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Reports

Prevention of Money Laundering and Terrorist Financing

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Amendment to Law 10/2010 of 28 April on the Prevention of Money Laundering and the Financing of Terrorism by the "Create and Grow" Law

On 19 October, some amendments to the Law on the Prevention of Money Laundering and the Financing of Terrorism (hereinafter "LPBCFT" [Ley de Prevención del Blanqueo de Capitales y de la Financiación del Terrorismo]) made by the "Create and Grow" Law came into force in Spain.

Some of these amendments are of less significance, and others show changes in relation to various aspects of the obligations of the persons obliged to comply with the regulations. It is a real opportunity for those who must comply with the rigorous obligations of the law to find an avenue that facilitates effective regulatory compliance, and in turn reduces obstacles to expanding their business.

The amendments that have the greatest significance for the obligated persons can be summarised in:

- Introduction of new possible regulatory exclusions to the obligations of the regulations for certain obligated persons, when there is little risk of money laundering or terrorist financing.
- Incorporation of a new method of identification for non-face-to-face business relationships.
- Creation of new Data Protection obligations and update to current regulations.

- Entitlement of the obligated persons to create common information systems, storage and, where appropriate, access the information and documentation collected for the fulfilment of due diligence obligations.

Authorisation to exchange information between obligated persons when extraordinary risks identified through the analyses of money laundering and terrorist financing risks occur.

Development of the amendments

Exclusion of obligated persons for low risk

The first of the amendments is in those considered “Persons Obligated” to comply with the regulation, who may be excluded by regulation, in whole or in part, when there is little risk of money laundering or terrorist financing (ML/TF). Thus, without prejudice to the fact that these exclusions must materialise by regulation, this amendment expands the typology of obligated persons who could benefit.

Prior to the amendment, this possibility was only intended for individuals who perform financial activities on an occasional or very limited basis, and those games of chance that present a low risk of money laundering and terrorist financing. Currently, the following may be excluded by regulation, in addition to the above:

- e-money entities,
- payment entities,
- entities that provide the account information service.

However, it should be mentioned that, to date, the only exclusion that has materialised by regulation is that indicated in article 3 of Royal Decree 304/2014, of 5 May, regarding foreign currency exchange activity carried out as an accessory to the main activity of the holder in certain circumstances indicated by the regulation.

Consequently, the regulatory route should be awaited to see to what extent these possible exclusions are implemented, and how beneficial they are for the obligated persons involved.

Non-face-to-face identification, new method

Another of the amendments that may be appropriate, when the speed of the market itself so requires, is that which has been made in relation to the fulfilment of the due diligence obligations for the identification of customers in non-face-to-face business and operations.

Before the change was established, the regulations provided that the obligated persons could establish business relationships or execute operations via the telephone or through electronic or virtual means, with customers who are not physically present, provided that they are identified by any of the methods authorised by the regulations themselves, This included identifying the customer by qualified electronic signature regulated by EU Regulations. This in turn expressly excluded the obligation to obtain a copy of that customer’s identity document.

After the modification, this method is also authorised for electronic signatures that do not meet the requirements of the qualified electronic signature, but in these cases the obligation to obtain a copy of the ID/Passport within one month is adhered to.

With this, another new method is enabled to identify non-face-to-face customers, which helps the obligated persons to comply with the identification obligation, having one month to complete the necessary documentation and obtain a copy of the customer's identity document.

Protection of Personal Data

With regard to the Protection of Personal Data, the amendment updates the references to the Data Protection legislation to current regulations, removing the mentions of the repealed Organic Law 15/1999, and replacing them with Organic Law 3/2018, of 5 December, on the Protection of Personal Data and guarantee of digital rights, and Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016.

Also, the amendment adds in Article 32 of the LPBCFT the requirement that the obligated persons must carry out an impact assessment on data protection on processing for compliance with information obligations, in order to adopt technical and organisational measures reinforced to ensure integrity, confidentiality and availability of personal data, a detail that was already provided for in Article 32 bis of the same Law on processing for compliance with due diligence obligations.

Finally, it is specified that the processing of data for the fulfilment of the information obligations must only be carried out by the OCI and the representative before the SEPBLAC.

Creating common information systems

Possibly one of the changes that may bring greater benefits if implemented and developed correctly by the obligated persons is the authorisation of persons belonging to the same category (same letter as article 2 of the LPBCFT) to create common information systems, storage and, where appropriate, access to the information and documentation collected, for the fulfilment of due diligence obligations. The only exception that is established is that related to the information and documentation inherent to the continuous monitoring of the business relationship which, as it is inherent to each business, must be obtained by the person obligated to continuously monitor it.

There are currently records of actual holders such as those used by notaries, but this amendment seems to open the doors for more complete systems to be created, where not only information can be obtained, but even documentation, and which may allow for streamlining the processes of compliance with the due diligence obligations that, on many occasions, may mean a brake on business and operations with customers who are sometimes inexperienced and unaware of PML/TF obligations.

This amendment includes the following specifications:

- Persons who adhere will be considered joint controllers of processing for the purposes of Data Protection legislation.
- Maintenance of these systems may be entrusted to a third party, even if it is not an obligated person.

- Co-responsible persons must notify the Commission on the Prevention of Money Laundering and Monetary Breaches of the intention to establish these systems at least 60 days in advance.
- The communication of data to these systems is covered by the Data Protection regulations, but the obligated persons may only access the information provided by another obligated person in the cases where the person to whom the data refers is their customer or access to the information is necessary for the fulfilment of the obligations.
- The data may only be provided by internal control bodies, who in turn will channel requests for access to the data contained in the system, and in any case the interested parties must be informed about the communication of the data to the system.
- The data obtained by the system may only be used for compliance with due diligence obligations.
- The obligated person who has provided the data to the system will be liable for its accuracy and updating, and must comply with the provisions of Regulation (EU) 2016/679, of 27 April 2016, regarding the rights of rectification or deletion of personal data, and the data subjects may, in any case, exercise those rights before, and against, each of the data controllers.
- The Commission on the Prevention of Money Laundering and Monetary Breaches may authorise the establishment of common systems in which several categories of obligated persons participate.

PML Commission Authorisation to Exchange Information

The last of the most significant changes that occur with the amendment of the regulations is the authorisation that the Commission for the Prevention of Money Laundering and Monetary Breaches may grant when extraordinary risks of ML/TF are detected in the risk analysis, and subject to a compliant opinion from the Spanish Data Protection Agency, to exchange between obligated persons information regarding certain types of transactions between obligated persons, or customers subject to certain circumstances. The purpose of this amendment is not only to detect and avoid ML/TF transactions, but also to prevent or hinder these transactions from being attempted by those same customers but before other obligated persons.

Other amendments

Finally, a series of amendments are also made that have little or practically no significance for the fulfilment of the obligations of the obligated persons, and which we will mention very concisely:

- the functions of the Commission on the Prevention of Money Laundering and Monetary Breaches include the removal of the Director of the SEPBLAC, in addition to the existing function of appointing him.
- it is indicated that the Bank of Spain will form an account for the expenses it incurs under the budget approved by the Commission for the Prevention of Money Laundering and Monetary Breaches and which, duly justified, it will send to the General Directorate of the Treasury and Financial Policy.
- it is indicated that the Secretariat of the Commission will inform the European Banking Authority of the sanctions imposed on credit and financial entities, including any appeal that may have been filed against them and its outcome (previously it was indicated that the European Supervisory Authorities would be informed).

Conclusion

As we have tried to reflect in this short analysis, the new amendments introduced in the LPBCFT by Law 18/2022, of 28 September, on business creation and growth (called the “Create and Grow Law”), although they do not represent a reform of the regulations, offer some improvements that, to a greater or lesser extent, may assist the obligated persons in the fulfilment of their due diligence obligations, as well as information obligations, while they will also imply a greater commitment on their part to comply with the Data Protection obligations established in Organic Law 3/2018, of 5 December, on Personal Data Protection and guarantee of digital rights, and Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016.

Going forward, you will see how the Commission on the Prevention of Money Laundering and Monetary Breaches, together with SEPBLAC, formalise these new opportunities, and how new regulatorily implemented systems are developed