The Fight Against Money Laundering Through Criminal Law in the European Union

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The difficulties that exist in the search for effective norms to combat money laundering are evident. In the European Union, different legal instruments have been developed following the recommendations of the United Nations, Council of Europe and the FATF. These efforts were able to determine instruments of a preventive nature and protection of the financial system and instruments related to the fight in the criminal field. However, while EU's action in the financial-economic field has been intense, only recently have the instruments of a criminal nature been improved with Directive (EU) 2018/1673, which aims to achieve harmonization of the crime of money laundering. This article analyzes the provisions of the aforementioned Directive to improve the fight against money laundering from the criminal sphere in the EU Member States.

Keywords: money laundering, criminal law, harmonization, international cooperation, proof, jurisdiction

INTRODUCTION

The fight against money laundering is one of the areas in which the difficulties in finding effective legal instruments to combat this criminal phenomenon are more evident than in any other area. It is enough to take into account, just as an example, some of the reasons behind this difficulty: the money-laundering offence is a criminal activity that easily penetrates and reaches all sectors of society; it extends its forces not only to tax havens but also and subtly coexists with the most developed public organizations; it is committed in a physical way, but also and more frequently, taking advantage of the digital environment[2], and therefore, it easily travels through time, space and individuals or legal entities that are, as a consequence, difficult to identify.

A hasty reflection on the phenomenon, which has just been outlined, would place on the track of any lawyer the problems that criminal justice must face regarding the investigation and evidence of money laundering, among which they stand out: (1) its internal and/or transnational and international nature; (2) its link to serious organized crime, but also to other less serious or even minor criminal phenomena, whether committed by groups or individuals; (3) but it is undoubtedly its economic nature and the impact it has on the economy in general that make it most difficult to prosecute, due to the need to combine instruments from various sectors of the legal system and the difficulties of interacting with the principles that inform each of these systems - particularly with the reinforced guarantees that should rule criminal justice; because of the States' need to create and strengthen cooperation mechanisms and achieve a certain legal harmonization, not only at European level, but also worldwide; because of the introduction, in this field, of international mandates not always coming from bodies with the capacity/power to legislate, blurring the legal concepts in the interest of greater flexibility[3]; due to the convertibility of money into a

virtual entity and its detection difficulties; and, without exhausting the long list of difficulties, due to the tolerance and permissibility that, in some cases/fields, laundering has generated.

The fight against money laundering gained special momentum at the end of the 1980s[4], led by the *United Nations Convention against Illicit Traffic in narcotic drugs and psychotropic substances dated December 20, 1988 and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime dated November* 8, 1990,[5] international instruments complemented by the action of different organizations, most notably the *Financial Action Task Force (FATF) in 1990*.[6] The aforementioned legal instruments described some of the action points to be followed by the States, which were initially based on the fight against drug trafficking - and therefore organized crime - and where the intention was to prevent and repress the perpetration of this type of offence through the deprivation of the economic benefits arising from it, also trying to avoid the infiltration of huge amounts of money into the financial system.[7] This clear relationship in money laundering between criminal activity/economy and sovereignty has determined since then the internal and international policies of action in this field, in which, in addition, international cooperation is an essential element for its effectiveness.

Different legal instruments were also developed in the EU in an effort to incorporate UN recommendations, Council of Europe and the organizations referred to above, which were generated, however, due to the Union's particular evolution, as was the case in other fields, a two-speed Community policy: (1) instruments concerning the preventive nature and protection of the financial system, the first example of which was Council Directive 91/308/EEC dated June 10, 1991 *on prevention of the use of the financial system for the purpose of money laundering*, which has been followed by other subsequent instruments[8]; and (2) instruments concerning the fight in criminal matters, the first acts of which are represented by Joint Action 98/699/JHA dated December 3, 1998 *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and by* Council Framework Decision 2001/500/JHA dated June 26, 2001, *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime which have been updated and replaced by Directive (EU) 2018/1673 dated October 23, 2018 of the European Parliament and of the Council on combating money laundering through Criminal Law and Regulation (EU) 2018/1805 of the European Parliament and of the Council dated November 14, 2018 on the mutual recognition of criminal decisions on confiscation and freezing.* The EU was aware from the outset that the fight against money laundering should be fought mainly "through criminal law measures and in the framework of international cooperation between judicial and police authorities", but that the strategy to combat this phenomenon should not, however, be "limited to the criminal law approach, because the financial system can perform a very effective role."[9]

The evolution of the fight against money laundering in the European sphere has also been determined by this incontrovertible relationship between criminal activity/economy and sovereignty, so that the action points continue to be perfectly recognized (fight in the economic-financial sphere through the establishment of obligations to collaborate in the detection and prevention of suspicious activities; due diligence measures; risk-based approach system; creation of a register for beneficial owners and a register for trustees; etc.), although the intention has been to improve and intensify the criminal aspect with a dual objective: to improve the prevention and, where appropriate, the punishment of these offences through criminal law and to strengthen cooperation between Member States with the purpose of eliminating obstacles to the necessary cooperation between States, which requires significant harmonization of the legislative instruments of the Member States, aspects to which particular attention has been paid in the latest European instruments referred to and whose main characteristics we will try to summarize in the following lines.

THE BOOST FROM THE EU IN THE CRIMINAL PROSECUTION OF MONEY LAUNDERING

The fight against money laundering from the criminal law area in the EU has been, as noted, particularly slow. In fact, it took more than 15 years after the adoption of DM 2001/500/JHA on money laundering to approve a new legal instrument in the criminal law area, focused on harmonizing the type of crime in the Member States and introducing some complementary measures to improve cooperation between States and the prosecution of these acts.

In fact, the EU during this temporary period had limited its action to strengthening criminal cooperation between Member States through the improvement of European instruments relating to the freezing and confiscation of the proceeds of crime. Evidence of this is provided by Council Decision 2007/845/JHA on asset tracking; Council Framework Decision 2003/577/JHA dated July 22, 2003 *concerning the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2006/783/JHA dated October 6, 2006 on the application of the principle of mutual recognition to confiscation orders*; Council Framework Decision 2005/212/JHA dated February 24, 2005 *on Confiscation of Crime-Related Proceeds, Instrumentalities and Property*; and Directive 2014/42/EU of the European Parliament and of the Council dated April 3, 2014 *on the freezing and confiscation of crime-related proceeds, instrumentalities and property in the European Union*[10].

In this context, in December 2016 and in the framework of the *EU Plan to strengthen the fight against the financing of terrorism and financial offences*, two instruments were introduced to reinforce the fight against terrorism and money laundering at EU level[11]: the proposal for a Directive against money laundering through criminal law and the proposal for a Regulation on mutual recognition of freezing and confiscation orders, both adopted in 2018, as mentioned above. These complementary instruments are intended, on the one hand, to harmonize criminal law rules on the definition of money laundering and, on the other hand, to strengthen cooperation between Member States on the recovery of assets and proceeds of crime through the recognition and enforcement of decisions in this field on EU territory. Its complementary nature is obvious, since the foundation stone of the recognition and enforcement of decisions at EU level is trust, and this is helped, in the criminal law area, when differences in typical frameworks are minimized or disappear.

Towards Harmonization of the Money-Laundering Offense

As has been stated, one of the key objectives of Directive (EU) 2018/1673 is to achieve the harmonization of the money laundering offence. In this regard, the EU has opted for a harmonization of "minima" (Art. 1.1) which changes only marginally the description of the preceding "criminal activity" and the money laundering offence referred to in international instruments, and that set out in the European Directives on prevention in the fight against money laundering. However, the adoption of this Directive represents a new departure in the fight against this criminal phenomenon, compared with previous instruments, particularly DM 2001/500/JHA[12], by stating in clause 4 that this instrument is not sufficiently comprehensive and that the current definition of money laundering lacks sufficient coherence to combat money laundering effectively throughout the Union and leads to the existence of loopholes in terms of enforcement and obstacles with regard to the cooperation between the competent authorities of the different Member States. So, concerning the regulation of this offence:

1. The Art. 3 establishes, as is usual at European level, international conventions and the FATF recommendations, a broad definition of money laundering[13], including self-laundering (Art. 3.5)[14] and the possibility of punishing reckless money laundering (Art. 3.2)[15].
2. The Art. 2 also refers in an extended manner to prior criminal activity delimited, in general, on the basis of the seriousness of the offence as measured by the penalty attached to it, by stating that it includes "any kind of criminal participation in the commission of any offence which, in accordance with national law, is punishable by deprivation of liberty or a detention order for a maximum period of more than one year or, in those Member States which have a minimum threshold for offences in their legal system, by any offence punishable by

deprivation of liberty or a detention order for a minimum period of more than six months." Along with this first delimitation, a list of offences is included, which, in any case - therefore, regardless of the penalty imposed - are considered to be prior criminal activity such as participation in a criminal organization or group; terrorism; human trafficking and illicit trafficking of migrants; sexual exploitation; illicit trafficking of narcotic drugs and psychotropic substances; illicit trafficking of arms, stolen goods, corruption, fraud, cybercrime, homicide, smuggling, extortion, etc., including tax offences.[16]

3. In addition to this, Art. 3.3 states that in order to convict for the offence of money laundering, it is not necessary to have a previous or simultaneous conviction for the preceding criminal activity; nor is it necessary to establish all the factual elements or all the circumstances relating to that criminal activity, including the perpetrator's identity;
4. and, finally, it provides for the possibility of conviction for the offence of money laundering in transnational cases, where the property is the result of conduct which has taken place in the territory of another Member State or in a third country, provided that such conduct would have constituted a criminal activity in the country in which a conviction for money laundering is handed down.[17] However, Article 3.4 provides for the possibility that, in these cases, the State with jurisdiction to judge money laundering may determine that the offence is subject to compliance with the principle of dual criminality, in other words, that previous conduct in another State is also classified as an offence, with the exception of the offences relating to criminal organizations or groups, terrorism, human trafficking and illicit trafficking of migrants; sexual exploitation; illicit trafficking in narcotic drugs and psychotropic substances and corruption, where prosecution cannot be made subject to this dual criminality.

In this sense, the harmonization projected by the EU seems to be another example of the expansive and punitive criminal policy that characterizes contemporary criminal law[18] and which, in this area, has been defined by at least the following elements:

a. The definition of money laundering itself, which includes criminal phenomena of a very diverse nature and entity, including self-laundering, covering fraudulent modalities, but also making it possible for States to regulate imprudent modalities.
b. It contains an important list of offence considered as "previous or precedent criminal activity" which, not only is delimited by extremely serious or serious crimes, linked to the fight against organized crime and terrorism, but also incorporates other less serious crimes, including tax offence.
c. The possibility of autonomous conviction for this offence, i.e. even without a conviction for the previous criminal activity[19].

The minimal framework also covers the range of sanctions provided for and which relate to the maximum penalty so that, for natural persons, the minimum of the maximum penalty must not be less than 4 years, at least for the most serious cases (Art. 5). In the case of legal persons, they shall be held liable both for the offences committed by the management positions of the legal person which led to the commission of the offence in his/her favour; and for shortcomings in supervision or control within the company (Art. 7. and in such cases the sanctions must be effective, proportional and dissuasive, including criminal or non-criminal fines and others such as disqualification of the natural or legal person; temporary or permanent closure; judicial winding-up and placing under judicial supervision).

Measures for the Investigation and Evidence of Money Laundering

The scope of the money laundering type, together with the vast consideration of previous criminal activity and the fact that, given the nature and scope of this offence there are different sectors of the legal system involved (financial system, criminal field, administrative field, etc), results in the existence of certain particularities both in the investigation measures and in the evidence, some of which have been addressed in Directive (EU) 2018/1673, following the trend of other international instruments in this area.

Indeed, Article 11 of that Directive states that "Each Member State shall take the necessary measures to ensure that persons, units or services responsible for the investigation or prosecution of the conduct referred to in Articles 3(1), 3(5) and 4 have at their disposal **effective investigative instruments, such as those used in the fight against organized crime or other serious offences"** (emphasis added)[20]. This provision should also be complemented by clause 19, which states that, to this end, "it must be ensured that sufficient staff and specific training, resources and updated technological capabilities are available." It adds that "The use of such instruments, in accordance with national law, **must be selective and take into account the principle of proportionality and the nature and seriousness of the offences under investigation, and respect the right to the protection of personal data"** (emphasis added). These principles, not for obvious reasons, must be expressly emphasized, as a way of visualizing the limits to which the action of the State in the prosecution of money laundering must be subject, especially since prior criminal activity is not always so serious as to make use of the most restrictive investigative measures in terms of fundamental rights.

In addition to the above, clause 21 of the Directive adds that its articles consider "the principles recognized in Article 2 of the Treaty on European Union, respect the fundamental rights and freedoms and observe the principles recognized in particular by the Charter of Fundamental Rights of the European Union, including those set out in Titles II, III, V and VI thereof, which cover, inter alia, the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, which also cover the requirements of precision, clarity and predictability in Criminal Law, the presumption of innocence, as well as the rights of suspects and defendants to have access to a lawyer, the right not to plead guilty and the right to a fair trial." It adds that it must be implemented in accordance with the above rights and principles, taking also into account the ECHR, the ICCPR and other human rights obligations under international law.

With regard to the subject matter of the evidence, it is stated that, for the punishment of the money laundering offence, it will not be necessary to determine the existence of a previous or simultaneous conviction for the criminal activity generating the property (Art. 3.3(a), nor to establish all the factual elements or all the circumstances relating to such criminal activity, including the perpetrator's identity (Art. 3.3b)[21].

In this context, and as a means of addressing possible obstacles to evidence the money laundering offence, the Directive does not expressly make any provision of a similar nature to the one set out in Article 3.3 of the UN Convention on *Illicit Drug Trafficking*, which accepted the use and legality of circumstantial evidence. Therefore, in the absence of any provision expressly referring to evidence of money laundering, a more general instrument will have to be used, Directive (EU) 2016/343 of the European Parliament and of the Council dated March 9, 2016, *which strengthens certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings.* This instrument provides, in Article 6, that States should ensure that the weight of the evidence lies with the prosecution, without prejudice, as stated in clause 22, to "any powers of evidence offered by the court of its own motion, or to the independence of the court in assessing the guilt of the suspected or accused person, *or to the use of de facto or de jure presumptions regarding the criminal liability of the suspected or accused person."*[22] However, reference is made to possible evidence of money laundering in clause 13 of Directive (EU) 2018/1673, by stating that, in each individual case, when examining whether the property is derived from criminal activity and whether the person was aware of it, account should be taken of the particular circumstances of the case, such as, for example, for objective elements, (1) the fact that the value of the property is disproportionate in relation to the lawful income of the accused person; (2) that the criminal activity and the acquisition of property have occurred within the same period of time. And, in order to obtain the judgment of certainty about the knowledge, intention or purpose required by the type of money laundering, the possibility of deducing objective factual circumstances is established, in a manner similar to that provided for in Article 3.3 of the UN Convention *on Illicit Drug Trafficking*, as well as in Art. 2f) UN Convention against transnational organized crime and, already at European level, in Art. 6.2(c) of the *European Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*.

From this short overview, in which only a selection of the possibilities to be taken into consideration in the investigation and evidence of these offences has been made, we can conclude:

1. The use of special investigative measures will be frequent, although the determination of the specific measures in each case will necessarily be subject to compliance with the basic legal guarantees of criminal justice (respect for the principles of legality, proportionality, due respect for the right to data protection and the rights of the defence and the presumption of innocence of suspects and defendants), all interests present at the time of their adoption having to be considered.
2. In matters of evidence, direct evidence may be used, although, because of the particular methods of commission, the use of circumstantial evidence will be frequent and even, as has just been pointed out, evidence of presumptions, without it being possible to shift the burden of proof which, in accordance with the principles in force in criminal proceedings, remains with the prosecution.

Improving International Cooperation in This Field

Criteria for Determining Jurisdiction

One of the concerns of the European legislator is to improve the fight against money laundering in cross-border cases, avoiding gaps or problems that may arise in the prosecution of these offences in terms of jurisdiction. To that end, and taking into consideration the movement of perpetrators and of proceeds of crime, as well as the complexity of cross-border investigations necessary to combat money laundering, all Member States should establish their jurisdiction in such a way that the competent authorities are empowered to investigate and prosecute such activities, ensuring that their jurisdiction covers situations where offence is committed by means of information and communication technologies from their territory, regardless of whether those technologies are based on their territory or not (clause 17).

This is why article 10 refers to the criteria for attribution, taking up the traditional criteria linked to the sovereignty of States -territoriality and active nationality-. In addition, it enables States to extend their jurisdiction to prosecute the offences referred to in articles 3 and 4 of the Directive when they have been committed outside its territory, after reporting to the jurisdiction, taking as criteria of attribution: that the perpetrator of the offence has his habitual residence in the State or when the offence has been committed for the benefit of a legal person residing in that State.

Finally, it should be noted that the Directive introduces criteria to solve possible conflicts between two or more Member States in cases of concurrent jurisdiction to prosecute these offences.[23] Accordingly, it points out that the Member States will work together to decide which of them has jurisdiction, with the purpose of centralizing legal proceedings in a single Member State on the basis of the following criteria:

(a) the territory of the Member State where the offence was committed;
(b) the nationality or place of residence of the perpetrator;
(c) the country of origin of the victim(s); and
(d) the territory in which the perpetrator was found.

Where appropriate, and in accordance with Article 12 of Framework Decision 2009/948/JHA, the case shall be transferred to Eurojust.

The Recognition and Enforcement of Decisions to Freeze and Confiscate the Proceeds of Crime from Money Laundering

There is no doubt about the relationship between the fight against money laundering and confiscation[24], since this instrument is shown to be one of the means to deprive criminals from the proceeds of crime, thus achieving a double objective: eliminating the "incentive" for the criminal who will not be able to enjoy those proceeds; and preventing future offences, by breaking the source of financing for them. The European legislator, aware of this figure's importance in the fight against crime in general - and therefore against money laundering - has taken a significant step forward with the approval of the aforementioned Regulation (EU) 2018/1805, from a dual perspective: on the one hand, the European legislator decided to abandon the normative technique of the directive as a regulatory

instrument, which requires transposition by the States within the time limit established therein, and opted for the Regulation, a binding and directly applicable legal instrument, thus indicating the clear community desire to try to solve this problem. On the other hand, the Regulation sets as general objectives to freeze and confiscate more criminal assets in cross-border cases, in order to prevent and combat crime, in particular terrorism and organized crime, and to better protect the rights of victims in cross-border cases. To this end, it proposes, among other measures, to cover - and now with direct effect - in addition to ordinary and extended confiscation, third party and civil confiscation, and reduces the scope of States' discretion to deny recognition in the case of extended confiscation; it establishes clear deadlines and the use of simplified and standardized forms regarding cooperation, as provided for in articles 4 et seq.); it intends to increase the protection of victims receiving cross-border compensation (by ensuring that, in cases where the issuing State confiscates assets, the victim's right to compensation and restitution takes precedence over the interest of the executing and issuing States).

With regard to the purpose of this contribution, Article 3 of the Regulation points out the obligation of States to recognize and execute a freezing order or a confiscation order **without verification of the dual criminality of the acts** which gave rise to it where those acts are punishable in the issuing State by a maximum penalty involving deprivation of liberty of at least three years and constitute, inter alia, a money laundering offence (Article 3.9). The important thing is that, in these cases, the recognition and execution of the freezing and confiscation order will not be subject to dual criminality control, which, as stated above, contributes directly to a significant improvement in cooperation between States in the fight against money laundering.

CONCLUSION

It is positive that the EU has considered making advances in the fight against money laundering in the criminal field. The adoption of the new instruments may, to some extent, contribute to a certain harmonization of the common framework, which will help to prevent the differences in legislation in the Member States from creating spaces of impunity - and facilitate "forum shopping" by criminals - while seeking to contribute in this way to improving mutual trust between Member States and hence cooperation between Member States in the fight against this criminal phenomenon by laying down certain provisions concerning the criteria for the allocation of jurisdiction and dispute settlement in cases of concurrent jurisdiction and by regulating, through a binding legal act of direct effect, the recognition and enforcement of freezing and confiscation orders without, in the case of the money laundering offence, making it subject to the principle of dual criminality.

However, there are still important problems that have already been highlighted in the legal systems of the Member States when applying their internal systems, due to the undermining of the legal guarantees in force resulting from this strong expansive and punitive trend in the regulation of this type of crime and which, once again, the European legislator, in the interests of greater efficiency, seems to fail to recognize, or at least to ignore.

ENDNOTES

1. 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), about which I am the main researcher.
2. In an expression used by GONZÁLEZ-CUÉLLAR SERRANO, which also highlights the two aspects under pressure in the relationship between the Internet and criminal justice: the usefulness and use that the digital environment can bring to the commission of different offences and, from another perspective, the huge virtuality that access to digital data can have for the State in order to investigate and clarify offences. And under this pressure, it will be necessary to bring the effectiveness of criminal justice into line with due protection of the fundamental rights of those under investigation. GONZÁLEZ-CUÉLLAR SERRANO, N., "Constitutional Guarantees in Criminal Prosecution in the Digital Environment", in DÍAZ-MAROTO Y VILLAREJO, J. (ed.) *Law and Criminal Justice in the 21st Century. Liber amicorum in honor of Professor Antonio González-Cuéllar García*, ed. Colex, Madrid, 2006, pp. 889 and ss.
3. Muñoz de Morales summarizes the different delimitations and criticisms of the so-called "soft law", underlining the importance that, in the criminal field, the recommendations of the Financial Action Task Force have had, which will be referred to shortly, precisely in the fight against money laundering, corruption and the financing of terrorism. See. Muñoz de Morales, Marta, *El Legislador penal europeo: legitimidad y racionalidad*, Thomsom Reuters/Civitas, 2011, pp. 74 and ss. In this regard, BLANCO CORDERO points out that "most of the institutions designed to address money laundering have their origin in soft law, especially the forty FATF Recommendations." BLANCO CORDERO, I., *El delito de blanqueo de capitales*, Thomson Reuters/Aranzadi, 2015, esp. p. 195.
4. It is important to note that the prevention policy for this criminal phenomenon emerged at the end of the 1980s as a result of the reaction of international organizations in response to the financial crime arising from drug trafficking, although, in the case of the UN, one of the first precedents for its actions can be considered to be the adoption of the Global Programme against Money Laundering in 1977. Peláez Martos, José Mª, *Manual práctico par prevención del blanqueo de capitales*, Wolters Kluwer, 2019, p. 303. For a more detailed study of the international legal framework, see ABEL SOUTO, M,, El blanqueo de dinero en la normativa internacional, Santiago de Compostela, Universidad de Santiago de Compostela, 2002; BLANCO CORDERO, I., *El delito de blanqueo de capitales, op. cit.,* pp.110-196.
5. These instruments have been followed, within the United Nations, by the *Convention for the Prevention of the Financing of Terrorism* dated December 9, 1999, *the Convention against Transnational Organized Crime* dated November 15, 2000 and *the Convention against Corruption* dated December 9, 2003, and within the Council of Europe by the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism dated May 16, 2005, known as the "Warsaw Convention."
6. The FATF is an intergovernmental organization whose objective is to set standards and promote the effective implementation of legal, regulatory and operational measures to fight against money laundering, the financing of terrorism and the financing of proliferation and other threats that affect the integrity of the international financial system. It also works to identify vulnerabilities at the national level to protect the international financial system from misuse. Its 40 recommendations, as summarized by the FATF in the introduction to the last review in 2012, constitute a comprehensive and consistent framework of measures that States should implement. The Original Recommendations from 1990 were an initiative to address the misuse of financial systems by persons laundering the money from illicit drug trafficking. The first review, in 1996, was intended to reflect the growing trends and techniques of money laundering and to extend its scope beyond drug assets. In 2001, the FATF extended its mandate to include the financing of terrorist acts and organizations, creating the 8 - later extended to 9 - Special Recommendations concerning the financing of terrorism. The second review, in 2003, was carried out shortly thereafter, and its greatest achievement was the endorsement of more than 180 countries - both the General Recommendations and the Special Recommendations concerning the financing of terrorism - and their recognition as the "international standard against money laundering and financing of terrorism." At the heart of the Council of Europe, the FATF's counterpart is MONEYVAL, the Committee of Experts on the Evaluation of Anti-Money Laundering and the Financing of Terrorism Measures, formally established in 1997, whose action and working methods have subsequently been developed by *Resolution R (2005) 47 on subordinate committees and bodies and its Statute by Resolution CM/Res (2010)12 on the status of the Committee of Experts on the Evaluation of Anti-Money Laundering and the Financing of Terrorism Measures*.

7. The justification is clearly reflected in the clauses of the above-mentioned UN Convention whose introduction highlighted the existence of clear links "between illicit trafficking and other related organized criminal activities, which undermine legitimate economies and threaten the stability, security and sovereignty of States."
8. This instrument has subsequently been amended by Directive 2001/97/EC of the European Parliament and of the Council dated December 4, 2001; Directive 2005/60/EC of the European Parliament and of the Council dated October 26, 2005 *relating to the prevention of the use of the financial system for the purpose of money laundering and financing of terrorism* - known as the 3rd Directive - and supplemented by Commission Directive 2006/70/EC dated August 1, 2006, laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council *concerning the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis*. Currently, Directive (EU) 2015/849 of the European Parliament and of the Council dated May 20, 2015, *on prevention of the use of the financial system for the purpose of money laundering and financing of terrorism*, known as the 4th Directive and Directive (EU) 2018/843, of the European Parliament and of the Council dated May 30, 2018, amending Directive (EU) 2015/849 on prevention of the use of the financial system for the purpose of money laundering or financing of terrorism, and amending Directives 2009/138/EC and 2013/36/EU, known as the Fifth Directive.
9. As stated in the clauses of Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. Some time ago, the doctrine had warned that this, now not so new, criminological and criminal policy scenario makes it necessary to use effective legal and material instruments to deal with a type of criminality that not only violates criminal law, but also affects commercial and financial legislation in order to provide access to the considerable profits it produces and make them inaccessible to State prosecution. See. MARTÍN PALLÍN, J.A., "Blanqueo de dinero, secreto profesional y criminalidad organizada", in DÍAZ-MAROTO Y VILLAREJO, J. (ed.) *Law and Criminal Justice in the 21st Century. Liber amicorum in honor of Professor Antonio González-Cuéllar García*, ed. Colex, Madrid, 2006, p. 652. These are two necessarily related areas, since from the financial sphere it is intended to prevent important economic sectors such as financial institutions and certain professional activities from being used for the money laundering coming from criminal activities, leaving the criminal sphere for the punishment of these offences. PELÁEZ MARTOS, José Mª, *Manual práctico…, op. cit.,* p. 303.
10. About this instrument, see BLANCO CORDERO, I., "El decomiso en el Código penal y la transposición de la Directiva 2014/42/UE sobre embargo y/o decomiso en la Unión Europea", in DE LA CUESTA ARZAMENDI/DE LA MATA BARRANCO/BLANCO CORDERO*, Adaptación del Derecho penal español a la política criminal de la UE*, Pamplona, Aranzadi, 2017, pp. 429-510; CARRILLO DEL TESO, A.E., "La Directiva 2014/42/UE sobre el embargo y el decomiso de los instrumentos y del producto del delito en la UE: decomiso ampliado y presunción de inocencia", *Revista de Estudios Europeos*, n. extra 1, 2017, pp. 20-32
11. The above-mentioned EU *Plan to strengthen the fight against the financing of terrorism and financial offences* is in turn part of the European Security Agenda from April 2015 which identified, as one of the areas of the fight against terrorism, the attack on financing systems (COM (2016) 50 final).
12. As BLANCO CORDERO states, this regulation contained some provisions regarding the definitions of serious offences, sanctions for money-laundering offences, confiscation and requests for assistance. BLANCO CORDERO, I., *El delito de blanqueo de capitales, op. cit.,* pp. 176-177.
13. Specifically, the Directive refers in Art. 3.1 (a) the conversion or transfer of property, knowing that such property is the result of criminal activity, for the purpose of concealing or disguising the illicit origin of the property or helping any person who is involved in the commission of such activity to avoid the legal consequences of his/her action; (b) the concealment or disguise of true nature, source, location, disposition, movement, or rights with respect to, or ownership of, property while knowing that such property constitutes the proceeds of crime; (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is derived from criminal activity
14. In this sense, the clause 11 of the Directive states that such a modality should be punishable "where the money laundering activity does not consist merely in the possession or use of property, but also involves the transfer, conversion, concealment or disguise of property and results in damage additional to that already caused by the criminal activity, for example by putting into circulation property obtained from criminal activity and thereby concealing its illicit origin."

15. In this regard, it should be noted that, while the aspects relating to the basic type of crime and the punishment of self-laundering are binding on States, imposed through the formula "they shall adopt"; however, the technical regulations are changed by referring to the punishment of reckless money laundering, leaving States free in this regard, under the formula "they may adopt." Regarding reckless money laundering in the case law of the Spanish SC, see DEMETRIO CRESPO, E., "El blanqueo imprudente: algunas reflexiones sobre normativa de prevención y el deber de cuidado", in ABEL SOUTO/SÁNCHEZ STEWART (coords), V Convention on the Prevention and Suppression of Money Laundering, Valencia, Tirant lo Blanch, 2018, pp. 217-228 (English version "Reckelss Money Laundering: some reflections on prevention regulations and the duty of care", *Journal of Leadership Accountability and Ethics*, Vol 16 (4), 2019, pp. 61-68).
16. The European legislator highlights that this provision is in line with the FATF Recommendations, although it does not overlook the differences in the definition of tax offences between the Member States, which may have repercussions in this area. In any case, it is noted that "the purpose of this Directive is not to harmonize the definitions of tax offences in national law."
17. However, Article 3.4 of the Directive states that "In the case of paragraph 3(c) of this Article, Member States may in addition require that the conduct in question constitutes a criminal offence under the national law of the other Member State or the third country where it was committed, except where such conduct constitutes one of the offences referred to in Article 2(1)(a) to (e) and (h), as defined in the applicable Union law
18. It is pointed out that this offence "has become a clear example of the expansive tendencies of a criminal law that has very little respect for the principles, guarantees and limits that should govern its interpretation and application." See. DEMETRIO CRESPO, E., "Sobre el fraude fiscal como actividad delictiva antecedente del blanqueo de dinero", in *Journal of Criminal Law*, 2016, n. 26, pp. 10 y 17
19. In a graphic way, ABEL SOUTO compares the expansion of the punishment of money laundering with the *"Big Bang"* by stating that this growth in the definition of the money laundering offence follows a process parallel to the creation of the Universe, and, consequently, continues to progress unceasingly. ABEL SOUTO, M., "Blanqueo de dinero, reformas penales de 2015, secreto bancario y paraísos fiscales" in DEMETRIO CRESPO/NIETO MARTÍN, *Derecho penal económico y Derechos Humanos*, Valencia, Tirant lo Blanch, 2018, pp. 445-466, esp. P. 446; and from the same author, "Las reformas penales de 2015 sobre el blanqueo de dinero", RECPC 19-31, 2017, pp. 1 and ss.
20. This follows the measures included in other international texts such as the UN Convention against transnational organized crime, which, in connection with the investigation of such offences, provides for the establishment of a monitoring, cooperation and information exchange regime between authorities (Art. 7), the possible implementation of joint research (Art. 19), the use of special investigative techniques such as controlled deliveries or electronic surveillance (Art. 20); the establishment of witness protection programs to avoid intimidation or retaliation (Art. 24), as well as from victims for the same reasons (Art. (25) or, without being exhaustive, the measures provided for in the event of cooperation by persons who might be under investigation or involved in the offences referred to in Article 26, both in the investigation and trial phase. Similarly, Article 4.2 of the *European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* states that "Each Party shall consider adopting such legislative or other measures as may be necessary to use special investigative techniques to facilitate the identification and tracing of proceeds from crime and the collection of evidence relating thereto. Such techniques may include order control, observation, telecommunications intersection, access to computer systems and orders to submit specific documents". Aspects also covered by the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw on May 16, 2005*, contains similar provisions (in particular in Art. 7.3).
21. The fact that a conviction is not required in relation to the previous criminal activity does not mean that there is an additional element of difficulty associated with demonstrating money laundering, since, as our SC has repeatedly stated in its case law, which can be summarized in its decision dated November 16, 2016, **the criminal origin of the property is obviously a criminal element and, as such, must be proven.**
22. In this sense, as some authors point out (LÓPEZ ESCUDERO, Manuel, "Article 48. Presumption of innocence and rights of defence", in MANGAS MARTIN, Araceli (dir.), *Charter of Fundamental Rights of the European Union. Article by article commentary*, BBVA Foundation, 2008, pp. 759-776, esp. pp. 761-762), it is necessary to take into account the doctrine of the TEDH that has been considered compatible with Art. 6.2 ECHR the existence of such presumptions of guilt provided that two conditions are met, (1)

the presumption is not automatically applied, so that the subject is not deprived of the effective exercise of the rights of the defence in order to introduce contradictory elements; and (2) in order to establish guilt, the assessment of the presumption is made in conjunction with the rest of the evidence adduced [ECHR dated October 7, 1988, Salabiaku v. France, No 10519/83, aps. 28-30; ECHR, dated September 25, 1992, Pham Hoang v. France, No. 13191/87, aps. 32-35]. We can also find different pronouncements of the ECJ in which the presumptions have been admitted as valid at the EU level, although generally referring to the area of sanctions for collusive practices. Thus, the ECJ upholds the validity of a presumption of "decisive influence" in matters of competition law, stating that it does not constitute "in any way a breach of the presumption of innocence, established by Article 48 of the Charter and Article 6(2) of the ECHR, in particular in view of its nature as a *rebuttable presumption*" (ECJ (First Chamber), dated June 19, 2014, FLS Plast A/S v European Commission, (Case C -243/12 P), par. 27 and case law cited].

23. Clause 17 states that under Council Framework Decision 2009/948/JHA and Council Decision 2002/187/JHA competent authorities of two or more Member States conducting concurrent criminal proceedings in respect of the same facts involving the same person should, with the assistance of Eurojust, enter into direct consultations with each other, in particular in order to ensure that all offences covered by this Directive are prosecuted.
24. In the same sense, MARTÍN SAGRADO, Óscar, "El decomiso en la investigación y enjuiciamiento del delito de blanqueo de dinero" in *Revista General de Derecho Penal*, 31 (2019), p. 3.