FATF'S MOST COMPLIANT COUNTRIES. SPAIN'S TECHNICAL COMPLIANCE AND EFFECTIVENESS: LESSONS FOR LEAST COMPLIANT JURISDICTIONS*

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Sumário: 1. Um dos países com mais conformidade; 2. Excessos: Covid-19, financiamento do terrorismo, imigração, responsabilidade criminal de pessoas jurídicas, novas tecnologias e expansão da punição em 2010, 2015 e 2021.

Resumo: De acordo com o Grupo de Ação Financeira Internacional, a Espanha é um dos países com mais conformidade. No entanto, no processo e punição de lavagem de dinheiro, vários excessos foram incorridos, que devem ser relatados.

Palavras-Chave: lavagem de dinheiro, conformidade, Covid-19, financiamento do terrorismo, imigração, responsabilidade criminal de pessoas jurídicas, novas tecnologias, expansão da punição.

Abstract: According Financial Action Task Force Spain is one of the most compliance countries. However, in the prosecution and punishment of money laundering, various excesses are being incurred that must be reported.

Keywords: Money laundering, compliance, Covid-19, terrorist financing, immigration, criminal liability of legal persons, new technologies, expansion of the punishment.

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1.

First of all according to the Financial Action Task Force 11 immediate outcomes represent an effective anti-money laundering and counter-terrorist financing system, but as professor Faria Costa says money laundering is a hot topic since the 90s[1]. Spain "achieved high or substantial levels of effectiveness on10 of the 11 key areas"[2]: high level of effectiveness on financial intelligence and relevant information appropriately used by authorities (immediate outcome 6), moderate level of effectiveness on prevention on terrorist funds and non-profit organizations abuse (immediate outcome 10), and substantial levels of effectiveness on combating money laundering and terrorist financing risks (immediate outcome 1), international cooperation (immediate outcome 2), appropriate supervision (immediate outcome 3), preventive measures and report of suspicious transactions (immediate outcome 4), legal persons[3] and their beneficial ownership (immediate outcome 5), investigation of money laundering and prosecution and sanction of offenders (immediate outcome 7), confiscation (immediate outcome 8), investigation, prosecution and sanction of terrorist financing (immediate outcome 9), and prevention on proliferation of weapons of mass destruction (immediate outcome 11). In conclusion, Spain is one of the most compliant countries[4]. However, according to professor FARIA COSTA, compliance programs represent many problems for classical criminal law focused on the protection of legal interests[5].

Secondly, the main money laundering risks in Spain related to the activities of criminal organizations from the Campo de Gibraltar area, North

1 José de Faria Costa, "El blanqueo de capitales. (Algunas reflexiones a la luz del Derecho penal y de la política criminal)", in *Hacia un Derecho penal económico europeo. Jornadas en honor al professor Klaus Tiedemann* (Madrid: Boletín Oficial del Estado, 1995), 656.

2 FATF, *Annual report 2019-2020,* accessed June 2021, http://www.fatf-gafi.org, 32.

3 Miguel Abel Souto, "Algunas discordancias legislativas sobre la responsabilidad criminal de las personas jurídicas en el Código penal español", *Revista General de Derecho Penal* 35 (2021): 1-62.

4 FATF, *Consolidated assessment ranting,* updated 18 February 2021, http://www.fatf-gafi.org.

5 José de Faria Costa, "Um olhar descentrado e crítico sobre 'cousas' que gravitam em torno do direito penal económico (v.g. programa de compliance e branqueamento de capitais)", in *VI congreso international sobre prevención y represión del blanqueo de dinero*, ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2019), 563.

Africa, Latin America and the former Soviet Union involved in drug crimes, tax and customs offences, counterfeiting and human trafficking, Islamic terrorist groups, returning foreign terrorist fighters, abuse of non-profit organizations and providing funds for terrorism. Lawyers and the real estate sector remain vulnerable to money laundering, while the money or value transfer services sector improved[6].

In addition, 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. Soon after, Organic Law 1/2015, of March 30, modified the regulation of criminal liability of legal persons[7] "to deal with the fact that certain state-owned enterprises were exempt from criminal liability"[8].

Finally, the new wording provided by Royal Decree-Law 11/2018 to Article 4.4 of Law 10/2010 warns about the need to identify the real owners of legal persons, considering as such those who own more than 25% of the capital or voting rights or who control them by other means and in trusts or corporations, the settlors, trustees, protectors, beneficiaries as well as those who control them, in addition to enforcing a registration and a declaration of the real owners[9]. Spain also created a National Registry of Foundations that centralises information on associations

6 FATF, *Anti-money laundering and counter-terrorist financing measures. Spain. Follow-up assessment, December 2019*, accessed June 2021, http://www.fatf-gafi.org, 4.

7 Miguel Abel Souto, "Expanding the crime of money laundering and countermeasures against global terrorism", in *Eighth Session of the International Forum on Crime and Criminal Law in the Global Era* (Beijing), *Lex Russica*, 121, no.12 (2016): 125-132; Miguel Abel Souto, "Criminal responsibility of legal persons and money laundering", *The 19th World Congress of the International Society of Criminology* (Doha: 2019); Miguel Abel Souto, "Admission of guilt in economic crimes, money laundering and criminal responsibility of legal persons", *XVII international research to practice conference Kovalyov readings. Legal reconciliation: compromise or concession?* (Yekaterinburg: February 13, 2020), *Advances in Social Science, Education and Humanities Research* 420 (2020): 14-18.

8 FATF, *Anti-money laundering and counter-terrorist financing measures. Spain. 1st Regular Follow-up Report & Technical Compliance Re-Rating, March 2018*, accessed June 2021, http://www.fatf-gafi.org, 7.

9 Miguel Abel Souto, "El blanqueo de dinero, la responsabilidad criminal de las personas jurídicas y la titularidad real según la Directiva 843/2018 y el Real Decreto- Ley 11/2018, *VII congreso sobre prevención y represión del blanqueo de dinero*, ed. Miguel Abel Souto, José Manuel Lorenzo Salgado and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2020), 267.

and foundations and provided some guidances to the foundations[10] and trusts[11].

Obviously it is necessary to sanction money laundering. However, in the prosecution and punishment of money laundering, various excesses are being incurred that must be reported. These excesses, as professor Faria Costa says, erode externally and internally the State[12].

2.

Regarding Covid-19 and money laundering, first of all, according to the dictionary of the Royal Academy of the Spanish Language "epidemic" is an "evil or damage that spreads" and the academic dictionary defines the "pandemic" as an epidemic "that extends to many countries"[13], so it can be stated that money laundering, like Covid-19, constitutes a pandemic, a scourge that affects the whole world and that without a doubt must be combated.

Secondly, the world economy has been very affected by Covid-19, which generates a great destruction of jobs and a huge decrease in the exchange of products, goods and services, leading to a deep economic crisis. In the same sense, money laundering unquestionably damages or endangers the state and international socio-economic order[14].

10 SEPBLAC, *Guía orientativa para los organismos que deben velar para que fundaciones y asociaciones nos sean utilizadas para el blanqueo de capitales o la financiación del terrorismo, Junio de 2015*, accessed June 2021, http://www.sepblac.es, 1-5.

11 SEPBLAC, *Guía de cumplimiento de las obligaciones de diligencia debida en relación con los fideicomisos anglosajones (trusts) y otros instrumentos jurídicos similares, Marzo de 2019*, accessed June 2021, http://www.sepblac.es, 1-6.

12 Faria, "Un olhar", 563.

13 Real Academia Española, *Diccionario de la Lengua Española* (2020), accessed June 2021, http://dle.rae.es.

14 Miguel Abel Souto, *El delito de blanqueo en el Código penal español* (Barcelona: Bosch, 2005); Miguel Abel Souto, "El blanqueo de dinero como innovador instrumento de control económico y social", *Revista Cuatrimestral Europea sobre Prevención y Represión del Blanqueo de Dinero,* no. 1 (2014): 11-65.

Thirdly, both money laundering[15] and Covid-19 are global phenomena, requiring global responses, so isolated state initiatives are doomed to failure[16].

Fourthly, as in Covid-19 it is preferable to avoid contagion than to cure the disease, so it is also better to prevent money laundering than to punish it, therefore the various states approve, in addition to criminal regulations, administrative prevention measures, in accordance with the consideration of criminal law as the last ratio.

Last but not least, INTERPOL[17] warns, in its guidelines for law enforcement agencies, that the Covid-19 pandemic has increased cybercrime, especially frauds of medical products needed to combat it or other online frauds (because the criminal is going to look for the victim in cyberspace since they no longer find her on the street), and according GAFILAT[18] governments must allocate large sums of money to face the pandemic with fast and flexible procedures "which translates into greater risk of corruption". Most of the profits from these crimes are laundered. Also increased with Covid-19 job offers to potential money launderers, malicious or reckless, through emails that promise easy work at home by providing a bank account to make transfers or helping alleged philanthropic associations, African orphans or millionaire widows to manage their assets.

But, in the prosecution and punishment of money laundering, various excesses are being incurred, because as professor Faria Costa said the "minimum values that make us democratic communities"[19] must be respected.

In this sense, the International Society of Criminology made, on April 1, 2020, an urgent request to governments to reduce the overcrowding in prisons, due to the "imminent risk of infection", especially considering that a

15 Faria, "El blanqueo", 662, 663 and 675.

16 Miguel Abel Souto, *El blanqueo de dinero en la normativa internacional: especial referencia a los aspectos penales* (Santiago: Universidad de Santiago de Compostela, 2002); Miguel Abel Souto, *Normativa internacional sobre el blanqueo de dinero y su recepción en el Ordenamieno penal español* (Montevideo/Buenos Aires/Madrid: B de F, 2020).

17 INTERPOL, *COVID-19 pandemic. Guidelines for law enforcement, 26 March 2020,* accessed June 2021, http://www.interpol.int, 14-16.

18 GAFILAT, *Statement on aCOVID-19 and its associated ML and FT risks, 8 April 2020,* accessed June 2021, http://www.gafilat.org, 3.

19 Faria, "El blanqueo", 676.

high percentage of the prisoners have not yet been convicted[20], a very important fact in relation to money laundering due to the evident disproportion, greater than in other crimes, between persons arrested or provisional prisoners and those who finally are sentenced for money laundering[21].

A second excess that many countries have incurred is the confusion between money laundering and terrorist financing[22]. Terribly 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"[23].

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 big 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 1 July 2016 "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed"[24], because as HE says "are threatening innocents' lives,

20 Emilio Viano, *The International Society of Criminology faced with the emergency posed by the Coronavirus pandemic* (Washington: International Society of Criminology, 2020), 1.

21 Miguel Abel Souto, "Volumen mundial del blanqueo de dinero, evolución del delito en España y jurisprudencia reciente sobre las últimas modificaciones del Código penal", *Revista General del Derecho Penal,* no. 20 (2013): 1-33; Miguel Abel Souto, "Jurisprudencia penal reciente sobre el blanqueo de dinero, volumen del fenómeno y evolución del delito en España", in *IV congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2014), 137-201 and 309-317.

22 José Manuel Lorenzo Salgado, "El blanqueo de dinero procedente de los delitos descritos en los artículos 368 a 372 del CP y las nuevas tendencias de financiación del terrorismo advertidas por las Directivas de 2018", in *VII congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto, José Manuel Lorenzo Salgado and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2020), 439-457 and 555-557.

23 Bingsong He, *Eighth Session of the International Forum on Crime and Criminal Law in the Global Era* (Beijing: 2016), 1.

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

infringing people's basic freedom and human dignity and threatening international peace and security seriously"[25], but 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"[26].

Organic law 2/2015, also of 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[27].

However, "in the financing of terrorism, the wrongfulness of the conduct lies not in the source of the goods, but at the destination"[28].

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[29].

Both human rights and the principles of legal certainty and proportionality prohibit criminalization, by connivance with terrorism, normal behaviour in a democratic society, because the reason of state can not prevail over the reason of law[30].

25 He, *Eighth Session,* 2.

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

27 Abel, "Expanding", 125-132; José Manuel Lorenzo Salgado, "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 *V congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2018), 371-374.

28 José Luis González Cussac and Caty Vidales Rodríguez, "El nuevo delito de financiación del terrorismo", in *Financiación del terrorismo, blanqueo de capitales y secreto bancario*, ed. José Luis González Cussac (Valencia: Tirant lo Blanch, 2009), 194.

29 Juan Carlos Ferré Olivé, "Política criminal europea en materia de blanqueo de capitales y financiación del terrorismo", in González, *Financiación*, 164-165.

30 Grupo de Estudios de Política Criminal, "Manifiesto por una política criminal sobre terrorismo adaptada a los nuevos tiempos", in *Una propuesta de renovación de la política criminal sobre terrorismo* (Málaga: Gráficas Luis Mahave, 2013), 9, 11, 15 and 20.

A third excess that many countries have incurred is the confusion between money laundering, immigration and border control.

Regarding immigration, first of all, inhuman trafficking and illegal immigration[31] are one of the most lucrative criminal phenomena[32] 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[33].

To illustrate this point there are several alternative delivery systems such as *hawala*[34] or *hundi*, informal funds transfer without moving based on a trust relationship, voucher systems in China and East Asia or changing the black market peso used by immigrants to send money to their countries[35] .

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[36].

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, normal

31 FAFT*, Report, Money laundering risks arising from trafficking in human beings and smuggling of migrants, July 2011*, accessed June 2021, http://www.fatf-gafi.org, 1-84.

32 FAFT, *Annual report 2010-2011,* accessed June 2021, http://www.fatf-gafi.org, 19.

33 FATF, *Report, Money laundering through money remittance and currency exchange providers, June 2010,* accessed June 2021, http://www.fatf-gafi.org, 7.

34 FATF, *Report, The role of hawala and other similar service providers in money laundering and terrorist financing, October 2013,* accessed June 2021, http://www.fatf-gafi.org, 1-72.

35 José Collado Medina, "El blanqueo de capitales: una aproximación", in *La investigación criminal y sus consecuencias jurídicas*, ed. José Collado Medina (Madrid: Dykinson, 2010), 480-481.

36 FATF*, Report, Money laundering using new payment methods, October 2010,* accessed June 2021, http://www.fatf-gafi.org, 46-47; FATF, *Report, Money laundering through the physical transportation of cash, October 2015,* accessed June 2021, http://www.fatf-gafi.org, 3.

behaviour in a democratic society, because the reason of state cannot prevail over the reason of law.

A fourth excess in which many countries have incurred are the defects of legislative technique when they introduce the criminal liability of legal persons and incorporate money laundering to this model of responsibility[37].

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[38].

Soon after, Organic Law 1/2015, of March 30, modified the hitherto 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.

First of all, it is quite surprising that Organic Law 1/2015 boasts of making "a technical improvement" (Preamble), as it incurs in 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 third paragraph of the second rule of article 66 bis, 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[39].

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"[40]. However this model of responsibility was not

37 Abel, "Criminal responsibility of legal persons", 1; Abel, "Admission of guilt", 14-18.

38 Javier Gustavo Fernández Teruelo, "Blanqueo de capitales", in *Memento experto Francis Lefebvre. Reforma penal. Ley orgánica 5/2010*, ed. Íñigo Ortiz de Urbina Gimeno (Madrid: Ediciones Francis Lefebvre, 2010), 319.

39 Miguel Abel Souto, "Antinomias de la reforma penal de 2015 sobre programas de prevención que eximen o atenúan la responsabilidad criminal de las personas jurídicas", in *Compliance y prevención de delitos de corrupción*, ed. Ángela Matallín Evangelio (Valencia: Tirant lo Blanch, 2018), 13-27.

40 Mateo G. Bermejo y José Ramón Agustina Sanllehí, "El delito del blanqueo de capitales", in *El nuevo Código penal. Comentarios a la reforma*, ed. Jesús María Silva Sánchez (Madrid: La Ley, 2012), 460.

mandatory[41], because international agreements normally only require "effective, proportionate and dissuasive" sanctions, that is to say, administrative sanctions, security measures and other legal consequences other than penalties in the strict sense of the term were enough[42].

In addition, managers and executives who have not adopted an effective compliance program will be held liable together with the company[43], given that now all act "as guarantors of the non-commission of money laundering offenses in their organization, in other words, as police officers"[44] and in case of non-cooperation the Damocles sword hangs over them for a money-laundering penalty.

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, plays an important role in determining the criminal liability of legal persons[45]. However, the mere existence of a protocol of good practices "will not be enough"[46], in order "to mitigate or exclude the liability of a legal person or avoid the liability of certain individual obligors"[47], 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 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,

41 Norberto Javier de la Mata Barranco, *Derecho penal europeo y legislación española* (Valencia: Tirant lo Blanch, 2015), 126 and 129.

42 Jesús-María Silva Sánchez, "La reforma del Código penal: una aproximación desde el contexto", *Diario La Ley* 7464 (2010): 3.

43 Julio Díaz-Maroto y Villarejo, *Estudios sobre las reformas del Código penal* (Cizur Menor: Civitas/Thomson Reuters/Aranzadi: 2011), 460.

44 Jesús-María Silva Sánchez, "Los delitos patrimoniales y económico-financieros", *Diario La Ley* 7534 (2010): 9

45 Bermejo and Agustina, "El delito del blanqueo", 446 and 459-461.

46 Bernardo del Rosal Blasco, "Las pymes son las que menos preparadas están", *Diario La Ley* 8532 (2015): 1.

47 Miguel Díaz y García Conlledo, "El castigo del autoblanqueo en la reforma penal de 2010", in *III congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2013), 292.

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 is condemned to "insignificant use"[48], 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"[49], 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"[50], that it incorporates to article 66 bis. The reform limits for legal persons, in the third paragraph of the second rule of the aforementioned article, to a maximum duration of two 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 second paragraph of its first section, was modified by the "less demanding"[51], formula "Serious breach ... of the duties of supervision, surveillance and

48 José Luis González Cussac, "Responsabilidad penal de las personas jurídicas: arts. 31 bis, ter, quáter y quinquies", in *Comentarios a la reforma del Código penal de 2015,* ed. José Luis González Cussac (Valencia: Tirant lo Blanch, 2015, 2nd ed.), 189.

49 González, "Responsabilidad", 189.

50 Emiliano Borja Jiménez, "Reglas generales de aplicación de las penas: arts. 66, 66 bis, 70 y 71", in González, *Comentarios*, 279.

51 Fiscalía General del Estado, *Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por la Ley orgánica 1/2015*, accessed June 2021, http://www.fiscal.es, 20 and 59.

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[52], 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 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 two 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 to distinguish "a greater intensity of the criminal instrumentalization of the legal person"[53]. 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"[54].

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 fifteen companies, some domiciled in tax havens such as Belize, the Bahamas, the Virgin

52 Isidoro Blanco Cordero, *El delito de blanqueo de capitales* (Cizur Menor: Thomson Reuters/ Aranzadi, 2015), 1017.

53 Borja, "Reglas", 280.

54 Borja, "Reglas", 281.

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. 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 judgments of March 2, 2016 and 5 December 2012, which confirmed the involvement of 14 companies -including four from Delaware that participated in three limited liability companies, a couple of companies domiciled in Gibraltar and two 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, 2012[55].

A fifth excess in which many countries have incurred are new technologies and money laundering.

According 6 Whereas of the Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law virtual currencies present "new risks and challenges from the perspective of combating money laundering" and Directive 2018/1673 obliges member states to "ensure that those risks are addressed appropriately", but already years before 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 required "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

55 Abel, "Criminal responsibility of legal persons", 1.

"providers engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers" (8Whereas).

Money laundering is a "crime of globalization"[56] with a "typically international dimension"[57]. Its importance nowadays is transcendental because of the economic crisis we are suffering.

Indeed, it was noted that an offense that has benefited from the internet is money laundering, generalised by the new electronic media, with a spectacular development thanks to the potential provided via internet and electronic transfers for executing this crime[58].

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[59]. These new technologies are appealing to money launderers mainly because of the anonymity[60] provided, high marketability and usefulness of funds and global access to ATM network[61]. To these factors one should add: the "difficulties"[62] of persecution[63], which requires new investigation methods that must maintain the delicate balance between security and fundamental rights.

In any case, to avoid misuse of legal insufficiencies in new technologies by organized crime, internet cannot be an "area outside the law"[64], but must be regulated.

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56 Michael Levi, "Crimes of globalisation: some measurement issues", in *New types of crime*, ed. Matti Joutsen (Helsinki: Heuni, 2012), 107.

57 Faria, "El blanqueo", 663.

58 Miguel Abel Souto, "Blanqueo, innovaciones tecnológicas, amnistía fiscal de 2012 y reforma penal*", Revista Electrónica de Ciencia Penal y Criminología* 14 (2012): 1-45; Miguel Abel Souto, "Money laundering, new technologies and Spanish penal reform", *Journal of Money Laundering Control*, 16, no. 3 (2013): 266-284.

59 FATF, "New payment", 7.

60 Norberto Javier de la Mata Barranco, "Ilícitos vinculados al ámbito informático", in *Derecho penal informático,* ed. José Luis de la Cuesta Arzamendi (Cizur Menor: Civitas/Thomson Reuters/Aranzadi, 2010), 19.

61 FATF, "New payment", 7.

62 Faria, "El blanqueo", 662.

63 Sabine Gless, "Strafverfolgung im Internet", *Schweizerische Zeitschrift für Strafrecht* 130, no. 1 (2012): 3-22.

64 Gless, "Strafverfolgung", 32.

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, 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[65].

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[66]. 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[67].

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

65 FATF, "New payment", 21.

66 *The money laundering officer's practical handbook 2011* (Cambridge: Compliance training products limited, 2011), 37-39 and 54.

67 FATF, "New payment", 12.

do not have to leave their job in order to collect their salary. This also reduces the possibility of corruption or bribery[68].

In 1996, the Financial Action Task Force was specifically concerned in the recommendation number 13 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[69] – 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 38 years ago there was no internet. However, a decade and a half later the closure of the "European Union Bank" 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[70]. In 2012 nearly three-quarters of households in the European Union have internet access and over a third of the population makes banking online. Today there are more than 4.5 billion internet users in the world.

Precisely for this reason the FATF developed, in October 2010, a report regarding the use of new payment methods for money laundering which focused on prepaid cards, payment services on the internet[71], steady growth, and its misuse for the implementation of the so called "cyber laundering" as well as on payments with mobile phones. Notably, with regard to his latter

68 FATF, "New payment", 12-13, 15 and 20.

69 Abel, "Volumen mundial", 2-6; Caty Vidales Rodríguez, *Régimen jurídico de la prevención y represión del blanqueo de capitales* (Valencia: Tirant lo Blanch, 2015), 16.

70 Jack A. Blum *et al., Refugios financieros, secreto bancario y blanqueo de dinero* (Nueva York: Naciones Unidas, 1999), 52-57.

71 Lixin Yan *et al.,* "Risk-based AML regulation on internet payment services in China", *Journal of Money Laundering Control* 14, no. 1 (2011): 93-101.

issue, it is estimated that 1,400,000,000 people used payments via mobile phones for their financial transactions in 2015[72].

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 recommendation number 16 discusses about electronic transfers and identifying both their originators as beneficiaries[73].

In June 2014 the FATF produced another report on virtual currencies[74], in June 2015 published a Guidance for a risk-based approach virtual currencies[75], in October 2018, the FATF modified recommendations 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 obtain and summit required beneficiary information to conduct USD/EUR 1000 transactions[76].

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[77]. 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.

In addition, 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[78] and the United Nations

72 FATF, "New payment", 18.

73 FATF, "New payment", 17.

74 FATF, *Report, Virtual currencies. Key definitions and potential AML/CFT risks, June 2014,* accessed June 2021, http://www.fatf-gafi.org, 1-15.

75 FATF, *Guidance for a risk-based approach virtual currencies, June 2015*, accessed June 2021, http://www.fatf-gafi.org, 1-46.

76 FATF*, Guidance for a risk-based approach virtual assets and virtual asset service providers, June 2019,* accessed June 2021, http://www.fatf-gafi.org, 4 and 55-56.

77 FATF, "New payment", 46-47.

78 FATF, *International standards on combating money laundering and the financing of terrorism & proliferation. The FATF recommendations, February* 2012, accessed June 2021, http://www.fatf-gafi.org, 25 and 99-102.

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. 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 (Ley 7/2012, article 7) and on 2021 the Spanish government limited 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[79].

Also with Covid-19 the use of cash is avoided and electronic means of payment are preferred, to reduce the possible contagion through physical contact with money. In the same sense, the aforementioned preventive measure of money laundering has an impact, which even intends to eliminate cash, but behind the apparent dogma of the criminogenic character of cash hides a program that exceeds the fight against crime, further marginalizing those who earn less and allows control of the private sphere[80].

Last but not least, Covid-19 has also affected the total control of the population through mobile phones, to monitor the prohibitions of movement or approach, a total control that is also intended to be used in money laundering investigations to achieve greater efficiency. However, that total control can lead us to the world of Orwellian telescreens, to a future, which ORWELL described in his *Nineteen Eighty-Four* work, of "a boot stamping on a human face – forever".

A sixth excess that most countries have incurred is the expansion of the punishment of money laundering. The crime of money laundering since

79 Abel, "Blanqueo, innovaciones tecnológicas, amnistía", 1-45; Abel, "Money laundering, new", 266-284.

80 Mark Pieth, "Zur Einführung: Geldwäscherei und ihre Bekämpfung in der Schweiz", in *Bekämpfung der Geldwäscherei: Modellfall Schweiz?,* ed. Mark Pieth (Basel: Helbing & Lichtenhahn, 1992), 27.

its creation has been expanding unceasingly in Bolivia, Chile, Colombia, Ecuador, Germany, Italy, Mexico, Paraguay, Peru, Spain, USA, etc.[81]

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[82].

I made a unattended call to the legislature to moderate its intervention in money laundering[83], which has preferred to add, with the organic laws 5/2010, 1/2015, 2/2015 and 6/2021, four additional reforms to the already long list of modifications on money laundering[84], 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[85]. These constant reforms violate the legal security or "the spirit of the mean", of which He[86] 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

81 Miguel Abel Souto, "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", in *Derecho Penal Económico y de la Empresa,* ed. Miguel Abel Souto, Rafael Berruezo, Jesús Agustín Celorio Vela and Yery Rojas Torrico (Ciudad de México: Centro Mexicano del Estudios en lo Penal Tributario, 2018), 9-103.

82 Miguel Abel Souto, *La expansión penal del blanqueo de dinero* (Ciudad de México: Centro Mexicano de Estudios en lo Penal Tributario, 2016).

83 Miguel Abel Souto, "Conductas típicas de blanqueo en el Ordenamiento penal español", in *I congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2009), 243-244.

84 Miguel Abel Souto, "Década y media de vertiginosa política criminal en la normativa penal Española contra el blanqueo", *La Ley Penal* 20 (2005): 5-26.

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

86 Bingson He, *Resolution of the International Forum on Crime and Criminal Law in the Global Era on the Theory of Human Rights Defense* (Beijing: 2010), 7-8.

activity", "without being clear the objective pursued"[87] with the replacement, speech which is attributed expansion effort and, in principle, wider than the previous noun "crime"[88], 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"[89]. 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 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[90], and increases social costs[91] so intolerable and contrary to the principle of proportionality[92]. Thus HE[93] says that to achieve the purpose of defense of human rights "the penalty must adhere

87 Araceli Manjón-Cabeza Olmeda, "Receptación y blanqueo de capitales (arts. 301 y 302)", in *Comentarios a la reforma penal de 2010,* ed. Francisco Javier Álvarez García and José Luis González Cussac (Valencia: Tirant lo Blanch, 2010), 340.

88 Fernández, "Blanqueo", 318-139 and 324.

89 Francisco Muñoz Conde, *Derecho penal. Parte especial* (Valencia: Tirant lo Blanch, 2010), 557.

90 Giovanni Maria Flick, "Le risposte nazionali al riciclaggio di capitali. La situazione in Italia, *Rivista Italiana di Diritto e Procedura Penale,* no. 4 (1992): 1264.

91 Giovanni Maria Flick, "La repressione del riciclaggio ed il controllo della intermediazione finanziaria", *Rivista Italiana di Diritto e Procedura Penale,* no. 4 (1990): 1293.

92 Fernández, "Blanqueo", 324; Manjón-Cabeza, "Receptación y blanqueo", 341.

93 He, *Resolution,* 7.

to the spirit of mean'', which opposes to ''any penalties that are extreme, excessive'' and requires ''moderateness and appropriateness''[94].

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[95] and "ditch one of the most controversial issues"[96]. In this sense there was already a plenary agreement no jurisdictional of the Supreme Court of 18 July 2006 admitting the self-laundering[97].

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"[98], even absurd[99], 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[100].

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,

94 Bingson He, *Fourth Session of the International Forum on Crime and Criminal Law in the Global Era* (Beijing: 2012), 4-5.

95 Fenández, "Blanqueo", 319.

96 González and Vidales, "El nuevo delito", 195.

97 Miguel Abel Souto, "La reforma penal, de 22 de junio de 2010, en materia de blanqueo de dinero", in *II congreso sobre prevención y represión del blanqueo de dinero,* ed. Miguel Abel Souto and Nielson Sánchez Stewart (Valencia: Tirant lo Blanch, 2011), 78-80, with references of various sentences.

98 Gonzalo Quintero Olivares, "Sobre la ampliación del comiso y el blanqueo, y la incidencia en la receptación civil", *Revista Electrónica de Ciencia Penal y Criminología* 8 (2010): 13; Gonzalo Quintero Olivares, "La reforma del comiso (art. 129)", in *La reforma penal de 2010: análisis y comentarios,* ed. Gonzalo Quintero Olivares (Cizur Menor: Aranzadi, 2010), 109.

99 Abraham Castro Moreno, "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* 7277 (2009): 1 and 4.

100 Quintero, "Sobre la ampliación", 13; Quintero, "La reforma", 109.

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[101] 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 this is not possible to sanction them for the previous crime[102]. 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[103]. 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 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[104], but regardless of the purpose that guides a money launderer[105].

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 a 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 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,

101 Carlos Martínez-Buján Pérez, *Derecho penal económico y de la empresa. Parte especial* (Valencia: Tirant lo Blanch, 2015), 579-580.

102 Quintero, "Sobre la ampliación"; Quintero, "La reforma", 110.

103 Abel, "La reforma penal, de 22 de junio", 81-98.

104 Muñoz, *Derecho penal,* 554 and 556.

105 Abel, *El delito de blanqueo,* 9-102, 290 and 291; Abel, "Conductas", 177-187 and 235.

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 (art. 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"[106], 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"[107], under the principle of insignificance[108] or of "minimal intervention"[109].

The same principle of insignificance applies to basic consumer acts, services or merchandise sales in everyday vital business[110], given how important it is for individuals to be able to transmit the money received and to use purchased goods[111]. The previous author who only has money originating from a crime "would prohibit almost the satisfaction of vital needs"[112] and thus, his own survival[113], 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

106 Joachim Vogel, "Geldwäsche - eine europaweit harmonisierter Straftatbestand?", *Zeitschrift für die Gesamte Srafrechtswissenschaft,* no. 2 (1997): 356.

107 Wilfried Bottke, "Mercado, criminalidad organizada y blanqueo de dinero en Alemania", translated to spanish by Soledad Arroyo Alfonso and Teresa Aguado Correa, *Revista Penal,* no. 2 (1998): 11.

108 Carlos Aránguez Sánchez, *El delito de blanqueo de capitales* (Madrid/Barcelona: Marcial Pons, 2000), 184, 185 and 248; José Manuel Palma Herrera, *Los delitos de blanqueo de capitales* (Madrid: Edersa, 2000), 350-351.

109 Martínez-Buján, *Derecho penal económico,* 565.

110 Aránguez, *El delito,* 184 and 247-248.

111 Ernst-Joachim Lampe, "Der neue Tatbestand der Geldwäsche (§261 StGB)", *Juristen Zeitung*, no. 3 (1994), 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,* no. XX (1997), 131-133.

112 Stephan Bacton, "Sozial übliche Geschäftstätigkeit und Geldwäsche (§261 StGB)", *Strafverteidiger,* no. 3 (1993), 161.

113 Isidoro Blanco Cordero, "Negocios socialmente adecuados y delito de blanqueo de capitales", *Anuario de Derecho Penal y Ciencias Penales,* no. L (1997), 272.

accounts with uncontrolled money now to refrain traffic"[114], which limits so much economic rights of the citizen raising serious questions of constitutionality[115]. 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"[116], and these elements are not satisfied in the current case and also here would criminalize "behaviours which do not violate human rights, such 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"[117].

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[118], the penalty is aggravated despite such increases gravity "do not have relevant general preventive effect"[119]. Over this punitive "hardening" [120] 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[121], so that the penalty can achieve "really high limits"[122].

The reform of April 28, 2021 increases the punishment of money laundering when goods come from trafficking in human bens, crimes against foreign citizens, those related to prostitution and sexual exploitation, corruption of

114 Wilfried Bottke, "Teleologie und Effektivität der Normen gegen Geldwäsche", Teil 2, *Wistra,* no. 4 (1995), 122.

115 Blanco, "Negocios", 290.

116 He, *Resolution,* 8.

117 He, *Fourth,* 4.

118 Abel, "La reforma penal, de 22 de junio", 98-103; Miguel Abel Souto, "Anti-corruption strategy in the global era and money laundering", in *Fifth Session of the International Forum on Crime and Criminal Law in the Global Era* (Beijing, 2013), 1-7.

119 Silva, "La reforma", 5.

120 Díaz, "El castigo", 288.

121 José Manuel Lorenzo Salgado, "El tipo agravado de blanqueo cuando los bienes tengan su origen en el delito de tráfico de drogas", in Abel and Sánchez, *III congreso,* 235-237.

122 Francisco Muñoz Conde, "El delito de blanqueo de capitales y el Derecho penal de enemigo", in Abel and Sánchez, *III congreso,* 376.

minors, corruption in business and the reform also aggravates the penalty for subjects bound by the prevention regulations if they launder in the exercise of their professional activity.

It cannot be presumed that the amount of money laundered from these offenses exceeds the amount derived from other crimes, for example, the "illicit sale of weapons"[123]. Neither are these aggravations justified by the legally protected interests[124], 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[125], so the qualified *typus* would focus on the characteristics of the material object, the "magnitude"[126] or obvious importance of the amount laundered, but not in the irrelevant nature of the predicate offense[127], since the foundation of the aggravation would reside in the greater flow of illicit goods[128] 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 would deny to attend the previous offense. 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[129]. Finally, the foundation of the aggravation underlies neither greater reproach, since the person who converts property

123 Faria, "El blanqueo", 678.

124 Ignacio Berdugo Gómez de la Torre and Eduardo Ángel Fabián Caparrós, "La «emancipación» del delito de blanqueo de capitales en el Derecho penal español", *Diario La Ley* 7535 (2010), 13.

125 Palma, *Los delitos,* 787-788.

126 Miguel Díaz y García Conlledo, "Blanqueo de bienes", in *Enciclopedia penal básica,* ed. Diego-Manuel Luzón Peña (Granada: Comares, 2002), 209.

127 Aránguez, *El delito,* 316.

128 Patricia Faraldo Cabana, "Aspectos básicos del delito de blanqueo de bienes en el Código penal de 1995", *Estudios Penales y Criminológicos,* no. XXI (1998), 150; Caty Vidales Rodríguez, *Los delitos de receptación y legitimación de capitales en el Código penal de 1995* (Valencia: Tirant lo Blanch, 1997), 142.

129 Eduardo Ángel Fabián Caparrós, *El delito de blanqueo de capitales* (Madrid: Colex, 1998), 194.

linked to these crimes is not guiltier than money launderers derived from other crimes, nor international pressure.

The excessive punishment of new aggravations, like "the abuse of any penalty", according to HE[130], 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[131].

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

In conclusion, as professor Faria Costa says, in the fight against money laundering, the "excessive and unjustified extension of the scope of protection of the regulation"[132] must be critized.

130 He, *Resolution,* 7.

131 J. J. Yu, "Terrorism financing. China", *Revista Penal,* no. 38 (2016), 358 and 361.

132 Faria, "El blanqueo", 670.