Anti-Money Laundering Newsletter

Main new legislation and news in relation to Anti-Money Laundering and combating Terrorism Financing (AML/TF) - 3Q21

GARRIGUES

November 2021

1. Legislation and publications by official bodies

The new European authority for the fight against money laundering will be operational in 2023

Within the fight against money laundering and terrorist financing, on July 20, 2021 the European Commission presented a package of measures to strengthen the EU AML/CTF rules. The proposals form part of the commitments undertaken in its Action Plan for a comprehensive Union policy on preventing these types of crimes, approved on May 7, 2020.

The package of new measures consists of four proposals by the Commission:

- Regulation for the establishment of a New European Anti-Money Laundering Authority (AMLA). It will be tasked with setting common European standards, and supervising financial institutions acting in several EU countries. The new authority's functions include:
  - Coordinating and supervising national authorities to achieve high quality supervision that will ensure correct and consistent application of EU rules.
  - Supervising directly a few financial institutions operating in a number of member states or which have a significant risk profile.
  - Promoting cooperation between national financial information units, by facilitating communication and joint analyses by them, to better identify illegal cross-border financial flows.
- Regulation that will harmonize European AML/CTF rules in the form of a single set of rules. This is to be achieved through directly applicable rules defining a single list of obliged entities for all member countries, and proposing uniform due diligence rules applying to clients and beneficial owners. It also includes a Europe-wide 10,000 euro limit on cash payments.
- VI Directive which will replace the Directive (EU) 2015/849 (4th Anti-Money Laundering Directive, as amended by the 5th Directive) currently in force, which contains provisions that will be included in national legislation, such as rules on national supervisors and financial intelligence units in the member states.
- Revision of Regulation 2015/847/EU, approved in 2015, on transfers of funds in relation to crypto-asset transactions which will allow them to be traced.

  These proposals will help to establish much more consistent rules on facilitating compliance with AML/CTF requirements, especially for obliged entities operating in several member states.

  The package will be debated by the European Parliament and the Council, and a swift legislative process is expected. The future anti-money laundering authority will be created in 2023 but not be fully operational until 2026.

Bank of Spain puts in place new register for virtual currency exchange providers and custodian wallet providers

This register, which was regulated in Spain last April to adapt the Spanish legislation to the 5th Anti-Money Laundering Directive, introduces a whole set of specific requirements to be taken into account by virtual currency exchange providers and custodian wallet providers.

The Bank of Spain recently put in place the new register for virtual currency exchange providers and custodian wallet providers. This register was regulated in additional provision two of Law 10/2010, introduced by Royal Decree-Law 7/2021, of April 27, 2021 on the transposition of EU directives on competition, anti-money laundering, credit institutions, telecommunications, tax measures, environmental damage prevention and remediation, posting of workers in the framework of the transnational provision of services and consumer protection.

Implementing Directive (EU) 2018/843 (the 5th Anti-Money Laundering Directive), the Spanish Anti-Money Laundering Law contains as new cases of obliged entities for the purposes of compliance with the legislation in this respect "providers engaged in exchange services for virtual and fiat currencies and custodian wallet providers". It needs to be remembered that for the purposes of the AML/CTF legislation, providers engaged in exchange services and custodian wallet providers are classed as financial institutions, so they will not be able to benefit from all the exemptions from the internal control rules that the Regulations for Law 10/2010 allows for non-financial institutions. As a result of this obligation and to ensure proper monitoring of their compliance, the law itself requires the Bank of Spain to put in place a register on which those providers have to be entered.

The specific requirements associated with this register are as follows:

(i) The parties that have to be entered include both providers not under the supervision of a competent authority, along with regulated institutions that provide these services and are already registered on the government registers kept by the competent authority.

(ii) The obligation to be registered applies to any providers which:

  (a) operate in Spain without an establishment (due to having the control or management of their activities outside Spain or being a legal entity established outside Spain); or

  (b) operate outside Spain but are established or domiciled (in the case of companies) in Spain.

(iii) The provider concerned must undergo a suitability test in which the Bank of Spain will verify whether it meets the relevant commercial and professional good standing requirements.

Therefore, registration will be necessary where the **supply** of these services, the **establishment** or the **management** of their services are in Spain, no matter where the customers for their services are located.

REGISTRATION PROCESS

Registration must be carried out by the providers in the procedures laid down by the Bank of Spain and using the forms provided by it:

(i) There are specific forms to be completed for each type of service, exchange or custodian wallet: CRIPTO01 (virtual currency exchange activities) or form CRIPTO03 (custodian services).

(ii) In both cases form CRIPTO05 has to be completed relating to the statement of commercial and professional good standing.

(iii) And together with the forms, they have to submit: a no-criminal-record certificate; identity document; the applicant's anti-money laundering and counter-terrorist financing manual; and the applicant's risk self-assessment.

(iv) Legal entities can only send the documents electronically to the Bank of Spain whereas individuals have the option of sending them by mail or electronically.

After examining the applicant's documents, the Bank of Spain will deliver a decision on the application within 3 months from their receipt.

Providing these services without the mandatory registration will be classed a very serious infringement under the Anti-Money Laundering Law, and may be classed serious if the activity was performed simply on an occasional or isolated basis.

Non-face-to-face identification procedure for transmission of account information on the Iberpay (SNCE) platform may continue to be used if certain additional measures are implemented

On September 28, de 2021, Sepblac (Enforcement Service of the Anti-Money Laundering and Monetary Infringements Commission) issued a new information notice on the non-face-to-face identification procedure at Sociedad Española de Sistemas de Pago S.A, (Iberpay), known as the "account ownership confirmation request procedure between institutions". The notice mentions an earlier notice, issued on May 13, 2021, reporting that the Iberpay procedure, which was required since May 22, 2015, would cease to be applicable on September 30, 2021.

The notice published in September states that, temporarily, until Iberpay creates a new procedure and it is authorized by Sepblac, **this procedure will continue to be authorized for non-face-to-face customer identification where additional measures are used to verify that the person participating in that remote identification procedure is the owner of the account that is the target of the identification system**.

One of the additional measures for this verification, as mentioned in the notice, is the chance to send to the account at another institution (the target of this identification system) "a transfer of a very small amount which includes in the description a randomly created alphanumeric code that cannot be made known by any other means to the person participating in the remote identification process". This person will enter their electronic banking service at the other institution and include the supplied alphanumeric code in the registration process. Additionally, the process has to meet specific requirements: "maximum number of attempts, limited validity period for the code and chance to make one request only for another transfer to be sent with the alphanumeric code".

Obliged entities must record these additional measures in writing which must be sent for approval by their internal control body, although Sepblac's specific prior approval is not needed.

The non-face-to-face identification systems set out in the Regulations for Law 10/2010 to date are the following:

(i) The customer must be identity proofed under the applicable legislation on electronic signatures.

(ii) The customer must be identity proofed using a copy of their identity document, which must be issued by a public authenticating official.

(iii) The first payment must come from an account in the customer's name opened at an institution domiciled in Spain, in the European Union or in equivalent third countries.

(iv) The customer must be identity proofed using other secure identification procedures in non-face-to-face transactions, provided that those procedures have first been authorized by Sepblac.

Sepblac has used its given powers to authorize the following secure non-face-to-face identification procedures:

(i) **2015**: Information exchange system on the Iberpay platform. Until September 30 it allowed a customer to be identified if they had opened an account at a credit institution that was a member of Iberpay. The customer's identification information was transmitted on this platform. On or after that date, it can be used if additional measures are used alongside it.

(ii) **2016**: Non-face-to-face identification procedure using videoconferencing.

(iii) **2017**: Non-face-to-face identification procedure using video identification.

Bearing in mind that the non-face-to-face identification procedure currently in place at Sociedad Española de Sistemas de Pago S.A (Iberpay) requires additional measures; the identification system involving the sending of a first transfer to the account intended to be opened, from a European bank at which the client being validated holds an account has been kept as the most efficient non-face-to-face identification system.

Another recently published document that needs to be considered is Order ETD/465/2021, of May 6, 2021, on remote video identification methods for issuing qualified electronic certificates, under the rules on trusted electronic services in the eIDAs Regulation, and implementing article 7.2 of Law 6/2020, of November 11, 2020, on certain aspects of trusted electronic services.

It would seem that the remote identification requirements laid down for anyone applying for an electronic certificate will be accepted for non-face-to-face customer identification, because one of the options allowed by the legislation is that "customers must be identity proofed under the applicable legislation on electronic signatures".

Now in force: Organic Law 6/2021 broadening definition of money laundering offender

After coming into force on April 29, Organic Law 6/2021, of April 28, 2021 has reformed articles 301 and 302 of the Criminal Code, on money laundering offenses.

Its purpose is to write into Spanish law Directive (EU) 2018/1673, enacted jointly by the European Parliament and the Council, which makes a technical enhancement by broadening the definition of a money laundering offender, to encompass all cases and include an aggravating circumstance which will allow the sentence to be increased where the laundered property comes from certain types of offenses.

Organic Law 6/2021 has introduced, among other amendments, a new **aggravating circumstance** in article 302.1 of the Criminal Code, consisting of cases where the money laundering offense **has been committed in the exercise of its professional activities by an obliged entity under the anti-money laundering legislation,** namely Law 10/2010, the Spanish Anti-Money Laundering and Counter-Terrorist Financing Law. The rule is as follows: "A sentence in the second half of the range of severity levels shall be imposed on persons who are obliged entities under the anti-money laundering and counter-terrorist financing legislation and engage in any of the types of conduct described in article 301 of the Criminal Code (LA LEY 3996/1995) in the exercise of their professional activity".

For further information, see here.

Sepblac deems it good practice for payment institutions and electronic money institutions to issue their own IBANs

On August 5, 2021, Sepblac issued a statement in which it deems it good practice for payment institutions and electronic money institutions, where they decide to provide specific IBANs for each customer, to issue their own numbers, and not to use third parties' numbers, usually issued by credit institutions.

The IBAN for an account is a basic element for customer identification and for the correct functioning of payment systems. For that reason, the generalized use of third parties' numbers may affect the fulfillment of anti-money laundering and counter-terrorist financing obligations so, in this notice, Sepblac provides conduct guidelines which have been consulted with the Bank of Spain.

In view of the difficulties that payment institutions and electronic money institutions have for accessing payment systems - exceptionally and only in the case of institutions having an establishment in Spain that choose to operate in the way mentioned in this statement while they manage access with their own IBAN to retail payment systems - a number of guidelines are provided, including: (i) identification of end customers at the start of transactions, so that the credit institution issuing the IBAN has the identification particulars of the customer of the payment institution or electronic money institution that is going to use it; (ii) periodical updating of customer information using an automated system between both institutions that will allow changes to their particulars to be notified and; (iii) recording of information on movements made by end users of the IBAN which will be recorded in the account at the credit institution and in the account at the payment institution or electronic money institution.

Lastly, the credit institutions issuing an IBAN will have to file a statement of information with the Centralized Banking Account Register (FTF), in which they will have to identify as owner of the account the payment institution or electronic money institution adopting the decision, and as beneficial owners, the end customers of the payment institution or electronic money institution, who are beneficiaries of the payment services that these institutions provide to them.

European Court of Auditors finds that EU efforts to fight money laundering in the banking sector are fragmentary and their implementation, insufficient

In its Special Report 13/2021, the European Court of Auditors found that the European Union's current measures in the fight against money laundering and terrorist financing in the banking sector are fragmentary and their implementation, insufficient.

The Court of Auditors based its opinion on deficiencies in coordination between EU institutions for the adoption of prevention measures after a risk has been identified. It found the system to be lacking in that there is still no single supervisor in the European Union and that powers are distributed among several EU bodies, which means that coordination is not uniform across the member states.

For all of those reasons, the Court of Auditors has made a number of recommendations in its reports, including (i) that the Commission should improve on the risk assessments that it currently makes; (ii) in addition to guaranteeing that the effect of the current anti-money laundering and counter-terrorist financing legislation is immediate and; (iii) lastly, the European Banking Authority and the Commission should make better use of their powers relating to the infringements that are committed in this area.

Registrars and European Public Prosecutor's Office sign anti-money laundering cooperation agreement

The Spanish Registrars' Association and the European Public Prosecutor's Office have signed a cooperation agreement allowing the European Public Prosecutor's Office to request information on the beneficial owners of companies entered at commercial registries in Spain.

This information, provided by the commercial registry, will be accessible to the Public Prosecutor's Office in the form of a digital certificate recognized by CORPME, for 24 hours a day, on the web service.

Under this agreement, the commercial registry makes available to the European Public Prosecutor's Office the Beneficial Ownership Register, which contains complete information, updated at least once a year, on the beneficial ownership of registered commercial companies.

It should be remembered that the information in the beneficial ownership file, managed by the commercial registry, is available for any obliged entities that sign an access agreement with that body.

Sepblac and the CNMV agree to review several institutions contemplated in inspection programs

The CNMV's annual report on securities markets and steps in 2020 states that under the rules on cooperation between Sepblac and CNMV in relation to anti-money laundering matters, the two institutions agreed in 2020 to carry out a review program for seven institutions among those contemplated in the audit programs.

The annual report states also that in relation to earlier years, Sepblac received the conclusions based on the scheduled work program regarding the degree of fulfillment of the anti-money laundering obligations relating to six investment services companies and seven companies managing collective investment vehicles.

Sepblac received relevant information in relation to the anti-money laundering incidents identified in the review in the auditor's reports drawn up by the institutions themselves.

2. High risk jurisdictions for AML/CTF purposes

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

On October 5, 2021, the European Union, through the European Council, updated the EU list of non-cooperative jurisdictions for tax purposes. The list is updated twice a year, in February and October, and the latest update was on February 22, 2021.

- Black List (Annex I):

  After this new update, the following jurisdictions **have been removed from the Black List**, and placed on the Grey List: **Anguila, Dominica and Seychelles**.

  Nine jurisdictions remain on the EU list of non-cooperative jurisdictions (Annex I Black List): American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

- Grey List (Annex II):

  Costa Rica, Hong Kong, Malaysia, North Macedonia, Qatar and Uruguay have also been added to the Grey List (Annex II), while Australia, Eswatini and Maldives have implemented all the necessary tax reforms and have therefore **been removed from it**. Furthermore, **Turkey continues to be mentioned** in Annex II. In its conclusions in February 2021, the Council called on Turkey to commit to automatic information exchange with all member states. Even though progress has since been made, further steps need to be taken.

  The EU list of non-cooperative jurisdictions for tax purposes was set up in December 2017 and forms part of the EU's external strategy for taxation. Its objective is to contribute to the current efforts to promote tax good governance throughout the world and it includes jurisdictions around the world that have not engaged in constructive dialog with the EU regarding tax governance or have not fulfilled their commitments to implement the necessary reforms to comply with a set of objective criteria to protect their tax revenues and fight against tax fraud, evasion and avoidance.

3. International sanctions

EU Council adopts framework for sanctions to address situation in Lebanon

The EU Council decided, on July 30, 2021, to adopt a **framework for the imposition of sanctions to try to defuse the situation in Lebanon**. This new framework contemplates the adoption of targeted restrictions and sanctions against individuals and entities who are responsible for undermining democracy in this country.

It allows sanctions to be imposed on either individuals or entities that engage in any of the following activities:

- obstructing the democratic process, by hampering the formation of a government or obstructing the holding of elections;
- obstructing or undermining the implementing of plans approved by Lebanese or international authorities, to improve accountability and good governance in the public sector; as well as structural economic reforms affecting the banking and financial sectors; and,
- serious financial misconduct, which are regarded as such by the United Nations Convention Against Corruption.

The new framework is another step in EU monitoring of the deteriorating political, economic and social situation that is devastating Lebanon. On December 7, 2020, the Council adopted Conclusions in which it noted with "increasing concern", the climate that is taking root in the country. It also reaffirmed a commitment to "the unity, sovereignty, stability, independence and territorial integrity of Lebanon".

EU terrorist list renewed for another six months

(i) The EU Council renewed the so-called **EU terrorist list** on July 19. This document sets out persons, groups and entities subject to restrictive measures with a view to the European Union's fight against terrorism. There are currently fourteen persons and 21 groups and entities on the list.

(ii) The specified restrictive measures include the freezing of assets in the European Union, and a prohibition against any EU operators making funds or economic resources available to them.

(iii) The EU has prepared this list since 2001, under a mandate in UN Security Council resolution 1373/2001, adopted after the terrorist attacks of September 11 in New York. It is regularly updated at least every six months.

(iv) Additionally, since September 2016, the EU can apply sanctions autonomously to ISIL/Daesh and Al-Qaida, and persons or entities associated with them.

Sanctions on Cuba: US approves new restrictive measures after July demonstrations

(i) On July 22, the U.S. Departments of the Treasury and of Defense approved **new sanctions against the Cuban government under the Magnitsky Act**. These measures were adopted after condemning the Cuban government's treatment of citizens who took part in the wave of demonstrations that started on July 11.

(ii) The sanctions were targeted at the Cuban defense minister Álvaro López Miera, and the special forces unit under the Cuban Ministry of the Interior (also known as the Boinas Negras or Black Berets).

(iii) The Office of Foreign Assets Control (OFAC), attached to the U.S. Department of the Treasury's Office, designated López Miera as the individual responsible for what they described as "repression" of the protests in July, as well as of "serious human rights abuse".

(iv) The sanctions include a blocking of all property and interests in property owned by the sanctioned persons and subject to U.S. control or U.S. jurisdiction, along with a prohibition on any U.S. persons, or within or transiting the United States, against carrying out any transactions with these persons.

4. Sanctions and judgments

Supreme Court acknowledges importance of criminal compliance programs at companies

The importance of criminal compliance programs at companies was acknowledged by the Supreme Court in a judgment delivered on May 2, 2021(STS 2197/2021).

In the judgment, the court convicted a company director for a subsidies fraud offense reliant on an offense of forgery and misrepresentation and misappropriation, and noted that the company's lack of control because it had not implemented a compliance program allowed those fraudulent activities to be carried out.

The court also explained that not having these programs "brings us into a domain where their implementation is not confined simply to the criminal liability of legal entities, and instead also includes the self-protection of businesses, bearing in mind that very possibly the facts held to be proven herein would not have occurred had there been a good legal compliance program, unless the appellant had fraudulently evaded the control mechanisms (article 31 bis. 2.3, Criminal Code)

Despite this, the Supreme Court held that these internal control measures do not release the appellant of liability and shift it to the company. It noted instead that the existence of these control mechanisms could have ensured at least that the criminal conduct could have been identified in time or the compliance program would at least have acted as a deterrent to prevent offenses of the type committed.

Supreme Court clarifies which cases determine need to alert Sepblac of money laundering indicators

The Supreme Court, in a judgment delivered on May 27, 2021, explained the assessment that obliged entities must make when faced with the existence of money laundering indicators.

The supreme court judgment reaches the opposite conclusion to that confirmed earlier by the National Appellate Court, and despite an apparently common understanding of what both courts consider to be an "indicator" (neither believe that an indicator is equivalent to prima facie evidence), the two judgments produced significantly different findings.

While for the Supreme Court, from "the list of indicators set out in the sanctioning decision (…) **it may reasonably be suspected that movements of funds from an allegedly illegal origin were made** which have no apparent economic purpose, and we consider that to be **a determining factor for fulfilling the obligation to report them**".

For the National Appellate Court, "the complex or unusual nature of the transactions or their not having any apparent economic or legal purpose may be considered to be risk factors which must lead to a special examination, although **in themselves they are not indicators related to money laundering or terrorist financing activities".** So, the National Appellate Court concluded in its judgment that in the case under examination **there were no "circumstances in relation to which we could strictly be talking about indicators** within the meaning mentioned because **in none of them would the alleged indicators mentioned by the sanctioning decision take us, after a logical process of determining a relationship - not even an approximate one -, to the illegal activities".**

The Supreme Court explained that the National Appellate Court's interpretation is based on the term "indicator", which **confers that room for opinion on the obliged entity**, which **it considers "detracts from the subject-matter and aim of the anti-money laundering legislation itself**, by making it lose its useful effect, concerning the legal duty to report any fact or transaction of which it is aware, as a result of the financial activities it has conducted, over which there is certainty, suspicion or founded reasons to suspect that it may be related to money laundering, after performing the special examination, under article 17".

Navarra Provincial Appellate Court dismisses money laundering complaint contrary to a report by public finance authority

Navarra Provincial Appellate Court (Panel 1, Decision 310/2021, JUR\2021\236716) dismissed a complaint against a Navarra family who settled their tax affairs in relation to assets in Switzerland and investments in the Caribbean, despite having tax reports from the Spanish central and provincial governments' public finance authorities which supported the accusation.

This decision, which had already been taken by Pamplona Investigative Court number 3, was corroborated by the provincial appellate court. The judge took the view in her decision that "the statements made in auditors' tax reports cannot be regarded as actual indicators rather than simple suspicions that do not invalidate the explanations and reasons provided (by the defendants)".

In 2012, with a view to settling the tax affairs of all their companies and funds abroad, a father and his sons had contacted an advisor in 2012, and that advisor had contacted the provincial public finance authority, to prepare all their personal income tax and wealth tax returns for non-statute barred years, and they also carried out a corporate restructuring, in which they centralized all the assets they owned abroad at a new company created in Spain, at which the only owners were the sons.

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