

TRANSPPOSITION OF EUROPEAN UNION DIRECTIVES ON THE PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING

The Council of Ministers has approved Royal Decree-law 7/2021 of 27 April 2021 (“**RDL 7/2021**”), transposing, among other European directives, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (“**AML**”), and amending Directives 2009/138/EC and 2013/36/EU (the “**Fifth Directive**”). RDL 7/2021 entered into force on 29 April 2021, with the exception of certain provisions that do not affect the regulation of AML.

These new provisions introduce significant developments to Law 10/2010 of 28 April 2010, on the prevention of money laundering and terrorist financing (“**Law 10/2010**”) and the Regulation of Law 10/2010, approved by Royal Decree 304/2014 of 5 May 2014 (“**RD 304/2014**”) (together, the “**AML Regulations**”).

Specifically, the reform pursues a twofold objective: on the one hand, to improve the mechanisms to prevent terrorism and, on the other hand, to improve transparency and the availability of information on the beneficial owners of legal persons and other entities without legal personality acting in the course of legal business.

It is also worth noting that the definitive transposition of the Fifth Directive in RDL 7/2021 does not include some of the amendments which were in the Preliminary Draft Law, published on 12 June 2020, with the intention of amending Law 10/2010, raising the standards established by the Fifth Directive. By way of example, the Preliminary Draft Law included securitisation funds and SOCIMIs (Spanish REITs) as obliged entities and even established a new system of liability for external experts. None of these measures were ultimately included in RDL 7/2021.

A. Main new features of the AML Regulations

The main developments resulting from the transposition of the Fifth Directive are as follows:

1. Inclusion of new obliged entities

RDL 7/2021 incorporates the following new obliged entities:

- (i) Intermediaries involved in the leasing of real estate for a total annual rent equal to or exceeding 120,000 euros, or a monthly rent equal to or exceeding 10,000 euros.

- (ii) Persons who provide material help, assistance or advice on tax matters as their main business or professional activity.
- (iii) Providers of electronic currency services and services for exchanging virtual currency for legal tender (and vice versa), as well as custodial wallet or key management services.

2. Registration of Beneficial Ownership

The transposition of the Fifth Directive implies the creation by the Ministry of Justice of a single central register throughout the national territory as a system of identifying beneficial ownership, which will be fed with information from the General Council of Notaries and the Commercial Register. This new registration system will enable information sharing with the registries of the other European Union countries and will facilitate public access to this information. RDL 7/2021 introduces numerous provisions to regulate the operation of the system, including the following:

- (i) The scope of persons who will be able to access information on beneficial owners and other types of entities has been broadened to include obliged entities and third parties, in addition to the competent AML authorities.
- (ii) Access to and consultation of the Register of Beneficial Ownership will be mandatory for compliance with beneficial ownership due diligence obligations in all cases.
- (iii) Different levels of access are foreseen for each category, as well as different eligibility requirements:
 - Free and unrestricted access to the competent AML authorities.
 - Obligated entities will have access to the current information contained in the register and may request proof of registration or an extract from the register in order to fulfil their obligations regarding the identification of the beneficial owner. For this purpose, in the event of business or client relationships of above-average risk, obliged entities cannot rely solely on the information contained in the register and must carry out additional checks.
 - Third parties not included in the above categories will only have access to data consisting of the surname and first name, month and year of birth, country of residence and nationality of the current beneficial owners of a legal person, or an entity or structure without legal personality, as well as the nature of such beneficial ownership, in particular whether it is due to the control of the property or of the management body thereof.

- (iv) It provides for the obligation for legal persons and unincorporated entities to obtain, preserve and update information on their beneficial owners and to provide it to authorities and obliged entities. In this regard, it specifies the information to be kept in the Register, as well as the persons responsible for updating it.
- (v) The registration of trusts and similar entities operating in Spain, as well as their beneficial owners, has been made compulsory.
- (vi) Legal persons will be obliged to obtain, retain and update the information on their beneficial owner(s) for 10 years. Likewise, the Board of Directors, and in particular the Secretary of the Board of Directors, regardless of whether he/she is a director, will be responsible for keeping the information on beneficial ownership up to date.

3. Due diligence measures

RDL 7/2021 includes amendments to specific aspects of the current regulations in relation to the application of due diligence measures, the most important of which are as follows:

- (i) It establishes the obligation to apply due diligence measures when the client's circumstances change or when the obliged entity has a legal obligation during the calendar year to contact the client to review the relevant information concerning the beneficial owner.
- (ii) It includes the obligation to establish due diligence measures for trusts, including the Spanish fideicomiso, the Italian fiducias, and the treuhand under German law.
- (iii) The following requirements are established for financial institutions acting as acquirers to accept payments made with anonymous prepaid cards issued outside Spain:
 - They cannot be rechargeable or must have a maximum monthly limit for payment transactions of 250 euros and can only be used in the specific Member State.
 - The maximum amount stored electronically must not exceed EUR 250.
 - It must be used exclusively to purchase goods or services.
 - Anonymous e-money financing is prohibited.
 - There must be sufficient control of the issuer's transactions or the business relationship to enable the detection of unusual or suspicious transactions.

4. Non-face-to-face transactions

In terms of the verification of the client's identity in non-face-to-face transactions, referral is made to the qualified electronic signature¹. Thus, when a qualified electronic signature is used for customer identification, it will not be necessary to obtain a copy of the documents needed to perform the due diligence required by the law. However, it will be compulsory to keep the identification data that demonstrates the validity of the procedure.

5. Persons with Public Responsibility ("PRP")

Senior officials of political parties with regional representation and senior officials of political parties with representation in constituencies of more than 50,000 inhabitants at a local level have been included as PRPs. Also included are persons who perform important public functions in international organisations which are accredited in Spain.

On the other hand, obliged entities and third parties that manage files containing data identifying PRPs are obliged to have procedures in place that allow them to keep such data continuously updated. To this end, appropriate technical and organisational measures must be employed to ensure a level of security that is in accordance with the risk.

6. Measures to protect whistleblowers

RDL 7/2021 provides that persons subjected to threats, hostile action or adverse employment actions as a result of reporting their suspicions internally or to competent authorities may safely and confidentially lodge a complaint with the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (known as SEPBLAC).

7. Enhanced due diligence measures

In the case of business relationships with high-risk countries, it establishes an obligation to request additional information about the client, the beneficial owner and the purpose and nature of the business relationship, as well as information about the source of the funds, the source of income of the client and beneficial owner and the reasons for the transactions.

It also establishes that, for high-risk third countries expressly determined as such by European Union legislation, obliged parties must implement, where appropriate, one or more of the following measures:

¹ Qualified electronic signatures are regulated in Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions.

- (i) Apply enhanced due diligence measures in business relationships or transactions involving nationals or residents of the third country.
- (ii) Establish systematic reporting of transactions involving nationals or residents of the third country or involving financial movements to or from the third country.
- (iii) Prohibit, limit or set conditions for business relationships or financial transactions with the third country or with nationals or residents of that country.

8. Internal communications between entities of the same corporate group

RDL 7/2021 specifies that the exception to the prohibition on disclosure, provided for communications between obliged entities belonging to the same group, is also applicable to the communication of information with obliged entities domiciled in third countries, provided that they apply group policies and procedures that comply with the standards required by the AML Regulations.

9. Centralised Banking Account Register

The regulation clarifies the reporting obligations of reporting institutions and extends this obligation to safe deposit boxes and all payment accounts, including those opened with e-money institutions and with all payment institutions.

In conclusion, following the entry into force of RDL 7/2021, obliged entities must adapt their risk assessment and, where appropriate, their internal procedures relating to AML, to the new regulatory requirements.

This Legal Briefing was prepared by Andrea Bartolomé and Sofía Larrauri, associates of the White Collar Crime and Investigations practice area.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 10 May 2021 and Pérez-Llorca does not assume any commitment to update or revise its contents.

For more information, please contact:

Juan Palomino

White Collar Crime and Investigations Partner

jpalomino@perezllorca.com

T: +34 91 423 20 87