AML Newsletter

Main new anti-money laundering and counter-terrorist financing legislation and news

GARRIGUES

Spain

March 2023

1. Sepblac invalidates the request procedure for confirming ownership of accounts between Iberpay entities

The account identification procedure used to date does not fit the recent EBA guidelines.

In 2015, Sepblac specifically authorized the **request procedure for confirmation of account ownership between entities**, a non-face-to-face identification system which may only be used between entities participating in the SNCE-03 subsystem of the National Electronic Clearance System.

This account ownership procedure could be used by any entity wishing to establish business relationships by phone, electronically or remotely with customers not physically in the same location to request confirmation of their identification particulars from another entity, about which it knows it maintains a relationship with that customer. The information was transferred between entities on the SNCE system, managed by Sociedad Española de Sistemas de Pago, S. A. (Iberpay).

On September 28, 2021, Sepblac notified that, temporarily until the implementation of a new procedure, it authorized use of this account ownership procedure for non-face-to-face identification of customers where additional measures would be applied to verify that the person that is participating in the remote identification process is the owner of the account that is the target of the procedure. By sending a two-factor authentication code, for example. This may have made unusable the products many obliged entities invested in to ensure that the additional measures were sufficient to verify the identities of their customers.

On January 17, 2023, Sepblac published on its website in the "Authorization of identification procedures" section, a notice on Iberpay's account ownership procedure, used by a great many credit institutions for the non-face-to-face identification of customers.

The notice states that **Iberpay's account ownership procedure does not fit the EBA's recent guidelines** (European Banking Authority) on non-face-to-face identification published on November 22, 2022 ("Guidelines on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive (EU) 2015/849 (EBA/GL/2022/15)"). Therefore, **the authorization for their use as a non-face-to-face identification procedure,** given by Sepblac on May 22, 2015**, will not be valid** from the date when Sepblac publicly notifies that it has informed EBA of its commitment to comply with the provisions in these guidelines (not before the next four months).

As the competent authority, Sepblac, expects to notify the EBA that it will commit to compliance with the provisions in the guidelines, once their Spanish translation is published.

Namely, that Iberpay procedure would not fall within the remote identification systems described in section ***"4.4.* Matching customer identity as part of the verification process*"*** of the guidelines.

This section requires that, unless an advanced or qualified signature is used, identification must be done using an attended or unattended remote identification system, and these solutions must also ensure, at least:

(i) that there is a match between the visible information of the natural person and the documentation provided;

(ii) where the customer is a legal entity, that it is publicly registered, where applicable; and

(iii) where the customer is a legal entity, that the natural person that represents it is entitled to act on its behalf.

It would appear from these provisions that confirmation by a credit institution of the information relating to the customer's identity which had been transferred through Iberpay does not of and in itself fulfill the requirements laid down by the EBA guidelines.

The notice mentioned above issued on January 17 states, however, that when the Iberpay procedure has become invalid generally, it may be used as a means for **third party application** of due diligence measures. In other words, if Iberpay meets the requirements laid down by the law (article 8 of Law 10/2010, relating to third party application of due diligence measures) to be able to be considered a third party whose services may be used for performance of due diligence obligations, the confirmation system for customer information may continue to be used as a non-face-to-face identification method.

2. Legislation and publications by official bodies

European Council agrees its position on a strengthened AML rulebook

To enlarge the scope of the existing regulatory framework and to close possible loopholes, in December the European Council agreed its positions on the new EU AML rulebook.

The components of this rulebook will be a regulation, a new directive (AMLD6), and a recast of the transfer of funds regulation. The agreed rules have the following goals:

- They will place the spotlight on crypto-asset service providers (CASPs). These providers will have to apply due diligence measures on their customers where they carry out transactions amounting to €1,000 or more.
- The new regulation will be applicable to third-party financing intermediaries, and persons trading in precious metals, precious stones and cultural goods as well as to jewelers, horologists and goldsmiths, where their transactions exceed €10,000.
- A €10.000 EU-wide maximum limit is set for cash payments.
- The EU will adopt the Financial Action Task Force (FATF) list of monitored jurisdictions, resulting in two EU lists: the "black list" and the "grey list".
- The rules on beneficial ownership have also been made more transparent. As a result, it will have to be ensured that any individual or legal entity, including journalists and civil society organizations that are connected with the prevention of money laundering and terrorist financing, has access to information held on the beneficial ownership registers.
- Lastly, this package also foresees a number of measures such as clarifications of outsourcing provisions and of the powers of supervisors, together with the information to which all financial intelligence units should have access.

New order published: Order ETD/1217/2022 on cash declaration in the context of preventing money laundering

On December 8, 2022 the Official State Gazette published Order ETD/1217/2022 of November 29, 2022, on cash declaration in the context of preventing money laundering and terrorist financing.

When it came into force on December 28, 2022, this order repealed Order EHA/1439/2006, of May 3, 2006.

Regulation (EU) 2018/1672 made it necessary to adapt the Spanish legislation to the new disclosure requirements required in EU law.

The subject-matter and scope of the order is **to determine the forms, principles and method applicable to persons who, acting for their own account or for a third party, make the movements of cash defined** in article 34 of Law 10/2010.

Articles 2 and 3 of the order set out the various types of payment mechanisms requiring a declaration, along with the declaration forms applicable to each, which may be completed in person or electronically:

- Notably the order has created **form S-2** for declaring unaccompanied cash entering or leaving Spain from or to an EU member state and for unaccompanied movements inside Spain.
- **Form S-1** has been retained for declaring cash, where it is carried by an individual, either inside Spain, or for movements out of or into Spain to or from an EU member state.
- Other movements that need to be declared will require the completion and filing of the templates approved by Commission Implementing Regulation (EU) 2021/776 of 11 May 2021. The order calls those templates **form E-1** (for accompanied cash) or **form E-2** (for unaccompanied cash).

Article 11 provides the option in certain cases for registered credit institutions to handle declarations filed by their customers, although it makes distinctions between cash leaving Spain and movements of cash inside Spain.

European Commission starts an infringement proceeding against Spain for incorrect transposition of the 5th AML Directive

The European Commission has reported an infringement proceeding started against Spain for “incorrect application” of the 5th Directive (EU) 2018/843, the common AML rules in the European Union.

Although Spain had notified the European Commission of complete transposition of the Directive, Brussels has identified “several instances of incorrect application of the Directive” in relation to the setting up of the central beneficial ownership registers.

In relation to this type of register, considered the "keystone" of EU AML rules, the Commission has sent a letter of formal notice to the Spanish national authorities, underlining that: "Enhancing transparency is fundamental to combat the misuse of legal entities. Member States have to ensure that information about the real owners of these legal entities (their beneficial owners) is stored in a central register".

The EU's press release reports that confidence in financial markets from investors and the general public depends largely on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of companies.

This is the first of three steps in an infringement procedure which gives Spain two months to resolve the shortcomings identified by Brussels. The Commission has started a similar proceeding against Italy for the same reason.

If after the end of that period the Commission considers that the problem continues to exist it will issue a reasoned opinion to give the country a further two months before deciding whether to refer the case to the Court of Justice of the European Union (CJEU).

EBA publishes its guidelines on remote customer onboarding

On November 22, 2022, the European Banking Authority (EBA) published its final guidelines on the use of remote customer onboarding solutions. These guidelines set out the measures that must be adopted by credit and financial institutions to ensure the safety and effectiveness of remote customer onboarding, in line with the applicable anti-money laundering and counter-terrorist financing legislation and with EU data protection rules.

They also set out the steps credit and financial institutions should take when choosing remote customer onboarding tools and to satisfy themselves that the chosen tool is adequate and reliable for complying effectively with their AML/CFT obligations. The guidelines are technologically neutral and do not give preference to one tool over another.

Its key points are:

- Policies and internal procedures. The guidelines require institutions to put in place and maintain polices and procedures that are sensitive to money laundering and terrorist financing risks and have at least:
  - a general description of the solution put in place to collect, verify, and record information throughout the remote customer onboarding process, providing an explanation of the features and functioning of the solution;
  - the situations where that solution can be used, including a description of the category of customers, products and services that are eligible for remote onboarding;
  - an account of which steps are fully autonomized and which steps require human intervention;
  - the controls in place to ensure that the first transaction with a newly onboarded customer is executed only once all initial customer due diligence (CDD) measures have been applied; and
  - a description of the induction and regular training programs.
  - The institution's managing body is responsible for approving these polices and procedures and overseeing their implementation.

- Assessment of the solution. The guidelines require assessment of the remote onboarding solution before it is implemented, plus ongoing monitoring afterwards. Institutions should be able to demonstrate to their competent authority which reviews they carried out and the remedial steps they have taken.
- The documents and information used to verify the customer's identity should be stamped with the date and time, and captured in a readable format allowing for later verification.
- Document authenticity and integrity. Where credit and financial institutions accept reproductions of an original document and do not examine it, they should ascertain that the reproduction is reliable, which should involve assessing several factors mentioned in the guidelines (whether the reproduction is of sufficient quality and definition, among others).
- Unattended processes: institutions should ensure that any photographs or videos are taken at the time the customer is performing the verification process and that algorithms are used to verify if the photograph or video taken matches the pictures retrieved from the official documents belonging to the customer. They should also perform liveness detection verifications to confirm that the customer is present at the onboarding process.
- Attended onboarding processes: institutions should ensure that the employee taking part in the process has sufficient knowledge of the applicable AML/CFT legislation, and is sufficiently trained to anticipate and prevent deception techniques and to react if they occur.
- Additional controls. Where there is an above-average risk of money laundering or terrorist financing, institutions should use one or more of the following controls:
  - draw the first payment on an account in the name of the customer with an EEA-regulated credit or financial institution or in a third country that has AML/CFT requirements that are not less robust than those required by Directive (EU) 2015/849849;
  - send a randomly generated passcode to the customer to confirm the presence during the remote verification process;
  - capture biometric data to compare them with data collected through other independent and reliable sources;
  - contact the customer by phone; or
  - perform controls through direct mailing to the customer (electronically and by post).
  - Where the evidence provided is of insufficient quality and the performance of remote checks is affected as a result, the onboarding process should be interrupted and restarted, or a face-to-face verification should be performed.
- Outsourcing. Where all or part of this process is outsourced, the EBA Risk Factors Guidelines should also be applied (EBA/GL/2021/02), along with the EBA Guidelines on outsourcing (EBA/GL/2019/02).

'Whistleblowing': The law on the protection of whistleblowers and anti-corruption is published, amending the AML/CFT law

Law 2/2023, of 20 February, regulating the protection of persons who report regulatory infringements and the fight against corruption, was published in the Official State Gazette of 21 February 2023. It transposes Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019, known as the Whistleblowing Directive.

The law is targeted at providing suitable protection for anyone who reports acts or omissions that may amount to any of the infringements contained in the law. To achieve its aim, the law requires certain entities to have in place an internal information channel (reporting channel), as well as a management and protection system for whistleblowers, preventing retaliation against them.

The law obliges legal entities in the private sector with 50 or more employees, and **all companies, regardless of the number of employees,** within the scope of application of European Union acts on financial services, products and markets, **prevention of money laundering or terrorist financing**, transport and environmental security. Read more about the law in this publication.

In September 2018, national legislation had already regulated the possibility of anonymous reporting in the field of prevention of money laundering and terrorist financing, through Royal Decree-Law 11/2018, of 31 August, which introduced into Law 10/2010, of 28 April, on the prevention of money laundering and terrorist financing, the current article 26 bis which regulates the internal procedures for reporting potential breaches (internal whistleblowing channels) so that their employees, managers or agents can report, even anonymously, relevant information on possible breaches of this law, its implementing regulations or the policies and procedures implemented to comply with them, committed within the obliged entity.

Now the fourth final provision of Law 2/2023 redrafts section 5 of article 65 of Law 10/2010, stating that "Persons exposed to threats, hostile action or adverse employment measures for communicating through internal channels or to the Commission's Executive Service communications on activities related to money laundering or terrorist financing may submit a complaint to the Autoridad Independiente de Protección del Informante, A.A.I., under the terms provided in the Law regulating the protection of persons who report breaches of regulations and the fight against corruption. In cases in which the obliged entity has not adopted the appropriate measures to maintain the confidentiality of the identity of the employees, managers or agents who have made a communication to the internal control bodies, under the terms of Article 30.1, Article 52.1.s) shall apply".

3. International sanctions

Sanctions against Russia

In December 2022 and in January and February 2023, the European Union approved new sanctions against Russia, coming on top of those imposed earlier, which may be seen here.

On 25 February, the Council adopts the **Tenth package of restrictive sanctions against Russia**. The agreed package includes bans on:

- exports of **critical technology and industrial goods**

- imports of asphalt and synthetic rubber
- provision of **gas storage capacity** to Russians
- transit through Russia of EU exported dual use goods and technology

The EU has also suspended the broadcasting licenses of RT Arabic and Sputnik Arabic; restricted the possibility for Russian nationals to hold any position in the governing bodies of EU critical infrastructures and entities; introduced new reporting obligations to ensure the effectiveness of the asset freeze prohibitions; imposed **additional sanctions against 87 individuals and 34 entities**.

On February 4, the Council decided to set two **price caps for petroleum products** falling under CN code 2710 which originate in or are exported from Russia. These are two caps on the price per barrel at or below which it is prohibited to provide:

- maritime transport of petroleum products originating from Russia to third countries and
- technical assistance, brokering services or financing or financial assistance, related to the maritime transport of petroleum products originating from Russia to third countries.

The price cap for petroleum products:

- traded at a **discount to crude oil** is set at **US$ 45 per barrel**;
- traded at a **premium to crude oil** is set at **US$ 100 per barrel**.

The European Council will review the **price cap mechanism for crude oil** in mid-March and thereafter at two month intervals.

Additionally, on **January 27**, the Council decided to prolong for six months, until July 31, 2023, the restrictive measures targeting specific sectors of the economy of the Russian Federation.

They currently consist of a broad spectrum of sectoral measures, including restrictions on trade, finance. technology and dual-use goods, industry, transport and luxury goods. They also cover a ban on the import or transfer of seaborne crude oil and certain petroleum products from Russia to the EU, a de-SWIFTing of several Russian banks, and the suspension of the broadcasting activities and licenses of several Kremlin-backed disinformation outlets.

The existing measures were adopted on December 16 in the ninth package of sanctions in response to Russia's continuing aggression against Ukraine. The new measures include bans on:

- exporting drone engines;
- exporting dual-use goods and technology;
- investing in the mining sector;
- performing transactions with the Russian Development Bank;
- providing advertising, market research and public opinion polling services.

The EU has also suspended the broadcasting licenses of another four Russian media outlets and sanctioned another 141 individuals and 49 entities.

Additionally, on December 3, the Council decided to set an oil price cap for crude oil, petroleum oils, and oils obtained from bituminous minerals, which originate in or are exported from Russia, at US$ 60 per barrel.

DPRK/North Korea: EU imposes additional restrictive measures on eight individuals and four entities responsible for or involved in the development of ballistic missiles

The European Union has imposed restrictive measures on the Democratic Republic of Korea for the development ballistic missiles. Eight individuals and four entities have been added to the list of those subject to EU restrictive measures.

The EU's first restrictive measures on North Korea were imposed in 2006, when the Council adopted the sanctions imposed by the UN, consisting of an arms embargo, a freezing of assets and a travel ban on persons involved in the DPRK's nuclear program, together with a ban on a range of imports and exports that could contribute to the DPRK's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programs.

Sanctions have been prolonged since then, mostly in relation to nuclear activities. These activities pose a grave threat to international peace and security, and clash with the EU's firm commitment to nuclear non-proliferation and disarmament.

The December 2022 sanction imposes a travel ban to the EU, the listed individuals and entities have had their assets frozen and a prohibition has been imposed on making funds or economic resources available to them. This sanction brings the total number of individuals targeted by EU sanctions to 65, in addition to those imposed sanctions by the United Nations Security Council. In relation to listed entities, the EU has frozen the assets of 13 North Korean companies.

In its press release, the EU calls on the Democratic People's Republic of Korea (DPRK) to comply with its obligations under international law and resume dialog with relevant parties.

4. High risk countries and territories for AML/CFT purposes

New list of tax havens for Spain

The Ministry of Finance and Public Service has approved Order HFP/115/2023 of February 9, 2023, determining the countries and territories, as well as the harmful tax regimes, which are considered non-cooperative jurisdictions.

This order updates the so-called tax havens list and fulfills Law 11/2021 of July 9, 2021 on measures to prevent and combat tax fraud. This law broadened the definition of tax haven to bring it closer to the international concept of non-cooperative jurisdiction, and determined new factors to be taken into account.

Published "to combat tax fraud more efficiently", the order "broadens the concept of tax haven, in line with several principles which, when assessed together", allow "the currently in force list of countries and territories appearing in Royal Decree 1080/1991, of July 5, 1991 to be updated":

- the list has been shortened by 15 territories. Those removed from the list include Monaco and Liechtenstein, with which Spain has not signed a double taxation agreement or tax information exchange agreement;
- the added territories are: Barbados, Guam, Palau, American Samoa, Trinidad and Tobago, and Samoa.

The following territories, and harmful tax regimes, are considered non-cooperative jurisdictions:

- Anguilla
- Bahrain
- Barbados
- Bermuda
- Dominica
- Fiyi
- Gibraltar
- Guam
- Guernsey
- Isle of Man
- Cayman Islands
- Falkland Islands
- Mariana Islands
- Solomon Islands
- Turks and Caicos Islands
- British Virgin Islands
- U.S. Virgin Islands
- Jersey
- Palau
- Samoa, with respect to its harmful preferential tax regime (Offshore Business)
- American Samoa
- Seychelles
- Trinidad and Tobago
- Vanuatu

How is this list relevant for the Mandatory Monthly Report?

While waiting for Sepblac to explain its method, there are sufficient arguments for considering that the list under Royal Decree 1080/91 has been replaced by the February 9 Order (Order HFP/115/2023 of February 9, 2023). Therefore, the countries to consider for the purposes of the Mandatory Monthly Report will be those included in the order described above and those set out in Order ECO 2652/2002: Egypt, the Philippines, Guatemala, Indonesia, Myanmar, Nigeria, Islamic Republic of Iran and Ukraine.

New update of the EU list of non-cooperative jurisdictions for tax purposes

On February 14, the European Council added the **British Virgin Islands, Costa Rica, the Marshall Islands and Russia to the** EU list of non-cooperative jurisdictions for tax purposes.

The EU list of non-cooperative jurisdictions for tax purposes was set up in December 2017. Work on the list is a dynamic process. Since 2020, the Council has updated the list twice a year. The next update is scheduled for October 2023.

Following these new additions, there are now 16 countries on the EU list:

- American Samoa
- Anguilla
- The Bahamas
- British Virgin Islands
- Costa Rica
- Fiyi
- Guam
- Marshall Islands
- Palau
- Panama
- Russia
- Samoa
- Trinidad and Tobago
- Turks and Caicos Islands
- U.S. Virgin Islands
- Vanuatu

This revised EU list of non-cooperative jurisdictions includes jurisdictions that have either not engaged in a constructive dialog with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms. Those reforms should aim to comply with a set of objective tax good governance criteria, which include tax transparency, fair taxation and implementation of international standards designed to prevent tax base erosion and profit shifting.

The list of high-risk jurisdictions for AML/CFT purposes has yet to be updated

In December 2022, the European Commission published a draft decision to add the Democratic Republic of the Congo, Gibraltar, Mozambique, Tanzania and United Arab Emirates to its list of high risk jurisdictions for AML/CFT purposes. In January 2023, the Council asked for more time to review this decision.

MEPs have raised concerns about the delay in adopting the Commission's updated list and are expected to push for faster and more credible listing process. At the same time, MEPs have been working on a revision of EU AML/CFT rules.

These are the high-risk countries for money laundering and terrorist financing purposes

We provide below a chart bringing together all the countries considered to be high risk on the various official lists.

In view of the many lists (FATF, European Commission, domestic lists) that obliged entities have to consult to determine their list of high-risk countries for money laundering and terrorist financing purposes, we drew up the following comparative chart showing the current picture (as of February 15, 2023) for the high-risk country list:

		FATF		European Commission		Spain
Number	Country	Monitored jurisdiction – Grey List (10/21/2022)	High-risk jurisdictions – Black List (10/21/2022)	High-risk third countries (13/03/2022)	Non-cooperative jurisdictions for tax purposes (02/14/2023)	Non-cooperative jurisdictions (02/11/2023)
1.	Afghanistan			■		
2.	Albania	■				
3.	**Anguilla**				■	■
4.	The Bahamas				■	
5.	**Barbados**	■		■		■
6.	**Bahrain**					■
7.	**Bermuda**					■
8.	Burkina Faso	■		■		
9.	Cambodia	■		■		
10.	Costa Rica				■	
11.	**Dominica**					■
12.	United Arab Emirates	■				
13.	Philippines	■		■		
14.	**Fiyi**				■	■
15.	**Gibraltar**	■				■
16.	**Guam**				■	■

Number	Country	FATF		European Commission		Spain
		Monitored jurisdiction – Grey List (10/21/2022)	High-risk jurisdictions – Black List (10/21/2022)	High-risk third countries (13/03/2022)	Non-cooperative jurisdictions for tax purposes (02/14/2023)	Non-cooperative jurisdictions (02/11/2023)
17.	**Guernsey**					
18.	Haiti					
19.	Iran					
20.	**Isle of Man**					
21.	**Cayman Islands**					
22.	**Maldives**					
23.	**Mariana Islands**					
24.	Marshall Islands					
25.	**Solomon Islands**					
26.	**Turks and Caicos Islands**					
27.	**British Virgin Islands**					
28.	**U.S. Virgin Islands**					
29.	Jamaica					
30.	**Jersey**					
31.	Jordan					
32.	Mali					
33.	Morocco					
34.	Mozambique					
35.	Myanmar					
36.	Nicaragua					
37.	Pakistan					
38.	**Palau**					
39.	Panama					
40.	Democratic Republic of the Congo					
41.	Democratic People's Republic of Korea					
42.	Russia					
43.	**Samoa**					(*)
44.	**American Samoa**					
45.	Senegal					
46.	**Seychelles**					
47.	Syria					
48.	South Sudan					
49.	Tanzania					
50.	**Trinidad and Tobago**					
51.	Turkey					
52.	Uganda					
53.	**Vanuatu**					

Number	Country	FATF		European Commission		Spain
		Monitored jurisdiction – Grey List (10/21/2022)	High-risk jurisdictions – Black List (10/21/2022)	High-risk third countries (13/03/2022)	Non-cooperative jurisdictions for tax purposes (02/14/2023)	Non-cooperative jurisdictions (02/11/2023)
54.	Yemen					
55.	Zimbabwe					

(*) Samoa is a non-cooperative jurisdiction for Spain in relation to its harmful tax regime (offshore business)

Team:

Luis de la Peña

Luis.de.la.pena@garrigues.com

Pilar Cruz-Guzmán

pilar.cruz-guzman@garrigues.com

Maria Luz Gómez

marialuz.gomez@garrigues.com

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Hermosilla, 3
28001 Madrid Spain
T +34 91 514 52 00 - **F** +34 91 399 24 08

garrigues.com