CHALLENGING ISSUES IN PREVENTING FINANCING OF TERRORISM AND EXTREMISM IN THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

This article discusses problems and solutions with respect to the organization and implementation of countermeasures, opposition and prevention of the financing of terrorism and extremism in the Republic of Kazakhstan. A brief analysis, made in this paper, investigates the causes and conditions of the financing issues of terrorism and extremism in the Republic of Kazakhstan. Recommendations are taken into account for further improvement of criminal law in the fight against the financing of terrorism and extremism in the Republic of Kazakhstan.

Keywords: financing/funding, terrorism, extremism, banks, EU, financial institutions.

The lowering of protectionist barriers in the financial sphere and the liberalization of capital flows have significantly enhanced opportunities for bringing in investments; however at the same time those factors have precipitated additional opportunities to launder criminal gains. Attempts at quantitative assessment of money laundering operations as well as the scope of certain shadow economy sectors have run into quite understandable difficulties both in terms of methodology and availability of information. According to the available expert evaluations, the volume of the shadow economy, including tax evasion and corruption, at this time equals approximately 9 trillion USD.

Legalization (laundering) of gains received by criminal means and the financing of terrorist activities pose a serious threat to financial stability and security for the financial system worldwide, and specifically for the Republic of Kazakhstan. In the context of the globalization of
financial markets counteracting these dangerous types of crime becomes more and more international in nature and requires effective and continuously improving methods.

Creation of an effective system to combat money laundering and the financing of terrorist activities both at the national and international levels can significantly reduce incentives for seeking these kinds of gains. Discovery and eradication of “dirty money” sources will deprive terrorist and criminal groups of the funds they need.

In view of this, combating criminal money laundering under conditions of the globalization of financial transactions has become one of the highest priorities both for individual countries and for the international community as a whole. "Combating the financing of terrorism", "blocking channels for financing terrorist and extremist organizations", "undermining the financial base of terrorism and extremism" - these and similar expressions are frequently found in the materials on counteracting terrorism: legislation, presidential decrees, agency directives, action plans of law enforcement agencies, and in the media.

It is important to realize that although a number of measures have been proposed, planned or taken, the problem of preventing the financing of terrorism and extremism is far from being resolved. This exists due to a number of factors: numerous sources of financing, a plethora of schemes and means for receiving funds addressed to organizations and individuals involved in these activities; insufficient experience of law enforcement and supervisory authorities also plays a role; as well as gaps in the coordination of activities among the authorities involved. Legal and regulatory systems are still somewhat weak; there are also numerous other factors.

Each of the problems listed above merits a separate detailed discussion. We will outline only a few legal issues.

Of course, no one states that there is no legislation aimed at preventing the financing of terrorism and extremism; first and foremost the is Law of the Republic of Kazakhstan dated August 28 2009, No. 115-3 “On Combating Legalization (Laundering) of Illegal Gains and Financing of Terrorism” [1]. This is practically the only specialized law intended to counteract terrorist financing; in addition, it is a dual purpose law of sorts: in addition to its eponymous function, the objective is to protect the legitimate interests of the citizens, society and state by creating a legal
mechanism to combat legalization (laundering) of criminal gains. Frankly speaking, that was the initial objective of the legislation; the provisions for counteracting terrorist financing were added to the law a year later via the Law of the Republic of Kazakhstan dated July 13, 1999 No. 416-1 “On Combating Terrorism” [2]. Moreover, the Law of the Republic of Kazakhstan “On Combating Legalization (Laundering) of Illegal Gains and Financing of Terrorism” does not contain a definition of “financing terrorism” (Art. 3), and that provides yet another confirmation of the original objective of the law. At the same time, these two areas - money laundering and terrorist financing - are, in most cases, completely unrelated. Moreover, given the volume of legal cash settlements and so-called black money, some of the provisions of the law (for example Art. 6, which defines transactions subject to mandatory control) make it barely applicable in practice for discovering the channels of financing of terrorist and extremist activities within the Republic of Kazakhstan.


It is also important to take a look at some provisions of the Articles of the Criminal Code of the Republic of Kazakhstan which envisage responsibility for terrorist and extremist activities. For example, Art. 235-4 “Funding activities of an organized group, criminal cell (criminal organization) or a transnational organized group, transnational criminal cell (transnational criminal organization) or a stable armed group (gang) as well as the collection, storage and distribution of property, developing channels for financing” entails responsibility for “financing of terrorist acts or a terrorist organization”, even though, as mentioned previously, there is no definition provided anywhere for the concept of “financing of terrorism”. In the Articles of the Criminal Code of the Republic of Kazakhstan (233-2, 233-1, 235-1 and 235-4), which envisage responsibility for crimes which are extremist in nature that are listed in Art. 233-3 of the Criminal Code of the Republic of Kazakhstan, there is no responsibility envisaged for financing extremist activities, with only generic statements on the subject of setting up extremist
organizations and managing them, creating an environment promoting extremist activities, etc. It appears that unless a clear regulatory framework is developed that includes specific definitions and takes into consideration the realities not only with respect to combating the funding of terrorism and extremism but also other methods of counteracting these activities, any countermeasures are not likely to be truly successful.

An important element of such response systems is to establish financial intelligence services as recommended by the Financial Action Task Force (FATF), and to vest them with a certain authority. Those can be of two varieties; the first includes financial intelligence services organized at the state financial institutions, and the second, at the law enforcement agencies. The former are dedicated to collecting and analyzing information on suspicious transactions, while the latter are involved in investigation and enforcement activities. Activities of both, and their cooperation with each other as well as other government authorities involved in combating money laundering, are extremely important for effective and efficient operation of the response system against the financing of terrorism and extremism.

At this stage the world economy is no longer an agglomeration of cooperating national economies; it is rather a single market and manufacturing area that includes national and regional sectors. New global markets emerge, new instruments are developed and new players appear. New rules for regulating international relations are put in place in the form of multilateral economic cooperation agreements. Mutual reliance among countries is becoming one of the most prominent features of the globalization of the world economy.

Over the past several decades international finance has become the main driving force for globalization of the world economy. Its development outstrips the growth of global industries and exports. Counter flows of direct investments, diversification, broadening and integration of international financial markets have brought the world economy to a totally new level of international integration on a global scale. [5].

On the one hand, globalization promotes market economy development, thus leading to a rise in the standard of living, development of the financial system, lowering of unemployment, and expansion of trade in goods and services between the countries. On the other hand, globalization
makes it easier for criminals to conceal their illegal gains and move these funds across state borders for laundering. Another consequence of globalization is increased mutual dependency of sovereign economies. Due to financial globalization local economic problems of individual countries frequently to some extent affect the financial system of the world as a whole. For example, the mortgage crisis occurring in the USA after 2007 quickly expanded beyond the country and affected the entire international community. Starting with the market for mortgage-backed securities within the US, the crisis brought the entire world banking system to the brink of collapse, led to a recession in all the developed countries, undermined growth in emerging market economies and provoked an unprecedented instance of government intervention in the economy.

The need to adapt banking activities to changing external and internal conditions has led to revision of development strategies for credit institutions. Survival of most banks will be largely determined by their positioning in specific segments of the market for financial services, and their ability to maintain their client base, ensure liquidity and engage in profitable transactions. In view of the above there is some concern that, as the banks attempt to enhance their profits, they may weaken their internal controls, including the system of combating money laundering and terrorist financing, which will in turn lead them to engage in dubious transactions.

An important issue considered in the article on this topic is the legal and economic basis for counteracting the legalization of illegal gains (money laundering) and terrorist financing as well as the role of the National Bank of the Republic of Kazakhstan in this process.

Unlike most of the currently existing legal institutions, which have been evolving relatively independently in individual countries, the institutions involved in combating money laundering have appeared recently as a response to specific threats arising within the international community. The legal framework of the response to money laundering in the majority of countries has been created under the influence of clearly worded requirements, recommendations and standards developed by international organizations and set forth in international agreements. These aspects account for structural similarities of the systems appearing in different countries for counteracting money laundering; however, there are some country-specific features. Establishment of an international system for counteracting money laundering was initiated by
developed countries, who have already acquired a certain amount of experience in this area. Mostly through their effort international organizations have been founded, whose mission has become the development of international standards. It is advised that these standards be followed when building national systems for combating money laundering.

Money laundering opportunities to a great extent depend on the state and quality of the regulations within the financial system, first and foremost the banking sector. Current state and structure of the banking system create certain conditions and opportunities for the banks to derive illegal gains and provide money laundering services for other legal entities and individuals.

The Republic of Kazakhstan practices a responsible approach to establishing and improving the system for monitoring and counteracting criminal income laundering. Active measures have been taken to train specialists and improve their professional qualifications within the local branches with respect to combating money laundering and terrorist financing, taking into consideration joint activities with FATF and the results of applying the provisions of the Law of the Republic of Kazakhstan “On Combating Legalization (Laundering) of Illegal Gains and Financing of Terrorism”. The National Bank of the Republic of Kazakhstan, fulfilling its function of monitoring credit institutions and banking groups, serves as one of the main centers for combating criminal gains laundering and terrorist financing. Reporting documents submitted by credit institutions enables it to supervise transactions effected by these institutions and their clients.

One should note a trend towards developing a clearer definition of “money laundering” based on an expanded list of crimes preceding money laundering as such. It is indicative that Directive No. 6543 of the European Union of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [6] suggests that a broader range of illegal activities preceding the committing of a crime makes it possible to report suspicious transactions and facilitates international cooperation in this area. In view of this it is also recommended that the concept of “felony” be defined in line with international norms. Precautions should, however, apply not only to the use of money obtained through crime but also to obtaining money and property that are intended for use in terrorist activities. In order to
prevent violations it is necessary to introduce special regulations for identification of clients and “economic proprietors” and provide a precise definition of what constitutes the concept of an “economic proprietor”. Since the investors in a legal entity control the use of property, they should be viewed as “economic proprietors”.

The obligation to exercise diligence or prudence for the institutions listed in the Directive (and other relevant parties) stems from the risk of money laundering and terrorist financing. The risk level depends on the nature of the client, business connections, and type of transaction. The obligation to exercise diligence or prudence applies to trusts and companies as well.

In case of a large cash payment the risk of money laundering and terrorist financing is very high. Consequently, the following are also subject to controls: entities trading in precious stones, noble metals and works of art, as well as auction traders. Control measures may be aimed primarily at individuals and legal entities involved in the trade of goods associated with a relatively high risk of money laundering or terrorist financing. The existing duties of notaries and other legal professionals will not change. Besides that, legal professionals are subject to the provisions of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the so-called Third European Directive on money laundering and terrorist financing) [7] if they participate in the financial transactions of a company (firm) for which there is a high level of danger that their services, including tax consultations which could be used for money laundering or terrorist financing. Legal counseling is associated with the attorney-client privilege, and therefore there are cases when it is allowed to not report information obtained before, during or after a case or during an evaluation of the client’s legal situation. The services that are compared directly should be considered in that manner if they are provided by the members of the professions listed in the afore-mentioned Directive.

The danger of money laundering and terrorist financing is not equally high in all cases. In view of this it may be acceptable to follow simplified procedure with respect to due diligence and prudence with respect to clients. However, in some cases the risk of money laundering and terrorist financing may be very high, and in those cases it is necessary to exercise extra caution in establishing and checking the client’s identity due to the heightened threat of tainted reputation.
for the financial sector. This stands true first and foremost for business connections with individuals persecuted for their political views, particularly from countries where corruption is rampant.

Directive 2005/60/EC underscores that even excessive vigilance while following the requirement for due diligence in establishing the client’s identity in case of individuals persecuted for their political views while living within European Union member countries or other states is justified by the need to combat corruption at the international level. It is, however, allowed to represent clients whose identity is already established provided that other safety rules are observed.

Representatives of the institutions as well as individuals subject to the Third European Directive on money laundering and terrorist financing shall not be registered with the Central Registration Bureau of the European Union member-state. Their responsibilities are defined by the executed agreements.

It is necessary to report suspicious transactions to the Registration Bureau of the European Union member-state; these transactions may be rendered null and void by the competent authorities before the message is conveyed in cases when due to the persecution of the beneficiary individual it is impossible to prevent the suspected money laundering or terrorist financing. Due to the international nature of money laundering and terrorist financing it is important, to the extent possible, to promote cooperation and coordination of activities between the Central Registration Bureaus of the European Union member-states, including development of the European Union FIU-NET networks.

The Third European Directive on money laundering and terrorist financing should not interfere with the activities of the judicial bodies of the European Union member-states. These states are strongly encouraged to spare no effort to protect witnesses (first and foremost employees who have reported suspicious activity associated with money laundering and who are in danger as a result).

Individuals involved in electronic data processing and are contractors to credit or financial institutions are not subject to the Third European Directive on money laundering and terrorist financing.
Activities of third country branches of credit and financial institutions shall be performed in compliance with the prevailing standards. They should also be outfitted with electronic systems so as to be able to quickly submit information on their business connections. This is particularly important for freezing or confiscation of assets.

European Union member-states must envisage effective and sufficiently deterring sanctions in case the directions based on the Third European Directive on money laundering and terrorist financing are not followed. This stands true for both individuals and the legal entities; first and foremost the legal entities are frequently involved in complex schemes of money laundering and terrorist financing.

Taking into consideration the above, for the purpose of counteracting money laundering and terrorist financing, the following measures are proposed for the Republic of Kazakhstan:

1) Expand the functions and authority of the National Bank of the Republic of Kazakhstan;

2) Note and use the Directive of the European Union No. 6543 on preventing the use of the financial system for the purpose of money laundering and terrorist financing;

3) Develop a set of legislation pertaining to control and monitoring of financial proceeds and transactions.
BIBLIOGRAPHY


