

- **Draft of the royal decree amending the secondary legislation for Act 10/2010 on Anti-money laundering and combating the financing of terrorism**

*By Alejandro Laguna*

The main aim of the draft decree is to adapt the existing secondary legislation to the new stipulations in Act 10/2010, 28 April, on anti-money laundering and combating the financing of terrorism (hereinafter, AML/CFT); and also, to make such corrections as are necessary to strengthen the efficiency of existing AML/CFT mechanisms. The main changes can be summarized as follows:

### **Exempted activities**

In order to exempt such foreign currency exchange as is conducted as a means to carry out the title owner's principal activity, the principal activity must not be one of those conducted by regulated entities, as described in article 2.1 of Act 10/2010.

### **Formal identification**

The threshold above which natural or legal persons must provide identification in on-site gambling transactions has been adjusted to EUR 2000. If the identity check is carried out after the business relationship has started, specific risk management measures must be applied (restrictions on the number, type and sum involved of transactions permitted) and more robust monitoring should be applied on those transactions that are significant because of the sum involved or their complexity.

### **Beneficial owner**

If a company is under the control of one or several natural persons, or of multiple companies that in turn are under the control of the same natural person or persons, who has a 25% plus one share stake in the company or an ownership right of more than 25% in the client company, this will be understood as evidence of indirect ownership. Other indicators of control are listed in article 22 (1) to (5) of EU Directive 2013/34 of the European Parliament and of the Council of 26 June 2013, on annual financial statements, consolidated financial statements and similar reports about certain types of company. Finally, it clarifies who should be treated as the beneficial owners in the case of trusts and legal instruments similar to trusts as they are understood in the US and UK sphere of influence.

### **Identifying the beneficial owner**

The draft legislation lists those institutions that are exempted from identifying the beneficial owner, as well as the identity data that should be collated in this process: identity document number, nationality, country of residence and date of birth. The nature of the interest or stake that determines whether a person is to be considered the beneficial owner must also be established.

### **Requirements in remote business relationships and transactions**

Business relationships may be established and transactions conducted with clients who are not physically present, provided that the identity of the client has been demonstrated with an authorized electronic signature, compliant with EU regulation 910/2014 of the European Parliament and of the Council, 23 July 2014, on electronic identification and trust services for electronic transactions in the internal market. Entities regulated under Act 13/2011, 27 May, on gaming regulations, must adapt to the criteria for checking client identities set out in articles 26 and 27 of Royal Decree 1613/2011, 14 November, containing the secondary legislation on the technical requirements for gaming activities.

## **Transactions potentially linked to ML/FT**

Here there is a new obligation to prepare and keep updated a full record of all the transactions that have been identified as potentially linked to ML/FT, specifying whether they been as a result of communication with staff, management, bank agents or automated alerts. The record will specify whether an analysis was carried out and, if it was, the outcome.

## **Regular communications**

This section describes what information must be communicated every month to the commission's executive service by credit entities, financial credit establishments, payment entities, electronic money entities, notaries, land registrars and persons carrying out deposit and custody services, and professional transport of funds or payment systems. The specific use to which this information should be put is also made clear.

## **Suitability of internal control procedures**

This section makes clear the duty of centralizing, managing, controlling and storing efficiently the documents and information about the transactions that have been analyzed in greater depth. It also specifies the duty of having a specific, independent and anonymous whistleblowing channel that can be used to receive communications about regulatory breaches.

## **Internal control measures at business group level**

On the issue of ML/FT prevention policies and internal control procedures, the regulation stipulates that these will apply to subsidiaries and branch offices where the group has a majority shareholding or holds control through other means, both in Spain and abroad. These policies and procedures will be centralized in the institution that meets one of these two conditions: (i) it is the group's parent company, or (ii) it is the company with the biggest assets of all the companies domiciled in Spain and is required to present the group's consolidated accounts.

## **Foundations and associations**

In the case of charitable foundations and associations, this section indicates the duty of identifying and checking the identity of persons who donate EUR 100 or more in cash or through anonymous payment systems; identification and checks are required for donations of EUR 1000 or more received by bank transfer from an account opened in a Spanish credit institution.

## **Financial ownership file**

The purpose of the financial ownership file has been extended, for use as a mechanism to prevent or impede not only ML/FT but also crimes leading up to this. More entities will be granted single points of access to this file, among them the central anti-terrorism and organized crime intelligence center, the office for asset recovery and management and the Spanish securities exchange commission (CNMV).

## **Sanctions**

On the matter of the public warning sanction, this will last for five years following its publication in the Official State Gazette and on the websites of the Commission, the Executive Service of the Commission (SEPBLAC) and the General Secretariat of the Treasury & Financial Policy. Likewise, sanctions that are not public will be published on the Commission's website, as stipulated in article 61.6 of Act 10/2010.

## Statistics

Every year the Commission will prepare and approve an exhaustive statistical ML/FT report that will contain, at the very least, the data required under European AML/CFT directives and those requested by virtue of this regulation by the relevant European Union institutions. The statistics will include: (i) the number of suspicious communications referred to the Anti-Money Laundering & Financial Intelligence Unit (SEPBLAC), monitoring of the communications and the number of cases investigated; (ii) number of investigations and number of people processed and found guilty of ML/FT and related crimes; (iii) volume and value of the funds and goods seized, embargoed and forfeited; (iv) data about cross-border requests carried out and received by SEPBLAC.

## AML/CFT risk analysis

The Commission, as proposed by the Financial Intelligence Unit, will approve a national risk analysis that will identify the sectors or areas that present greater and lesser ML/FT risk in order to decide in which sectors their regulated entities should apply more robust due diligence measures. Risks relating to the financing of the proliferation of weapons of mass destruction will be considered as equally significant. Risk analysis will be used to improve the national AML/CFT system, guaranteeing that regulations appropriate to the level of risk are put in place and forming the basis for deciding how to allocate AML/CFT resources.

## Other matters

- Recognition of acceptable supporting documents for the purposes of Switzerland's formal identification (personal identity document, letter or official card issued by that country's authorities).
- Exclusion from the process of updating client identification documents the copy of the national identity document issued in Spain.
- Due diligence measures conducted by subsidiaries or branches of regulated entities, domiciled in third countries, will be accepted provided that the effective application of these measures is supervised at group level by the competent authority of the country where the group's parent company is located.
- Clarification is given on which types of clients need to be subject only to simplified due diligence measures, and the conditions that must be met for this treatment.
- Definition of private banking services, so that these are subject to reinforced due diligence measures.
- The description of high risk countries, territories and jurisdictions has been brought into line with the provisions of article 9 of EU Directive 2015/849, of 20 May, defining them as those which are considered to have strategic deficiencies in their AML/CFT systems.
- Customs supervision services have been added to the category of institutions that can require documents and information obtained or generated by regulated entities to be handed over.
- The criteria that franchises should bear in mind have been clarified, to establish internal control measures that should apply.
- Another item that must be included in the AML/CFT manual: an anonymous internal procedure for reporting breaches of the prevention regulations or of the procedures approved by the institution to fulfil these (whistleblowing channel).
- Compatibility of the technical unit to handle and analyze information, with the crime prevention functions as defined in article 31 a) of the Spanish criminal Code.
- The external examination will cover all the entities in the group that are classified as regulated entities, pursuant to article 2.1 of Act 10/2010.
- Changes to the internal control mechanisms applicable to lotteries and other on-site games of chance, requiring the client to be formally identified when the transaction is above EUR 2000.

- The treatment of payment systems subject to intervention by customs or police officers, their transfer and custody has been clarified.
- There is an item granting authority to the General Secretariat of the Treasury and Financial Policy, via the General Sub-directorate for capital movement inspection and control, to authorize fund transfers, the opening and maintenance of current accounts and the provision of financial services subject to countermeasures.
- Statements made by credit entities are to be more comprehensive and will include payment accounts and rental contracts for security boxes.
- Regulated entities may create shared storage systems for information and documents collected as part of their due diligence fulfilment.
- The composition and duties of the financial intelligence unit have been altered.