THE CRIME OF MONEY LAUNDERING AS A TOOL IN COMBATING ORGANIZED CRIME: A TURKISH LAW PERSPECTIVE VERSUS THE FINANCIAL ACTION TASK FORCE'S VIEW*

Organize Suçlulukla Mücadelede Bir Araç Olarak Suçtan Kaynaklanan Malvarlığı Değerlerinin Aklama Suçu: Mali Eylem Görev Gücü'nün (FATF) Yaklaşımına Karşı Türk Hukuku Perspektifi

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ABSTRACT

Türkiye faces significant money laundering and terrorist financing risks because of its geographic location as the Financial Action Task Force on Money Laundering (FATF) emphasizes frequently. Indeed, penalization of money laundering as a tool to combat organized crime for the first time appeared as an international demand and even pressure on Turkish law just as many other jurisdictions. As such, punishing the acts of money laundering is always confronted by various principles in the Turkish law, but most particularly by the legality principle. Further, money laundering appears as a contemporary type of crime for the Turkish law. Considering money laundering plays a pivotal role in combatting organized crime, a strong necessity for an effective national law which is in compliance with the international conventions exist. This study, therefore, aims to compare the Turkish criminal law perspective with the FATF's views. Such being the case, firstly it provides some insight into historical developments in Türkiye, *e.g.,* main impulses leading to criminalization of the transactions of the proceeds of crime. Then it outlines when and how money laundering occurs as a criminal act pursuant to the Turkish Penal Code in 2005, with a particular focus on the FATF's critics and recommendations (Mutual Evaluation in 2019 and Follow-Up Report 2023) on Türkiye's case on the matter.

Keywords: Money laundering, the proceeds of crime, predicate offence, Turkish Criminal law, The FATF, organized -crime, financing of terrorism

* There is no requirement of Ethics Committee Approval for this study.

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ÖZET

Mali Eylem Görev Gücü'nün (FATF) sıklıkla vurguladığı üzere Türkiye coğrafi konumu nedeniyle ciddi suçtan kaynaklanan malvarlığı değerlerinin aklanması (kara para) ve terörün finansmanı riskleriyle karşı karşıya kalmaktadır. Nitekim Türk hukukunda organize suçlulukla mücadele aracı olarak suçtan kaynaklanan malvarlığı değerlerinin aklanmasının cezalandırılması, ilk kez uluslararası bir talep ve hatta baskı sonucu olmuştur. Bu itibarla suçtan kaynaklanan malvarlığı değerlerinin aklama fiillerinin cezalandırılması, Türk hukuku açısından suç ve ceza politikalarının temel ilkeleri ile, özellikle de kanunilik ilkesiyle ilgili tartışmaları gündeme getirmiştir. Keza suçtan kaynaklanan malvarlığı değerlerinin aklama suçu, Türk ceza hukukunda görece yeni bir suç türüdür. Bu suç türüyle mücadelenin organize suçlulukla mücadelede önemli bir rol oynadığı göz önüne alındığında, uluslararası sözleşmelerle uyumlu, etkili hukuki düzenlemelere güçlü bir ihtiyaç bulunmaktadır. Bu nedenle bu çalışma, Türk ceza hukuku perspektifini FATF'ın görüşleri ile karşılaştırmayı amaçlamaktadır. Buna göre öncelikle Türkiye'deki suçtan kaynaklanan malvarlığı değerlerinin aklama suçunun düzenlenmesine ilişkin tarihi arka plan ve bu şekilde 2005 yılında Türk Ceza Kanunu'nda suçtan elde edilen gelirin aklanmasının münhasır bir suç tipi (md. 282) olarak yer verilmesine giden süreç incelenecektir. Daha sonra, FATF'ın Türkiye ile ilgili 2019 Karşılıklı Değerlendirme Raporu ve 2023 Ara Raporu ışığında bu suç tipine ve uygulamasına dair FATF'ın eleştirileri ve tavsiyeleri ele alınacaktır. Bu şekilde FATF'ın bu suç türüyle ilgili Türk ceza hukukuna yaklaşımlarıyla ilgili analitik bir değerlendirme ortaya konulması hedeflenmektedir.

Anahtar Kelimeler: Karapara aklama, suçtan kaynaklanan malvarlığı değerleri, öncül suç, Türk ceza hukuku, Mali Eylem Görev Gücü (FATF), organize suçluluk, terörün finansmanı

INTRODUCTION

Money laundering as a particular type of crime has a quite short history in Türkiye. Indeed, this was a foreign concept to the Turkish law until 1980s.[1] In 1991, Türkiye became a member of the Financial Action Task Force on Money Laundering (The FATF)[2] established at G-7 submit in 1989.[3] Among the FATF

[1] Umut Türkşen, İsmail Ufuk Mısırlıoğlu and Osman Yükseltürk, 'Anti- Money Laundering Law of Turkey and the EU: An Example of Convergence?' (2011) 14 (3) Journal of Money Laundering Control 279, 280; Murat Volkan Dülger, *Suç Gelirlerinin Aklanmasına İlişkin Suçlar ve Yaptırımlar* (Seçkin, Ankara, 2011) 412.

[2] FATF, Countries: Turkey, <https://www.fatf-gafi.org/en/countries/detail/Turkey.html> accessed 25 September 2023.

[3] FATF, History of the FATF, <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html> accessed 25 September 2023. The FATF, as an international organization as "largely United States of America prompting". See Phil Williams, 'Money laundering'

countries, Türkiye has been one of the last countries to have introduced a law on money laundering.[4] An anti-money laundering law was introduced through the Code 4208 within the framework of organized crime in 1996, in order to comply with so called *Forty Recommendations* of the FATF[5] and other international conventions, *inter alia*, the Vienna Convention of 1988.[6] Prior to this, it was considered a classic crime called *destroying, concealing and transforming evidence of the committed crime*, or even as *crime of harbouring an outlaw.*[7] Indeed, money laundering can be classified as a contemporary type of crime in some jurisdictions.[8] In any case, as a general rule, the proceeds obtained through the commission of a crime was subject to the law of confiscation, just as it is applied to any crime today. Because the main principle that has prevailed in Turkish criminal law is that it is not allowed that commission of crime serves as a source of a financial gain.[9] Indeed, Türkiye's confiscation practices are rated as 'largely compliant' by the FATF in 2019[10] and "fully met" in its Follow- Up Report in 2023.[11]

Why is benefiting from the assets that are obtained from the commission of a crime considered as a particular type of crime? Is that the natural outcome that perpetrator benefit from a criminal act? For example, a burglar who steals

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1997 5 (1) South African Journal of International Affairs 71, 87 <https://doi.org/10.1080/10220469709545210> accessed 20 November 2023.

4 Olgun Değirmenci, 'Mukayeseli Hukukta ve Türk Hukukunda Suçtan Kaynaklanan Malvarlığı Değerlerinin Aklanması Suçu (TCK m. 282)' (PhD Thesis, Marmara University 2006) 456.

5 Neslihan Coşkun, 'Karaparanın Aklanması Suçu' (2004) 12 (3-4) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 229, 229- 230; Dülger (n 1) 409.

6 Alev İzci, 'Turkey: Efforts to Prevent Money Laundering' (1998) 1 (4) Journal of Money Laundering Control 374 <https://doi.org/10.1108/eb027163 > accessed 25 September 2023; Değirmenci (n 4) 456; Dülger (n 1) 413-414; Selman Dursun, 'Geldwäsche im türkischen Strafrecht' (2016) 4 (2) Journal of Penal Law and Criminology 97, 100.

7 Ümit Kocasakal, Karapara Aklama Suçu (PhD Thesis, İstanbul University 2000) 324; Değirmenci (n 4) 461 ff.; İzzet Özgenç, *Türk Ceza Kanunu Gazi Şerhi* (3 edn, Ankara Açık Ceza İnfaz Kurumu Matbaası 2006) 1050.

8 Mahdi Salehi and Vahid Molla Imeny, 'Anti-money laundering developments in Iran: Do Iranian banks have an integrated framework for money laundering deterrence?' (2019) 11 (4) Qualitative Research in Financial Markets 387, 394 <https://doi.org/10.1108/QRFM-05-2018-0063> accessed 25 September 2023.

9 İzzet Özgenç, *Suç Örgütleri* (12th edn, Seçkin, Ankara 2019) 154.

10 FATF, Anti-money Laundering and Counter-terrorist Financing Measures – Turkey, Fourth Round Mutual Evaluation Report (Paris, 2019) 167 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Turkey-2019.pdf> accessed 25 September 2023.

11 FATF, Anti-money Laundering and Counter-terrorist Financing Measures –Türkiye, Follow- Up Report [3rd Enhanced] & Technical Compliance Re-Rating (Paris, July 2023) 21 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Türkiye-Follow-Up-Report-2023.pdf.coredownload.pdf> accessed 25 September 2023.

jewellery from someone does not confine himself to the act of taking other's belonging, but he/she also conducts other various acts in order to benefit from that item. However, the mere existence of these crimes were seen as insufficient, in particular regarding combatting cross-border organized crime.[12] Indeed, in comparative law, money laundering is viewed as a crime in the context of the organized crime[13] as confiscating the proceeds of a crime serves as a limiting tool to prevent the perpetrators from benefitting from their criminal acts.[14] In fact, money laundering appears as one of the main financial resources of these criminal organizations and as such demands a *wider approach.*[15] By virtue of its obligations stemming from international and regional organizations, Turkish law-makers stipulated that money laundering shall be a separate crime. As such, the FATF states that:

> "Located at an inter-continental junction, Türkiye faces significant money laundering (ML) and terrorist financing (TF) risks. This includes serious threats from illegal activities of criminal organisations, terrorist organisations and foreign terrorist fighters (FTFs) seeking to exploit domestic and cross-border vulnerabilities, given Türkiye's geographic location".[16]

Türkiye is geographically located between the Europe and the Middle East. Whereas in Europe there are regional and international legal frameworks and organizations against money laundering, in the Middle East, there are some countries, in some of which criminal organizations easily nest as the civil war exists.[17] Consequently, smugglers use Türkiye as a transit to Europe and to the Middle East.[18] Further, empirical studies display that Türkiye still lies at the

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12 Kocasakal (n 7) 3; Veli Özer Özbek, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu (TCK md.282)' in Yener Ünver (eds), *Kamusal ve Ticari Yaşamda Hukuk ve Etik Açısından Yolsuzlukla Mücadele* (Seçkin, Ankara 2014) 163, 164.

13 Norman Mugarura, *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries* (Routledge, London- New York 2016) 75-77; Verena Zoppei, *Anti-money Laundering Law: Socio-legal Perspectives on the Effectiveness of German Practices* (Springer, Berlin-Heidelberg 2017) 69-70; Yener Ünver, *İftira, Suç Uydurma, Suç Üstlenme, Yalan Tanıklık ve Bilirkişilik, İnfaz Kurumlarından Kaçma (TCK'da Düzenlenen Adliyeye Karşı Suçlar)* (5th edn, Seçkin, Ankara 2019) 447; Özbek (n 12) 164.

14 FATF (n 10) 45.

15 *Ibid.*

16 *Ibid.* 5.

17 Alexander R. Dawoody, 'Terrorism in the Middle East: Policy and Administrative Approach' in A.R. Dawoody (eds), *Eradicating Terrorism from the Middle East Policy and Administrative Approaches* (Springer, Switzerland 2016) 3, 14.

18 Şule Toktaş and Hande Selimoğlu, 'Smuggling and Trafficking in Turkey: An Analysis of EU–Turkey Cooperation in Combating Transnational Organized Crime' (2012) 14 (1) Journal of Balkan and Near Eastern Studies 135, 137 <https://doi.org/10.1080/19448953.2012.656970> accessed 25 September 2023.

centre of irregular immigration from the Middle East.[19] The existence of even the smallest legal loophole in Turkish law or any failure with respect to cooperation with other countries, in particular with the European countries, may hamper the fight against organized crime on both the national and the international level. Indeed, the FATF draws attention to the fact that Türkiye has been "*a target of many domestic and international terrorist organisations"*.[20] Money laundering constitutes a pivotal source of finance for criminal organizations.[21] In that context, from a historical view, it is concluded that Türkiye has consistently supported international initiatives (e.g., the FATF) regarding anti-money laundering law[22] and has had similar legislative framework as the EU Member States.[23] Nevertheless, the FATF provides critiques of many aspects of the crime of money laundering as well as new recommendations to Türkiye. To illustrate, the FATF Report in 2019 states that:

> "The main shortcomings include the definition of ML as being not totally in line with the Conventions as act of concealing and disguising assets requires a specific intention, minor shortcoming with regard to self-money laundering in addition to the non-dissuasiveness of sanctions applied to legal persons".[24]

The same critiques are repeated in the 2021 and 2023 follow-up reports for Türkiye. It considers the sanctions, particularly for legal persons as very low and not dissuasive.[25] Could these critiques contained in the FATF Report indeed be totally in line with the principles of criminal law in a democratic society *under rule of law*? The EU Türkiye Report of 2020 calls upon Türkiye to further improve the legal framework regulating the fight against money laundering and terrorist financing by considering the FATF's Report in 2019.[26]

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19 Ahmet İçduygu and Şule Toktaş, 'How Do Smuggling and Trafficking Operate via Irregular Border Crossings in the Middle East? Evidence from Fieldwork in Turkey' (2002) 40 (6) International Migration 25, 32 <https://doi.org/10.1111/1468-2435.00222> accessed 25 September 2023.

20 FATF (n 10) 17.

21 Williams (n 3) 71.

22 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 280, 289.

23 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 289; Toktaş and Selimoğlu (n 18) 136: Güneş Okuyucu, 'Anti-money laundering under Turkish law' (2009) 12 (1) Journal of Money Laundering Control 88 <https://doi.org/10.1108/13685200910922679> accessed 25 September 2023.; Güneş Okuyucu Ergün, 'Anti-Corruption Legislation in Turkish Law' (2007) 8 (9) German Law Journal 903; Salehi and Imeny (n 8) 395.

24 FATF (n 10) 167.

25 FATF, Anti-money Laundering and Counter-terrorist Financing Measures –Türkiye, Follow- Up Report [2nd Enhanced] & Technical Compliance Re-Rating (Paris, May 2022) 3 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Follow-Up-Report-Turkey-2022.pdf.coredownload.inline.pdf> accessed 25 September 2023; FATF (n 11) 21.

26 European Commission, Turkey 2020 Report (Brussels, 2020) 43 <https://neighbourhood-

At the outset, it should be noted that Türkiye implements a dual system in the fight against money laundering, including the financing of terrorism, in which measures of both administrative[27] (administrative offences and institutions such as MASAK, abbreviation of the Turkish Financial Intelligence Service authority in Turkish)[28] and criminal law provisions (in the Turkish Penal Code and supplementary laws) exist in parallel, because imposing only criminal law sanctions for money laundering were considered insufficient.[29] Further, the financing of terrorism is stipulated as a separate crime.[30]

This chapter, however, confines itself to the crime of money laundering, which is regulated in the Turkish Penal Code. As such, the chapter seeks to explore whether or not the FATF's critiques and recommendations regarding the crime of money laundering in mutual evaluation report of 2019 and the follow up report of 2021 for Türkiye's case are legitimate in view of the principles of Turkish criminal law. The main limitation of the study is that the aforementioned FATF's reports were not merely dedicated to money laundering, but also counter-terrorist financing measures which covers a range of crime types and surrounding issues. The study does not come up with a detailed analysis, but it considers the main critical aspects in the reports regarding crime of money laundering in order to open up the debate.

To that end, the chapter begins with displaying the tension between the legality principle and State's international obligations stemming from being member of the FATF[31] through a case from 2011. Then it respectively outlines the legal interest behind the crime of money laundering and the legislative framework, e.g., when and how money laundering occurs as a criminal act pursuant to the Turkish law. It analyses money laundering as a type of crime in Turkish criminal law, with a particular focus on the FATF's critiques and recommendations for Türkiye.

enlargement.ec.europa.eu/system/files/2020-10/turkey_report_2020.pdf> accessed 25 September 2023.

27 These includes "customer identification, record-keeping and the reporting of suspicious transactions" as Palermo Convention in Art. 7 requires. See the UN, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 9 <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed 25 September 2023.

28 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 281; Dursun (n 6) 105-106.

29 Dülger (n 1) 409.

30 In Art. 4 of the Code no 6415, taken in force on 07 February 2013. See Havva Begüm Tokgöz, Uluslararası Hukuk Bağlamında Terörizmin Finansmanının Önlenmesi (Master Thesis, Istanbul University 2018) 134 ff.

31 See e.g. FATF (n 10) 10.

1. Cross-border Feature of Money Laundering and State's International Obligation

Consider the following, considerably old, case where a company, with representation of the defendant A and with the participation of the defendant B, joined in a tender held by a Company belonging the State of India. According to the letter of Interpol-India, the company won the tender because of the commission of fraud, bribery, and forgery of documents and then the contract price was transferred to the bank accounts of the defendants in Switzerland on 29 November 1995. It was noticed that from those accounts', money was transferred multiple times to various countries, including Türkiye between 30 November 1995 - 01 August 1997. The money in these accounts was subjected to various actions before and after these dates. In Türkiye, it was on 13 November 1996 when the crime of money laundering was first regulated with the Code 4208. The Turkish Court of Cassation *(Yargıtay)*, therefore, ruled that since the date on which it is alleged that the money was laundered by the defendants was before the date the Code 4208 came into force, it is not possible to accept that the actions of transferring the money are subject to punishment on account of crime of the money laundering due to the principle of legality *(nullum crimen, nulla poena sine lege)* ensured in the Constitution (Art.38), ECHR (Art.7) and Penal Code (Art. 2).[32]

Although the illicit acts in this case were conducted between 1995 and 1997, it was the 2011 when the case could be ultimately ended. This case led to controversies among the first Instance Court and the 7th Chamber of the Turkish Court of Cassation and finally ended up before the Assembly of Criminal Chambers of the Turkish Court of Cassation in 2011. This case illustrates very well that money laundering acts have the cross-border features, and the sole existence of international conventions does not suffice. Indeed, there is a strong necessity for the existence of effective national laws. Therefore, even if the Turkish Court of Cassation gave preference to the legality principle, as such, to the principle State under the rule of law, which is admirable from the point of criminal law, this can be viewed as creation of obstacle to the struggle against money laundering effort at the international area. Penalization of money laundering, through the introduction of a separate crime type, as a tool to combat organized crime first appeared as an international demand and even pressure in Türkiye[33] just as it does in other jurisdictions.[34] Therefore,

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32 Yargıtay Ceza Genel Kurulu [The Assembly of Criminal Chambers of the Court of Cassation], Date: 01.11.2011, E. 2011/31, K. 2011/219 <https://www.lexpera.com.tr/ictihat/yargitay/cgk-e-2011-7-31-k-2011-219-t-01-11-2011> accessed 3 May 2021.

33 Değirmenci (n 4) 361; Dülger (n 1) 413-414; Dursun (n 6) 102.

34 For other jurisdiction example, see Peter Lewisch, 'Money Laundering Laws as a Political Instrument: The Social Cost of Arbitrary Money Laundering Enforcement' (2008) 26 Eur J

punishing money laundering have always been confronted by various principles in the Turkish law, but most particularly by the legality principle. To be more concrete, the long-established understanding and application of the core principles of criminal law in each jurisdiction may not be easily matched with the international expectations.

2. Criminalization of Money Laundering and The Legal Interest

It is noted that two main methods exist in regulating money laundering in criminal law: (1) Within the framework of acts of criminal organization and (2) as crimes against the functioning of judiciary in the penal code just as in Switzerland.[35] In 1996, it was dealt with within the framework of organized crime and therefore it was regulated with a separate code.[36] This was Türkiye's response to money laundering in the wake of International Conventions. However, in the criminal law reform period in 2000s, which sought the creation of legislative system in criminal law maintaining consistency in terms of criminal law's core principles[37], money laundering is included in the system of the Penal Code. In that regard, terminology changed, *i.e.*, jargon like "dirty money" or "black money" were abandoned.[38] Accordingly, the title of new crime regarding money laundering reads as "laundering the proceeds obtained through the commission of a crime". Further, the EU Türkiye progress report in 2001 pinpointed that Türkiye needed to strengthen its money laundering legislation and ensure compliance with the FATF's recommendations.[39] The explanatory memorandum regarding the crime of money laundering in Penal Code, focuses on the particular importance of *general prevention of punishment*[40] in money laundering by pointing out that:

> "The inclusion of the economic values obtained by committing a crime or by giving the image of legitimacy to the economic system also leads to transforming and concealing evidence of the committed crime, which serves harbouring criminals".[41]

Consequently, as of 2005, with the new Penal Code no 5237, Türkiye followed the Swiss (Art. 305bis) and German (Art. 261) Penal codes, where

Law Econ 405 <https://doi.org/10.1007/s10657-008-9073-7> accessed 3 May 2021.

35 Jörg Rehberg, *Strafrecht IV: Delikte gegen die Allgemeinheit* (2 edn, Schulthess Polygraphischer Verlag, Zürich 1996) 360.

36 Kocasakal (n 7) 328.

37 Also the former Penal Code no 765 was based on the core principles, however, it did loose its consistency after the remerkable amount of amendments during its application period.

38 Özgenç (n 9) 155.

39 Toktaş and Selimoğlu (n 18) 141.

40 Özbek (n 12) 166.

41 *Ibid*.

money laundering is stipulated as a separate crime in Art. 282.[42] This crime is listed in the Penal Code among the crimes against *the functioning of judiciary* which lies under the section called *the crimes against nation and State*, just as with the crime of perjury. In terms of legal interest, which is protected through the crime of money laundering, in 2018, the Turkish Cassation Court states:

> "The legal interest that is protected through this crime, which is a crime committed against the legal interests of the State, is the right to a fair trial. Because the acts that constitute this crime prevent the investigation and prosecution authorities from reaching the proceeds of the predicate crimes and from conducting an effective investigation and prosecution, thus making it difficult to uncover the predicate crimes and their perpetrators hidden with this crime. Therefore, by introducing money laundering acts a crime, it is aimed to ensure that justice system functions".[43]

Consequently, the victim of this crime is the public.[44] This approach to criminalization of money laundering after 2005, in both case- law and doctrine in civil law jurisdiction like Türkiye, differs substantially from the view of the FATF. Because, in Türkiye, money laundering as a type of crime type is not an end in itself, but it serves a similar purpose as the crimes of destroying, concealing and transforming evidence of the committed crime, or the crime of purchasing or accepting property acquired through the commission of crime, perjury or harbouring an outlaw.[45] These types of crime are all considered at first sight as crimes that mislead or prevent the functioning of the justice system. As for committing the crime of money laundering within a criminal organization, it is considered as an aggravated circumstance that requires more punishment than the crime of money laundering (Art. 282-4).

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42 This new legislation was marked as progress by the EU Turkey Progress Report in 2004 and 2005 (Toktaş and Selimoğlu (n 18) 144-145). Also see Kerim Çakır, *Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu* (Adalet, Ankara 2016) 228.

43 Yargıtay Ceza Genel Kurulu [The Assembly of Criminal Chambers of the Court of Cassation], Date: 16.10.2018, E. 2015/172, K. 2018/435, <https://www.lexpera.com.tr/ictihat/yargitay/ceza-genel-kurulu-e-2015-172-k-2018-435-t-16-10-2018> accessed 3 May 2021. Also see İzzet Özgenç and Fatih Yurtlu, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçları Bakımından Teori ve Uygulamada Ortaya Çıkabilecek Sorunlara İlişkin Bir Değerlendirme', at 7 <https://api.hacibayram.edu.tr/files/1/5.turkkorecezahukukugunleri/Özgenç,%20Yurtlu%20Suçtan%20Kaynaklanan%20Malvarlığı%20Değerlerini%20Aklama%20Suçları%20Bakımından%20Teori%20ve%20Uygulamada%20Ortaya%20Çıkabilecek%20Sorunlara%20İlişkin%20bir%20Değerlendirme.pdf> accessed 3 May 2021.

44 Özgenç (n 9) 170; Osman Yaşar, Hasan Tahsin Gökcan and Mustafa Artuç, *Yorumlu-Uygulamalı Türk Ceza Kanunu, 6th Volume* (2nd edn, Adalet, Ankara 2014) 8358.

45 Dursun (n 6) 100.

In 2009, the crime definition was modified by the Code no. 5918 after the FATF's evaluation, as such, some elements of crime were subject to change. In the first version of the Art. 282 in 2005 the punishment was lower than it is today, as it was punished by imprisonment from two years up to five years and a fine up to twenty thousand days. Furthermore, the threshold for predicate offences were higher, stipulated as crimes that requires a minimum sentence of one year imprisonment. As such, the definition of crime is frequently criticized (we will further discuss in the following parts) by the FATF and has been subject to such amendments at various times, *ratione temporis* and, respectively, the legality principle remains as a main issue in case law for the application to the crime of money laundering in Türkiye.[46]

3. The Acts of Money Laundering under Turkish Law

Two main questions arise as to: *what makes money dirty?* Dirty money simply refers to the money obtained through the commission of crime which is termed as a predicate offence. Indeed, the FATF defines money laundering as "the processing of these criminal proceeds to disguise their illegal origin".[47] At the initial legislative attempt in Türkiye, the Code of 1996 indicated a crime catalogue[48] that was criticized among scholars.[49] For example, crimes against the State, which includes organized crime, crimes listed in tax law or the crimes arising from organ and tissue transplantation law. However, today, no crime catalogue listing predicate offences exists in the definition of money laundering under Turkish law. Rather, in order to avoid the casuistic approach of the former regulation (Code 4208)[50], a *minimum threshold approach*[51] is adopted. After the FATF's evaluation, in 2009, the threshold for predicate offences was amended as crimes requiring a minimum six months of imprisonment. Therefore, every type of crime which may have been committed in Türkiye or abroad, such as a crime of burglary, results in so-called *dirty money.*[52] Nevertheless, one scholar[53] argues that stipulating a threshold is not the right method. Instead, whether the proceeds are obtained through the commission of crime is the decisive element.[54] Therefore, at the initial draft of the Penal

46 Yaşar, Gökcan and Artuç (n 44) 8356.

47 FATF, What is Money laundering?, <https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab> accessed 25 September 2023.

48 See Dülger (n 1) 416; İzci (n 6) 377; Özgenç (n 9) 142.

49 Kocasakal (n 7) 345 ff.; Coşkun (n 5) 261; Değirmenci (n 4) 467; Özgenç (n 9) 143 and also 153; Dülger (n 1) 418 and 432.

50 Dülger (n 1) 435-436.

51 FATF (n 10) 167.

52 Özgenç (n 9) 158.

53 *Ibid.* 153 and 156.

54 *Ibid.*

Code in 2004, no threshold was required. However, after the objection by the competent administrative authorities on money laundering, a threshold was added.[55] As for practice, it is observed that money laundering as a result of drug trafficking, fuel smuggling, human trafficking and migrant smuggling, occur more frequently.[56] The perpetrator of predicate offence and laundering money can be different or the same person.[57] However, the predicate offence is to be determined by a court judgment. In other words, there must be a court determination on that predicate offence, in order to reach decisions on the crime of money laundering.[58] That is, in order to answer the question whether the perpetrator is convicted of a predicate offence or not.[59]

In a case from 2011[60], it was noted that the bank account movements of the defendants were very high and remarkable, and this amount could not have been obtained through the trading capacity of the company owned by them. This high amount of money was taken from their account on 3 April 2002. Besides, the defendants were arrested with drugs on the border between Romania and Hungary. The defendants were convicted of money laundering.[61] This judgment was harshly criticized because it was based on presumption that a predicate offence was committed, rather than a judgment.[62] That is to say, the Court decided on the act of money laundering without seeking for existence of a judgment regarding drug trafficking. This is an issue because the predicate offence serves a substantial (objective) element of crime of money laundering, and the predicated offence has to be previously proven by the court in order to later assess the acts of money laundering.

The Turkish Penal Code in 2005 covers both self-laundering and third-party laundering. For self-laundering, Art. 282-1 reads;

> "Anyone who transfers abroad the proceeds of any predicate offence that requires a minimum of six-month imprisonment, subjects these proceeds to various *actions*[63] for the purpose of concealing their illegitimate origin or making them seem

55 *Ibid.* 156-157.
56 FATF (n 10) 56 and 57.
57 Ünver (n 13) 453; Yaşar, Gökcan and Artuç (n 44) 8357; Çakır (n 42) 281.
58 Özgenç (n 9) 161.
59 *Ibid.* 164.
60 Yargıtay 7. Ceza Dairesi [The Seventh Criminal Chambers of the Court of Cassation], Date: 22.11.2011, E. 2008/18019, K. 2011/24972, retrieved from Özbek (n 12) 172.
61 *Ibid.*
62 Özbek (n 12) 173.
63 In Turkish original version, the word *"action"* is referred as *"işlem"* which is a broad term and includes "all activities, operations and procedures" (Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 282). This word, *"işlem"*, in crime definition is criticized as being not in line with legality principle by scholars. See Özbek (n 12) 176-177; Ünver (n 13) 458.

> to be obtained through a legitimate way shall be sentenced to imprisonment from three years to seven years and a fine up to twenty thousand days".

Pursuant to Art. 282-1, the crime of money (self-) laundering consists of two main alternative acts. These are (1) transferring the proceeds abroad or (2) subject these proceeds to various actions for the purpose of concealing their illegitimate source or making them seem to have been obtained through a legitimate way. Apart from the act of transferring sums abroad, all acts to laundering the proceeds is to be conducted for a specific purpose, concealing their illegitimate origin. To the FATF, requiring a specific intent for the acts of concealing or disguising the proceeds, shows that Turkish law is not totally, but broadly in compliance with *Vienna* and *Palermo Conventions*.[64] In other words, requiring a specific intention hamper combatting money laundering according to the FATF's view.[65] As a matter of fact, Art. 3 of the Vienna Convention (1988) also mentions "the purpose" as follows:

> "The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions".[66]

In the Turkish Penal Code, the act of subjecting the proceeds of predicate offence to various actions without any purpose of concealing their illegitimate origin or making them seem to have been obtained through a legitimate way, does not hold a sufficient degree of unjust character that would justify the intervention of criminal law. That is to say, without such a specific intent, the perpetrator does not direct her/his act to laundering, even if in the end, the acts of the perpetrator lead to concealing the proceeds. Furthermore, the legal interest that must be protected from this crime is the functioning of judiciary. Laundering the proceeds of crime, prevents judicial authorities from knowing that a crime is committed and the subsequent prosecution. If the perpetrator does not act with any intention such a prevention, as a rule, an inference can be drawn that this person does not perform any act violating the legal interest, the

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64 FATF (n 10) 165 and 167. The same critics in 2023 Follow- Up Report. See FATF (n 11) 21.

65 FATF (n 10) 167.

66 The UN, The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, 3, <https://www.unodc.org/pdf/convention_1988_en.pdf> accessed 25 September 2023.

functioning of judiciary, which refers to ensuring that justice system functions.[67] However, where the way the perpetrator acts result in such prevention is self-evident, such as transferring them abroad, may be considered in determining this specific intention.

What's more, this crime definition does not require harm (outcome), acting is already is sufficient for the crime of money laundering to occur. Therefore, this crime is considered an abstract crime of danger 68 referring to crimes wherein the judge does not investigate whether or not money is laundered by the act.

As for third-party money laundering, it includes a subjective legal component wherein the perpetrator knew the proceeds were obtained through an illegitimate way. Therefore, purchasing the proceeds of any crime without knowing these proceeds' illicit origin, e.g., when the person does not know this illicit origin due to recklessness, does not constitute the crime of money laundering. As such, Art. 282-2 states;

> "Anyone who does not participate to the commission of a crime, but purchases, accepts, possesses or uses the proceeds arising from commission of that crime by knowing that such proceeds were obtained through an illegitimate way shall be sentenced to imprisonment from two years to five years".

Third-party laundering was introduced in Art. 3-1-(c) of the Vienna Convention and Art. 6-1-(b)-(i) of the Palermo Convention. In doing so, the acts, "possess" and "use" of the proceeds arising from commission of that crime, were included in crime of money laundering[69]. Third-party laundering coincides with the crime, titled 'purchasing or accepting property acquired through the commission of crime', Art. 165 of the Penal Code. Third- party money laundering stands as special crime in comparison with crime of 'purchasing or accepting property acquired through the commission of crime', because third-party laundering is committed only by knowing that such proceeds were obtained through an illegitimate way. [70] Therefore, the crime of money laundering supersedes the crime of purchasing or accepting property acquired through the commission of crime.[71]

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67 Özbek (n 12) 177; Dülger (n 1) 453.

68 Yaşar, Gökcan and Artuç (n 44) 8355; Özbek (n 12) 176; Ünver (n 13) 470; Çakır (n 42) 279. In Turkish criminal law, crimes are also classified into two main group as *crime of harm* and *crimes of danger* which is either abstract or concrete and does not require the occurrence of harm as a legal element of crime. For this terminology and explanation see Emilio S. Binavince, 'Crimes of Danger' (1968-1969) 15 Wayne L. Rev. 683.

69 The explanatory memorandum of crime of money laundering (Art. 282) of the Turkish Penal Code.

70 Özbek (n 12) 178.

71 *Ibid.*

There are two aggregated circumstances that require more punishment for crime of money laundering. If this crime were to be committed by a public official or any professional in the course of performing her or his duty, the punishment shall be increased by half. (Art. 282-3). This refers to professional money laundering cases. Further, if this crime were committed within the activities of a criminal organization, the punishment shall be doubled. (Art. 282-4). In this case, in addition to the crime of money laundering, the perpetrator is punished due to criminal organization (Art. 220) depending on forming, being member or aider without being member[72]. This does not violate the prohibition against double jeopardy.[73]

The offender remorse which enables the perpetrator to be free of punishment under certain conditions is recognized by the lawmaker. As such, Art. 282-6 states that "if the person ensures the competent authorities to seizure of the proceeds or facilitate its seizure by disclosing the place where the assets are located prior to the prosecution is initiated on the account of this crime, shall not punished for the crime in this Article".

As for the Palermo Convention, it already dealt with the issue in such a broad sense in Art. 7, titled *measures to combat money-laundering,* requires States to *institute a comprehensive domestic regulatory and supervisory regime.*[74] This provision is adopted already from the Palermo Convention.[75] Therefore, the FATF's assessment that money laundering crime definition in Turkish law is *broadly in line with the Vienna and Palermo Conventions* shows a lack of strong reasoning.

4. Sanction for Natural Persons

The FATF critiques that sanction of money laundering is relatively low.[76] As pointed earlier, this is an *abstract crime*, that is to say, this crime definition does not require harm (*outcome),* acting is already sufficient to consider the crime of money laundering to have occurred. Therefore, a judge does not investigate whether or not the money is laundered as a consequence of this act. Nevertheless, the basic form of crime (self-laundering) requires imprisonment from three years to seven years and fine up to *two thousand days*[77]. If laundering is conducted within a criminal organization, the punishment is to be doubled

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72 *Ibid.* 179.

73 Ünver (n 13) 467.

74 The UN, United Nations Convention against Transnational Organized Crime and the Protocols Thereto (n 27) 9-10.

75 Özgenç (n 9) 167-168.

76 FATF (n 10) 165.

77 Fine as one of the two sanctions in criminal law is applied based on daily basis scale which refers to day fine system. As such, *"The amount of fine for one day, which lies on the scale from twenty to one hundred Turkish Liras, is appraised by taking into account the economic and other personal conditions of the person"* (Art. 52, the Turkish Penal Code).

by the court. That means, the maximum penalty could be up to fourteen years of imprisonment. The sanctioning of money laundering is obviously high in comparison with other crimes against *the functioning of judiciary.* Furthermore, forming a criminal organization (Art. 220-1, the very basic form of crime) requires imprisonment between four years to eight years.

5. Sanctioning Legal Persons

Türkiye is a civil law jurisdiction, and unlike in the common law approach, it considers legal entities as artificial or fictitious person created through the law, in order to meet the needs of society. They lack independent will for a responsible act in the field of criminal law.[78] In other words, as opposed to human beings, legal entities cannot have their own will that lie at the core of the conception of punishment. Because of this lack of will, which is one of obligatory components of the criminal activity, the crime can only be committed by a natural person.[79] In the Turkish criminal law, therefore, it is admitted by the current statutes that legal entities cannot commit a crime, thus, be subject to punishment. To illustrate this, if a corporation is involved in human or drug trafficking cases as an autonomous party of some relationships with others, and it gains profits from these sorts of criminal activities, the available punishment will be inflicted on those who decide to take part in these criminal activities, mostly members of board of that company.

Punishing legal entities for criminal activity is not even a matter of discussion in Turkish criminal law seeing that the current statute, Art. 20 of the Penal Code, states explicitly that punishment shall not be inflicted on legal entities, but security measures may apply. Thereby, certain security measures, e.g., *"revocation of the license"* or *"confiscation of properties",* are applicable to legal entities under Art. 60 of the Penal Code, if the crimes are intentionally committed within its name or in favour of it.[80] However, legal entities, especially corporations, operate internationally, and get involved in crimes which have transnational dimensions such as human or drug smuggling or trafficking, environmental, financial or cybercrimes, etc. In addition, in order to inflict measures on legal entities for a certain crime, the definition of crime must include a provision that require measures to be taken. As a matter of fact, with the crime of money laundering, Art. 282-5 states that "legal entities are subject to the special measures[81] on account of commission of this crime".

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78 Kayıhan İçel, Füsun Sokullu-Akıncı, İzzet Özgenç, Adem Sözüer, Fatih Selami Mahmutoğlu and Yener Ünver, *İçel Suç Teorisi* (2nd Book, 3rd edn, Beta, İstanbul 2004) 57. See also Nur Centel, 'Ceza Hukukunda Tüzel Kişilerin Sorumluluğu -Şirketler Hakkında Yaptırım Uygulanması-' (2016) 65 (4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 3313.

79 See Berrin Akbulut, 'Criminal Law Responsibility of Legal Entities in Turkey' (2017) 6 (1) Perspectives of Business Law Journal 154.

80 See Centel (n 78) 3317; Akbulut (n 79) 155-156.

81 For these special measures see Akbulut (n 79) 156-158.

That legal entities have no criminal liability as natural persons in Turkish law causes some problems and conflicts among jurisdictions at a global level. The crime of money laundering is one of the matters that leads to that conflict. The FATF views sanctions in Turkish law for legal person as limited[82] and accordingly states:

> 'When a legal person is involved in the commission of a ML offence, it is subject to specific security measures: TCL[83], Art. 282 (5), such as the cancelation of its license and confiscation measures. No criminal penalties shall be imposed on legal persons TCL, Art. 20 (2), as implementation of criminal measures against legal persons is contrary to the fundamental principles of the criminal justice system in Türkiye, according to authorities. In addition to security measures, legal persons that are misused for the commission of an ML offence are also subject to administrative fines, which range from EUR 1.500 – EUR 325.000. These administrative fines are not considered as dissuasive'.[84]

It should be noted that FATF does not make any difference as judicial or administrative fine for legal person on the account of crime money laundering. Rather it highlights that "sanctions for legal persons are not sufficiently effective, proportionate and dissuasive".[85] However, it argues that sanctioning legal persons in Turkish law is necessarily based on the prosecution or conviction of a natural person obstructs this dissuasiveness.[86]

One of the fundamental principles of the criminal justice system in Türkiye is the principle of individual criminal responsibility. Whereas the FATF critiques the current sanction in Art. 282, even the existing sanction for legal entities in Art. 282-5 is already criticized among Turkish scholars who argue that the provision breaches the individual criminal responsibility and is to be abolished.[87] Further, in imposing punishment on legal entities, the aims of the punishment such as having the effect of deterrent, retribution and prevention become meaningless.

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82 FATF (n 10) 165; FATF (n 11) 21.

83 FATF's abbreviation for the Turkish Criminal Law which this chapter uses it as the Turkish Penal Code.

84 FATF (n 10) 167.

85 *Ibid.* 19.

86 *Ibid.*.Cf. Akbulut (n 79) 154-155.

87 Ünver (n 13) 452; Sacit Yılmaz, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu' (2011) 2 Ankara Barosu Dergisi 70, 94. See also Dülger (n 1) 409.

In response to criticisms due to criminal responsibility of legal entities Türkiye faces in the international arena with respect to international conventions regarding the fight against corruption[88], Türkiye introduced a middle ground in the year of 2009 after the previous EU Türkiye Report and the FATF reports. Accordingly, the Code on Administrative Crimes 5326 in Art. 43/A enables the law to impose administrative fines on legal entities, if a given crime is committed by a competent person and in favour of a legal entity. A catalogue of crimes that covers mostly crimes arising from Türkiye's responsibility from international conventions, whereby money laundering is included in the list.[89] In this case, a legal entity may incur an administrative fine — ranging from ten thousand Turkish Liras to fifty million Turkish Liras. Article 43/A thus circumvents the Penal Code's provisions on legal entities' criminal responsibility. Therefore, legal entities may be subject to administrative sanctions (not a criminal law one) but based on the criminal act as defined in the Penal Code.

Concluding Thoughts

Money laundering appears to be one of the main financial resources of criminal organizations. As the FATF emphasizes that Türkiye, located at an inter-continental junction, faces significant money laundering and terrorist financing risks and criminal organizations seek to exploit domestic and cross-border vulnerabilities, given Türkiye's geographic location.[90] However, in the struggle of the State, *under rule of law*, against money laundering or the financing of terrorism, respectively, cannot be operated at all costs. In that regard, such State needs to maintain fundamental principles such as legality, human dignity, and the principle of individual criminal responsibility.

The FATF's recommendations and critiques that are directed towards practical aspects of Turkish application of money laundering — *inter alia*, the establishment of a national strategy for investigating and prosecuting money laundering and, respectively, dealing with complex money laundering cases such as prioritizing professional and third-party money launderers[91] — are useful and fit the purpose of tackling cross-border organized crime. However, as for the FATF's recommendations and critiques of the definition of the crime, this may not be the case.

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88 This was pointed out in the explanatory memorandum of this Art. Türkiye Büyük Millet Meclisi [The Grand National Assembly of Turkey], 'Türk Ceza Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı ile Avrupa Birliği Uyum ve Adalet Komisyonları Raporları (1/670)', 5 <https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss353.pdf> accessed 25 September 2023. See also Centel (n 78) 3321.

89 See Centel (n 78) 3321.

90 FATF (n 10) 5.

91 *Ibid.* 45.

It is not difficult to draw an inference that the definition of the crime of money laundering in the Turkish Penal Code has been in harmony with the *Vienna* and *Palermo Conventions*. Indeed, money laundering as a particular type of crime in Turkish law was first introduced and later amended by international conventions and institutions. The legislative framework of money laundering as a type of crime meets the requirements of these Conventions to some extent. However, the FATF does not consider the differences between civil law approaches and the ones in common law. This crime necessitates international cooperation and harmonized applications. Thereby, contradictions and disagreements between civil law and common law approaches come into question naturally. The long-established understanding and application of the core principles of criminal law in Türkiye may not be easily matched with the international expectations. Therefore, one hundred percent compliance outcome from the FATF's report will not be the case in a short term.

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