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Voidness of contracts for infringement of money laundering rules

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The Spanish Anti-Money Laundering Act sets out many rules containing prescriptions and prohibitions on conduct related to third party activities that may qualify as money laundering as defined in the Criminal Code. Should the contravention of these rules always trigger the voidness of the contracts through which the suspect transactions were carried out? If not, in which cases is contractual voidness an adequate solution?

1. The transaction

We are going to imagine a simple case of (possible) money laundering. An ENTITY listed in art. 2 of the Anti-Money Laundering Act 20/2010 ("LPBC") has not - or has not adequately - taken the due diligence measures required by said act and transfers an asset to a natural person in a transaction with sufficient "risk indicators" as to be able to suspect that the payment money comes from the commission of a criminal offence abroad. The ENTITY, having been warned of the risk it runs, will want to cancel the transfer transaction due to turpitude or relevant mistake. There is still no result of the supervisory activity of SEPBLA nor has the acquirer been criminally convicted (nor is it known whether it will be) as the principal of an offence under art. 301 of the Criminal Code ("CP").

2. The prohibitive constituent elements of money laundering

Spanish legislation defines the constituent elements of money laundering in two places. On the one hand, art. 1(2) LPBC ("for the purposes of this act, money laundering means"). On

the other hand, in art. 301 CP, setting out the offence of money laundering. Although both provisions are worded differently, it can be argued that they *substantially* contain an equivalent description of the prohibitive constituent elements: *convert, transfer, conceal, acquire, possess, use property knowing that it is the proceeds of crime or assist persons who have been involved in the infringement*.

This is prima facie intentional conduct. It cannot be consummated through negligence, nor can it be a form of criminal accessoriness when born out of negligence. But here the CP goes beyond the LPBC. Article 301(3) CP criminalizes acts committed through *gross* negligence.

We already observe that negligent liability may arise for the party not falling under the intentional actus reus, either from some omissive conduct that may be regarded as joint principality or accessoriness in the actus reus of money laundering (cf. the description of acts under art. 1(2)(d) LPBC), or from the negligent infringement of the prescriptive and prohibitive rules under the LPBC (due diligence), which only have an external instrumental relationship with the prohibitive actus reus of money laundering.

As the scope of this paper is limited to certain civil law effects, when we refer to intent and negligence we are not necessarily demanding that the legal person ENTITY itself be held criminally liable under the terms of arts. 31 bis, 31 ter and 302 CP.

3. List of mandatory rules on preventive conduct (due diligence)

The LPBC contains a plurality of mandatory provisions and prohibitions of conduct affecting the entities that are included in art. 2 thereof (in the case of ENTITY). We are not going to transcribe all of them, but the most likely to be relevant in the present case. We will distinguish between unilateral conduct requirements and prohibitive requirements of contractual exchange.

(a) Unilateral. Obligors shall identify all those who intend to establish business relations or intervene in any obligation (art. 3(1)). Obligors shall identify the beneficial owner (art. 4(1)). Obligors shall obtain information on the purpose or intended nature of the business relationship (art. 5). They shall apply measures of continuous monitoring to the business relationship (art. 6). They shall assess the anti-money laundering controls applied by the client entity in a correspondent relationship (art. 13). They will examine with particular attention any operation or pattern of behaviour that is complex, unusual or indicative of simulation and fraud (art. 17). They shall communicate to SEPBLA, on their own initiative, any fact, including a mere attempt, when there are grounds to believe or certainty that it is related to money laundering (art. 18). They shall not disclose to clients or third parties that the aforementioned communication has been made (art. 24).

(b) The following are among the bilateral requirements (prohibitions). Under no circumstances shall obligors have business relations with others who are not duly identified (art. 3(1)(II)). Obligors shall not establish business relationships with legal persons whose ownership or control structure could not be determined (art. 4(4)(II)). They shall not establish business relations or carry out transactions where they are unable to apply due diligence measures as provided for by law or they shall terminate such relations (art. 7(3)). Credit institutions shall not establish or have correspondent relationships with shell banks (art. 13(2)). They shall not establish or have correspondent relationships that allow the execution of transactions with the clients of the represented entity (art. 13(3)). They shall refrain from carrying out any of the transactions referred to in art. 18 (ostensible lack of correspondence with the nature, volume of activity or operational background of the clients, provided that no business purpose can be found in the examination).

Note that the above sectorial conduct provides the constituent element of the administrative infringement, but does not necessarily constitute the actus reus of the offence under art. 301 CP.

4. Applications

We will present a map of the possible combinations of interaction between art. 301 CP and the LPBC in order to pursue our ultimate objective of knowing if the ENTITY can petition for voidness of the transaction.

Let us first make three clarifications.

First. To date, there is no consistent case law on whether the infringement of mandatory or prohibitive sectoral rules (as is the case with the LPBC) necessarily leads to voidness of the act or transaction when the rule (as is the case with arts. 51-53 LPBC) has provided for specific sanctions in the case of contravention (cf. Angel CARRASCO, *Derecho de Contratos*, 2017, pp. 704-718). Second, arts. 127 and 127 bis CP provide for the ancillary sanction of confiscation (seizure of money or other property representing the instrumentalities or proceeds of crime) in the case of money-laundering offences. Third, according to art. 1275 of the Civil Code ("CC"), illegal contracts (made in turpitude) have no effect, such contracts being illegal if against the law (*contra legem*) or in breach of good customs (*contra bonos mores*); when this is the case and "voidness arises from illegality of the contract, if the act or omission constitutes a minor or serious offence common to both contracting parties, they will have no action against each other", the appropriate confiscation being carried out, but if "there is only a minor or serious offence on the part of one of the contracting parties, the not guilty party may claim what he had given and will not be obliged to fulfil what he had promised". If the act or omission does not constitute an offence, the same rule shall apply, even though confiscation does not apply (arts. 1305 and 1306 CC).

Having made these clarifications, we can now proceed with a combinatorial map.

(a) Unilateral sector infringements (by ENTITY) without conviction (yet) of the acquirer for money laundering. I believe that in this case neither art. 6(3) nor art. 1275 CC apply. ENTITY fully internalizes its minor offence and faces the appropriate sanctioning law under LPBC, without any other consequence.

(b) Bilateral sector offences (by ENTITY), when entering into prohibited relationships with the acquirer, without conviction (yet) of the acquirer for money laundering. In my opinion, the administrative infringements of arts. 51 to 53 LPBC do not exhaust the consequences of the infringement. There is the voidance of art. 6(3) CC, but the restitutionary consequence would be the ordinary consequence of art. 1303, since, absent the special unworthiness of the actus reus of money laundering, there will be no "illegality" or "turpitude". The case law existing to date justifies this distinction between the two types of voidness. Either of the parties may petition for voidness and, according to the case law applicable to cases such as the present one, this entitlement cannot be inhibited by applying the doctrine of estoppel.

(c) (Unilateral, bilateral) sector infringements by ENTITY, but *not involving gross negligence*, with conviction of the acquirer for money laundering. We put forward this hypothesis in the abstract, although we know that it does not match our case. Regardless of the fact that the contract may be void for the reason given above (b), ENTITY is not an accessory to the offence of money laundering under art. 301 CP.

(d) Involvement of ENTITY in the *intentional consummation of money laundering* (art. 1(2) (d) LPBC). Does not seem to be our case. However, in addition to the voidness that may arise in accordance with (b) above, ENTITY would be an accessory to the offence of money laundering. Art. 1305 CC.

(e) Unilateral or bilateral infringement of the LPBC by ENTITY and with *gross negligence*. In this case, and apart from the consequences of (b) above, it would be *questionable* (it is in criminal scholarly writings) if ENTITY would find itself, and in which infringements, in the position of guarantor under art. 11 CP, so that it could commit the actus reus as joint principal or accessory. If so, art. 1305 CC would also apply.

5. Voidability due to contractual mistake

The possibility of an action to void an assignment contract due to a material mistake suffered by ENTITY remains to be considered. We believe that such voidness would not be appropriate:

(a) Because if the money laundering offence could only have been committed through dereliction of duties imposed by the LPBC, the mistake would not be indefensible for ENTITY.

(b) Because ENTITY has not actually suffered *harm* under the contract of assignment to the acquirer.

6. Article 7.3 II LPBC

The obligors shall not establish business relations when they are unable to apply the due diligence measures provided for in this act. Refusal to establish business relations or to execute orders "or the ending of the business relationship due to an impossibility of applying due diligence measures" shall not entail liability for the obligors.

Focusing on the text between quotation marks, it could be thought that the obligors are legally entitled to void such contracts or transactions. This idea is far from the truth. First, there must be an impossibility (subjective or objective?) of applying due diligence measures. Secondly, to 'end' is not to 'void'. Only a non-consummated long-term relationship is ended. When the transaction has been consummated, it can no longer be 'ended'. What the rule does is to create a specific case of resilement (lawful withdrawal) from long-term relationships, whether or not of continuing performance.

Voidness is not an exculpatory defence for the infringement

Finally, with or without actions to void, ENTITY cannot avoid the imposition of sanctions under the LPBC if, through its conduct, it has infringed arts. 51 and 52. Bringing an action to void would not even be a "rectification" under art. 59(1)(b) for the purposes of a downward adjustment of the sanction.