Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


Money laundering, COVID-19 and new technologies

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Abstract
"Epidemic" is an "evil or damage that spreads" and "pandemic" is an epidemic "that extends to many countries", so money laundering and COVI-19 are two pandemics. The world economy has been very affected by COVID-19 and money laundering unquestionably damages or endangers the state and international socio-economic order. Both money laundering and COVID-19 are global phenomena, requiring global responses, so isolated state initiatives are doomed to failure. 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. INTERPOL warns that the COVID-19 pandemic has increased cybercrime and according GAFILAT 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 through emails that promise easy work at home by providing a bank account. Obviously it is necessary to sanction money laundering. However, in the prosecution and punishment of money laundering, various excesses are being incurred. In this sense, the International Society of Criminology made an urgent request to governments to reduce the overcrowding in prisons, due to the "imminent risk of infection", especially considering that a high percentage of the prisoners have not yet been convicted, a very important fact in relation to money laundering due to the evident disproportion, greater than in other crimes, between provisional prisoners and those who finally are sentenced. In addition, Directive 2018/1673 obliges member states to ensure that new risks of virtual currencies are addressed appropriately. Directives 2015/849 and 2018/843 on money laundering require continuous adaptations of the legal framework to respond to threats of the use of new technologies in money laundering. Also with COVID-19 the use of cash is avoided and electronic means of payment are preferred, to reduce the possible contagion through

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physical contact with money. In the same sense, it is even intended to eliminate cash to prevent money laundering marginalizing those who earn less and controlling the private sphere. Last but not least, COVID-19 has also affected the total control 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, total control can lead us to a future, which Orwell described in his *1984* work, of "a boot stamping on a human face – for ever."

Keywords: *money laundering; COVID-19; cybercrime; new technologies; electronic money; virtual currencies.*

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1. 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" (Real Academia Española 2020), so it can be stated that money laundering, like COVI-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 (Abel Souto 2005b and 2014c).

Thirdly, both money laundering and COVID-19 are global phenomena, requiring global responses, so isolated state initiatives are doomed to failure (Abel Souto 2002 and 2020b).

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 (2020: pp. 14-16) 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 (2020: p. 3) 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.

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, because as Professor He said the penalty "to achieve the greatest value of defending human rights" must be "free from excess" (He 2010: p. 8).

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

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


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risk of infection", especially considering that a high percentage of the prisoners have not yet been convicted (Viano 2020: p. 1), 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 (Abel Souto 2013b and 2014a).

A second excess that most countries have incurred is the expansion of the punishment of money laundering. The crime of money laundering since its creation has been expanding unceasingly in Bolivia, Chile, Colombia, Ecuador, Germany, Italy, Mexico, Paraguay, Peru, Spain, USA, etc. (Abel Souto 2017, Ayala Herrera 2020, Fernández Zacur 2020, Gallegos Ortiz 2020, Joffre Calasich 2020, Ruiz Rengifo 2020, Sánchez Stewart 2020).

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 (Abel Souto 2016a: pp. 1-183).

I made a unattended call to the legislature to moderate its intervention in money laundering (Abel Souto 2009: pp. 243-244), which has preferred to add, with the organic laws 5/2010, 1/2015 and 2/2015, three additional reforms to the already long list of modifications on money laundering (Abel Souto 2005a: pp. 5-26, Zaragoza Aguado 2011: pp. 1154-1155, 2015: pp. 639-640), 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 (Hassemer 1994: p. 1369, 1998: p. 217). These constant reforms violate the legal security or "the spirit of the mean", of which He (2010: pp. 7-8) speaks, citing Cheng Hao and Chen Yi, scholars of Chinese Song dynasty, who believed that the doctrine of the mean includes to be steady, "steadiness means not to be changeable" and "is the law of the world".

First of all, organic law 5/2010, in the initial clause contained in article 301.1, regarding the requirement for the knowledge that the goods have their origin "in a crime", changes these words by the formula "in a criminal activity", "without being clear the objective pursued" (Manjón-Cabeza Olmeda 2010: p. 340) with the replacement, speech which is attributed expansion effort and, in principle, wider than the previous noun "crime" (Fernández Teruelo 2010: pp. 318-319 and 324), 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" (Muñoz Conde 2010: p. 557). 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 (Flick 1992: p. 1293, Terradillos Basoco 2008: p. 261), and increases social costs (Flick 1990: p. 1264) so intolerable and contrary to the principle of proportionality (Fernández Teruelo 2010: p. 324, Manjón-Cabeza Olmeda 2010: p. 341). Thus He (2010: p. 7) says that to achieve the purpose of defense of human rights "the penalty must adhere to the spirit of mean", which opposes to "any penalties that are extreme, excesive" and requires "moderateness and appropriateness" (2012: pp. 4-5).

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 (Fernández Teruelo 2010: p. 319) and "ditch one of the most controversial issues" (González Cussac and Vidales Rodríguez 2009: p. 195). In this sense there was already a plenary agreement no jurisdictional of the Supreme Court of 18 July 2006 (Gómez Rivero 2010: p. 540) admitting the self-laundering (Abel Souto 2011a: pp. 15-16, 2011b: pp. 78-80, with references of various sentences).

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" (Quintero Olivares 2010a: p. 13, 2010b: p. 109), even absurd (Castro Moreno 2009: pp. 1 and 4), 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 (Quintero Olivares 2010a: p. 13, 2010b: p. 109).

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

To avoid jeopardy (Martínez-Buján Pérez 2015: pp. 579-580) 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 (Quintero Olivares 2010a: p. 20, 2010b: p. 110). 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

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


money laundering (Abel Souto 2011a: pp. 17-27, 2011b: pp. 81-98). 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 (Muñoz Conde 2010: pp. 554 and 556), but regardless of the purpose that guides a money launderer (Abel Souto 2005b: pp. 93-102, 290 and 291, 2009: pp. 177-187 and 235, Blanco Cordero 2011: p. 42, 2012: p. 437).

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, 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" (Vogel 1997: p. 356), 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" (Bottke 1998: p. 11), under the principle of insignificance (Aránguez Sánchez 2000: pp. 184-185 and 248, Palma Herrera 2000: pp. 350-351, Ragués i Vallès 2001: p. 625, Terradillos Basoco 2008: pp. 240 and 263) or of "minimal intervention" (Martínez-Buján Pérez 2015: p. 565).

The same principle of insignificance applies to basic consumer acts, services or merchandise sales in everyday vital business (Aránguez Sánchez 2000: pp. 184 and 247-248), given how important it is for individuals to be able to transmit the money received and to use purchased goods (Lampe 1997: pp. 131-132). The previous author who only has money originating from a crime "would prohibit almost the satisfaction of vital needs" (Barton 1993: p. 161) and thus, his own survival (Blanco Cordero 1997: p. 272), if behaviours directed to sustain life are not excluded from typus. Furthermore, it would be forcing any potential provider of goods or services "now to waive the settlement of accounts with uncontrolled money now to refrain traffic" (Bottke 1995: p. 122), which limits so much economic rights of the citizen raising serious questions of constitutionality (Blanco Cordero 1997: p. 290). 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" (He 2010: p. 8), 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" (He 2012: p. 4).

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 (Abel Souto 2011a: pp. 27-31, 2011b: pp. 98-103, 2013c: pp. 1-7, Ferré Olivé 2013: pp. 389-391, Núñez Paz 2013: pp. 267-279), the penalty is aggravated despite such increases gravity "do not have relevant general preventive effect" (Silva Sánchez 2010a: p. 5). Over this punitive "hardening" (Díaz y García Conlledo 2013: p. 288) 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 (Lorenzo Salgado 2013: pp. 235-237), so that the penalty can achieve "really high limits" (Muñoz Conde 2013a: p. 376).

It cannot be presumed that the amount of money laundered from these offenses exceeds the amount derived from other crimes. Neither are these aggravations justified by the legally protected interests (Berdugo Gómez de la Torre and Fabián Caparrós 2010: p. 13), 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 (Palma Herrera 2000: pp. 787-788), so the qualified *typus* would focus on the characteristics of the material object, the "magnitude" (Díaz y García Conlledo 2002: p. 209) or obvious importance of the amount laundered, but not in the irrelevant nature of the predicate offense (Aránguez Sánchez 2000: p. 316), since the foundation of the aggravation would reside in the greater flow of illicit goods (Faraldo Cabana 1998: p. 150, Vidales Rodríguez 1997: p. 142) 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 (Álvarez Pastor and Eguidazu Palacios 2007: p. 356). 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 (Fabián Caparrós 1998: p. 194). Finally, the foundation of the aggravation underlies neither greater reproach, since the person who converts property linked to crimes against the public administration and urban planning is not guiltier than money launderers derived from other crimes (Palma Herrera 2000: p. 785), nor international pressure, since no supranational instrument forces a heavier penalty of money laundering in these cases.

In conclusion, the excessive punishment of new aggravations, like "the abuse of any penalty", according to He (2010: p. 7), 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,

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


bribery and disrupting the order of financial administration and financial fraud crimes (Yu 2016: pp. 358 and 361).

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

A third excess that many countries have incurred is the confusion between money laundering and terrorist financing (Lorenzo Salgado 2020). 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" (He 2016: p. 1).

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" (United Nations 2016: p. 1), because as He says "are threatening innocents' lives, infringing people's basic freedom and human dignity and threatening international peace and security seriously" (He 2016: p. 2), 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" (United Nations 2006: p. 9).

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 (Abel Souto 2016a: pp. 125-132, Lorenzo Salgado 2018: pp. 371-374).

However, "in the financing of terrorism, the wrongfulness of the conduct lies not in the source of the goods, but at the destination" (González Cussac and Vidales Rodríguez 2009: p. 194).

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 (Ferré Olivé 2009: pp. 164-165).

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 (Grupo de Estudios de Política Criminal 2013: pp. 9, 11, 15 and 20).

A fourth 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 (FATF 2011b: pp. 1-84) are one of the most lucrative criminal phenomena (FATF 2011a: p. 19) 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 (FATF 2010a: p. 7).

To illustrate this point there are several alternative delivery systems such as *hawala* (FATF 2013: pp. 1-72) 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 (Collado Medina 2010: pp. 480-481).

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 (FATF 2010b: pp. 46-47, FATF 2015: p. 3).

However, immigration and money laundering must not be confused to extend on immigration the exceptional and reinforced protection against money laundering. Border control cannot become an excuse to control absolutely all citizens and to destroy the guarantees of the rule of law.

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

A fifth 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 (Abel Souto 2019 and 2020a).

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 (Fernández Teruelo 2010: p. 319).

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 (Gómez-Jara Díez 2015: pp. 1-8).

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 (Abel Souto 2018: pp. 13-27).

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


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" (Bermejo and Agustina Sanllehí 2012: p. 460). However this model of responsibility was not mandatory (Mata Barranco 2015: pp. 126 and 129), 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 (Silva Sánchez 2010a: p. 3).

In addition, managers and executives who have not adopted an effective compliance program will be held liable together with the company (Díaz-Maroto y Villarejo 2011: p. 460), given that now all act "as guarantors of the non-commission of money laundering offenses in their organization, in other words, as police officers" (Silva Sánchez 2010b: p. 9). and in case of non-cooperation the Damocles sword hangs over them for a money-laundering penalty (Arzt,Weber, Heinrich and Hilgendorf 2014: §29).

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 (Bonatti Bonet 2017, Gómez Tomillo 2016, Nieto Martín 2015, Reyna Alfaro 2018), plays an important role in determining the criminal liability of legal persons (Bermejo and Agustina Sanllehí 2012: pp. 446 and 459-461). However, the mere existence of a protocol of good practices "will not be enough" (Rosal Blasco 2015: p. 1), in order "to mitigate or exclude the liability of a legal person or avoid the liability of certain individual obligors" (Díaz y García Conlledo 2013: p. 292), 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, 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" (González Cussac 2015: p. 189), 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" (González Cussac 2015: p.

189), 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" (Borja Jiménez 2015: p. 279), 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" (Fiscalía General del Estado 2016: pp. 20 and 59), formula "Serious breach ... of the duties of supervision, surveillance and control" of the current letter b) of 31 bis, following the recommendation made by the OECD to the Spanish authorities of "greater precision" in the "duty of control". Thus, Organic Law 1/2015 is incongruous (Blanco Cordero 2015: p. 1017), 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" (Borja Jiménez 2015: p. 280). 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" (Borja Jiménez 2015: p. 281).

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 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

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


domicilied 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 (Abel Souto 2019).

2. 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 "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" (Levi 2012: p. 107). Its importance nowadays is transcendental because of the economic crisis we are suffering.

Indeed, it was noted that "an offense that has benefited most from the internet is money laundering" (Velasco San Martín 2012: p. 75), "generalised and radicalized" (Sandywell 2010: p. 46) by the new electronic media, with a "spectacular" (Pérez Estrada 2010: p. 306) development thanks to the potential provided via internet and electronic transfers (Fernández Teruelo 2011: pp. 231 and 234) for executing this crime (Abel Souto 2012a: pp. 1-45, 2012b: pp. 220-247, 2013a: pp. 266-284, 2013b: pp. 1-53, 2013c: pp. 1-7, 2014a: pp. 80-91).

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 (FATF 2010b: p. 7). These new technologies are appealing to money launderers mainly because of the anonymity (Mata Barranco 2010: p. 19, Miró Llinares 2011: pp. 12-13 and 25-26) provided, high marketability and usefulness of funds and global access to ATM network (FATF 2010b: p. 7). To these factors one should add: the

problems of persecution (Gless 2012: pp. 3-22), which requires new investigation methods that must maintain the delicate balance between security and fundamental rights (Pérez Estrada 2010: pp. 307, 309 and 311-317).

In any case, to avoid misuse of legal insufficiencies in new technologies by organized crime (Angelini and Gibson 2007: pp. 65-73), internet cannot be an "area outside the law" (Gless 2012: p. 22), but must be regulated (Gómez Tomillo 2006: p. 189).

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 (FATF 2010b: p. 21).

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 (The money laundering 2011: pp. 37-39 and 54). 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 (FATF 2010b: p. 12).

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 do not have to leave their job in order to collect their salary. This also reduces the possibility of corruption or bribery (FATF 2010b: pp. 12-13, 15 and 20).

In 1996, the Financial Action Task Force (FATF) 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 (Abel Souto 2013b: pp. 2-6, Vidales Rodríguez 2015: p. 16) —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” (Schudelaro 2006: pp. 47-72) was agreed in Antigua, the bank that became famous for being the first bank to operate through the

Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


DOI: 10.58179/CCLR6204
https://globalresearchpublishing.com/cclr/


internet and for advertising explicitly on the web that this was the right bank for tax evaders and money launderers (Blum et al. 1999: pp. 52-57, with reproduction of the advertisements that the "European Union Bank" made available in internet, Martin 1997: pp. 38-39). In 2012 nearly three-quarters of households in the European Union have internet access and over a third of the population makes banking online (Bruselas 2012: p. 1, Comisión 2012: p. 1). 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 (Baldwin and Fletcher 2004: pp. 125-158) which focused on prepaid cards, payment services on the internet (Philippsohn 2001: pp. 485-490, Ping 2004: pp. 48-55, Yan et al. 2011: pp. 93-101), steady growth, and its misuse for the implementation of the so called "cyber laundering" (Filipkowski 2008: pp. 15-27) as well as on payments with mobile phones. Notably, with regard to his latter issue, it is estimated that 1,400,000,000 people used payments via mobile phones for their financial transactions in 2015 (FATF 2010b: p. 18).

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 (FATF 2010b: p. 17).

In June 2014 the FATF produced another report on virtual currencies (FATF 2014: pp. 1-15), in June 2015 published a Guidance for a risk-based approach virtual currencies (FATF 2015a: pp. 1-46), 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 (FATF 2019: pp. 4 and 55-56).

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 (FATF 2010b: pp. 46-47). Thus, the study of the framework of the Mafia published by Varese criminal goods arrived in Italy by a large network of individuals who traveled from Russia with cash (Varese 2012: p. 242). There are also new "money mules" recruited by email with the excuse of having an opportunities to work at home through internet. Sometimes the only payment they receive is criminal prosecution for money laundering (Clough 2010: pp. 187-188).

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 (FATF 2012: pp. 25 and 99-102) and the United Nations Convention against corruption provides that "States Parties shall consider implementing feasible measures to

detect and monitor the movement of cash… across their borders", but "without impeding in any way the movement of legitimate capital".

It has been said that the cash is the common medium of exchange in criminal transactions (Jurado and García 2011: p. 172). 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 2017 the Spanish government wanted to limit cash payments to 1,000 euros. So also France and Italy, and the Indian government banned on 2016 money notes of 500 and 1,000 rupees.

However, in order to escape the Charybdis of paper money we will find the Scylla of electronic money, because new payment technologies are not without risks that may thwart prevention and repression of money laundering (Abel Souto 2012a: pp. 1-45, 2013a: pp. 266-284, 2016c: pp. 345-353, González Cussac and Cuerda Arnau 2013: pp. 1-540).

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 (Pieth 1992: p. 27).

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 – for ever."

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Criminology and Criminal Law Review
Volume 6 (Issue 2)/2023 | pp. 43-66


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Volume 6 (Issue 2)/2023 | pp. 43-66


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Volume 6 (Issue 2)/2023 | pp. 43-66


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Received 29 March 2022, accepted 19 April 2023.