

## On the Challenges of Drafting a Comprehensive Criminal Money Laundering Statute in Albania

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### Abstract

*The criminal money laundering statute in Albania is presented in Article 287 of the Criminal Code. This statute became the cornerstone for a definition of money laundering in Albania in 2003 when it was completely amended to introduce the term “money laundering” in the Albanian criminal legislation. Since then, the statute has been amended several times, including complete rewrites of the entire statute. This article will examine the rationale behind the frequent changes, and the difficulties presented to the drafters in drafting a definition that stands the test of time and judicial scrutiny. The article will inquire into the compatibility of the long-established principles of the Albanian criminal justice system with the new concepts inherent in anti-money laundering concepts and prerequisite of international instruments. The article will reach conclusions based on available academic work, reports on Albania, and judicial opinions of the higher courts in the country.*

**Keywords:** money laundering, laundering of crime proceeds, Albania, criminal code, criminal statute, legislation drafting

### 1. Introduction

The term ‘*money laundering*’ originates from the United States (Schneider and Windischbauer, 2010.) It seems quite a word game as it was first used to describe Mafia’s attempt to put illegal proceeds back into circulation via laundromats that operated with cash and that were controlled by business formations (Ertl, 2004.) A great deal of the laundered money derives from drug dealing. Most of the illegal transactions are processed by cash since there is the smallest risk to leave traces, although there is an obvious tendency to misuse the internet to undertake illicit transactions in electronic or online forms.

The term was officially used for the first time in 1973 during the Watergate Scandal. Therefore, it does not have an original legal definition, because it was just a colloquial paraphrase describing the process of transforming illegal into legal assets (Schneider and Windischbauer, 2010.) A supranational definition of money laundering was created by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>1</sup>.

Money laundering represents an especially challenging crime to define. It is a crime that depends on another crime<sup>2</sup> to exist, although provided for by the criminal law as a completely separate crime. This specific feature that does not apply to any other crime makes it a challenge for academics to explain the theory of it, for legislative drafters to draft a comprehensive definition, and for practitioners to apply it in court.

The intertwining of money laundering with the predicate offense serves also as an opportunity, as a facilitator of further criminality, especially terrorism (Rrokaj, 2017). In this context, money laundering remains in between two types of criminal activities: one it originates from and one it finances. This makes money laundering a difficult crime to discover, but also essential for the discovery of the two other types of criminal activity, especially organized crime, where it originates and terrorism that it finances (Rrokaj, 2017.) Following financial transactions, that is “*following the money*”, could thus lead to the discovery of not one, not two, but three distinct criminal activities. Those are only some of the reasons why a clear, concise, but comprehensive definition of money laundering is so essential.

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<sup>1</sup> Signed on December 20, 1988.

<sup>2</sup> The so-called ‘*predicate offense*.’

This article will examine the origins of money laundering in the modern Albanian Criminal Code. It will trace all changes made to this Code and the respective rationale. Then, it will closely look into the current formulation of money laundering and analyze it from the viewpoint of the applicable international standards. The article will close with recommendations arising from the linguistic and interpretative analysis of the history of the money laundering definition *vis á vis* the international instruments.

## 2. The original money laundering statute in Albania

At first face, the original Criminal Code of Albania, adopted after the fall of communism, does not contain a money laundering statute. Article 287 seems to cover the transfer of assets:

*“The alienation, transfer, concealment, obliteration of the nature, source, ownership of assets gained through crime ...”*<sup>3</sup>

This definition was intended to cover money laundering<sup>4</sup> (The Parliament of Albania, 1995.) The discussions in the plenary session refer to the UN conventions of drugs that require criminalization of laundering drug trafficking proceeds, which was also the intention of the drafters, but the plenary decided to extend it to all criminal activity.

The drafters claim to have been based on a UN Convention for the language of this Article, although not much detail is provided. It seems that this convention is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, but the citations from the definitions of this convention are only partially correct. This may be due to a general lack of familiarity with international conventions and, obviously, to a lack of knowledge and understanding of money laundering practices.

This was precisely the finding of the Council of Europe during their first evaluation of Albania (CDPC, 2001.) The Albanian authorities contended that, although the Criminal Code had been reviewed and amended, this was a pre-existing provision, which was drafted at a time when the Albanian experience of money laundering was very limited, and at the same time committed to drafting a better provision.

The Criminal Code used the term ‘*money laundering*’ for the first time in 2001 with the changes made to the Code. Article 287 remained as it was, while ‘*Laundering of dirty money*’ was added as Article 287/a:

*“Carrying out financial transactions or other economic transactions with the aim of laundering money known to be derived from criminal activity, as well as the re-entry of those in circulation and usage for entrepreneurial or economic activity of any kind ...”*<sup>5</sup>

The existence of both Articles makes one of them redundant, but neither Article reflects the standards applicable at that time for the definition of money laundering.

## 3. The subsequent amendments to the money laundering statute and their challenges

### 3.1. Amendments in 2003

Law no. 9086, dated 19.6.2003 abolished the existing criminal definition of laundering of dirty money and introduced a new definition of money laundering, called since then ‘*laundering of crime proceeds*.’

Article 287 - “*Laundering of crime proceeds committed through:*

- a) *the exchange or transfer of assets that are known to be crime proceeds, in order to hide or conceal the asset’s illegal origin or to give assistance for avoiding the legal consequences of having committed the crime;*
- b) *hiding or covering up of nature, source, position, location, displacement of property or other rights related to the asset that is a crime proceed;*
- c) *the performance of financial activities and structured transactions to avoid reporting based on the money laundering law;*
- ç) *gain, possession or use of an asset known to be a crime proceed;*
- d) *advice, incitement, or public call to commit any of the offenses specified above...”*

This definition seems to be closer in language with the 1988 UN Convention, although by this time the UN had adopted the Palermo Convention<sup>6</sup> that is to this day regarded as the cornerstone of the definition of money laundering.

<sup>3</sup> Law no. 7895, dated 27.1.1995, Article 287.

<sup>4</sup> Interestingly, during the plenary session, the MPs talk about using ‘*zbardhja e parave- lit. money bleaching*’, instead of ‘*pastrimi i parave- lit. cleaning/laundrying of money*’, which seems like an appropriate and possibly more interesting term, but in the end, they use neither.

<sup>5</sup> Law no. 8733, dated 24.1.2001, Article 72.

<sup>6</sup> The UN Convention against Transnational Organized Crime adopted on November 15, 2000.

The new definition adds these special circumstances where money laundering still stands despite the fate of the predicate offense: “...where the person that has committed the offense, from which the crime proceeds derive, cannot be taken as a defendant, cannot be punished, [where] there is a cause that obliterates the criminal offense or one of the conditions for criminally prosecuting such an offense is missing.”

The same law introduces a new Article 287/a that criminalizes opening anonymous bank accounts: “Opening deposits or bank accounts, anonymously or with fictitious names...”

The 2003 definition addresses many of the deficiencies of the original definition. It seems that in 2003 Albania managed to have a robust criminalization of money laundering (MONEYVAL, 2004) embracing the all-crime nature of money laundering, where all crimes contained in the Criminal Code could potentially serve as predicate offenses. However, the 2003 definition is not clear as to whether it covers also indirect proceeds or own-proceeds laundering. In this period, the judicial case law embraced an interpretation of money laundering that required a prior or simultaneous conviction for the predicate crime is needed to indict for money laundering. This was an extremely strict interpretation not in line with international standards that put to risk the entire effort against money laundering in Albania.

### 3.2. Amendments in 2004

In 2004, minor changes were made to Article 287 by adding paragraph dh): “...use and investment in economic or financial activities of money or objects that are proceeds of criminal offenses.”<sup>7</sup>

In 2004, MONEYVAL would find that the definition of the money laundering offense is largely in line with the UN Conventions (MONEYVAL, 2005.) At this time the judicial case law had evolved to allow a money laundering conviction without the need for a conviction for the underlying offense, but the prosecution still needed to prove that the proceeds were connected to a specific predicate offense. In 2004, there was still no consensus as to whether self-laundering was covered and the Criminal Code did not expressly state that the criminal intent, knowledge, or purpose can be inferred from objective factual circumstances (MONEYVAL, 2005.) More than an issue related to money laundering, this is something that stems from the general provisions of the Criminal Code and its judicial interpretation.

### 3.3. Amendments in 2007

In 2007, several changes were made to Article 287<sup>8</sup>. Paragraph a) was amended: “...exchange or transfer of assets that are known to be products of the criminal offense, to hide, cover the origin of the asset or provide assistance to avoid the legal consequences related to the offense committal.”, while paragraph ç) was abrogated.

The same law added a new provision, Article 287/b, that criminalized the embezzlement of stolen money or objects<sup>9</sup>.

At this time, it appeared that the progress made so far with the wording of the money laundering statute was not sufficient anymore to satisfy the demands of the judicial case-law and the evolving international standards. It became apparent that the Criminal Code needed to clarify that Albania had jurisdiction over money laundering offenses when the predicate offense was committed abroad by a foreign citizen, that self-laundering was covered, to specify that knowledge, intent, or purpose could be inferred from objective factual circumstances, and to introduce the ancillary offense of ‘helping’ or ‘assisting’ (MONEYVAL, 2007.) The most pressing issue at this time remained the lack of prosecutions for money laundering, as prosecutors still applied a very heavy evidentiary burden on these offenses. At the same time, the Criminal Code still did not contain the FATF-designated predicate offenses of insider trading and market manipulation, while Article 287/b offenses were limited to stolen goods (MONEYVAL, 2011.)

## 4. The current formulation

The current formulation of Articles 287 and 287/b was adopted in 2012<sup>10</sup>.

*Article 287 – “Laundering of the proceeds of a criminal offense or criminal activity, through:*

*a) Exchange or transfer of property, for purposes of concealing or disguising its illicit origin, knowing that such property is a proceed of a criminal offense or activity;*

*b) Concealing or disguising the real nature, source, location, disposition, relocation, ownership, or rights concerning the property, knowing that such property is a proceed of a criminal offense or activity;*

*c) Obtaining ownership, possession, or use of property, knowing at the time of its acquisition, that such*

<sup>7</sup> Law no.9275, dated 16.9.2004, Article 24.

<sup>8</sup> Law no. 9868, dated 26.2.2007, Article 24.

<sup>9</sup> *Ibid*, Article 25.

<sup>10</sup> Law no. 23/2012.

property is proceeds of a criminal offense or activity;

ç) Conducting financial operations or fragmented transactions to avoid reporting, according to the legislation on the prevention of money laundering;

d) Investing money or items in economic or financial activities, knowing that they are proceeds of a criminal offense or activity;

dh) Advising, assisting, inciting, or making a public call for the commission of any of the offenses defined above...”

Further, this Article provides that it will also apply where:

“a) The criminal offense, the proceeds of which are laundered, has been committed by a person who cannot be prosecuted as a defendant or who cannot be punished;

b) Criminal prosecution for the offense the proceeds of which are laundered, has reached the statute of limitations or has been amnestied;

c) The person who performs laundering of the proceeds is the same person who committed the offense, from which the proceeds have derived;

ç) No criminal prosecution has been initiated, or no punishment has been imposed by a final criminal decision in relation to the criminal offense, from which the proceeds have derived;

d) The offense, the proceeds of which are laundered, has been committed by a person, regardless of his citizenship, outside of the territory of the Republic of Albania, and is also punishable both in the foreign country and Republic of Albania.”

In addition, Article 287 provides that “knowledge and intent, under the first paragraph of this Article, shall be derived from objective factual circumstances.”

Article 287/b – “Whoever buys, takes, hides or, in any other manner, embezzles for himself or a third party, or assist in buying, taking, hiding or using money or other objects, knowing that another person has gained this money or objects as a consequence of committing a criminal offense or criminal activity... it is applied regardless of the legal impediments from criminally prosecuting the person that has committed the crime from with the embezzled money or objects derive.”

A closer look at the applicable international instruments will be the basis for the analysis of the current definition. The two main applicable conventions are:

- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.5.2005.
- The UN Convention against Transnational Organized Crime (Palermo Convention), 2000.

**Table 1: The table of compatibility**

The CoE Warsaw Convention	The Palermo Convention	Article 287 CC
“Proceeds” means any economic advantage, derived from or obtained, directly or indirectly, from criminal offenses. It may consist of any property as defined here. <sup>11</sup>	“Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offense. <sup>12</sup>	Not defined.
“Property” includes property of any description, whether corporeal or incorporeal, movable or immovable and legal documents or instruments evidencing title to or interest in such property. <sup>13</sup>	“Property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets. <sup>14</sup>	Not defined.
“Instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offense or criminal offenses. <sup>15</sup>	Not used, not defined.	Not used, not defined.
“Predicate offense” means any criminal offense as a result of which proceeds were generated that may become the subject of a laundering offense. <sup>16</sup>	“Predicate offense” shall mean any offense as a result of which proceeds have been generated that may become the subject of a laundering offense. <sup>17</sup>	Not defined.

<sup>11</sup> Article 1.

<sup>12</sup> Article 2.

<sup>13</sup> Article 1.

<sup>14</sup> Article 2.

<sup>15</sup> Article 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> Article 2.

Intentional crime. <sup>18</sup>	Intentional crime. <sup>19</sup>	Intentional crime.
<b>Actus Reus</b>		
The conversion or transfer of property, knowing that such property is proceeds [of crime], for the purpose of concealing or disguising the illicit origin of the property or of assisting the person who is involved in the commission of the predicate offense to evade the legal consequences of his actions. <sup>20</sup>	The conversion or transfer of property, knowing that such property is proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping anyone who is involved in the commission of the predicate offense to evade the legal consequences of his or her action. <sup>21</sup>	The exchange or transfer of property, for purposes of concealing or disguising its illicit origin, knowing that such property is proceeds of a criminal offense or activity.
The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds [of crime]. <sup>22</sup>	The concealment or disguise of the true nature, source, location, disposition, movement, or ownership of or rights concerning the property, knowing that such property is proceeds of crime. <sup>23</sup>	Concealing or disguising the real nature, source, location, disposition, relocation, ownership or rights in relation to the property, knowing that such property is proceeds of a criminal offense or activity.
The acquisition, possession, or use of property, knowing, at the time of receipt, that such property was proceeds [of crime]. <sup>24</sup>	The acquisition, possession, or use of property, knowing, at the time of receipt, that such property is the proceeds of crime. <sup>25</sup>	Obtaining ownership, possession, or use of property, knowing at the time of its acquisition, that such property is proceeds of a criminal offense or activity.
Not included.	Not included.	Conducting financial operations or fragmented transactions to avoid reporting, according to the legislation on the prevention of money laundering.
Not included.	Not included.	Investing money or items in economic or financial activities, knowing that they are proceeds of a criminal offense or activity.
Participation in, association, or conspiracy to commit, attempts to commit and aiding, abetting, facilitating, and counselling the commission of any of the laundering offenses. <sup>26</sup>	Participation in, association with, or conspiracy to commit, attempts to commit and aiding, abetting, facilitating, and counselling the commission of any of the laundering offenses. <sup>27</sup>	Advising, assisting, inciting or making a public call for the commission of any of the laundering offenses.
It shall not matter whether the predicate offense was subject to the criminal jurisdiction of the Party. Each Party shall ensure that predicate offenses for money laundering extend to conduct that occurred in another State, which constitutes an offense in that State, and which would have constituted a predicate offense had it occurred domestically. Each Party may provide that the only prerequisite is that the conduct would have constituted a predicate offense had it occurred domestically. <sup>28</sup>	Predicate offenses shall include offenses committed both within and outside the jurisdiction of the State Party in question. However, offenses committed outside the jurisdiction of a State Party shall constitute predicate offenses only when the relevant conduct is a criminal offense under the domestic law of the State where it is committed and would be a criminal offense under the domestic law of the State Party had it been committed there. <sup>29</sup>	The offense, the proceeds of which are laundered, is under Albanian jurisdiction when it was committed by a person, regardless of his citizenship, outside of the territory of the Republic of Albania, and is also punishable both in the foreign country and Republic of Albania.
It may be provided that the laundering offenses do not apply to the persons who committed the predicate offense. <sup>30</sup>	If required by fundamental principles of the domestic law of a State Party, it may be provided that the laundering offenses do not apply to the persons who committed the predicate offense. <sup>31</sup>	The crime exists when person who performs laundering of the proceeds is the same person who committed the offense, from which the proceeds have derived.
Knowledge, intent or purpose required as an element of a laundering offense may be inferred from objective, factual circumstances. <sup>32</sup>	Knowledge, intent or purpose required as an element of a laundering offense may be inferred from objective factual circumstances. <sup>33</sup>	Knowledge and intent, as part of the laundering offenses, shall be derived from objective factual circumstances.

<sup>18</sup> Article 9.<sup>19</sup> Article 6.<sup>20</sup> Article 9.<sup>21</sup> Article 6.<sup>22</sup> Article 9.<sup>23</sup> Article 6.<sup>24</sup> Article 9.<sup>25</sup> Article 6.<sup>26</sup> Article 9.<sup>27</sup> Article 6.<sup>28</sup> Article 9.<sup>29</sup> Article 6.<sup>30</sup> Article 9.<sup>31</sup> Article 6.<sup>32</sup> Article 9.

Each Party shall ensure that a prior or simultaneous conviction for the predicate offense is not a prerequisite for a conviction for money laundering. <sup>34</sup>	Not included.	Money laundering can be prosecuted when: - The criminal offense, the proceeds of which are laundered, has been committed by a person who cannot be prosecuted as a defendant or who cannot be punished; - Criminal prosecution for the offense the proceeds of which are laundered, has reached the statute of limitations or has been amnestied; -The person who performs laundering of the proceeds is the same person who committed the offense, from which the proceeds have derived; -No criminal prosecution has been initiated, or no punishment has been imposed by a final criminal decision concerning the criminal offense, from which the proceeds have derived.
Each Party shall ensure that a conviction for money laundering is possible where it is proved that the property originated from a predicate offense, without it being necessary to establish precisely which offense. <sup>35</sup>	Not included.	Not included.

The table shows that it requires more effort in Albania to define the actions that constitute money laundering. This is due to the general structure of criminal law and its fundamental principle. It also shows that Albania has made all the efforts to comply with international standards, even where those are only advisory.

The title of Article 287 of the Criminal Code (CC) has been amended and now covers the '*laundering of the proceeds of the criminal offense or criminal activities*' (MONEYVAL, 2015.) Similarly, the title of Article 287/b has been amended. This change is welcomed as it signals the legislator's intention to move away from the previous conservative jurisprudence developed as a result of the restrictive ML offense. It is expected that this should create the necessary legal conditions for a more adequate approach concerning the level of proof for the predicate offense, enhancing in this way the legal framework to prosecute and obtain a conviction for stand-alone money laundering cases criminal cases.

The 2012 definition criminalized without any remaining doubt the self-laundering, under Article 287 (c) of the CC concerning acquisition, possession, or use of a property. It should be noted, however, that Article 287/b as amended (Acquisition of money or goods resulting from the offense or criminal activity) could be read as limiting acquisition, possession, or use of property, as set out in its provisions, in respect of money or other goods obtained by a third person as a result of a criminal offense or criminal activity. As a consequence, to ensure a correct application of Article 287, these two articles should be applied separately, in order not to hinder the application of self-laundering as set out in 287 (c).

In 2012, Article 287/b was further amended to clarify that its coverage extends beyond acquisition, possession, or use in the case of stolen goods. Also, the wording in 287/b regarding the separate responsibility of the author of this crime and the predicate crime. These are in line with MONEVAL recommendations (MONEYVAL, 2015.)

The changes made in 2012 to the Criminal Code supplement Article 287 beyond the changes that were made to the text of that article. The Parliament enacted provisions to cover all predicate offenses, including insider trading and market manipulation. The relevant provisions of the amended Criminal Code are as follows:

- Article 143/a/1 of the CC (Market Manipulation);
- Article 143/a/2 (Unauthorized use and disclosure of privileged information);
- Article 143/a/3 (Price manipulation and the spreading of false information);
- Article 143/a/4 (Submission of false data and their unauthorized distribution);
- Article 143/a/5 (The registration of the securities in an unauthorized manner);
- Article 143/a/6 (Concealment of property);
- Article 143/a/7 (Illegal trading of securities);
- Article 149 / a (Violation of industrial property rights);
- Article 149 / b (Violation of the rights of the topography of semiconductor circuit).

<sup>33</sup> Article 6.

<sup>34</sup> Article 9.

<sup>35</sup> Article 9.

The 4th round MONEYAVL report (MONEYVAL, 2015) underlined that the simple acts to aid and abet or facilitate or to counsel commission did not appear to be encompassed under the CC provisions that deal with collaboration in general. At that time, the CC provided that collaboration involves an agreement between two or more persons to commit a criminal act and several types of collaboration were described in particular (i.e., organizers, executors, helpers, and instigators). The evaluators of the 4th round observed that the gap left by the general part of the CC provisions was filled only partially by the ancillary conduct that was incorporated directly in the money laundering provisions themselves (i.e., “Article 287 para. 1(d) criminalizes the “advice, encouragement or public call” for the ML offenses that are specified in Article 287 (1)(a)-(c). In the case of Article 287/b offenses, the provision provides that persons are liable if they assist in the conduct.”)

With the amendment of Article 287/1/ subsection “dh) in 2012, ancillary conducts are covered in all circumstances, including “assistance”, and that the latter is interpreted broadly in the Albanian language. It appears that the wording of the legislation has been amended in a way to cover all the actions required by international standards. This issue remains, however, to be confirmed by judiciary practice before being able to firmly conclude that the concept of ‘assistance’ is broad enough to cover the simple acts of aiding and abetting or facilitating the commission of a money laundering offense.

## 5. Conclusions

As a result of the changes made in 2012, the completion of secondary legislation since then, and the evolvement of the judicial case-law, it can be firmly said that the money laundering statute in Albania is very robust, in line with international standards, and it represents a very good definition of the money laundering offense. In its 1st Enhanced Follow-up Report on Albania, MONEYVAL found that Albania remains largely compliant on the issues and recommendations related to the criminalization of money laundering (MONEYVAL, 2019.)

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