Spain implements one of the toughest AML laws in Europe

The Regulation implementing Spain's new anti-money laundering ('AML') law entered into force on 6 May, creating a sense of certainty for Spanish businesses with regard to AML obligations by updating a 1995 law with legislation that takes into account more recent technological developments, such as e-money. Juan Palomino of Pérez-Llorca analyses this AML law and why the Spanish AML regulations are considered to be one of the toughest legal regimes established to combat money laundering in Europe.

The regulation implementing Spanish Law 10/2010, of 28 April 2010, on the Prevention of Money Laundering and Terrorist Financing (the 'Spanish AML Law') entered into force on 6 May 2014, the very date it was published in the Official State Gazette of Spain (the 'Regulation')[1].

The Regulation puts an end to an anomalous legislative context in Spain. Indeed, the Regulation brings certainty to the market by replacing an outdated piece of legislation from 1995, which was intended to implement the Spanish AML Law. It should be noted that the 1995 piece of legislation did not foresee new social and technological phenomena such as e-money, neither did it include important preventive measures such as the identification of the so-called beneficial owner. The lack of regulation of the above-mentioned areas made AML compliance difficult and uncertain for companies, especially taking into account that the fight against money laundering and terrorist financing is a dynamic field.

The current legislative context

The Spanish AML Law was amended on 9 December 2013, introducing significant changes in the legislation[2]. These amendments had a clear risk-based approach and emphasised the importance of carrying out rigorous analysis. In other words, companies subject to AML obligations have to carry out an analysis of the risk associated with each transaction and client, and have to accommodate the application of due diligence measures accordingly. This principle serves as the basis for the Spanish AML legislation and is of great importance given that Spain is considered a money laundering hot spot in Europe.

As a result, the Spanish government decided to include, in the Regulation, the latest recommendations of the Financial Action Task Force ('FATF')[3], enacted on February 2012, for the prevention of money laundering and terrorist financing. The FATF's recommendations are highly regarded in the field and Spain has decided to incorporate the February 2012 recommendations to its judicial system since they are currently not part of a binding European Directive. In this sense, the Spanish government is anticipating the trend for future European regulations and has decided to comply with them in advance.

The current Spanish legislative context, along with Spain's reputation as a hot spot for money laundering, has a great impact on the level of AML obligations that companies have to comply with when providing, for example, financial services in Spain. Indeed, Spain could be considered as having one of the toughest AML legal regimes throughout Europe, as can be shown by the Spanish AML Law, which requires companies to keep AML-related records for 10 years (as opposed to the five year period set out in Directive 2005/60/EC). Furthermore, in terms of enforcement, it should be noted that failure to comply with the Spanish AML Law by foreign companies providing services in Spain has resulted, in some cases, in multi-million Euro fines[4].

Areas affected

In essence, the areas that have been affected more significantly by the Regulation are: (i) the application of due diligence measures; (ii) the application of simplified due diligence; and (iii) the Financial Ownership File (Fichero de Titularidades Financieras).

Due diligence measures

The Regulation establishes exemptions for the full application of AML due diligence measures depending on the size and economic magnitude of the companies that fall within the scope of the Spanish AML Law. Indeed, the Regulation foresees that companies with less than 10 employees and an annual balance sheet of under €2 million will be exempt from complying with obligations concerning internal AML policies, AML bodies, reviews by an external expert or AML training for employees. However, these thresholds can raise questions in practice. For example, it is possible that a particular company carries out different areas of business, some of which fall within the scope of the AML legislation while others do not. Would the exemption still apply if the regulated area of business does not meet the threshold? What if the company exceeds the threshold when adding the figures of all its areas of business (the regulated and unregulated ones)? Valid arguments can be presented in favour and against the application of the exemptions in these cases.

Questions regarding the thresholds will have to be dealt with by the Courts and, in terms of enforcement, by SEPBLAC, the Spanish supervisory body for the prevention of money laundering and terrorist financing.

Furthermore, the Regulation establishes a list of matters that shall be included in the manual that companies that are subject to the Regulation are obliged to have; the purpose of the manual is to set out their internal AML policies. Amongst the matters that will necessarily be included in the manual, it is significant to highlight the introduction of the obligation to carry out internal audits of the AML policies in place in addition to the existing obligation of being audited by an external expert. In this regard, the Regulation foresees that the said internal audit be carried out periodically and should analyse: (i) the adequacy and efficiency of the internal control policies; and (ii) the grade of compliance of the said internal policies by employees and directors.

The current Spanish legislative context, along with Spain's reputation as a hot spot for money laundering, has a great impact on the level of AML obligations that companies have to comply with

Simplified due diligence

The Spanish AML Law foresees the possibility of applying simplified due diligence measures to those customers or products that show low risk of money laundering. In summary, the application of simplified due diligence enables the companies subject to the Regulation to lower the level of application of due diligence measures. With regard to the customers and products considered to have a low risk of money laundering, it is worth mentioning the following:

a) Financial entities domiciled in the European Union (or third equivalent countries) subject to anti-money laundering and terrorist financing supervision are considered to be of low risk of money laundering. However, this general rule is expressly excluded for payment entities; and

b) E-money is considered to be a product with a low risk for money laundering when the device holding the funds meets several quantitative limits. However, the application of simplified due diligence measures is expressly excluded when the e-money is issued against cash. This exclusion has been greatly criticised in the market for being hostile from a commercial perspective. Furthermore, said measures have no precedents in any European legislation on the matter.

Financial Ownership File

The Spanish AML Law introduces the obligation for credit institutions to report to SEPBLAC the opening or cancellation of current accounts, savings accounts, securities accounts and term deposits. Said information is to be held in a Financial Ownership File. The Spanish AML Law did not provide essential information on the mechanics of the said reporting and therefore the obligation to report said information has not been enforced yet.

1. The Regulation includes the necessary detail to enforce the reporting obligations. In accordance with the Regulation, credit institutions must report on a monthly basis, and within the first seven days of each natural month, the abovementioned information and also some other additional information such as holders' identity, proxies or date of opening or cancellation of the account. Indeed, this new obligation means that credit institutions will have to cope with additional AML burdens.

2. The Financial Ownership File is still pending several formalities before it becomes operational. The Spanish authorities have a two year period in order to carry out the said formalities and will have to give the credit institutions at least six months notice before the Financial Ownership File starts operating. In the meantime, credit institutions have time to adapt their structures in order to comply with this obligation.

Juan Palomino Lawyer
Pérez-Llorca, Spain
jpalomino@perezllorca.com

1. The Regulation was approved by the Spanish government at a meeting held by the Council of Ministers on 30 April 2014, despite being granted just one year to enact the legislation, which elapsed on 30 April 2011.
2. The amendments introduced in December 2013 involved areas such as the level of application of due diligence measures, simplified due diligence, the definition of 'politically exposed persons' and sanctions and financial international countermeasures.
3. The FATF is an independent inter-governmental body in charge of developing and promoting policies to protect the global financial system against money laundering and terrorist financing.
4. This is despite the fact that the sanctioned companies complied with the applicable AML rules in their home State.