Money Laundering, Criminal Responsibility of Legal Persons and 2018 Directives*

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The common criminal instrumentalization of companies for the commission of money laundering motivated in 2010 their incorporation into the criminal responsibility of legal persons and the possible exemption or mitigation of punishment in 2015 through compliance programs, which pose several problems. Directive 2018/843 also seeks to achieve greater transparency of transactions, companies, legal entities, trusts and similar instruments, and Directive 2018/1673 makes it compulsory to ensure that legal persons can be held responsible for the money-laundering offense, although it does not require the use of criminal penalties; however, a reform of Article 303 of the Criminal Code will be necessary, and this amendment should be used to remove obvious errors.

Keywords: money laundering, criminal responsibility of legal persons, Directive 2018/843 and Directive 2018/1673

INTRODUCTION

It is not surprising that, due to the frequent incidence of money laundering within companies[1] and the "linkage"[2], from the very first incriminations, between money laundering and organized crime[3], with measures of establishments closure, suspension of activities or dissolution[4], by introducing the reform dated June 22, 2010, the criminal responsibility of legal persons incorporated money laundering into this innovating model of criminal responsibility[5] provided for in Article 31 bis of the punitive legislation[6], but it is striking that Organic Law 1/2015 boasts a "technical improvement"[7] in the until recently poorly applied[8] regulation, as I stated in Doha[9], an application that has become regular although not particularly frequent[10] recently[11], because Organic Law 1/2015, in addition to generating inconsistencies such as the invocation of a non-existent application experience[12] and "many shadows that need to be cleared"[13], incurs obvious contradictions, such as exempting, according to the second and fourth paragraphs of Article 31bis, legal persons from criminal responsibility for money laundering that should not have existed by virtue of the adoption and effective implementation of compliance programs that are suitable or adequate to prevent it[14].

In any case, according to SILVA SÁNCHEZ, in the face of the alleged "need to fulfill international commitments"[15], this model of liability was not compulsory[16], since conventions normally only require "effective, proportionate and dissuasive" sanctions, which include administrative sanctions, security measures and other legal consequences other than penalties in the strict sense[17]. The fact that several European Union countries have not considered the criminal responsibility of legal persons[18], such as Germany, is clear proof that there is no incrimination mandate, but in the end Spain joined the "current"[19]

of Western countries in 2010, and in Europe the Netherlands enshrined the criminal responsibility of legal persons in 1976, United Kingdom, Norway and Ireland in 1991, Iceland in 1993, France in 1994, Finland in 1995, Slovenia and Denmark in 1996, Estonia in 1998, Belgium in 1999, Switzerland and Poland in 2003 or Portugal in 2007. In Latin America, Chile has also followed this trend in 2009, Ecuador in 2014, Mexico and Venezuela in 2016, Argentina in 2017 and Peru in 2018[20]. There has even been talk, with regard to the criminal punishment of legal persons, of a necessity imposed "in the law of our time"[21].

On the other hand, with the company as a "source of danger"[22], those directors or managers who have not adopted an effective compliance program[23] will be held responsible, since they now all act "as guarantors of the non-commission of money laundering offenses in their organization, in other words, as police officers"[24], "collaborators in the exercise of public functions, even to their own detriment"[25], a surprising transfer of police functions from their profession when the technical police in the field did not suspect any illegal activities[26], and in the event of non-cooperation, the sword of Damocles hangs over them on a money-laundering charge[27], which represents "a considerable expansion of criminal law"[28], another example of police cooperation with American roots[29], such as the punishment of the attempt that favours the figure of the agent provocateur[30], which, moreover, is already expressly defined in Article 1956 a, 3, A), which refers to undercover police action[31]. Consequently, the State transfers control duties to the company, but at the same time there is another transfer of responsibility from the managers to the workers, as denounced by GONZÁLEZ CUSSAC, since the risk that corresponded to the capital now, with the compliance programs, extends to the employees, who assume duties to avoid and manage risks, with loss of rights such as privacy, in relation to the use of new technologies, to keep silent or be contradictory, and the entrepreneur increases his monitoring and disciplinary powers, furthermore, the administrators, who are given the responsibility, are separated from the capital, which remains with the dividends or the share appreciation, the large fines go to the cost/benefit balance sheet of the company and mitigate the constant financial crisis of the State[32]. However, economic and business criminal law, in order to face the criminal instrumentalization of corporations, companies and multinationals, cannot become a "differentiated sub-model"[33] that privileges and darkens "the figure of the individual -economic criminal-"[34].

Even in the United States, there is a specific type of money-laundering under Title 18 of the Criminal Code, section 1960[35], which punishes anyone who conducts, controls, manages, monitors, directs or owns an unlicensed money-transmission business[36], an offense whose volitional requirements have been relaxed by the Patriot Act[37], many companies linked to organized crime (RICO) are engaged in money laundering and Articles 1961 to 1964 punish with up to 20 years' imprisonment persons linked to companies that are structured in a mafia-like manner or that carry out a *racketeering activity*, which is very broadly defined in Article 1961, first paragraph[38].

Although the charge of improper omission by managers or control bodies in a position of guarantor[39] requires more than the neglect of the functions of surveillance and poses considerable problems[40], such as the perpetration of acts through command responsibility[41] and the application to legal persons of the theory "the perpetrator behind the perpetrator" created for criminal organizations or the charging of several persons[42], including the *compliance officer*, [43]and the admission of both the perpetration[44] and the participation of a natural person to generate criminal responsibility of legal persons, since article 31 bis of the Criminal Code refers to the commission of the offense and not to the execution of the action[45].

As a result, risk management[46], or the evaluation and monitoring by the regulated entity of the money laundering risk with respect to its clients, through [47]*compliance programs*[48], plays an important role in determining the criminal responsibility of legal persons[49], although, even if government authorities have stated otherwise, [50]"it will not be enough"[51], the mere existence of a protocol of good practice "will not be sufficient"[52] to mitigate or exclude the responsibility of a legal person or to avoid the responsibility of certain individual obligated parties",[53] because compliance programs represent a necessary but insufficient requirement for exemption or mitigation[54] and not a "guarantee of automatic exclusion of the company's criminal responsibility"[55], despite the fact that Organic Law 1/2015 dated March 30 contradictorily introduces new paragraphs, the second one (condition one) and fourth, into article 31 bis of the Criminal Code, exempting from criminal responsibility legal persons that adopt and effectively

implement an organization and management model that is suitable or appropriate for the prevention of offenses related to the nature of the crime committed or for the significant reduction of its perpetration risk, since in most cases the subsequent money-laundering will demonstrate the inefficiency of the model, its inappropriateness or unsuitability to prevent it, and that the danger of criminal commission has not been significantly reduced[56]: "the best proof of ineffectiveness"[57] will be "that the perpetration of a crime has not been prevented"[58], hence the "high problematic burden" of demonstrating effectiveness after the initiation of proceedings for the commission of an offense, "insurmountable situation" or "paradoxical"[59], although the paradox can be partially avoided "if we rule out an impossible parameter of absolute material suitability"[60]. Indeed, an interpretation in accordance with the principle of validity requires that suitability, adequacy or effectiveness be understood not in an "absolute"[61] way but in a relative sense, since "suitable"[62] is not "infallible"[63], therefore "the measurement parameter must be reduced to a relative material suitability *ex ante*"[64] and there is no discussion "in the abstract"[65] about the "program's goodness"[66]; as an example, normally the program's controls prevent the acceptance of cash from the sales representatives, but on some occasions they admit it, generating a risk of money laundering, so that it can be stated that the danger is reduced[67] and that the offense prosecuted involved "a sporadic, occasional and even exceptional risk[68].

In fact, "there is an undeniable relationship between prevention of money laundering and compliance programs"[69] and it has even been said that the exemption or mitigation of punishment of legal persons by the adoption of *compliance programs* "seems to be inspired by the risk-based approach"[70] to money laundering prevention, since the enhancement of this approach has been "of essential importance in the creation of compliance programs"[71], although the policies and procedures to be reflected in the prevention of money laundering manual are not exactly the same as the *compliance programs* mentioned in the Punitive Legislation[72], which affect different offenses, such as bribery, influence peddling[73] or crimes against public finances[74], and obviously not only legal persons bound by the prevention of money laundering regulations can commit this offense[75].

However, the exemption is condemned to "a negligible application"[76], demonstrated by the Italian experience, important here since the reform of 2015 reproduces literally a criticized Italian legislative decree, dated June 8, 2001, a servile copy that even incorporates verbal disagreements[77]; more often than not, as in this country or in the United States, the "cradle of *compliance*"[78] which does not usually exempt legal persons[79] either, will be used as a mitigating factor[80] for "partial accreditation", which of course cannot refer to an unacceptable reduction in the burden of proof, of the prevention systems[81], but rather to the "insufficiency[82]" of the "organizational and management models"[83], although the different description of the mitigating factor in paragraphs 2 and 4 of Article 31 bis for the actions of managers and subordinates also poses interpretation problems[84]. *V. gr.,* condition one of Article 31 bis (2) requires the adoption and effective implementation, prior to the offense, of a compliance program suitable to prevent crimes of the same nature, so that if the management body agrees to adopt a program but does not implement it[85], it "could be considered as mitigating"[86], although "there is a gap"[87] between the mitigation applied to condition one of Article 31 bis (2) and the *ex-post* mitigating circumstance of 31 quáter(d), where the suitability to prevent or reduce the risk of the committed offense is not established but society claims that the program otherwise works. In the absence of a specific parameter, it would not be possible to create "a *supralegal exoneration*, nor an analogical extenuating circumstance without express legal authorization"[88], however, the judge could evaluate it in the choice and modulation of the penalty within the discretion that the Criminal Code allows in judicial individualization[89]. Most often the mitigating factor is "skillfully combined with plea bargaining"[90], which has the powerful stimulus of creating fears of facility closures or business interruptions that will result in much greater business disruption. This is also the case in the United States, the [91]"cradle of *plea bargaining*"[92], where there are *deferred prosecution agreements* and agreements not to prosecute for the benefit of the company and the prosecuting authorities[93], such as the recent and controversial agreement between the Department of Justice and the Swiss bank HSBC, which paid a historic fine in order to continue operating in the United States[94], informal agreements that the *Crime and Courts Act* introduced into English law[95] on February

24, 2014. In Spain, this means that a legal entity can claim a lesser penalty by accepting a negotiated sentence and renouncing both oral proceedings and the presentation of evidence[96].

In any case, "it would be a contradiction in terms if those who control the legal person which they use to channel their criminal activity in turn implemented measures to prevent their own purposes and plans"[97], as stated in the sentence dated July 19, 2017, because in the case of intentional crimes "the function of general prevention is deployed by the Criminal Code, and not a compliance program"[98] and "maliciousness is bad for the ideology of prevention and care"[99], just as there is no point in a *"paper compliance"*[100] or "cosmetic compliance"[101] that reflects "a pretended but not real willingness to take crime prevention seriously within the company"[102], a program not of compliance but, in the jargon, of "compliance and lying".

With regard to the emergence of prevention programs, on February 23, 1947, the *International Organization for Standardization* (ISO) was created within the United Nations to promote worldwide, certifiable standards that would guarantee the quality of products and services[103]; In 1977, the United States issued regulations against corruption and bribery, within the framework of which the *Organizational Guidelines* were approved, which provided for the reduction of the penalty for companies that incorporated *compliance programs*. Later, the UN drafted a convention that forced the States to promote measures against corruption[104], and as a consequence of Organic Law 1/2015, dated March 30, the compliance programs were introduced into Spanish criminal law, which can be certified by AENOR[105] (UNE regulations), a member of the ISO since 1986. This is how the standards ISO 19600: 2014 on *compliance* management systems, 19601: 2017 on *criminal compliance*[106] and UNE 19602: 2019 on tax risks[107] appeared and *compliance programs* were born as a "translation of the codes of conduct into criminal law"[108], first implemented in American business[109] activity and which "would later travel to Europe"[110] driven by the "great transnational corruption scandals"[111]. Although even before the 2015 reform in Spain, compliance programs were already contained in the "duty of companies to control their own employees and managers"[112], according to company law, the regulations on health and safety in the workplace and, of course, in the subject under discussion, the prevention of money laundering, to which the financing of terrorism was assimilated[113].

Obviously, *compliance* represents an added value to the company, it is in vogue in our country and the reform dated March 30, 2015 gave it a great diffusion impulse[114]. However, "the Spanish model is very generous"[115] in allowing "a compliance program to operate as an exemption"[116], since the criminal process is neither "an audit"[117] nor a "quality assessment"[118]. The total exclusion by *compliance programs* of the criminal responsibility of legal persons is a problem, especially when it derives, as in Spain, from the actions of a natural person and above all with respect to criminal decisions adopted by those who have the corporate power for whom control systems are useless[119]. It is enough to remember that Enron's compliance program was designed to divert criminal responsibility towards the inferior ones, who absorbed it, so that *compliance programs* also generate disillusionment and a risk of becoming judicially simple nominal sticker controls[120], so that an AENOR certification[121] could come to be considered a "criminal responsibility vaccine"[122] or "safe-conduct"[123] moving corporate responsibility "to nebulous grounds between the public and the private"[124] in another example of a singular economic criminal law or "covert self-regulation"[125]. However, the role of a compliance program should not be simplified to a mere "protective shield" or [126] "bull"[127], as the company will never be fully confident of adopting an effective program[128], because "it is impossible to state *ex ante* that applying a series of measures will prevent the perpetration of offenses or reduce the risk of their perpetration"[129]. Therefore, even though the judge may take into account the certifications, "in no event is he subject to them"[130], "they do not bind him"[131] nor do they represent "an absolute guarantee or credit of the program's effectiveness"[132] but simply constitute one more element of the judicial assessment[133].

With regard to the legal consequences[134], it must be taken into account whether we are dealing with legal entities or companies in which those responsible for the offenses have a total or majority shareholding. Accordingly, the ruling dated July 19, 2017, reduced the penalties for legal entities from five to two years, with a reduction in the daily fee from 2,000 to 100 euros, and for the suspension and

closure of premises and establishments from five to two years in one case and from four years in another, with a daily fee of 2,000 euros, to two years and a fee of 100 euros per day[135].

Finally, even though a large proportion of money laundering operations are carried out by companies and many of the parties bound by the prevention regulations are legal persons[136], the order of the Criminal Division of the Spanish National Court of Justice dated May 19, 2014, which refused to register a trading company, which had its assets seized and whose sole administrator was the defendant in a money laundering proceeding, began to explore the concept of corporate responsibility[137] and to distinguish between legal persons that are not subject to liability and those that are subject to liability, those "that have sufficient material substrate"[138], since "tortuous chains of linked companies"[139] are often used that only aim to "lose track of the capital movement"[140] to launder money, so that some companies will be subject to Article 129 of the Criminal Code and others will be liable under Article 31 bis, provisions that imply different legal systems in the effectiveness of prevention programs, procedural rules and legal consequences[141].

In this way, legal persons which "operate normally in the market"[142] and to which the provisions on compliance programs in Article 31 bis[143], paragraphs 2 to 5, are addressed shall be "chargeable companies"[144]. Also considered "imputable"[145] are "companies that carry out a certain activity, mostly illegal"[146], which are normally used for money laundering by mixing criminal funds with those of the company's legal activity, which appears to be much greater than the real one; they are referred to in the second rule of Article 66 bis[147] as those used "instrumentally for the perpetration of criminal offenses", which offers a genuine interpretation of instrumentalization, "that the legal activity of the legal person is less relevant than its illegal activity"[148], although the identical wording of the two paragraphs (b) of the second rule of Article 66 bis poses problems, since the same hypothesis serves to exceed the limit of two and five years, that is why the sentence of July 19, 2017 reduced the penalty for the closure of premises and establishments to two years[149], or allows the permanent imposition of certain penalties that sometimes match, legislative laziness that must be saved by "a systematic interpretation"[150] and in accordance with the principle of validity that allows a distinction to be made between "a greater intensity of criminal instrumentalization of the legal person"[151], so that if a tax consultancy is engaged in money laundering rather than in its legal work, the two-year limit on the penalty of prohibition of activity could be exceeded, the five-year limit on this penalty could be exceeded if the company is engaged in significantly more money laundering than in consultancy, and it would be possible to impose the above-mentioned prohibition permanently when "the company is engaged almost exclusively in money laundering"[152]. Finally, " non-imputable companies"[153], which would not be liable under Article 31 bis but under Article 129[154], would be those with no legal activity, *v. gr.* the three companies referred to in the sentence dated September 15, 2016[155] or those referred to in the sentences dated December 15, 2016[156] and October 3, 2017[157], those used simply for the holding or ownership of assets which conceal the natural person who possesses or enjoys them, as in the case of the sentence dated May 19, 2017 regarding the sole administrator of a company "which had no activity other than holding ... aimed at separating the ownership of those assets"[158], shell or facade corporations with no real activity, organization, infrastructure or assets, used as criminal tools or to hinder investigation, to which the figure of contractual simulation and the theory of lifting the corporate veil[159] had already been applied and which are still valid[160]; societies in which there is "an absolute and substantial identity"[161] between the manager and the legal person, with totally overlapping wills, are also considered "non-imputable"[162], so that a double incrimination[163] contrary to reality and violating *non bis in idem*[164] is avoided, since "the double demand for responsibility is meaningless"[165] when the society simply represents "a way of reversing a one-person business"[166].

In fact, the use of shell companies for money laundering is frequent, as evidenced by the Supreme Court rulings dated June 26, 2012[167] and February 4, 2015, which refer to about fifteen companies, some domiciled in tax havens such as Belize, Bahamas, Virgin Islands, Panama, Liberia, Jersey or Liechtenstein, which concealed the ownership of a huge volume of properties "whose sole list takes up twenty-three pages of the court ruling"[168], but so far the accessory consequences and the doctrine of the lifting of the corporate veil, which outlaws the prevalence of created legal personality if fraud is

committed or third parties are harmed, had sufficed, as pointed out in the Supreme Court rulings dated March 2, 2016[169] and December 5, 2012, which confirmed the involvement of 14 companies - including four Delaware companies participating in three limited liability companies, a couple of Gibraltar companies and two others domiciled in the United Kingdom- owned by a lawyer, whose assets were clearly and unjustifiably confused with the companies' assets, to pay costs, fines and civil liabilities arising from their money-laundering and tax offenses, and against the Public Finance[170], civil liability on which, of course, there was no problem with legal entities, as noted in the Supreme Court ruling dated April 9, 2012, that it upholds the appeal in cassation brought by the private prosecution to hold La Caixa and Fibanc-Mediolanum liable for the breach of the rules on prevention, which undoubtedly facilitated the perpetration of the offense, which would have been made extraordinarily difficult by the obligatory reporting to the administrative authorities because "the indications that the operations were suspected of being lawful were evident from their very high amount, the absence of any ascertainment of the real origin of the funds, the intervention of a foreign citizen, the mechanics of their execution with a clear inclination towards quick conversion into cash, etc."[171]

I also reported[172] the fact that the incorporation of the "complex and disorderly"[173] regulation on the criminal responsibility of legal persons had not been accompanied by the essential procedural reform[174] of rules that were not adapted to the new model of incrimination[175]. The legislator did not even allude "to the need for a contemporary reform of the Law on Criminal Procedure"[176] that would establish the procedural *status* of legal persons[177], which would materialize for them the presumption of innocence[178], the right not to testify against themselves[179] and the other procedural guarantees[180], a modification without which "it is extremely doubtful that the new model will be able to meet its intended objectives[181]", since not taking into account the specific characteristics of the business activity leads to a "preventive inefficiency"[182]. That is precisely why the State Prosecutor General during one of the previous socialist governments had described the need to reform the criminal process as "imperative"[183] in order to clarify the many doubts about how to put a society on the bench[184]. In this regard, *Law 37/2011 dated October 10 on procedural acceleration measures*[185] somewhat improves the situation by enshrining a certain procedural *status* of legal persons in two new articles of the Criminal Procedure Act, since one applies to the taking of statements from the representative appointed by the legal person "the rights to remain silent, not to testify against himself and not to confess guilt"[186] and, equally, the other states, with almost identical wording, that the representative may testify on behalf of the legal person "without prejudice to the right to remain silent, not to testify against himself and not to confess guilt, as well as to exercise the right to the last word at the end of the trial proceedings"[187].

Many questions remain to be resolved in the context of the criminal responsibility of legal persons, including in the procedural field, where it seems systematically appropriate to conclude with the right to the last word. In the case of a convicted legal person's claim that he has not been given the opportunity to make final allegations, which leaves it up to the offending natural person to agree to the legal person, to compensate him or to cooperate with the authorities, which, according to the ruling dated February 29, 2016, would be an intolerable limitation of the right of defense that should be legally resolved by the appointment of a judicial defender of the legal person, the attribution to independent persons, the assignment to the so-called compliance officer, or to someone alien to any procedural conflict of interest chosen by the representative bodies, without the participation of those who will be judged in the same process, the ruling dated July 19, 2017 states that in the case under examination "it lacks viability"[188], because there are no contradictory interests between a limited company and its *de facto* owner or between a company and those who hold the majority of its share capital. Since the real owners have been part of the process and have enjoyed all the rights, there are no conflicting interests between them, and it is "a legal person that comes to identify himself with the accused natural persons"[189].

In this sense, it is necessary to take into account the Spanish reality, in which small and medium enterprises, the so-called SMEs, represent 99.9%, 89% of private companies are family businesses, which generate 67% of employment, and micro enterprises, with no more than nine workers, represent 42.2%, an immense field for the double criminal responsibility of natural and legal persons, which entails a great danger of harming the principle *of non bis in idem*[190], insofar as, as QUINTERO OLIVARES states, "the

smaller the undertaking, the greater the risk of the criminal penalty being doubled"[191]. *Compliance programs* were created for large Anglo-Saxon companies, but the problems of multinationals are not those of most Spanish companies, where the duties of administration and control usually come together in the same person and the criminal consequences end up with that person[192]. This is recognised in part by the Punitive Legislation, which allows "small legal persons"[193] to have supervisory functions "assumed directly by the administrative body"[194]. So it will be very difficult both to "prevent the company from being declared criminally responsible based on the identification between the company's will and that of its owners"[195] and to prevent the greater criminal severity of small businesses in which natural and legal persons agree, unlike large companies, whose "fines do not personally hit their managers"[196].

In addition, concerning the possible instrumentalization of legal persons for the perpetration of money laundering by organized crime, Royal Decree Law 11/2018[197] dated August 31 amends Article 26 of the Law on Prevention of Money Laundering, which requires regulated entities to have prevention manuals closely related to *compliance programs*, non-compliance with which is sanctioned in the amended Article 51. Therefore, there is a need to create a specific money laundering prevention *compliance* or to integrate it into a broader criminal *compliance*, but unlike criminal legislation this "adequate"[198] prevention manual is compulsory[199] and must be kept "up to date"[200]. Also new are both the establishment of an internal *whistleblowing*[201] channel or "internal procedures for reporting potential non-compliance"[202] and the creation of an "internal control body and representative before the executive service"[203], a *compliance officer*, which, also unlike criminal regulations, is compulsory[204], unless otherwise stipulated by regulation[205]. In addition, annual audits and biennial follow-up reports by external experts[206] on internal control measures and bodies under Articles 26 bis and 26 ter are provided for. In addition, Article 13.3 prohibits credit institutions from establishing or maintaining correspondent relationships with shell banks, which it defines as "a credit institution, or an institution engaged in a similar activity, incorporated in a country in which it does not have a physical presence enabling it to exercise genuine management and control and which is not a subsidiary of a regulated financial group"[207]. Finally, the new wording provided by Royal Decree-Law 11/2018 to Article 4.4 of Law 10/2010 warns about the need to identify the real owners of legal persons, considering as such those who own more than 25% of the capital or voting rights or who control them by other means and in *trusts*, the settlors, trustees, protectors, beneficiaries as well as those who control them[208], in addition to enforcing a registration and a declaration of the real owners[209].

With regard to the fifth anti-money laundering Directive dated May 30, 2018, with "extensive whereas"[210], which amends the fourth Directive of 2015[211], apart from new developments in the field of service providers both for virtual currency exchange in fiduciary currency and for the custody of electronic purses[212], it insists on the need to "adopt measures to ensure greater transparency of financial transactions, of corporate and other legal entities, as well as of trusts and legal arrangements having a structure or functions similar to trusts"[213], the fifth Directive requiring Member States to establish registers of beneficial ownership for companies and other legal entities no later than January 10, 2020, and for trusts and similar legal arrangements no later than March 10, 2020, which must be interconnected by a central European platform by[214] March 10, 2021[215].

In particular, the fifth Directive aims at an environment "hostile to criminals who seek shelter for their finances through opaque structures"[216], since a sound financial system in the Union requires "ensuring"[217] transparency not only in companies and other legal entities, but also in "trusts and similar legal arrangements"[218]. This is why the register of beneficial ownership and trusts is amended, in order to "clarify certain issues which had been confused in the fourth Directive and to strengthen its effectiveness[219].

Thus, Article 3(6)(b) adds *trusts* as a specification in brackets and forces Member States to impose penalties on trustees to obtain and retain adequate information on the actual ownership of trusts or similar instruments[220], penalties which shall be effective, proportionate and dissuasive[221].

Data on holders of bank and payment accounts or safe deposit boxes are fragmented and beyond the reach of the authorities, so it is "essential to establish centralized automated mechanisms in all Member States", e.g.[222] registers or data consulting systems[223], and to take account of the increased risks to money laundering posed by "certain intermediate structures"[224].

These records should be "publicly available" [225]because disclosure of ownership is very important for "the confidence of investors and the general public in financial markets"[226]. The Fourth Directive allowed access to information in Article 30(5)(c). to "any person or organization which can demonstrate a legitimate interest", an expression which "gave rise to doubts of interpretation"[227]. As a result, the fifth Directive changes the formula[228] to "any member of the public" and the legitimate interest, to be defined by the States, extends not only to judicial or administrative proceedings but also to non-governmental organizations and investigative journalism[229], although access may be refused "where there are reasonable grounds for suspecting that the written request is not in accordance with the objectives of this Directive"[230].

Certainly "accurate and up-to-date information on the beneficial owner is a key factor in locating criminals"[231], who may be hidden "behind a corporate structure"[232], and because of differences between legal systems some trusts and similar instruments were not subject to supervision or registration[233], but in order to respect privacy and protect personal data as well as to safeguard proportionality[234] only "the minimum data necessary for conducting investigations"[235] should be stored and what "should be made available to the public should be limited"[236], and therefore disappears from Article 30. 5 the reference to "all" information. Accordingly, the name and surname, month and year of birth, country of residence, nationality and the nature and extent of "ownership held"[237], referred to in the Fourth Directive as "real participation", will be made public about the actual holders and the Fifth Directive changes it to "real interest" and incorporates as a novelty that national regulations may allow access to additional information enabling the identification of the beneficial owner, which will at least include his/her date of birth and contact details[238]. In short, the access that should be allowed on the beneficial ownership of trusts and related instruments should be similar "to the corresponding rules that apply to companies and other legal entities"[239] to avoid their use by money launderers[240].

The same year, 2018, the European Union adopted another Directive on money laundering, in an unprecedented legislative succession that undermines legal certainty: Directive 2018/1673[241], which is the result of a Commission proposal dated December 21, 2016, and a compromise text dated May 20, 2017[242], which seeks to harmonize criminal legislation in the countries of the European Union[243], also deals with the responsibility of legal persons, which it defines as "any entity having legal personality under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organizations"[244].

Article 7 of the Directive on combating money laundering through Criminal Law[245] is clearly inspired by Article 10 of the Warsaw Convention [246]or *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* dated May 16, 2005,[247] and requires Member States to ensure that legal persons can be held liable for the offense of money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position based on a power of attorney of the legal person, or on the power to take decisions on behalf of the legal person, or to exercise control over the legal person[248]. They shall also ensure that they can be made responsible where the lack of monitoring or control has made possible the perpetration of money laundering for the benefit of the legal person[249]. Finally, Article 7(3) provides that the responsibility of legal persons shall not exclude criminal proceedings against natural persons responsible for money laundering.

The "sanctions applicable to legal persons" are covered by Article 8 of Directive 2018/1673, which requires Member States to ensure that legal persons responsible for money laundering are punishable "by effective, proportionate and dissuasive sanctions" so there is no need to make legal persons criminally[250] responsible[251]. It is compulsory[252] to impose fines, whether criminal or not[253], and it is optional to apply other sanctions mentioned in a non-closed list of examples[254]: disqualification from public benefits or aid, temporary or permanent exclusion from public financing, including tenders, subsidies and grants, temporary or permanent disqualification from the exercise of commercial activities, judicial intervention or dissolution, and temporary or permanent closure of establishments used for the offense[255].

Article 10 of Directive 2018/1673 also refers to legal persons: after requiring Member States to establish their jurisdiction over money laundering offenses committed, in whole or in part, in their

territory and by their citizens[256], allows, subject to a mandatory report to the Commission, for extraterritorial extension of jurisdiction where the perpetrator is habitually resident in that country[257] or "the offense was committed for the benefit of a legal person established in that country"[258], ultra-territorial applications of criminal law that will generate conflicts of jurisdiction[259], which Article 10.3 seeks to resolve with the cooperation of the Member States in initiating proceedings, taking into account the place where the offense was committed, the nationality or residence of the perpetrator, the country of the victim[260], an inappropriate criterion which is due to the uncritical reproduction of the provisions of other directives concerning individual victims[261], and "the territory in which the perpetrator was found"[262].

Finally, even if Spanish criminal legislation is far more expansive[263] than Directive 2018/1673 and does not need many changes to fulfill the community requirements, which also reflect "the expansive and punitive criminal policy that characterizes contemporary criminal law"[264], a reform of our punitive legislation "by December 3, 2020"[265] will be necessary: Article 303 of the Spanish Criminal Code "will have to be modified"[266] due to the mandate, established in Article 6(1)(b). of Directive 2018/1673, to consider it an aggravating circumstance "that the perpetrator is a regulated entity within the meaning of Article 2 of Directive (EU) 2015/849, and has committed the offense in the course of his professional activity", Article 2 which includes not only financial and credit institutions, but also an extensive catalogue of natural and legal persons, when acting professionally, which has just been extended by Directive 2018/843 of 30 May[267]. This essential reform of article 303 of the punitive legislation should be used to eliminate, once and for all, the heinous references to doctors, social workers, teachers or professors[268], who have no sense of money laundering and who come from offenses related to drug trafficking, "which explains, but does not justify, the amazing reference"[269].

ENDNOTES

* This work was financially supported by the project RTI2018-6H-093931-B-100 (AEI/ERDF, EU) of the State Research Agency (Ministry of Science, Innovation and universities), operational program ERDF 2014-2020 "a way to make Europe". Also, this contribution is in line with the Research Project R+D+I called "Investigation and evidence of money laundering. The 4th Guideline" (Reference DER2016-80685-P).

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7. Preamble, third paragraph, first subparagraph.

8. The first ruling of the Supreme Court on the criminal responsibility of legal persons, which declared applicable to their sentences "the irrevocable principles that inform the criminal law", did not come until September 2, 2015. *Vid.* STS nº 514/2015, de 2 de septiembre, RJ\2015\3974, fundamento de derecho segundo, en www.westlaw.es (March of 2020). For a comment on this sentence *vid.* GÓMEZ-JARA DÍEZ, C., "El Tribunal Supremo ante la responsabilidad penal de las personas jurídicas: aviso a navegantes judiciales", in *Diario La Ley,* nº 8632, 26 de octubre de 2015, pp. 1-8.
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103. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 116.
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108. GONZÁLEZ CUSSAC, J.L., "El plano político criminal...", *cit.,* p. 98.
109. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 137.
110. *Ibidem.*
111. GONZÁLEZ CUSSAC, J.L., "El plano político criminal...", *cit., loc. cit.*
112. QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 153.
113. *Ibidem.*
114. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* pp. 110, 111 and 137.
115. GONZÁLEZ CUSSAC, J.L., "La eficacia eximente de los programas...", *cit.,* p. 622.
116. *Ibidem.*
117. GONZÁLEZ CUSSAC, J.L., "La eficacia eximente de los programas...", *cit.,* p. 623.
118. *Ibidem.*
119. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* pp. 136, 143 and 154, that in pp. 141 and 142 criticizes the fact that the exemption from liability for prevention programmes extends not only to crimes committed by employees but also to those of their managers.
120. *Cfr.* GONZÁLEZ CUSSAC, J.L., "El plano político criminal...", *cit.,* pp. 107 and 110.
121. *Vid.* BONATTI BONET, F., "Claves para introducirse en la certificación de sistemas de gestión de *compliance* penal", in FRAGO AMADA, J.A., *op. cit.,* pp. 143-156.
122. QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 112.
123. FERRÉ OLIVÉ, J.C., "Reflexiones...", *cit.,* p. 77; RAMÍREZ BARBOSA, P.A./FERRÉ OLIVÉ, J.C., *Compliance..., cit.,* p. 99.
124. GONZÁLEZ CUSSAC, J.L., "El plano político criminal...", *cit.,* p. 100.
125. *Ibidem.*
126. QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 118.
127. *Ibidem.*
128. *Cfr.* GONZÁLEZ CUSSAC, J.L., "La eficacia eximente de los programas...", *cit.,* p. 624.
129. *Ibidem.*
130. GONZÁLEZ CUSSAC, J.L., "La eficacia eximente de los programas...", *cit.,* p. 625.
131. FERRÉ OLIVÉ, J.C., "Reflexiones...", *cit.,* p. 77; RAMÍREZ BARBOSA, P.A./FERRÉ OLIVÉ, J.C., *Compliance..., cit.,* p. 99.
132. GONZÁLEZ CUSSAC, J.L., "La eficacia eximente de los programas...", *cit.,* p. 626.
133. *Ibidem.*
134. *Vid.* CUESTA ARZAMENDI, J.L. DE LA, "Penas para las personas jurídicas en el Código penal español", in GÓMEZ COLOMER, J.L., *op. cit.,* pp. 67-99; ESCOBAR JIMÉNEZ, R., "Régimen penológico aplicable a la persona jurídica responsable penal", in GÓMEZ-JARA DÍEZ, C., Persuadir…, tomo I, *cit.,* pp. 805-838; MANZANARES SAMANIEGO, J.L., "Las penas de las personas jurídicas", in MANZANARES SAMANIEGO, J.L., Cuestiones polémicas del Derecho penal español en el siglo XXI, Reus, Madrid, 2018, pp. 13-34.
135. STS nº 583/2017, *cit.,* fundamento de derecho cuarto and fallo.
136. *Cfr.* BERMEJO, M.G./AGUSTINA SANLLEHÍ, J.R., *op. cit.,* p. 455.
137. *Cfr.* FISCALÍA GENERAL DEL ESTADO, *Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por la Ley orgánica 1/2015,* in www.fiscal.es (March of 2020), p. 28.
138. *Ibidem.*
139. BORJA JIMÉNEZ, E., "Reglas generales de aplicación de las penas: arts. 66, 66 bis, 70 y 71", in GONZÁLEZ CUSSAC, J.L., Comentarios a la reforma del Código penal de 2015, *cit.,* p. 278.
140. *Ibidem.*
141. *Cfr.* GONZÁLEZ CUSSAC, J.L., "Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero", *cit.,* p. 347.
142. FISCALÍA GENERAL DEL ESTADO, *Circular 1/2016..., cit.,* p. 28.

143. *Ibidem.*
144. GONZÁLEZ CUSSAC, J.L., "Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero", *cit., loc. cit.*
145. *Ibidem.*
146. FISCALÍA GENERAL DEL ESTADO, *Circular 1/2016..., cit.,* p. 28.
147. *Ibidem.*
148. Likewise, Peruvian legislation provides for an aggravating circumstance due to the instrumental use of the legal person in art. 13 of the Legislative Decree of 6 January 2017, which also provides an authentic interpretation: when its activity "is predominantly illegal". With regard to the initial version of the draft code of the Bolivian penal system, it considered, in art. 76, aggravating circumstance the criminal instrumentalization of the legal person, but such circumstance disappeared both from the catalogue of aggravating circumstances of art. 71 in the subsequent version of the draft, of May 25, 2017, as of the brief definitive list of aggravating factors contained in art. 70 of the non-nato Bolivian penal system code.
149. *Cfr.* STS nº 583/2017, *cit.,* fundamento de derecho cuarto.
150. BORJA JIMÉNEZ, E., *op. cit.,* p. 280.
151. *Ibidem.*
152. BORJA JIMÉNEZ, E., *op. cit.,* p. 281.
153. GONZÁLEZ CUSSAC, J.L., "Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero", *cit., loc. cit.*
154. *Ibidem.*
155. *Cfr.* STS nº 706/2016, RJ\2016\4558, antecedente de derecho primero, on a marriage of drug traffickers that builds a corporate network in which a third as administrator appeared, surprising resolution by the cumulative disproportion of the three fines of five million euros , in www.westlaw.es (March of 2020).
156. *Cfr.* STS nº 939/2016, RJ\2016\5987, fundamento de derecho cuarto, in www.westlaw.es (March of 2020).
157. *Cfr.* STS nº 649/2017, RJ\2017\4264, fundamento de derecho tercero, in www.westlaw.es (March of 2020).
158. *Cfr.* STS nº 362/2017, RJ\2017\2711, fundamento de derecho cuarto, in www.westlaw.es (March of 2020).
159. *Cfr.* FISCALÍA GENERAL DEL ESTADO, *Circular 1/2016..., cit.,* pp. 27 y 29.
160. *Cfr.* MORAL GARCÍA, A. DEL, "Cuestiones generales", in CAMACHO VIZCAÍNO, A. (dir.), Tratado de Derecho penal económico, Tirant lo Blanch, Valencia, 2019, p. 547.
161. GONZÁLEZ CUSSAC, J.L., "Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero", *cit., loc. cit.*
162. *Ibidem.*
163. *Vid.* FUENTES SORIANO, O., "Responsabilidad penal de la persona jurídica y *ne bis in idem*", in GÓMEZ COLOMER, J.L., *op. cit.,* pp. 805-835.
164. *Cfr.* FISCALÍA GENERAL DEL ESTADO, *Circular 1/2016..., cit.,* p. 29.
165. MORAL GARCÍA, A. DEL, *op. cit.,* p. 547.
166. *Ibidem.*
167. *Vid.* STS nº 578/2012, RJ\2012\9057, fundamento de derecho décimo, in www.westlaw.es (March of 2020).
168. *Cfr.* STS nº 57/2015, RJ\2016\258, fundamento de derecho séptimo, in www.westlaw.es (March of 2020).
169. *Cfr.* STS nº 165/2016, RJ\2016\5767, fundamento de derecho quincuagésimo sexto, in www.westlaw.es (March of 2020).
170. *Cfr.* STS nº 974/2012, RJ\2013\217, fundamento de derecho décimo cuarto, en www.westlaw.es (marzo de 2020).
171. STS nº 279/2012, RJ\2012\5606, fundamento de derecho noveno, in www.westlaw.es (March of 2020).
172. *Vid.* ABEL SOUTO, M., "La expansión...", *cit.,* pp. 6 and 32; ABEL SOUTO, M., "La reforma...", *cit.,* pp. 61, 107 and 108.
173. MAPELLI CAFFARENA, B., in CUELLO CONTRERAS, J./MAPELLI CAFFARENA, B., Curso de Derecho penal. Parte general, Tecnos, Madrid, 2011, p. 259, marginal 478.
174. About the test in general *vid.* LÓPEZ RAMÍREZ, A., La prueba ilícita penal, Tirant lo Blanch, Ciudad de Méjico, 2019 and with respect to legal persons *vid.* PLANCHADELL GARGALLO, A., "Prohibiciones probatorias en la investigación de delitos cometidos por personas jurídicas", in GÓMEZ COLOMER, J.L.,

op. cit., pp. 1121-1163; ROSA CORTINA, J.M. DE LA, "La prueba en el proceso penal contra las personas jurídicas", in GÓMEZ-JARA DÍEZ, C., Persuadir…, tomo I, *cit.,* pp. 771-803.

175. *Cfr.* FERNÁNDEZ TERUELO, J.G., "Blanqueo...", *cit.,* p. 329, marginal 3006.
176. SILVA SÁNCHEZ, J.-M., "La reforma...", *cit.,* p. 7.
177. *Vid.* GÓMEZ COLOMER, J.L., "Introducción: La responsabilidad penal de las personas jurídicas y el control de su actividad. Estructura jurídica general en el Derecho procesal penal español y cultura de cumplimiento (*compliance programs*)", in GÓMEZ COLOMER, J.L., *op. cit.,* pp. 25-63.
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184. *Ibidem.*
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187. Art. 786 bis, first subparagraph, first subparagraph.
188. STS nº 583/2017, *cit.,* fundamento de derecho segundo.
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190. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* p. 140.
191. *Ibidem.*
192. *Cfr.* QUINTERO OLIVARES, G., "Los programas de cumplimiento...", *cit.,* pp. 140 and 141.
193. Art. 31 bis.3 of the Criminal Code .
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200. *Ibidem.*
201. *Cfr.* FERNÁNDEZ TERUELO, J.G., "El *compliance* y las políticas…", *cit.*, p. 431.
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213. *Directiva (UE) 2018/843 del Parlamento Europeo y del Consejo, de 30 de mayo de 2018, por la que se modifica la Directiva (UE) 2015/849 relativa a la prevención de la utilización del sistema financiero para el blanqueo de capitales o la financiación del terrorismo, y por la que se modifican las Directivas 2009/138/CE y 2013/36/UE,* in *Diario Oficial de la Unión Europea,* L 156, 19 de junio de 2018, whereas 2.
214. Directive 2017/11132 on certain aspects of Company Law of 14 June 2017 created the European central platform requiring the Coordination of national systems with different technical characteristics, as evidenced by recital 37 and by Articles 10 and 11 of the EC treaty. 30.10 and 31.9 of Directive 2018/843.
215. *Cfr.* whereas 53 and art. 67.1.
216. Whereas 4.
217. LORENZO SALGADO, J.M., "El blanqueo...", *cit.,* p. 462.
218. Whereas 4.
219. ANDRÉS PÉREZ, S. DE., *op. cit.,* p. 2.
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222. Whereas 20.
223. Whereas 24.
224. *Ibidem.*
225. Whereas 33.
226. Whereas 32.
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228. *Vid.* NÚÑEZ PAZ, M.A., "El tipo agravado...", *cit.,* pp. 288 and 289.
229. *Cfr.* Whereas 42.
230. Whereas 28.
231. Whereas 25.
232. *Ibidem.*
233. *Cfr.* Whereas 26.
234. *Cfr.* LORENZO SALGADO, J.M., "El blanqueo...", *cit.,* p. 460.
235. Whereas 21.
236. Whereas 34.
237. ANDRÉS PÉREZ, S. DE, *op. cit.,* p. 2.
238. *Cfr.* arts. 30.5 c) and 31.4.
239. Whereas 27.
240. *Ibidem.*
241. *Vid. Directiva (UE) 2018/1673 del Parlamento Europeo y del Consejo, de 23 de octubre de 2018, relativa a la lucha contra el blanqueo de capitales mediante el Derecho penal,* in *Diario Oficial de la Unión Europea,* L 284, 12 de noviembre de 2018, pp. 22-30.
242. *Cfr.* SANZ HERMIDA, A.M., "Nuevos retos de la lucha contra el blanqueo de capitales en la UE: la orientación general de la Comisión Europea", in *Revista General del Derecho Procesal,* nº 44, enero de 2018, p. 6.

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247. BOE de 26 de junio de 2010.
248. *Cfr.* art. 7.1.
249. *Cfr.* art. 7.2.
250. *Cfr.* CARPIO DELGADO, J. DEL, "Hacia la pancriminalización...", *cit.,* p. 38.
251. *Cfr.* VIDALES RODRÍGUEZ, C., "*Condotte...", cit.,* p. 8.
252. *Cfr.* CARPIO DELGADO, J. DEL, "Hacia la pancriminalización...", *cit.,* p. 38.
253. *Cfr.* SANZ HERMIDA, A.M., "La lucha contra el blanqueo…", *cit.,* p. 10.
254. *Cfr.* VIDALES RODRÍGUEZ, C., "*Condotte...", cit.,* p. 8.
255. *Cfr.* art. 8, a), b), c), d), e) and f).
256. *Cfr.* art. 10.1, a) and b).
257. *Cfr.* art. 10.2, a).
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259. *Cfr.* SANZ HERMIDA, A.M., "La lucha contra el blanqueo…", *cit.,* p. 15.
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261. *Cfr.* CARPIO DELGADO, J. DEL, "Hacia la pancriminalización...", *cit.,* pp. 39 and 40.
262. Art. 10.3, d).
263. *Vid.* ABEL SOUTO, M., "Las reformas penales de 2015 sobre blanqueo de dinero", in *Revista Electrónica de Ciencia Penal y Criminología*, 19-31, 2017, pp. 1-35.
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265. Article 13 (1), first subparagraph.
266. LORENZO SALGADO, J.M., "El blanqueo...", *cit.,* p. 465.
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