

## MONEY LAUNDERING, CYBERCRIME AND CRIMINAL RESPONSIBILITY OF LEGAL PERSONS <sup>1</sup>

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This paper was subject of report in Beijing by its author on November 30, 2019, at the *Tenth Session of the International Forum on Crime, and Criminal Law in the Global Era*. This work was financially supported by the RTI2018-6H-093931-B-100 (AEI/FEDER, UE) project of the Spanish State Research Agency (Ministry of Science, Innovation and Universities), Operational Program FEDER 2014-2020 *A way of making Europe*.

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<sup>1</sup> Artículo recibido el 18 de octubre de 2019 y aprobado el 27 de noviembre de 2019

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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 payment, discourages service providers from obtaining a 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 hereto barely applied regulation. It is quite surprising that Organic Law 1/2015 boasts of making *a technical improvement*, as it incurs obvious contradictions by exempting criminal liability to legal persons for a money laundering, that should not have existed due to the adoption and effective execution of suitable or adequate compliance programs to prevent it, as well as taking into account to limit the punishment non-serious breaches of supervisory, monitoring, and

control duties, when letter b) of the first paragraph of article 31 bis only takes into consideration serious breaches of those duties. Already in 2010, in order to introduce the criminal liability of legal persons, the Spanish Legislator invoked the alleged *need to comply with international commitments*. However, this model of responsibility was not mandatory, because international agreements normally only require *effective, proportionate, and dissuasive sanctions*. In addition, managers and executives, who have not adopted an effective compliance program, will be held liable together with the company, given that now all act as police officers. In conclusion, the use of dummy corporations for money laundering is frequent, as it is evidenced by the judgments 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.

**KEYWORDS:**

Money laundering, cybercrime, expansion of the punishment, foreign exchange, money remittance, transboundary movements of cash, new technologies, electronic money, virtual currencies, and criminal liability of legal persons

## Cyber Crime and Money Laundering

Directive 2015/849 of the European Parliament, and the European Council of May 20, 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 (E.U.) 2018/843 of the European Parliament, and the European Council of May 30, 2018, amending Directive (E.U.) 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 globalization*<sup>3</sup>. Its importance nowadays is transcendental, because of the economic crisis we are suffering.

Indeed, it was noted that *an offense that has benefited most from the internet is money laundering*<sup>4</sup>, *generalized and radicalized*<sup>5</sup> by the new electronic media, with a *spectacular*<sup>6</sup> development thanks to the potential provided

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<sup>3</sup> LEVI. 2012, p. 107.

<sup>4</sup> VELASCO SAN MARTÍN. 2012, p. 75.

<sup>5</sup> SANDYWELL. 2010, p. 46.

<sup>6</sup> PÉREZ ESTRADA. 2010, p. 306.

via internet and electronic transfers<sup>7</sup> for executing this crime<sup>8</sup>.

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<sup>9</sup>. These new technologies are appealing to money launderers mainly because of the anonymity<sup>10</sup> provided, high marketability, usefulness of funds, and global access to ATM network<sup>11</sup>. To these factors, one should add: the problems of persecution<sup>12</sup>, which requires new investigation methods that must maintain the delicate balance between security and fundamental rights<sup>13</sup>.

In any case, to avoid misuse of legal insufficiencies in new technologies by organized crime<sup>14</sup>, internet cannot be an *area outside the Law*<sup>15</sup>, but must be regulated<sup>16</sup>.

Undoubtedly, the new payment systems facilitate money launderers' criminal activity. These systems are better than cash

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<sup>7</sup> FERNÁNDEZ TERUELO, 2011, p. 231, and 234.

<sup>8</sup> ABEL SOUTO. 2012a, pp. 1-45; *idem*. 2012b, pp. 220-247; *idem*. 2013a, pp. 266-284; *idem*. 2013b, pp. 1-53; *idem*. 2013c, pp. 1-7; *idem*. 2014a, pp. 80-91.

<sup>9</sup> FATF. 2010b, p. 7.

<sup>10</sup> MATA BARRANCO, 2010, p. 19; MIRÓ LINARES. 2011, p. 12, 13, 25, and 26.

<sup>11</sup> FATF. 2010b, p. 7.

<sup>12</sup> GLESS. 2012, pp. 3-22.

<sup>13</sup> PÉREZ ESTRADA. 2010, p. 307, 309, and pp. 311-317.

<sup>14</sup> ANGELINI, and GIBSON. 2007, pp. 65-73.

<sup>15</sup> *Ibid.* p. 22.

<sup>16</sup> GÓMEZ TOMILLO. 2006, p. 189.

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 payment, discourages service providers from obtaining a complete and accurate customer information, and the nature of the trade and the speed of transactions make it difficult to control property or freezing<sup>17</sup>.

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<sup>18</sup>. 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<sup>19</sup>.

For example, a total of 4 million people in the United States receive Social Security benefits without actually being bank accounts holders. To reduce their dependence on checks, which force transactions in them, spending between \$50 and \$60 dollars a month in check cashing, bill payment, or sending money to

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<sup>17</sup> FATF. 2010b, p. 21.

<sup>18</sup> *Ídem. The Money Laundering*. 2011, pp. 37-39, and 54.

<sup>19</sup> *Ídem*. 2010b, p. 12.

their families, benefits were provided with prepaid cards with which could buy goods or get cash. Moreover, in 2009, the war displaced in Pakistan more than a 1,000,000 people, 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<sup>20</sup>.

In 1996, the Financial Action Task Force (FATF) was specifically concerned in the recommendation number 13<sup>th</sup>. with new technologies, and the danger they pose for potential money laundering by allowing the realization of huge transactions instantly from remote locations, while keeping 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 to new technologies: the problem of physical volume of money posed for launderers<sup>21</sup> -to the point of leaving the paper money because of slow movement- is minimized with *electronic money*, its rapid mobility, especially on the internet, difficult to trace the funds transferred and the unusual volume of data to analyze 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*

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<sup>20</sup> FATF. 2010b, p. 12, 13, 15, and 20.

<sup>21</sup> ABEL SOUTO, 2013b, pp. 2-6; VIDALES RODRÍGUEZ, 2015, p. 16.

*Bank*<sup>22</sup> was agreed in Antigua, the bank that became famous for being the 1<sup>st</sup>. 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<sup>23</sup> with reproduction of the advertisements that the *European Union Bank* made available in internet<sup>24</sup>. Today nearly three-quarters of households in the European Union have internet access, and over a third of the population makes banking online<sup>25</sup>.

Precisely for this reason, the FATF developed, in October 2010, a report, regarding the use of new payment methods for money laundering<sup>26</sup>, which focused on prepaid cards, payment services on the internet<sup>27</sup>, steady growth, and its misuse for the implementation of the so called *cyber laundering*<sup>28</sup> as well as on payments with mobile phones. Notably, with regard to this latter issue, it is estimated that 1,400,000,000 people used payments via mobile phones for their financial transactions in 2015<sup>29</sup>.

Also, the FATF has 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, relating to new technologies; while

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<sup>22</sup> SCHUDELARO. 2006, pp. 47-72.

<sup>23</sup> BLUM, et al. 1999, pp. 52-57.

<sup>24</sup> MARTÍN. 1997, p. 38, and 39.

<sup>25</sup> FAFT. 2012, p. 1; EUROPEAN COMMISSION. 2012, p. 1.

<sup>26</sup> BALDWIN, and FLETCHER. 2004, pp. 125-158.

<sup>27</sup> PHILIPSOHN. 2001, pp. 485-490; PING. 2004, pp. 48-55; YAN, et al. 2011, pp. 93-101.

<sup>28</sup> FILIPKOWSKI. 2008, pp. 15-27.

<sup>29</sup> FATF. 2010b, p. 18.



recommendation number 16 discusses about electronic transfers, and identifying both their originators as beneficiaries<sup>30</sup>.

On June, 2014, the FATF produced another report on virtual currencies<sup>31</sup> on June, 2015, publishing a Guidance for a risk-based approach of virtual currencies<sup>32</sup>; on October, 2018, the FATF modified recommendation 15 to clarify that it is applied to financial activities, involving virtual assets, and on June, 2019, the FATF approved an interpretative note to recommendation 15 for virtual assets and virtual asset service providers to obtain and submit required beneficiary information to conduct USD/EUR 1000 transactions<sup>33</sup>.

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<sup>34</sup>. Thus, the study of the framework of the Mafia, published by Varese, where criminal goods arrived in Italy by a large network of individuals, who traveled from Russia with cash<sup>35</sup>. There are also new *money mules*, recruited by email, with the excuse of having an opportunity to work at home through internet. Sometimes the only payment they receive is criminal prosecution for money laundering<sup>36</sup>.

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<sup>30</sup> FATF. 2010b, p. 17.

<sup>31</sup> *Ídem*. 2014, pp. 1-15.

<sup>32</sup> *Ídem*. 2015a, pp. 1-46.

<sup>33</sup> *Ídem*. 2019, p. 4, 55, and 56.

<sup>34</sup> *Ibíd.* p. 46, and 47.

<sup>35</sup> VARESE. 2012, p. 242.

<sup>36</sup> CLOUGH. 2010, p. 187, and 188.

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<sup>37</sup>, 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<sup>38</sup>. In similar vein, the Spanish government, having more closely in mind its tax collection purposes, approved in 2012 a bill to combat tax fraud. The government limited to €2,500 euros cash payments (Law 7/2012, article 7), and on 2017, the Spanish government wanted to limit cash payments to €1,000 euros. So also France and Italy, and the Indian government banned on 2016 money notes of 500 and 1,000 rupees.

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 prevention and repression of money laundering<sup>39</sup>.

Furthermore, behind the apparent dogma of the criminogenic character of cash hides, a program that exceeds the fight against

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<sup>37</sup> FATF. 2012, p. 25, and pp. 99-102.

<sup>38</sup> JURADO, and GARCÍA. 2011, p. 172.

<sup>39</sup> ABEL SOUTO. 2012a, pp. 1-45; *idem.* 2013a, pp. 266-284, and *idem.* 2016c, pp. 345-353; GONZÁLEZ CUSSAC, and CUERDA ARNAU. 2013, pp. 1-540.

crime, further marginalizing those who earn less, and allows control of the private sphere<sup>40</sup>.

### **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, USA, etc.<sup>41</sup>.

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 has been expanding unceasingly<sup>42</sup>.

I made an unattended call to the Legislature to moderate its intervention in money laundering<sup>43</sup>, which has preferred to add with the Organic Laws 5/2010, 1/2015, and 2/2015, 3 additional reforms to the already long list of modifications on money laundering<sup>44</sup>, that undermine the legal certainty, and the consideration of Criminal Law as *ultima ratio*. This criminal policy goes to a *breakneck speed*, and continues to accelerate despite being reported a long time ago<sup>45</sup>. These constant reforms

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<sup>40</sup> PIETH. 1992, p. 27.

<sup>41</sup> ABEL SOUTO. 2017.

<sup>42</sup> *Ídem*. 2016a, pp. 1-183.

<sup>43</sup> *Ídem*. 2009, p. 243, and 244.

<sup>44</sup> ABEL SOUTO. 2005a, pp. 5-26; *idem*. 2015, pp. 639, and 640; ZARAGOZA AGUADO. 2011, p. 1154, and 1155.

<sup>45</sup> HASSEMER. 1994, p. 1369; *idem*. 1998, p. 217.

violate the legal security or *the spirit of the mean*, of which HE<sup>46</sup> speaks, citing CHENG HAO, and CHEN YI, scholars of 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 for the knowledge that the goods have their origin *in a crime*, changes these words by the formula *in a criminal activity, without being clear the objective pursued*<sup>47</sup> with the replacement speech, which is attributed expansion effort and, in principle, wider than the previous noun *crime*<sup>48</sup>, it seemed to allow the inclusion of the petty offenses made in preceding facts of money laundering, which would mean *an enormous enlargement of the field of this crime*<sup>49</sup>. But the petty offenses 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 offenses, using Orwellian Newspeak, it actually transforms most of them into minor offenses in Spain, so that expands the preceding facts of money laundering.

To illustrate this point, a single euro from a previous petty offense of fraud, now a minor offense, according to article 249 of the Spanish Criminal Code, becomes a material object capable

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<sup>46</sup> HE. 2010, p. 7, and 8.

<sup>47</sup> MANJÓN-CABEZA OLMEDO. 2010, p. 340.

<sup>48</sup> FERNÁNDEZ TERUELO. 2010, p. 318, 319, and 324.

<sup>49</sup> MUÑOZ CONDE. 2010, p. 557.

of money laundering, and preparatory acts of such fraud, before unpunished regarding petty offenses, are punished in accordance article 269. However, must be excluded here the punishment of money laundering by the principle of insignificance.

Moreover, the petty offences, now minor offenses, cannot be included in the previous facts to the crime of money laundering, because it limits the effectiveness of the norm<sup>50</sup>, and increases social costs<sup>51</sup>, so intolerable and contrary to the principle of proportionality<sup>52</sup>. Thus, HE<sup>53</sup> says that to achieve the purpose of defense of human rights *the penalty must adhere to the spirit of mean*, which opposes to *any penalties that are extreme, excessive*, and requires *moderateness and appropriateness*<sup>54</sup>.

Secondly, Organic Law 5/2010, after the reference in article 301.1 to the *criminal activity*, which integrates the previous fact, added *committed by him or by any third person*, which punishes expressly money laundering committed by those responsible for the previous fact in the way the majority interpreted the crime<sup>55</sup>, and *ditch one of the most controversial issues*<sup>56</sup>. In this sense, there was already a plenary agreement

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<sup>50</sup> FLICK. 1992, p. 1293; TERRADILLOS BASOCO. 2008, p. 261.

<sup>51</sup> *Ídem*. 1990, p. 1264.

<sup>52</sup> FERNÁNDEZ TERUELO. 2010, p. 324; MANJÓN-CABEZA OLMEDO. 2010, p. 341.

<sup>53</sup> HE.. 2010, p. 7.

<sup>54</sup> *Ídem*. 2012, p. 4, and 5.

<sup>55</sup> FERNÁNDEZ TERUELO.. 2010, p. 319.

<sup>56</sup> GONZÁLEZ CUSSAC, and VIDALES RODRÍGUEZ. 2009, p. 195.

no jurisdictional of the Supreme Court of July 18, 2006<sup>57</sup>, admitting the self-laundering<sup>58</sup>.

But the punishment of self-laundering combined with new behaviour of possession or use to the Criminal Code, incorporated by Organic Law 5/2010, produces *strange consequences*<sup>59</sup>, even absurd<sup>60</sup>, because this would imply that the person, who has a painting or a jewel which he has stolen, would now commit a new crime, and the same applies to the individual using someone else's car without permission<sup>61</sup>.

Not only that, but since the enlargement of the previous facts to the old petty offenses 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 offense converted now into a minor offense, according to article 234.2, and who uses an old moped of very little value, which he subtracted, because the old petty offense has become a minor offense of theft of usage with no predetermined worth of article 244.1.

To avoid jeopardy<sup>62</sup>, the *typus* should be interpreted as meaning that the possession by the authors or participants is in the preceding fact, as money laundering is punishable only when

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<sup>57</sup> GÓMEZ RIVERO. 2010, p. 540.

<sup>58</sup> ABEL SOUTO, 2011a. p. 15, and 16; *ibid.* 2011b. pp. 78-80, with references of various sentences.

<sup>59</sup> QUINTERO OLIVARES. 2010a, p. 13; *idem.* 2010b, p. 109.

<sup>60</sup> CASTRO MORENO. 2009, p. 1, and 4.

<sup>61</sup> QUINTERO OLIVARES. 2010a, p. 13; *ibid.* p. 109.

<sup>62</sup> MARTÍNEZ-BUJÁN PÉREZ. 2015, p. 579, and 580.

it is not possible to sanction them for the previous crime<sup>63</sup>. 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 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<sup>64</sup>. The possession and used 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 the 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<sup>65</sup>, but regardless of the purpose that guides a money launderer<sup>66</sup>.

Thus, it seems that since Organic Law 1/2015 the Spanish offense of money laundering includes the carrier, that among the things that moves sees the above-mentioned scarf with an anti-theft device, the person who takes care of this scarf in the cloakroom of an establishment, and the garage worker, who guards the old moped mentioned, knowledgeable of the subtraction, because

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<sup>63</sup> *Ibíd.* p. 20; *ibíd.* 2010b, p. 110.

<sup>64</sup> ABEL SOUTO. 2011a, pp. 17-27; *ibíd.* 2011b, pp. 81-98.

<sup>65</sup> MUÑOZ CONDE. 2010, p. 554, and 556.

<sup>66</sup> ABEL SOUTO. 2005b, pp. 93-102, 290, and p. 291; *idem.* 2009, pp. 177-187, and p. 235; BLANCO CORDERO. 2011, p. 42; *ibíd.* 2012, p. 437.

article 301.1 punishes simple possession of property with knowledge, that have their origin in an offense.

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 Spanish Criminal Code, such as §261 II number 2 of the German StGB, seems covering surprisingly, who write a text with a subtracted computer, but much more astonishing that since Organic Law 1/2015, which transforms the old petty offense into a minor offense of theft (article 234.2), if a person writes something with a subtracted pen, he is considered a money launderer.

However, the Spanish offense of money laundering, as well as the German, should be *teleologically restricted*<sup>67</sup>, which excludes of the article 301 of the Criminal Code by reason of lack of typus, all material objects of insignificant quantity, as the *amount of cents*<sup>68</sup>, under the principle of insignificance<sup>69</sup> or of *minimal intervention*<sup>70</sup>.

The same principle of insignificance applies to basic consumer acts, services, or merchandise sales in everyday vital business<sup>71</sup> given how important it is for individuals to be able to transmit the money received, and to use purchased goods<sup>72</sup>. The previous

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<sup>67</sup> VOGEL. 1997, p. 356.

<sup>68</sup> BOTTKÉ. 1998, p. 11.

<sup>69</sup> ARÁNGUEZ SÁNCHEZ. 2000, p. 184, 185, and 248; PALMA HERRERA. 2000, p. 350, and 351; RAGUÉS I VALLÈS. 2001, p. 625; TERRADILLOS BASOCO. 2008, p. 240, and 263.

<sup>70</sup> MARTÍNEZ-BUJÁN PÉREZ. 2015, p. 565.

<sup>71</sup> ARÁNGUEZ SÁNCHEZ. 2000, p. 184, 247, and 248.

<sup>72</sup> LAMPE. 1997, p. 131, and 132.



author, who only has money originating from a crime, *would prohibit almost the satisfaction of vital needs*<sup>73</sup>, and thus, his own survival<sup>74</sup>, if behaviours directed to sustain life are not excluded from 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*<sup>75</sup>, which limits so much economic rights of the citizen, raising serious questions of constitutionality<sup>76</sup>. 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*<sup>77</sup>, and these elements are not satisfied in the current case, and also here would criminalize *behaviours which do not violate human rights, such as unethical behaviours*. The primary and main adjustments in response to crimes in the era of globalization requires decriminalization of *immoral behaviours or minor offences with petty violation against social orders*<sup>78</sup>.

Fourthly, regarding the new aggravations laundering of profits from certain crimes against public administration, contained in articles 419-445 of the Penal Code, against land planning, and urbanism<sup>79</sup>, the penalty is aggravated despite such increases

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<sup>73</sup> BARTON. 1993, p. 161.

<sup>74</sup> BLANCO CORDERO. 1997, p. 272.

<sup>75</sup> BOTTKE. 1995, p. 122.

<sup>76</sup> *Ídem*. 1997, p. 290.

<sup>77</sup> HE. 2010, p. 8.

<sup>78</sup> *Ídem*. 2012, p. 4.

<sup>79</sup> ABEL SOUTO. 2011a, pp. 27-31; *ídem*. 2011b, pp. 98-103; *ídem*. 2013c, pp. 1-7; FERRÉ OLIVÉ. 2013, pp. 389-391; NÚÑEZ PAZ. 2013, pp. 267-279.

gravity *do not have relevant general preventive effect*<sup>80</sup>. Over this punitive *hardening*<sup>81</sup>, must be applied the penalty of imprisonment in the upper half for membership of an organization dedicated to money laundering of article 302.1 Penal Code<sup>82</sup>, so that the penalty can achieve *really high limits*<sup>83</sup>.

It cannot be presumed that the amount of money laundered from these offenses exceeds the amount derived from other crimes. Neither are these aggravations justified by the legally protected interests<sup>84</sup>, 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<sup>85</sup>, so the qualified typus would focus on the characteristics of the material object, the *magnitude*<sup>86</sup> or obvious importance of the amount laundered, but not in the irrelevant nature of the predicate offense<sup>87</sup>, since the foundation of the aggravation would reside in the greater flow of illicit goods<sup>88</sup> put into circulation. From a technical standpoint, it is also unacceptable to increase the penalties for laundering, according to the origin of goods, given that the autonomy of this crime

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80 SILVA SÁNCHEZ. 2010a, p. 5.

81 DÍAZ, and GARCÍA CONLLEDO. 2013, p. 288.

82 LORENZO SALGADO. 2013, pp. 235-237.

83 MUÑOZ CONDE. 2013a, p. 376.

84 BERDUGO GÓMEZ DE LA TORRE, and FABIÁN CAPARRÓS. 2010, p. 13.

85 PALMA HERRERA. 2000, p. 787, and 788.

86 DÍAZ, and GARCÍA CONLLEDO. 2002, p. 209.

87 ARÁNGUEZ SÁNCHEZ. 2000, p. 316.

88 FARALDO CABANA. 1998, p. 150; VIDALES RODRÍGUEZ. 1997, p. 142.

would deny to attend the previous offense<sup>89</sup>. The criminalization 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<sup>90</sup>. 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<sup>91</sup>, nor international pressure, since no supranational instrument forces a heavier penalty of money laundering in these cases.

In conclusion, the excessive punishment of new aggravations, like *the abuse of any penalty*, according to HE<sup>92</sup>, is a breach of the theory of human rights defense, and a *serious violation of the value target*.

This expansion in punishment of money laundering is taking place worldwide. Thus, in Spain, the Organic Law 1/2015 extended the previous facts of money laundering to the ancient petty offenses, now called minor offenses, and in China, article 191 of the Criminal Code, in 1997, punished money laundering from drug crimes, organized criminal syndicate nature, or smuggling crimes, in 2001, terrorism was added to the list of preceding offenses 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<sup>93</sup>.

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<sup>89</sup> ÁLVAREZ PASTOR, and EGUIDAZU PALACIOS. 2007, p. 356.

<sup>90</sup> FABIÁN CAPARRÓS. 1998; PALMA HERRERA. 2000, p. 787, and 788.

<sup>91</sup> *Ibid.* p. 785.

<sup>92</sup> HE. 2010, p. 7.

<sup>93</sup> YU. 2016, p. 358, and 361.

What will be the next step? How long will our Criminal Code wait to punish money laundering from mere administrative infractions or civil wrongs?<sup>94</sup>

### **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*<sup>95</sup>.

In 2017, Paris, and London have once again become tragic protagonists, in addition to Nice, Manchester, Berlin, Stockholm, the Ramblas 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, but in other latitudes the fatalities are counted by hundreds, as in Afghanistan, Iraq, Syria, Somalia, Pakistan, Nigeria, Mali, Yemen, the Philippines, India or Egypt, with the last attack, for the moment, with more than 300 dead in the Sinai.

In accordance with the resolution adopted by the General Assembly of United Nations on July 1st., 2016: *Any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed*<sup>96</sup>, because as HE says: *Are threatening innocents' lives, infringing people's basic freedom, and human dignity,*

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<sup>94</sup> HE. 2010, p. 7.

<sup>95</sup> HE. 2016, p. 1.

<sup>96</sup> UNITED NATIONS ORGANIZATION (UNO). 2016, p. 1.

*and threatening international peace, and security seriously*<sup>97</sup>, but the United Nations also remember that in the fight against terrorism is necessary to ensure the *respect for human rights for all, and the rule of law*<sup>98</sup>.

Organic Law 2/2015, also published on March 30, introduces a new form of money laundering in article 576 of the Spanish Criminal Code with a terrorist purpose, which distorts the legally protected interest by criminalization of money laundering, because it is not required that the goods used for terrorism are of illegal origin<sup>99</sup>.

However, *in the financing of terrorism, the wrongfulness of the conduct lies not in the source of the goods, but at the destination*<sup>100</sup>.

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, has been expanded the prosecution of money laundering, but the fight against terrorism cannot become an excuse to control absolutely all citizens, and to destroy the guarantees of the rule of law<sup>101</sup>.

Both human rights, the principles of legal certainty, and proportionality prohibit criminalization by connivance with

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<sup>97</sup> HE. 2016, p. 2.

<sup>98</sup> UNITED NATIONS ORGANIZATION (UNO). 2006, p. 9.

<sup>99</sup> ABEL SOUTO. 2016a, pp. 125-132; LORENZO SALGADO. 2018, pp. 371-374.

<sup>100</sup> GONZÁLEZ CUSSAC, and VIDALES RODRÍGUEZ. 2009, p. 194.

<sup>101</sup> FERRÉ OLIVÉ. 2009, p. 164, and 165.

terrorism normal behaviour in a democratic society, because the reason of State can not prevail over the reason of law<sup>102</sup>.

Regarding immigration, first of all inhuman trafficking, and illegal immigration<sup>103</sup> are one of the most lucrative criminal phenomena<sup>104</sup>, and obviously, they are connected with money laundering.

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 with the use of various examples, voluntary or unconscious, laundering activities, and warned the detection at low compared to the volume of suppliers<sup>105</sup>.

To illustrate this point, there are several alternative delivery systems, such as hawala<sup>106</sup> or hundi, informal funds transfer without moving, based on a trust relationship; voucher systems in China and East Asia are changing the black market peso used by immigrants to send money to their countries<sup>107</sup>.

Thirdly, the detection and monitoring of transboundary movements of cash, despite being one of the oldest techniques of money laundering, it still continues to increase its volume significantly<sup>108</sup>.

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<sup>102</sup> GRUPO DE ESTUDIOS DE POLÍTICA CRIMINAL. 2013, p. 9, 11, 15, and 20.

<sup>103</sup> FATF. 2011b, pp. 1-84.

<sup>104</sup> *Ídem*. 2011a, p. 19.

<sup>105</sup> *Ídem*. 2010a, p. 7.

<sup>106</sup> *Ídem*. 2013, pp. 1-72.

<sup>107</sup> COLLADO MEDINA. 2010, p. 480, and 481.

<sup>108</sup> FATF. 2010b, p. 46, and 47; *ídem*. 2015, p. 3.

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 criminalization by connivance with immigration, and normal behaviour in a democratic society, because the reason of State cannot prevail over the reason of 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<sup>109</sup>.

Soon after, Organic Law 1/2015, published on March 30, modified the hereto barely applied regulation of criminal liability of legal persons, because the first judgment of the Supreme Court on the criminal liability of legal persons did not occur until September 2, 2015<sup>110</sup>.

First of all, it is quite surprising that Organic Law 1/2015 boasts of making *a technical improvement* (Preamble), as it incurs in

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<sup>109</sup> FERNÁNDEZ TERUELO. 2010, p. 319.

<sup>110</sup> GÓMEZ-JARA DIEZ. 2015, pp. 1-8.

obvious contradictions by exempting, in the second, and forth sections of article 31 bis, criminal liability to legal persons for a money laundering that should not have existed due to the adoption and effective execution of suitable or adequate compliance programs to prevent it, as well as taking into account to limit the punishment, in the 3.º paragraph of the 2<sup>nd</sup>. rule of article 66 bis, non-serious breaches of supervisory, monitoring, and control duties, when letter b) of the 1<sup>st</sup>. section of article 31 bis only takes into consideration serious breaches of those duties<sup>111</sup>.

Secondly, already in 2010, in order to introduce the criminal liability of legal persons, the Spanish Legislator invoked the alleged *need to comply with international commitments*<sup>112</sup>. However this model of responsibility was not mandatory<sup>113</sup>, because international agreements normally only require *effective, proportionate, and dissuasive* sanctions, which means that administrative sanctions, security measures, and other legal consequences other than penalties in the strict sense of the term were enough<sup>114</sup>.

In addition, managers and executives, who have not adopted an effective compliance program, will be held liable together with the company<sup>115</sup>, given that now all act *as guarantees of the non-commission of money laundering offenses in their organization, in other words, as police officers*<sup>116</sup>; and in case of non-cooperation,

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<sup>111</sup> ABEL SOUTO. 2018, pp. 13-27.

<sup>112</sup> BERMEJO, y AGUSTINA SANLLEHÍ. 2012, p. 460.

<sup>113</sup> MATA BARRANCO. 2015, p. 126, and 129.

<sup>114</sup> SILVA SÁNCHEZ. 2010a, p. 3.

<sup>115</sup> DÍAZ-MAROTO, y VILLAREJO. 2011, p. 460.

<sup>116</sup> SILVA SÁNCHEZ. 2010b, p. 9.



the Damocles sword hangs over them for a money-laundering penalty<sup>117</sup>.

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<sup>118</sup> plays an important role in determining the criminal liability of legal persons<sup>119</sup>. However, the mere existence of a protocol of good practices *will not be enough*<sup>120</sup>, in order to *mitigate or exclude the liability of a legal person or avoid the liability of certain individual obligors*<sup>121</sup>; despite the fact that Organic Law 1/2015 introduces in a contradictory manner a new 2<sup>nd</sup>. (1<sup>st</sup>. condition), and 4 sections in article 31 bis of the Criminal Code, that exempts from criminal liability legal entities that effectively adopt and execute a model of organization, and management suitable or adequate for the prevention of crimes of the nature of the committed, 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, 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

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<sup>117</sup> ARZT, WEBER, HEINRICH, and HILGENDORF. 2014, §29.

<sup>118</sup> BONATTI BONET. 2017; GÓMEZ TOMILLO, 2016; NIETO MARTÍN. 2015; REYNA ALFARO. 2018.

<sup>119</sup> BERMEJO, y AGUSTINA SANLLEHÍ. 2012, p. 446, and pp. 459-461.

<sup>120</sup> ROSAL BLASCO. 2015, p. 1.

<sup>121</sup> DÍAZ, y GARCÍA CONLLEDO. 2013, p. 292.

is condemned to *insignificant use*<sup>122</sup>, which is demonstrated by the Italian experience. This is important to note here, because the penal reform of 2015 literally reproduces a criticized Italian Legislative Decree of June 8, 2001; in the majority of cases, as in the country cited, the mitigating factor provided for the *partial accreditation* will be resorted to, which of course cannot refer to an inadmissible alleviation of evidence of the prevention systems *skillfully combined with accordance*<sup>123</sup>, which has the powerful stimulus of the fear to suffer closures of premises or suspension of activities, that entail a much greater loss for the company.

Organic Law 1/2015 also contradicts itself in *the only novelty*<sup>124</sup>, that it incorporates to article 66 bis. The reform limits for legal persons in the 3<sup>rd</sup>. paragraph of the 2<sup>nd</sup>. rule of the aforementioned article to a maximum duration of 2 years the penalties in the crimes committed: by those subject to the authority of the legal representatives, to those authorized to decide on behalf of the legal entity, or those who have powers of organization 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 2<sup>nd</sup>. paragraph of its 1<sup>st</sup>. section, was modified by the *less demanding*<sup>125</sup> formula: *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

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<sup>122</sup> GONZÁLEZ CUSSAC. 2015, p. 189.

<sup>123</sup> *Ibíd.*

<sup>124</sup> BORJA JIMÉNEZ. 2015, p. 279.

<sup>125</sup> FISCALÍA GENERAL DEL ESTADO. 2016, p. 20, and 59.

of *greater precision* in the *duty of control*. Thus, Organic Law 1/2015 is incongruous<sup>126</sup>, 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 2<sup>nd</sup>. rule of article 66 bis refers to legal persons used *instrumentally for the commission of criminal offenses*, which offers an authentic interpretation of instrumentalization, *that the legal activity of the legal entity is less relevant than its illegal activity*, although the identical wording of the 2 letters b) of the 2<sup>nd</sup>. rule of article 66 bis raises problems. This poses problems given the fact that the same hypothesis serves to overcome the 2, and 5 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 to distinguish *a greater intensity of the criminal instrumentalization of the legal person*<sup>127</sup>. Therefore, for example, if a tax consulting firm is dedicated to the laundering of money something more than to its legal work, the 2 year limit in the penalty of prohibition of carrying out activities could be exceeded. It would be possible to exceed the 5 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

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<sup>126</sup> BLANCO CORDERO. 2015, p. 1017.

<sup>127</sup> BORJA JIMÉNEZ. 2015, p. 280.

prohibition on a permanent basis when *the company is almost exclusively dedicated to money-laundering*<sup>128</sup>.

In conclusion, the use of dummy corporations for money laundering is frequent, as is evidenced by the judgments of the Supreme Court of June 26, 2012, and February 4, 2015, which make reference to some 15 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 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. Such doctrine prohibits the prevalence of the created legal personality, if fraud is committed, or 3<sup>rd</sup>. parties are harmed, as is reflected in the Supreme Court judgments of March 2, 2016, and December 5<sup>th</sup>., 2012, which confirmed the involvement of 14 companies -including 4 from Delaware, that participated in 3 limited liability companies, a couple of companies domiciled in Gibraltar, and 2 other companies domiciled in the United Kingdom- of a lawyer, whose assets were clearly, and unjustifiably confused with the assets of the companies, to the payment of costs, fines, and civil liabilities derived from their crimes of money laundering, and against the Treasury, civil liability with regard to which, of course, there was no problem that it corresponded to legal persons, as noted in the judgment of the Supreme Court of April 9<sup>th</sup>., 2012<sup>129</sup>.

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<sup>128</sup> BORJA JIMÉNEZ. 2015, p. 281.

<sup>129</sup> ABEL SOUTO. 2019.

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