

Victim's right to compensation from the money launderer: a comparative perspective

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Abstract

Money laundering in Latvian law is considered a criminal offence against the interests of the financial system and the administration of justice. However, money laundering may also affect the property interests of the victim of a predicate offence whose assets due to money laundering have become unrecoverable. The study examines whether the victim can claim compensation from the launderer under Latvian law compared to Swiss and German laws. The results show that Latvian courts do not consider money laundering activities to cause economic losses to the victim, thus excluding compensation. However, payment of the value of the laundered assets may be ordered for the benefit of the victim. In contrast, Swiss and German courts acknowledge economic losses stemming from the money laundering itself, which provides a basis for compensation. Both approaches lead to different legal issues, which are analysed.

Keywords

economic losses, money laundering, right to compensation

INTRODUCTION

Money laundering in Latvian law is usually considered a criminal offence against the interests of the financial system and administration of justice (Krastiņš, 2017; Krastiņš et al., 2023; Liholaja, 2022). However, there are situations when the assets obtained from the victim of a predicate offence due to money laundering activities have become unrecoverable. In such cases, a question arises whether the victim of a predicate offence may claim compensation from the money launderer, especially when only the latter is identified and prosecuted. Eurojust (2022) has also indicated that countries may encounter difficulties regarding restitution or compensation of victims if the crime of money laundering itself is considered victimless.

The study aims to determine whether the victim of a predicate offence may claim compensation from the money launderer whose actions made his property unrecoverable. The study addresses the issues of legal interests protected by Article 195 ('money laundering') of the Latvian Criminal Law, the status of a victim in criminal proceedings against the money launderer and the rights of a victim in Latvian, Swiss and German case law to claim compensation from the money launderer.

In the study, a victim is defined as an individual whose assets have been obtained in a predicate offence and are

lost due to laundering activities, i.e. cannot be seized and returned. Compensation refers to any monetary remedy for an infringement of the victim's rights.

A comparative method is used to analyse Latvian and Swiss/German legal regulation and case law, considering the different legal approaches courts in these countries have taken to address a similar legal issue.

RESEARCH RESULTS AND DISCUSSION

Protected legal interests under Article 195 of Latvian Criminal Law

Each offence in the Criminal Law protects certain legal interests. The protected interests provide essential guidance for an accurate application of the Criminal Law provisions. Article 7 of the Latvian Criminal Law refers to the interests of individuals and society. The interests protected under the Criminal Law are specified based on the offences listed in the Special part of the Criminal Law (Mincs, 2005b).

Article 195 of the Latvian Criminal Law is included in the chapter on criminal offences in the economy. Legal literature indicates that the object of Article 195 is the interests of economy in the financial-credit sphere (Krastiņš et al., 2023; Liholaja, 2022). Moreover, money laundering as a multi-object offence also protects the interests of the administration of justice (Krastiņš, 2017). If a person handles criminal proceeds, it always

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jeopardises both interests of the economy and administration of justice, and in practice, it is not possible to determine which of these interests the offence affects more (Baumanis, 2019). It is specified that Article 195 protects the interests of the administration of justice in the detection and punishment of criminal offences: '[W]ith this offence not only is the capital laundered that was obtained by criminal means, but also obstacles are created for the detection of crimes in which the laundered assets were obtained' (Judins, 2008).

Furthermore, legal doctrine suggests that Article 195 of the Criminal Law also protects the interests of individuals whose property has been laundered. Juriss (2002) indicates that the object of the offence under Article 195 can also be the economic interests of both natural and legal persons. Mincs (2005a) has also noted that '[t]he offender, through his independent criminal actions, consolidates the unlawfulness created by the predecessor, further complicating the restoration of the affected property to its lawful state'. Janums (2022) draws attention to the fact that by interpreting the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention) too narrowly, a situation arises where, in qualifying the offence, the actual interest jeopardised by the act of money laundering is unjustifiably lost.

Latvian case law establishes that the object of money laundering is the interests of the economy in the financial-credit sphere (e.g. Judgement of the Riga Regional Court of 24 March 2022, case No. 11904001515) or in the financial field (e.g. Decision of the Senate of the Republic of Latvia of 01 February 2023, SKK-1/2023, case No. 12507000710). This aligns with the Directive 2015/849, which highlights the potential harm of illicit money flows to the integrity, stability and reputation of the financial sector (the first recital of the Directive 2015/849). Additionally, the Senate of the Republic of Latvia in its decision of 28 November 2022, emphasises 'the public interest in safe and stable operation of the financial system' (Decision of the Senate of the Republic of Latvia of 28 November 2022, SKA-1118/2022, case No. A43003222). In some instances, the case law recognises that offence under Article 195 also poses a threat to the interests of the administration of justice in the detection and punishment of criminal offences (e.g. the Judgement of the Economic Court of 07 December 2022, case No. 11110006918). Therefore, it can be inferred from Latvian case law that money laundering constitutes a multiple-object offence, however, a comprehensive assessment of the interests protected by Article 195 of the Criminal Law has not yet been conducted.

Protected legal interests in Swiss and German law

In Switzerland, the offence of money laundering is in Article 305bis of the Swiss Criminal Code.. The article is included

in the Criminal Code section on offences against the administration of justice. The definition of money laundering explicitly includes the purpose of 'hindering the determination of the origin, discovery or confiscation of proceeds' ('die Ermittlung der Herkunft, die Auffindung oder die Einziehung von Vermögenswerten zu vereiteln') as an element of the crime. Thus, the law explicitly indicates the interest in confiscation of criminal proceeds as a protected legal interest of money laundering offence.

The Swiss legal doctrine of Article 305bis emphasises that the provision protects, among other things, the execution of the state's confiscation claim ('der Einziehungsanspruch') (Ackermann, 2021). Additionally, Article 305bis alongside societal interests protects the interests of individual victims: 'When the launderer carries out the criminal activities with the proceeds obtained through criminal offence against property, [...] the victim clearly has an interest in preserving the "paper trail" that could allow him, by the implementation of criminal justice, to recover the assets from which he was stripped' (Cassani, 2001).

The Swiss Federal Supreme Court in its Judgement of 09 July 2020, stated that money laundering under Article 305bis (1) primarily protects the administration of justice in enforcing the state's right to confiscation and the public interest in an unimpeded functioning of the criminal justice system. However, in cases in which the assets subject to confiscation stem from offences against property, the regulation serves not only the state's interest in confiscation but also the protection of those who have been individually injured by the predicate offence (Judgement of the Swiss Federal Supreme Court of 09 July 2020, case 6B_1202/2019). Similar findings have been expressed previously (e.g. Judgement of the Swiss Federal Supreme Court of 18 April 2007, case 133 III 323; Judgement of the Swiss Federal Supreme Court of 08 September 2003, case 129 IV 322).

In Germany, the offence of money laundering is included in Article 261 of the German Criminal Code. The article is in the same section as the offence of acquiring and disposing of stolen property (comparable with Article 314 of the Latvian Criminal Law). Similarly to Swiss law, Article 261 specifies the intent to obstruct the confiscation of proceeds ('in der Absicht, [...] dessen Einziehung [...] zu vereiteln') as an element of the money laundering offence.

The German Federal Court of Justice in the Judgement of 19 December, 2012, indicated that the activities included in Article 261 of the Criminal Code impede or complicate the access of law enforcement authorities to the proceeds obtained as a result of a predicate offence. Consequently, not only the confiscation of proceeds, but also the enforcement of the victim's claim of damages is hindered. Therefore, the said provision also serves the individual interests of those who have been injured by the predicate offence (Judgement of the

German Federal Court of Justice of 19 December 2012, case VIII ZR 302/11).

Protection of property interests under Article 195 of Latvian Criminal Law

Article 195 of the Latvian Criminal Law constitutes a fundamental element of Latvia's anti-money laundering (AML) legal framework, establishing criminal liability for the most serious acts endangering protected legal interests. Consequently, Article 195 should align not only with the objectives of international and European Union law regarding the criminal liability of persons involved in money laundering but also with the goals of freezing, seizing and confiscating criminally obtained assets, including the victims' rights to compensation or restitution (e.g. Articles 29 and 30 of Regulation 2018/1805).

The Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing (hereinafter – Law on Prevention of Money Laundering) along with the Criminal Procedure Law governs the freezing, seizing and confiscation of criminal proceeds. Article 32.1 of the Law on Prevention of Money Laundering authorises the Latvian Financial Intelligence Unit to freeze financial assets when there is a reasonable suspicion of money laundering. Additionally, the Law on Criminal Procedure regulates the procedure of seizure and confiscation of criminal proceeds (Articles 361 and 358, respectively).

Article 195 of the Criminal Law is a blanket legal provision, the characteristics of which are specified in Articles 4 and 5 of the Law on Prevention of Money Laundering (Decision of the Senate of the Republic of Latvia of 12 March 2024, SKK-50/2024, case No. 15830111509). According to Article 5(1), points 1 and 2, money laundering may involve actions with 'the purpose of concealing or disguising' or 'concealment or disguise' of the proceeds. The provisions do not specify the subject from whom the concealment or disguise must occur.

In accordance with the Criminal Procedure Law, law enforcement authorities have responsibilities regarding the seizure and confiscation of criminal proceeds, which includes the search and seizure of laundered assets. Additionally, the Law on Prevention of Money Laundering obliges entities to conduct customer due diligence (Article 11.1) and enhanced due diligence (Article 22), along with an obligation to report suspicious transactions to state institutions. This involves verifying the sources and origin of the client funds. Thus, by engaging in concealing or disguising activities (or activities with such intent), both state institutions and obliged entities can be misled, obstructing the fulfilment of legal obligations. This indicates that Article 195 of the Criminal Law serves not only the interests of administration of justice in detecting and punishing criminal offences, but also the interests of

freezing, seizing and confiscating criminal proceeds, which may be hindered by money laundering activities.

Under Article 358(1) of the Criminal Procedure Law restitution of property to the previous owner or legal possessor takes priority over the confiscation of assets. The funds obtained from confiscation shall be primarily used to satisfy the victim's claim of compensation (Article 359(1)). Thus, the legal framework prioritises the property owner's interests in reclaiming criminally obtained property or receiving compensation over the state's interests in confiscation. Both interests can be equally secured through the seizure of property (Article 361(1)). Therefore, the law safeguards the interests of confiscation as well as ensures restitution or compensation for damages. This implies that Article 195 of the Criminal Law protects not only the legal interests of the confiscation of criminal proceeds but also, a fortiori, the victim's interests in recovering the property.

Victim in the criminal proceedings against the money launderer

Article 95 of the Criminal Procedure Law outlines the procedural status of a victim. A victim in criminal proceedings is a person to whom harm has been caused by a criminal offence, i.e. moral injury, physical suffering or economic loss. Therefore, an assessment of economic loss is a crucial factor in determining a person's status. Only economic loss, which was directly caused by a criminal offence, is significant (Article 2(1)(a)(i) of Directive 2012/29/EU).

The status of a victim is tied to various legal rights. Only a victim can apply for compensation (Kūtris, 2019). Compensation for damages is essentially a civil liability within the framework of criminal proceedings (Decision of the Senate of the Republic of Latvia of 28 March 2024, SKK-41/2024, case No. 15840025922). Compensation for damages or harm is typically a remedy that is applied when restitution is not possible (Decision of the Senate of the Republic of Latvia of 09 March 2018, SKA-291/2018, case No. A420193115). Confiscation against the perpetrator shall not prevent the victim from seeking compensation (Article 8(10) of Directive 2014/42/EU).

Additionally, The Criminal Procedure Law provides for the legal status of an 'owner or legal possessor'. However, the law does not define the term or outline the legal rights of such persons. According to Article 356, the status is related to two factors: 1) a person's ability to demonstrate a loss of the property and 2) entitlement to the property. If, during criminal proceedings, the owner of criminally obtained property is identified, Article 357 of the Criminal Procedure Law provides that the property must be returned rather than confiscated. While a victim's status is not mandatory for the property to be returned, the person is likely to hold this status (Kūtris, 2019). In the Latvian case law of stand-alone money laundering

cases usually, no person is recognised as a victim (e.g. Judgements of the Economic Court of 25 July 2023, case No. 18300004723; of 27 July 2023, case No. 18300003523; of 31 May 2023, case No. 11830002722; of 04 April 2023, case No. 18300001223). In such cases, depending on the circumstances, the entire value of the laundered property or just the sum the launderer received as a fee may be recovered from him in favour of the state (Vecozols, 2023). Since there is no victim involved in the proceedings, the question of compensation for damages is not considered.

There are only a few judgements in stand-alone money laundering cases where legal issues regarding the victim have been analysed. In criminal case No. 11210094215 the Economic Court established that an amount of 699 euros had been fraudulently obtained from an individual. The funds were then transferred to the accused's bank account, and a portion was subsequently laundered. During the pre-trial proceedings, the bank was recognised as a victim and submitted a compensation claim as it had reimbursed the individual for the losses incurred. However, the court ruled that the economic loss had resulted from the predicate offence, not from money laundering. The court emphasised that the offence defined under Article 195 of the Criminal Law did not harm the bank or any other person. Consequently, the court rejected the bank's compensation claim. The final judgement in the case is still pending.

The absence of a victim in money laundering cases can be attributed to several factors. Many cases in Latvia involve laundering of proceeds from criminal activities committed abroad. Laundering activities are often executed by individuals known as 'money couriers' or 'money mules'. Since the predicate offence occurs outside Latvia, no one typically reports it to the local authorities or files a compensation claim. Often, laundered assets are mixed with other property, transferred across multiple bank accounts and involve unauthorised use of third-party data, making it difficult to identify the owner. Furthermore, according to the law, it is not necessary to specify the criminal offence from which the assets originated in order to establish the elements of money laundering (Article 5(2.1) of the Law on Prevention of Money Laundering).

Assessment of economic losses in Latvian case law

In accordance with the Criminal Procedure Law, the victim must demonstrate the economic loss resulting from the criminal offence and specify its amount (Article 351). Given the limited regulation of economic losses in the Criminal Procedure Law, it is necessary to apply the provisions for losses and their compensation in the Civil Law. Under Article 1773 of the Civil Law, a loss is considered direct when it is the natural and necessary result of a wrongful act or omission. Such loss can materialise either as a reduction in the victim's

existing property, as seen in the cases of predicate offences where the property is diverted from the owner, or as a prevention of anticipated profits (Article 1772).

The term 'anticipated profits' in Article 1772 of the Civil Law includes all material benefits that were not part of the victim's property at the time of the unlawful act but would have been obtained if the actions causing the losses had not been committed (Kalniņš, 2023). In the case law, anticipated profits are interpreted as anticipated gains that would increase the value of the victim's property if the unlawful conduct had not occurred (the Judgement of the Senate of the Republic of Latvia of 15 January 2014, case SKC-12/2014). The legal regulation provided in Article 1772 allows for a more precise calculation of the economic consequences resulting also from a criminal offence (Kūtris, 2019).

Economic losses must be causally linked to the criminal conduct. The causal relationship is described as an objective connection between the unlawful act or omission and the harmful consequences it caused, where the act or omission is the main cause that inevitably led to the harmful outcome (Krastiņš, 2014). Different legal methods can be used to prove causality. According to the equivalence theory each cause is considered equivalent, i.e. the cause does not lose its significance even if there were other contributing factors (Leja, 2019). This theory is also accepted in the case law (Decision of the Senate of the Republic of Latvia of 15 October 2019, SKK-357/2019, case No. 12290000213). The adequacy theory is used to exclude legally insignificant causes (Leja, 2019). The results of applying the adequacy theory can then be adjusted based on the scope of protection of the violated norm (Strazdiņš, 2017).

In case No. 11210094215 the Economic Court assessed whether the economic losses claimed by victims were caused by the actions of the money launderer. In the judgement of 07 February 2022, the court ruled that the launderer did not inflict harm on the victims, as the harm was caused by the predicate offence. A similar conclusion was reached in the Judgement of 07 September 2023, in case No. 11261084822, where the court stated that the economic loss was caused by fraud, not by money laundering. The court emphasised that, according to established criminal law doctrine, economic loss is an actual financial detriment suffered by the victim as a result of a criminal act and is causally linked to the actions of the perpetrator. Considering that the element of Article 195 of the Criminal Code, i.e. financial assets, had already been acquired, any subsequent actions by the defendant cannot be considered to have caused the financial detriment to the victims. As a causal link between money laundering and the harm inflicted on the victims could not be established, the court declined the compensation claims.

However, guided by the principle of fairness outlined in Article 1 of the Criminal Procedure Law, the court in case No.

11261084822 acknowledged the victims' entitlement to the value of the criminal proceeds equivalent to their laundered property. Article 70.14(2) of the Criminal Law allows for the recovery of the value of the property being confiscated if the property has been disposed of, making it impossible to confiscate or return to the victim. The court applied Article 357(1) of the Criminal Procedure Law, which states that criminally obtained property must be returned to the owner or legal possessor, to also cover the recovery of the value of the property. The recoverable amount was calculated according to the value of each victim's assets that were lost due to laundering. The remaining value of the proceeds, whose origin was not established, was confiscated for the benefit of the state.

Assessment of economic losses in Swiss and German case law

Swiss and German case law recognises that money laundering may also cause an economic loss to the victim of a predicate offence. In the Judgement of 09 July 2020, the Swiss Federal Supreme Court considered the issue of civil liability of the money launderer for the damages caused to the victim of the predicate offence. Deciding on the damages, the lower court compared the state of the victim's assets before and after the laundering activities, establishing that no additional losses were inflicted. Similarly to the aforementioned Latvian court judgement, the court concluded that the launderer bore no liability for the losses inflicted on the victim, placing sole responsibility on the perpetrator of the predicate offence. However, the Federal Supreme Court disagreed with this assessment. It ruled that the assets of the injured party were deprived by the perpetrator of the predicate offence and the money launderer maintained this situation of damage (die Schadenlage). Consequently, the court found that the money launderer is jointly liable for the damage caused to the extent of the assets whose confiscation was prevented by money laundering (Judgement of the Swiss Federal Supreme Court of 09 July 2020, case 6B_1202/2019). Ursula Cassani points to an adequate causal relationship established in case law, which could also be applied in matters of money laundering (Cassani, 2001).

The German Federal Court of Justice in the judgement of 19 December 2012, addressed the issue of compensation for damages involving a person previously convicted of money laundering. In previous criminal proceedings, it was established that the person had shared his bank account details with individuals engaged in fraudulent activities. The perpetrators of the underlying crime had remained unidentified. The German Federal Court of Justice concluded that money laundering under Article 261 of the German Criminal Code constitutes a legal violation under Article 823(2) of the German Civil Code, thereby entitling the victim to compensation for

damages (Judgement of the German Federal Court of Justice of 19 December 2012, case VIII ZR 302/11).

Comparative analysis of Latvian and Swiss/German law

Latvia, Switzerland and Germany recognise the need to confiscate proceeds of crime but differ in their approach to victim compensation. Switzerland and Germany recognise the right of a victim of a predicate offence to claim compensation for damages from money launderer. In contrast, Latvian case law does not recognise economic losses resulting from money laundering itself, and therefore compensation cannot be awarded. Instead, the courts may order the recovery of the value of the laundered property for the benefit of the victim, provided that such recovery from the launderer is justified. The latter approach is arguably more favourable to the launderer, as it takes into account whether the recovery of the full value of the laundered assets or merely a launderer's fee is ordered. This balances the liability of the launderer against the interests of the victim. However, the approach does not entirely fit the traditional framework of restitution or compensation, as the claim for compensation is rejected, but the value of the lost property is still directly recovered for the benefit of the victim. By clearly dividing the recovery amount between the victim's and the state's claims, Latvia effectively avoids double recovery issues. In contrast, Swiss and German law provides that confiscation is precluded to the extent that the injured party's claim to the return of the object obtained or compensation has expired (Article 73e of the German Criminal Code, Article 70 of the Swiss Criminal Code). All jurisdictions ensure that double recovery does not occur by reducing the amount to be confiscated by the sums that are returned to the victim. This coordinated approach ensures that double recovery of both the proceeds and damages does not occur during the enforcement stage of the ruling.

An issue in Latvian practice may be a fair distribution of the recovered sums among multiple victims. Typically, a bailiff distributes assets proportionally during the enforcement of the final decision. Issues arise if the decision on whom to compensate is left to the convicted person or if the victim declines compensation. The law mandates the recovery of criminal proceeds or an equivalent value regardless of the victim's consent to prevent the perpetrator from retaining the illicit gains.

The examined jurisprudence does not address a situation where proceeds are recovered from the money launderer, but subsequent legal proceedings are initiated against the perpetrator of the underlying crime. Fairness and the aim of confiscation dictates that recovery should not exceed the actual proceeds acquired. Joint liability of the predicate offender and the launderer might resolve this issue. Christian Heierli (2012) has indicated that the launderer could pursue a regress claim against the perpetrator. It could also be

addressed under Chapter 61 of the Criminal Procedure Law, which deals with the issues arising during the execution of judgements and decisions. The number of unresolved legal questions on the analysed issues suggests that court practice in these areas might evolve over time.

CONCLUSION

Confiscation of criminal proceeds or restitution of the criminal property to the victim are some of the key objectives of the AML legal framework. Therefore, the scope of protection of Article 195 of the Latvian Criminal Law should include not only the interests of the financial system and administration of justice in detecting and punishing for criminal offences but also the interests of confiscation of criminal proceeds, as well as property interests of persons whose property has been laundered.

Money laundering activities can jeopardise the return of property to the victim, causing distinct and deeper harm compared to harm already done by the predicate offence itself. Consequently, economic losses can result directly from money laundering activities, which have prevented the property from being returned to the victim or confiscated for the victim's benefit. In this case, the money launderer and the perpetrator of the predicate offence can be held jointly liable for the damages caused to the victim to the extent that the money laundering activities have prevented restitution or compensation.

The victim's right to compensation can also be ensured during the enforcement stage of the compensation order, as provided in national and EU law. Although the enforcement of confiscation orders is beyond the scope of this article, it may hold practical significance, especially in the context of international criminal cooperation when the victim is located abroad, making it a basis for further research.

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