Money Laundering and the European Investigation Order

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Money laundering and related financing of terrorism and organized crime continue to be important problems at the European Union level, damaging the integrity, stability and reputation of the financial sector and constituting a threat to the internal market and internal security of the Union.

In order to address these problems, to complement and strengthen the implementation of Directive (EU) 2015/849 of the European Parliament and of the Council, Directive EU 2018/1673 of the European Parliament and of the Council dated October 23, 2018 regarding the fight against money laundering intends to combat it with new measures. Additionally, there are other cooperation in criminal matters organizations such as the European Investigation Order and the European Arrest Warrant and Surrender which can be used for this purpose.

Keywords: European investigation order, money laundering, judicial cooperation in criminal matters, evidence, circumstantial evidence

INTRODUCTION

Money laundering and related financing of terrorism and organized crime continue to be important problems at the Union level, damaging the integrity, stability and reputation of the financial sector and constituting a threat to the internal market and internal security of the Union.

Money laundering can be defined as "the set of diverse and complex mechanisms and procedures that tend to give the appearance of legality to assets of criminal origin (the case of profits from drug trafficking, for example) or to assets of legal origin which their owners have extracted from the pool of known assets for management". In accordance with ALIAGA MÉNDEZ, apart from the criminal concept of money laundering, three consecutive phases are usually identified at the operational level:

a. the placement phase or entry into the financial system, usually with small amounts of money;
b. The diversification phase, consisting of operations intended to erase the initial trace; and
c. The integration phase that intends the return of the assets to the estate of the person who launders with an appearance of normality and legality.

We can conclude from this author that one of the most complicated aspects of determining money laundering activities is understanding the network of financial operations that may underlie these activities and that in many cases it is only possible to obtain the information by means of a prior court order, but, in order to obtain such an authorization, it is necessary to have information to prove the indications that authorize the judicial order[1].

In order to address these problems and to complement and strengthen the implementation of Directive (EU) 2015/849 of the European Parliament and of the Council, the Directive EU 2018/1673 of the European Parliament and of the Council dated October 23, 2018 regarding the fight against money laundering aims to combat money laundering by means of criminal law, allowing a more effective and faster cross-border cooperation between competent authorities. According to its explanatory memorandum:

> "*Measures taken exclusively at national or even Union level, without considering international coordination and cooperation, would have very limited results. The measures taken by the Union to combat money laundering must therefore be compatible with those undertaken in international fora and must be at least as stringent." (insert appropriate citation, i.e. page or paragraph or section number)*

This is why this Directive has a wider dimension because it aims to establish mechanisms for effective cooperation in criminal matters. To that end, it considers that the definition of the criminal activities that constitute predicate offenses for money-laundering purposes should be sufficiently consistent in all Member States, as opposed to what has been the case up to now where such a typical interpretation has been entrusted to different Member States.

Member States should ensure that all offenses punishable by imprisonment under this Directive are considered predicate offenses to money laundering. Any kind of punishable participation in the perpetration of a predicate offense, as defined in accordance with national law, should also be considered a criminal activity for the purposes of this Directive. However, where Union Law allows Member States to provide for sanctions other than criminal sanctions, this Directive should not impose an obligation on Member States to classify offenses in such cases as predicate offenses for the purposes of this Directive.

Consequently, the aim is to establish a broader definition of money laundering so that it also covers offenses perpetrated intentionally and in the knowledge that the assets were generated by an illegal activity, regardless of whether such acquisition was made directly or indirectly from criminal activity. In each specific case, the legal or illegal origin of the assets and whether the person was aware of it must be examined.

But the paradigm change also refers to the possibility of considering as a means of proof directly and sufficiently circumstantial evidence, in the sense that it has already been proposed in the Community legal order and in the Spanish system, as we will analyze later on as it constitutes one of the essential elements of this study.

In fact, it is expressly provided that, in examining whether the property is a result of illegal activity, each individual case must be analysed, assessing circumstances such as the fact that the value of the assets is not proportional to the legal income of that same person and that the criminal activity and the acquisition of assets have occurred within the same period of time. Intent and knowledge can be deduced from objective factual circumstances.

The criminal origin of the assets is an element of the criminal type, a normative element, therefore, it must be subject to the evidence, and there is no special rule in that sense. According to this, the principles set out in SSTC 174/1985, 175/1958 and 229/1998, which provide that "the right to the presumption of innocence is not opposed to the fact that a judicial conviction in criminal proceedings may be formed on the basis of circumstantial evidence", are applicable to demonstrating the criminal origin of the assets[2].

This is however the last step in the fight against money laundering in the EU and the deadline for its transposition by the Member States is December 3, 2020 as stipulated in Article 13.

MONEY LAUNDERING OFFENSES: CONCEPT AND TYPICAL CONDUCTS.

The offense of money laundering refers to all types of conducts or procedures aimed at covering up the illegal origin of the proceeds of illegal activities until such time as they appear to be generated by legal activities and can legitimately circulate in the legal economy[3].

The previous Community Directives established only that Member States shall ensure that money laundering and financing of terrorism are prohibited and they left the question of how to articulate this prohibition specifically to those States, so that a broader criminalizing effect was achieved by national legislation. Neither was there any express reference to self-money laundering and, in order to prevent the violation of *ne bis in idem*, there was no provision for conduct consisting of "*possession and use of the assets"* as a form of laundering[4].

However, Article 3 of the Directive expressly states as follows:

"1. *Member States shall take the necessary measures to ensure that the following conducts, when perpetrated intentionally, are punishable as an offense:*

a) The conversion or transfer of assets, knowing that such assets are the result of criminal activity, for the purpose of concealing or disguising the illegal origin of the assets or of assisting persons who are involved in such activity to evade the legal consequences of their action.

b) The concealing or disguising of the true nature, origin, location, disposition, movement or rights in or to the assets or property of such assets, in the knowledge that such assets are derived from criminal activity.

c) The acquiring, possession or use of assets in the knowledge, at the time of receipt, that such assets are derived from criminal activity."

Furthermore, the second paragraph states that *"Member States may take the necessary measures to ensure that the conducts referred to in paragraph 1 are punished as a criminal offense when the perpetrator suspects or should have known that the assets were derived from a criminal activity",* which in our view again refers to circumstantial evidence and even a certain reversal of the presumption of innocence.

The fifth paragraph of the same provision also provides that Member States shall punish the conduct referred to in paragraph 1(a) and (c) where it is perpetrated by persons who have carried out the criminal activity from which the assets originate or who have taken part in it.

Article 4 states that aiding and abetting, inciting and attempting such conduct constituting money laundering for the purposes of this Directive must be punishable as a criminal offense and calls on the Member States to take the necessary measures to that end.

Article 6 establishes the following as aggravating circumstances of criminal responsibility:

a) The offense has been perpetrated within the framework of a criminal organization, within the meaning of Framework Decision 2008/8417JHA; or
b) That the perpetrator is a liable entity within the meaning of Article 2 of Directive (EU) 20157849, and has already perpetrated the offense within the meaning of Framework Decision 2008/841/JHA or
c) That the perpetrator is a liable entity within the meaning of Article 2 of Directive (EU) 2015/849, and has perpetrated the offense in the course of his/her professional activity.

In turn, the same provision determines that in relation to the conducts of Article 3(1) and (5) referred to above, Member States shall consider them to be aggravating circumstances:

a) The value of the laundered assets is significant or;
b) That the laundered assets are derived from one of the offenses referred to in Article 2(1)(a) to (e) and (h).[5]

In turn, such typical conducts may be carried out by both natural and legal persons, so that Article 7 of this Directive provides that Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the conducts of Article 3 paragraphs 1 and 5, either as perpetrators or as participants, perpetrated for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based either on a power of representation, or on the power to take decisions on behalf of the legal person, or on the power to exercise control within the legal person.

The same provision in the following paragraph calls on Member States to take the necessary measures in order to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in the preceding paragraph has made possible the perpetration of such acts.

However, the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or participants in the conduct referred to in Articles 3(1), 4 and 5 of this Directive.[6]

SPECIAL REFERENCE TO THE CIRCUMSTANTIAL EVIDENCE. -

On very few occasions has direct evidence been used in money laundering cases, and indirect or circumstantial evidence is usually required.

In this sense, we must resort to the case-law of the Supreme Court that allows the sentence as long as certain requirements are met, as stated in his work MARTÍNEZ DE SALINAS:

1. Each one of the indications must be proven by direct, legitimate and practiced evidence with all the procedural guarantees, consisting normally in this type of wrongful acts in documentary evidence (mercantile or fiscal) seized from the money launderer, in minutes of a record, police statements, testimony of the intervening agents...
2. The indication must be plural, unless it is one of great entity, with important relation or affinity between them which determines its probative force.
3. There must be a relevant connection between the facts that serve as the basis for the circumstantial evidence, so that the judge obtains his/her conviction beyond all reasonable doubt.
4. The circumstantial elements must be directly and materially related to the criminal action and its perpetrator.
5. The deductive reasoning behind the conviction must be made explicit in the sentence.

As the same author has concluded since the 1988 Vienna Convention, recourse to circumstantial evidence is provided when he states in article 3 that *"knowledge, intent or purpose required as an element of any of the offenses set forth in paragraph 1 of this article may be inferred from the objective circumstances of the case"*.[7]

In this connection, Article 3(3)(b) of Directive 2018/1673 dated October 23, 2018, provides that Member States must take the necessary measures to ensure that "*a conviction for the offenses referred to in paragraphs 1 and 2 is possible where it is established that they result from criminal activity, regardless of whether all the factual elements or all the circumstances relating to the criminal activity, including the identity of the perpetrator, are established*".[8]

It is time to contribute from the dual criminal and procedural perspective to a correct prevention and suppression of money laundering and in this regard we value positively the contribution of the Community legislator. Only by means of a common policy at the European level will we be in a position to gain advantage over the mafia or organized crime operating in the EU area, which is why it is very important that the Member States take the necessary measures to ensure that those responsible for the prosecution of typical money laundering conduct are supplied with the necessary investigative instruments already used in the fight against organized crime or other serious offenses, as provided for in Article 11 of the Directive. Only in this way will it be possible to act with some guarantee of success, for this reason our assessment of the rule in question is very positive and we encourage the Member States to transpose it within the stipulated time limit, bringing their national law into line with the aforementioned precautions.[9]

In the meantime, it is obvious that the most effective instrument of criminal judicial cooperation in this field and with special reference to this type of criminal conduct is the European Investigation Order, which we will deal with next, but only with reference to its application to the field of money laundering according to its law of transposition into the Spanish legal system.

EMISSION AND EXECUTION OF THE EUROPEAN INVESTIGATION ORDER. SPECIAL REFERENCE REGARDING OBTAINING INFORMATION ON BANK ACCOUNTS AND OTHER FINANCIAL ACCOUNTS

In the case in question, concerning money laundering, European regulations and our Mutual Recognition Law reserve some particularities in relation to the European Investigation Order (EOI).

Clause 27 of the Directive on the European Investigation Order already provides for the possibility of using a European Investigation Order to obtain information on accounts of any kind held by a person subject to criminal proceedings in connection with the investigation of banking or financial activities and to obtain information from any bank or non-bank financial institution. In this regard, continuing with the provisions of this clause, the European Investigation Order may refer not only to the person under investigation but also to all those who may be considered by the competent authorities to be necessary to obtain information concerning them.

Our national legislation, in Articles 198, 199, 217 and 218 of the Mutual Recognition Law,[10] establishes the parameters to be followed both for the issuance of the European Investigation Order by national authorities, as well as for the execution of Orders received from foreign authorities. In this connection, it is determined that the European Investigation Order is not limited exclusively to the identification of the bank accounts involved in the offense under investigation, so that it can be extended to those banking and financial operations carried out within a certain period of time, so that the form for issuing the European Investigation Order will need to specify the circumstances that allow to conclude that the account for which the information is required is located in this territory.

In the case of execution of the European Investigation Order in Spain, among the grounds for refusal, in addition to the general ones, it is appropriate to reject the required investigation measure if in the event of an internal case it is not possible to carry it out.

Apart from the investigation procedures dealt with, the European Investigation Order also integrates those other measures that involve the obtaining of evidence in real time, continuously or over a period of time, providing for everything necessary to solve the existing differences between the national legislation of each Member State.

It follows that the latest measures adopted by the European Union in the field of judicial cooperation in criminal matters are perfectly referable to this type of organized crime offenses for the purpose of money laundering.

We are not only referring to the European Investigation Order, but also to the European arrest warrant and surrender, within the legal limits of the national laws of the Member States and the implementing Directive, and also to the protection of personal data and its exception in the light above all of the latest rule on the matter, approved by Directive 2016/680, which is pending transposition into Spanish law at this stage.

The European arrest warrant and surrender allows the immediate surrender of the person arrested in relation to the list of offenses, thirty-two of which do not require double criminality, that is to say, the act is not proven to be an offense in both countries, so that the only requirement is that it be punishable by imprisonment for a maximum of at least three years in the country of issue, unless there is a mandatory or optional ground for refusal.[11]

The personal data protection cannot be an obstacle to obtain relevant information in a criminal proceeding in cases of money laundering. The limitation of privacy requires the adoption of judicial decisions considered in accordance with the principle of proportionality, given the entity of the right to privacy in its aspect of the right to informational self-determination, especially in relation to sensitive data, such as medical or genetic data. The latter are useful for the purpose of identifying potential participants in punishable offenses, hence the concern of the European authorities to encourage the transnational transmission of genetic data for the purpose of criminal identification of suspects held in national databases.

Since the Prüm Convention dated May 27, 2005, such communication has been encouraged and, as far as Spanish law is concerned, the adaptation rule was approved by Organic Law 10/2007 dated

October 8 regulating police databases on identifiers obtained from DNA, subsequently reformed to facilitate physical coercion to obtain the undoubted biological sample for the purposes of comparison by the Law reforming the Criminal Procedure Act approved by Law 5/2015 dated April 27.[12]

Cooperation is essential in order to encourage the prosecution of criminal offenses and to prevent the free movement and elimination of borders from encouraging the impunity of criminals at European le

ENDNOTES

1. ALIAGA MÉNDEZ, Joan Antonio, Aspectos institucionales del blanqueo en España: fuentes de información en VVAA, *Prevención y represión del blanqueo de capitales*, Estudios de Derecho Judicial, Madrid, 2000, págs. 37 y ss.
   Sobre las tipologías de blanqueo en España, véase, PINILLA RODRÍGUEZ, Álvaro, Las tipologías de blanqueo en España (I): Estudio de las tipologías más frecuentes en nuestro país en VVAA, *Prevención y represión del blanqueo de capitales*, Estudios de Derecho Judicial, Madrid, 2000, págs. 73 y ss; ÁVILA SOLANA, Esteban, Las tipologías de blanqueo en España (II): Casos prácticos específicos en el blanqueo en VVAA, *Prevención y represión del blanqueo de capitales*, Estudios de Derecho Judicial, Madrid, 2000, págs. 85 y ss.; GONZÁLEZ, Esteban, Las tipologías de blanqueo en España (III): Investigaciones policiales sobre el blanqueo de dinero y problemática más frecuente en VVAA, *Prevención y represión del blanqueo de capitales*, Estudios de Derecho Judicial, Madrid, 2000, págs. 105 y ss.
2. LOMBARDERO EXPOSITO, Luis Manuel, *Blanqueo de capitales. Prevención y represión del fenómeno desde la perspectiva penal, mercantil, administrativa y* tributaria, Bosch, Barcelona, 2009, págs. 157-158
3. ABEL SOUTO, Miguel, SÁNCHEZ STEWART, N. (Dir.), *II Congreso sobre prevención y represión del blanqueo de dinero*, Tirant lo Blanch, Valencia, 2011, pp. 29 y ss.
   Sobre los tipos penales de blanqueo de capitales existentes en nuestro ordenamiento jurídico v. BLANCO CORDERO, Isidoro, *El delito de blanqueo de capitales*, Aranzadi, Pamplona, 2015; MALLADA FERNÁNDEZ, Covadonga, GARCÍA DÍEZ, Claudio, LÓPEZ RUIZ, Francisco, *Guía práctica de prevención del blanqueo de capitales*, Aranzadi, Pamplona, 2015; CÓRDOBA RODA, Juan, *Abogacía, secreto profesional y blanqueo de capitales*, Marcial Pons, Madrid, 2006; LOMBARDERO EXPÓSITO, Luis Manuel, *Blanqueo de capitales,* Ob. cit.
4. MATALLÍN EVANGELIO, Ángela, *Blanqueo de capitales y principios penales*, "Revista Teoría y Derecho", TOL, 7.009.128.
5. Article 2 provides definitions for the purposes of this Directive, in particular point 1 states that it is considered "criminal activity": any form of criminal involvement in the perpetration of any offense which, under national law, is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or, in those Member States which have a minimum threshold for offenses in their legal system, any offense which is punishable by deprivation of liberty or a detention order for a minimum of more than six months, but in any event the following offenses shall be considered criminal activity for the purposes of this Directive:
   a) *Participation in a criminal organization or group, through blackmail, intimidation or other methods;*
   b) *Terrorism;*
   c) *Human trafficking and migrant smuggling;*
   d) *Sexual exploitation;*
   e) *Illicit drug and psychotropic substance trafficking;*
   f) *Illicit arms trafficking;*
   g) *Illicit trafficking of stolen goods and other properties;*
   h) *Corruption;*
   i) *Fraud;*
   j) *Currency counterfeiting;*
   k) *Counterfeiting and piracy of products;*
   l) *Environmental crimes;*
   m) *Murder and serious injuries;*
   n) *Kidnapping, illegal arrest and hostage taking;*
   o) *Theft or larceny;*
   p) *Smuggling;*

q) *Tax offenses related to direct or indirect taxes;*
r) *Extortion;*
s) *Counterfeit,*
t) *Piracy;*
u) *Insider trading and market manipulation;*
v) *Cybercrime.*

6. Article 8 of the Directive provides for penalties applicable to legal persons convicted in connection with this type of criminal activity and calls on the Member States to ensure that such penalties are effective, proportionate and dissuasive by indicating the possible penalties, which include, inter alia: a judicial winding-up order, judicial intervention, temporary or permanent closure...
7. MARTÍNEZ DE SALINAS, L., Últimas tendencias jurisprudenciales en material de blanqueo de capitales en ABEL SOUTO, Miguel, SÁNCHEZ STEWART, Nielson (dir.), *II Congreso sobre prevención y represión...*, op. cit, pp. 36 y 37.
   Sobre la prueba indiciaria y su reflejo en la jurisprudencia v. GONZÁLEZ CANO, Mª Isabel, FIDALGO GALLARDO, Carlos (dir.), *La prueba*, TOL 6.450.341.
8. We will have to wait for the regulation of the Spanish lawmaker to analyze the specific terms of this Directive's provision, although it points to a relaxation of the prosecution's evidence that will have to be examined if it is well-compatible with the presumption of innocence and the right of defense of the prosecuted person.
9. As stated by GARZÓN REAL, Baltasar (with VV.AA., CGPJ, *Prevention and Suppression of Money Laundering,* Madrid, 2000, p 444), "*it should not be forgotten that money laundering is an instrument, probably the most effective one, of organized crime. It constitutes the lifeline that gives meaning and coherence to the activity of criminal organizations because fighting it means facing up to them, and we must all be committed to this task by activating to the maximum the ratification and implementation of the instruments and by leading the investigations in the direction currently defined by them, acting with an avant-garde and not a retrograde approach".*
10. Similar to the European Investigation Order Directive in Articles 26 and 27.
11. Council Framework Decision dated June 13, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). Article 2
    Scope of the European arrest warrant
    1. *A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where the complaint concerns the enforcement of a conviction or a security measure of not less than four months' imprisonment.*
    2. *The following offenses, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as defined by the law of the issuing Member State, shall give rise to surrender on the basis of a European arrest warrant under the conditions set out in this Framework Decision and without verification of the double criminality of the acts:*
        - *participation in a criminal organization,*
        - *terrorism,*
        - *human trafficking,*
        - *sexual exploitation of children and child pornography,*
        - *Illicit drug and psychotropic substance trafficking,*
        - *Illicit arms trafficking, ammunition and explosives,*
        - *corruption,*
        - *fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention dated July 26, 1995 on the protection of the European Communities' financial interests,*
        - *laundering of the proceeds of crime,*
        - *Currency counterfeiting, including the Euro counterfeiting,*
        - *high-tech crime, particularly computer-related crime,*
        - *environmental crimes, including illicit trafficking in protected animal species and protected plant species and varieties,*
        - *facilitation of unauthorized entry and residence,*
        - *voluntary manslaughter, assault and battery,*

- *illicit trade in human organs and tissue,*
- *kidnapping, illegal detention and hostage taking,*
- *racism and xenophobia,*
- *organized or armed robberies,*
- *illicit trafficking in cultural property, including antiquities and works of art*
- *scam,*
- *blackmail and extortion,*
- *violation of industrial property rights and counterfeiting of goods*
- *forgery of administrative documents and trafficking in false documents,*
- *counterfeiting of means of payment,*
- *illicit trafficking in hormonal substances and other growth factors,*
- *illicit trafficking in radioactive materials or nuclear substances,*
- *trafficking in stolen vehicles,*
- *violation,*
- *arson attack,*
- *crimes within the jurisdiction of the International Criminal Court,*
- *Hijacking aircraft and ships,*
- *sabotage.*

3. *The Council may decide to add other categories of offenses to the list contained in paragraph 2 of this Article at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU). The Council shall consider, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.*
4. *For offenses other than those referred to in paragraph 2, surrender may be subject to the condition that the facts which justify the issuing of the European arrest warrant constitute an offense under the law of the executing Member State, regardless of the constituent elements or the way in which they are described.*

12. Article 520.6. LECrim: *The assistance of counsel will consist of:*
(c) Informing the detainee of the consequences of giving or refusing consent to the performance of the requested procedure.
If the detainee refuses to take the samples by means of a buccal smear, in accordance with the provisions of Organic Law 10/2007 dated October 8, which regulates the police database regarding identifiers obtained from DNA, the investigating judge, at the request of the Judicial Police or the Public Prosecutor's Office, may impose the compulsory execution of such a measure by means of the use of the minimum indispensable coercive measures, which must be proportionate to the circumstances of the case and respect his or her dignity".
Sobre este tema IGLESIAS CANLE, Inés Celia, Análisis crítico de la LO 10/2007, de 8 de octubre, reguladora de la base de datos policial sobre identificadores obtenidos a partir del ADN, *Revista General de Derecho Procesal, Iustel,* núm. 20, 2010.
ÁLVAREZ BUJÁN, María Victoria, *La prueba de ADN como prueba científica. Su virtualidad jurídico procesal,* Tirant Lo Blanch, Valencia, 2018, págs. 540 y ss.