Money Laundering, Cybercrime and Criminal Responsibility of Legal Persons

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Abstract. *Directives 2015/849 and 2018/843 on money laundering require continuous adaptations of the legal framework to respond to threats of the use of new technologies in money laundering. Directive 2018/843 extends the scope of Directive 2015/849 to 'providers engaged in exchange services between virtual currencies and fiat currencies, as well as custodian wallet providers'. Undoubtedly, the new payment systems facilitate money launderers' criminal activity. These systems are better than cash for moving large sums of money, non-face to face business relationships favour the use of straw buyers and false identities, the absence of credit risk, as there is usually a prepaid option, discourages service providers from obtaining complete and accurate customer information, and the nature of the trade and the speed of transactions make it difficult to control property or freezing. However, the development of technologies, including the Internet, has unquestionable advantages involved and even provides, through online resources, verification of identity or other duty of surveillance for the prevention of money laundering. In addition, the reform of June 22, 2010 introduced in Spain the criminal liability of legal persons and incorporated money laundering, together with other crimes, to this innovative model of criminal responsibility. Soon after, Organic Law 1/2015, of March 30, modified the hitherto barely applied regulation. In conclusion, the use of dummy corporations for money laundering is frequent, as is evidenced by the judgements of the Supreme Court of June 26, 2012 and February 4, 2015, but until recently the accessory consequences and the doctrine of piercing the corporate veil were sufficient.*

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Introduction. Cybercrime and money laundering

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing requires 'quick and continuous adaptations of the legal framework' (28 Whereas) to respond to threats of the use of new technologies in money laundering, and *Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing* insists on the 'need to adapt to new threats' (6 Whereas) and extends the scope of Directive 2015/849 to 'providers engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers' (8 Whereas).

Money laundering is a 'crime of globalisation'[1]. Its importance nowadays is transcendental because of the economic crisis we are suffering.

Indeed, it was noted that 'an offence that has benefited most from the Internet is money laundering'[2] - 'generalised and radicalised'[3] by the new electronic media, with 'spectacular'[4] development thanks to the potential provided via Internet and electronic transfers[5] for executing this crime[6].

The increasing use of new payment methods, such as transactions and movements of funds, resulted in an increase in the detection of cases of money laundering committed using telematic media[7]. These new technologies are appealing to money launderers mainly because of the anonymity[8] provided, high marketability and usefulness of the funds, and global access to the ATM network[9]. To these factors, one should add: the problems of persecution,[10] which requires new investigation methods that must maintain the delicate balance between security and fundamental rights[11]

In any case, to avoid the misuse of legal insufficiencies in new technologies by organised crime[12], the Internet cannot be an 'area outside the law' [13], but must be regulated.[14]

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[1] Levi M, Crimes of globalisation: some measurement issues' [in:] Joutsen M (Ed.), New types of crime. Proceedings of the international seminar held in connection with HEUNI's thirtieth anniversary Helsinki 20 october 2011. Heuni, Helsinki, 2012, p. 107.

[2] Velasco San Martín, 2012, p. 75.

[3] Sandywell, 2010, p. 46.

[4] Pérez Estrada M.J, La investigación del delito a través de las nuevas tecnologías. Nuevos medios de investigación en el proceso penal, [in:] Cuesta Arzamendi J.L de la (Ed.), Derecho penal informático. Civitas/Thomson Reuters/Aranzadi, Cizur Menor, 2010, p. 306.

[5] Fernández Teruelo J.G, Derecho penal e Internet, Lex Nova, Valladolid, 2011, pp. 231 and 234.

[6] Abel Souto M, Blanqueo, innovaciones tecnológicas, amnistía fiscal de 2012 y reforma penal, *Revista Electrónica de Ciencia Penal y Criminología, 2012,* No. 14, pp. 1–45; Abel Souto M, The Update of Penalty Concept and Adjustment of Crime in Money Laundering, *Antiriciclaggio,* 2012*,* No. 2/3, pp. 220-247; Abel Souto M, Money laundering, new technologies and Spanish penal reform, *Journal of Money Laundering Control,* 2013, No. 16, 3, pp. 266–284; Abel Souto M, Volumen mundial del blanqueo de dinero, evolución del delito en España y jurisprudencia reciente sobre las últimas modificaciones del Código penal. *Revista General de Derecho Penal,* 2013*,* No. 20, pp. 1–53; Abel Souto M, Anti-corruption strategy in the global era and money laundering, Fifth Session of the International Forum on Crime and Criminal Law in the Global Era. Beijing, 2013, pp. 1–7; Abel Souto M, Jurisprudencia penal reciente sobre el blanqueo de dinero, volumen del fenómeno y evolución del delito en España, [in:] Abel Souto M, Sánchez Stewart N, 2014, pp. 80–91.

[7] FATF, Report, Money laundering using new payment methods*,* 2010, p. 7. *Electronic source:* in http://www.fatf-gafi.org, *accessed:* 20.09.2019.

[8] Mata Barranco N.J. de la, Ilícitos vinculados al ámbito informático: la respuesta penal, [in:] Cuesta Arzamendi J.L. de la (Ed.), Derecho penal informático. Civitas/Thomson Reuters/Aranzadi, Cizur Menor, 2010, p. 19; Miró Llinares, 2011, pp. 12, 13, 25 and 26.

[9] FATF, Report, Money laundering using new payment methods, 2010, …, *op. cit.*, p. 7.

[10] Gless S, Strafverfolgung im Internet. *Schweizerische Zeitschrift für Strafrecht*, 2012, Vol. 130, No. 1, pp. 3–22.

[11] Pérez Estrada M.J, La investigación ..., *op. cit.*, pp. 307, 309 and 311–317.

[12] Angelini and Gibson, 2007, pp. 65–73.

[13] Gless S, p. 22,

[14] Gómez Tomillo, 2006, p. 189.

Undoubtedly, the new payment systems facilitate money launderers' criminal activity. These systems are better than cash transfers for moving large sums of money; non-face-to-face business relationships favour the use of straw buyers and false identities; the absence of credit risk, as there is usually a prepaid option, which discourages service providers from obtaining complete and accurate customer information, and the nature of the trade and the speed of transactions make it difficult to control or freeze the property.[15]

However, the development of technologies, including the Internet, has unquestionable advantages and even provides, through online resources, verification of identity or other duty of surveillance for the prevention of money laundering[16]. The new payment methods are the result of the need to both offer commercial alternatives to traditional financial services and to include everyone in the system irrespective of poor credit rating, age, or residence in areas of low bank offer. These methods can also have a positive effect on the economy, given their efficiency in terms of speed of transactions, technological security, low costs compared to payment instruments based on paper, and accessibility, especially for prepaid cards and payment services with mobile phones, identified as a possible tool to integrate excluded individuals because of poverty.[17]

For example, a total of four million people in the United States receive Social Security benefits without actually being bank account holders. To reduce their dependence on cheques, which forces them to spend between 50 and 60 dollars a month on check cashing, bill payment or sending money to their families, benefits were provided with prepaid cards with which they could buy goods or get cash. Moreover, in 2009, the war displaced more than a million people in Pakistan, and their government distributed prepaid cards with a maximum value of 25,000 rupees, about $300, for the immediate assistance of 300,000 families. Similarly, in Afghanistan, the police salary is paid via mobile phones, so that policemen do not have to leave their job in order to collect their salary. This also reduces the possibility of corruption or bribery.[18]

In 1996, the Financial Action Task Force (FATF) was specifically concerned in recommendation number 13 with new technologies and the danger they pose for potential money laundering by allowing the realisation of huge transactions instantly from remote locations, while maintaining the anonymity of the transgressor, and without the involvement of traditional financial institutions. The absence of financial intermediation makes it difficult to identify customers and to keep a record of relevant information. In addition, traditional investigation techniques become ineffective or obsolete for new technologies: the problem of the physical volume of money posed for launderers[19] — to the point of leaving the paper

[15] *FATF,* Report, Money laundering using new payment methods, 2010, … *op. cit.*, p. 21.

[16] The money laundering, 2011, pp. 37–39 and 54.

[17] FATF, Report, Money laundering using new payment methods, 2010, … *op. cit.*, p. 12.

[18] FATF, Report, Money laundering using new payment methods, 2010,… *op. cit.*, pp. 12, 13, 15 and 20.

[19] Abel Souto M, Volumen mundial del blanqueo de dinero, evolución del delito en España y jurisprudencia reciente sobre las últimas modificaciones del Código penal. *Revista General de Derecho Penal*, 2013, No. 20, pp. 2–6; Vidales Rodríguez C (Ed.), Régimen jurídico de la prevención y represión del blanqueo de capitales. Valencia, 2015, p. 16.

money because it slowed them down too much — is minimised with 'electronic money'. Its rapid mobility, especially on the Internet, the difficultly of tracing the funds transferred, and the unusual volume of data to analyse make it almost impossible to detect any suspicious activity.

Please note that 30 years ago there was no Internet. However, a decade and a half later, the closure of the 'European Union Bank'[20] was agreed in Antigua, the bank that became famous for being the first bank to operate through the Internet and for advertising explicitly on the web that this was the right bank for tax evaders and money launderers[21]. Today, nearly three-quarters of households in the European Union have Internet access, and over a third of the population performs banking online[22]. It is precisely for this reason that the FATF developed, in October 2010, a report regarding the use of new payment methods for money laundering[23] which focused on prepaid cards, payment services on the Internet[24], steady growth, and its misuse for the implementation of so called 'cyber laundering'[25] as well as on payments via mobile phones. Notably, with regard to the latter issue, it is estimated that 1,400,000,000 people used payments via mobile phones for their financial transactions in 2015.[26]

Also, the FATF provided revised recommendations on February 16 2012, of which recommendation number 15 indicates that countries and financial institutions should identify and assess the risks for money laundering related to new technologies, while recommendation number 16 discusses electronic transfers, and identifying both their originators as beneficiaries.[27]

In June 2014, the FATF produced another report on virtual currencies[28], and in June 2015, published a Guidance for a risk-based approach to virtual currencies.[29] In October 2018, the FATF modified recommendation 15 to clarify that it is applied to financial activities involving virtual assets, and in June 2019, the FATF approved a interpretative note to recommendation 15 for virtual assets and virtual asset service providers to obtain and summit required beneficiary information to conduct USD/EUR 1000 transactions.[30]

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[20] Schudelaro, 2006, pp. 47–72.

[21] Blum et al., 1999, pp. 52–57, with reproduction of the advertisements that the 'European Union Bank' made available in Internet; Martin, 1997, pp. 38 and 39.

[22] Bruselas, 2012, p. 1; Comisión, 2012, p. 1.

[23] Baldwin and Fletcher, 2004, pp. 125–158.

[24] Philippsohn, 2001, pp. 485-490; Ping, 2004, 48-55; Yan et al., 2011, pp. 93–101.

[25] Filipkowski W, Money laundering — legal and economic aspects, Białystok, 2008, pp. 15–27.

[26] FATF, Report, Money laundering using new payment methods, 2010, …, *op. cit.*, p. 18.

[27] *Ibid.*, p. 17.

[28] FATF, Report, Virtual currencies. Key definitions and potential AML/CFT risks, June,2014. *Electronic source:* http://www.fatf-gafi.org, pp. 1-15, *accessed:* 6.11.2019.

[29] FATF, Guidance for a risk-based approach virtual currencies, June, 2015. *Electronic source:* http://www.fatf-gafi.org, pp. 1–46, *accessed:* 05.11.2019.

[30] FATF, Guidance for a risk-based approach virtual assets and virtual asset service providers, June, 2019, pp. 4, 55 and 56. *Electronic source:* http://www.fatf-gafi.org, *accessed:* 6.11.2019.

As for the detection and monitoring of transboundary movements of cash, and despite being one of the oldest techniques of money laundering, it still continues to increase its volume significantly.[31] Thus, in the study of the framework of the Mafia published by Varese, criminal goods arrived in Italy by a large network of individuals who travelled from Russia with cash.[32]. There are also new 'money mules' recruited by email under the guise of having an opportunity to work at home through the Internet. Sometimes the only payment they receive is criminal prosecution for money laundering.[33]

Last but not least, the Financial Action Task Force urges countries to ensure that their authorities impede or restrict the movement of cash which is potentially related to money laundering[34] and the United Nations Convention against corruption provides that 'States Parties shall consider implementing feasible measures to detect and monitor the movement of cash… across their borders', but 'without impeding in any way the movement of legitimate capital'.

It has been said that the cash is the common medium of exchange in criminal transactions[35]. In a similar vein, the Spanish government, having more closely in mind its tax collection purposes, approved a bill to combat tax fraud in 2012. The government limited cash payments to 2,500 euros (Ley 7/2012, article 7), and in 2017, the Spanish government wanted to limit cash payments to 1,000 euros. As did France and Italy, and the Indian government banned 500 and 1,000 rupee banknotes in 2016.

However, in order to escape the Charybdis of paper money, we will find the Scylla of electronic money, because new payment technologies are not without risks that may thwart the prevention and repression of money laundering[36]

Furthermore, behind the apparent dogma of the criminogenic character of cash hides a program that exceeds the fight against crime, further marginalising those who earn less and allows control of the private sphere.[37]

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[31] FATF, Report, Money laundering using new payment methods, 2010, …, *op. cit.*, pp. 46, and 47.

[32] Varese, 2012, p. 242.

[33] Clough, 2010, pp. 187 and 188.

[34] FATF, International standards on combating money laundering and the financing of terrorism & proliferation. The FATF recommendations, February, 2012, pp. 25 and 99–102. *Electronic source:* http://www.fatf-gafi.org, *accessed:* 6.11.2019.

[35] Jurado and García, 2011, p. 172.

[36] Abel Souto M, Blanqueo, innovaciones tecnológicas, amnistía fiscal de 2012 y reforma penal. *Revista Electrónica de Ciencia Penal y Criminología*, 2012, No. 14, pp. 1–45; Abel Souto M, Money laundering, new technologies and Spanish penal reform. *Journal of Money Laundering Control*, 2013, No. 16, Issue 3, pp. 266–284; Abel Souto M, Cybercrime and money laundering, [in:] Kolaric, D. (Ed.), Thematic conference proceedings of international significance Archibald Reiss Dayss, Vol. 3. Academy of Criminalistic and Police Studies. Belgrade, 2016, pp. 345–353; González Cussac, J.L, Cuerda Arnau M.L (Eds), Nuevas amenazas a la seguridad nacional. Terrorismo, criminalidad organizada y tecnologías de la información y la comunicación. Valencia, 2013, pp. 1–540.

[37] Pieth M, Zur Einführung: Geldwäscherei und ihre Bekämpfung in der Schweiz, [in:] Pieth M (Ed.), Bekämpfung der Geldwäscherei: Modellfall Schweiz?, Helbing & Lichtenhahn, Basel und Frankfurt am Main, Schäffer-Poeschel. Stuttgart, 1992, p. 27.

The expansion of the crime of money laundering

The crime of money laundering since its creation has been expanding unceasingly in Bolivia, Ecuador, Germany, Italy, Mexico, Peru, the USA, etc. [38]

When the 'expansion' of the punishment for money laundering is taken into consideration, a simile is being made: just as the universe was created, it is said, with the Big Bang and its ongoing expansion, so the crime of money laundering since its creation has been expanding unceasingly[39].

I made an unattended call to the legislature to moderate its intervention in money laundering[40], which has preferred to add, with Organic Laws 5/2010, 1/2015 and 2/2015, three additional reforms to the already long list of modifications on money laundering[41], that undermine the legal certainty and the consideration of criminal law as *ultima ratio*. This criminal policy is going at 'breakneck speed' and continues to accelerate, despite being reported a long time ago[42]. These constant reforms violate the legal security, or 'the spirit of the mean', of which He[43] speaks, citing Cheng Hao and Chen Yi, scholars of the Chinese Song dynasty, who believed that the doctrine of the mean includes to be steady: 'steadiness means not to be changeable' and 'is the law of the world'.

First of all, Organic Law 5/2010, in the initial clause contained in article 301.1, regarding the requirement of knowing that the goods have their origin 'in a crime', changes these words for 'in a criminal activity', 'without being clear of the objective being pursued'[44] with the replacement, the wording which is attributed to expansion of effort is, in principle, wider than the previous noun 'crime'[45]; it seems to allow

[38] Abel Souto M, La expansión mundial del blanqueo de dinero y las reformas penales españolas de 2015, con anotaciones relativas a los ordenamientos jurídicos de Bolivia, Alemania, Ecuador, Estados Unidos , Méjico y Perú, I congreso de la Asociación Iberoamericana de Derecho Penal Económico y de la Empresa. Santa Cruz de la Sierra, Bolivia, 2017.

[39] Abel Souto M, La expansión penal del blanqueo de dinero, Centro Mejicano de Estudios en lo Penal Tributario. Méjico, 2016, pp. 1–183.

[40] Abel Souto M, Conductas típicas de blanqueo en el Ordenamiento penal español, [in:] Abel Souto M, Sánchez Stewart N, 2009, pp. 243 and 244.

[41] Abel Souto M, Década y media de vertiginosa política criminal en la normativa penal española contra el blanqueo. Análisis de los tipos penales contra el blanqueo desde su incorporación al Texto punitivo español en 1988 hasta la última reforma de 2003. La Ley Penal. Revista de Derecho Penal, Procesal y Penitenciario, 2005, No. 20, octubre, pp. 5-26; Zaragoza Aguado J A, [in:] Gómez Tomillo M (Ed.), Comentarios al Código penal, 2nd ed. Valladolid, 2011, pp. 1154 and 1155, 2015, pp. 639 and 640.

[42] Hassemer W, Gewinnaufspürung: jetzt mit dem Strafrecht, Wertpapier Mitteilungen, Zeitschrift für Wirtschafts- und Bankrecht (Gastkommentar), 1994, p. 1369, translated to Spanish by Miguel Abel Souto as Localización de ganancias: ahora con el Derecho penal. *Revista de Ciencias Penales*, Vol. 1, 1998, No. 1, p. 217.

[43] He B, Resolution of the International Forum on Crime and Criminal Law in the Global Era on the Theory of Human Rights Defense. Beijing, 2010, pp. 7 and 8.

[44] Manjón-Cabeza Olmeda A, Receptación y blanqueo de capitales (arts. 301 y 302), [in:] Álvarez García F J, González Cussac J L (Eds), Comentarios a la reforma penal de 2010. Valencia, 2010, p. 340.

[45] Fernández Teruelo J G, Blanqueo de capitales, [in:] Ortiz de Urbina Gimeno (Ed.), Memento experto Francis Lefebvre. Reforma penal. *Ley orgánica 5/2010,* Ediciones Francis Lefebvre, Madrid, 2010, pp. 318, 319 and 324.

the inclusion of the petty offences in the preceding facts of money laundering, which would mean 'an enormous enlargement of the field of this crime'.[46] But the petty offences should be excluded from previous facts on the basis of a literal, historical and systematic interpretation.

However, Organic Law 1/2015 of March 30, although says eliminating, doing away with the petty offences, using Orwellian Newspeak, it actually transforms most of them into minor offences in Spain, so that expands the preceding facts of money laundering.

To illustrate this point, a single euro from a previous petty offence of fraud, now a minor offence according to article 249 of the Spanish Criminal Code, becomes a material object capable of money laundering and preparatory acts of such fraud, before unpunished as petty offences, are punished in accordance article 269. However, the punishment of money laundering must be excluded here by the principle of insignificance.

Moreover, the petty offences, now minor offences, cannot be included in the previous facts of the crime of money laundering because it limits the effectiveness of the norm[47], and increases social costs[48] so intolerable and contrary to the principle of proportionality[49]. Thus He[50] says that to achieve the purpose of the defence of human rights 'the penalty must adhere to the spirit of mean', which opposes 'any penalties that are extreme, excessive', and requires 'moderateness and appropriateness'[51]

Secondly, Organic Law 5/2010, after the reference in article 301.1 to 'criminal activity', which integrates the previous fact, added 'committed by them or by any third person', which expressly punishes money laundering committed by those responsible for the previous fact in the way the majority interpreted the crime[52] and 'ditches one of the most controversial issues'[53]. In this sense, there was already a plenary agreement in the jurisdiction of the Supreme Court of 18 July 2006[54] admitting self-laundering[55].

[46] Muñoz Conde F, Derecho penal. Parte especial, 18th Ed. Valencia, 2010, p. 557.

[47] Flick G M, Le risposte nazionali al riciclaggio di capitali. La situazione in Italia. *Rivista Italiana di Diritto e Procedura Penale*, 1992, No. 4, p. 1293; Terradillos Basoco J M, El delito de blanqueo de capitales en el Derecho español', [in:] Cervini R et al., El delito de blanqueo de capitales de origen delictivo. Cuestiones dogmáticas y político-criminales. Un enfoque comparado: Argentina-Uruguay-España, Alveroni, Córdoba (República Argentina), 2008, p. 261.

[48] Flick G M, La repressione del riciclaggio ed il controllo della intermediazione finanziaria. Problemi attuali e prospettive. *Rivista Italiana di Diritto e Procedura Penale*, 1990, No. 4, p. 1264.

[49] Fernández Teruelo J G, p. 324; Manjón-Cabeza Olmeda A, p. 341.

[50] He B, Resolution of the International …, *op. cit.,* p. 7.

[51] He B, Fourth Session of the International Forum on Crime and Criminal Law in the Global Era, Beijing, 2012, pp. 4 and 5.

[52] Fernández Teruelo J.G, p. 319.

[53] González Cussac, J L, Vidales Rodríguez C, El nuevo delito de financiación del terrorismo: consideraciones acerca de su necesidad y conveniencia, [in:] González Cussac, J.L. (Ed.), Financiación del terrorismo, blanqueo de capitales y secreto bancario: un análisis crítico. Valencia, 2009, p. 195.

[54] Gómez Rivero M C, Nociones fundamentales de Derecho penal. Parte especial. (Adaptado al EEES), Tecnos. Madrid, 2010, p. 540.

[55] Abel Souto M, La expansión penal del blanqueo de dinero operada por la *Ley orgánica*, 2010, Vol. 5, de 22 de junio. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, 2011, No. 79, febrero, pp. 15 and 16; Abel Souto M, La reforma penal, de 22 de junio de 2010, en materia de blanqueo de dinero, [in:] Abel Souto M, Sánchez Stewart N, pp. 78-80, with references of various sentences.

But the punishment of self-laundering combined with the new behaviour of possession or use, added to the Criminal Code incorporated by Organic Law 5/2010, produces 'strange consequences'[56], even absurd[57], because this would imply that a person who has a painting or a jewel which they have stolen would now commit a new crime, and the same applies to an individual using someone else's car without permission[58].

Not only that, but since the enlargement of the previous facts to the old petty offences operated under Organic Law 1/2015, a new crime is also committed by anyone having or wearing a scarf worth 5 euros acquired through theft, a petty offence converted now into a minor offence according to article 234.2, and who uses an old moped, of very little value, which they stole, because the old petty offence has become a minor offence of theft of usage with no predetermined worth in article 244.1.

To avoid jeopardy[59], the *typus* should be interpreted as meaning that the possession by the authors or participants in the preceding fact as money laundering is punishable only when it is not possible to sanction them for the previous crime[60]. It should exclude from the *typus* both the use and another kind of possessions on the basis of the principle of insignificance and teleological interpretation, taking into consideration the legally protected interest, requiring a significant impairment of the socio-economic order and the appropriateness of behaviours to incorporate illegal capital to trade.

Thirdly, the reform of June 22, 2010 incorporated in the initial paragraph of article 301.1 of the Criminal Code, the possession and use of criminal property as new forms of money laundering.[61] The possession and use behaviours were already covered, from the Criminal Code in 1995, through the formula 'perform any other act to conceal or disguise the illicit origin, or to help a person who has participated in the infringement or infringements to evade the legal consequences of their actions'. Now, however, they are also explicitly included in the Code[62], but regardless of the purpose that guides a money launderer[63].

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[56] Quintero Olivares G, Sobre la ampliación del comiso y el blanqueo, y la incidencia en la receptación civil. *Revista Electrónica de Ciencia Penal y Criminología*, 2010, Vol. 8, de marzo, p. 13; Quintero Olivares G, La reforma del comiso (art. 129), [in:] Quintero Olivares G (Ed.), La reforma penal de 2010: análisis y comentarios, Aranzadi, Cizur Menor, 2010, p. 109.

[57] Castro Moreno A, Reflexiones críticas sobre las nuevas conductas de posesión y utilización en el delito de blanqueo de capitales en la reforma del Anteproyecto de 2008. *Diario La Ley*, No. 7277, 5 de noviembre, 2009, pp. 1 and 4.

[58] Quintero Olivares G, Sobre la ampliación del comiso ..., *op. cit.*, p. 13; Quintero Olivares G, La reforma del comiso (art. 129), [in:] Quintero Olivares G (Ed.), La reforma penal ..., *op. cit.*, p. 109.

[59] Martínez-Buján Pérez C, Derecho penal económico y de la empresa. Parte especial, 5th ed. Valencia, 2015, pp. 579 and 580.

[60] Quintero Olivares G, Sobre la ampliación…, *op. cit.,* p. 20; Olivares G, La reforma del comiso..., *op. cit.*, p. 110.

[61] Abel Souto M, La expansión penal del blanqueo..., *op. cit.*, pp. 17–27; Abel Souto M, La reforma penal, de 22 de junio..., *op. cit.*, pp. 81–98.

[62] Muñoz Conde F, Derecho penal. Parte especial, 18th ed. … *op. cit.*, pp. 554 and 556.

[63] Abel Souto M, El delito de blanqueo en el Código penal español, Bosch, Barcelona, 2005, pp. 93–102, 290 and 291; Abel Souto M, Conductas típicas de blanqueo en el Ordenamiento penal español, [in:] Abel Souto M, Sánchez Stewart N, 2009, pp. 177–187 and 235; Blanco Cordero I, 2011, El delito fiscal como actividad delictiva previa del blanqueo de capitales, *Revista Electrónica de Ciencia Penal y Criminología*, 2011, No. 13–01, p. 42; Blanco Cordero I, El delito de blanqueo de capitales, 3rd ed. Aranzadi, Cizur Menor, 2012, p. 437.

Thus, it seems that since Organic Law 1/2015, the Spanish offence of money laundering includes the possessors of things that have been moved such as the abovementioned scarf with an anti-theft device, including the employee who takes care of this scarf in the cloakroom of an establishment, and the garage worker who guards the abovementioned old moped, being knowledgeable of the theft, because article 301.1 punishes simple possession of property with knowledge of its origin as an offence.

In addition, from the reform of June 22, 2010, the mere use of goods from a crime is incriminated, so that article 301.1 of the Spanish Criminal Code, as with §261 II number 2 of the German StGB, seems to cover, surprisingly, someone who writes a text with a stolen computer, but much more astonishing is Organic Law 1/2015, which transforms the old petty offence into a minor offence of theft (art. 234.2), saying that if a person writes something with a stolen pen, they are considered a money launderer.

However, the Spanish offence of money laundering, as well as the German, should be 'teleologically restricted'[64], which excludes article 301 of the Criminal Code because by reason of the lack of *typus* all material objects of insignificant quantity, e.g. the 'amount of cents'[65], fall within the scope of the principle of insignificance[66] or of 'minimal intervention'[67].

The same principle of insignificance applies to basic consumer acts, services, and merchandise sales in everyday vital business[68], given how important it is for individuals to be able to transmit the money received and to use purchased goods[69]. The previous author who only has money originating from a crime 'would prohibit almost the satisfaction of vital needs'[70] and thus, their own survival[71], if behaviours directed to sustain life are not excluded from the *typus*. Furthermore, it would be forcing any potential provider of goods or services 'now to waive the settlement of accounts with uncontrolled money now to refrain traffic'[72], which limits

[64] Vogel J, Geldwäsche – eine europaweit harmonisierter Straftatbestand? *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 1997, No. 2, p. 356.

[65] Bottke W, Mercado, criminalidad organizada y blanqueo de dinero en Alemania, traslated to Spanish by Soledad Arroyo Alfonso and Teresa Aguado Correa. *Revista Penal*, 1998, No. 2, p. 11.

[66] Aránguez Sánchez C, El delito de blanqueo de capitales. Madrid/Barcelona, 2000, pp. 184, 185 and 248; Palma Herrera J.M, Los delitos de blanqueo de capitales. Madrid, 2000, pp. 350 and 351; Ragués i Vallčs R, Lavado de activos y negocios standard. Con especial mención a los abogados como potenciales autores de un delito de lavado, [in:] Roxin C, Homenaje. Nuevas formulaciones en las Ciencias penales, Lerner. Universidad Nacional de Córdoba, 2001, p. 625; Terradillos Basoco J.M, 2008, pp. 240 and 263.

[67] Martínez-Buján Pérez C, p. 565.

[68] Aránguez Sánchez C, pp. 184, 247 and 248.

[69] Lampe E.-J, Der neue Tatbestand der Geldwäsche (§ 261 StGB), *Juristen Zeitung*, 1994, No. 3, pp. 123–132, translated to Spanish by Miguel Abel Souto and José Manuel Pérez Pena as El nuevo tipo penal del blanqueo de dinero (§ 261 StGB). *Estudios Penales y Criminológicos*, 1997, No. XX, pp. 131 and 132.

[70] Barton S, Sozial übliche Geschäftstätigkeit und Geldwäsche (§261StGB). *Strafverteidiger*, 1993, No. 3, p. 161.

[71] Blanco Cordero I, Negocios socialmente adecuados y delito de blanqueo de capitales‹› Anuario de Derecho Penal y Ciencias Penales, tomo L, fascículo único, enero-diciembre, 1997, p. 272.

[72] Bottke W, Teleologie und Effektivität der Normen gegen Geldwäsche, Teil 2. *Wistra*, 1995, No. 4, p. 122.

the economic rights of the citizen so much as to raise serious questions of constitutionality[73]. According to He, the penalty 'to achieve the greatest value of defending human rights' must be 'moderate, appropriate, fair, impartial, and free from excess and deficiency'[74] and these elements are not satisfied in the current case, and here would also criminalise 'behaviours which do not violate human rights, such as unethical behaviours'. The primary and main adjustments in response to crimes in the era of globalisation requires decriminalisation of 'immoral behaviours or minor offences with petty violation against social orders' [75].

Fourthly, regarding the new aggravations, laundering of profits from certain crimes against public administration, contained in articles 419–445 of the Penal Code, such as land planning and urbanism[76], the penalty is aggravated despite the fact that such increases in gravity 'do not have a relevant general preventive effect'[77]. Over this punitive 'hardening'[78], the penalty of imprisonment must be applied in the most serious cases for membership of an organisation dedicated to money laundering, as in article 302.1 of the Penal Code[79], so that the penalty can achieve 'really high limits'[80].

It cannot be presumed that the amount of money laundered from these offences exceeds the amount derived from other crimes. Neither are these aggravations justified by legally protected interests[81], because they are the same values protected by the basic *typus*, since the Administration of Justice is interested in punishing any crime and the socio-economic order is not more damaged by the laundering of the proceeds of such crimes. Truly, the laundered value determines a higher content of unfairness and it should aggravate the penalty[82], so the qualified *typus* would focus on the characteristics of the material object, the 'magnitude'[83] or obvious importance of the amount laundered, but not on the irrelevant nature of the

[73] Blanco Cordero I, Negocios socialmente ..., *op. cit.*, p. 290.

[74] He B, Resolution of the International …, *op. cit.*, p. 8.

[75] He B, Fourth Session of the International …, *op. cit.,* p. 4.

[76] Abel Souto M, La expansión penal del blanqueo..., *op. cit.*, pp. 27–31; Abel Souto M, La reforma penal, de 22 de junio ..., *op. cit.*, pp. 98–103; Abel Souto M, Anti-corruption strategy…, *op. cit.*, pp. 1–7; Ferré Olivé J.C, El nuevo tipo agravado de blanqueo cuando los bienes tengan su origen en delitos relativos a la corrupción, [in:] Abel Souto M, Sánchez Stewart N (Ed.), III congreso sobre prevención y represión del blanqueo de dinero. Valencia, 2013, pp. 389–391; Núñez Paz, M.A, El tipo agravado de blanqueo de dinero procedente de delitos urbanísticos', [in:] Abel Souto M, Sánchez Stewart N, 2013, pp. 267–279.

[77] Silva Sánchez J.-M, La reforma del Código penal: una aproximación desde el contexto. *Diario La Ley*, 2010, No. 7464, 9 de septiembre, p. 5.

[78] Díaz y García Conlledo M, El castigo del autoblanqueo en la reforma penal de 2010. La autoría y la participación en el delito de blanqueo de capitales, [in:] Abel Souto M, Sánchez Stewart N, 2013, p. 288.

[79] Lorenzo Salgado J.M, El tipo agravado de blanqueo cuando los bienes tengan su origen en el delito de tráfico de drogas, [in:] Abel Souto and Sánchez Stewart, 2013, pp. 235-237.

[80] Muñoz Conde F, El delito de blanqueo de capitales y el Derecho penal de enemigo, [in:] Abel Souto and Sánchez Stewart, p. 376.

[81] Berdugo Gómez De La Torre I, Fabián Caparrós, E.A, La 'emancipación' del delito de blanqueo de capitales en el Derecho penal español. *Diario La Ley*, 2010, No. 7535, 27 de diciembre, p. 13.

[82] Palma Herrera J.M, pp. 787 and 788.

[83] Díaz y García Conlledo M, Blanqueo de bienes, [in:] Luzón Peña D.-M (Ed.), Enciclopedia penal básica, Comares. Granada, 2002, p. 209.

predicate offence[84], since the foundation of the aggravation would reside in the greater flow of illicit goods[85] put into circulation. From a technical standpoint, it is also unacceptable to increase the penalties for laundering according to the origin of the goods, given that the autonomy of this crime would deny the attendance of the previous offence.[86] The criminalisation of money laundering would be deprived of independent material content and would simply be a reinforcement of the legally protected interest through the crime of which capital derives.[87] Finally, the foundation of the aggravation underlies neither greater reproach, since the person who converts property linked to crimes against the public administration and urban planning is not guiltier than money launderers derived from other crimes[88], nor international pressure, since no supranational instrument forces a heavier penalty on money laundering in these cases.

In conclusion, the excessive punishment of new aggravations, such as 'the abuse of any penalty', according to He[89] , is a breach of the theory of human rights defence and a 'serious violation of the value target'.

This expansion in the punishment of money laundering is taking place worldwide. Thus in Spain Organic Law 1/2015 extended the previous facts of money laundering to the ancient petty offences, now called minor offences, and in China, article 191 of the Criminal Code of 1997 punished money laundering from drug crimes, organised criminal syndicate nature or smuggling crimes, in 2001 terrorism was added to the list of preceding offences of money laundering, and in 2006, the previous facts were extended to crimes of corruption, bribery and disrupting the order of financial administration and financial fraud crimes[90]

What will be the next step? How long will our Criminal Code wait to punish money laundering from mere administrative infractions or civil wrongs?

Money laundering, terrorism and immigration

Terrorism is escalating around the world. After the terroristic acts in Paris and Brussels in 2015, there were 'about 900 attacks in Iraq and Syria during the first quarter of 2016'[91].

In 2017, Paris and London have once again become tragic protagonists, in addition to Nice, Manchester, Berlin, Stockholm, La Rambla in Barcelona, and the Paseo de Cambrils. Although it might seem otherwise, in fact a Directive against terrorism was approved in 2017, the European Union is not the most affected region. In other

[84] Aránguez Sánchez C, p. 316.

[85] Faraldo Cabana P, Aspectos básicos del delito de blanqueo de bienes en el Código penal de 1995. *Estudios Penales y Criminológicos*, 1998, No. XXI, p. 150; Vidales Rodríguez C (Ed.), Los delitos de receptación y legitimación de capitales en el Código penal de 1995. Valencia, 1997, p. 142.

[86] Álvarez Pastor, Eguidazu Palacios, 2007, p. 356.

[87] Fabián Caparrós E.A, El delito de blanqueo de capitales. Madrid, 1998, p. 194.

[88] Palma Herrera J.M, p. 785.

[89] He B, Resolution of the International …, *op. cit.*, p. 7.

[90] Yu, J.-J, Terrorism financing. China. *Revista Penal,* 2016, Vol. 38, pp. 358 and 361.

[91] He B, Eighth Session of the International Forum on Crime and Criminal Law in the Global Era, Beijing, 2016, p. 1.

latitudes the fatalities are counted in the hundreds, as in Afghanistan, Iraq, Syria, Somalia, Pakistan, Nigeria, Mali, Yemen, the Philippines, India, and Egypt, with the last attack, for the moment, counting more than 300 dead in the Sinai.

In accordance with the resolution adopted by the General Assembly of the United Nations on 1 July 2016 'any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed'[92], because as He says, they 'are threatening innocents' lives, infringing people's basic freedom and human dignity and threatening international peace and security seriously'[93]. However, the United Nations also remember that in the fight against terrorism, it is necessary to ensure the 'respect for human rights for all and the rule of law'[94].

Organic law 2/2015, also of March 30, introduces a new form of money laundering in article 576 of the Spanish Criminal Code, for the purpose of terrorism, which distorts the legally protected interest by the criminalisation of money laundering, because it is not required that the goods used for terrorism are of illegal origin.[95] However, 'in the financing of terrorism, the wrongfulness of the conduct lies not in the source of the goods, but at the destination'[96]

Terrorism financing and money laundering must not be confused to extend onto money laundering the exceptional and reinforced protection of the prevention of terrorism. In recent years, under the pretext of pursuing terrorism, the prosecution of money laundering has been expanded, but the fight against terrorism cannot become an excuse to control absolutely all citizens and to destroy the guarantees of the rule of law.[97]

Both human rights and the principles of legal certainty and proportionality prohibit criminalisation, by connivance with terrorism, normal behaviour in a democratic society, because the reasoning of the state cannot prevail over the reasoning of the law.[98]

Regarding immigration, first of all, human trafficking and illegal immigration[99] are one of the most lucrative criminal phenomena[100] and obviously they are connected with money laundering.

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[92] United Nations, Resolution adopted by the General Assembly on 1 July 2016, The United Nations Global Counter-Terrorism Strategy Review, A/RES/70/291, 2016, p. 1.

[93] He B, Eighth Session …, *op. cit.*, p. 2.

[94] United Nations, Resolution adopted by the General Assembly on 8 September 2006, The United Nations Global Counter-Terrorism Strategy, A/RES/60/288, 2006, p. 9.

[95] Abel Souto M, La expansión penal ..., *op. cit.*, pp. 125-132; Lorenzo Salgado, J.M, El blanqueo de dinero procedente del narcotráfico, la protección del orden socioeconómico y la desnaturalización del bien jurídico en las modalidades de blanqueo con finalidad terrorista, introducidas por la *Ley orgánica 2/2015*, de 30 de marzo, por la que se modifica el Código penal, [in:] Abel Souto and Sánchez Stewart, 2018, pp. 371–374.

[96] González Cussac J.L, Vidales Rodríguez, 2009, p. 194.

[97] Ferré Olivé J.C, Política criminal europea en materia de blanqueo de capitales y financiación del terrorismo, [in:] González Cussac J.L (Ed.), Financiación del terrorismo, blanqueo de capitales y secreto bancario: un análisis crítico. Valencia, 2009, pp. 164 and 165.

[98] Grupo de Estudios de Política Criminal, 2013, pp. 9, 11, 15 and 20.

[99] FAFT, 2011, Report, Money laundering risks arising from trafficking in human beings and smuggling of migrants, July, pp. 1–84. *Electronic source:* http://www.fatf.gafi.org, *accessed:* 11.11.2019.

[100] FATF, 2011, Annual report 2010–2011, p. 19. *Electronic source:* http://www.fatf-gafi.org, *accessed:* 12.11.2019.

Secondly, the sector of foreign exchange and money remittance also are connected with money laundering. FATF devoted a special report in 2010 to the sector of foreign exchange and money remittance which demonstrated laundering activities, voluntary or unconscious, with the use of various examples, and warned that detection levels are low compared to the volume of suppliers.[101]

To illustrate this point, there are several alternative delivery systems such as *hawala*[102]and *hundi*, informal funds transfers based on a trust relationship, as well as voucher systems in China and East Asia, and changing the black market peso used by immigrants to send money to their countries.[103]

Thirdly, the detection and monitoring of transboundary movements of cash, despite being one of the oldest techniques of money laundering, is still continuing to increase in volume significantly. [104] However, immigration and money laundering must not be confused to extend on immigration the exceptional and reinforced protection against money laundering. Border control cannot become an excuse to control absolutely all citizens and to destroy the guarantees of the rule of law.

In conclusion, both human rights and the principle of proportionality also prohibit criminalisation, by connivance with immigration, normal behaviour in a democratic society, because the reasoning of the state cannot prevail over the reasoning of the law.

Criminal responsibility of legal persons and money laundering

The penal reform of June 22, 2010 introduced in Spain the criminal liability of legal persons and incorporated money laundering, together with other crimes, to this innovative model of criminal responsibility provided in article 31 bis of the Criminal Code.[105]

Soon after, Organic Law 1/2015 of March 30 modified the hitherto barely applied regulation of criminal liability of legal persons, because the first judgement of the Supreme Court on the criminal liability of legal persons did not occur until September 2, 2015.[106]

First of all, it is quite surprising that Organic Law 1/2015 boasts of making 'a technical improvement' (Preamble), as it creates obvious contradiction by exempting, in the second and forth sections of article 31 bis, criminal liability of legal persons for money laundering that should not have existed due to the adoption and effective

[101] FATF, 2010, Report, Money laundering through money remittance and currency exchange providers, June, p. 7. *Electronic source:* http://www.fatf-gafi.org, *accessed:* 14.11.2019.

[102] FATF, 2013, Report, The role of hawala and other similar service providers in money laundering and terrorist financing, October, pp. 1–72. *Electronic source:* http://www.fatf-gafi.org, *accessed:* 12.11.2019.

[103] Collado Medina J, El blanqueo de capitales: una aproximación', [in] Collado Medina J (Ed.), La investigación criminal y sus consecuencias jurídicas. Madrid, 2010, pp. 480 and 481.

[104] FATF, 2010, Report, Money laundering using new payment methods, ..., *op. cit.*, *op. cit.*, pp. 46 and 47; FATF, 2015, p. 3.

[105] Fernández Teruelo J.G, p. 319.

[106] Gómez-Jara Díez C, El Tribunal Supremo ante la responsabilidad penal de las personas jurídicas: aviso a navegantes judiciales. *Diario La Ley*, 2015, No. 8632, 26 de octubre de 2015, pp. 1–8.

execution of suitable or adequate compliance programs to prevent it, as well as by taking into account the limit to punishment, in the third paragraph of the second rule of article 66 bis, of non-serious breaches of supervisory, monitoring and control duties, when letter b) of the first section of article 31 bis only takes into consideration serious breaches of those duties[107].

Secondly, in 2010, in order to introduce the criminal liability of legal persons, the Spanish legislator invoked the alleged 'need to comply with international commitments'[108]. However this model of responsibility was not mandatory[109], because international agreements normally only require 'effective, proportionate and dissuasive' sanctions, that is to say, administrative sanctions, security measures and legal consequences other than penalties in the strict sense of the term were enough.[110]

In addition, managers and executives who have not adopted an effective compliance program will be held liable together with the company[111], given that now all act 'as guarantors of the non-commission of money laundering offences in their organisation, in other words, as police officers'[112] and in the case of non-cooperation, the Damocles sword hangs over them as a money-laundering penalty[113].

Thus, the evaluation and monitoring by the obliged subject or legally bound party of the danger of money laundering with respect to its clients, through compliance programs[114], plays an important role in determining the criminal liability of legal persons[115]. However, the mere existence of a protocol of good practices 'will not be enough'[116], in order 'to mitigate or exclude the liability of a legal person or avoid the liability of certain individual obligors'[117], despite the fact that Organic Law 1/2015 introduces in a contradictory manner a new second (first condition) and fourth sections in article 31 bis of the Criminal Code that exempts from criminal

[107] Abel Souto M, Antinomias de la reforma penal de 2015 sobre programas de prevención que eximen o atenúan la responsabilidad criminal de las personas jurídicas, [in:] Matallín Evangelio A (Ed.), Compliance y prevención de delitos de corrupción. Valencia, 2018, pp. 13–27.

[108] Bermejo, Agustina Sanllehí, 2012, p. 460.

[109] Mata Barranco, N.J. de la, Derecho penal europeo y legislación española. Valencia, 2015, pp. 126 and 129.

[110] Silva Sánchez J.-M, La reforma del Código penal: una aproximación desde el contexto. *Diario La Ley*, 2010, No. 7464, 9 de septiembre, p. 3.

[111] Díaz-Maroto y Villarejo J, Estudios sobre las reformas del Código penal. Civitas/Thomson Reuters/Aranzadi, Cizur Menor, 2011, p. 460.

[112] Silva Sánchez, J.-M, Los delitos patrimoniales y económico-financieros, *Diario La Ley*, 2010, No. 7534, 23 de diciembre, p. 9.

[113] Arzt G, Weber U, Heinrich B, Hilgendorf E, Strafrecht, Besonderer Teil: Lehrbuch, 3. Auflage, Gieseking, Bielefeld, §29, Geldwäsche, §261, 2014, §29.

[114] Bonatti Bonet F, (Ed.), Memento experto Francis Lefebvre, Sistemas de gestión de compliance. Normas ISO y UNE 19601, Lefebvre-El Derecho. Madrid, 2017; Gómez Tomillo M, Compliance penal y política legislativa. Valencia, 2016; Nieto Martín A (Ed.), Manual de cumplimiento penal en la empresa. Valencia, 2015; Reyna Alfaro L (Ed.), Compliance y responsabilidad penal de las personas jurídicas. Lima, 2018.

[115] Bermejo M.G, Agustina Sanllehí J.R, El delito del blanqueo de capitales, [in:] Silva Sánchez J.-M (Ed.), El nuevo Código penal. Comentarios a la reforma. Madrid, 2012, pp. 446 and 459–461.

[116] Rosal Blasco B del, Las pymes son las que menos preparadas están. *Diario La Ley*, 2015, No. 8532, 5 de mayo, p. 1.

[117] Díaz y García Conlledo M, El castigo del autoblanqueo en la reforma penal…, *op. cit.*, p. 292.

liability legal entities that effectively adopt and execute a model of organisation and management suitable or adequate for the prevention of crimes or for the significant reduction of the risk of their commission, because in the majority of cases, the latter money laundering will prove the inefficiency of the model, its unsuitability or inadequacy to prevent it, as well as the fact and that the danger of the commission of a criminal act has not been significantly reduced. Even when an interpretation in accordance with the principle of validity requires understanding suitability, adequacy or effectiveness in a relative sense, the exemption is condemned to 'insignificant use'[118], demonstrated by the Italian experience. The above is important to note here because the penal reform of 2015 literally reproduces a criticised Italian Legislative Decree of June 8, 2001; in the majority of cases, as in the country cited, the mitigating factor provided for 'partial accreditation' to be resorted to (obviously cannot refer to an inadmissible alleviation of evidence of the prevention systems) 'skillfully combined with accordance'[119] , a powerful stimulus of the fear that a business facility will be closed down or the business activity will be suspended, which entails a much greater loss for the company.

Organic Law 1/2015 also contradicts itself in 'the only novelty'[120], that it incorporates into article 66 bis. The reform limits the penalties for legal persons, in the third paragraph of the second rule of the aforementioned article, to a maximum duration of two years for crimes committed by those subject to the authority of legal representatives, to those authorised to decide on behalf of the legal entity, and those who have powers of organisation and control, when the liability of the legal entity 'derives from a breach of the duties of supervision, monitoring and control that is not of a serious nature'. The truth is that the forgetful legislator of 2015 forgot that in the same reform, the criterion of 'due control', which was contained in article 31 bis, in the second paragraph of its first section, was modified by the 'less demanding'[121] formula of a 'Serious breach… of the duties of supervision, surveillance and control' of the current letter b) of 31 bis, following the recommendation made by the OECD to the Spanish authorities of 'greater precision' in the 'duty of control'. Thus, Organic Law 1/2015 is incongruous[122], given the fact that it stops punishing, in accordance with letter b) of the first section of article 31 bis, the less serious and minor breaches of due control and at the same time, contradictorily, takes into account to limit the penalty, in the third paragraph of the second rule of article 66 bis, non-serious breaches of supervision, monitoring and control duties that are now atypical.

Last but not least, the second rule of article 66 bis refers to legal persons used 'instrumentally for the commission of criminal offences', which offers an authentic interpretation of instrumentalisation, 'that the legal activity of the legal entity is less relevant than its illegal activity', although the identical wording of the two

[118] González Cussac J.L, 2015, p. 189.

[119] *Ibid.*

[120] Borja Jiménez E, Reglas generales de aplicación de las penas: arts. 66, 66 bis, 70 y 71, [in:] González Cussac, 2015, p. 279.

[121] Fiscalía General del Estado 2016, Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por la *Ley orgánica 2/2015*, pp. 20 and 59. *Electronic source:* http://www.fiscal.es, *accessed:* 12.11.2019.

[122] Blanco Cordero I, El delito de blanqueo de capitales, 4th ed. Thomson Reuters/Aranzadi, Cizur Menor, 2015, p. 1017.

letters b) of the second rule of article 66 bis raises problems. This poses problems, given the fact that the same hypothesis serves to overcome the two- and five-year term limit or allows the permanent imposition of sometimes coinciding certain penalties. The afore said legislative negligence must be resolved with 'a systematic interpretation' and in accordance with the principle of validity that allows 'a greater intensity of the criminal instrumentalisation of the legal person'[123] to be distinguished. Therefore, for example, if a tax consultancy firm is dedicated to the laundering of money something more than to its legal work, the two year limit in the penalty of prohibition of carrying out activities could be exceeded. It would be possible to exceed the five year ceiling for this penalty if the company is much more engaged in money laundering than providing advice, and it would be possible to impose the aforementioned prohibition on a permanent basis when 'the company is almost exclusively dedicated to money-laundering'[124]

In conclusion, the use of dummy corporations for money laundering is frequent, as is evidenced by the judgements of the Supreme Court of June 26, 2012 and February 4, 2015, which make reference to some fifteen companies, some domiciled in tax havens such as Belize, the Bahamas, the Virgin Islands, Panama, Liberia, Jersey or Liechtenstein, which concealed the ownership of a huge volume of properties 'which are listed over twenty-three pages of the ruling of the Court of first instance'. Until recently, the accessory consequences and the doctrine of piercing the corporate veil were sufficient. The said doctrine prohibits the prevalence of the created legal personality if fraud is committed or third parties are harmed, as is reflected in the Supreme Court judgements of March 2, 2016 and 5 December 2012, which confirmed the involvement of a lawyer in 14 companies — including four from Delaware that participated in three limited liability companies, a couple of companies based in Gibraltar, and two other companies based in the United Kingdom — whose assets were clearly and unjustifiably confused with the assets of the companies, which were then subject to the payment of costs, fines, and civil liabilities derived from their crimes of money laundering and against the Treasury; the civil liability with regard to which, of course, there was no problem that it corresponded to legal persons, as noted in the judgement of the Supreme Court of April 9, 2012.[125]

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[123] Borja Jiménez E, 2015, p. 280.

[124] *Ibid.*, p. 281.

[125] Abel Souto M, Criminal responsibility of legal persons and money laundering, The 19th World Congress of the International Society of Criminology. Doha, 2019.

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***Streszczenie.** Dyrektywy 2015/849 i 2018/843 w sprawie prania pieniędzy wymagają ciągłego dostosowywania ram prawnych w celu reagowania na zagrożenia związane z wykorzystaniem nowych technologii w procederze legalizacji środlków pochodzących z przestępstwa. Dyrektywa 2018/843 rozszerza zakres stosowania dyrektywy 2015/849 na podmioty świadczące usługi wymiany między walutami wirtualnymi, a walutami fiducjarnymi, jak również podmioty świadczące pakiety opiekuńcze. Niewątpliwie nowe systemy płatności ułatwiają przestępczą działalność osobom dopuszczającym się prania pieniędzy. Wykorzystanie takich systemów jest lepsze niż transakcje gotówkowe z udziałem dużych sum pieniędzy. Brak bezpośrednich relacji biznesowych sprzyja wykorzystywaniu figurantów i fałszywych tożsamości. Brak ryzyka kredytowego, z uwagi na to, że zazwyczaj istnieje opcja przedpłaty, zniechęca usługodawców do uzyskiwania pełnych i dokładnych informacji o klientach, a charakter handlu i szybkość transakcji utrudniają kontrolę własności lub zamrażanie środków. Jednakże rozwój technologii, w tym Internetu, ma niewątpliwe zalety, a nawet gwarantuje weryfikację tożsamości lub inne sposoby nadzoru w celu zapobiegania praniu pieniędzy za pośrednictwem zasobów internetowych. Ponadto reforma z 22 czerwca 2010 r. wprowadziła w Hiszpanii odpowiedzialność karną osób prawnych i nadała osobowość prawną procederowi prania pieniędzy oraz innym przestępstwom, tworząc innowacyjny model odpowiedzialności karnej. Wkrótce potem, ustawa organiczna 1/2015 z 30 marca zmodyfikowała dotychczas praktycznie nie stosowaną regulację. Autor zwraca uwagę, że wykorzystywanie fikcyjnych korporacji do prania brudnych pieniędzy jest częste, o czym świadczą wyroki Sądu Najwyższego z 26 czerwca 2012 r. i 4 lutego 2015 r., chociaż do niedawna wystarczające było wyciąganie konsekwencji i doktryna przebijania zasłony korporacyjnej.*

***Zusammenfassung.** Die Richtlinien 2015/849 und 2018/843 zur Geldwäsche erfordern eine kontinuierliche Anpassung des Rechtsrahmens, um auf Bedrohungen durch den Einsatz neuer Technologien in der Geldwäsche zu reagieren. Die Richtlinie 2018/843 erweitert den Geltungsbereich der Richtlinie 2015/849 auf 'Anbieter von Austauschdiensten zwischen virtuellen Währungen und Fiat-Währungen sowie Anbieter von Depotbrieftaschen'. Zweifellos erleichtern die neuen Zahlungssysteme die kriminellen Aktivitäten von Geldwäschern. Diese Systeme sind besser als Bargeld, um große Geldsummen zu bewegen. Nicht persönliche Geschäftsbeziehungen begünstigen die Verwendung von Strohkäufern und falschen Identitäten. Das Fehlen eines Kreditrisikos, da es normalerweise eine Prepaid-Option gibt, hält Dienstleister davon ab, vollständige Geldbeträge zu erhalten und genaue Kundeninformationen sowie die Art des Handels und die Geschwindigkeit der Transaktionen erschweren die Kontrolle von Eigentum oder das Einfrieren. Die Entwicklung von Technologien, einschließlich des Internets, hat jedoch unbestreitbare Vorteile und bietet sogar durch Online-Ressourcen eine Überprüfung der Identität oder eine andere Überwachungspflicht zur Verhinderung von Geldwäsche. Darüber hinaus führte die Reform vom 22. Juni 2010 in Spanien die strafrechtliche Verantwortlichkeit juristischer Personen ein und bezog die Geldwäsche zusammen mit anderen Straftaten in dieses innovative Modell der strafrechtlichen Verantwortlichkeit ein. Bald darauf änderte das Organgesetz 1/2015 vom 30. Zusammenfassend lässt sich sagen, dass Dummy-Unternehmen häufig zur Geldwäsche eingesetzt werden, wie aus den Urteilen des Obersten Gerichtshofs vom 26. Juni 2012 und 4. Februar 2015 hervorgeht. Bis vor kurzem waren dies jedoch die zusätzlichen Konsequenzen und die Doktrin, den Unternehmensschleier zu durchdringen ausreichend.*

***Резюме.** Директивы 2015/849 и 2018/843 об отмывании денег требуют постоянной адаптации нормативно-правовой базы в целях реагирования на угрозы, возникающие в связи с использованием новых технологий для легализации доходов от преступлений. Директива 2018/843 расширяет сферу применения Директивы 2015/849 на поставщиков услуг обмена между виртуальной и фидуциарной валютами, а также на поставщиков пакетов страхования. Нет сомнений в том, что новые платежные системы облегчают преступную деятельность лиц, занимающихся*

отмыванием денег. Использование таких систем намного выгоднее, чем наличные операции с большими суммами денег. Отсутствие прямых деловых отношений способствует использованию фигурантов и фальшивых личных данных. Отсутствие кредитного риска, так как обычно существует возможность предоплаты, препятствует получению поставщиками услуг полной и точной информации о клиенте, а характер сделки и быстрота проведения транзакции усложняют контроль за собственностью или блокирование средств. Однако развитие технологий, в том числе Интернета, имеет определенные несомненные плюсы и даже гарантирует проверку личности или другие методы надзора в целях предупреждения легализации доходов, полученных преступным путем с помощью Интернет-ресурсов. Кроме того, реформа, проведенная 22 июня 2010 года, ввела уголовную ответственность юридических лиц в Испании и придала правосубъектность отмыванию денег и другим преступлениям, создав инновационную модель уголовной ответственности. Вскоре после этого органический закон 1/2015 от 30 марта изменил ранее практически неиспользованное положение. Автор отмечает, что использование фиктивных корпораций для отмывания денег является частым явлением, о чем свидетельствуют постановления Верховного суда от 26 июня 2012 года и 4 февраля 2015 года, однако до недавнего времени достаточно было лишь привлекать к ответственности за соучастие и учитывать доктрину, позволяющую прорвать корпоративную завесу.