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Prevention and Suppression of Money Laundering in Private Banking Activities

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ABSTRACT: Banking institutions that segment their clients, primarily based on the amount of their net assets, offer those in their upper bracket a specialized and personalized wealth management and structuring service, both from the perspective of investment objectives and tax obligations to the Public Treasury. Confidentiality and the offering of tailored products govern the banking activity known as Private Banking. The opacity that characterizes this business relationship often leads criminal organizations to use this channel to redirect money from illicit activities into the legal economy. In this sense, the client admission policy in the private banking segment, due to its higher-than-average risk, requires stricter measures. The crime of money laundering is therefore susceptible to commission, even more so considering that many clients transfer their profits to tax havens through banking networks, offshore jurisdictions that facilitate the concealment of beneficial ownership in the customer identification process at the beginning of the business relationship. Hence the increased risk that requires substantiating the criminalization and prevention of money laundering.

The subject of our research is the prevention and repression of money laundering in this banking sector. We must first distinguish between the concepts of money laundering prevention, which is defined in Law 10/2010 and refers to actions aimed at preventing important economic sectors, such as financial institutions, from being used for money laundering. In this case, the law is not punitive in nature, unlike its repression; in other words, it does not seek to penalize the aforementioned money laundering, but rather to prevent certain institutions from being used for this purpose.

Regarding repression, through its classification in the penal code, within the heading "Receiving and other similar conduct", it is intended to punish criminal conduct, which is composed of two basic actions, on the one hand, the source or underlying crime and on the other, the activity that has the purpose of carrying out the action of giving a legal appearance to the goods from the source crime.

On the other hand, we must consider the attribution of criminal liability to legal entities, and their exemption provided they have appropriate organizational and management models. To do this, we must take into account Article 31 bis of our Criminal Code. In this regard, it is the legal entity's responsibility to prove that its organizational and management models meet the legal conditions and requirements, and it is the prosecution's responsibility to prove that the crime was committed under the circumstances established in Article 31 bis, paragraph 1. It is also important to note that it is important to prove the legal entity's willingness to comply with regulations and to what extent the crime represents only a one-off event outside its ethical culture.

KEYWORDS*:* Criminal Code, Banking System, Private Banking, Money Laundering, Organized Crime, Regulatory Compliance Programs - bank secrecy--tax crime

I. INTRODUCTION

Banks are deposit-taking institutions, which as such are legally entitled to raise funds - typically and routinely - directly from the public, but this is a very limited definition if we take into account that Law 26/1988 of June 28 on Discipline and Intervention in Credit Institutions, in its article 1, extends it to include loans and the temporary transfer of assets, with a commitment to restitution and which may be applied on their own account to the provision of credit or other similar operations. These are therefore entities that are part of the financial system, within the so-called credit institutions. However, as has been pointed out on multiple occasions, international organized criminal groups, with increasingly sophisticated means, have managed to significantly penetrate the different circuits of the legal economy, made up of a set of institutions or intermediaries, markets and products whose integrity and strength must be preserved, however the presence of regulations such as those that protect banking secrecy, make it difficult to discover, freeze and seize income and assets resulting from criminal activities, carried out in a global market and with an increasingly reduced presence of physical money widely replaced by electronic money. For this reason, the crime of money laundering has become a central aspect in the development of international and community criminal regulations , and in Spain has been specified mainly through Organic Law 10/2010 of April 28 on the Prevention of money laundering and the financing of terrorism, amended by subsequent regulations, which specifies the means and procedures to be followed to combat this type of crime , in any case the law of the EU enjoys primacy and the interpretation of our legal system must be consistent with Community standards.

As is well known, the term money laundering has its origin in the United States where it is known as money laundering since the days of Prohibition, when mobsters like Al Capone or Meyer Lansky , the first in Chicago and the second in Louisiana, Florida and Las Vegas, laundered the profits derived from the sale of alcohol and gambling, drug trafficking, corruption of public officials and other illegal activities in small laundromat chains. In other countries like Germany it is known as Geldwäsche , in Italy as ricciclagio , in France as Blanchiment and in Spanish-speaking countries as money laundering, whitewashing or legitimation of capital or money .

It is a legal figure of a complex nature with a diverse legal and doctrinal definition, an objective typicality that pivots on money laundering of a malicious nature, whether it be direct intent, first and second degree, or eventual (intentional ignorance), and reckless money laundering, the existence of a basic type and an aggravated type and in which the concepts of authorship and participation have been outlined, and in turn their demarcation and differentiation from the crimes of concealment and receiving, the latter especially since 2010.

Regarding preparatory acts in the crime of money laundering, provocation, conspiracy, and proposal are punishable. Regarding attempt, the new Penal Code eliminates its distinction from frustration, defining it as the initiation of an action dangerous to the legal right that does not result in the production or consummation of any of the offenses established in Article 301.

The error of prohibition, which together with intent and attempt makes up the subjective type, occurs when the author, despite knowing the circumstances of the wrong, does not know that his behavior is illegal. In the case of the crime of money laundering, the following are distinguished: error regarding the existence of a prohibition, error regarding the causes of justification, and finally error of validity.

Special mention should be made of the fact that in money laundering offences the evidence that causes the accused to lose the presumption of innocence is usually circumstantial or indirect in nature and rarely direct, as is established in the repeated jurisprudence of the Second Chamber of the Supreme Court, and as is known in the case of the assessment of direct evidence it is the court of first instance that has the final say, while in circumstantial evidence, the Court of Cassation may review the rationality of the inference judgments made by the prosecuting body.

As PALOMO DEL ARCO states, [1]in the crime of money laundering, a series of backbone clues are distinguished by jurisprudence to prove the existence and participation of the accused , which are the following:

1) Unusual increase in the capital of the person accused of the crime
2) The execution of transactions outside of ordinary commercial practices. In this case, the Supreme Court has established various indicative elements, some of which are as follows:
   a) Use of assumed identities
   b) Making documentary changes
   c) The perception of high commissions by intermediaries
   d) The use of front men without real financial availability over the assets
3) Lack of legitimate business that could provide a full explanation for such increase or disposition of funds
4) Link, proximity or connection with persons, groups or the set of illicit activities in which illicit trafficking or the practice of serious criminal acts took place.

Circumstantial evidence must be diverse, with a connection between the underlying facts; the elements must bear a direct and material relationship to the crime. In summary, it can be stated that the legal rights protected are diverse, since in addition to guaranteeing the socioeconomic order, state security, and the administration of justice, public health is also protected. The latter is at the historical origin of criminal legislation relating to this crime, as it is associated with illicit profits derived from drug trafficking.

However, in some cases, doctrinal and jurisprudential positions favor the application of the so-called principle of insignificance or trifle to exclude criminal classification in certain cases, such as the minimal offensiveness of the agent's conduct, the lack of any legal harm caused, or the defendant not being a repeat offender.

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As for the material object, these would be assets that, in addition to their criminal origin, are capable of being incorporated into the criminals' assets. And that are susceptible to commercial trafficking.

As for its practical implementation as a process, there are various models, from the one proposed by the FATF to Bernasconi's phase models, Zünd 's cycle or circulation model , and the four-sector model, to name the most important. The phase model proposed by the FATF is as follows:

[1] See PALOMO DEL ARCO, A.” "Money Laundering and Banking Corruption" in "Money Laundering and Corruption in the Banking System". Ed. University of Salamanca. 2002, page 166

1) Placement of assets or cash (placement) with the introduction by the launderer of assets of illicit origin into the financial system., and can present various modalities from deception (Täuschung) to a person in good faith, who, through false facts, acts as a straw man (Strohman) in the process., bribery (Bestechung), also the so-called system of use of smurfs or Smurfing and its complement called Structuring . , deserves mention the exchange of banknotes (Change - Geschäft) of small value for others of greater unit value. And finally the use of the so-called exempt transactions,
2) The second stage is concealment or overshadowing. (layering). In which the aim is to locate the assets as far away as possible from their illicit origin, often using true financial engineering techniques. There are various ways or methods, the first being money laundering within the country (Inländische). Geldwäscherei) of the country that normally serves as a preliminary stage for international money laundering. and international transfers-,
3) The third stage, called investment or integration , is where the funds re-enter the legal economy. For example, this stage can be achieved through direct investments and undervaluation or overvaluation of assets in sales transactions.

The circulation model (Kreislauf) of Zünd , which was established during the discussion of section 305a and 305ter of the StGB , inspired by the circulation model of water;

a) Niederslag or precipitation where the obtaining of cash takes place
b) Versickerung or insurance, in which the first purification (Reinigung) of the money is carried out
c) Grundwasserströme transformation of the original money into another type of goods
d) Grundwasserseen / abfluss with money transfer abroad
e) Neuerlich Collection in Seen with preparation for legalization-
f) Pumpstation entry into the legal economy
g) Kläranlage or second purification of money
h) Settlement / transfer of asset values to national or international bank accounts, elimination of criminal traces, and investment in the legal economy.

The four-sector model, established by Christof Müller, consists of a structured scheme on two double poles: legality/illegality and country of crime/country of money laundering, in which four sectors are configured;

Sector I - Country of crime/legality

Sector II Country of crime/illegality

Sector III Country of money laundering/illegality

Sector IV Country of money laundering/legality

This process is materialized through the so-called black box process , which aims, as BLANCO CORDERO indicates, to prepare the money to be laundered for crossing sectors and/or to use the specific possibilities of the sectors for other transformations or transfers.

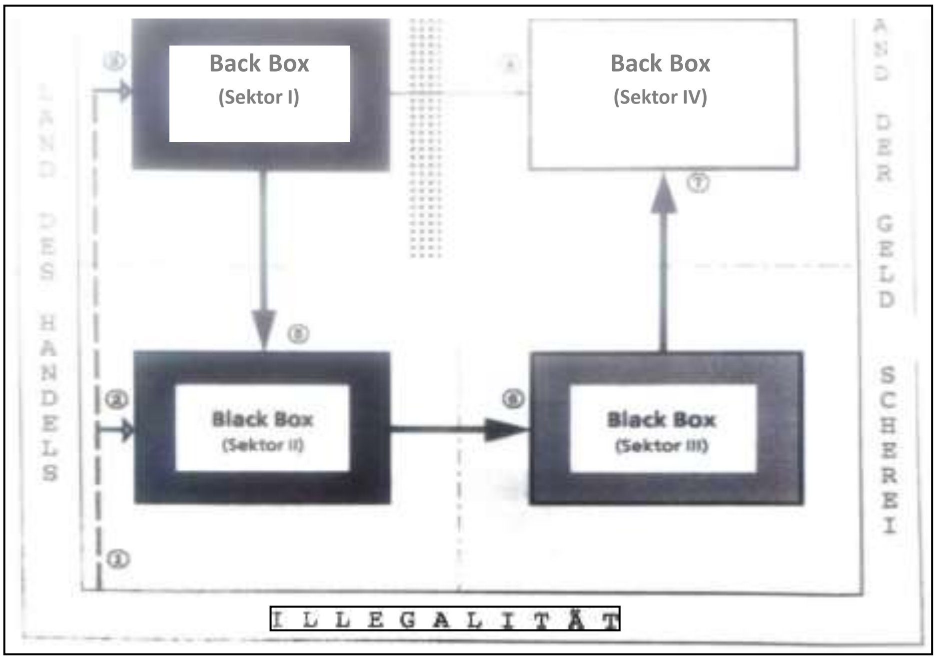

Figure 1. Black Box

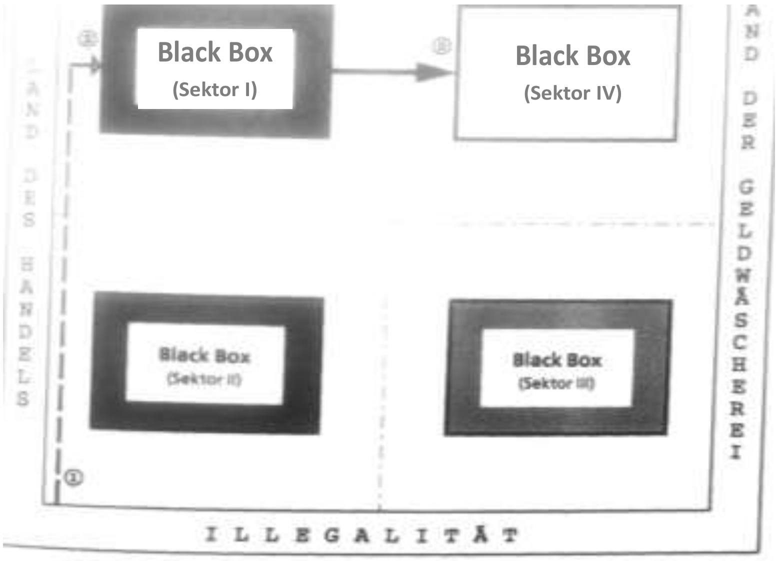

Figure 2. Source: Christof Müller. Geldwäscherei Motive- Formen -Abwehr...(Page 109).

Despite all that has been said, there is a sector of criminal doctrine that considers money laundering beneficial from the point of view of the Public Treasury, since in this way the hidden money would re-enter the legal economy and the launderers would have to pay taxes on these illicit profits, a position that we can find in the STS 649/1996 that confirmed the ruling of the National Court of September 27, 1994 known as the Nécora Case, as stated by Mallada Fernández.[2]

It has been pointed out in the introduction to this study the existence of a system of economic and financial transactions entirely globalized, based on the principle of freedom of movement of capital which added to the possibility that criminals members of international criminal organizations can operate in several countries, to which the principle of freedom of movement of people helps, makes money laundering particularly difficult to detect in many cases, and to describe this process have been established, according to the United Nations Office on Drugs and Crime, the so-called 10 fundamental laws of money laundering, in the context of the existence of banking secrecy and financial havens or tax havens, some of which are the following[3]

- The more the laundering operations resemble the behavior of legal operations, the less difficult it will be to detect.
- The more embedded illegal activities are in the legal economy and the greater the institutional and functional separation, the more difficult their detection will also be.
- The higher the ratio of services to goods in the productive activity of an economy, the more easily capital can be laundered in that economy.
- The greater the presence of SMEs or small self-employed traders in the structure of production and distribution of goods and services, the more difficult it will be to distinguish legal from illegal operations.
- The greater the deregulation of financial operations, the greater the ease of money laundering.

II. THE CRIME OF MONEY LAUNDERING. GENERAL ASPECTS

A. Money laundering and banking activities

On the other hand, for the proper analysis of economic crime linked to the development of banking activity, we can start with the situational models that FRANCISCO MUÑOZ CONDE and LUIGI FOFFANIi[4] have been established in relation to financial crimes in which banks are the protagonists, and in which they sometimes appear as perpetrators and other times as victims of the crime.

The first model refers to cases in which the bank or its representatives are the perpetrators of a crime committed for the benefit of the bank and to the detriment of third parties, the community, or the banking system as a whole.

The second model refers to cases in which the bank appears as an instrument in the commission of a crime against third parties, involving individuals who are not members of the bank as both perpetrator and victim.

The third model would include cases in which the bank is the victim of a crime committed by individuals who perform functions within the bank and exploit the trust between the bank and the bank.

The fourth and final model is the case in which the bank commits a crime against the banking organization.

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[2] MALLADA FERNÁNDEZ, C. "Money Laundering and Tax Evasion." Ed. Lex Nova. Valladolid 2012. p. 143.

[3]See "Financial Safe Havens, Bank Secrecy, and Money Laundering" in the Crime Prevention and Criminal Justice Bulletin, Issue 34 and 35, and Issue 8 of the UNDCP Technical Series.

[4]MUÑOZ CONDE, FRANCISCO, FOFFANI, LUIGI. "Banking Institutions as Perpetrators or Victims of Financial Crimes" *in Revista Penal. Univ. Huelva and Salamanca*, no. 25.2010. p. 81.

Beyond these issues, it is necessary to pay attention to Royal Decree 11/2018 of August 31, which transposes the IV EU Directive and modifies Law 10/2010, which establishes new obligations for financial and investment entities, such as the creation of an internal reporting channel, thorough knowledge of customers and the operations carried out, communication of suspicious operations and collaboration with the SEPBLAC, training of employees in the prevention of operations that entail the crime of money laundering, internal and external control measures (audits), the preparation by banks of a prevention manual, and the retention of documentation for a minimum period of 10 years.

Other obligations related to customer identification include submitting a file of financial ownership, identifying the beneficial owners, declaring the purpose or nature of the business relationship and, in terms of risk level, not applying due diligence to low-risk customers and reinforcing these due diligence measures in private banking activities, as they present a higher risk of money laundering, along with cross-border correspondent banking relationships and the presence of persons with public responsibilities who, under the name of politically exposed persons, extend enhanced due diligence measures to their closest relatives and other close persons, since crimes arising from corruption are often common.

The creation of an alert system and the regulation of employee training and protection, who are sometimes victims of threats and discrimination after reporting suspicious transactions, cannot be left out of the anti-money laundering regulations. This includes the confidentiality of the identity of employees, managers or agents who have made any communication to financial intelligence groups.

B. International instruments to combat money laundering in banking activities. The Basel Declaration

The Basel Declaration of December 12, 1988, a text by Sotf law , given its non-binding nature, also known as the Declaration of Principles of the Committee on Rules and Practices of Banking Operations, on the prevention of the use of the banking system for the laundering of funds of criminal origin. As stated by Mallada Fernandez [5], these are ethical rules directed at financial institutions in the signatory countries, such as the identification of clients, cooperation with judicial and administrative units, training actions for employees of banking entities and the preservation of accounting documents of the operations carried out.

In short, despite not having binding legal force, it is a historically fundamental legal document for the tasks of regulation and supervision of banking activity, since a large part of this activity is carried out through international transfers, making it necessary to control money movements, detect front men and prevent the acceptance of money from suspicious sources. Finally, banks seek to avoid the association between their activities and criminals by their clients, in other words, to enhance the reputation of the entity.

Back in 2015, the so-called Fourth EU Directive introduced important changes. Given their impact on the banking sector, we analyze the most significant new features:

- Inclusion of tax crime as a pre-existing crime of money laundering (art. 3), specifically recital 11 and art. 17 authorize the exchange of information and assistance between financial intelligence units,
- Strengthening the risk-based approach system, with the elimination of cases of non-application of due diligence measures and the application of simplified due diligence measures. (Articles 15 and 16)
- Creation of a real ownership registry
- Expansion of obliged subjects that can be provided with a centralized prevention body
- Strengthening the communication of good faith information to financial intelligence units
- Creation of an EU blacklist of high-risk third countries, i.e., those with strategic weaknesses that threaten the internal market.
- Reduction in the amount of cash payments related to the trade of goods

C. The crime of money laundering in the Spanish Penal Code. Historical background.

The classification of the crime of money laundering constitutes, in the opinion of many authors, a clear manifestation of the process of expansion of criminal law, which in the Spanish case since the beginning of its regulation in 1988, with Organic Law 1/1988 of March 24, which in its article 546, bis f) classified what the doctrine called specific receiving, which was not strictly a crime of receiving, but an autonomous crime, and which came to overcome the inadequacy of the classic crimes of receiving and concealment by means of this legal figure of money laundering, linked from the beginning to drug trafficking crimes.

Subsequently, with the entry into force of Law 8/1992 of December 23, which amended the Penal Code, the term "money laundering" was included in a Spanish law for the first time, specifically in Articles 344 bis h) and i), following the guidelines established in the 1988 Vienna Convention.

As Kai has pointed out, both [6]the different European regulatory instruments, based on the Vienna Convention (European Council Convention of 1990 and European Union Directive of 2005) establish 3 basic criminal types of money laundering.

1) The conversion or transfer of assets of illegal origin for a specific purpose.
2) The concealment or concealment of the true condition, origin, and disposition.
3) The acquisition, possession or use of goods.

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[5]MALLADA FERNÁNDEZ, COVADONGA. *Op cit* . Page 72

[6] AMBOS, KAI. Internationalization of Criminal Law: The Example of "Money Laundering." In 2nd Congress on the Prevention and Suppression of Money Laundering. Abel Souto , Miguel, Sánchez Stewart , co-ordinator . Pages 181 et seq.

Thus, any participation in any of these criminal offenses, including attempts, must be punished by national legislation.

The jurisprudential evolution of the crime of money laundering can be summarized in four major stages: the first, in which it is defined in relation to drug trafficking offenses; the second, beginning with the 1995 Penal Code, which connects it with all serious crimes; however, since 2003, it has been extended to any crime, and in 2010, the crime of self-laundering was classified as a crime.

D. The concept of money laundering.

The concept of money laundering originates from the distinction made by legal doctrine between black money, which is defined as amounts of money that have not been declared to the Public Treasury, meaning that, although they originate from legitimate activities, they are hidden for tax purposes. Gray money, or dirty money, is money that originates from illicit activities. Therefore, money laundering involves two actions: the concealment of assets and their reintroduction into the legal economy, emphasizing that, in the latter case, the very act of laundering is to conceal its origin in illicit activities. In the case of black money, on the contrary, there are two possibilities: one is repentance by regularizing the situation, and the other is laundering, which in this case would coincide with gray money. And considering that in the private banking sector, tax advice and planning are a fundamental aspect of the private banking service, the high risk of money laundering and its connection to tax crimes is clear, which explains the enhanced due diligence measures required by Law 10/2010.

Article 305 of our penal code regulates tax crime, which, in the case of illicit profits, has produced a variety of doctrinal positions, a sector represented by authors such as JAVIER ZARAGOZA, or ALEJANDRO LUZON, understands that tax crime can constitute a crime of money laundering , based on the principle of equality before the law, in this sense there is the STS 21-12-1999. However, in the words of LUIS MARTINEZ DE SALINAS, the crime of money laundering is not at the basis of the persecution of the individual tax offender, but against organized crime, but all this is clarified by Law 10/2010 in its literal wording which is the following: Assets derived from criminal activity shall be understood to mean all types of assets whose acquisition or possession originates from a crime, whether tangible or intangible, movable or immovable, tangible or intangible, as well as documents or legal instruments regardless of their form, including electronic or digital, that prove ownership of said assets or a right over them, including the defrauded amount in the case of crimes against the Public Treasury.

Regarding the defrauded amount and the application of a general principle of criminal law such as the principle of *ne bis in idem*, it should be noted that this amount must be the same as the money laundered (by use, conversion or transmission) in order for both crimes to be punishable, but it is prior to the tax crime and is also integrated with the rest of the assets that have legal status, which makes it very difficult to separate the part of the assets that has been laundered. The criminal sanction for both conducts , tax crime and money laundering crime, is therefore very difficult to apply.

MALLADA FERNÁNDEZ [7]explains how a very common method of laundering money is the use of financial institutions, dividing the money into small amounts to avoid money laundering controls , and that launderers using the method called *smurfing* , often have the complicity of employees or managers, and by depositing the money in different accounts they transfer the money to another account, normally located abroad.

Tax havens are also frequently used for the criminal activity of money laundering , through the use of offshore banks, which are entities regulated by specific laws and are subject to more favorable tax regulations than *onshore banks* . According to the same author , *offshore* banks come in various forms;

Shell banks , which do not usually have a physical presence in these territories.

Operating or *booking* branches *hands*

In addition to offshore banks, holding companies such as certain *holding companies are also used.*

In the case of Private Banking services, which we will analyze in more detail in the following pages, it is significant, as SANCHEZ ULLED has pointed out , the process of establishing [8]*offshore* companies and Trusts , which include the possibility of providing services as secretaries to the board of directors, bookkeeping, issuing powers, all with two basic objectives: on the one hand, banking secrecy taken to the extreme, since the identity of the ultimate beneficiary is hidden, and on the other, tax optimization, which sometimes becomes opacity and evasion.

In this regard, García Noriega[9] has described the importance of tax havens for banking activity. As an example, in 2010, there were 500 banking entities and 30,000 companies domiciled in the Cayman Islands, which are tax-exempt and pay only a single, very modest annual registration fee. The offshore system is therefore a nominal system with no guarantees for third parties. Positions have been divided between those that attribute a pluri-offensive character to it, in relation to legally protected assets such as the socio-economic order and the State Administration of Justice in its task of reparation, as is the case of BLANCO LOZANO, FARALDO CABANA, or VIDAL RODRIGUEZ, and, on the contrary, authors such as ARANGUREN SÁNCHEZ or SUÁREZ

[7] MALLADA FERNANCDEZ, COVADONGA. Op.cit . p. 181 ff.

[8] SÁNCHEZ ULLED, EMILIO JESUS. Money Laundering in the Banking Sector. Practical Aspects. In FERRÉ OLIVÉ ET AL. “Money Laundering and Corruption in the Banking System. Ed. University of Salamanca. 1st Ed. , 2002, p. 316 ff.

[9] GARCIA NORIEGA, ANTONIO. “Money Laundering and Anti- Money Laundering.” Ed. Difusión Jurídica. Madrid 2010, pp. 133 et seq.

GONZÁLEZ defend the existence of a single interest as a reason for criminal intervention. In any case, with regard to the penalties, there seems to be a continuum between the intentional type and the reckless type.

The crime of money laundering, regulated under Chapter XIV of Title XIII of Law 10/2010, covers three basic types of conduct, defined in Articles 301.1, paragraph 1, and 302.1.

The first type includes the acquisition, possession, use, conversion, or transfer of assets, knowing that these originate from a criminal activity, meaning that they do not pursue any purpose beyond intent .

The second type of crime is the performance of any other act to conceal or cover up the illicit origin of the goods or to assist the persons who have participated in the infringement. Therefore, there is a subjective element of injustice, in contrast to its absence in the first type of crime.

The third type of crime occurs when the true nature, origin, destination, and movement of assets or property is concealed or covered up.

Two new qualified types are also introduced: the first one penalizes as crimes the assets derived from bribery, influence peddling, embezzlement, fraud and illegal exaction and the second one the crimes derived from land use planning and urban development.

It is also worth noting the important new developments that, following the regulations introduced by Organic Law 10/2010, have taken place in our legal system with the publication of Royal Decree-Law 7/2021 of April 27 transposing EU Directive 2018/843, also known as the Fifth Directive. Thus, among the new guidelines is the creation of a Single Registry of beneficial ownership of legal persons and entities or structures without legal personality, based on the data held in the Commercial Registry and the General Council of Notaries, and which must be accessible to obliged subjects.

Also noteworthy is the expansion of the regulatory definition of individuals with public responsibilities to include senior management positions in regional and local political parties.

Specific mention deserves the issue of the transposition of the aforementioned Directive 2018/843, in relation to the aggravated type of laundering of assets from corruption and persons with political presence and public functions, which has merited a study by NUÑEZ PAZ [10], who has highlighted the regulations established in its new article 20 *bis* that provides for the preparation by the Commission of a single list of all important public functions, said list must be public and a list prepared by each of the Member States that includes those persons who perform or have performed important public functions, and all this because crimes linked to political corruption serve as the base crime of a consecutive crime of money laundering. The period of two years being the mandatory period for applying due diligence measures to persons who have ceased to perform functions of political responsibility.

Finally , it is worth mentioning, in relation to political corruption, the modification of the penal code that has taken place following the entry into force of Organic Law 6/2021 of April 28, with the wording of article 301.1, third paragraph, expanded to increase the penalty to the upper half, that is, from 3 years and 3 months to 6 years in prison, in addition to the fine of double to triple the value of the assets and the possibility of special disqualification, among other measures.

III. PREVENTION OF MONEY LAUNDERING IN PRIVATE BANKING ACTIVITIES.

A. Private Banking. Conceptual delimitation

Although private banking is sometimes understood as an area of banking activity distinct from public banking, in our case we are referring to a specific area of this activity: personalized and exclusive service to clients with high net worth. Consequently, it is necessary to segment clients across different banking institutions, so that those at the top receive differentiated treatment, commonly known as a red carpet, aimed at advising on and managing these assets. This treatment includes the creation of appropriate legal structures (remember the old SICAVs or even *Family Offices)* to optimize tax advice and also its transmission to subsequent generations, all based on a relationship of trust and confidentiality.

More specifically, we can define private banking as a preferential service based on the client's investment objectives, time horizon, risk profile and tax situation, among other variables, and which is based on 4 pillars of action and offer that are[11]

1) Traditional banking products such as the following
   - Current accounts
   - Term deposits
   - Investment funds (own and third-party)
   - Trading of securities
   - Pension plans, PPA and EPSV
   - Credit cards
   - Mortgages

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[10] NUÑEZ PAZ, MIGUEL ANGEL. Issues relating to the transposition of the so-called "Fifth Directive" in relation to the aggravated type of money laundering derived from corruption and persons with political presence and public functions. In ABEL SOUTO, MIGUEL AND SANCHEZ STEWART (coord.). 8th *International Congress on the Prevention and Suppression of Corruption. Money laundering.* Ed. Tirant lo Blanch. Valencia. 2021, pp. 627–649

[11] Source consulted. Sabadell-Urquijo Private Banking. October 2018. File 10

- Credits
- Life or savings insurance
- Protection insurance

2) Specific Private Banking products such as
   - Discretionary portfolio management
   - Structured products
   - Position reports
   - Venture Capital and Alternative Investments
   - Direct access to Broker
   - Invitations to events and conferences
   - Structured financing
3) Tax and property advice
   - Information and updates on legal and tax regulations
   - Analysis of products and appropriate structures
4) Financial advice
   - Main service of Private Banking
   - Access to positions and profitability, daily monitoring of clients' portfolios based on their knowledge, experience, and investment objectives, all of which are usually confirmed through the so-called Suitability Test.
   - Restructuring of family groups and business restructuring
   - Planning income generation and its distribution
   - Tax optimization in the transfer of assets.

B. Historical origins and current situation

As ANNELICE LICONA CAMPERO has pointed out [12], the term private banking is historically situated in the service of management of the private assets of kings, as opposed to the management of the assets that belonged to the monarchy as a public power, however modern private banking as we know it today comes from countries such as the United States, the United Kingdom and Switzerland, the Anglo-Saxon term *Private Banking itself* gives its name to this activity while in Spain the first entities were BANIF (Investment and Finance Bank) created in 1962, and which has had clients throughout its history of notable popularity and importance, including members of the Spanish royal family, and SAFEI (Investments and Financial Studies, SA) created in 1963.

C. Profile of the private banking client

Private banking is a different type of banking activity than that typically performed with commercial banking clients. It is based on knowledge of the client and their risk profile, especially through a personal advisor or private banker. Private banking clients are traditionally included in this segment because they are debt-free and have a high income or significant assets, requiring specialized service. There are clearly two management models: one that follows the American model, serving primarily corporate entities seeking to increase their assets through investment, and the other, the Swiss model, which focuses on high-net-worth clients seeking to increase their wealth by reducing their tax burden and obtaining returns close to inflation. We can take the example of the defunct BanIf , which became part of Banco Santander's private banking sector and which counted among its clients important businessmen such as Amancio Ortega, Fernando Fernández Tapias, famous athletes such as Sergio Ramos, Carles Puyol, or artists such as Isabel Pantoja, which gives an idea that the most important fortunes in Spain channeled their savings through these investment services, in which discretion and confidentiality are important notes. Special mention should be made of the so-called politically exposed persons (PEPS) in our area of prevention of money laundering. This means that people who hold or have held prominent public positions, whether in Spain or abroad, or officials of international organizations. It is not surprising that among the FATF Recommendations regarding money laundering and terrorism prevention, number 12 is dedicated to these people, along with their relatives up to the second degree of consanguinity and their closest collaborators, who are linked to the PEPS through employment contracts and who are likely to be affected by corruption. And in this way, by using their power and influence, they can obtain a particular advantage or benefit derived from public assets, with the resulting legal and reputational damage to the banking institutions that establish a contractual or business relationship with them. Let us remember, in general, that transnational organized crime no longer uses violence as its primary means of action, but rather corruption. Hence , it is necessary for banking institutions to adopt due diligence measures, given the high amount of assets managed in the private banking sector.

D. The private banker as advisor

When a client accesses the private banking service by having the minimum assets, which varies according to the criteria of each entity (for example in *Santander Private Banking* , the lower limit is 500,000 euros, while in other entities such as UBS this limit is

[12] LICONA CAMPERO, ANNELICE. Private Banking; Technological Horizon in the Spanish Market. Final Degree Project. Santander. July 2021, page 9

a minimum of 1,000,000 euros, at the top of this service is the so-called *Private Weallth* , which manages assets exceeding 10 million euros, and which is a more comprehensive service that includes advice on real estate investments, works of art or philanthropic activities, has a private banker, expert in markets and financial products, and who normally has a certification as a European Financial Advisor, granted by the *European Financial Planning Association* , that is, they possess the qualifications corresponding to the highest professional standards in relation to the advice and management of large assets. Private bankers typically have a small client portfolio, normally no more than 100 per banker. As noted, they provide highly personalized service, allowing the advisor to know whether the client has a more or less conservative investment profile. This is well known following the publication of the MIFID 2 regulations. Furthermore, investment transactions in the private banking segment must be authorized by the banker, which implies the presence of certain obstacles for the client, who nevertheless enjoys the advantages of differentially favorable treatment compared to clients of commercial banks.

Of particular interest is the case in which the private banker and his team, in their tax advisory work, encounter some of these large estates, consisting of a mixture of funds from legal and illegal activities, in which two distinct crimes were allegedly committed, one of them against the public treasury. This indicates the high degree of responsibility these professionals exert in dealing with these clients, in terms of detecting possible criminal origins in the money deposited into the bank.

E. The legal framework for the prevention of money laundering in the banking sector

Following the paradigm shift that took place after the entry into force of Organic Law 5/2010 of 22 June, which converted legal persons into criminally liable entities, going beyond the simple administrative sanctions to which they were subject until then, and also the entry into force of Law 10/2010, which provided for punishment for individuals or legal entities that committed the crime of money laundering, with a vicarious liability system, but also with the presence of a self-liability system through their own wrongdoing as an organisational defect, banks, as obliged subjects, began to adopt compliance measures by drafting financial crime prevention manuals and applying them to all businesses and contracts that took place, especially in private banking activities.

Generally speaking, the risk arising from financial crime in relation to money laundering is defined as the conversion or transfer of assets, knowing that said assets derive from a criminal activity or from participation in a criminal activity, with the purpose of concealing or covering up the illicit origin of the assets or helping implicated individuals evade the consequences of their actions. It also includes concealing or covering up the origin, location, disposition, movement, or beneficial ownership of assets or rights to those assets, knowing that they derive from a criminal activity.

With a risk-based approach, banking activities must design controls based on the ability to identify and mitigate the aforementioned risk by communicating priority areas of action to the authorities and maintaining strict confidentiality throughout the process, all within a framework of appropriate corporate policies and procedures that comply with national and international laws, especially those of the European Union.

Therefore, banking entities have published their money laundering prevention manuals, taking into account the social impact of financial activity and the implementation of a corporate culture based on integrity. In this sense, compliance units are responsible for promoting policies and procedures aimed at complying with current legislation at the corporate level, especially the FATF Recommendations and the relationship with supervisory bodies such as SEPBLAC, safeguarding assets, image and reputation.

Regarding internal control, the codes of conduct contemplate the accounting, recording, and documentation of all operations, so that all control areas and internal and external auditors can verify them.

In particular, the possession of privileged information must be reported to the compliance unit. Let us recall the case of Mariano Rubio, president of the Bank of Spain, during the PSOE government headed by Felipe González, who was prosecuted for communicating such information for the benefit of certain investors.

Likewise, in applying anti-money laundering regulations, clients and their operations must be known, monitored, and controlled, using human and technological resources such as artificial intelligence and Big Data.

The SEPBLAC has published a guide for use in the prevention of money laundering [13], and although it lacks regulatory effectiveness, we highlight due to its interest some issues such as the need to carry out a risk self-assessment report, according to different factors such as the sector of activity, the size of the entity, its geographical location, the type of clients,

Senior management of corporate entities is responsible for implementing the necessary policies and procedures for preventing money laundering, as well as establishing a feedback process *for communication* between prevention units and business units, differentiating between administrative bodies and internal control bodies.

It should be noted that apart from the SEPBLAC as the executive prevention body, there is a fundamental body which is the COPBLAC which is in fact the Commission for the Prevention of Money Laundering and Monetary Offenses, chaired by the Secretary of State for the Economy, and which is responsible, as far as we are concerned, for the Catalogue of Risk Operations, in order to help obliged subjects in the prevention and control of operations or businesses susceptible to the crime of money laundering.

[13]SEPBLAC has actually produced several publications, such as the Guide to Compliance with Due Diligence Obligations in Relation to Anglo-Saxon Trusts *and* Other Similar Legal Instruments, and Good Practices: Application of Lists of Persons and Entities Subject to International Sanctions, among others.

Prevention and Suppression of Money Laundering in Private Banking Activities

In general, and from a risk-based approach, anti-money laundering measures, in terms of the level of responsibility, extend to the highest levels of bank management, that is, to their board members, to whom the supervisory committee usually reports, and, depending on these, other internal control bodies, which usually involve a control system by areas and departments.

The implementation of the preventive action of banking entities is manifested in the issuance of daily communications to the Bank of Spain, as the inspection and supervision body, the weekly report to the SEPBLAC of the financial ownership file, and in terms of rapid profiling of clients, the analysis of their cash movements in collections and payments, the blocking of accounts if necessary, which although not expressly authorized by law, is based on the mandatory abstention from executing operations and the cancellation of the business relationship, in the event that the client does not document their income if required to do so.

The SEPBLAC has an information suite with an algorithm that responds to the banks once a month. In general, in large banking entities, thousands of people are in charge of this control task, although progressively new technologies, such as artificial intelligence and information control techniques, will facilitate the process.

IV. THE REPRESSION OF MONEY LAUNDERING

A. The Beginnings: Italy and the United States

Two countries hit hard by organized crime at the beginning of the last century, Italy and the United States, were the first to adopt measures aimed at suppressing money laundering, specifically investigating criminal activities that generated large profits. This means that targeting the money launderer also meant targeting the criminal organization. As FERRÉ OLIVÉ has stated, [14]the use of criminal activities has been a widespread and unpunished practice for many years, practically throughout the world. This situation has been due to the lack of diligence on the part of banking institutions, which at the same time obtained significant profits from these transactions.

The criminalization of money laundering in Spain began with a very limited framework, being limited, as mentioned above, to assets or profits derived from drug trafficking.

B. The extension of the ius State punishment in criminal law relating to money laundering . The breach of the principle of minimum intervention

The rapid increase in legal regulations on money laundering is an indisputable fact, and it defines the criminal policy measures implemented, both through international legislative instruments and at the domestic level in different countries, which have attempted to harmonize their provisions to prevent the globalization of the economy from facilitating the intensification of crime. What is punished in this crime is a second-degree conduct, following a prior offense, which, as we know, can be any crime, especially since the entry into force of Law 1/2015 in Spain, which now classifies misdemeanors as minor offenses.

Within a risk-based approach, the FATF has defined what it calls threats, which are those people, groups of people or their activities that pose a potential danger due to their ability to cause harm to the State, society, the economy, or other fundamental elements of a country's life. Therefore, threats have criminal objectives, and to address them, they must be subject to action by police authorities, CNI, CITCO, the State Attorney General's Office, judges and courts, so that they do not use the vulnerabilities of the financial system to give an appearance of legality to their benefits.

Table 1. Convictions and acquittals from 2020 to 2016 from the criminal court

	2020			2019			2018			2017			2016		
	Condemnatory	Absolutory	Total	Condemnatory	Absolutory	Total	Condemnatory	Absolutory	Total	Condemnatory	Absolutory	Total	Condemnatory	Absolutory	Total
Provincial Court	37	11	48	41	27	68	48	22	70	36	19	55	35	25	60
National Court	13	6	19	14	6	20	11	2	13	4	4	8	14	3	17
TSJ	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Criminal Court	3	0	3	0	0	0	0	0	0	1	0	1	0	0	0
Total sentences	53	17	70	55	33	88	59	24	83	41	23	64	49	28	77

Source: Judicial Statistics of the CGPJ. Time series 2020-2016.

As for the penalties, it is necessary to distinguish whether it concerns natural or legal persons, and the existence of principal and accessory penalties, all of which are established in articles 301.1 and 302.2 of the Penal Code.

[14]FERRE OLIVÉ, JUAN CARLOS. Corruption, organized crime, and money laundering in the financial market. In FERRÉ OLIVÉ et al. Money laundering and corruption in the banking system. Ed. University of Salamanca. 2002. p. 13

Regarding the main penalties for individuals convicted of money laundering, there are two options: one is a prison sentence and the other is the payment of a fine, specifically:

- Prison sentence of 6 months to 6 years
- A fine of three times the value of the goods

This is with regard to the basic type; in the aggravated type, the penalty is applied in its upper range.

It also includes disqualification from exercising the profession or industry for a period ranging from 1 to 3 years and the temporary (for a period not exceeding 5 years) or permanent closure of the establishment or premises in which the acts were committed.

If the conviction is against a legal entity, it is regulated in Article 302.2 and when the requirements of Article 31 of the Penal Code are met, the penalties provided are as follows:

- A fine of 2 to 5 years when the crime committed by the natural person carries a prison sentence of 1 to 5 years.
- A fine of 6 months to two years in the following cases, in compliance with the provisions of art. 33 b) ag) of the Penal Code.
- Dissolution of the legal entity
- Suspension of its activities for a period not exceeding 5 years
- Closure of premises and establishments for a period not exceeding 5 years
- Prohibition of carrying out activities whose exercise has led to the commission, facilitation or concealment of the crime for a period not exceeding 15 years,
- Disqualification from obtaining subsidies and public aid, from contracting with the public sector, tax incentives or Social Security for a period not exceeding 15 years
- Reckless money laundering, in turn, is punishable by imprisonment from 6 months to 2 years and a fine of up to three times the value obtained.

C. Private banking and money laundering: the case of the Pujol family

The investigation into bribery, influence peddling, tax evasion, money laundering, malfeasance, embezzlement, and falsification of funds against former Catalan President Jordi Pujol Soley and his family has been widely reported in the media and has served as a public demonstration of the close connection between private banking and the possibility of money laundering.

As is well known, it all began with the transfer of four million euros from Andbank to Banca Privada de Andorra (BPA) in 2010, which alerted the tax authorities. In 2014, Jordi Pujol Soley admitted to having hidden these amounts from the public treasury for 34 years. Later, a complaint filed by the ex-girlfriend of Jordi Pujol's son, María Victoria Álvarez, implicated Jordi Pujol Ferrusola, who used the same money laundering network as the so-called Sinaloa Cartel, a criminal and drug trafficking organization, through the bank Casa de Cambio Monex, based in Mexico City, to which he transferred money from BPA.

Another operation that significantly shows the development of this process is the purchase in 2007 by Jordi Pujol Jr. of 30% of the Argentine port of Rosario, which is a springboard for transporting drugs to Europe and the United States, for 300,000 euros and its sale for 5 million euros in 2012 to the Argentine oil company Vicentin [15], as well as his business relations in Mexico with the company ISOLUX CORSAM[16], which had federal contracts worth billions of pesos, and the sending of funds to shell companies in various countries such as Croatia, Argentina, Uruguay and Mexico.

In July 2020, the head of the Investigative Court No. 5 of the National Court considered the investigation phase to be completed, with charges of various crimes such as belonging to or organizing a criminal organization and money laundering, among others.

Also worthy of mention in the Pujol family case is the Bank of Spain's intervention in Banco de Madrid, which is 100% controlled by BPA, following an investigation initiated by the U.S. Treasury Department, which accused the Andorran bank of providing services to criminal individuals and organizations, engaging in corruption and smuggling, and of failing to cooperate with justice.

Table 2. Convictions and acquittals from 2016 to 2020 by sex.

	Men	Women	Legal Persons	Total	Men	Women	Legal Persons	Total
	2020				**2019**			
Condemned	123	27	1	151	194	83	1	278
Acquitted	32	30	0	62	114	49	15	178
Total number of prosecuted	155	57	1	213	308	132	16	456
	2018				**2017**			
Condemned	172	90	2	264	71	43	0	114
Acquitted	133	73	8	214	81	42	0	123

[15] Web: Libertaddigital.com/internacional/Latinoamérica/2015-11-04
[16] Web: lainformacion.com/economía-negocios-finanzas

Total number of prosecuted	305	163	10	478	152	85	0	237

	2016			
Condemned	124	68	6	198
Acquitted	97	31	8	136
Total number of prosecuted	221	99	14	334

Source: Judicial Statistics of the CGPJ

Table 3. Quantification of sentences by sex, convictions and acquittals, taking into account nationality

	Provincial Court of Nationality of Convicts			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	48	2	12	4
Women	9	0	4	3
Total	57	2	16	7

	National Court Nationality Convicts			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	32	5	17	0
Women	2	1	8	0
Total	34	6	25	0

	Criminal Court Nationality Convicted			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	1		1	1
Women				
Total	1		1	1

	Nationality of Convicts			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	81	7	30	5
Women	11	1	12	3
Total	**92**	**8**	**42**	**8**

	Provincial Court Nationality Acquitted			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	15	0	2	5
Women	16	1	1	5
Total	31	1	3	10

	National Court Nationality Acquitted			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	7	0	3	0
Women	6	0	1	0
Total	13	0	4	0

	Nationality Acquitted			
	Spanish	**EU**	**Non-Community**	**Not Determined**
Men	22	0	5	5
Women	22	1	2	5
Total	**44**	**1**	**7**	**10**

Table 4. Privacy penalty and fine in euros

Deprivation of liberty sentence	**Fine in euros**	**Number of convicts**
4 years	From 120,000.00 to 600,000.00	3

From 3 years to 3 years and 4 months	From 45,000.00 to 2,500,000.00	11
From 2 years to 2 years and 8 months	From 1,500.00 to 900,000.00	12
20 months	From 1,000,000.00 to 1,500,000.00	2
1 year, 6 months and 1 day	1,259,320.00	7
1 year and 10 months	From 10,000.00 to 340,000.00	4
1 year and 9 months	1,000,000.00	2
1 year	Not determined in Sentence	7
From 1 year to 1 year and 9 months	From 500.00 to 279,995.92	14
15 months	From 300,000.00 to 500,000.00	2
10 months	From 5,000.00 to 1,000,000.00	21
9 months and 8 days	130,000.00	2
9 months and 1 day	629,660.00	2
9 months	From 980.00 to 41,961.00	4
6 months and 1 day	10,000.00	4
6 months	From 140.00 to 1,800,000.00	21
5 months	6,215,136.00	1
5 months	From 9,000.00 to 250,000.00	4
4 months and 15 days	1,800,000.00	1
4 months	8,075,037.53	1
4 months	From 4,115.00 to 200,000.00	2
3 months and 1 day	From 1,789,809.75 to 6,648,889.00	2
3 months	28,496.00	6
3 months	From 30,000.00 to 821,859.00	10
45 days	25,000.00	1
1 month and 15 days	1,556.00	1
Days fine	36,689.00	1
Days fine	13,870.00	1
Days fine	23,920.00	1
		150

Three sentences of 6 months and fines between 140 and 1800,000 euros correspond to criminal courts.

V. CONCLUSIONS

It has been pointed out many times that money laundering is as old as money itself. Vespasian's famous phrase, "Pecunia non Olet ," clearly expresses this fact.

The establishment of an expansive criminal law system, with accelerated legislation to regulate a crime closely linked to transnational organized crime, originally began with drug trafficking. Later, through the requirements of various international organizations, such as the FATF and the Egmont Group, through which the Financial Intelligence Units were created, it came to encompass all types of crimes. As noted, criminal law also requires punishment for second-degree conduct. The focus of our study has been private banking, characterized by the confidentiality of the relationship between the client and the bank through the figure of the private banker, and in which banking secrecy, as a manifestation of professional secrecy and the right to privacy of individuals, acquires special relevance, giving it its characteristic opacity.

On the other hand, the legal and reputational impact of the crime of money laundering means that the principle of liability of legal entities established in Law 10/2010 and its exemption regulated in Law 1/2015 have made banking entities equip themselves with the material and personal means to carry out compliance programs. Programs.

Finally, it should be mentioned that the crime of money laundering is necessary from a risk-based approach, and that in the case of private banking, reinforced due diligence measures must be taken, as indicated by Law 10/2010.

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