

## THE AMENDMENT OF THE CRIMINAL CODE IN RELATION TO MONEY LAUNDERING MEANS COMPANIES HAVE TO REVISE THEIR COMPLIANCE PROGRAMMES

Spain has finally transposed the content of Directive (EU) 2018/843 (known as AMLD5, or the "**Fifth Directive**") and Directive (EU) 2018/1673 (known as AMLD6, or the "**Sixth Directive**").

Shortly after publication of Royal Decree-law 7/2021, of 27 April, in the official state gazette (*BOE*), which transposes the Fifth Directive into Spanish legislation and includes new measures to strengthen the anti-money laundering and terrorist financing systems, the Organic Law 6/2021 has modified the Criminal Code to complete the transposition of the Sixth Directive with respect to anti-money laundering, with an increase of the penalties for this offence.

### INCREASE OF PENALTIES FOR MONEY LAUNDERING: DEPENDING ON BOTH THE OBLIGED PARTY AND THE TYPE OF PRECEDING OFFENCE

The recent reform of the Criminal Code has introduced **two major developments**:

- First of all, among the aggravating factors applicable to the offence of money laundering, there is now an explicit factor that the Criminal Code had not contemplated before, referring to the special status of the perpetrator of the offence, according to the list contained in article 2 of the Anti-Money Laundering and Terrorist Financing Act (*Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo*).
- Secondly, the aim is to apply harsher criminal penalties to those scenarios in which the assets being laundered are the proceeds of certain offences, which include, aside from those offences already envisaged in the Spanish Criminal Code such as trafficking in toxic drugs, narcotics or psychotropic substances), others such as human trafficking, against foreign citizens, prostitution, sexual exploitation and corruption of minors, as well as those offences related to business corruption.

As the Preamble states, the **purpose of this change** is, on the one hand, to include a description of the type of offence that covers all the scenarios required by the European legislation; and, on the other, to make it possible to effectively combat a type of offence that is characterised by the variety and complexity of the forms it takes, with a view to equipping the fight against money laundering with more effective, proportionate and deterrent sanctions.

Thus, **the penalties** envisaged in the Criminal Code have been **increased, with those envisaged in the upper half of the scale being imposed** in two scenarios:

#### Key issues

- **Spain has finally transposed the Fifth Directive and, in line with the provisions of the Sixth Directive, has increased the penalties associated with some conduct related to money laundering.**
- An increased penalty is envisaged **for obliged parties** in relation to money laundering and terrorist financing, **when they commit these offences in the context of their professional activity.**
- Increased penalties will also be imposed **when the laundered assets are the proceeds of certain offences.**

These amendments will oblige undertakings to revise and update their risk maps.

- in case those who, being **parties that are bound** by anti-money laundering and terrorist financing regulations, **commit any money laundering conduct in their professional activity**; and
- when **the assets being laundered are the proceeds of certain offences**, such as trafficking in toxic drugs, narcotics or psychotropic substances, as well as human trafficking, offences against foreign citizens, prostitution, sexual exploitation and corruption of minors, land use and urban planning offences and those related to corruption (bribery, influence peddling, business corruption, embezzlement, fraud, etc.).

## **THE NECESSARY REVISION AND UPDATE OF COMPLIANCE PROGRAMMES IN LIGHT OF THE INCREASED PENALTIES**

From a practical perspective, these amendments to the Criminal Code entail the need to revise and update compliance programmes.

Both obliged parties and companies that, in general, have identified some kind of risk related to money laundering on their risk maps, will have to carry out a **revision of their compliance systems, specifically, of their risk maps and internal oversight**, with a view to accounting for the increase in risk associated with such conduct. This process is of particular importance for obliged parties, as they are now facing harsher penalties in the event they commit any money laundering offences as part of their professional activity.

These recent amendments highlight, once again, the **importance of constant updates of compliance programmes**, including anti-money laundering manuals, as well as proper training for employees and executives on what is a shifting panorama and that requires continuous effort in order to be up-to-date with regard to new risks and threats in fields such as that of anti-money laundering.

## **OTHER REGULATORY DEVELOPMENTS: SPAIN FINALLY TRANSPOSES THE FIFTH DIRECTIVE**

The transposition of the Fifth Directive has been carried out **by means of Royal Decree-law 7/2021, in view of the urgency after the deadline had passed** with the twofold objective of perfecting terrorist prevention mechanisms and improving the transparency and availability of information on the beneficial owners of legal persons and other entities without legal personality active in legal transactions.

The main **new developments** include:

- the inclusion of **new obliged parties** such as "services providers of virtual currency for fiat currency exchange, and custodian wallet providers", being the last defined by the same legislation as those natural or legal persons who provide services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies in a similar way to the custody of funds or traditional financial assets (providers of these services are also required to register in the Bank of Spain);
- the establishment of **detailed regulations for a single and central Beneficial Ownership Register, access to which will be public**;
- incorporation of **new obligations with respect to the Financial Ownership File**, such as the obligation to declare the rental of safe deposit boxes and payment accounts, including those managed by payment institutions and electronic money institutions, which are now obliged parties and have to declare together with credit institutions, which already had this obligation; and
- the **processing of personal data** in line with the General Data Protection Regulation (EU) 2016/679 of 27 April 2016 and the Spanish Personal Data Protection Act (*Ley Orgánica 3/2018, de 5 de diciembre, Protección de Datos Personales y garantía de los derechos digitales*).

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28046 Madrid, Spain

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