it was meant to be exhaustive or was merely meant to provide some examples. To complicate the issue further, the items on the list are not well defined either. Particularly the first item, “grey economy”, is not even an activity, but indicates a “non-recorded” component of the economy. One should add that in the Serbian Law there seems to be no definition of “grey economy”, even if several activities commonly understood to be part of the “irregular economy”, such as non compliance with employment and social security regulations, are sanctioned by Serbian law. But even if one did accept this very liberal interpretation, one would still have to face the question which of the “irregularities” of the “irregular” economy (a deliberate tautology) would rank as predicate offences!

¹⁷ Art.2 par a) “it shall no matter whether the predicate offence was subject to the criminal jurisdiction of the Part”.

- A second major uncertainty of the definition was the term (or, better, the verb) “deposit” used both in Art. 2 (par. 2) and Art. 27. With the exception of a deposit of sums previously held in cash, the act of depositing is not a complete transaction but only a component thereof (arrival at destination). Not only does a complete transaction require at least another component that is the departure or transfer, but in the case of money laundering one should also expect intermediate passages (“layering”). In other words, by introducing the provision that money laundering exists only when “deposit money [. . .] into the accounts held with banks and other financial organizations and institutions in the territory of the Federal Republic of Yugoslavia”, the legislator artificially dissected the notion of “financial transaction” in a manner that does not correspond to actual practice, thereby choosing to consider only one component and ignoring other components, such as the transfer of sums from an account in Serbia to an account abroad that should have been taken into consideration.

The legislator’s choice of wording with regards to the “deposit” issue did have practical consequences on the fight against money laundering. Josip Bogić, the former Chief of the Department for Fighting Organized Financial Crime within the Department for combating organized crime of the Ministry of Interior, offers a practical example of this issue by citing a case in which 36 million EUR – the proceeds of evasion of Serbian tax – were smuggled in cash out the Republic of Serbia and deposited in a bank account in Bosnia and Herzegovina (Republic of Serbia).¹⁸ The perpetrators could not be charged for the criminal offence of money laundering precisely because – according to Bogić – the criminal offence of money laundering under this law includes only depositing money on accounts of banks and other financial organizations in the Federal Republic of Yugoslavia. In the cited case it was possible to prosecute the persons involved on the basis of Article 77a of the Law of Banks and other Financial Organizations.¹⁹

Available sources do not offer a persuasive answer as to why the judiciary did not interpret the old law extensively enough so as to resolve the “deposit” paradox contained in the definition in Art.2 and Art.27. The issue becomes even more poignant after the Strasbourg Convention was ratified. Considering that the said definition may well be seen as *contra conventionem* it is unclear why the judiciary did not begin to apply or otherwise use the

¹⁸ Bogić, J. (2005) „Criminal-Law Problems of Money Laundering (concept, background, legal regulations, case studies, analyses and forecasts), in: Radovanović, D. (ed.) *Penal legislation: progressive or regressive solutions*, Belgrade: Institute of Criminological and Sociological Researches and the Advanced School of Internal Affairs: p. 322.

¹⁹ Article 77a of the Law on Banks and other Financial Organizations reads:
Whoever, without the National Bank of Serbia license for work, engages in depositing, credit and other bank activities shall be punished with imprisonment of three months to five years.
If by an act referred to paragraph 1 of this Article, a material gain exceeding the amount of 50.000 RSD is obtained, the offender shall be punished with imprisonment of one to eight years.
If by an act referred to paragraph 1 of this Article a material gain in exceeding the amount of 500.000 RSD is obtained, the offender shall be punished with imprisonment of two to ten years.
For committing an act referred to paragraph 1, 2 and 3 of this Article, the responsible person and legal entity shall also be punished, in case the legal entity engages in depositing, credit and other bank activities without the National Bank of Serbia license for work.

Convention directly.²⁰ It must be remembered in this context that provisions of the ratified international convention acquire the status of constitutional law, ranked higher than domestic law such as the 2001 Law on the Prevention of Money Laundering. We can only speculate that the judiciary did not understand well the definition of Art. 2 and 27, and/or was not given proper instructions on how to apply it or, perhaps, were not familiar on how to deal with norms derived from ratified international treaties. On the other hand, it must also be said that the judiciary was probably wary of applying the criminal law more extensively and Art. 2 and 27 did contain an explicit limitation “deposits into the account...” to “the territory of the FRY”.

²⁰ It is interesting to draw a parallel with the definition of predicate crime. Art.64 of Strasbourg Convention States that “Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration”. In ratifying, Serbia made no declaration relating to this article. Should it then be interpreted that it considered all crimes as defined in national penal law be considered as predicate crime? Would according to the Convention no declaration be interpreted in this sense? If this was the case and intention of Serbia how would the Judiciary behave in a case of money laundering not connected to the one of the illegal activities listed (eg. a case of kidnapping) and if they did go for an “extensive” interpretation based on the application of the Convention, why did they not adopt the same logic with regards to the “deposit” issue?

B) Concealment is a very old criminal offence which obviously includes money laundering, or at least some of its forms, so that according to Prof. Stojanović, “money laundering can be considered the special kind of the criminal offence of concealment and as such it was partly possible earlier to prosecute for money laundering using this provision as well” (Stojanović, 2006: 552). According to court practice, money is considered object in terms of this criminal offence. Predicate crimes include all crimes where some material gain is obtained illegally, and are not limited to traditional property crimes. However, it does not include concealment by the person who committed predicate crime.

2.2. The new Regime

All in all, the old regime provided quite a poor definition for the crime of money laundering. On the one hand, predicate offences were defined in a very imprecise and vague way; whilst the definition of transactions falling within the scope of the law was excessively narrow. The result was a tool that was very difficult to use in practice allowing excessive latitude in interpretation. The reform does resolve several issues previously discussed and more appropriately matches the standards of the Strasburg Convention and other international treaties. First of all, the new regime introduces a clear distinction of the roles that the new Law on the Prevention of Money Laundering and the new Criminal Code (hereinafter referred to as: the CC) are to accomplish in the fight against money laundering:

- The 2005 Law on the Prevention of Money Laundering focuses on prevention aspect whereas provisions on the crime of money laundering and related sanctions are included in the new CC in the section dedicated to Crimes against the Economy.
- As a measure of coordination, money laundering is defined in the same manner both in Article 231 of the Criminal Code of the Republic of Serbia (providing a particular criminal offence of money laundering) and in Article 2 of the 2005 Law on the Prevention of Money Laundering.

In the CC, art. 231 the criminal offence of money laundering is defined as the “conversion or transfer of property, with the knowledge that such property originates from a criminal offence, with the intention to conceal or falsely present illegal origin of property, or conceal or falsely present facts about that property with the knowledge that that property originates from a criminal offence, or acquire, hold or use the property with the knowledge, at time of receiving it, that that property originates from a criminal offence”.

This definition resolves several issues of the old regime previously discussed.

First of all, unlike the previous term “illegal activities”, the reference to “criminal offence” does provide for a clear indication that predicate offences are to be considered:

- only the activities that are defined as crimes by law;
- all actions that are sanctioned by penal law are considered predicate elements of money laundering²¹;
- there is no explicit limitation to Serbian penal provisions. Thus there seems to be no obstacle to the application of the Strasburg Convention principle on the neutrality of territorial jurisdiction.

Secondly, the “deposit” issue is also resolved as the new definition adopts the same wording “conversion or transfer”²² as the Strasburg Convention.

Finally, it is worth stressing that the predicate crime may be any crime through which the material gain is obtained (Stojanović, 2006: 553), including corruption and similar criminal offences.

2.3. Sanctions

As previously mentioned, the reform of the regime has entailed the translation of penal sanctions from the Law on the Prevention of Money Laundering to the CC. The actual contents of these sanctions have remained substantially the same and that can be grouped as follows:

- A first set of sanctions directly punishing the perpetrator of the crime of money laundering. For the basic form of this criminal offence, the sanction is imprisonment for no less than six months and up to five years (same as old law). If the amount of money or property exceeds one million and five thousand RSD (1.5 million RSD), the offender shall be sentenced to imprisonment of one to ten years (old law: 1 to 8 years).
- A second set of sanctions is imposed on the persons who, knowingly or out of negligence, enabled the launderer to perpetrate his crime. This is typically the case of the “responsible person” of entities who are entrusted by money laundering law with monitoring and reporting duties. Thus, according to the CC the responsible person of the legal entity if one knew, that is, could have known or should know that the money or property present proceeds acquired from a criminal offence is punishable in the same terms as the perpetrator of the money laundering offence. In case of a physical person who is not tasked by the money laundering law with specific duties, sanctions are more lenient, that is, one is sentenced to imprisonment up to three years.

²¹ This approach is consistent with the Strasbourg Convention Art 6. par 4 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration.

²² Art 6.1.a of the Convention

2.4. Open issues

Whilst Law on the Prevention of Money Laundering and the new Criminal Code define money laundering in the same way, the two definitions are not identical. Whereas the Law on the Prevention of Money Laundering has retained the particular provision relating to money laundering in course of ownership transformation (“Concealment of illegally acquired social property and social capital, in the process of ownership transformation of enterprises.”) that was also included in the definition provided by the old 2001 Law on the Prevention of Money Laundering, such provision was not introduced in the text of Art. 231 of the CC.

It is not completely clear what was the intention of the lawmaker when he kept the provision on money laundering in course of ownership transformation in the definition given in the Law on the Prevention of Money Laundering, but omitted it from CC incrimination. It does not seem that it will have any impact on the way Criminal Code is interpreted. According to Prof. Stojanović, Chairman of the Commission that drafted the CC, the FIU asked the Commission to prescribe criminal offence of money laundering. Prof. Stojanović was not able to explain why this form is kept in the new Law on the Prevention of Money Laundering. However, he was clear that the provisions from Criminal Code are the only ones that are relevant for criminal liability.

The old regime did not clarify whether perpetrators of the predicate offence and the offence of money laundering (so called “self laundering”) could be indicted for both as, for example, the CC of Montenegro that does prescribe more severe punishment for such a case (Rakočević, 2005: 936). The new Serbian CC has not introduced particular provisions on the matter and it remains to be seen how legal practice shall interpret the provisions of the CC in this regard: will it in such cases decide on criminal prosecution for criminal offences in concurrence with laundering or only for the predicate criminal offence. According to Prof. Stojanović, who, as the criminal law expert should be recognized as an authoritative source, the person who committed predicate crime cannot be indicted for the crime of money laundering, since in that case money laundering should be treated as “later non-punishable offence”. Here the analogy with the criminal offence concealment²³ is used (Stojanović, 2006: 553).

²³ See later for more details about this criminal offence.

3. Prevention, Detection and Proof

As argued by some authors, “money laundering most often uses liberal systems which are not found under the direct control of the state authorities” (Fijat, 2003: 30) and it is therefore important to also establish appropriate measures of supervision and control (both external and internal) over financial operations of banks and other financial organisations, as well as over performed payment transactions in general. This consideration entails compliance to appropriate practices and standards by several industry (mainly financial) sectors, as well as an effective supervision by central banks and other supervisory authorities comprehensive supervision over implementation of relevant legislation in all transactions.

In general, the main stays on which a prevention regime typically relies entail:

- Entrusting entities that typically engage in sectors and transactions that may be used by criminals as inroads to launder the proceeds of crime. These entities (“Obligors”) act as gatekeepers of legitimate finance and business and their main duties are:
 - verifying the good standing of their counterparts through appropriate controls (customer due diligence) and if, appropriate, deny entering into business relations and report to competent authorities;
 - reporting to the competent authority all transactions that exceed the legal threshold or that appear suspicious. If appropriate, suspend or refuse such transactions in coordination/consultation with the competent authorities;
 - keeping appropriate records (on client’s accounts and performed transactions), reporting suspicious transactions, reporting transfers of considerable amounts of cash or other transferable instruments across the state border (checks, securities, and alike);
- A State Authority (Financial Intelligence Unit: “FIU”) that presides to the functioning of the prevention system. Specifically:
 - collects and further analyses reports received from the Obligors
 - depending on its status (whether it is entrusted with enforcement/prosecution powers or not) decides whether to initiate investigation on suspicious transactions or reports them to law enforcement/prosecution authorities.
 - maintains a database of reports received
 - coordinates with other law enforcement/prosecution authorities in investigations on money laundering cases and provides required information

- liaises and coordinates with peer institutions of other countries for cross border transactions, exchanges of information and investigations.
- ensures the proper functioning of the prevention system and supervises Obligors, providing them with appropriate guidance and directions and ensuring proper compliance with set regulations

In Serbia prevention and detection of money laundering is to the greatest extent regulated by the Law on the Prevention of Money Laundering and the Criminal Procedure Code, while the provisions pertaining to proving are mainly contained in the Criminal Procedure Code. In addition measures of comprehensive internal regulatory and control regime for banks and other financial institutions are provided for both in the Law on the Prevention of Money Laundering and other, sector specific laws and by-laws.

3.1. The Obligors

Art. 5 of the 2001 Money Laundering Law set out an extensive list of relevant categories as persons obliged to take measures for detecting money laundering (“Obligors”). However, this did not include several categories, such as professionals engaged in the provision of legal/financial services (auditors, accountants, attorneys, asset managers) that are today recognized as relevant for the prevention of money laundering. Also, the wording of Art.5 may be considered quite obscure and imprecise, raising several important issues of interpretation.

First and foremost, a detailed listing of entities and institutions would normally be interpreted as restrictive. That is, the institutions listed would be only considered obligors. Unfortunately, Art.5 also leaves doors open for a more extensive interpretation to include, one could argue, just about everyone or at least a very ample extensive group of persons and entities. For example, Par.1 introduces a list of legal entities subject to the obligations but Par.2 also adds that “*other legal as well as physical entities (entrepreneurs) engaged in transactions relating to purchase and sale of claims and debts, asset management for third parties, leasing and factoring, forfeiting, issuing and conducting operations with payment and credit cards, real estate business, trade in artworks, antiques and other valuable objects as well as treatment of and trade in precious metals and jewels*”. As some of these activities (sale of claims and debts, and precious metals and jewels) are already included in the list under Par.1 should one infer that the purpose of Par.2 is to extend obligations also to persons/entities who do not engage in the said activities as their main business? If so, the subjects “engaged in transactions” might well be interpreted not only to include entities/persons who enter these kinds of transactions only occasionally (i.e. not as part of their normal business), but also entities/persons who just happen to enter into a once-only transaction!

The correlation between Par1. and Par.2 is not the only source of confusion: For example, Item 2 in Par.1 listing: what are other enterprises and cooperatives as compared to Post Office Units? Is reference made strictly to other (if any) entities running postal courier services (e.g. DHL)? Is the net more widely cast to include operators of money transfers? What about any

communication service such as telecommunications? If the legislator did not have any specific category in mind does the reference to other enterprises and cooperatives refer to *all* enterprises and cooperatives in Serbia but, if so, was there any point of even setting down a list if all businesses were to be obligors? Similarly, in a nation where public or social ownership and support is still the norm, ownership transformation, the list of Par.1 would seem to bring under the obligations an extremely large number of entities. Furthermore, would a producer or importer of expensive industrial machinery (e.g. high-tech components for automated manufacturing plants) be considered as someone engaged in transactions of “valuable objects” and, as such, fall under the obligations of the Law on the Prevention of Money Laundering? With regards to the latter case, indeed the Strasburg Convention prescribes the need to account for transactions related to valuable goods. However, the Convention sets down a general principle and it is up to the national legislator to turn it into a well crafted provision that can be interpreted and applied in practice.

The 2005 Law introduces changes to the list of Obligors. For a start, very much in line with what international best practices recommend (and in some cases impose),²⁴ the law has expanded the group of persons who are obliged to take measures for detecting and preventing money laundering to include attorneys, partnership law firm, auditing company, certified auditor and legal entity or physical person responsible for keeping business books or providing tax advisory services. These professional categories have reporting obligations when acting on behalf of its client in financial transaction or transaction related to real estate business, assessing that there is a suspicion of money laundering related to a certain transaction or person/entity or when the client asks for advice related to money laundering. It is interesting to note that the legislator did not include these categories with the other Obligors (Art.4), but chose to regulate them separately (Art. 26 and 27).

On the other hand, other than some minor modifications, Art. 4 of the 2005 Law substantially preserve the list of Obligors as set down in the old money laundering law. Indeed, the new law does define some categories better and introduces some new ones. However, as illustrated by the comparative table below, the fundamental interpretation issues previously raised remain fundamentally unresolved. Thus, there is justification for the Anti-corruption Council’s recent claim²⁵ that the listing is so vague that it could be argued it includes just about everybody:

3.2. The Authority for the Prevention of Money Laundering

The 2005 Law on the Prevention of Money Laundering provides the obligation of establishing the *Financial Intelligence Unit* (FIU) within the Ministry of Finance. Thus, the APML- Authority for the Prevention of Money Laundering - was established as an administrative organ within the Ministry of Finance with the task of collecting data, analysis, keeping and exchange, monitoring, co-operation, training and other activities relevant for detection and prevention of money laundering.

²⁴ Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, October 2005.

²⁵ Interpretation of the Anti-corruption Council given in the «Potential pitfalls in the Law on the Prevention of Money Laundering», 6 June 2006, www.antikorupcija-savet.sr.gov.yu

Upon the suggestion of the director of the FIU, Minister of Finance establishes the inner organization and systematization of the working places within the FIU. The FIU is managed by the director, who is appointed by the Government of the Republic of Serbia upon the proposal of the minister of finance. Minister is obliged to submit the Government annual reports on the work of the FIU.

The Law prescribes special training of the staff and the competence of the minister relating to its organization, rights and obligations of its staff. In particular, it is provided that the FIU staff may not perform activities which are incompatible with their work in the FIU and with the work of the FIU itself.

For the purpose of detecting money laundering, the Law prescribes the obligation of obligors to provide the FIU the data referred to in Article 34 of the Law²⁶ on any cash transaction, that is, on several inter-related cash transactions in the total sum amounting to or exceeding 15.000 EUR in dinar counter value. The obligation of reporting life insurance operations to the FIU is also prescribed. Also, customs authorities are obliged to submit to the FIU the data on every transfer of cash, foreign currency, checks, securities, precious metals and precious stones across the state border the value which exceeds the allowed amounts prescribed by the provisions on bringing in or out the state borders RSD, foreign currency, checks and securities, and not later than three days from the day of such transfer. The old Law prescribed the obligation of providing data on every transfer across the state border exceeding 30.000 RSD (500 EUR at time of adoption of the Law).

In addition, the Law on the Prevention of Money Laundering harmonized limits of the „suspicious transaction“ amounts with the international standards and they today amount to 15.000 EUR, instead of 600.000 RSD (10.000 EUR in RSD counter value at the time of passing the Law, and for approximately a third less than that in 2005, due to inflation).

The obligor shall be obliged to appoint one or more persons who shall be responsible for detecting, preventing and reporting to the FIU the transactions and persons suspected to be related to money laundering. Furthermore, the Law also prescribes the obligation of obligors to provide professional trainings for employees performing the duties prescribed by the Law on the Prevention of Money Laundering, to provide training in compliance with the standards and methodology determined by the regulation passed based on Article 13 paragraph 2 of this Law, to perform in-

²⁶ Pursuant to Article 34 paragraph 1 items 1) to 4), 7) to 10) and 12), the following data are to be submitted: firm, registered office, registration number, tax identification number (hereinafter referred to as: TIN) of the legal entity opening an account, establishing cooperation or performing a transaction, or for which account is opened, business cooperation established or transaction performed; name and surname, date and place of birth, residence, identity document number and place of issuance, unified citizen's registration number (hereinafter referred to as: the UCRN) of the employee or the proxy opening and account, establishing business cooperation or performing transaction on behalf of a legal entity; name and surname, date and place of birth, residence, identity document number and place of issuance, unified citizen's registration number of physical person opening an account, establishing business cooperation, entering in the gaming place of the organizers of special games of chance, or performing a transaction, that is, on behalf of whom the account is opened, business cooperation established or transaction performed; type and purpose of the transaction and name and surname, and the UCRN of the physical person, that is, firm, registered office, registration number and TIN of legal entity for which the transaction is intended; date and time of performing the transaction; amount of the transaction in RSD; currency in which the transaction is performed; manner of performing the transaction and if the transaction is performed based on signed contract and subject of the contract as well as contracting party; reasons for suspecting a case of money laundering.

ternal control of activities performed in compliance with this Law, as well as to develop a list of indicators for identifying suspicious transactions.

In terms of detection of money laundering, it is also important to stress that the FIU has the power to *request from the obligor to provide data* on financial standing and bank deposits, data related to payment transaction instruments (cash and non-cash) in the country and abroad, as well as other data and information necessary for detecting and preventing money laundering when assess that certain transactions or persons/entities are suspected to be involved in money laundering. In addition, the FIU may issue an order for *temporarily suspending the transaction*, if assess that there is a suspicion of money laundering, of which it shall notify competent judicial and inspection authorities, as well as authorities of internal affairs. Also important for detection is that the FIU may issue an order to the obligor to monitor all transactions performed through accounts specified in such order.

The FIU may also request from the state authorities, organizations or legal entities entrusted with public authority, as well as from an attorney, partnership law firm, auditing company, certified auditor, and legal entity or physical person to providing accounting services or tax advisory services, the data, information and documentation necessary for the detection and prevention of money laundering. The FIU may, at the initiative of the Court, Public Prosecutor, National Bank of Serbia, Ministry of Interior, Ministry of Finance, the Agency for Privatization, Securities Commission and other competent state authorities, conduct an examination of all transactions and persons/entities suspected to be involved in money laundering.

The competent state authorities shall be obliged to regularly provide the FIU the data and information on proceedings related to breaches, economic offences and criminal offences related to money laundering, as well as on offenders (personal data, phase of the proceedings, enforceable court decision) twice a year, while at the request of the FIU, more often as well. The Courts shall be obliged to provide to the FIU the reports on all concluded real estate contracts.

The Law prescribes a fine in the amount from 45.000 to 3.000.000 RSD for a legal entity in case of failing to meet the obligation to notify the FIU, prescribed in the Law. However, the Law on the Prevention of Money Laundering does not provide a particular obligation of reporting related to financing of terrorism, nor prohibits notifying the client about filing a report or giving information to the police.

Comparative list of Obligors

(excluding professionals ex Art. 27 2005 law):

(Official English Translation as published by Ministry of Finance)

2001 Law	2005 Law
<p>Article 5: Legal entities and the responsible persons therein (hereinafter: obligors) shall be obliged to undertake actions and measures aimed at discovering and preventing money laundering.</p> <p>Pursuant to this Act, the obligors shall be:</p> <ol style="list-style-type: none"> 1. banks and other financial organisations (Post Office Savings Bank, savings 2. banks, savings and credit organisations, and savings and credit cooperatives); 3. Post Office units, other enterprises and cooperatives; 4. Government agencies, organisations, funds, bureaux and institutions as well as 5. other legal persons which are in whole or in part financed from public revenues; 6. the National Bank of Yugoslavia œ Clearing and Payments Department as the 7. executor of the country's payment operations; 8. insurance companies; 9. stock exchanges, stock brokers and other persons engaged in transactions 10. involving cash, securities, precious metals and jewels as well as purchase and 11. sale of claims and debts; and 12. Exchange offices, pawnshops, gambling rooms, betting places, slot machine 13. clubs as well as organizers of commodity and money lotteries and other games of <p>Pursuant to this Act, the term obligor shall also include other legal as well as physical entities (entrepreneurs) engaged in transactions relating to purchase and sale of claims and debts, asset management for third parties, leasing and factoring, forfeiting, issuing and conducting operations with payment and credit cards, real estate business, trade in artworks, antiques and other valuable objects as well as treatment of and trade in precious metals and jewels</p>	<p>Article 4: Legal entities (hereinafter referred to as: the Obligors) and responsible persons within the legal entities are obliged to undertake actions and measures for the detection and the prevention of money laundering.</p> <p>For the purpose of this Law, the obligors shall be:</p> <ol style="list-style-type: none"> 1. banks and other financial organizations (savings banks, savings and credit organizations and savings and credit cooperatives); 2. bureaux de change; 3. postal and telecommunication enterprises, as well as other enterprises and cooperatives; 4. insurance companies; 5. investment funds and other institutions operating in the financial market; 6. stock exchanges, broker-dealer associations, custody banks, banks authorized to trade in securities and other entities engaged in transactions involving securities, precious metals and precious stones; 7. organizers of classical and special games of chance (casinos, slot-machine clubs, betting places), as well as of other games of chance; 8. pawnshops. <p>For the purpose of this Law, the obligors shall also be understood to mean other legal entities and individuals doing business related to:</p> <ol style="list-style-type: none"> 1. asset management for other persons; 2. factoring and forfeiting; 3. leasing; 4. issuing payment and credit cards and performing operations with the cards; 5. real estate business; 6. trade in artworks, antiques and other valuable objects; 7. trade in automobiles, vessels and other valuable objects; 8. treatment and trade in precious metals and jewels; 9. organization of travels; 10. mediation in negotiations related to granting credits; 11. mediation and representation in insurance business; 12. organising auctions.

The new listing does exclude a category that was previously included, that is “government agencies, organisations, funds, bureaux and institutions as well as other legal persons which are in whole or in part financed from public revenues”. Notable institutions that are now exempted from obligations are the ones involved in the process of privatization and, first and foremost the Privatization Agency. One must assume that as a Government Agency financed by public revenues the Privatization Agency does fall squarely in the list of obligors as defined in the 2001 Law. It should be highlighted that this is the second instance in which privatizations drop out of sight in the money laundering scene as we already noted that the definition of the criminal offence of money laundering in the new CC does not contain anymore the provision relating to ownership transformation. At the time when the legislator seems anxious not to exempt from the regulatory regime even the more marginal operators, it is supremely odd that he would exempt the entity that presumably handles some of the largest transactions in the country.

However, the application of the Law on the Prevention of Money Laundering needs to be monitored and the list of obligors and their obligations should be reconsidered. The warning of Anti-corruption Council that with obliging a vast majority of transactions to be reported to the FIU could lead to overburden of useless information and consequently miss genuine money laundering activities, need to be kept in mind and checked in practice. Privatization Agency should have obligation to report suspicious transactions, bearing in mind high risk of money laundering connected to it.

3.3. Client identification and keeping of records

It is also considered, as well as emphasized in the new Basel Agreement on Capital, that one of the key ways for combating money laundering is knowledge of the client and of his financial position. In that way, one of the often used methods of money laundering, that is, opening accounts under false name or in the name of persons or interested parties acting on behalf of another beneficiary can be omitted (Fijat, 2003: 30). Experts believe that the principle of “Customer Due Diligence” is not contrary to the banking ethics of protecting client’s interests and discretion of banking activities, yet may give results in the sense of money laundering prevention, because “it may be more dear for any bank to be publicly related to money laundering than giving up a suspicious client”.²⁷

Relevant Serbian legislation contains different provisions on identifying the clients. First of all, according to the Law on Banks and Other Financial Organizations, each bank freely decides on its choice of clients. The client is signing the agreement on opening and maintaining bank account with the respective bank or other financial organization, which, inter alia, contains the following data: full name of the bank/legal entity, place and address of bank registered office, that is, of other legal entity, registration number of the bank/legal entity, name, surname and function of the person representing the bank/legal entity, while for physical persons – basic data on the persons

²⁷ “Inspection of client's financial status – safest cure” – prevention of money laundering according to the standards of the new Basel Agreement, Danas, April 6, 2006

(name and surname, father's name,²⁸ place of residence, unified citizen's registration number, identity card number) and number and name of the account that is being opened.

On the other hand, as to the Law on the Prevention of Money Laundering (2005) every obligor shall be obliged to identify the customer, collect data on the customer and the transactions, as well as other data relevant for the detection and prevention of money laundering when opening an account or establishing other form of business cooperation with the customer, as well as in case of specific transactions and operations related to life insurance. When identifying the customer, the obligor shall be obliged to request a statement as of in whose name and on whose behalf he/she performs transaction, opens an account or establishes business cooperation. In case the customer undertakes some of these businesses on behalf of other, he/she must have an authorization as well as all the documentation relevant for identification of the person on behalf of whom he/she acts. The Law on the Prevention of Money Laundering provides that when opening an account or establishing business cooperation, the obligor may perform the identification of the customer even without his presence, but then it must beyond doubt determine the identity of the customer by establishing all relevant data pursuant to this Law. However, if the identity of the customer cannot be determined, the obligor shall be obliged to refuse to perform the transaction. If the obligor (legal entity) does not identify the client, it will be punished for the economic offence.

Although none of the analyzed laws explicitly prohibit opening anonymous accounts, the analysis of both the Law on the Prevention of Money Laundering and other relevant laws and by-laws illustrate that the intention of the lawmaker is to oblige competent financial and other institutions and organizations, as well as other physical persons and legal entities to determine the identity of every client in each individual case, making a basis for preventing the cases of money laundering.

The obligors in the sense of the Law on the Prevention of Money Laundering shall be obliged to keep records on customers, that is, opening of accounts, establishing business cooperation and performed transactions. All documentation and data related to the said must be kept for at least five years as of the day the transaction was performed or business cooperation ended. On the other hand, the FIU is obliged to keep the data contained in the records maintained in accordance with this Law for at last 10 years from the date of receiving them, while after expiration of the said term, these data shall be archived. They shall be kept in the archives for three years after which time they shall be destroyed.

Data which relate to personal data, financial status and transactions, ownership or business relations of the client present a bank secret and may not be disclosed to any third party or used contrary to the interests of the bank and its clients, nor can an access to this data be given to third parties. It means that each bank shall be obliged to observe the confidentiality of the account and provide the information concerning the account only to the client, unless otherwise provided by the laws. However, some exceptions, relevant for prevention of money laundering, are provided for by several laws. The Law on Payment Transactions provides for obligation of banks to submit

²⁸ In regard to this kind of data (father's name) we might say that this is not a specific measure provided for the filed of money laundering, rather a data that is usually required within the legal transactions, when filling some official forms, etc.

to the National Bank of Serbia the data identifying the client and client's accounts as per name and number immediately upon the opening, or closing the relevant accounts, as well as the data from records on performed payment transactions according to the uniform list of accounts. The National Bank of Serbia shall maintain the single register of accounts of the banks, legal entities and physical persons engaged in activities. In that way, the NBS may have an insight into all opened accounts and performed transactions, which makes a basis for detecting and preventing money laundering on time. On the other hand, both the Law on Payment Transactions and the Law on Banks and Other Financial Organizations foresee that the bank shall be obliged to provide the data on turnover of funds in the client's account and other data relating thereto to the competent authority, specifically, by order of the court, tax or other competent authority for the prevention of money laundering.

In order to conclude, we may state that a permanent control and supervision of opening and closing bank accounts and the realized payment transactions provided for by relevant laws, certainly present a solid ground for the prevention and detection of money laundering.

3.4. The role of Banking Supervision

The National Bank of Serbia performs supervision, i.e. control of financial position and legality of the operation of banks and other financial organizations, both indirectly and directly.²⁹ The indirect supervision is performed through the control of data, reports and other documentation, which the banks submit to the NBS. The direct control means the inspection of business books and other documentation of the bank or other legal entity whose business activities are being controlled. Pursuant to the Decision on the Supervision of Payment Transactions Performed by Banks, in this segment provides that, the NBS has the right to inspect not only appropriate documentation of the bank but also of the agent and all clients of the certain bank, that is, participants in the business which is the subject of control. Thus, supervision of payment transactions, amongst other, also includes the supervision of the regularity of opening, maintaining accounts for performing client's payment transactions, supervision of performing payment transactions and their recording through appropriate accounts, and alike.

According to the Law on Foreign Exchange, the National Bank of Serbia performs supervision of foreign exchange transactions of authorized banks and other legal entities and individuals.

In conducting supervision function, the NBS cooperates both with local authorities and institutions competent for supervision in the field of financial operations and with foreign institutions competent for supervision of business banks with which there are signed agreements on cooperation in this field.

Finally, as to the measures of internal control, it is important to point out that the Law on Banks and Financial Organizations provides for internal control of bank operations at all levels, as well as the control of the regularity of bank operations and efficiency of internal control system

²⁹ According to the National Bank of Serbia Governor's Decision on Detailed Conditions and Manner of Conducting Supervising Function of the National Bank of Serbia

(Article 82). The National Bank of Serbia shall pass appropriate by-laws which lay down in further detail conditions and manner of organizing and performing systems of internal control, so it remains to be seen in which way shall the provisions of the said Law be applied in practice as well as what kind of results they will yield, amongst other, also related to the prevention of money laundering.

3.5. The Criminal Procedure Code

Some of the important requirements contained in international instruments are related to the provisions relevant for detecting and proving money laundering, including particularly investigation techniques, such as:

- electronic surveillance and other forms of surveillance and secret operations (tailing, watching, tapping telecommunications, access to computer systems, and alike);
- controlled delivery;
- inspecting business books and other books of banks and other financial institutions, that is, making available relevant records of banks and other financial institutions to courts and/or other competent authorities or seizing them.

In Serbia, investigative techniques are regulated by Criminal Procedure Code. Both old and new Criminal Procedure Code (hereinafter referred to as: the CPC) have several provisions of significance for detecting and proving money laundering. A part of them are provisions applicable to all crimes, while the other are provisions whose application is limited to organized crime, other forms of serious crimes or other, specifically enlisted, criminal offences.

In this section we shall compare the measures relevant for detecting and proving money laundering, provided in the old, but still applied in Criminal Procedure Code, with the novelties which are provided in new Criminal Procedure Code, passed in May 2006.³⁰

3.5.1 General investigative techniques and money laundering

Both old and new Criminal Procedure Code provide several provisions applicable to all criminal offences, which are of special importance for detection and proving of money laundering. These provisions relate to the possibility of inspecting goods, assets and premises, freezing and seizing, inspection of mail, as well as the possibility of requesting information regarding a suspect's business or personal accounts to banks and to other entities.

The Article 85 of CPC (both old and new) provides that the investigating judge may order the postal, telephone and other enterprises, companies and persons registered for the transmission of information to retain and deliver to him, against receipt, letters, telegrams and other shipments addressed to the accused or sent by him, if there are circumstances which indicate that it is likely that these shipments shall serve as an evidence in the proceedings. Also, the public prosecutor

³⁰ It is important to mention that considering a great number of new solutions, the new Criminal Procedure Code shall come into force only a year later from the day it is passed (with the exception of provisions on witness protection, which will be immediately applicable).

may order a bank, financial or other organization to submit data on statement of balance of the suspect's business or personal accounts. Besides that, he may order that the execution of financial transactions for which there is a suspicion that they present criminal offence or the gain originated from the criminal offence, will be temporarily discontinued, all financial resources and cash in local and foreign currency allocated for these transactions will be temporarily confiscated, deposited on a particular account and kept until conclusion of the proceedings.

Finally, the new CPC provides as a general probative act that the public prosecutor may request that the competent state authority, bank or other financial organization performs *control of business activities* of certain persons and that the same submit documentation and data which may serve the public prosecutor as a proof of the criminal offence or of property obtained from criminal offence, as well as information on suspicious cash transactions in the sense of the Convention on Money Laundering, Search, Seizure and Confiscation of Proceeds from Crime. In addition, the public prosecutor may order that the competent authority or organization *temporarily discontinues payment*, i.e. issuing of suspicious money, securities or objects. While previous CPC prescribed it as a special investigative technique applicable only to organised crime, according to new CPC it can be applied to all criminal offences, i.e. to all cases of money laundering, regardless whether it meets conditions for organised crime or not.

3.5.2. Special investigative techniques and money laundering

Special investigation measures and techniques, provided both in old and new CPC include: surveillance and recording, control of business activities, providing simulated business services, concluding simulated legal transactions, engaging undercover investigators, controlled delivery, as well as temporary confiscation of objects and material gain. In addition, the new CPC provides new probative method: automatic computer search of personal and other data.

The new Criminal Procedure Code provides the use of special investigation measures to three groups of criminal offences:

- A)** criminal offences pertaining to organised crime as defined by Law;
- B)** the broader range of criminal offences considered, according to penalty prescribed, serious crimes;
- C)** other specifically listed criminal offences.

The 2 latter categories have been introduced by the new CPC, and significantly expand the possibility of using special investigation techniques in money laundering cases. Under the new CPC, only the use of *surveillance and recording* is restricted to cases of money laundering that are considered as organised crime, while all other investigation techniques may be used without restrictions in all other money laundering cases.

Besides offences of organised crime, the new CPC provides the possibility of applying *providing simulated business services and making simulated legal transactions* in case when there is a ground for suspicion that the following offences were committed: forging money, money laundering, illicit production and traffic in narcotic drugs, illicit traffic in weapons, ammunition or explosive

substances, human trafficking, traffic in children for the purpose of adoption, giving and receiving bribes and abuse of official status.

Moreover, the new CPC expands the application of the measure of engaging the undercover investigator, in such way that it, besides in case of organised crime, may also be applied in case of every other organised commission of criminal offences against the constitutional order or security or against humanity and international law as well as in case of other criminal offences for which the prescribed punishment of imprisonment is more than 4 years (therefore, regardless whether the legal conditions pertaining to organised crime are fulfilled or not).

Although, unlike the previous regime, the new CPC does not limit the use of controlled delivery to organised crime, it considers its use exceptional. In addition, it also explicitly mentions that *controlled delivery* is to be applied when it is impossible or difficult to detect, among other, stolen objects and other objects obtained by crime.

The new CPC provides a new probative method of *automatic computer search of personal and other data*, which consists in automatic searching of already kept personal and related data and their automatic comparing with the data referring of the committed criminal offence and persons which may be brought into connection with this criminal offence so as to exclude in such a manner some persons as possible suspects and singled out persons for which data are to be collected as a ground for suspicion. It may be applied in case of *money laundering* as well as in cases of some other offences enlisted in the Code.

The novelty in new CPC says that if there is a ground for suspicion that certain object or material gain originates from criminal offence for which punishment of imprisonment of ten years or more is prescribed, the court may impose a measure of temporary confiscation of the object or material gain even aside from the general conditions provided by the Code. This provision differs from those of the old CPC which limits this exception with offences from the field of organized crime only.

3.6. Assessment of provisions on the detection and proving

The provisions of the Law on the Prevention of Money Laundering and the Criminal Procedure Code to a great extent completed and improved legal regulations in this field. By providing a series of detailed measures, which are focused on the detection and special measures of proving, solid ground for detecting and proving money laundering was created.

In old CPC the use of some of these measures was limited to the cases when money laundering could be treated as organized crime. However, it is significant that the new CPC, which will start to be applied on June 1st 2007, besides providing a new probative method of automatic computer search of personal and other data, also explicitly mention application of providing simulated business services, making simulated legal transactions, control of business activities, engaging undercover investigator as well as controlled delivery when there is a reasonable doubt that it is a matter of money laundering also when it does not have elements of organized crime.

However, it is worth mentioning that, similarly as the most of new legal provisions in Serbia, the legal provisions about investigation techniques are prescribed without clear systematisation and connection with the wider legal context, which may make their interpretation and application difficult and inconsistent. Thus, it is necessary that the use in practice of temporary measures and special investigation measures and techniques in cases of money laundering is monitored in order to establish how significant in reality they are for prevention, detection and proving of money laundering.

4. Provisions of the criminal material law relevant to the prevention of money laundering

Given that money laundering is a new criminal offence, so that it may be expected that Public Prosecutors will at first not be confident to apply it, it should be borne in mind that the Criminal Code of the Republic of Serbia also contains, as it already contained before money laundering as a criminal offence by other provisions whose application may prevent the occurrence of money laundering, that is, under which money laundering may in fact be subsumed and sanctioned, although money laundering is not explicitly mentioned. In the first case, it is a matter of a criminal offence titled the *concealment*, while in the second case it is a measure of mandatory confiscation of any material gain obtained from criminal offence, which indeed includes all predicable criminal offences.

4.1. Concealment and predicate crimes

As we already mentioned, concealment was provided in Art. 184 of old CC. It is also a criminal offence provided in Art. 221 of the present Criminal Code (2005). The new provision is in essence the same as one from Art 184, but it also contains some differences, i.e. restrictions regarding the penalty.

Article 221 from 2005 CC says: “whoever conceals, circulates, purchases, receives in pawn or otherwise obtains an object for which one knows was acquired by criminal offence or whatever obtained it by sale or exchange shall be punished with imprisonment up to three years, where the penalty may not exceed the statutory penalty for the offence by whose commission the object was acquired”. As we can see, the penalty is significantly lower in comparison to earlier provision, since it is now possible to impose fine (which was not possible earlier), or imprisonment of up to 3 years instead 1 to 5 years as it was provided in earlier CC. Also, the penalties provided for concealment is not in accordance with money laundering penalty provision either, i.e. the penalties prescribed for concealment are much more lenient than for money laundering.

Another change is related to the new provision which says: “In case the offender habitually engages in the criminal offence or in case the offence is committed by an organized group or the value of concealed items exceeds the amount of one million and five thousand RSD, a more severe punishment is provided including imprisonment of six months to five years. This is another example of the lack of harmonisation within new CC: the penalty provided for the similar provision about money laundering is from 1 to 10 years (when the amount is more than 1.5 million RSD).

The Criminal Code provides a whole series of predicate criminal offences, as well as greater number of offences whose manner of commission includes various fraudulent acts and forgeries, which may also refer to forging data of financial nature (for example, abuse of authority in economy, forging documents, specific cases of forging documents, forging official documents, abuse of official status, unconscientiously performing office, fraud in service, fraud, obtaining and using credits and other benefits without grounds). Finally, there are also criminal offences, which are punishable for a behaviour, which disables timely detection of money laundering (for example, disabling the control of business books and other documentation).

4.2. Confiscating illicit material gain³¹

The measure of confiscating illicit material gain is a measure of a general character, which may be imposed regardless of the fact from which criminal offence and the kind of material gain was acquired. This measure is regulated by Articles 91 and 92 of the Criminal Code of the Republic of Serbia. The Article 91 provides that “no one may retain material gain obtained by criminal offence” and that the material gain shall be seized on conditions provided by the Criminal Code and the court decision determining the commission of a criminal offence. Article 92 provides that money, items of value and all other material gains obtained by a criminal offence shall be seized from the offender, and if such seizure should not be possible, the offender shall be obliged to pay a pecuniary amount commensurate with the obtained material gain. It is also prescribed that the material gain obtained by criminal offence shall be seized from the person to whom it was transferred without compensation or with compensation that is obviously inadequate to its real value, as well as confiscation of the material gain for the benefit of other which was acquired by criminal offence.

Besides provisions of general character relating to the measure of confiscating illicit material gain, the Criminal Code of RS provides obligation of confiscating material gain also within incrimination of some predicate criminal offences (for example, corruption, illicit mediation), as well as in case of criminal offence of the financing of terrorism and money laundering.

The criminal offence under the title of financing terrorism referred to in Article 393 of the 2005 Criminal Code presents a novelty in the Serbian criminal legislation. This provision provides the sentence of one to ten years of imprisonment for “those who provide or collect funds for financing commission of” Criminal Codes of terrorism, international terrorism and taking hostages, by which the Serbian legislation is harmonized with the international standards in this filed.

³¹ It should be mentioned that in the legal terminology of Serbia the measure of confiscating illicit material gain is understood in different way from confiscation. Namely, the term confiscation is associated with penalty of confiscation, which was found in the earlier Criminal Code and which consisted of confiscating property from the convicted person, and was not limited to property acquired by criminal offence, so that, being a relic of the communist period, it was not provided in the present Criminal Code.

5. Serbian legislation on money laundering vis-a-vis international standards

Results of the analysis of Serbian legislation related to the issue of money laundering presented in this paper suggest that Serbian legislation regarding money laundering is formally in compliance with international standards and obligations.

Based on our analysis, we may conclude that current provisions pertaining to the criminal offence of money laundering and criminal liability for it are in compliance with the Strasbourg Convention requirements, as well as with other ratified international instruments such as the Council of Europe Convention against Corruption (1999), the UN Convention against Transnational Organized Crime (2000), the UN Convention against Corruption (2003). This applies both in regard to prescribed forms and in regard to punishing, attempt, incitement and its organized commission (through imposing punishment for commission of the criminal offence of criminal association and conspiring for commission of criminal offence). Moreover, the obvious exclusion of the application of the provisions related to the criminal offence of money laundering to persons who committed predicate crimes is also in compliance with international law. Namely, the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime clearly provides that such solution can be provided for by State Parties. Also, in Serbian legislation there is not any restriction related to which crime can be considered predicate crime, which also allow corruption to be treated as predicate crime. Thus, Serbian legislation is in accordance with both the UN Convention against Transnational Organized Crime (2000), and the UN Convention against Corruption (2003), which respectively request that as much as possible predicate crimes are included, and that corruption is treated as predicate crime, as well.

In regard to the use of special investigation measures and techniques and temporary measures, we may conclude that Serbian legislation is harmonized with the requirements of international instruments, particularly with the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and the UN Convention against Transnational Organized Crime, but also with the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the UN Convention against Corruption (2003).

By providing for the criminal offence under the title of financing of terrorism, Serbian legislation is harmonized with the UN Convention for the Suppression of the Financing of Terrorism (1999). On the other hand, by providing for a numerous predicate crimes, including corruption, it is also in compliance with the UN Convention against Transnational Organized Crime (2000) and the UN Convention against Corruption (2003)

Taking into consideration provisions on the confiscation of the illicit material gain and on freezing and seizing instruments or gains from crime, it may be concluded that the provisions on con-

fiscation are in compliance with the Strasbourg Convention, but also with the Council of Europe Convention against Corruption (1999), the UN Convention against Transnational Organized Crime (2000), and the UN Convention against Corruption (2003), which request prescribing confiscation of property, that is, freezing and seizing instruments or gains from crime, including corruption, or property whose value corresponds to that gain, in compliance with national legislation.

Establishing FIU as a specialized agency for detection and prevention of money laundering is in compliance with the Council of Europe Convention against Corruption (1999), while providing for cooperation and exchange of information on both national and international level is harmonized with the provisions contained in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), the Council of Europe Convention against Corruption (1999) and the UN Convention against Transnational Organized Crime (2000).

By providing different forms of prevention, control and supervision over banking and other financial transactions, our legislation is harmonized with the requirements from the following international documents: the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), the Council of Europe Convention against Corruption (1999), the UN Convention against Transnational Organized Crime (2000), the UN Convention against Corruption (2003).

Finally, we might conclude that most of the FATF Anti-Money Laundering Recommendations, prepared by the MONEYVAL Secretariat are met by the current Serbian legislation.³²

³² Report on Serbia and Montenegro on the standards for anti-money laundering and countering terrorist financing, European Committee on Crime Problem, Strasbourg, 2005.

Compliance of Serbian legislation on money laundering with the international instruments

Serbian legislation on money laundering	Compliance with the international instruments
Definition and sanction	
Definition of money laundering (Art. 231 of the Criminal Code, Art. 2 of the Law on the Prevention of Money Laundering)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), Council of Europe Convention against Corruption (1999), UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Sanction (Art. 231 of the CC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), Council of Europe Convention against Corruption (1999), UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Detecting and proving	
Temporary seizure of post, telegrams and other shipments (Art. 85 of the CPC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990)
Surveillance and recording of telephone and other conversations or communications by other technical means as well as optical recording of persons (Art. 146 of the CPC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), UN Convention against Transnational Organized Crime (2000)
Controlled delivery (Art. 154 of the CPC)	UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
Automatic computer search of personal and other data (Art. 155 of the CPC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990)
Collecting data from banks and other legal entities and temporarily discontinues payment, i.e. issuing of suspicious money, securities or objects/obligation of banks and other financial institutions to provide these data (Art. 86 of the CPC, Art. 535 of the Law on Banks, Art. 35 of the Law on the Payment Transaction)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), Council of Europe Convention against Corruption (1999), UN Convention against Corruption (2003)
Engaging the undercover investigator (Art. 151 of the CPC)	Not particularly mentioned in the international documents, but can be included in other investigative measures according to: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), UN Convention against Transnational Organized Crime (2000)
Providing simulated business services and making simulated legal transactions (Art. 148 of the CPC)	Not particularly mentioned in the international documents, but can be included in other investigative measures according to: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), UN Convention against Transnational Organized Crime (2000)

Liability and punishment of legal entity (Art. 37 of the Law on the Prevention of Money Laundering)	In compliance with: UN Convention against Transnational Organized Crime (2000)
Confiscation, i.e. freezing and seizing instruments or gains from crime (Art. 82 and 255 of the CPC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), Council of Europe Convention against Corruption (1999), UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Confiscation of illicit material gain (Art. 91 and 92 of the CC)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990), UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Financial Intelligence Unit (specialization of the state agencies) (Art. 12-26 of the Law on the Prevention of Money Laundering)	Council of Europe Convention against Corruption (1999)
Terrorism financing and predicate crimes	
Corruption and other predicate crimes (provisions of the CC)	UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Criminal offence of terrorism financing (Art. 393 of the CC)	UN Convention for the Suppression of the Financing of Terrorism (1999)
Prevention and supervision	
Comprehensive regulatory and supervisory regime for banks and other financial institutions (Art. 63 and 64 of the Law on the National Bank of Serbia, Art. 35-36 of the Law on the Prevention of Money Laundering, Art. 82 of the Law on Banks, Art. 41 of the Law on Foreign Currency Transaction)	UN Convention against Transnational Organized Crime (2000), UN Convention against Corruption (2003)
Obligors and their obligation in terms of prevention and detection of money laundering (Art. 4, 27-29 of the Law on the Prevention of Money Laundering)	Council of Europe Convention against Corruption (1999)
Identifying clients (Art. 5-7 of the Law on the Prevention of Money Laundering)	UN Convention against Corruption (2003)
Keeping records (Art. 33 of the Law on the Prevention of Money Laundering)	UN Convention against Corruption (2003)
Reporting import or export of the certain amounts of money, checks, value papers etc. over the state border (Art. 37 of the Law on Foreign Currency Transaction, Art. 9 of the Law on the Prevention of Money Laundering)	UN Convention against Transnational Organized Crime (2000) UN Convention against Corruption (2003)
Cooperation and exchange of information on national and international level (Art. 25 of Law on the Prevention of Money Laundering, Art. 65 of the Law on the National Bank of Serbia, Art. 47 of the Law on the Foreign Currency Transaction)	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990) Council of Europe Convention against Corruption (1999) UN Convention against Transnational Organized Crime (2000)

6. Conclusions

Results of our analyses suggest that Serbian legislation regarding money laundering is formally in compliance with international standards and obligations. Last years, after the new Law on money laundering as well as the new Criminal Code and Criminal Procedure Code are passed, there has been significant improvement in comparison to the situation before.

These improvements include particularly better harmonization with international standards and between different laws, as well as clearer and comprehensive definition of money laundering, i.e. predicate offence and transaction, provision of financing of terrorism as criminal offence, expanding the list of obligors, inclusion of professional categories as obligors, detailed regulation of obligations, as well as providing in detail an entire series of detection, prevention and investigation measures.

However, formal compliance with broad international principles does not translate automatically in good and effective laws. The main problems identified in our analysis include:

- A)** The lack of clarity in list of obligors;
- B)** Unclear situation in relation to money laundering in privatization, which seems to open space for immunity in this vulnerable sphere;
- C)** Problems related to the role of the FIU, particularly its lack of independence, insufficient clarity in relations with other institutions, and problematic quality of information collected;
- D)** The lack of harmonisation of penalties prescribed for money laundering and similar offences.

It seems that the application of the Law on the Prevention of Money Laundering needs to be monitored and the list of obligors and their obligations should be reconsidered. The warning of the Anti-corruption Council that with obliging a vast majority of transactions to be reported to the FIU, could lead to overburden of useless information and consequently miss genuine money laundering activities, need to be kept in mind and checked in practice. Privatization Agency should have obligation to report suspicious transactions, bearing in mind high risk of money laundering connected to it. It is necessary also that the use in practice of temporary measures and special investigation measures and technique in cases of money laundering is monitored in order to establish how significant in reality they are for prevention, detection and proving of money laundering.

Finally, establishing FIU as a part of the Ministry of Finance of the Republic of Serbia, is an important step in establishing a state mechanism for combating money laundering, although it should be somehow evaluated whether this form of institutional organization in which it is dependent on the Ministry of Finance is good or it might be misused for achieving political aims. In

other words, it should be explored whether it would be better to have the FIU as an independent agency.³³

It may be concluded that Serbian legal system is still very vulnerable so that the process of implementing the current legal solutions and harmonizing with the world, and in particular with the European standards, in reality is slow and not efficient enough. Finally, it is worth mentioning that in Serbia, as well as in entire former Yugoslavia, the laws in practice were always much bigger problem than the laws in books. Thus, the effort should be made in education of police, prosecutors and judiciary as well as in monitoring of implementation of laws in practice.

³³ Interpretation of the Anti-corruption Council given in the «Potential pitfalls in the Law on the Prevention of Money Laundering», 6th June 2006, www.antikorupcija-savet.sr.gov.yu

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