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BUSINESS LAW FIRM FOR AFRICA

FOCUS ON THE LAW GOVERNING BANKING SECRECY IN CAMEROON

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SUMMARY

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On April 27, 2022, Law No. 2022/006 regulating banking secrecy in Cameroon (hereinafter the "**Banking Secrecy Law**") was enacted. The main objective of this recent law is to modernize the previous law on banking secrecy, which was 18 years old[1], and some of its provisions had become obsolete. The text thus aims at revitalizing the banking sector, which is faced with the emergence of new risks linked in particular to cybercrime, financial crime, money laundering and the financing of terrorism. These risks required the implementation of appropriate and adequate solutions to face these constantly evolving challenges.

By way of introduction, it is appropriate to understand the concept of "banking secrecy". With regard to the texts specifically governing this field, it is important to note that this is an aspect of banking law that has recently been framed by Cameroonian domestic positive law[2]. Indeed, it is Law No. 2003/004 of April 21, 2003 on banking secrecy that laid the foundations of the legal regime governing this notion in Cameroon. The Banking Secrecy Law defines it as *"the obligation of confidentiality to which the institutions subject to it are bound with respect to acts, facts and information concerning their clients of which they have knowledge in the exercise of their profession"*[3].

Banking activity being fundamental in a market economy such as ours, the banker, in his function of collecting deposits from the public, financing projects, managing liquidity, managing risk and offering various financial services, has access to a certain amount of information concerning not only the activity of his clients, but also their private lives, their financial situation as well as their relations with third parties. In the exercise of his profession, the banker has access to the accounts of his clients; to the operations related to them[4]; to their full identities as well as to those of their representatives. He as well has access to information peripheral to the account such as the existence of loans, personal securities and movable or immovable properties that may be given as security. These information are confidential by nature, both to protect the privacy of the bank's clients and to preserve business secrecy[5]. In view of the foregoing, it was therefore crucial for the Cameroonian legislator, in the interests of moralizing business life, to regulate banking secrecy.

The Banking Secrecy Law thus establishes the banking secrecy rules for subjected institutions, including credit institutions, microfinance institutions and payment service providers. This law imposes a confidentiality obligation on these institutions regarding acts, facts and information concerning their clients.

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[1] As a reminder, Section 29 of the Banking Secrecy Law repeals the provisions of Law No. 2003/004 of 21 April 2003 on banking secrecy.

[2] As a reminder, Article 42 of Annex 2 of the Convention on the Harmonization of Banking Regulations in the Central African States provides: "*Any member of the Board of Directors or the Supervisory Board of a credit institution, or any person who in any capacity participates in the management of such an institution or is employed by it, shall be bound by professional secrecy under the conditions and under the penalties provided for in this respect by the Criminal Code of the State in which the institution is located.* With this provision, the CEMAC legislator leaves it to the member states to regulate banking secrecy in depth.

3 Section 3, Banking Secrecy Law.

[4] For example: The account number, the debit or credit entries it contains, as well as its balance.

[5] Richard ROUTIER, Obligations et responsabilités du banquier, Dalloz, 4th Edition, 2017, P.644.

This obligation of confidentiality is nevertheless limited in certain situations, in particular with regard to judicial, tax and customs authorities and institutions in charge of fighting corruption and money laundering. The objective is to protect the personal information of clients and institutions subjected to the law while enabling the authorities to fight against illegal activities.

With this in mind, we will analyze below (1) the scope of banking secrecy and (2) the violation of banking secrecy as an offense punishable by law.

1. SCOPE OF APPLICATION OF BANKING SECRECY

To present the scope of application of banking secrecy within the meaning of the Banking Secrecy Law, we must initially determine (1.1) the entities subject to this law and subsequently present (1.2) the cases in which banking secrecy cannot be invoked.

1.1 Entities subjected to the Banking Secrecy Law

The debtors of the banking secrecy obligation are presented in section 1.1.1, and the creditors of the banking secrecy obligation in section 1.1.2.

1.1.1 The debtors of the banking secrecy obligation

The persons subjected to the obligation of banking secrecy are defined under Section 4 of the Banking Secrecy Law. They are all persons who, in any capacity whatsoever, and for any period or in any manner whatsoever, participate in the direction, management, control or liquidation of an institution subjected to the obligation or those employed by it. In addition to this first circle of debtors, there is a second circle which includes persons who, without being part of the personnel, have had knowledge of or access to information of a subjected institution in an undue or authorized manner, by virtue of their quality, their technical and intellectual aptitudes or their function.

Traditionally, banking secrecy has been presented as an obligation imposed only on credit institutions. The Banking Secrecy Law extends this obligation to the various institutions subject to it: microfinance institutions; payment service providers[6] and any other organization duly authorized, under the provisions of the laws and regulations governing the banking sector, to carry out dedicated activities[7].

With this provision, the legislator intends to extend the obligation of banking secrecy to different types of financial institutions, beyond just credit institutions. This extension of the obligation of banking secrecy is intended to strengthen the protection of confidential information of the clients of these different institutions and to ensure an equivalent level of confidentiality for the entire financial sector. It should be noted that the obligation of confidentiality is valid even after the termination of activities.

With regard to the second group of debtors, uncertainty arises with regard to employees who do not carry out a banking activity, such as bank maintenance staff, security guards, etc.

[6] As a reminder, Regulation No. 04/18/CEMAC/UMAC/COBAC of December 21, 2018 already insisted through its Articles 46 and 64 on the payment service provider's duty of confidentiality with respect to its customers' data.
[7] Section 1-5, Banking Secrecy Law.

While there is no doubt that these employees are bound by a contractual obligation of discretion, the violation of which is punishable under civil and disciplinary law, the solution is less clear with regard to their possible obligation to respect the bank's professional secrecy. In our opinion, they are not subject to the latter, for several reasons.

On the one hand, and as we shall see hereinafter, in order to be qualified as confidential, the information must have been communicated to the banker or discovered by the latter in the course of his professional activity. This condition therefore excludes from the obligation of secrecy employees who do not carry out any actual banking operations. On the other hand, and above all, banking secrecy is only imposed on persons whose activity requires, in order to be properly carried out, disclosures from clients: lawyers, doctors, pharmacists, auditors, etc.[8] These are known as "necessary confidants". However, the professionals referred to earlier in the paragraph do not fall within this category.

1.1.2 Creditors of the banking secrecy obligation

Banking secrecy aims to protect the client against the disclosure of confidential information. It also protects all persons about whom the banker has confidential information because of his relationship with his client: for example, the agent in charge of operating the client's account, the guarantor of his obligations or the beneficiary of a check. Based on the respect of privacy, banking secrecy is simply a protection for the client - more generally for the persons concerned by the confidential information - so that they can waive it: they can lift the secrecy and thus authorize the banker to communicate the said information. In the absence of such authorization, banking secrecy is opposed to any communication; it is said to be enforceable against third parties. The enforceability of banking secrecy against third parties thus requires any debtor of this confidentiality obligation to deny requests from third parties for information of a confidential nature[9].

The Banking Secrecy Law does not explicitly specify who the beneficiary of this confidentiality obligation is, in other words who has the right to have the information of a confidential nature which relates to him remain secret. Traditionally, the doctrine limits this protection to the benefit of the clients of the credit institution concerned[10]. From our analysis, this approach remains restrictive. In fact, the banker is required to hold and process a great deal of indications, data and information relating to third parties in the course of his activities. Consequently, both the bank's clients and persons not contractually bound to the bank must be able to benefit from the protection of banking secrecy.

With particular reference to his relationship with third parties, we have already stated that the banker, in the course of his activity, is led to collect information on persons with whom he does not have a contractual relationship. However, there is nothing to prevent them from being protected by banking secrecy. Third parties have just as much need for discretion as the clients of credit institutions. For example, a customer may tell his banker that he is making a large transfer to help a friend (not a customer of the same bank) whose company's finances are favorable. It is obvious that such information about the business of this third party could be exploited by competitors if it were disclosed. It should therefore be kept secret. The circle of protected persons must therefore be extended beyond the bank's contractual partners.

[8] Jérôme LASSERRE CAPDEVILLE, Le secret bancaire, approches nationales et internationales, REVUE BANQUE Édition-18, rue La Fayette, 75009-www.revue-banque.fr-2013 Diffusé par les Éditions d'Organisation - 1, rue Thénard - Paris, 2014, P. 25.
[9] Jérôme LASSERRE CAPDEVILLE, op. cit, p. 38.
[10] Jérôme LASSERRE CAPDEVILLE, op. cit, p. 29.

Having determined the persons subject to the Banking Secrecy Law, it is appropriate to consider the cases in which banking secrecy cannot be invoked.

1.2 The unenforceability of banking secrecy

The unenforceability of banking secrecy is understood to mean the ineffectiveness of banking secrecy with respect to third parties and allowing these third parties to ignore its effects. This concept is based on the legislator's concern to protect the general interest (1.2.1) and the interest of individuals (1.2.2).

1.2.1 Unenforceability based on the protection of the general interest

In the general interest, the unenforceability of banking secrecy is based, among other things, on the need for supervision and control of banking activities by public authorities and bodies. The institutions subject to the law are thus traditionally required to provide, at the request of the Bank of Central African States (BEAC), any information, justification and documents deemed useful for the examination of their situation and the assessment of their risks; banking secrecy cannot therefore be invoked. Furthermore, banking secrecy cannot be invoked against sworn agents of the Public Treasury, the Monetary Authority (Ministry of Finance), the National Economic and Financial Committee (CNEF)[11], the Banking Commission of Central Africa (COBAC), and the Financial Markets Supervisory Commission (COSUMAF)[12] acting in the exercise of their functions[13].

Banking secrecy cannot be invoked against the judicial authority acting in the context of criminal proceedings[14]. In addition, the requirements of the fight against money laundering and terrorist financing impose an obligation to report any transaction that the banker considers suspicious. Clearly, the suspicious transaction report obliges the banker to report to the competent authorities any transaction carried out by a client on which there is a mere presumption of irregularity or suspicion. It should also be noted that banking secrecy can only be lifted in civil, commercial or social matters in the cases provided for by the legislative and regulatory provisions governing these matters[15].

In addition, banking secrecy cannot be invoked against the tax authorities[16] acting within the framework of a written communication procedure as provided for by the General Tax Code. By law, they have the right to access the files of accounts held by bankers. These files are called “FICOBA”. The same right is granted to officials of the customs administration who have more extensive powers under which, with their employment commission, they can seize documents of any kind, including accounting records, copies of letters, checkbooks and any other element that may facilitate the accomplishment of their mission[17].

[11] This is an extension of the new law. Indeed, in addition to the traditional beneficiaries (COBAC, BEAC, Treasury), the Banking Secrecy Law now includes the National Economic and Financial Councils (CNEF) and the institutions in charge of fighting corruption acting in the exercise of their functions.
[12] Section 13, Banking Secrecy Law.
[13] Section 12, Banking Secrecy Law.
[14] Section 8, Banking Secrecy Law.
[15] Section 8-2, Banking Secrecy Law.
[16] Section 10, Banking Secrecy Law.
[17] Section 11, Banking Secrecy Law.

Finally, banking secrecy cannot be invoked against other public entities such as the Supreme Audit Institutions of Public Finance; it cannot be invoked against the prosecuting agents of the national body in charge of Social Security acting in the context of the collection of contributions due by employers, against the institutions in charge of the fight against corruption, money laundering and the financing of terrorism, acting in the context of operations falling within their competence, and against the public institution in charge of the collection of debts, acting in the context of activities falling within its competence.

Now that the cases of non-enforceability of banking secrecy based on the protection of the general interest have been determined, what about those based on the protection of particular interests?

1.2.2 Unenforceability based on the protection of the interest of individuals

In order to protect the interests of individuals, limitations are placed on banking secrecy. In this respect, banking secrecy cannot be invoked against persons having a power of representation granted by law or by an agreement. Thus, it cannot be invoked against a client's agent who has been given the power to carry out transactions on one or more accounts held by a subjected institution. However, banking secrecy is raised only within the limits of the mandate. It is also unenforceable against against a spouse with legal or contractual representation powers, to the guardian of a minor or an incapable adult and to the curator of a protected adult[18].

In addition, banking secrecy may be waived in several cases related to the continuity of the *deceased*'s estate, in particular before the universal successors of the clients of the subjected institutions, the heirs, the beneficiaries, the executors, the liquidators and administrators of the estate. Moreover, the banking secrecy may be waived by the subjected institution on the property subject to the real rights of the usufructuary, the bare owner and the pledgee, by virtue of their rights relating to the use, enjoyment, supervision and possible realization of the pledge. It should be added that it is not enforceable against holders of a joint account, a third party whose client has stipulated in his favor in a transaction, and a guarantor in the context of his information on the default of the principal debtor and the amount owed by the latter, in principal, interest and other accessories[19].

Finally, in corporate matters, banking secrecy cannot be invoked against the legal management or control bodies of a company, in particular the auditors. The latter are entitled to the information necessary for the performance of their mission. Also, in the event of receivership or liquidation of assets, all persons or bodies duly authorized and intervening within the framework of these procedures may obtain from the subjected institution any document useful for the accomplishment of their mission[20].

After reading the above points, the question that could legitimately be asked at this point is what would be the consequences of violating banking secrecy.

[18] Sections 17 to 20, Banking Secrecy Law.
[19] Sections 21 to 24, Banking Secrecy Law.
[20] Sections 25 & 26, Banking Secrecy Law.

2. VIOLATION OF BANKING SECRECY: AN OFFENCE PUNISHABLE BY LAW

The violation of banking secrecy is an offence punishable by law. Therefore, it is appropriate to first highlight (2.1) the constituent elements of a breach of banking secrecy, before presenting (2.2) the repression of the violation of banking secrecy.

2.1 Elements of a breach of banking secrecy

The elements constituting an offence are the conditions necessary for a conduct to be qualified as a criminal offence.

The Banking Secrecy Law in this sense provides for conduct of persons obliged to maintain banking secrecy that would constitute a breach of banking secrecy[21] and other conduct that would not be punishable[22]. Therefore, it is necessary to first consider (2.1.1) the punishable acts, and then to present (2.1.2) the tolerated behaviors.

2.1.1 Punishable acts (Presentation of the material elements of the offence, as well as the place of the moral element in the constitution of the offence)

The violation of banking secrecy is an offence under the business criminal law. It is understood that criminal business law is the body of law concerning offences that may occur in business life. The offences in this field are traditionally enshrined in the Criminal Code. Nevertheless, most of the related offences are still disseminated in various texts, including the Banking Secrecy Law. Thus, in order for an offence to be constituted in business criminal law, it is necessary to have a moral and a material element.

Concerning the moral element, Article 74 paragraph 2 of the Cameroonian Penal Code states:

*"The person who voluntarily commits the acts that constitute the elements of an offence with **the intention** that these acts should result in the commission of the offence is criminally liable.*

With this provision, the legislator emphasizes on the intention that leads to the commission of the offence. The proof of a guilty intention thus appears as a principle for the constitution of any offence.

As for the material element, the offences of business criminal law are either offences of commission or offences of omission. Thus, the violation of banking secrecy will consist of the punishable acts and the acts assimilated to the violation of banking secrecy as described below:

- Punishable acts

Among the punishable acts, we can mention those related to: the disclosure and communication, by any means, of facts and information on banking, microfinance or payment operations, known in the exercise of their functions by employees, directors, management or control bodies of a subjected institution; or the disclosure, communication by any means by third parties, of information received or obtained from a subjected institution. Other punishable acts are the exploitation for personal purposes, as well as the communication to third parties by a credit institution or its personnel of facts, studies, projects and other information entrusted to it by a client or a member.

[21] Section 5, Banking Secrecy Law.
[22] Section 6, Banking Secrecy Law.

- Facts assimilated to the violation of banking secrecy

The legislator mainly recognizes as a fact that may constitute a violation of professional secrecy: the fact of proceeding, even by imprudence, to an automated processing of nominative banking information without taking all the necessary precautions to preserve the security of the procedures and of such a nature as to cause distortion, damage or communication to third parties; the fact of fraudulently accessing or remaining in all or part of an automated data processing system of a subjected entity; finally, the fact of fraudulently introducing data into an automated data processing system of a subjected entity or fraudulently deleting or modifying the data contained therein.

2.1.2 Tolerated behaviors

The tolerated behaviors are acts that are likely to violate banking secrecy, but which, due to the combination of circumstances, the creditors of the banking secrecy obligation or the national and sub-regional authorities, escape the repression of the law. These acts include:

- The communication, by any means whatsoever, of information of a general nature, in particular any information that it is customary to provide to third parties, customers, members or not of the subjected entity;
- The communication, by any means whatsoever, of information or indications with the authorization of the client or member, his heirs or assigns;
- The exchange of confidential information between financial institutions in the exercise of their profession;
- The communication by the subjected institutions, upon request or by regulatory obligation, of banking information to the public prosecutor, the monetary authority, the supervisory bodies and all other entities to which banking secrecy cannot be invoked;
- Reporting to the National Financial Investigation Agency of transactions or information concerning sums of money they suspect to be derived from, among other things, drug trafficking, the activity of criminal organizations, money laundering or the financing of terrorism, and any other underlying offenses;
- The declaration made during legal proceedings or before a judicial police officer acting on the requisition of the public prosecutor or on a rogatory commission from the investigating judge by the directors of a subjected entity;
- The fact that a subjected entity allows its books and databases to be examined following a court order, under the conditions defined by the Uniform Act of the Organization for the Harmonization of Business Law in Africa (OHADA) relating to general commercial law;
- The communication, by any means whatsoever, of information to the tax authorities within the framework of the right of communication as provided for by the General Tax Code and the international conventions concluded by Cameroon in tax matters;
- Communication, by any means whatsoever, to the customs administration within the framework of the right of communication as provided for by the customs code of the Central African Economic and Monetary Community (CEMAC), as well as the international conventions and agreements concluded by Cameroon in customs matters.

2.2 Repression

In the event of a breach of banking secrecy, the legislator has provided for criminal sanctions to this effect. Legal action may be taken by the Public Prosecutor's Office, by the Monetary Authority, in this case the Ministry of Finance, and finally by the victim[23]. There are two types of sanctions for the violation of banking secrecy. Thus, the legislator establishes in the law (2.2.1) the principal penalties and (2.2.2) the accessory penalties.

2.2.1 The principal penalties

The Banking Secrecy Law punishes any person who violates banking secrecy with imprisonment ranging from three (03) months to three (03) years or with a fine of one million (1,000,000) to fifty million (50,000,000) CFA francs or both[24].

These penalties are doubled when the offences are committed through the written press, radio, television, electronic communication or any other means intended to reach the public.

If the offence is committed by a legal entity, the latter can only be fined up to five times the amounts initially provided for as mentioned above.

2.2.2 The accessory penalties

The court may impose accessory penalties in addition to the main penalties as stated above on persons who have violated banking secrecy.

When banking secrecy has been violated by a natural person, that person may be prohibited from holding a position or engaging in an activity in a subjected institution. The decision pronounced will be published and disseminated through the media[25].

When it is a legal entity that is involved, it may be ordered to pay the following accessory penalties: publication of the decision and its dissemination through the media. The court may also order the closure for a specified period of time of the entity or branches that participated in the commission of the sanctioned acts[26].

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[23] Section 28, Banking Secrecy Law.
[24] Section 27 (1) of the Banking Secrecy Law.
[25] Section 27(4)(a), Banking Secrecy Law.
[26] Section 27(4)(b), Banking Secrecy Law.