Some Evidentiary Problems in the Fight Against Money Laundering: International Legal Framework and Its Projection on the Spanish System

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The fight against money laundering represents significant difficulties for the States, among which are the difficulties related to the proof of this crime. The complexity of its typical configuration, its link to a previous criminal activity and the need to prove the intentional elements characterizing these offenses makes it necessary to resort to the use of circumstantial evidence. This form of proving money laundering is generally accepted in international treaties and conventions in this area. This article shall analyze the evidentiary standards used by the Spanish Supreme Court to convict for money laundering.

Keywords: money laundering, criminal law, evidence, circumstantial evidence

INTRODUCTION

The fight against money laundering is one of the areas wherein States have been paying special attention for decades now. The link between this crime and other serious or extremely dangerous criminal activities (drug trafficking, organized crime, terrorism, etc.) and the consequences which, given the nature and scope of this crime, it has on the different sectors of the legal system (financial system, criminal, administrative, etc.), highlight the specific complexity in the development of effective legal instruments to combat this criminal phenomenon.

It suffices to take as an example the numerous treaties and conventions which have been drawn up on this subject. Indeed, the first international instruments emerged mainly at the end of the 1980s[2], notably the UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES dated December 20, 1988, and the Council of Europe Convention on Laundering, Search, Seizure *and Confiscation of the Proceeds from Crime dated November 8, 1990*[2], which have been complemented by the action of various organizations, most notably the Financial Action Task Force (FATF) in 1990[3]. The aforementioned legal instruments described some of the action points to be pursued by the States, which were initially based on the fight against drug trafficking - and thus, organized crime - and whose intention was to prevent and repress the perpetration of this type of offence through the deprivation of the economic benefits arising from it, also trying to avoid the infiltration of huge amounts of money into the financial system. This clear relationship in money laundering between criminal activity/economy and sovereignty has since then determined the internal and international action policies in this field, in which, in addition, international cooperation is an essential element for its effectiveness[4].

Different legal instruments were also developed by the EU in an effort to incorporate UN recommendations, the Council of Europe and the organizations referred to above were created; however, due to the Union's particular evolution, as was the case in other fields, a two-speed Community policy: (1)

instruments concerning the preventive nature and protection of the financial system, the first example of which was Council Directive 91/308/EEC dated June 10, 1991 *on prevention of the use of the financial system for the purpose of money laundering*, which has been followed by other subsequent instruments; and (2) instruments concerning the fight in criminal matters, the first acts of which are represented by Joint Action 98/699/JHA dated December 3, 1998 *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and by* Council Framework Decision 2001/500/JHA dated June 26, 2001, *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime which have been updated and replaced by Directive (EU) 2018/1673 dated October 23, 2018 of the European Parliament and of the Council on combating money laundering through Criminal Law and Regulation (EU) 2018/1805 of the European Parliament and of the Council dated November 14, 2018 on the mutual recognition of criminal decisions on confiscation and freezing*. The EU was aware from the outset that the fight against money laundering should be fought mainly "through criminal law measures and in the framework of international cooperation between judicial and police authorities", but that the strategy to combat this phenomenon should not, however, be "limited to the criminal law approach, because the financial system can perform a highly effective role"[5].

The incorporation of these guidelines has raised various problems in domestic legal systems, particularly in criminal investigation and prosecution. In these areas, the difficulties in investigating these crimes, as well as in proving them, become evident. In the following lines we will summarize some of these problems related to evidence and the different evidentiary standards or parameters referred to in the international legal framework, as well as those used by the jurisprudence of the Spanish Constitutional Court and the Supreme Court.

ON THE INTERNATIONAL EVIDENTIARY FRAMEWORK IN THE MONEY LAUNDERING CRIME AND ITS PROJECTION IN SPANISH JURISPRUDENCE

The Object of the Evidence: The Money Laundering Crime and the Relaxation of Its Criminalization

The first difficulty in the fight against money laundering, regarding evidence, rest precisely with the specification of what needs to be proven. This is a particularly controversial aspect, due precisely to the broad delimitation of the conducts that can be subsumed in this type of crime, because of the evolution of its criminalization from its origins to the present day. Hence, its progression has been compared to the "big-bang" phenomenon[6], since its growth and expansion seem to have no limit. Hence, it has been pointed out that this crime is another example of the expansive and punitive criminal policy that characterizes contemporary criminal law[7]. It should be noted that this expansion has been marked by at least the following elements:

a. The criminalization of money laundering itself, which encompasses criminal phenomena of diverse nature and entity, covering both intentional and negligent modalities, including self-laundering.
b. The growth of the list of crimes considered as "prior or antecedent criminal activity" which, in its origins, pursued the fight against drug trafficking and evolved, almost immediately, towards other criminal areas such as the fight against organized crime and terrorism, later incorporating other less serious crimes, including tax crime.
c. The possibility of an autonomous conviction for this crime, that is, even in the absence of a conviction for the previous criminal activity.

The latest EU instruments give a good example of this panorama, both the criminalization established in the 5th Directive [Directive (EU) 2018/843], as well as that established in DIRECTIVE (EU) 2018/1673 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of October 23, 2018 on combating money laundering by criminal law[8], a rule that will be the starting point, given that it aims at harmonizing the criminalization of the offense in the EU, and whereof the following elements are worth highlighting:

1. Art. 3 establishes, as is customary in the European and international level, a broad definition of money laundering, including self-laundering[9].
2. Art. 2 also refers extensively to prior criminal activity, which generally speaking includes "'criminal activity' means any kind of criminal involvement in the commission of any offence punishable, in accordance with national law, by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal systems, any offence punishable by deprivation of liberty or a detention order for a minimum of more than six months". Along with this first delimitation, a list of offenses is included, which, in any case - therefore, regardless of the foreseen penalty - are considered as prior criminal activity, such as the participation in an organized criminal group and racketeering; terrorism; human trafficking and migrant smuggling; sexual exploitation; illicit trafficking in narcotic drugs and psychotropic substances; corruption, including any offence set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union; counterfeiting and piracy of products; environmental crimes; murder, grievous bodily injury; cybercrime, etc., including tax crimes relating to direct and indirect taxes, as laid down in national law[10].
3. In addition, Art. 3.3 establishes that in order to convict for the money laundering crime, it is not required that there be a prior or simultaneous conviction for the prior criminal activity; nor is it necessary to establish all the factual elements or all the circumstances relating to such criminal activity, including the identity of the perpetrator.
4. and, finally, it provides for the possibility of conviction for laundering offences in the case of assets derived from conduct that took place in the territory of another Member State or in that of a third country, provided that such conduct constituted a criminal activity in the country wherein the conviction for laundering is handed down[11]. However, Art. 3. 4 provides for the possibility that, in these cases, the State with jurisdiction to prosecute money laundering may make the application of the offense conditional upon compliance with the principle of dual criminality, that is, that the prior conduct occurring in another State is also criminalized in the State of commission, with the exception of the crimes of membership to a criminal organization or group, terrorism, human trafficking and illicit treatment of migrants; sexual exploitation; illicit trafficking in narcotic drugs and psychotropic substances and corruption, in which prosecution is not subject to this dual punishment.

In Spain, the criminalization of money laundering is in line with the considerations set out above, so that a broad definition has been established in Arts. 301 et seq. of the Criminal Code, including self-laundering and the same for the antecedent offense or prior criminal activity, for which no prior conviction is required, although, as it cannot be otherwise, the jurisprudence will require a certain connection, with certain specialties when the criminal activity is a tax offense[12], as will be pointed out in the following sections.

Measures for the Investigation and Proof of Money Laundering: International Legal Framework

The magnitude of the type of money laundering, together with the vast consideration of the prior criminal activity and the fact that, given the nature and scope of this crime, there are different sectors of the legal system involved (financial system, criminal area, administrative area, etc.), generates the existence of certain particularities in the evidence -and, obviously, also in the investigative measures-. In this context, international regulations do not expressly mention all the evidentiary aspects of the laundering offense, so that it is left to the national legislator to regulate the procedural aspects, although there are some indications to this effect, of which we will highlight those that, due to their content and scope, may have a greater impact.

The first of these can be practically identified from the first international instruments in this area and is the need for States to use **effective measures of investigation and proof for these crimes**. This expression is by itself a matter of truism, though it must be contextualized in the beginnings of the fight against these

crimes, initially linked to serious or extremely dangerous criminal phenomena and related to organized crime or drug trafficking activities. Hence, due to the impact on fundamental rights which this crime presents, this circumstance has, from the beginning, favored the use of particularly intensive investigative and/or evidentiary measures, such as the use of undercover agents, controlled deliveries, collaborators of justice, etc.

Thus, in Art. 3.3 of the UN Convention on Illicit Drug Trafficking, emphasis was placed on the possible obstacles to proof of the crime of money laundering, given that it also requires antecedent criminal activity and that direct proof of the same is not always possible, so that the **use and legality of circumstantial evidence** to obtain the judgment of certainty about the knowledge, intent or purpose required by the type of laundering **was accepted**.

In addition, shortly thereafter, with *the Convention against Transnational Organized Crime* dated November 15, 2000, more provisions were introduced in this area which were directly related to the investigation of these crimes, such as the establishment of a regime of supervision, cooperation and exchange of information between authorities (Art. 7), the possible conduct of joint investigations (Art. 19), the use of special investigative techniques such as controlled deliveries or electronic surveillance (Art. 20); the establishment of witness protection programs to avoid intimidation or reprisals (Art. 24), as well as for victims for the same reasons (Art. 25) or, without being exhaustive, the measures envisaged in case of the collaboration of persons who could be co-investigated or co-participants in these crimes referred to in Art. 26, both in the investigation and prosecution phase. On the other hand, Art. 6f) again points out an element that may be of importance in terms of evidence, which is that "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances".

At the European level, Art. 6.2c) of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, states, in like manner as the provisions of the above-mentioned UN Convention, that "knowledge, intent or purpose required as an element of an offense set forth in that paragraph may be inferred from objective, factual circumstances". In addition, Art. 4.2 of said instrument stipulates that "Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracking of proceeds, as well as the gathering of evidence related thereto. Such techniques may include monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents". These aspects are equally included in the *Convention on the Laundering, Monitoring, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism, held in Warsaw on May 16, 2005,* which contains similar provisions (especially, in Art. 7.3).

In the EU, the different Directives on the prevention of money laundering and the fight against terrorism, together with other European Directives on the fight against organized crime, human trafficking, sexual abuse or the fight against terrorism, contain those different measures to which reference has been made and that, in some way, are included in the provision of Article 11 of Directive (EU) 2018/1675 where it is established that "Member States shall take the necessary measures to ensure that effective investigative tools, such as those used in combating organized crime or other serious crimes are available to the persons, units or services responsible for investigating or prosecuting the offences referred to in Article 3 (1) and (5) and Article 4." This provision must also be complemented by what is established in recital 19, where it is stated that for these purposes, "It should thereby be ensured that sufficient personnel and targeted training, resources and up-to-date technological capacity are available." And it adds that "The use of such tools, in accordance with national law**, should be targeted and take into consideration the principle of proportionality, as well as the nature and seriousness of the offenses under investigation and should respect the right to the protection of personal data**" (emphasis added). These principles, not because they are obvious, should cease from being expressly underlined, as a way of visualizing **-** in terminology so hackneyed nowadays **-** the limits to which the action of the State in the pursuit against money laundering must be subject to, especially because prior criminal activity is not always so serious as to make use of the most restrictive investigative measures of fundamental rights.

As a complement to the aspects that we have just mentioned, recital 21 of the above-mentioned Directive adds that its articles take into accounts "*the principles recognized by Article 2 of the Treaty on European Union (TEU), respects fundamental rights and freedoms and observes the principles recognized, in particular, by the Charter of Fundamental Rights of the European Union, including those set out in Titles II, III, V and VI thereof which encompass, inter alia,* ***the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law, the presumption of innocence, as well as the rights to an attorney for suspects and accused persons, the right not to incriminate oneself and the right to a fair trial.*** *" And add "This Directive must be implemented in accordance with those rights and principles, also taking into accounts the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other human rights obligations under international law."*

Finally, also in the context of the Union and in the absence of any specific provision referring to the proof of money laundering, it will be necessary to resort to a more general instrument, DIRECTIVE (EU) 2016/343 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on the strengthening of certain aspects on the presumption of innocence and on the right to be present at the trial in criminal proceedings. This instrument establishes, in Art. 6, that the States must guarantee that *the burden of proof for establishing the guilt of suspects and accused persons* ***is on the prosecution,*** without prejudice, as stated in recital 22 "without prejudice to any ex officio fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. Such presumptions should be confined within reasonable limits, taking into considerations the importance of what is at stake and maintaining the rights of the defense, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and, in any event, should be used only where the rights of the defense are respected"[13].

From this brief overview, wherein only a selection of the possibilities to be taken into consideration in the investigation and proof of these crimes has been made, the following conclusions can be drawn:

1. The use of special investigative measures will be frequent, although the determination of the specific measures in each case will necessarily be subject to compliance with the basic legal guarantees of criminal justice, as well as with the principle of proportionality.
2. Regarding evidence, direct evidence could be used, although, due to the specific modalities of commission, the use of circumstantial evidence will be frequent and even, as has just been pointed out, presumptuous evidence, without it being possible to shift the burden of proof which, in accordance with the principles in force in the criminal proceedings, continues to correspond to the prosecution.

Proof of Money Laundering and the Evidentiary Standards Established by the Spanish Jurisprudence

The Necessary Existence of a Minimum of Evidentiary Activity

Article 24.2 of the Spanish Constitution sanctions the presumption of innocence as a fundamental right of the defendant, incidentally in accordance with international human rights texts. To undermine this presumption, a minimum evidentiary activity is required (Constitutional Court Rulings 161/1990, October 19, 1990 and 118/1991, May 23, 1991, among others), lawful -without violating fundamental rights in accordance with Art. 11.1 LOPJ- and sufficient, with the burden of proving the accusation falling on the accusing parties (STC 140/1991, June 20, 1991). And that, for these purposes, only evidence that, according to the law, is considered to be of such a nature, which is practiced in the oral trial -with the exceptions of anticipated and pre-constituted evidence- under the immediacy of the jurisdictional body that must resolve and observe the due contradiction and right of defense, excluding mere investigative proceedings that serve to support the accusation, but do not serve on their own to convict (SSTC 10/1992, of January 16; 51/1995, of February 23; 40/1997, of February 27, among others).

Furthermore, the SC points out in its STS 220/2015, of April 9 (ECLI: ES:TS:2015:2199) that "the money laundering crime is not a crime of suspicion. Like any other criminal conviction, it requires accrediting every single element of the crime".

To destroy the presumption of innocence, the prosecution may present direct evidence or, when not possible, circumstantial evidence[14] without, as pointed out by the SC in the above-mentioned STS 220/2015, evidentiary presumptions being admissible; nor is there a crime of illicit enrichment in our system,[15] which allows a reversal of the burden of proof, a controversial issue that has been the subject of significant doctrinal debate.[16]

Specifically, according to the SC, to disprove the presumption of innocence in this area, three basic rules which have been coined in its consolidated doctrine must be addressed (STS 2369/2014, of April 29; ECLI: ES:TS:2014:2369):

> 1st The prior conviction for the basic offense (antecedent criminal activity or predicate offense) from which the laundered money originates is not required, but it will be necessary to prove a certain connection, a link which presents specific considerations, as will be pointed out below, if the criminal activity is a tax offense.
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> 2nd Proof of the money laundering crime requires proving the concurrence of both the objective elements of the money laundering criminal offense, as regulated in most of the States (including self-laundering), and the subjective elements (in the various forms of intentional laundering, but also reckless laundering). In other words, it will be necessary to prove not only the criminal origin of the funds, and their origin from criminal activities, but also that these circumstances were covered by the malice of the defendants (STS 220/2015).
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> 3rd In this area, circumstantial evidence is the most suitable means and, in most cases, the only means possible to accredit the commission.

Hence, depending on the specific circumstances of each case, even more specifically, in addition to the prior criminal activity, the evidentiary standards used by the case law may be of quite different content or level.

Proof of Evidence and Money Laundering

Firstly, it should be noted, as pointed out by the SC, that it is rare to convict for a money laundering offense based on direct evidence,[17] as such, circumstantial evidence is usually used as a means of proving its commission. This type of evidence, as has been pointed out above, is supported in the main international texts on the subject, allowing its use not only to prove the existence of the crime and the antecedent criminal activity, but also the subjective element or intentionality.

Based, therefore, on the validity of the circumstantial evidence to disprove the presumption of innocence, the jurisprudence of our SC (Supreme Court) has gradually specified the evidence to be taken into consideration depending on the crime preceding the money laundering. The first decisions of the SC in this area (or in the origins of this crime as of the reception) begin with STS 755/1997, of May 23, and in subsequent rulings such as STS 356/1998, of April 15; 774/2000, of May 9; or 2410/2001, of December 16. Thus, for example, in STS 801/2010, of September 23 (ECLI:ES:TS:2010:4967), when specifying the indications to be taken into consideration for the conviction for the crime of laundering of assets of illegal origin wherein there is no previous conviction for the base crime from which the laundered capital originates, these valuation standards shall be referred to:

1. Importance of the amount of money laundered,
2. Connection of the perpetrators to illicit activities or groups or persons related to them.
3. Unusual or disproportionate increase in the subject's wealth.

4. The nature and characteristics of the economic operations carried out, e.g., with the abundant use of cash.
5. The absence of lawful justification of the income that allowed for the realization of these operations.
6. The weakness of the explanations about the licit origin of these capitals.
7. The existence of "shell" companies or financial networks that are not based on demonstrably lawful economic activities.

In fact, these valuation standards can be grouped in what has been called the "indicative triad"[18] which, our SC in STS 578/2012, of June 26 (ECLI: ES:TS:2012:5698), among others, specifies under:

1. Unusual increase in wealth or handling of sums of money, which due to their high amounts, complexity in their transfer, and liquidity (available as cash), reveal operations that are strange to ordinary commercial practices.
2. Non-existence of lawful businesses that justify the increase in assets or the transfer of money.
3. Evidence of any link or connection with illicit activities or with persons or groups related to these sorts of activities.

In any case, the SC points out, this doctrine cannot be understood "as a relaxation of the evidentiary requirements, but as ***another form of proof, which can lead to the always required degree of objective certainty needed for a criminal conviction"*** (STS 2369/2014, of April 29; ECLI: ES:TS:2014:2369).

Proof of the Antecedent Criminal Activity

But in the simplified description which has been made above on the evidence required to proof the existence of money laundering, there is a constant appeal to the existence of some prior criminal activity. Indeed, for there to be money laundering, there existence of an antecedent crime is necessary, even when there was no conviction for such antecedent crimes, be it prior or concurrent [as is similarly stated in art. 3.3.a) of Directive (EU) 2018/1673], which adds a further element of difficulty to the proof of money laundering. In this sense, the doctrine of the SC is constant, which we can see synthesized in its STS 4980/2016, of November 16, 2016 (ECLI: ES:TS:2016:4980) and wherein it emphasizes that **the criminal origin of the assets is evidently an element of the criminal type and, as such, must be subject to proof.** The accreditation of prior criminal activity, according to the SC, requires:

1. Proving a specific act, even if it is no longer necessarily a serious crime and even if one can be convicted of laundering without the prior conviction of the laundered crime. In any case, the act must be susceptible of being qualified as a crime.
2. *Among the data that must configure the fact-cause of obtaining the laundered property, it must be possible to establish that, in fact, such criminal act resulted in the* ***obtention of an*** *economic* ***benefit*** *constituted by* ***capital income*** *in the patrimony of the active subject of such* ***crime****.*
3. ***These data*** *must include the identification of* ***chronological*** *and* ***spatial references*** *that make possible the refutation of their claim as having occurred.*
4. The reference to an unspecified "criminal activity" does not meet the requirements of the presumption of innocence.

However, it should be borne in mind, as noted in Art. 3.3(b) of Directive (EU) 2018/1673 that it should not be necessary to "establish all the factual elements or all the circumstances relating to that criminal activity, including the identity of the perpetrator".

The evidentiary specialties in money laundering matters have, however, been subject to some nuances when the antecedent/predicate offense is a **tax offense** [19]**.** The first important decision in this area was STS 974/2012, of December 5 (ECLI:ES:TS:2012:8701). In this decision, the SC ruled for the first time on the suitability of the tax offense as a predicate offense for money laundering, establishing that the defrauded quota constitutes an asset originating from a criminal activity and, therefore, susceptible to be laundered. This judgment was supported by the dissenting vote of one of its judges, Mr. Antonio del Moral, for whom "**the avoidance of paying taxes does not generate an increase in assets**. It allows a saving, but it does not contribute anything to the patrimony. Objects or property derived from a crime that does not generate

them cannot be considered as laundered"[20]. The above-mentioned ruling was the subject of a broad doctrinal debate as to whether the principle of non bis in idem was being violated in these cases.

Later, the SC in STS 1013/2014, of March 11, 2014 (ECLI: ES:TS:2014:101), emphasized the need to specify the specific amounts defrauded that would have been subject to laundering and the specific laundering operations and the amounts that would have been used in them, to be able to estimate a sufficiently motivated conviction for this crime. Thus, according to the SC, this requirement is not met when "there is no specification of which specific tax liability relating to what fiscal year has been laundered and in what way. There is no factual specification as to what was done with the defrauded quotas, and if there is a generic reference to reinvestment in real estate, there is not a single reference to the specific real estate that was acquired with such quotas, nor in which accounts or funds the money said to have been reinvested was deposited".

Subsequent decisions of the SC, such as STS 265/2015, of April 29 (ECLI:ES:TS:2015:1925), emphasized the purpose pursued by laundering. In the said decision, the SC points out that, from the valuation point of view, **the main characteristic of laundering does not reside in the mere enjoyment or exploitation of illicit gains, but rather that the "return" be sanctioned, as a procedure for the wealth of criminal origin to be introduced into the business cycle**. The laundering of the proceeds from a criminal activity by its own perpetrator must be punished autonomously in view of the special protection required by the legal right that it infringes, other than the one protected by the crime to which it subsumes. According to the SC, Art. 301 of the PC typifies a type of conduct "which consists of carrying out **acts aimed at concealing or covering up criminal assets or helping the perpetrator of this activity to evade the corresponding sanction**".

Thus, and as the SC has made clear in consolidated case law, the crime of money laundering also requires proving the **intentional element of the crime**, the presence of which is decisive in deciding whether certain behaviors constitute the above-mentioned crime, or not. The subjective form of the crime requires that the perpetrator of the **money laundering** acts intentionally or with gross negligence, with the purpose of concealing or covering up the criminal origin or helping the perpetrator of such activity to avoid the corresponding sanction. Therefore, the SC states that not every act of acquisition, conversion or transfer of the property of illicit origin is a typical behavior, but, as for the other acts referred to in paragraph 1 of article 301, it is also required that they **be ordered by the perpetrators for the purposes indicated above**.

With this interpretation, according to the SC, excesses would be avoided, such as punishing for self-laundering, the person responsible for the preceding criminal activity, for the mere fact of acquiring the assets that are a necessary and immediate consequence of the commission of his crime. Or that of considering as laundering, the mere use of the money corresponding to the unpaid installment in a tax crime, for ordinary expenses, without any purpose of concealment or the intention of obtaining an apparently legal title, on assets coming from a previous criminal activity, which is what constitutes the essence of the behavior that is sanctioned through the money laundering crime.

Taking into accounts the above considerations, the SC states that[21]:

a. The mere possession or use of illicit funds for ordinary consumption expenses (for example, the payment of the rent of the house), or in expenses destined to the trafficking activity itself (for example, the payment of tickets to the Dominican Republic for the drug couriers), does not constitute self-laundering since it is not related to acts carried out with the purpose or object of hiding or concealing goods, to integrate them into the legal economic system with the appearance of having been acquired in a lawful manner.
b. On the contrary, the purpose of concealing or masking assets, to integrate them into the legal economic system with the appearance of having been acquired in a lawful manner, must be appreciated in the purchases of vehicles placed in the name of third parties, since the use of front men implies in any case the intention to conceal assets. This same purpose can be seen, in general, in investment expenses (acquisition of businesses or companies, shares or financial securities, real estate that can be resold, etc.), since the purpose of these acquisitions is usually to obtain, through the exploitation of the acquired goods, laundered profits, which hide the illicit origin of the money with which they were acquired.

Presumption of Innocence and Free Appraisal of Evidence

Once the evidentiary activity has been carried out, the jurisdictional organ must decide according to its conscience, on evaluating the evidence collected in the oral trial. This means that in this legal sphere **the principle of free appraisal applies to the full extent**, although it is up to the court to give reasons for the result of the evidence. In addition to this, and given that circumstantial evidence, as has been pointed out, is the most frequent, the requirements derived from respecting for the principle of presumption of innocence impose the need to verify that the decision complies with various formal and material requirements, such as the following[22]:

1st.) From the formal perspective:

a) that the judgment states the basic facts or indications, which are considered fully accredited and that will serve as the basis for the deduction or inference.
b) that the sentence makes explicit the reasoning through which, based on the evidence, the conviction has been reached regarding the occurrence of the punishable act and the participation of the accused in it, an explanation which -even though it may be succinct or brief- is essential in the case of circumstantial evidence, precisely to enable the review of the reasonability of the inference.

2nd.) From the material perspective, it is necessary to comply with certain requirements that refer both to the evidence itself, as well as to the deduction or inference.

Regarding the **evidence**, **it is necessary**:

a) that they be fully supportive,
b) that they be plural, or exceptionally unique but of a singular supporting power,
c) that they be concomitant to the fact which they strive to prove, and
d) that they be interrelated, when there are several of them, in such a way that they reinforce each other.

Given that the circumstantial evidence requires the realization of a logical judgment, it is necessary to determine the canon of control for the rationality and solidity of the inference whereon the circumstantial evidence is based and which can be carried out: both from the canon of its logic or coherence; that is to say, not only is it not arbitrary, absurd or unfounded, but that it fully responds to the rules of logic and experience, so that the accredited basic facts flow, as a natural conclusion, the data required to prove the existence of a "precise and direct link according to the rules of the human criterion" (art. 1253 of the CC) between both, so that it will be unreasonable if the proven evidence rules out the fact that is inferred from them or that does not naturally lead to it; or from its sufficiency or conclusive quality (the inference will not be reasonable when it is excessively open, weak or imprecise, so that within it there are so many alternative conclusions, none of which can be considered proven), although in the latter case one must be especially cautious, since it is the judicial bodies who, by virtue of the principle of immediacy, have a full and complete knowledge of the evidence, obtained with all the guarantees of the evidence.

A disintegrated and fragmented analysis of different pieces of evidence can lead to unacceptable conclusions from the point of view of the reasoning. Thus, with regards to the control of the judgment of inference, the SC states that[23]:

a) If the facts that founded the previous convictions of the accused are revealed as functional to the production of assets of patrimonial value. Inferring from a specific background the dedication of the accused to a different criminal activity, as a basis for the conviction, is incompatible with elementary fundamental rights. The accusatory principle demands the prior imputation by the parties of that criminal activity. And the right of defense requires specificity, without which refutability would be an unrealizable chimera.
b) Even supposing that the accused had committed some other **crime**, the *iter that leads* from that commission to the availability of assets by the accused, as an effect of that crime, must be identified.
c) The chronological reference is also relevant if the events referred to in the alleged origins of the laundered money took place years before the laundering acts. The delay in executing the alleged **laundering** makes the question of delay a pressing one, since the ability to conceal the

money for so many years suggests that the dispositive acts referred to in the judgment of conviction did not have a functionality such as the one attributed to it, which would undoubtedly have already been achieved during those years.

d) It is also necessary to consider the reasonableness of the alternative proposed by the defense, regarding the true origin of the availability of that money; and the refutation of the alternative made by the money **laundering** accusing-person, which should be rejected if it lacks rhetorical forcefulness.

e) Finally, the SC points out that the automatic inclusion in the list of perpetrators of the **crime** of article 301 of the Criminal Code of the holders of assets with a value that does not match their purchasing power implies, at least, a reversal of the burden of proof. And this is to the extent that the lack of concordance between assets and purchasing power is a premise that can derive from multiple different situations from the one criminally typified in said provision.

In any case, as underlined by the SC in STS 578/2012, of June 26 (ECLI: ES:TS:2012:5698) *the rules and criteria collected by this jurisprudential doctrine are not a kind of equation that must lead to conviction, but an orienting guide due to the frequency with which it appears in this type of crimes. However, it will always be necessary to consider each specific case and the nature and supporting potential of these indications.*

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ENDNOTES

1. It is emphasized that the preventive policy of this criminal phenomenon emerged at the late 1980s because of the reaction of international organizations to the financial crime derived from drug trafficking, although, in the case of the UN, the approval of the Global Programme to against Money Laundering in 1977 can be considered among the first antecedents of its actions. PELÁEZ MARTOS, José Mª, Manual práctico par prevención del blanqueo de capitales, Wolters Kluwer, 2019, p. 303.
2. These instruments have been followed, within the United Nations, by the Convention for the Prevention of the Financing of Terrorism dated December 9, 1999, the Convention against Transnational Organized Crime dated November 15, 2000 and the Convention against Corruption dated December 9, 2003, and within the Council of Europe by the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism dated May 16, 2005, known as the "Warsaw Convention."
3. The FATF is an intergovernmental organization whose objective is to set standards and promote the effective implementation of legal, regulatory, and operational measures to fight against money laundering, the financing of terrorism and the financing of proliferation and other threats that affect the integrity of the international financial system. It also works to identify vulnerabilities at the national level to protect the international financial system from misuse. Its 40 recommendations, as summarized by the FATF in the introduction to the last review in 2012, constitute a comprehensive and consistent framework of measures that States should implement. The Original Recommendations from 1990 were an initiative to address the misuse of financial systems by persons laundering the money from illicit drug trafficking. The first review, in 1996, was intended to reflect the growing trends and techniques of money laundering and to extend its scope beyond drug assets. In 2001, the FATF extended its mandate to include the financing of terrorist acts and organizations, creating the 8 - later extended to 9 - Special Recommendations concerning the financing of terrorism. The second review, in 2003, was carried out shortly thereafter, and its greatest achievement was the endorsement of more than 180 countries - both the General Recommendations and the Special Recommendations concerning the financing of terrorism - and their recognition as the "international standard against money laundering and financing of terrorism." At the heart of the Council of Europe, the FATF's counterpart is MONEYVAL, the Committee of Experts on the Evaluation of Anti-Money Laundering and

the Financing of Terrorism Measures, formally established in 1997, whose action and working methods have subsequently been developed by Resolution R (2005) 47 on subordinate committees and bodies and its Statute by Resolution CM/Res (2010)12 on the status of the Committee of Experts on the Evaluation of Anti-Money Laundering and the Financing of Terrorism Measures.

4. The justification is clearly reflected in the clauses of the above-mentioned UN Convention whose introduction highlighted the existence of clear links "between illicit trafficking and other related organized criminal activities, which undermine legitimate economies and threaten the stability, security and sovereignty of States."

5. As indicated in the recitals of the above-mentioned Directive 91/308/EEC, on the prevention of the use of the financial system for money laundering. The doctrine had already warned for some time that this, now not so new, criminological, and criminal policy scenario makes it necessary to use effective legal and material instruments to deal with a form of criminality that not only violates criminal law, but also affects commercial and financial legislation to make the substantial profits it produces inaccessible to the prosecution by the State. Cf. MARTÍN PALLÍN, J.A., "Blanqueo de dinero, secreto profesional y criminalidad organizada", in DÍAZ-MAROTO Y VILLAREJO, J. (ed.) Law and Criminal Justice in the XXI Century. Liber amicorum en homenaje al Profssor Antonio González-Cuéllar García, ed. Colex, Madrid, 2006, p. 652. These two areas are necessarily related, since the financial area aims at preventing important economic sectors such as financial institutions and certain professional activities from being used for laundering money from criminal activities, leaving the criminal area for the punishment of these crimes. PELÁEZ MARTOS, José Mª, Practical Manual..., op. cit., p. 303.

6. In a graphic way, ABEL SOUTO compared the expansion of the punishment for money laundering with the "Big Bang" stating that this growth in the criminalization of money laundering follows a process parallel to the creation of the Universe, and, consequently, continues in an incessant progression. ABEL SOUTO, M., "Blanqueo de dinero, reformas penales de 2015, secreto bancario y paraísos fiscales" (Money laundering, 2015 penal reforms, bank secrecy and tax havens) in DEMETRIO CRESPO/NIETO MARTÍN, Economic criminal law, and Human Right law, Valencia, Tirant lo Blanch, 2018, pp. 445-466, esp. P. 446; and by the same author, "Las reformas penales de 2015 sobre el blanqueo de dinero" (The penal reforms of 2015 on money laundering), RECPC 19-31, 2017, pp. 1 et seq.

7. It is pointed out that this crime "has become a clear example of the expansive tendencies of a criminal law with little respect for the principles, guarantees and limits that should preside over its interpretation and application". Cf. DEMETRIO CRESPO, E., "Sobre el fraude fiscal como actividad delictiva antecedente del blanqueo de dinero"(Tax fraud as a criminal activity antecedent to money laundering), in Revista General de Derecho Penal, 2016, n. 26, pp. 10 and 17.

8. In December 2016 and in the framework of the EU Plan to strengthen the fight against terrorist financing and financial crime. Two instruments were presented to strengthen the fight against terrorism and money laundering at the EU level: the proposal for a Directive on combating money laundering through criminal law and the proposal for a Regulation on mutual recognition of freezing and confiscation orders, both adopted in 2018, as noted above. These complementary instruments pursue, on the one hand, the harmonization of criminal rules around the criminalization of money laundering; and, on the other hand, the strengthening of cooperation between Member States in the recovery of assets and proceeds of crime through the recognition and enforcement of orders issued in this area in the EU territory. Their complementary nature is evident, since the cornerstone for the recognition and enforcement of judgments within the EU is trust, and this trust is contributed to, in the criminal field, when the differences in the typical frameworks are minimized or eliminated.

9. To this end, recital 11 of the Directive states that "Member States should ensure that certain types of money laundering activities are also punishable when committed by the perpetrator of the criminal activity that generated the property ('self-laundering'). In such cases, where, the money laundering activity does not simply amount to the mere possession or use of property, but also involves the transfer, conversion, concealment or disguise of property and results in further damage than that already caused by the criminal activity, for instance by putting the property derived from criminal activity into circulation and, by doing so, concealing its unlawful origin; that money laundering activity should be punishable".

10. The European legislator stresses that, with this provision, it is in line with the FATF Recommendations, although it does not ignore the differences in the criminalization of tax offenses among the Member States, which may have repercussions in this area. In any case, it is pointed out that "the purpose of this Directive is not to harmonize the definitions of tax offenses in national law".

11. However, Art. 3.4 of the Directive states that "In the case of point (c) of paragraph 3 of this Article, Member States may further require that the relevant conduct constitutes a criminal offence under the national law of the other Member State or of the third country where that conduct was committed, except where that conduct constitutes one of the offences referred to in points (a) to (e) and (h) of point (1) of Article 2 and as defined in the applicable Union law."

12. The SC recalls, in its STS 2369/2014, of April 29, that the crime of money laundering was introduced in our legislation as a rigorous novelty by LO 1/1988, of March 24, "with the aim of making possible the intervention of criminal law in all sections of the economic circuit of drug trafficking", seeking "to incriminate the conducts that have come to be called laundering of illegal origin". The technique initially adopted by the Legislator was to adapt the crime of receiving, defined in Art. 546 bis a) to the new needs for punishment, referring it to drug trafficking crimes. On the evolution of the crime up to the present time, cf. BLANCO CORDERO, Isidoro, El delito de blanqueo de capitales (The crime of money laundering), Aranzadi, 2015, pp. 196 et seq.

13. In this sense, as evidenced by some authors (LÓPEZ ESCUDERO, Manuel, "Article 48. Presumption of innocence and rights of the defense", in MANGAS MARTÍN, Araceli (dir.), Charter of Fundamental Rights of the European Union. Comentario artículo por artículo (An article-by-article commentary), Fundación BBVA, 2008, pp. 759-776, esp. pp. 761-762), it is necessary to take into accounts the doctrine of the ECtHR, which has considered the existence of these presumptions to be compatible with Art. 6.2 ECHR; the existence of these presumptions of guilt provided that they meet two conditions, (1) that there is no automatic application of the presumption, so that the subject is not deprived of the effective exercise of the right of defense to introduce elements of contradiction; and (2) that, to determine guilt, the assessment of the presumption is made in conjunction with the rest of the evidence [STEDH, of October 7, 1988, Salabiaku v. France, no. 10519/83, aps. 28-30; ECHR, 25 September 1992, Pham Hoang v. France, No. 13191/87, aps. 32-35]. We can also find different pronouncements of the CJEU (Court of Justice of the European Union) wherein the validity of presumptions in the EU has been admitted, although generally referring to the sanctioning area for collusive practices. Thus, the JCJEU (Judgments of the Court of Justice of the European Union) upholds the validity of a presumption of "decisive influence" in competition law matters, stating that it does not constitute "in any way a violation of the presumption of innocence, enshrined in Article 48 of the Charter and Article 6(2) of the ECHR, having regards, in particular, to its nature as a rebuttable presumption" [JCJEU (First Chamber) of 19 June 2014, FLS Plast A/S v. European Commission, (Case C 243/12 P), nr. 27 and case law cited].

14. However, as the SC has pointed out, this distinction between direct and indirect evidence is more artificial than real, as, among others, STS 220/2015, April 9. STC 128/2011, of July 18, synthesizes the doctrine on the aptitude of circumstantial evidence to constitute prosecution evidence: *"[In the absence of direct prosecution evidence, circumstantial evidence may also support a conviction, without undermining the right to the presumption of innocence, provided that: 1) the base fact or facts (or indicia) must be fully proven; 2) the facts constituting the crime must be deduced precisely from these fully proven base facts; 3) the reasonableness of the inference can be controlled, for which it is necessary, first of all, that the judicial body externalizes the facts that are accredited, or indicia, and, above all that it explains the reasoning or logical connection between the base facts and the consequential facts; and, finally, that this reasoning is based on the rules of human judgment or on the rules of common experience or, "on a reasonable understanding of the reality which is normally experienced and appreciated in accordance with the collective criteria in force" (SSTC 300/2005, of November 21, FJ 3; 111/2008, of September 22, FJ 3 and 70/2010 , FJ 3). Assuming "the radical lack of competence of this amparo jurisdiction for the assessment of the evidentiary activity practiced in a criminal proceeding and for the evaluation of such assessment according to criteria of quality or opportunity" (SSTC 137/2005, of May 23, FJ 2 and 111/2008, of September 22, FJ 3), the right to the presumption of innocence is only considered violated in this area of prosecution when "the inference is illogical or so open that within it there is room for such a plurality of alternative conclusions that none of them can be considered proven" (SSTC 229/2003, of December 18, FJ 4 ; 111/2008, of September 22, FJ 3; 109/2009, of May 11, FJ 3 ; 70/2010, of October 18, FJ 3 ; 25/2011, of March 14, FJ 8)].*

15. GIMENO SENDRA, VICENTE, "LOS DERECHOS A LA PRESUNCIÓN DE INOCENCIA Y DE DEFENSA" (THE RIGHTS TO THE PRESUMPTION OF INNOCENCE AND TO DEFENSE) IN GIMENO SENDRA/TORRES DEL MORAL/MORENILLA ALLARD/DÍAZ MARTÍNEZ, LOS DERECHOS FUNDAMENTALES Y SU PROTECCIÓN JURISDICCIONAL (FUNDAMENTAL RIGHTS AND THEIR JURISDICTIONAL PROTECTION), EDISOFER, MADRID, 2017, PP. 479-505, PP. 481; FERNÁNDEZ LÓPEZ, MERCEDES, "CONSIDERACIONES PROCESALES SOBRE EL

DELITO DE ENRIQUECIMIENTO ILÍCITO" (PROCEDURAL CONSIDERATIONS IN THE CRIME OF ILLICIT ENRICHMENT), IN DEMETRIO CRESPO/GONZÁLEZ-CUÉLLAR SERRANO (DIRS), HALCONES Y PALOMAS: CORRUPCIÓN Y DELINCUENCIA ECONÓMICA (CORRUPTION AND ECONOMIC CRIME), MADRID, CASTILLO DE LUNA, 2015, PP. 431-466 .

16. On these aspects, cf. among others, PÉREZ CEBADERA, Mª A., "La prueba del origen ilícito de los bienes y el decomiso ampliado" (The proof of the illicit origin of the assets and the extended confiscation), in GONZÁLEZ-CUÉLLAR (dir)/ORTIZ PRADILLO Y SANZ HERMIDA (coords.), Problemas actuales de la Justicia Penal (Current problems of Criminal Justice), Colex, Madrid, 2013, pp. 365-382, esp. p. 374; FERNÁNDEZ LÓPEZ, Mercedes, op. cit., passim. Indeed, the SC (Supreme Court) in the above-mentioned STS 220/2015 states "For a conviction for a laundering offense, as for any other, the certainty beyond reasonable doubt is necessary, based on objective and rational parameters, that each and every one of the elements of the crime concur: a prior criminal activity suitable for generating profits or assets; operations carried out with those assets with the finality of concealing their origin and making them flow in the licit market; and, in the case of the aggravated type, that the prior offense be related to the trafficking of toxic drugs, narcotics or psychotropic substances. None of these matters can be "presumed" in the sense that they can escape such objectifiable certainty. A somewhat high probability or suspicion is not enough. This is significantly different from the clear fact that the criminological reality of this type of offenses obliges, on many occasions -and this is also a topical statement in the jurisprudence (for all, sentences 1637/2000, of January 10, 2410/2001, of December 18, 774/2001, of May 9 or 1584/2001, of September 18)- to resort to the so-called circumstantial evidence".

17. The SC, in recent judgment STS 3504/2019, of November 4, 2019 (ECLI: ES:TS:2019:3504), has been synthesizing its consolidated doctrine on circumstantial evidence that can be defined "as that which is aimed at showing the certainty of certain facts, indications, which are not those constituting a crime, but from which these and the participation of the accused can be inferred by means of reasoning based on the causal and logical nexus existing between the proven facts and those which it is sought to prove". This type of evidence requires at least two fundamental elements: (a) The requirement of a base fact or indication, which must be fully supported and (b) The deductive or inference judgment, where the jurisdictional organ, from the base fact or indication, extracts the consequence of the realization of the punishable act by the accused, being convinced, through a logical and rational discourse, of his guilt.

18. All of this is also based on the doctrine of the ECtHR which, in its judgements of the European Court of Human Rights (SsTEDH) of February 6, 2006, Murray v. United Kingdom; of March 20, 2001, Telfner v. Austria; and in the field of confiscation - therefore, closely related to money laundering, of September 23, 2008, Grayson and Barnham v. United Kingdom.

19. On these aspects, see more extensively. BACIGALUPO, Enrique, Sobre el concurso de delito fiscal y blanqueo de dinero (On the contest of tax crime and money laundering), Madrid-Civitas, 2012; BLANCO CORDERO, Isidoro , "El delito fiscal como actividad delictiva previa del blanqueo de capitales" (Tax crime as a prior criminal activity of money laundering), in Revista Electrónica de Ciencia Penal y Criminología, 2011, 13-01, pp. 1-46; DEMETRIO CRESPO, Eduardo, "Sobre el fraude fiscal como actividad delictiva antecedente del blanqueo de dinero" (On tax fraud as an antecedent criminal activity to money laundering), in Anuario de Derecho penal económico y de la empresa , 2018, nº 4, pp. 433-450. On the other hand, info relating to the general problems in proving tax crime can be consulted in GARCÍA DÍEZ, Claudio, "La prueba en el delito fiscal" (The evidence in tax crime), in DEMETRIO CRESPO/SANZ DÍAZ-PALACIOS, El delito fiscal. Aspectos penales y tributarios, Atelier, 2019, pp. 137-180.

20. The aforementioned Magistrate points out in his dissenting opinion that : (i) the tax crime -in the modality of omission of payment of taxes- does not produce assets or generate an increase in the assets of its author, the tax debt is born before the criminal conduct; (ii) the money derived from the non-payment of taxes does not access the author's assets through an illicit circuit at any time; (iii) it is practically impossible to individualize the defrauded/laundered quota in the author's assets due to the fungibility of the money; (iv) in short, "the tax debt is the presupposition of the crime but not its consequence".

21. STS 265/2015, of April 29 (ECLI:ES:TS:2015:1925).

22. Vid. For all, the recent STS 3504/2019, of November 4, 2019 (ECLI: ES:TS:2019:3504), where the doctrine of this high Court on circumstantial evidence is updated and synthesized.

23. Cfr STS 4980/2016, of November 16 (ECLI: ES:TS:2016:4980) and cited case law.