IMPLEMENTATION OF INTERNATIONAL STANDARDS OF FIGHT AGAINST LEGALIZATION OF CRIMINALLY OBTAINED FUNDS OR OTHER PROPERTY IN CRIMINAL LEGISLATION OF REPUBLIC OF AZERBAIJAN

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Abstract

International organizations have developed international standards against the legalization of criminal proceeds. These include but are not limited to standards, conventions and norms introduced by the UN and the FATF. To fulfill international obligations in this area, these norms have been implemented in the legislation of the Republic of Azerbaijan.

Keywords: *Implementation, money laundering, international standards, legalization of criminally obtained income, FATF standards.*

Even the history of laundering illicit gains started within one state (the USA), this phenomenon has gained international aspect. This can be proved with standards, draft laws and conventions created by international organizations. However, existence of these norms related to money laundering is not enough for properly application of them in practice. Therefore, it is crucial to examine these norms in accordance with implementation of them in national law.

There are two basic schools on the relationship between international law and national law, "monist" and "dualist". According to "monist" school international law and national law are parts of single field, and whenever there is conflict of norms international law has supremacy. On the other hand "dualist" school shares the thought that international law and national law exist separately, therefore there cannot be conflict between them as they regulate different fields.

There is general rule stated in the Vienna Convention on the Law of Treaties, that regulation of the norm by internal law in different way is not justification for the failure of performance of a treaty [28, article 27]. There can be general and specific obligations in international treaties for parties. To take necessary legislative, administrative and other actions are general obligations, and States do not have responsibility for violating these norms. However, if an international treaty obliges parties to adopt or abolish certain law or norm, States will carry liability for not doing so [14, 62-63]. Moreover, the principle of "pacta sunt servanda" states that states should perform treaties; they are part of, in good faith [28, article 26]. The Republic of Azerbaijan also makes efforts for fulfillment of obligations of international treaties [17, article 15]. Therefore, it is important to analyze the process of application of international law within the state, or implementation of international law.

Implementation is realization of international obligations in the state level, for which a state uses normative and organizational-legal tools. There are two types of implementation. First is incorporation, when after recognition of the international treaty by the state, international law norms enter into the national law. The second type of implementation is transformation, when international is not ipso fact included to the national law and special law is needed for this. Unless special law has not been enacted, international law does not have effect in the state. The Republic of Azerbaijan joins international treaties after resolution by the parliament if

ratification is needed, or by the President or other executive power body if ratification is not needed [17, article 14]. Moreover, according to the Constitution, international treaties are internal part of our legislative system [2, provision 148]. It should be mentioned that the 1977 USSR Constitution did not allow the direct operation of international law within the domestic setting. A major change had been introduced by the 1989 Law on Constitutional Supervision. For the first time in Soviet history, this Law provided a mechanism for the direct incorporation of various international rules into the Soviet legal system. CIS countries, and so the Republic of Azerbaijan gradually "opened" the domestic legal systems to international law after gaining independence. Many of them have rejected the traditional Soviet dualist approach of implementation of international law in domestic legal systems and proclaimed international law to be part of domestic law.

Main international documents relating anti money laundering and financing of terrorism have been created by the United Nations and Financial Action Task Force. Those are:

– UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention);

– International Convention for the Suppression of Financing of Terrorism (1999) (SFT Convention);

– Convention against Transnational Organized Crime (2000) (Palermo Convention);

– Convention on Corruption (2003) (Merida Convention);

– FATF Forty Recommendations on Money Laundering (2003) (FATF 40 Recommendations); and

– FATF Nine Special Recommendations on Terrorist Financing (2001) (FATF Special Recommendations). In this paper we will try to examine main provisions of these international laws and evaluate the implementation of them in national law of Azerbaijan Republic.

The Republic of Azerbaijan is a party of these conventions since 1993, 2001, 2003 and 2005 respectively. Moreover, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) (Strasbourg Convention) was ratified in 2003. Furthermore, Azerbaijan is member state of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) of the Council of Europe, which is entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems. The FATF was recognized main international standards setter in this field, so is will mainly focus on these Recommendations in this paper. The FATF also recommends becoming party to and implementing fully the Vienna Convention, the Palermo Convention, the United Nations Convention against Corruption and the Terrorist Financing Convention. Where applicable, countries are also encouraged to ratify and implement the Council of Europe Convention on Cybercrime, 2001; the Inter-American Convention against Terrorism, 2002; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005 [10, R 36].

The UN was one of the first international players in the field of anti-money laundering policy. Consequently, first international instrument which required states to establish criminal offence for money laundering was Vienna Convention adopted by the UN in 1988. Apart from stating criminal offences related narcotic drugs and psychotropic drugs, the Convention also established criminal offence for laundering of proceeds of these crimes [26, article 3]. Moreover, proceeds of those criminal offences should be subjected to confiscation [26, article 5]. The Criminal Code of Azerbaijan established criminal offences for the crimes connected to illegal circulation of narcotics and psychotropic substances, which is compatible with the Convention [7, chapter 26].

SFT Convention requires states to take measures to protect their financial systems to be used for the purposes committing terrorist activities and proceeds of these activities [13, article 8]. Therefore, international cooperation is crucial for prevention of the financing of terrorism.

Another international document requiring states to criminalize laundering of the proceeds of crime was Palermo Convention 2000. However, minimum standard for predicate offences in the Convention were only those associated with organized criminal groups [5, article 6]. Possibility of confiscation of proceeds of crime was also included to the Convention [5, article 12]. If another State receives relevant request for confiscation, measures should be taken to identify, trace and freeze or seize proceeds of crime [5, article 13]. Merida Convention also requires States to have adequate measure to combat money laundering [5, article 14].

It is obvious from the examples above that combating money laundering is crucial to prevent other crimes. However, these documents were not enough for proper creation of national or international anti money laundering regime. Firstly, they were designed for combating individual crimes. Even some set all serious crimes as predicate offences for money laundering there were not detailed explanation of how these measures should be carried out. Moreover, different anti money laundering regimes in States do not result in effective money laundering fight.

Another effort by the UN to tackle this problem was drafting of model legislation in this field in 2005. The model legislation gives different variants of provisions for the States. For instance, proceeds of crime can be from any offence or from an offence punishable by a maximum penalty of imprisonment for more than one year, or for more than six months [27, article 1.3]. Moreover, definitions of financial institutions designated non-financial businesses and professions, beneficial owners were given, which includes wide range of subjects [27, article 1.3]. Minimum five years was stated as record keeping duration [27, article 2.2.9], establishment of financial intelligence unit (FIU)and role of it in anti-money laundering and financing of terrorism policy [27, article 3.1.1], access to information for the accomplishment of its functions [27, article 3.1.4] was set in the model legislation. Apart from FIU, another central body should be established for seizure and confiscation [27, article 5.4.1], which administers and manages these funds and property [27, article 5.4.2].

The first co-operative and global policy response to the threats posed by money laundering was by the G7 group of countries who established the FATF in 1989. The main international standards in the field of combating money laundering and terrorist financing were created by the Financial Action Task Force, therefore it is known as "policy-making body". The FATF recommendations are applicable to all countries. The core documents of the FATF are, "The revised FATF 40 Recommendations on Money Laundering, Terrorist Financing and Proliferation Financing" ("the standards") which includes interpretative notes, "Methodology for assessing compliance with the standards", and "Best Practice Guidelines for implementation of the standards". These standards have been internationally accepted as the global policy benchmark for anti-money laundering, anti-terrorist financing and anti-proliferation financing measures by the United Nations, International Monetary Fund, World Bank, Asian Development Bank and many other international organizations and bodies. First Recommendations were issued in 1990, which were revised several times to be more detailed. By now there are 40 Recommendations and 9 Special Recommendations related to financing of terrorism issued by the FATF. Even Azerbaijan is not member of the FATF; MONEYVAL is associate member of the FATF, which assesses compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation in the member States, so Azerbaijan.

Taking into account wide range of recommendations, i will examine implementations of main standards of the FATF in this paper. The core of the AML/CFT policy is to designate central authority and to have national cooperation and coordination of relevant competent authorities [10, R 2]. Financial Monitoring Service was established in Azerbaijan in 23 February

2009, which is central authority functioned in this field, under Financial Markets Supervision Chamber [9]. Moreover, Commission on Combating Corruption was established in 2004, which also takes part in the national AML/CFT policy. Coordination of competent authorities, and control over the implementation of state programs on AML/CFT are carried out by the CCC. [23, provision 5.8]. Investigation of crimes related to money laundering carried out by the Head Department on Combating Corruption under the Chief Prosecutor's Office. Investigations of terrorist financing offences are carried out by the State Security Service. Therefore, designated law enforcement and investigative authorities were also established in Republic of Azerbaijan [10, R 30] which has sufficient powers to identify, trace, and initiate freezing and seizing of assets [20, provision 30.5].

The main principle at the legislation level is to criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention. All serious offences should be applied to predicate offences [10, R 3]. Predicate offences for money laundering should be extended to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically (20, provision 3.6). Money laundering is a criminal offence according to the Criminal Code of Republic of Azerbaijan [7, article 193-1]. Legalization of money proceeds or other property obtained through criminal acts is punishable up to 12 years of imprisonment in Azerbaijan. Therefore, the Criminal Code sets all crimes as predicate offences, what is compatible with the FATF standard. Crime shall be admitted as a socially dangerous action (action or inaction), forbidden by the Criminal Code, under threat of punishment on guilty [7, 14].

The main purposes of the policy in this field are to punish launderers and to take back proceeds of crime. Competent authorities should have authority and competence for confiscation and provisional measures [10, R 4]. Decision on the confiscation of proceeds is carried out by the court order according to the Criminal Code. Law on the Prevention of the Legalization of Criminally Obtained Funds or Other Property and the Financing of Terrorism sets the rules of provisional orders as seizure and freeze of assets. Within the framework of the fight against financing of terrorism, assets of the persons in the sanction list are frozen even they don't have connection with any terror actor financing of terrorism [19, 11-1.2]. This was also mentioned in the FATF standards [10, R 5]. If the Financial Monitoring Service finds out from suspicious activity report enough ground, it gives resolution on primary freeze of assets and send it to the Prosecution Office. It examines the activity, and if there is criminal offence, prosecutor takes actions, for instance, gives provisional orders, seizures of proceeds of crime, addresses the court for freeze order.(19, 19-1) Moreover, the FMS can give resolution on the suspension of the operation after SAR and send it to the Prosecution Office for further legal procedural actions [19, 19]. İt should be mentioned that in some countries, including the United States, the obligation of financial institutions is to report "suspicious activities" rather than "suspicious transactions" [11, P 42] or "indication of money laundering" [4, Article 6]. The term of "suspicious activities" is broader than "suspicious transaction", which is more related to reports of financial institutions. Report can be done electronically or in paper form. The FMS of Azerbaijan accepts both forms, signed and stamped paper report or electronic report approved with electronic signature [25, 9.1].

By reporting to the FMS monitoring entities can disclose information protected by law. This can lead some legal challenges from the clients. Therefore, FATF set a standard of financial institution secrecy law – which regulates that FATF standards have preference on the secrecy law [10, R 9]. This means that STR cannot be abandoned on the basis of any secrecy law [19, 16.1]. If the report was done in good faith, criminal and civil liability should be exempted [10, R 21]. There are two aspects to this immunity. First is exemption from legal requirements of professional secrecy and confidentiality. Second is protection against potential liability to the persons named in there ports [11, P 51]. Moreover, there should not be any provision in national

law impeding the transfer of customer information from a host bank branch or subsidiary to its head office or parent bank in the home jurisdiction for risk management purposes, including ML/FT risks [3, Paragraph 92].

The volume of financial transactions makes it impossible to report and examine all of them. Moreover, there is no such a need, as even there are many who wants to launder their illicit gains, legal transactions have majority on them. Therefore, there should be some legal standards, which set rule for report. First of all, financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names. This makes impossible to determine if that person involved in any illegal activity. Secondly, customer due diligence should be undertaken: which includes - customer and beneficial owner identification, purpose and intended nature of the business relationship and ongoing due diligence on the business relationship and scrutiny of transactions. These measures are carried out when establishing business relations, so which are wire transfers, an occasional transaction if it equates to EUR 15,000 or more, or to several transactions which, combined, equate to the same amount, there is suspicion on illegal activity or doubts about the costumer information [10, R 10]. This Recommendation is also regulated by Law in Azerbaijan [19, 9]. Amount of minimum limit for CDD in Azerbaijan was set 15000 manats, which was also set by the Law. CDD information may be obtained by third parties; however, in this case all responsibilities still remain on the financial institution [10, R 17]. Azerbaijan legislation does not have such norm, which allows financial institutions rely on the information provided by the third party. One of the effective solutions to tackle huge amount of transactions is to have İT monitoring systems against risks and abnormal situations [3, Paragraph 26].

A bank should have clear customer acceptance policies and procedures which should include all relevant factors such as a customer's background, occupation, source of income and wealth, country of origin and residence, use and purpose of accounts, linked accounts, business activities or other customer-oriented risk indicators [3, Paragraph 30]. Identity of the customer and beneficial owner can be verified before or during the course of establishing a business relationship or conducting transactions for occasional customers. Verification can be completed after the establishment of the business relationship, if this occurs as soon as reasonably practicable, if this is essential not to interrupt the normal conduct of business and if the ML/TF risks are effectively managed [20, provision 10.14]. When problem arises which cannot be resolved, after business relationship has been established, the bank should close or otherwise block access to the account [3, Paragraph 38].

In every case there should be clear understanding of customer's profile and behavior. When there is high risk, enhanced due diligence should be required, [20, provision 10.17] for instance regard to higher-risk countries [10, R 19]. In case of lower risk factors, such as by the country or the financial institution, simplified CDD can be carried out [20, provision 10.18]. When the customer or beneficial owner is politically exposed person, or family member or close associate of such PEPs, additional measures are conducted for appropriate risk management and approval of senior management is needed [10, R 12]. All information on transactions by PEPs should be presented to the FMS [19, 7.2.3]. Moreover, if there is suspicion or enough ground for suspicion on ML/FT, including attempted transactions, it should be reported to the FMS [19, 7.2.1]. This provision of the law is implemented from the FATF Recommendation [10, R 20] and the relative Methodology of FATF [20, provision 20.2]. In this case amount of the transaction is not important. (15, R20) The information about the report cannot be disclosed [10, R 21].

Additional identification and verification measures are also required for cross-border correspondent banking and other similar relationships to fully understand AML/CTF policy of the respondent bank [10, R 13]. Relationship with respondent shell banks should be prohibited and there should be proper information that respondent banks are not permitting their accounts to be used by shell banks [20, provision 13.3]. Additional verification measures should be carried

out on transactions through correspondent accounts of foreign banks [19, 9.13.4]. All the information about the bank's AML/CFT system should be checked when opening correspondent accounts of foreign banks at local banks, [24, provision 8.1.6] and this should be refused if correspondent banks have relations or operations with shell banks [24, provision 9.3.7] Prohibition for countries to establish relationship with shell banks was also set in the FATF Recommendation [10, R 26].

Moreover, special attention should be paid to the use of legal persons for ML/FT. Therefore, information on beneficial owner and control of legal persons should be examined, in order to fully understand and evaluate risk in this field **[**10, R 24]. For effectiveness of this recommendation countries should oblige all legal persons to be registered in company register, where all relevant information on a legal person can be obtained, which is publicly available [20, provision 24.3]. Information about a legal person can be obtained from legal persons register for AML/CFT measures by the FMS, monitoring entities and DNFBPs. [18, 15.9.3]. Moreover, information can be obtained from mass media, internet, official publication and it should be verified with information submitted before [19, 9.9]. All this measures should be taken by monitoring entities in order to mitigate ML/FT risks. Without adequate steps taken against ML/TF, financial institutions may become subject to reputational, operational, legal and concentration risks, which can result insignificant financial cost [8, Paragraph 1].

Information obtained through the CDD measures should be kept for at least 5 years [10, R 11]. Sometimes AML/CTF measures make possible to identify and prosecute criminals. In some cases the process can be vice versa, while during the prosecution suspicion on ML/TF can also arise. Therefore, it is essential to keep this information in order to enable them to the competent authorities, both domestic and international. Duration of 5 years was set by the Law for all the information on the client, beneficial owner and authorized representative and etc. after termination of the customer's account or termination of the legal relationship with the customer, after the operation was carried out and after CDD measures was carried out on the suspicious transactions. These terms can be prolonged by the FMS and supervision authorities [19, 10]. İf accounts are closed, in the event of ongoing investigation or litigation; all records should be retained until the closure of the case [3, Paragraph 48].

Furthermore, statistics should be maintained, which should include statistics on the STRs received and disseminated; on money laundering and terrorist financing investigations, prosecutions and convictions; on property frozen, seized and confiscated; and on mutual legal assistance or other international requests for cooperation. Statistical information on the offences related to the legalization of criminally obtained funds or other property and the financing of terrorism in Republic of Azerbaijan is submitted to the FMS on semiannual basis [19, 18.1].

To have proper regulation in the field of AML/CFT is not enough to be successful against launderers. One of the reasons is that not all employees of a financial institution are lawyers and familiar with regulation in this field. Therefore, it is crucial to have proper internal controls within the institution [10, R 18] that should be approved and overseen by the board of directors [3, Paragraph 15]. This includes internal rules and procedures, identification, assessment and mitigation of risks, training programs of employees, determination of red flags, to have proper internal audit system, compliance office and mechanisms and rules of report of relative information to the FMS [19, 12.1].This requirement is a part of the banks' general obligation to have sound risk management programme to mitigate all kinds of risks, including ML/FT risks [3, Paragraph 12] Moreover, relative guidance and feedback should be established to assist financial institutions and DNFBPs. [10, R 34].

The CDD and record-keeping requirements are also applicable to designated non-financial businesses and professions [10, R 22]. The list of DNFBPs services of FATF Recommendation is same with the Law of Azerbaijan [19, 5.1]. To have fully implementation of this norm Trust and Company Service providers can be added to the definition of DNFBPs. [19, 1.0.8]. DNFBPs

monitor transactions and apply AML/CFT measures when they engage in activities set in the Recommendations with clients. Designated threshold only apply to dealers in precious metals and dealers in precious stones [10, R 23]. This rule also applies to DNFBPs in Azerbaijan [19, 5.1]. However, professional secrecy has privilege on this rule [19, 5.3].

Success of AML/CFT policies depends not only on how financial institutions and DNFBPs follow rules and regulations, but also on how they are supervised and regulated. This is part of the duty of supervisors to protect the integrity of their national banking/financial system [8, Paragraph 62]. Starting point of this process is licensing and registration of them by the State and continuing monitoring by the FIU [10, R 26]. Supervisors should have adequate powers to conduct inspections, request for any information essential for supervision and monitor, and impose sanctions for failure to comply with the rules and policies [10, R 27]. Implementation of a system requiring disclosures of suspicious transactions on the part of financial institutions created the need for a central office or agency for assessing and processing these disclosures [12, page 1]. Therefore, a Financial Intelligence Unit should be established, that serves as a national center for the receipt and analysis of suspicious transaction reports, and other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis [10, R 29]. All this information can be used for operational analysis for specific targets, and strategic targets to identify relative trends and patterns [20, 29.4]. Countries can choose any model of FIU [15, R29]. The FIU should be member of Egmont Group, [20, 29.8] which is a united body of 155 Financial Intelligence Units. The Egmont Group provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing. The FMS of Azerbaijan became full-fledged member of the Egmont Group in 2011. The FMS was given right to ask for information from financial institutions, DNFBPs and authorities if there is a need to monitor an operation [19, 17.3]. In case of not complying with regulations, the FMS has to send such violation to relative supervision authority [19, 17.6].

Other competent authorities should also be part of AML/CFT policy. One of the important fields in AML/CFT measures is physical cross-border transportation of currency and bearer negotiable instruments. Adequate measures and competent authorities should be in place in order to detect, stop or restrain the ones which are related to terrorist financing, money laundering or predicate offences, or that are falsely declared or disclosed [10, R 32]. One of them is the implementation of a declaration system or a disclosure system [20, 32.1]. Criminal, civil or administrative sanctions can be imposed for false declaration or disclosure [15, 6].

If suspicion on ML/FT arises during transportation of currency values into and from the Republic of Azerbaijan, the State Custom Committee should take adequate measures, and send information about it to designated law enforcement and investigative authorities and the FMS [19, 8.1]. Moreover, if amount of cash brought into Republic of Azerbaijan exceeds 50.000 USD, relevant information should be presented to the Central Bank, the FMS and the Ministry of Taxes [16, 9.3, 11.4].

Success of AML/CFT policies is also depended on sanctions imposed to financial institutions and DNFBPs, and to their directors and senior management for violating the law [10, R 35]. In the Republic of Azerbaijan there is criminal responsibility for illegal disclosure of information on ML/FT [7, 316-2]. For other violations of ML/FT legislation requirements there is sanction of administrative penalty of officials and legal persons [1, 598.1]. It is crucial that legislative body would clarify some definitions, especially when there is responsibility for violating those requirements. One of these definitions is the suspicion or suspicious transactions/activity, which need to be expressed in the clearest terms possible [11, P 43].

Taking into account the international nature of ML/FT, international cooperation is essential for counter measures against it. Therefore, countries should have widest possible range of mutual legal assistance and treaties, arrangements or other mechanisms to enhance

cooperation [10, R 37]. The differences between national supervisory practices make it also essential to obtain international agreement to a Statement of Principles to which financial institutions should be expected to adhere [21, P2]. Azerbaijan is also cooperating with foreign authorities in the sphere of information exchange, investigation, prosecution and execution of court decisions [19, 20.1]. This can be refused on the basis if it is against national law or national interests [19, 20.3]. Therefore, when requesting information for ML/FT cases, at a minimum the reason for the request, the purpose for which the information will be used and enough information should be disclosed to enable for determining whether the request complies with its domestic law [22, Paragraph 10]. All these actions are carried out in accordance with national legislation and the international treaties to which the Republic of Azerbaijan is a party [19, 20.5]. One of the main parts of cooperation is confiscation (10, R 38), which is also carried out in accordance with national legislation and the international treaties to which the Republic of Azerbaijan is a party [19, 20.6], and extradition [10, R 39], that is carried out in accordance with the Law of Republic of Azerbaijan "On Extradition" from 2001.

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