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SYNOPSIS

This chapter deals with the issues related to bank secrecy and confidentiality under Greek law. Such rules are included in the Greek Constitution of 1975, the Penal Code and statutes regulating the pertinent issues.

The statutes in question address in particular the nature of the obligation of confidentiality, the remedies available for breach thereof as well as breach of bank secrecy, the exceptions to the rule, the scope of the exceptions and the question of how foreign investigatory and supervisory bodies can gain access to confidential information in Greece.

Following this line of thought some practical examples are examined related to such access, and the pertinent questions arising therefrom are addressed. Subsequently, examples concerning the tracing of funds both in Greece and abroad are discussed.

The last part of the chapter addresses various areas of the law which are worthy of examination such as insider dealing, cross-selling, the use of information stored as data and protection thereof.

Finally examples related to conflict of interest and takeovers are discussed in the light of existing Greek legislation. In the latter case a differentiation is made between financing through public subscription and private placement and the role of the bank is clarified accordingly.

INTRODUCTION

The rules of Greek law related to bank secrecy are included in the Greek Constitution, the Penal Code and statutes. A brief analysis of the relevant rules is therefore necessary.

GREEK CONSTITUTION

Article 19 of the Constitution of 1975 stipulates the principle of protection of communication and correspondence. Such protection embraces also foreign

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persons, as according to art 4 both Greek citizens and foreign nationals enjoy the same civil rights. Consequently, the constitutional protection in question includes both bank secrecy and the duty of confidentiality for Greek and foreign nationals alike.

PENAL CODE

Article 371, para 1 of the Penal Code provides that the penalties of a fine or of up to one year's imprisonment are imposed upon doctors, lawyers, notaries and other persons and their assistants confided with private secrets in the exercise of their profession, who reveal such secrets to third parties in any manner whatsoever.

Obviously the article in question embraces both Greek and foreign persons without distinction. Paragraph 2 of the same article provides that criminal proceedings are not suspended in the case of the death of the person confided with such a secret and that proceedings continue against the person who acquires possession of the documents and notes related thereto. Paragraph 3 stipulates that an act is not unjust and remains unpunished if the person responsible therefor aims at the fulfilment of a duty or at the protection of a lawful or otherwise justified substantial interest, either public or of his own or of a third party, that could not be otherwise protected.

THE BANKS' DUTY OF CONFIDENCE

Banks

Article 1 of LD 1059/1971 provides that all deposits with Greek banks are secret, thereby excluding foreign banks from its ambit of protection. However, the controversy was settled by art 10 of L 1858/1989, which has substituted the term Greek banks with the broader term 'financial institutions' thereby embracing foreign banks as well.

The principle of secrecy of bank deposits includes deposits of any kind, deposits in money and claims deriving from bonds, bank transfers and the like. Therefore, the disclosure by a bank of any information in any way as regards the deposits made with it, is prohibited.

Remedies

In case of breach of bank secrecy and confidentiality laid down in art I of LD 1059/1971 the liability of the violator is both criminal, as mentioned above, and civil.

Civil liability is based on art 914 of the Civil Code which provides that 'whoever unlawfully and intentionally has caused damage to another is liable to pay compensation'. Particularly in the case of breach of bank secrecy the act in question is unlawful because it infringes art 914 of the Civil Code. However, the damage, the unlawfulness of the act, the intention and the adequate connection between the act and the damage must be proven. The person liable is obligated to redress the damage and pay compensation that includes positive damage and loss of profits.

Lastly, an injunction to restrain publication is a remedy available under arts 682 ff of the Code of Civil Procedures to any person having a lawful interest thereto.

THE EXCEPTIONS TO THE DUTY OF NON-DISCLOSURE

Article 2, para 2 of LD 1059/1971 provides that the consent of the person protected by the secrecy does not change the criminal character of the offence. This is a literal translation of the law, which seems to suggest that a criminal offence is committed even when the customer consents.

An exception, however, is one dictated by reasons of public interest. In particular art 3 of LD 1059/1971 provides that the disclosure of information concerning bank deposits is subject to the following requirements:

- (I) a duly reasoned order or application or decision of an investigating organ or judgment of a Greek court; and
- (II) such information must be absolutely necessary for the identification and punishment of actions characterised either as crimes committed in Greece or violations of the national currency legislation.

Greek courts hold the view that, among other cases, the secrecy is inapplicable to the case of a bankruptcy receiver of a foreign company lawfully established in Greece who seeks relevant information from a bank. ~

Other exceptions have been introduced by statutes and administrative decisions. In particular:

- (I) Article 2 of L 1325/1972 waives bank secrecy in case of bounced cheques.
- (II) Decisions 213/19-1-1983 and 1182/1-9-1987 of the Governor of the Bank of Greece (being the Central Bank) establish the right of control of auditors appointed by the Bank of Greece.
- (III) Article 40 of L 1806/1988 waives bank secrecy as regards some persons appointed by the Bank of Greece in the exercise of its powers related to the supervision and control of the banking system.
- (IV) Article 27, paras 1 and 2, sub-paras a and b of L 1868/1989 waive bank secrecy as regards crimes characterised as felonies vis-à-vis the Bank of Greece.
- (V) Article 38 of L 1828/1989 waives the right of bank secrecy vis-à-vis the Bank of Greece in case of appointment of a Commissioner to a bank by the Governor of the Bank of Greece.
- (VI) Article 44 of L 2065/1992 provides that bank secrecy is waived:
 - (A) in case of tax evasion where the difference in the taxable amount exceeds 300 million drachmae; and
 - (B) in cases where an amount exceeding 50 million drachmae deriving from deducted taxes, duties and contributions, has not been rendered to the Greek state.

Article 25, para 1 of L 2214/1994 waives bank secrecy and stipulates that there exists an obligation to furnish the requested information to the

- (VII) 1 Piraeus Single-member Court of First Instance, Judgment No 3629/84.

- (IX) Director of the competent Tax Authority. Compliance with this obligation cannot be evaded by the invocation on the part of the interested party of the secrecy of bank deposits that is waived for the facilitation of tax control. However, for such a waiver a Joint Decision of the Tax Authority Inspector and of the Director of the Tax Authority is necessary. Moreover, bank secrecy is waived as regards cheques issued in favour of the Greek state provided they exceed the amount of 1 million drachmae. Article 66, para 1 of L 2238/1994 stipulates that bank secrecy can be waived only by means of a decision of the appropriate Tax Authority carrying out the audit, or by a Joint Decision of the Director of the competent Tax Authority and the Director of the Internal Revenue Service. However, in cases of identified tax evasion, the waiver of bank secrecy embraces also those deposits kept in the name of the President and the Managing Director of the Board as well as those kept in the name of the administrators of limited liability companies or general partnerships, in addition to the blocking of deposits kept in the name of the company. Articles 4, 5, 7 and 8 of L 2331/1995 and Circular 2/1997 of the Governor of the Bank of Greece regulate cases related to money laundering. Credit institutions are required to ask for evidence related to the identity of the person in question for every transaction equal at least to 15,000 ECUs. Moreover, credit institutions should not make transactions for which they know or have valid suspicions that transactions are related to the legalisation of proceeds deriving from criminal activity, unless the immediate realisation of the transaction is urgently required, as well as in cases where the non-realisation of the action is likely to make difficult the disclosure of evidence or persons involved in the legalisation of such proceeds. Where an investigation is carried out with regard to the legalisation of proceeds deriving from criminal activity, the investigator, after a concurrent opinion of the prosecutor, may prohibit the use of the accounts, provided that valid suspicions exist that the accounts in question contain moneys deriving from the legalisation of proceeds related to criminal activity. The disclosure of information in such cases is allowed provided it is made in good faith and may be used in court. Lastly, the committee established by art 7 accepts, evaluates and investigates any information related to transactions for the legalisation of proceeds deriving from criminal activities and transmitted to it by foreign agencies with which it co-operates for the provision of every possible assistance.

CONFIDENTIAL INFORMATION

As regards the issue of access of foreign investigatory bodies and foreign supervisory bodies to confidential information in Greece some distinctions may be drawn. In the first place, branches of foreign banks established in Greece are governed by Greek law.

In order, however, for such bodies to have access to information in Greece we must inquire whether a bilateral treaty of judicial assistance is in force between the two states involved (ie in the cases mentioned in the text² between

² See Editor's note on p 313.

the governments of the United States and the United Kingdom, on the one hand, and the government of Greece on the other). If no such treaty is in force between the two states myu~veu 1079/1971 applies which, as stated above, requires a duly reasoned order or application or decision of the investigating organ or judgment of a Greek court and that such information must be absolutely necessary for the identification and punishment of actions characterised either as crimes committed in Greece or violations of the national currency legislation.

Indeed such bilateral treaties of judicial assistance have been signed between Greece and the United States and between Greece and the United Kingdom, and have been ratified by L 5554/1932 and L AAA/1912 respectively. Therefore, the provisions of these two treaties shall be applicable in cases where the disclosure of confidential information is requested by the Chief Executive Officer of the bank in the United States of America, in the first example, and the Securities and Investments Board, in the second example?

The issue whether the Greek criminal or supervisory authorities, who are doing the investigation and trying to compel the bank established in Greece to disclose information held by a branch or wholly owned subsidiary in the United Kingdom are entitled to do so, shall be decided on the basis whether a bilateral treaty of judicial assistance is in force between Greece and the United Kingdom. In the contrary case English law shall be the applicable one. However, as mentioned above, a bilateral treaty of judicial assistance is in force between the two states and, therefore, the provisions of the treaty shall apply to the case in question.

As regards the process of tracing funds, we shall address first the case where our client in Greece has been defrauded of large sums of money by some of its employees who have vanished. Assume that the funds have been traced from our client's bank account to various other accounts of banks in Greece. Recipient banks can be compelled to disclose whether or not they still hold the funds on the basis of art 5, para 5 of the Brussels Convention on International Jurisdiction and Execution of Judgments in Greece providing that 'A person domiciled in the territory of a contracting party may be sued in another contracting state... 5. as regards disputes related to the exploitation of a branch, agency or any other kind of establishment, before the court of their seat'. In view of the fact that the United States of America and the United Kingdom on the one hand, and Greece on the other, have signed the Convention, its provisions apply and, therefore, the recipient banks may be compelled to disclose whether they still hold the funds and whether they sent them to any party having a lawful interest on the basis of the procedure related to injunctions (arts 682 ff of the Code of Civil Procedures).

Assume that orders have been obtained obliging the banks to disclose where the money went and that the banks report that the funds have been transferred abroad to other banks which they name, in countries which again they name, for the account of named customers or to numbered accounts. In such a case the banks of such foreign destinations cannot be compelled to help our client to trace the funds further because the foreign law of the country of final destination shall be the applicable one. The position would not be different if the foreign bank were a branch or a subsidiary of one of the banks against whom

3 See Editor's note on p 313.

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the tracing order had been obtained in Greece. Again, the foreign law of the home country would apply.

If one reverses the facts and assumes that the foreign lawyer or client has obtained orders in his own country revealing that the stolen funds have reached a particular bank in Greece, the provisions of the Brussels Convention mentioned above would apply.

REGULATION OF FINANCIAL MARKETS

Insider dealing

Insider dealing is assimilated to fraud pursuant to art 386 of the Penal Code. The elements of the offence are:

- (I) the damage to somebody else's property,
- (II) an unlawful benefit at the expense of somebody else's property,
- (III) intention,
- (IV) intentional presentation of untrue facts as true or unlawful concealment thereof, and
- (V) persuasion upon another person to an act, omission or tolerance.

Moreover, civil liability against the person responsible may be established on the basis of arts 914 ff of the Civil Code.

In Greece the interbank network TEIRESIAS serves the needs of the banks for information related to cheques and bills of exchange; however, for bank secrecy to be waived a duly reasoned court decision would be the necessary condition as mentioned above.

Cross-selling

Cross-selling between companies which are members of the same group does not give rise to liability, criminal or civil. Banks are also allowed to pass each other credit information about customers, but not to their client companies because in such a case they would breach the provisions of Greek law mentioned above related to bank secrecy and confidentiality.

Data protection

In Greece a Data Protection Act has recently been introduced in Parliament and awaits endorsement.

However art 42 of L 2121/1994 does not allow the reproduction, translation, adaptation, or any other change of a computer program without a licence; Article 43 of the same law specifies that reverse engineering, decompilation and disassembly are allowed to the licensee only in order to enable the latter to collect the necessary information and secure the networking of an independently created computer program with other programs, provided that such information is not easily and quickly accessible to the licensee and is restricted to the parts of the original program necessary for the accomplishment of the networking thereof.

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Conflicts of interest

In case a bank or one of its subsidiaries has financial information about a customer as a result of acting as its banker, it is not entitled to advise other customers in the stockbroking business on the benefits of buying or selling its customer's shares, nor is the bank itself entitled to deal in the customer's shares, even if it separates the two businesses. This is because the bank in acting in such a way breaches its duty of confidentiality and commits the offence mentioned in art 371 of the Penal Code discussed. If the bank knows that its customer is in financial difficulties, while another part of the bank is simultaneously advising its clients to buy the customer's shares, the bank again breaches its confidentiality duty, while a civil liability pursuant to the provisions of arts 914 ff of the Civil Code related to tortious liability cannot be ruled out.

Takeovers

In case the bank organises financing for a takeover bid, some distinctions must be drawn. In the first place such financing is governed by Decision No 1955/2-7-91 of the Governor of the Bank of Greece as amended, which stipulates that financing for the purchase of shares is allowed also in cases where the borrower maintains or increases his shareholding in the undertaking in whose share capital the participation is effected.

If the increase of the share capital is effected by means of a public subscription, the underwriter, the borrower and the bank in question are involved. The bank, however, as a lender is responsible only to check the details pertaining to the financing, creditworthiness and viability of the project and to approve the loan following an approval of the share capital increase by means of a public subscription by the Capital Market Committee. Liability arises only for the underwriter in cases where the information related to the share price included in the prospectus is inaccurate, where the issuing company and the underwriter are jointly liable.

In case the increase of the share capital of the borrower company is effected by means of a private placement of shares, the bank acts simply as an intermediary for the financing and, therefore, no liability of the bank may arise.

CONCLUSION

Bank secrecy cannot be waived except in cases specified in the statutes addressing the issue and in particular in cases of tax evasion, facilitation of the control exercised by the Bank of Greece in the frame of its supervisory role assigned to it under Greek law or in case of crimes committed in Greece and characterised as felonies.

Editor's note (referring to pp 310 and 311 above)

The author is referring here to the first two case studies which were put forward for discussion by the contributors at the Annual International Financial Law Seminar of the International Bar Association in Prague in May 1997.

The full text of these case studies was as follows:

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Case one

A subpoena is served on your banking client (a US national bank) in the United States pursuant to a grand jury investigation to make available all account records, etc, relating to a named customer. The relevant account records are all held by a branch of the bank in your country. The subpoena is served on the Chief Executive Officer of the bank in the United States, who promptly orders the branch manager in your country to despatch all the relevant information to head office.

The branch manager asks you whether he should comply with this order.

What do you advise him to do?

Would your advice be different if the demand to inspect the account records was made by the Comptroller of the Currency in the United States as part of his office's routine annual inspection: you are told he is entitled to inspect any document held anywhere in the world by a US national bank or a subsidiary of such a bank?

Would your advice in either case be different if the relevant account records were held in your country by a wholly owned subsidiary of the bank incorporated in your country?

What do you think happens in practice in your country in cases like these?

Case two

The head office of your client bank in another country is approached by the supervisory authority in that country in relation to various transactions which are thought to have been improper but not to give rise to criminal liability. The transactions are suspected to have been undertaken by various customers of the bank, possibly with the connivance of officers of the bank. The supervisory authority has requested that the bank make available all its records to its investigators. Some of these records are held in your country by a branch of the bank. The supervisory authority has also asked the bank not to reveal the existence of the investigation to the customers of the officers of the bank who are under suspicion.

Do you advise the bank to make the records available?

Would you advise the bank to tell the customers and officers about the request for information?