Neate and Godfrey: Bank Confidentiality

Sixth Edition

General Editor
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BLOOMSBURY

32 Portugal

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INTRODUCTION

[32.1] The Portuguese Constitution[1] provides in art 26 for the protection of privacy.[2] It is generally understood that the bank confidentiality obligation falls within the scope of this constitutional protection.[3]

In addition, the bank confidentiality legal regime is established in several statutory provisions, as follows:

1 the Banking Law (more specifically, the 'Legal Regime for the Credit Institutions' as laid down in Decree Law no 298/92, dated 31 December, amended by Decree-Law 201/02, dated 26 September). This law sets forth a detailed regime of the bank confidentiality obligation which is understood as a part of the rules of conduct for banks and their directors and employees. Also, the conflict of interests between the activity of banks vis-à-vis the public and particularly their customers and their private interests is covered by the Law;
2 the Criminal Code (Decree Law no 48/95, dated 15 March) and other criminal law legislation, including the Criminal Procedure Code;
3 the Civil Code (Decree Law no 47344, dated 25 November 1966);
4 data protection legislation (Law 67/98, dated 26 October);
5 other.

LEGAL REGIME OF BANK CONFIDENTIALITY OBLIGATION

Bank confidentiality in the Portuguese legal system and brief reference to some major issues

[32.2] Bank confidentiality is defined in the law as the secrecy which the banks, their directors, employees and other people working or providing services to a bank

1 The Portuguese Constitution is dated 2 April 1976 and its last revision is dated August 2005.
2 The text of this provision is the following:
'Everyone is entitled to personal identity, civil capacity, citizenship, good name and reputation, image, free expression and privacy and protection against any form of discrimination'.
3 Only a small number of tax law commentators have held the opinion that the need of the tax authorities to obtain information for tax purposes does not allow constitutional protection to the bank confidentiality obligation. However, this is not only a minority view, but also highly controversial.

must keep as to the customer's business or activity, ie the economic, financial and personal data concerning the customer which has been acquired by virtue of their activity.

One of the first references to bank confidentiality in Portuguese law dates back to the nineteenth century, more particularly, the Law of 1881 ruling the activity of the Bank of Portugal. Since then, bank confidentiality has always been laid down in Portuguese law concerning banking activity. The purpose of the law has always been the protection of the customer's investments and savings, thus accomplishing the public economic interest of creating a climate of confidence in investment. Bearing in mind that the customer's right to bank confidentiality is connected to the constitutional protection of the privacy right, it has always been understood that the customer is not only someone who enters into any particular transaction with a bank, but also someone who has initiated contacts with the bank with a view to entering into any possible transaction. Therefore, information and personal data about a prospective customer of the bank who, with a view to entering into a negotiation, has supplied the bank with some personal data without, however, reaching any final agreement is covered by bank confidentiality. Thus, the matter of bank confidentiality may be relevant within the scope of pre-contractual liability.

But, bank confidentiality gains a special importance during any transactions with the bank and after those transactions have been concluded.

A classic question in bank confidentiality concerns the limits of bank confidentiality vis-à-vis the interests of criminal investigation. Until 1994, banks, the police and criminal courts faced this problem, and often the banks refused to provide any information about customers to police or criminal courts. However, Act no 36/94, dated 29 September, on measures against corruption and economical and financial crimes, amended by Law 5/02, dated 11 January 2002, implemented new legislation to oblige the banks to provide confidential information whenever the criminal investigation is related to bribery and certain defined financial and economic crimes (generally, so-called white-collar crimes) as well as, since the latest amendment, terrorism and certain forms of trafficking. Bearing in mind the importance of this law, a special reference shall be made below.

The Banking Law and the scope of bank confidentiality

[32.3] One of the major purposes of the Banking Law is to define and keep banking activity within the codes of professional conduct and consider the customer as a consumer of services.

Banking legislation is applied to:

1 banks;
2 investment companies; leasing, factoring and hire-purchase companies, electronic currency institutions; and
3 any other entities that the law considers as similar to banks for some specific purposes, which are herein referred to, in general, as banks even though, technically, the entities indicated in 2 and 3 are not, strictly speaking, banks.

This broad application of the Banking Law to all those entities is an important factor in the protection of a customer's rights. The supervision of all banking activities in Portugal is conducted by the Bank of Portugal.

The first relevant provision of the Banking Law (art 78) on the confidentiality obligation reads as follows:

'1 The board of directors members and the supervisory board members of credit institutions, its employees, proxies and all other people who provide them services, permanently or not, shall not disclose or use information on facts relating to the activity of the institution or its relations with customers which have been obtained exclusively during the performance of their functions or the provision of services.
2 Bank confidentiality covers, among others, the customers' names, the deposit accounts and all other banking operations.
3 The confidentiality obligation does not end on the termination of contractual relations'.

Consequently, the following persons are, within and in addition to the banks, obliged to keep confidentiality and abide by the bank confidentiality legislation:

1 the members of the board of directors and supervisory board of banks;
2 bank employees and proxies; and
3 any other person or entity providing services to a bank on a permanent or occasional basis.

The confidentiality obligation includes:

1 the duty of non-disclosing,
2 the duty of non-using,

any information upon facts or data concerning the bank activity relating to customers, provided that they have acquired them by virtue of the exercise of their functions.

Those confidentiality duties do not terminate with the termination of their functions or employment in the bank. The infringement of those duties is a crime.

Exception to the bank confidentiality obligation

[32.4] These exceptions are laid down both in the Banking Law and other legislation.

Article 79 of the Banking Law reads that:

'1 The facts concerning the relationship between the customer and the bank may be disclosed in case of customer's consent provided to the bank.
2 Beyond this case, the facts covered by confidentiality obligation may only be disclosed:
a) to the Bank of Portugal;
b) to the Securities Board;
c) to the Guarantee of Deposits Fund and the System of Indemnities to Investors;
d) to the criminal authorities under the provisions of criminal law;
e) to the tax authorities in the context of its activities;
f) where there is another legal provision that expressly provides for a limitation to the confidentiality obligations'.

Exceptions provided for in the Banking Law

Customer's consent

[32.5] In order to understand the notion of the customer's consent, it is of use to point out that a customer's consent is not required for information that has become public and is therefore no longer secret in nature.

On the other hand, there are some persons who are authorised by the customer or the law to have access to confidential information kept by the bank. Such is the case for, inter alia:

1 the guarantors of some commercial papers in possession of a bank, such as bills of exchange, who need to know the information covered by confidentiality concerning those documents in order to exercise their rights or duties;
2 proxies;
3 third parties representing the bank's customer by operation of law (for instance, a representative of a minor etc); and
4 bankruptcy trustees.

There is no legal requirement that the customer's consent should be given in writing, although this is considered the most advisable way to communicate with the bank.

Information provided to some entities authorised by law

[32.6] In addition, the following entities may also receive confidential information under certain limited conditions:

1 the Bank of Portugal (as the central bank), for instance, in connection with the sanctions to apply to the practice of crimes for the issuance of cheques returned unpaid;
2 the Securities Board in connection with its functions of supervising the securities market;
3 the Guarantee of Deposits Fund; and
4 entities authorised to have access to bank data under certain special legislation as detailed below.

Exceptions provided for in other legislation

The Criminal Code

[32.7] The Criminal Code provides in art 195 that:

> 'whoever, without permission, discloses a secrecy related to a third party which has been obtained by virtue of his profession, status or employment is subject to a one year imprisonment penalty or, in alternative, to a maximum fine of 240 days.[4]'

On the other hand, art 196 establishes that:

4 Under art 47 of the Criminal Code, the amount of a criminal fine defined in terms of days is fixed by the judge case by case between €1 and €500.00 per day.

'whoever, without permission, takes advantages or benefit from a confidential information concerning the commercial, industrial, professional or artistic activity of a third party by virtue of his profession, status or employment is subject to a one year imprisonment penalty or, in alternative, to a maximum fine of 240 days'.

The Criminal Code considers as a reason that may exclude criminal liability the protection of satisfaction of an interest which is clearly more important than the interest protected by the bank confidentiality rules, which, therefore, may be overridden.

Moreover, the Criminal Code establishes an exception based on necessity (art 34):

'An act is not illegal which has been practiced as the adequate way to remove a threat to the legitimate interests of someone or of a third party, provided that (cumulatively):

(I) the threat has not been voluntarily created by it;
(II) there is a reasonable superiority of its interest in relation to the interest which can be offended by the threat; and
(III) it is reasonable to impose upon the third party the loss or damage of its interest taking into consideration the nature or the higher value of the interest threatened'.

As a consequence, in criminal law matters other interests may prevail over bank secrecy.

The Criminal Procedure Code

[32.8] This provides that credit institutions may invoke bank confidentiality to prevent them having to make depositions or statements in criminal investigation procedures.

If the judge, however, has doubts about the confidential nature of the information required from a bank, he shall decide about the disclosure duties after consultation with the professional or banking association representing the persons under the disclosure duty.

Article 135 of the Code provides:

'1 Priests, lawyers, doctors, journalists and members of credit institutions and other people allowed or obliged by law to keep professional confidentiality may refuse to make any statements or provide information covered by the confidentiality duty.
2 If the court has reasonable doubts about the validity of the refusal, it may take all necessary measures to solve the doubt. If the Court concludes that the refusal is not legally valid, it may order that the statement be produced.'

In this last case, the entity which represents the professional involved (union, association, etc) would also be heard in order to help the court decide whether the confidentiality obligation should be overridden or not.

In addition, the Criminal Procedure Code regulates in art 182 the presentation to the court of documents or objects that the above indicated professionals and also credit institutions, have in their possession. According to this legal provision, the credit institutions must present to the criminal authorities, at their request, any documents or objects held by them which may be seized. The credit institution may

refuse this request in writing and then the criminal authority will need to decide whether the protection is to be accepted or not. As noted above, the criminal authority may override the confidentiality obligation where such is considered necessary to assure the protection of interests of higher value or importance.

Furthermore, the Criminal Procedure Code also allows (art 181) the seizure of money, documents or other things deposited in a credit institution (even in a bank private safe box) if they are connected with the commission of any crime and are of great importance to the development of the investigation. It is not necessary that the documents or other things be owned by any suspect involved in a criminal investigation.

Paragraph 2 of art 181 establishes that the criminal investigations judge may inspect any correspondence or other banking documentation in the possession of the banks with a view to deciding which goods are to be seized.

The judge and all people who have co-operated with him are subject to a strict duty of confidentiality in relation to the information obtained under such conditions.

The inspections and searches made at credit institutions should be preceded by an express court decision, of which a copy must be previously sent to the bank, except in special cases (for instance, suspicion of terrorism, violent crimes etc) where the criminal inspection or search may be conducted by the police before an authorisation is granted by the court. In any event, the court should later confirm the validity of such investigations.

OTHER LEGISLATION

[32.9] Bribery and certain crimes of a financial and economic nature (white-collar crimes) have a special legislation allowing the police duly authorised by the criminal investigation judge to have access to bank confidential information.

In addition, an important bill about criminal investigation concerning the production, preparation or trade of narcotics and funds connected with that illegal activity (Decree Law no 15/93, dated 22 January, amended by several bills, the most relevant to this matter being Law 45/96, dated 3 September and the most recent one Law22/2014 dated 28 April) authorises the access to information covered by bank confidentiality and the duty of credit institutions to provide such information to the authorities.

This bill establishes (art 60) that by virtue of the needs of the criminal authorities, the competent court may request any information and the presentation of documents relating to assets, bank deposits and the like which belong to individuals who are suspects or accused of having committed crimes relating to the production, preparation or trade of narcotics. If such request relates to banking entities, or financial or equivalent entities, the request may be requested by the Bank of Portugal. The requested entities, both public (including tax authorities) and private (including all credit institutions), cannot refuse to provide the authorities with such information or documents.

USE OF CREDIT INSTITUTION TO LAUNDER MONEY

[32.10] The use of a credit institution to launder money has also a special legal regime following Directive 2010/78/EC of the European Parliament and of the

Council 'Directive Omnibus I', dated 24 November 2010, which was transposed into Portugal by decree – Law No 18/2013, of February, which amended Law No 25/2008 of 25 June that, amongst other references, sets out the following:

1 credit institutions are obliged to inform the authorities (the General Public Prosecutor '*Procurador Geral da República*' and the Financial Information Unit '*Unidade de Informação Financeira*') whenever they suspect that any funds or transactions are connected with money laundering or terrorism financing;
2 credit institutions are obliged not to follow or perform any customer's instruction whenever they suspect that they are connected or related to money laundering or terrorism financing, and to inform the authorities at once. The authorities may instruct the credit institutions not to perform the requested actions, but that has to be confirmed by a judge no later than two days after the initial notification by the credit institutions. Should it be impossible for the credit institution to abstain from executing the instructions given by the customer or if the abstinence would prejudice the investigation by the criminal authorities, the banks are allowed to execute the customer's instructions, but after that must immediately inform the authorities.

TAX LEGISLATION

[32.11] The legislation has evolved significantly in this regard and the fact is that, considering the number of situations that can trigger the authorities' access to bank details, in practice bank confidentiality (for tax purposes) is not such a solid concept anymore. For example, whenever there is evidence of tax felony, the tax authorities may have access to information of documents held by the bank, regardless of the consent of the person to whom that information belongs to.

Access to information protected by banking secrecy is, in principle, subject to prior judicial authorisation, except where the law specifically sets out the possibility of tax authorities acting and having access to that information without reliance on that authorisation. Lack of co-operation may only be deemed legitimate when the same involves access to facts of the private life of citizens, the violation of personal rights and other rights, freedoms and guarantees of citizens on the terms and limits of the constitution and the law. In those cases, and should the tax payer oppose the access to that information, the tax authorities may only move forward after being duly authorised by the competent district court jurisdiction on the basis of a reasoned request from the tax administration. Credit institutions, finance companies and other entities shall comply with obligations concerning access to information covered by confidentiality obligations within ten days.

As briefly mentioned above, certain tax law commentators hold that the above-quoted provision of the constitution related to the protection of privacy of citizens does not always cover information falling within the scope of bank confidentiality.

Their view is based on the fact that the above-mentioned provision of the constitution refers only to basic rights of citizens connected with human dignity and spiritual values such as philosophical or religious convictions or sexual inclinations. Therefore, the financial situation of individuals would fall outside the scope of protection given by the constitution. Consequently, under this point of view, where the information kept by banks relates to the above basic rights, bank confidentiality is effective; if such is not the case, it may be overridden for tax purposes, particularly with a view to obtaining information on the financial situation of bank customers.

Moreover, the same commentators hold that the duty corresponding to the public interest of obtaining tax information has higher value than the interests protected by bank confidentiality. Therefore, the banks should provide information covered by the bank confidentiality obligation in order to allow the tax authorities to have information on the real incomes of companies, taking into account that the principle of taxation of the truthful income is also laid down in the constitution as a right of taxpayers.[5] In addition, according to the same legal commentators, the bank customers will not be affected by such measures once the tax authorities are subject to the duty of tax confidentiality which covers precisely the information obtained about the financial situation of taxpayers.[6] However, the majority of legal commentators have argued that such understanding would, in fact, jeopardise the value of bank confidentiality. Indeed, it is almost consensually understood that this confidentiality obligation falls within the constitutional protection and that there is no exception in favour of tax authorities. Furthermore, other authors who disagree with the opinion of those tax commentators have pointed out that the activities of tax authorities, when carrying out an investigation into the financial situation of individuals, may be punished under criminal law.

In addition, credit institutions are also subject to automatic reporting mechanisms in relation to opening or maintaining accounts by taxpayers whose tax situation is not regularised[7] and belonging to risky sectors, and in relation to cross-border transfers which are not related to income payments subject to one of the reporting schemes required by law for tax purposes and commercial transactions or those effected by public entities, under conditions to be defined by order of the Minister of Finance, after consultation with the Bank of Portugal.

The tax administration has the power to access all the information or bank documents, without the need for consent of the owner of the protected data, in (amongst others) the following cases: (i) where there are indications of a crime in tax matters or tax felony; (ii) where there are facts which specifically indicate a lack of truthfulness in information reported; (iii) when the declared income is significantly less, without justifiable reason, than that which would be consistent with the level of wealth exhibited by the taxpayer, etc. The tax authorities may also access bank documents in cases of refusal by the taxpayer to present them or make them available: (i) in the case of documents supporting accounting records of personal and corporate income tax subject to specific accounting systems; (ii) when the taxpayer is benefiting from benefits or a preferential tax regime, and there is a need to monitor their eligibility – for that purpose only, etc.

Officers, employees and agents of the tax administration are required to maintain the confidentiality of data collected on the tax situation of taxpayers, and items of a personal nature that they learn during the course of their proceedings, including matters covered by professional secrecy or any other legally regulated duty of secrecy.

With regard to the US Foreign Account Tax Compliance Act ('FATCA') impact in Portugal, on 2 April 2014, the US Treasury Department announced that Portugal

5 This principle is set out in art 104, para 2 of the Constitution, which states the 'taxation over companies shall be applied on the real income'.

6 Notwithstanding, even those commentators agree that a search made by tax authorities in the house or premises of the taxpayer, particularly companies, as set out in art 125 of the Corporate Income Tax Code, can only be made with the previous authorisation of a court if the taxpayer does not agree to it voluntarily.

7 In accordance with Article 64 (5) and (6) of General Tax Law – Lei Geral Tributária.

would be one of the jurisdictions to be treated as having Intergovernmental Agreements (IGA) in place until 31 December 2014. Therefore, it is expected that the IGA (Model 1) between the US and Portugal will soon be signed in order for this status to remain applicable.

Regardless of such IGA, the majority of the Portuguese financial institutions have already registered directly with the US IRS so that they may be listed as Foreign Financial Institutions ('FFI') reporting under the US FATCA tax regime.

OTHER LEGAL PROVISIONS

[32.12] There are more exceptions including, inter alia:

1 the right of the civil courts to receive information from the banks. This includes:
   (a) information concerning funds or assets owned by debtors (bank customers) in civil actions for money which is in the possession of banks;
   (b) in connection with the enforcement of letters of request addressed by foreign authorities or foreign courts to Portuguese civil courts under international conventions; and
   (c) for obtaining legal aid;
2 in certain cases, the Parliament's commissions of investigation may request information from private entities;
3 the bank's customer's spouse may request information from the bank in cases where:
   (a) the customer is not able to manage the bank account because of being at an unknown place and provided that no power of attorney has been granted to anyone; or
   (b) the customer provides the spouse with a general proxy for the administration of assets.
4 In addition, as seen below on case law, the department of inspection of a bank may inspect the accounts of its employees who are suspected of having committed irregular or dishonest acts.

As mentioned above, the supervising authorities are also subject to a duty (art 80 of the Banking Law) as follows:

> '1 Everyone who is carrying or has carried out functions in the Bank of Portugal, or the ones who are rendering or have rendered services, both on a permanent or occasional basis, are subject to the confidentiality obligation about the facts which knowledge has been obtained exclusively by virtue of the exercise of their functions or services and may not disclose or use the information so obtained.'

The facts covered by the confidentiality obligation may only be disclosed in the following cases:

1 through the customer's consent given to the Bank of Portugal;
2 in pursuance of provisions of criminal law or criminal procedure law;
3 in connection with court proceedings of bankruptcy or winding up of companies under certain conditions; and
4 the disclosure of certain data is allowed for statistical purposes provided that does not include the identification of people or institutions.

Co-operation with regulatory entities and other entities

[32.13] In pursuance of art 81 of the Banking Law, the Bank of Portugal may exchange information with other entities which, however, must keep it confidential, including but not limited to: the Securities Board (under certain limited conditions); the Insurance Institute (the regulatory and supervising entity of the insurance activity) and the Central Institute for Credit to Agriculture; other banking supervisory authorities of the EU member states in compliance with EC Directives, etc.

This information may be supplied on an individual or consolidated basis.

The co-operation agreements with countries outside the EU as set out in art 82 of the Banking Law may only be executed where such countries provide for a guarantee of confidentiality at least equivalent to the one granted by the Portuguese Banking Law.

Under art 83 of the Banking Law, credit institutions are allowed under the bank confidentiality rules to establish a system whereby they exchange and maintain a central register of information about banking business risks.

Remedies for breach of the bank confidentiality obligation

[32.14] Article 84, in its turn, relates to the remedy for the infringement of the bank confidentiality obligation. This provision reads that:

> 'Without prejudice to other penalties which may be applicable, the infringement of bank confidentiality is subject to the Criminal Code'.

Therefore, there is the possibility of cumulating civil liability with criminal liability. Civil liability, particularly liability in contract for breach of the confidentiality obligation, is governed by the general regime of civil liability. The law does not specify what damages cannot be claimed. Thus, the damages that may be claimed are those which, under the general regime of civil liability, could have been caused by any unlawful act.

Special reference to the Data Protection Act

[32.15] Data protection legislation is covered by Law 67/98, dated 26 October, implementing in the Portuguese legal system Council Directive 95/46/EC of 24 October 1995 relating to the protection of individuals concerning the treatment of personal data and the free circulation of such data. This law incorporates, therefore, the EU regime of transfer of personal data within the EU and to third countries. The national supervising entity, which may also issue opinions, is an administrative independent entity named, as before, the National Commission for Data Protection.

The scope of application of this law is the following: the treatment of personal data, by means totally or partially automatic, as well as the non-automatic treatment of personal data, contained in manual files or destined to such files (except treatment made by individuals to their exclusively personal or domestic activities) either: (i) within the scope of activities of the establishment responsible for the treatment located in Portuguese territory; or (ii) outside national territory in a place where Portuguese law is applicable by virtue of international law; (iii) where the responsibility for the

treatment of data is not established in the EU but has recourse to means, automatic or not, located in Portuguese territory, save if such means are only used to traffic throughout the EU.

Article 3 of Law 67/98 provides for several definitions, among which the following:

'*Personal Data*' is defined as 'any information of whatever nature and irrespectively of its vehicle including sound and image, relating to an individual identified or identifiable ("the owner of the personal data")'; information is considered as identifiable if the person may be identified directly or indirectly, namely by means of a reference to an identification number or to one or more specific elements of his or her physical, physiological, psychic, economic, cultural or social identity.

'*Treatment of Data*' is defined as 'any operation or aggregate of operations about personal data, made with or without recourse to automatic means, such as the collection, the registry, organisation, conservation, adjustment or alteration, the recovery, consulting, use, communication through transmission, broadcast or any other form of making available, with comparison or interconnection, as well as the blockage, erasure or destruction'.

'*Consent of the owner of personal data*' is defined as any free, specific and informed expression of intentions, under which the owner accepts the way in which his or her personal data is treated.

Beyond regulating the manner of treatment of such data and principles that must be complied with, this law establishes, in art 6, the conditions under which the treatment of data is lawful. Such treatment can only be made if the respective owner of the data had provided clearly its consent or if the treatment is necessary for:

1 the execution of contracts where the owner of data is part of or has intervened in the preliminary phases of preparation of the documents and negotiation of the terms and conditions of the contract or declaration of the intention to contract made at its request;
2 the compliance of a legal obligation to which the responsibility for the treatment is subject;
3 the protection of vital interests of the owner of data if the latter is physically or legally incapable of providing its consent;
4 the execution of a task of public interest or in the exercise of public authority in which quality the person for the treatment is acting or a third recipient of such data; or
5 the carrying out of lawful interests of the responsibility for the treatment or of a third recipient of the data, provided that the rights or freedoms or guarantees of the owner of the data shall not prevail.

Article 7 governs the treatment of sensitive data, forbidding the treatment of personal data referring to philosophical, political or religious beliefs, private life or racial or ethnical issues, as well as health and sexual life, including genetic information. In case of legal permission or authorisation of the National Commission for Data Protection, the treatment of this data may be carried out if, due to an important public interest, such treatment is necessary to the exercise of statutory functions of its responsibility or where the owner of data has provided its express consent to such treatment (in both cases with compliance of certain rules).

The treatment of this kind of data is also allowed when:

1 it is necessary to protect vital interests of the owner of data or of another person and the owner is physically or legally prevented from expressing its consent;

2 it is carried out with the consent of the owner to certain non-profitable entities of political or ideological nature, within certain rules;
3 it relates to data clearly made public by its owner, provided that it may lawfully conclude from its declarations that consent is being given in relation to such treatment; or
4 it is necessary to the declaration, exercise or defence of a right in a court procedure and is made exclusively with that purpose.

According to art 17 of Law 67/98, the entities responsible for the treatment of personal data, as well as all those who, in connection to the exercise of their functions, become aware of treated personal data, are obliged to maintain professional secrecy even after the termination of their functions. This does not exclude the duty of supply of compulsory information, except where such information is contained in files organised for statistical purposes.

Law 67/98 also contains a provision on the treatment of data and organisation of files, made by the competent authorities, relating to suspicious or illegal activities.

Special reference to the bona fide principle

[32.16] The Portuguese Civil Code is strongly influenced, as far as contractual relations are concerned, by the bona fide principle.[8]

Indeed, this principle is laid down in art 227 of the Civil Code on guilt on the formation of contracts (in general) which reads as follows:

'1 Whoever negotiates with a third party to the completion of a contract must, both in the preliminary actions and in the formation of the contract, act under the rules of bona fides, otherwise such person is liable for the damage caused with guilt to the other party.'

In this provision, there is a reference to the distinction between the two stages precedent to the contract: (i) the so-called negotiation stage, consisting of the preparation of the contents of the agreement; and (ii) the so-called decision stage, where each of the parties issue a declaration to contract, more precisely the proposal and its acceptance.

Throughout the Portuguese legal system there are various applications of this principle in several areas of the law.

Consequently, whenever there is no specific rule concerning any particular point of bank confidentiality, the banks, in performing their functions or discharging their contractual duties vis-à-vis their customers, must act towards the protection of the customers' interests using loyalty and due diligence, including informing the customers about any matter concerning their interest.

Of course, the duty of confidentiality does not authorise the bank to use any information concerning a customer to protect another customer in a conflict of interests situation. The bona fide principle is, however, of use to discipline the position of banks towards

8 A large number of legal essays have been written about the principle of bona fides, eg António Menezes Cordeiro 'Da Boa Fé no Direito Civil' in Coimbra (ed) (1985) vols I and II; António Menezes Cordeiro 'Banca, Bolsa e Crédito' in Almedina (ed) *Estatutos de Direito Comercial e de Direito da Economia* (1990) vol I.

their customers and limit their use of information contrary to their duty of protection of the customer's interests, including any customer which has a conflict of interests with another customer of the same bank.

It is an application of this principle that art 74 of the Banking Law reflects in providing:

> 'the bank directors and employees must proceed diligently in their relations with the customers, being loyal and discrete and dealing conscientiously with the interests of the customers that have been entrusted to them.'

It is, therefore, of importance to point out that, where conflict of interests is concerned, both the law and banking practice in Portugal do not require from the banks the duty to provide their customers with advice implying the infringement of bank confidentiality obligations concerning another customer or any protected data held by a bank. In other words, the banks are not allowed to provide such information to any customer, even where they are engaged to advise him on a business matter, if this may infringe the confidentiality obligation owed to another customer. The principle of bona fides is also reflected in Law 67/98, dated 26 October (the Data Protection Legislation; see above), as a general principle to the treatment of such data (art 5.1 a) of this law).

A special reference to legislation on measures against corruption, economical and financial crimes, terrorism and certain types of traffic crimes

[32.17] Act no 36/94, dated 29 September, on measures against corruption and economic and financial crimes was amended by Law 5/02, dated 11 January and more recently by Law 32/2010 of 2 September. Law 5/02, as amended by Law 60/2013 of 23 August, provides for the legal background on measures to combat organised and economical-financial crime. The scope of application of this law, providing for breaches of secrecy (as well as a special regime of collection of evidence and loss of goods in favour of the state) is the following, according to its art º 1:

1 traffic of narcotics;
2 terrorism and terrorist organisations;
3 traffic of guns;
4 influence peddling;
5 certain forms of corruption and peculation;
6 economical participation in business;
7 money laundering;
8 criminal association;
9 illegal commerce (contraband);
10 traffic and illegal alteration of stolen vehicles;
11 traffic of minors and certain connected types of crimes;
12 traffic of human beings; and
13 counterfeiting of currency and titles equivalent to currency.

Article 2, no 1 of Law 5/02, on breach of secrecy states the following:

> 'In the stages of enquiry, production of evidence and trial of procedures relating to the crimes set forth in art 1, the professional secrecy of members of corporate bodies of credit institutions and financial companies, and of its employees and persons who render services to such institutions, as well as the secrecy of

employees of the tax authorities, shall cease if there are reasons to believe that the respective information have interest to the finding of the truth.'

The extension of the scope of the breach to employees of the tax authorities has been an important amendment provided in Law 5/02 which did not exist in Law 36/94, especially taking into account that the list of crimes covered by this law has also been expanded.

Article 2 contains in addition the following provisions which are herein quoted due to their major importance:

'2. To the purposes of this law, the regime laid down above depends only on the decision, duly justified, of a court in charge of such procedure.
3. The decision referred to in the previous number must identify the people covered by the measure and shall specify the information that must be provided and the documents that must be requested; such decision may have a generic formulation to each of the people covered where the mentioned specification is not possible.
4. If the person or people who own the accounts or the intervenient in the transactions are not known, it is considered sufficient the identification of the accounts and transactions in relation to which information is required.
5. In case of information relative to an accused person in a criminal procedure or a collective entity, the decision referred to in number 2 above shall always have a generic formulation comprising:
   a) Tax information;
   b) Information relative to bank accounts and the respective movements that the accused or the collective entity is the owner or co-owner, or in relation to which such person or the collective entity has the power to make movements;
   c) Information relative to banking and financial transactions where the accused or the collective entity is an intervenient;
   d) Identification of the other intervenient in the operations referred to in items b) and c);
   e) Supporting documents of the information referred to in the previous numbers.
6. In order to comply with the provisions contained in the previous numbers, the courts and the criminal police with competence to the investigation shall have access to the database of the tax authorities.'

On the other hand, art 3 of Law 5/02 regulates the procedure, subsequent to the steps laid down in art 2 quoted above, applicable to credit institutions or financial companies. Basically, it provides for the request, made either by a court or – through the delegation of the latter – a criminal authority competent to the investigation, to the credit institutions or financial companies for all information and supporting documents considered relevant.

Such entities are obliged to provide the authorities with the requested documents within certain deadlines, established in Law 5/02, otherwise (or if the authorities suspect that certain documents or information have not been duly disclosed) the court in charge of the procedure shall enforce the attachment of such documents.

If the credit institutions or financial companies mentioned above are not known, the court in charge of the procedure shall request the Bank of Portugal to broadcast the request for documents and information.

Moreover, art 4 of the same bill governs the 'control of bank accounts' as follows:

Such control obliges the credit institution to transmit to the court or the criminal police information on any transactions concerning the bank account within the subsequent 24 hours.

The control of the bank account may be either authorised or imposed, depending on the circumstances of the case, by the decision of a judge where this procedure is important in establishing the truth. This decision shall identify:

1 the bank account(s) covered by the measure;
2 the respective period of duration; and
3 the court or entity of the criminal police responsible for the control of the bank account.

The said decision may also include the suspension of any transactions, where such is necessary to prevent crimes of money laundering.

It should be noted that the person referred to in art 2, no 1, quoted above, ie the members of corporate bodies of credit institutions and financial companies, their employees and those who render services and employees of the tax authorities, are bound to justice secrecy in relation to the above-described procedures, if they become aware of those, and cannot disclose the knowledge of such procedures to the persons whose accounts are controlled or about which there has been a request for the provision of documents and information.

If any of these people fail to comply with the provision of information and documents without justified cause, or supply false information or documents, the penalties are imprisonment from six months to three years or a corresponding fine of not less than 60 days (art 13 of Law 5/02).

CASE LAW

Criminal law cases

[32.18] Case law on bank confidentiality has focused mainly on criminal, civil and labour cases, and a reasonably large amount of case law has been adjudicated.

Most concern the classical issue relating to the protection of bank confidentiality towards an order given by criminal authorities to the bank, requiring the latter to disclose private information for the purpose of helping the investigation of a crime.

Even when the law was not as clear as it is now on the limits of bank confidentiality, the Courts of Appeal have held that bank confidentiality must be overridden by the higher interest of criminal investigation and criminal justice.[9] This position has also been sustained and other judgments, for instance, by the Courts of Appeal of Coimbra (dated 31 October 1990, 6 July 1994 and 17 April 1996) and Évora (dated 5 November and 12 May 1992) as discussed in detail below.

Let us consider in particular some of the most important case law.

1 *Judgment of the Court of Appeal of Coimbra, dated 31 October 1990* – the court applied the Criminal Code in force at the time on the duty of disclosure of information relating to a person suspected of having stolen and used valuables belonging to a third party. The court based the judgment on the assumption that

9 Eg the judgment of the Court of Appeal of Oporto, dated 11 November 1991.

the interest of good administration of justice is clearly of higher value than the interest of obtaining and maintaining a climate of confidence of the clients with the banks', despite this being also a very important concern.

The court, therefore, decided that the bank should disclose the information requested by the criminal authorities where such disclosure is the right way to make justice.

The principle stated by the court in this judgment, which has been repeated in other similar case law, provides for a clear option about the conflict of interests in question, that is, the conflict between the interest of the bank's customers to keep trust in the banking system and the interest of the community in preserving criminal justice.

The same understanding was held in the following judgments.

2 *The Court of Appeal of Coimbra, dated 31 January 1990* – this case also concerned a theft of valuables. The court decided that the bank should disclose the identity of the person who received the proceeds of the stolen valuables.

3 *The Court of Appeal of Évora, dated 5 November 1991* – the court had in mind that, in the context of a criminal investigation, any relevant information should be disclosed by the bank where the criminal authorities consider that the requested information 'is necessary and adequate for the purpose of accomplishing the public interest'.

4 *The Court of Appeal of Évora, dated 12 May 1992* – also dealing with investigation in a criminal case, the court decided that 'the purpose of investigation of the facts is clearly higher than the ground on which the bank confidentiality obligation is based: in case of a conflict between the public interest of the state in acting against everyone who violates the criminal law and the right to privacy of the citizens, the former should prevail over the latter'.

5 *The Supreme Court of Justice, dated 12 November 1986* – the Public Prosecutor should start criminal proceedings even where the facts that may qualify as a crime have been brought to this knowledge through a breach of the bank confidentiality obligation.

6 *The Court of Appeal of Coimbra, dated 6 July 1994; the Supreme Court of Justice, dated 4 November 1981; and the Court of Appeal of Évora, dated 11 October 1994* – the first two of these judgments were given in the context of the criminal investigation of unpaid cheques; the third related to joint bank accounts.

All judgments concluded that the interests of a criminal investigation should override the duty of bank confidentiality. The Supreme Court of Justice decided that 'in case of unpaid cheques, bank secrecy cannot prevail over the right of the court to arrest the necessary documents to obtain evidence of the crime'.

7 *The Court of Appeal of Coimbra, dated 17 April 1996* – in this judgment, the court reinforced former decisions when it said: 'It is legal to override the bank confidentiality obligation when it is necessary for the criminal investigation.'

This judgment, therefore, established in a strict way (ie not depending on particular circumstances of the case) the priority of one interest over the other.

The priority is not applicable if the purpose of the investigations is not the defence of a public interest or if such investigation does not necessarily require the disclosure. Where there is no public interest, bank confidentiality may not be overridden without a specific legal provision allowing it. This was established, for instance, in the judgment of the Supreme Court of Justice, dated 21 May 1980. The court decided that:

> 'If there is no specific legal provision that authorizes banks to disclose information to criminal authorities about certain data of the client, the bank

confidentiality obligation should maintain and the bank has the right to refuse any request for disclosure under such conditions.'

Similarly, the judgment of the Supreme Court of Justice, dated 20 October 1988, concluded that the bank confidentiality obligation promotes the creation of a climate of confidence with banks and may only be overridden when the law allows derogation.

8 *Judgment of the Court of Oporto, dated 9 January 2002* – the court concluded that the directors and employees of the tax administration are bound to keep secrecy about the facts relative to the tax situation of the taxpayers; however, such duty of secrecy ceases under the applicable provisions of the Penal Code and the Criminal Procedure Code.

Civil law cases

[32.19] Similarly to the above case law in which the priority of the interest of the criminal investigation over bank confidentiality is concerned, the courts have adjudicated decisions acknowledging that *certain private interests* must prevail over bank confidentiality.

Such has been the case of the attachment of funds in actions for money. In these actions the court may need to obtain the co-operation of banks to obtain information which may facilitate the identification of funds to attach. The courts have decided in these cases that it is not fair that, based on bank confidentiality rules, someone may avoid the attachment of their own funds which are responsible for the compulsory payment of a debt.[10]

Particularly, in the judgment of the Court of Appeal of Lisbon, dated 22 June 1995, the court decided that all banks are obliged to execute the order given by a court as to the attachment of funds in actions for money and, moreover, the bank must inform the court in the event that the amount of money in the customer's account is less than the amount that the court requested to be attached.

More recent case law, for example, the judgment of the Court of Lisbon, dated 20 January 2000, focused on the breach of bank confidentiality in case of attachment of the accounts further to the court claim filed by the creditor who faced limitations of its own knowledge in the identification of the bank accounts.

However, in some cases where there is a mere interest of a party to prove a fact in a lawsuit based on bank information, the courts have not agreed to set aside the bank confidentiality obligation. For example, the Supreme Court of Justice delivered a judgment, dated 10 April 1980, in a civil matter, in which it considered that, as a general rule, anyone, even one who is not a party to an action, has the duty to co-operate in the search for truth. However, the refusal to co-operate with this duty is legitimate if co-operation would result in a breach of the bank confidentiality obligation which binds all directors and employees of banks.

In addition, the bank confidentiality obligation was not overridden in the judgment of the Supreme Court of Justice, dated 8 February 1990. The court concluded in this case that a court may not override the confidentiality obligation of a bank by ordering

10 Judgments of the Court of Appeal of Coimbra, dated 7 November 1989, the Court of Appeal of Lisbon, dated 22 June 1995 and 8 October 1996, the Court of Appeal of Oporto, dated 12 June 1995; and the Court of Appeal of Évora, dated 18 June 1996.

an inspection of the bank with a view to investigating accounts for tax purposes which are not expressly allowed by law.

This judgment is very interesting because it brings face-to-face the public interest relating to the payment of taxes and the public interest of bank confidentiality.

The factual background was as follows. The Public Prosecutor, in a judicial action for distribution of an inheritance estate, sued the heirs on the grounds of failure to file with the tax authorities the list of the whole estate. According to the Public Prosecutor, this was an attempt to avoid payment under the inheritance tax rules. The heirs maintained that, in fact, there were bank accounts forming part of the estate, which were not identified. The tax authorities notified the bank, which refused to identify the accounts. The heirs also failed to identify the accounts. The Public Prosecutor then asked the court to send a court clerk to the bank's premises to check the documents needed to identify the bank accounts. The bank maintained its refusal to co-operate.

The first instance court accepted the position of the heirs based on the bank confidentiality obligation. The Court of Appeal, however, decided in favour of the Public Prosecutor, considering that, since there was a lack of information from the heirs which would allow the determination of the values on which the inheritance tax would be applied, the inspection at the premises of the bank was necessary. Moreover, the court held that an order given by a court must always be executed either by public or by private entities, and this included banks.

The heirs filed an appeal to the Supreme Court of Justice and maintained that bank confidentiality could only be overridden if there was a specific legal provision allowing an exception to such duty of confidentiality, which was not the case.

The Court of Justice adjudicated in favour of the heirs. It pointed out that, although there was a conflict of two public interests, that is, the public interest of payment of taxes and the public interest of keeping bank confidentiality, the latter should be protected and prevail over the former whenever there is no legal provision providing for an exemption to the confidentiality obligation.

The court concluded that the bank was entitled to refuse the disclosure of information and considered that the bank confidentiality obligation in this case was a lawful limit to the duty of banks to co-operate with authorities in the search for truth.

This was also the conclusion of a judgment of the Court of Appeal of Oporto, dated 21 October 1996, on a labour law matter.

This appeal was filed by an employee against his employer after the employee argued he had been unfairly dismissed. During the production of evidence in the court of first instance, the issue of the conflict between bank confidentiality and the necessity of disclosure of information kept by banks in order to support the employee's defence at court, was raised. The Court of Appeal of Oporto decided:

> 'In labour matters, bank confidentiality must prevail against the general duty of co-operation with courts in order to provide evidence which may be relevant to settle the dispute.'

In another context, the judgment of the Court of Appeal of Lisbon, dated 5 July 1989, also on a labour law matter, decided that there was no breach of bank confidentiality in a case where the internal inspection department of a bank investigated the accounts of its workers who were suspected of having committed irregular and dishonest acts.

Similarly, the Supreme Court of Justice delivered a judgment of 29 May 1991, according to which:

> 'the ban is entitled to make all the necessary investigations as to the defence of its interests, including examining the bank account of the worker who is suspected of having committed irregular acts. For this purpose, the worker does not acquire the quality of a bank's customer when irregular acts were committed by him.'

The judgment of the Court of Oporto, dated 21 May 2001, decided, as to the scope of bank confidentiality, that the right of an employee to request from its employer (a bank) internal audits made in the bank (from which the employee needed to extract evidence to support a particular claim against the employer) did not breach bank secrecy, provided that the names of the clients and identification of the accounts was not disclosed.

The Court of Lisbon issued on 14 November 2000 and 28 February 2002 judgments stating that the right of a bank account holder to obtain information on account transactions may be transferred to the respective heirs who, therefore, become the beneficiaries of the duty of bank confidentiality. Consequently, a bank cannot refuse to give such information to the heirs (after evidence is produced on the death of the owner) on the basis of bank confidentiality.

CONCLUSIONS

[32.20] Bank confidentiality is ruled in Portugal by several legal provisions, including the Banking Law, which assures the bank customers (and also those who have provided banks with some personal information with a view to entering into any agreement which was not concluded or for any other purpose) that their affairs will not be disclosed to third parties, except in those limited cases laid down in statutory provisions.

Bank confidentiality is considered by law a professional duty and, is therefore, more than just a contractual obligation. As a consequence, its infringement is punished as a crime and may give rise to an imprisonment charge and civil liability for bank directors, employees and suppliers of services to the banks. The criminal sanction is expressly laid down in the law, both in the Banking Law and in the Criminal Code. Civil liability is governed by the Civil Code. Banking law does not establish any limitation as to the damages that can be claimed from a bank in such cases.

The most significant exception to bank confidentiality relates to criminal investigation. The search for truth in a criminal action has a higher value than bank confidentiality. However, it is necessary that the criminal investigation judge authorises previously, and expressly, the banks to disclose the information protected by the confidentiality rules.

Some case law regarding civil matters has also been established to the effect that the banks must co-operate with the courts about the attachment of funds of a bank customer who owes money to a third party, where the third party has applied to the court for the attachment of such funds in an action for money.

In contrast, in civil matters of a different nature, including labour matters, the breach of the bank confidentiality obligation should be allowed only by a court in exceptional and duly justified circumstances.

The data protection legislation is very detailed and follows the EU regime. Banks may be, under international conventions, obliged to co-operate with other foreign banks, criminal authorities and others in supplying information about their clients.

The service of a writ of summons in connection with actions pending in foreign courts and addressed to a national court in order to be served on a bank, for instance, to request the disclosure of information, is governed both by domestic law and by international conventions.

Of special importance in this respect is the legislation on measures against organised crime and economic financial crimes, which covers money laundering, the unlawful production of and trade in narcotics, white collar crimes and, following the latest and most recent amendment, terrorism, terrorist organisations and certain types of trafficking, including that of minors and of guns. This very recent amendment gains particular importance since it has expanded: (i) the scope of crimes where breach of secrecy duty is required; and (ii) the scope of the breach of secrecy, since it now covers also the professional secrecy of employees of tax authorities, thus allowing for more efficiency in this area within the international and EU trend of actions against these kind of crimes.