

THE FIGHT AGAINST MONEY LAUNDERING AND TERRORISM FINANCING: THE PORTUGUESE EXPERIENCE

*LA LUCHA CONTRA EL BLANQUEO DE CAPITALS Y LA FINANCIACIÓN DEL
TERRORISMO: LA EXPERIENCIA PORTUGUESA*

*O COMBATE À LAVAGEM DE DINHEIRO E AO FINANCIAMENTO DO TERRORISMO:
A EXPERIÊNCIA PORTUGUESA*

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Abstract: When it comes to investigating terrorism and, consequently, money laundering, the consideration of balancing the defence of rights and liberties becomes less stringent in the eyes of States. They tend to automatically replace community or the collective interest. It is, therefore, important to question if the weighting and balancing result from the legal text. One of the legal instruments is Act 83/2017, of August 18th, and we will review its regime by introducing its main measures and assessing the (dis)respect for fundamental rights. For the development of the research, the inductive method was used from the literature review. The number of entities and duties leads us to conclude that States, without any doubt, cannot fight these crimes on their own. They must unite, apply measures that can produce effects in every country, but even when doing so, they need their citizens to help them in this fight; such citizens are those that deal with financing activities, those who deal with criminals themselves or even those with relation to people that have political or economic power.

Keywords: Money laundering; Portuguese experience; Political exposed person; compliance.

Resumen: Cuando se trata de investigar el terrorismo y, en consecuencia, el blanqueo de capitales, la ponderación de la defensa de los derechos y libertades se vuelve menos rigurosa a ojos de los Estados. Tienden a reemplazar automáticamente el interés comunitario o colectivo. Por lo tanto, es importante cuestionar si la ponderación y el equilibrio resultan del texto legal. Uno de los

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instrumentos legales es la Ley 83/2017, de 18 de agosto, y repasaremos su régimen introduciendo sus principales medidas y evaluando el (des)respeto a los derechos fundamentales. Para el desarrollo de la investigación se utilizó el método inductivo a partir de la revisión bibliográfica. La cantidad de entidades y deberes nos lleva a concluir que los Estados, sin duda, no pueden combatir solos estos delitos. Deben unirse, aplicar medidas que puedan producir efectos en todos los países, pero aun así, necesitan que sus ciudadanos los ayuden en esta lucha; tales ciudadanos son los que se ocupan de las actividades de financiación, los que se ocupan de los propios delincuentes, o incluso los que se ocupan de las personas que tienen poder político o económico.

Palabras clave: Blanqueo de capitales; Experiencia portuguesa; Persona políticamente expuesta; Programas de cumplimiento.

Resumo: Quando se trata de investigar o terrorismo e, conseqüentemente, a lavagem de dinheiro, a ponderação da defesa de direitos e liberdades torna-se menos rigorosa aos olhos dos Estados. Eles tendem a substituir automaticamente a comunidade ou o interesse coletivo. Importa, pois, questionar se a ponderação e a ponderação resultam do texto legal. Um dos instrumentos legais é a Lei 83/2017, de 18 de agosto, e revisaremos seu regime introduzindo suas principais medidas e avaliando o (des)respeito aos direitos fundamentais. Para o desenvolvimento da pesquisa, foi utilizado o método indutivo a partir da revisão de literatura. A quantidade de entidades e deveres nos leva a concluir que os Estados, sem dúvida, não podem combater sozinhos esses crimes. Eles devem se unir, aplicar medidas que possam produzir efeitos em todos os países, mas mesmo assim, precisam de seus cidadãos para ajudá-los nessa luta; tais cidadãos são aqueles que lidam com atividades de financiamento, aqueles que lidam com os próprios criminosos ou mesmo aqueles que se relacionam com pessoas que têm poder político ou econômico.

Palavras-chave: Lavagem de dinheiro; Experiência portuguesa; Pessoa politicamente exposta; *Compliance*.

INTRODUCTION

Above all, the fact that money laundering is associated with terrorism financing means that prevention and prosecution measures regarding the former also apply to the latter.

In preventing and fighting this type of crimes, the main characteristics of the measures adopted are: prevalence of investigative measures to the detriment of the fundamental rights of the investigated, allowing the application of more invasive adjective measures, even when there is no investigation, by using hidden or disguised means of investigation, and union of forces and measures between States in their investigation.

When it comes to investigating terrorism and, consequently, money laundering, the consideration of balancing the defence of rights and liberties becomes less stringent in the eyes of States. They tend to automatically replace community or the collective interest.

However, the generalisation of such prevalence without cautious consideration of its effects could lead to the application of investigative measures under the criminal procedural law of the enemy. It is, therefore, important to question if the weighting and balancing result from the legal text.

One of the legal instruments is Act 83/2017, of August 18th, and we will review its regime by introducing its main measures and assessing the (dis)respect for fundamental rights.

Firstly, we will review the main measure of that law in order to fulfil guidance from the European Union (hereinafter EU) in fighting money laundering and terrorism financing.

Secondly, we will introduce the criteria for election of politically exposed persons (PEP), which entails for some entities more duties or obligations of compliance and due diligence.

Finally, we will criticise those duties imposed on lawyers, as the obligation to accuse their own clients destroys one of the main warranties of that profession: legal and professional secrecy.

These are the tasks we set out to accomplish herein.

1. THE PORTUGUESE ACT 83/2017, OF AUGUST 18TH

Act 83/2017, of August 18th, establishes preventive and repressive measures to combat the laundering of illicit advantages and the financing of terrorism. Transposing into the national legal system Directives 2005/60/EC of the European Parliament and of the Council of October 26th, 2006/70/EC of the Commission of August 1st and Directive 2015/849 of the European Parliament of May 20th, 2015, all concerning the prevention of the use of the financial system and activities and professions specially designated for the purpose of money laundering and terrorism financing of Council Directive 2016/2258/EU of December 6th, 2016.

The innovation of the 2017 act is essentially as follows: introduction of more entities bound by the duties contained in that law. It clarifies the catalogue of PEP by specifying exactly who these people are and by requiring obliged entities to take enhanced customer due diligence measures in their operations or business relations – from among those designated as PEP. In addition to those already provided for in the definition of Act 25/2008, for example, members of the governing bodies of political parties are included. The Act is also meant to clarify that serious criminal activity related to money laundering and terrorism financing includes “direct and indirect tax-related crimes”. It also

broadens its subjective scope and makes subject to its obligations, for example, “real estate agents”, “gambling service providers” or natural or legal persons – service providers – that trade goods and receive sums equal to or greater than €15,000.00; in addition to providing the prosecutor with new powers and instruments. Act 83/2017, of August 18th, therefore provides a holistic and soundly based approach. Member States and the EU can identify, understand and mitigate this risk in timely manner and consequently provide that corporate entities and other legal persons incorporated in their territory be required to obtain and retain sufficient current and accurate information about their beneficial owners, including detailed data on the economic interests held, which may be consulted by different internal and European entities.

This Act creates a set of duties and consequences for non-compliance with certain activities and professionals in which the possibility of detecting money laundering conduct will be easier. In the spirit of the law, there is a need to impose on certain types of institutions or individuals the obligation to fulfil certain duties in the prevention of money laundering, under penalty of very high fines or, in certain circumstances, expel them from the professional association that they belong to, preventing them from performing their professional activity. Said duties range from identification, due diligence, reporting, refusal, retention, collaboration, examination of suspects, amongst others, for activities suspected of money laundering conduct. In pragmatic terms, this Act is a mere police measure or precautionary measure aimed solely at preventing and combating money laundering and terrorism financing. Like all precautionary or police measures, it applies without criminal investigation and within the scope of preventing of crimes or safeguarding evidence for the investigation to be carried out. The State, in its duty of safeguarding public peace and tranquillity, delegates such tasks to private entities, determining consequences for non-compliance therewith. There is a purely State-wide delegation of powers to private entities, once again considering the seriousness of the crimes and the EU requirements in question.

These duties were initially imposed on financial system related entities only, entities involving use or transactions in capital where the detection of money laundering would be easier. However, following the guidelines of FATF³, these duties are imposed on other entities unrelated to the financial

3 International Financial Action Group (FATF) is an intergovernmental body that aims to design and promote, at both national and international level, strategies against money laundering and terrorism financing. It is an intergovernmental and multidisciplinary body established in 1989 with the aim of developing a global strategy to prevent and combat money laundering and, since October 2001, also against the financing of terrorism, acknowledged internationally as the entity that sets the standards in this matter. FATF monitors the progress made by member countries in implementing the necessary measures, through self-assessment and mutual evaluation mechanisms. All necessary information on this Office can be found on the website: www.fatf-gafi.org.

system, but closer to the possibility of detecting money laundering conduct. Thus, its Article 4⁴,

4 The following entities result from its catalogue:

The following entities that operate in national territory are subject to the provisions of this Act, under the terms of this article, subject to the provisions of Chapter XI:

Casino operating concessionaires and bingo operating room operating concessionaires.

Betting and lottery prize paying entities;

Entities covered by the Legal Regime for Online Gambling and Betting (RJO), approved by Decree-Law no. 66/2015, of April 29th;

Entities not listed in the previous article that carry out any real estate activity;

Auditors, chartered accountants and tax consultants, incorporated in a company or in individual practice;

Lawyers, solicitors, notaries and other independent legal professionals, established in partnership or individual practice;

Service providers to companies, other legal persons or centres of collective interests without legal personality;

Other professionals that intervene in operations of disposal and acquisition of rights over practitioners of professional sports activities;

Economic operators engaged in auction activities, including lenders;

Economic operators engaged in the import and export of rough diamonds;

Entities authorised to carry out the activity of transport, custody, treatment and distribution of funds and securities, provided for in Article 3 (1) d) of Act no. 34/2013, of May 16th;

Merchants who transact goods or provide services whose payment is made in cash.

The professionals covered by paragraph f) of the preceding paragraph are subject to the provisions of this Act when they intervene or assist, on behalf of a client or in other circumstances, in:

Operations for the purchase and sale of real estate, commercial establishments or shareholdings;

Fund management operations, securities or other assets belonging to clients;

Operations for opening and managing bank, savings or securities accounts;

Operations for the establishment, incorporation, operation or management of companies, companies, other legal persons or centres of collective interests without legal personality, involving:

Making the necessary inputs and contributions of any kind for the purpose;

Any of the services mentioned in a) to f) of the following paragraph;

Disposal and acquisition of rights over practitioners of professional sports activities;

Other financial or real estate transactions, in representation or in assistance to the client.

The professionals listed in (1) g) are subject to the provisions of this Act when they do not fit into the professional categories provided for in e) and f) of the same paragraph and provide the following services to third parties, in the exercise of their professional activity:

Incorporation of companies, other legal persons or centres of collective interests without legal personality;

Provision of registered offices, business, administrative or postal addresses or other services related to companies, other legal persons or centres of collective interests without legal personality;

Performing the functions of administrator, secretary, partner or associate of a company or other legal person, as well as carrying out the necessary steps for another person to act in the aforementioned ways;

Performing the functions of trustee of an express trust or similar function in a centre of collective interests without legal personality of a similar nature, and carrying out the necessary steps for another person to act in the aforementioned ways;

under the heading non-financial entities, describes which entities are subject to different duties. This regime, in practical terms, will require that certain public or even private entities become true judicial collaborators, with functions very similar to those of criminal police bodies in detecting and combating crime⁵. Act 83/2017, of August 18th, is meant to highlight an aspect that seems curious and reveals the current axiology regarding the agents of crime.

In Portuguese criminal science, the conduct or behaviour of the agent is the factor that legitimises incrimination and punishment. The law criminalises conducts. However, we increasingly notice that this construction is being violated by implementing measures that take into account not conducts, but the type of agent. This is the case in Act 83/2017, in our view. It pays more attention to some people regardless of their actions. That is what we will propose to review in the next point of this paper.

Intervention as a fiduciary shareholder on behalf of another person (nominee shareholder) that is not a company listed on a regulated market subject to information disclosure requirements in accordance with European Union law or subject to equivalent international standards, and performance of necessary steps for another person to act in this way;

Provision of other related representation, management and administration services to companies, other legal persons or centres of collective interests without legal personality.

Except for gambling concessionaires in casinos, the Government, through an ordinance of the members of the Government responsible for the areas of finance and gambling, may exempt, totally or partially, from the application of this Act, the gambling services provided for in final part of subparagraph a) and paragraphs b) and c) of paragraph 1, based on an assessment demonstrating the existence of a demonstrably low risk of money laundering and terrorism financing, based at least on the weighting of following specific aspects:

Nature and, if applicable, scale of operations of the services concerned;

Degree of vulnerability of transactions associated with the services in question, including with regard to the payment methods used;

Conclusions arising from the reports and respective updates referred to in Article 8 (4), in the applicable part, and the granting of any exemption must be preceded by an indication of how such conclusions were considered.

Exemptions granted under the preceding paragraph: a) are reported by the Government to the European Commission, together with the specific risk assessment on which they are based; b) are subject to regular and risk-based monitoring, through the adoption of measures, to be specified in the ordinance mentioned in the preceding paragraph, as appropriate to ensure that such exemptions are not misused for the purpose of money laundering and terrorism financing; c) are subject to immediate revocation where there is an increase in the risk of money laundering and terrorism financing that was the basis for granting the exemption.

We believe that full inclusion of its extensive catalogue is pertinent in order to understand the wide range of entities that are now subject to multiple duties in order to assist the role of the State in the prevention and repression of money laundering behaviours. Note that this catalogue does not include notary services and registration offices, as for these entities their reference is made in an autonomous norm, specifically, Article 7 of the Act.

5 As Vitalino Canas says: "(...) this regime takes the requirement that citizens act as agents of this same public activity further than any other area of criminal prevention". CANAS, Vitalino. *As medidas de natureza preventiva contra o branqueamento e o financiamento do terrorismo*. In SILVA, Luciano Nascimento; BANDEIRA, Gonçalo Sopas de Melo (Coord.). **Branqueamento de capitais e injusto penal**. Análise dogmática e doutrina comparada luso-brasileira. Lisboa: Juruá, 2010. p. 487.

2. POLITICALLY EXPOSED PERSONS (PEP)

Under Act 83/2017, suspect does not mean, as defined by Portuguese criminal law, certain entities among which there is a duty of increased due diligence. PEP, according to Article 2 (6), are natural persons who hold, or have held for one year, high positions of political or public nature, as well as close members of their family and people known to have close relations of a corporate and commercial nature with them. PEP is the concept embodied in the subsequent paragraphs.

What we wish to emphasise is the framework of the spirit of the national and European legislator who believes that these people deserve special vigilant attention compared to the common citizens. These are the so-called new risk groups in a new vision of criminality in light of globalisation⁶.

This does not mean that we do not agree with such selection, and it is not even a new reality in Portugal. It should be noted that Act 4/83, of April 2nd, concerning public control of the wealth of political office holders, already enshrines that holders of such offices be required to submit their income to the Constitutional Court, not as prevention of money laundering proper, but for the sake of greater transparency on the part of those that serve or hold office in a sovereign body.

However, they are nonetheless and in the abstract, by virtue of the means and contacts they have, potentially more prone to carry out money laundering conducts.

This Act has broadened the concept of entities linked to PEP. It is no longer their residence, but the assessment of their role and their personal and professional connections that are at stake. In our view, the concern of this Act is to find, associated with the PEP, those commonly known as “foreheads”. The legal regime of the Act to prevent and combat money laundering also applies to them and to the capital and financing of terrorism, with all its effects and repercussions. The Act is meant to create a central record of beneficiaries, with the aim of gathering information about natural persons who control legal persons and other persons who act in certain businesses as formal owners only⁷.

6 In the words of Anabela Rodrigues: “Social organisation will therefore be achieved through the creation of networks (or communities) of individuals who identify with each other, regardless of any distinction between legal and criminal networks (or communities). (...) A multiplicity of social groups is constituted and reconstituted, criminal or otherwise, all operating in the same way.” RODRIGUES, Anabela Miranda. **O direito penal europeu emergente**. Coimbra: Coimbra Editora, 2008. p. 365.

7 Managed and organised by official entities.

It is a legal demonstration that these people are at higher risk of corruption and money laundering. It was the response of the national and European legislatures to criticism regarding the protection of politicians, who, with this law, cease to be protected, if ever, but deserve special attention, namely from judicial authorities and police bodies, at least as far as a higher degree of alertness or vigilance when involved in financial operations. If the desired effect is as described above, strictly considering the values to be protected and sacrificed, we do not think it should go beyond the postulates of our Fundamental Rights.

Once again, research shows that the theory of the three spheres, developed by German doctrine and implemented in Portugal by Costa Andrade, is malleable due to the notoriety or position that certain people occupy in society⁸.

The sphere of private life will be more or less compressed depending on the notoriety of its holder. It allows concluding that the lower the public or political notoriety, the greater the protection of the sphere of private life and the lesser the legitimacy of intervention therein.

It seems to us that the criminal law of the agent begins to emerge from individual statuses of people presumed dangerous. And here lies the beginning of the greater danger of the criminal law of the agent. This is what Mariona Angli calls the moral enemy⁹ or the so-called criminal law of the author, incompatible with classic conceptions of criminal dogmatic and dangerously fruitful in the construction of the criminal law of the enemy¹⁰.

8 “According to this construction, there are 3 spheres that can be differentiated as follows: the sphere of intimate life or intimacy, corresponding to an inviolable and intangible domain of private life, subtracted from the knowledge of others; the sphere of private life itself, which encompasses facts that one shares with a limited core of people, and the sphere of public life or normal life of relation, involving facts that may be known to all, concerning the participation of each individual in the life of the community.” ANDRADE, Manuel da Costa. **Sobre as proibições de prova em processo penal**. Coimbra: Coimbra Editora, 2013. p. 94.

9 “Therefore, pointing out certain subjects as perpetrators of a crime because of their position evokes a Criminal Law of the author and a configuration of the Criminal Law of the enemy, not as a “dangerous subject-enemy” but as “an amoral subject-enemy”. ANGLI, Mariona Lobte. Qué fue de la libertad de expresión y la diligencia política en la apología del terrorismo? En busca de su bien jurídico protegido. In MASFERRER, Aniceto (Coord.). **Estado de derecho y derechos fundamentales en la lucha contra el terrorismo: una aproximación multidisciplinar**. Navarra: Thomson Reuters Aranzadi, 2011. p. 558-559.

10 Following the definition of Dyellber Araújo: “While for a range of jurists it is a crime to constitute an infraction or injury to a certain legal asset, for others the criminal infraction would be human scorn for moral, biological or psychological languor; it is not only the offence of the act, but the awakening of the importance of its author, spawning the most tenebrous effects of criminal law, the set of these characters is called the Author’s Criminal Law.” ARAÚJO, Dyellber Fernando de Oliveira. Institutos penais de emergência - “Novas” fórmulas para velhos dilemas-: Uma análise dos novos estudos de política criminal voltada aos indesejados pela sociedade, **Direito Penal hoje: Novos desafios e novas respostas**. In ANDRADE, Manuel da Costa; NEVES, Rita Castanheira (Org.). Coimbra: Coimbra Editora, 2009.

We must always resist such constructions; criminal and procedural law, all criminal law, cannot be based on the persecution of agents, but always on the conducts of said agents: their behaviour, not who they are.

As desperate as the European voice begging for persecution of certain people may be, the State's strongest punitive instrument – criminal law – must always be based on facts or conducts rather than on the kind of people who perform them. Agents, or certain kinds of people, cannot be “the present black death”¹¹. Hence, although there is greater indication or suspicion about a certain type of person and even a greater duty of vigilance over them, only the facts themselves, and only those, deserve the attention of formal control bodies.

From a different perspective, taking into account not the type of people but their professions, one should note the very special regime that this law enshrines, regarding the activities of lawyers. We will review that in the next point of this article.

3. DUTIES OF LAWYERS ACCORDING TO ACT 83/2017, OF AUGUST 18TH, AND PROFESSIONAL SECRECY

Of all entities included in Act 83/2017, scholars mainly raised voices regarding lawyers and when they intervene on behalf of their client.

What one sees is that in this Act, by virtue of the Directive that generated it, it is important to distinguish between the performance of a lawyer representing their client and when merely providing assistance. In the former situation, more stringent duties are imposed because they “act with more autonomy”, in the words of Isabel Branco¹².

Hence, when acting on behalf of clients, their ethical duties may conflict with the obligation to comply with the obligations arising from the Act.

Following a purely literal interpretation of Article 4 (2) a) to f) of the Act, one could conclude that the law imposes such duties on lawyers when intervening or assisting on behalf of a client or in

11 A “peste negra da atualidade.” ARAÚJO, Dyllber Fernando de Oliveira. Institutos penais de emergência - “Novas” fórmulas para velhos dilemas-: Uma análise dos novos estudos de política criminal voltada aos indesejados pela sociedade, **Direito Penal hoje: Novos desafios e novas respostas**. In ANDRADE, Manuel da Costa; NEVES, Rita Castanheira (Org.). Coimbra: Coimbra Editora, 2009. p. 177.

12 BRANCO, Isabel. **Medidas de combate ao branqueamento de capitais, financiamento do terrorismo e o dever de «comunicação» imposto aos advogados: violação do segredo profissional?** Jan, 2017, http://www.verbojuridico.net/ficheiros/forenses/advogados/isabelbranco_combatebranqueamento_violacaooseviolacaoosegredoprofissional.pdf

other circumstances: in certain operations described in that Article. Given that very broad and even undetermined concept, it is difficult to gauge, effectively, under what circumstances such duties are imposed. Although the Act specifies operations, the phrase in other circumstances is far more polysemic and, therefore, covers an unlimited number of realities. However, we agree with Vitalino Canas when he mentions that the phrase in other circumstances does not apply to lawyers when acting without a power of attorney on behalf of clients, which means that the duties are imposed on lawyers only when lawyers exercise their own mandate¹³.

According to Article 79 of this Act, lawyers are exempted from the duty of reporting in certain circumstances when performing professional activity. Those are as follows: assessment of the client's legal situation; legal consultation; customer representation in a judicial procedure; or counselling about a judicial procedure, advising the client as to the form of filing or of avoiding it; as well as in reference to the information obtained before, during or after the procedure. Except for these situations, lawyers have the duty to report to the Bar Association, when challenged by the competent judicial authority. In addition to the duty of reporting, there is also the duty of collaboration and abstention. Thus, the Act on preventing and combating money laundering and terrorism financing imposes more stringent duties on lawyers when lawyers act on behalf of their client and the duty to report and collaborate with the judicial authority exists whenever requested for that purpose. However, in order to harmonise such duties with the ethical obligations of lawyers within the relation with their client, such duties are not required of lawyers when acting on behalf of clients with a mandatory letter of attorney. It is to be determined whether it is justified to do away with the secrecy of lawyers in all cases in which it does not affect essential activities and observes the principle of proportionality, that is, the secrecy of lawyers can be totally or partially restricted, when strictly necessary.

Isabel Branco thinks that imposing on lawyers the obligation to report to the Bar Association, which will then report to criminal investigation authorities, information received by the client, in the performance of their profession, is a violation of the principle of loyalty and trust that guides this liberal professional activity. Such principles impose on lawyers the obligation to keep professional secrecy about everything that their client communicates or knows about them. This author even mentions that the legislator in criminal proceedings takes these two principles into account, making them prevail at the expense of the discovery of the truth, in particular the duty of excuse representing the client and the impossibility for the lawyer to be tap wired when communicating with the suspect

13 Note that the possibility of intervention or assistance in the operation in circumstances other than on behalf of a client, strictly speaking, will not apply to lawyers, only to other natural and legal persons listed in the introductory part of f)." CANAS, Vitalino. *As medidas de natureza preventiva contra o branqueamento e o financiamento do terrorismo*. In SILVA, Luciano Nascimento; BANDEIRA, Gonçalo Sopas de Melo (Coord.). **Branqueamento de capitais e injusto penal**. Análise dogmática e doutrina comparada luso-brasileira. Lisboa: Juruá, 2010. p. 546.

or accused¹⁴. Daiane Chaves explains that often consultations carried out by lawyers are aimed at achieving success in financial transactions. Therefore, such professionals should not be exempted from the duty of reporting. Hence, in this perspective and considering the exclusions of this duty contained in the Act, there is no violation of the right to fair trial, because if the lawyer takes part, these duties do not apply. And when this is not the case, when the lawyer does not represent or is not on the verge of representing one in a judicial procedure, there is nothing to prevent one from collaborating in the fight against money laundering.¹⁵ In our view, despite the seriousness of the crimes that this Act is meant to combat, the imposition of such duties on lawyers, especially mandatory reporting to legal authorities of conducts practiced by clients, is a violation of the very nature of the profession.

Jurisdictional protection will never be effective if lawyers, in discharging their duties, can no longer be lawyers, even if those functions do not allow judicial or pre-judicial intervention. One of the guarantees for those seeking a legal professional is to be sure that everything they tell or know about them is covered by professional secrecy. Likewise, clients are required to tell their lawyer everything, so that the lawyer can inform or counsel them accordingly. If this guarantee fails, lawyers, strictly speaking, cease to be lawyers. The typical criminalisation of money laundering is enough to legitimise that lawyers can become authors if they intentionally assist the practice of money laundering conduct to inhibit this behaviour. Thus, if a lawyer, in the exercise of the profession, acknowledges that they are helping to “(...) commit the crime in a meticulous way”¹⁶, they will actually be the perpetrator of the crime of money laundering and cannot, for obvious reasons, be a collaborator in combating it.

14 As she says: “It is for the police and judicial authorities to carry out criminal investigation; lawyers cannot, under any circumstances, become employees of the police or the Public Prosecution against their clients.” BRANCO, Isabel. **Medidas de combate ao branqueamento de capitais, financiamento do terrorismo e o dever de «comunicação» imposto aos advogados: violação do segredo profissional?** Jan, 2017, http://www.verbojuridico.net/ficheiros/forenses/advogados/isabelbranco_combatebranqueamento_violacaooseviolacaosegredoprofissional.pdf

15 “(...) No matter how many risks are raised to which the safeguarding of the relation of trust and loyalty between lawyer and client may be exposed, as a condition for performing the profession of lawyer and, furthermore, for these guarantees to be considered adequate and effective guarantees to protect the integrity of that relation, we strongly stress that secrecy must be considered in the legal context that involves those parties, that is, pre-procedural or legal procedure in progress, not the case of a lawyer used to make the consummation of a crime easier! If a law does not intervene in a way that interferes with this conscious mistake on the part of many lawyers, the secrecy peculiar to that profession can certainly be used with an intention opposite to the aim that justifies it.” CHAVES, Daiane. A complexidade do papel do advogado na luta contra o branqueamento de capitais (mandamentos da directiva comunitária e a crise na relação cliente/advogado em razão do sigilo profissional). In SILVA, Luciano Nascimento; BANDEIRA, Gonçalo Sopas de Melo (Coord.). **Branqueamento de capitais e injusto penal**. Análise dogmática e doutrina comparada luso-brasileira. Lisboa: Editorial Juruá, 2010. p. 52-53.

16 CHAVES, Daiane. A complexidade do papel do advogado na luta contra o branqueamento de capitais (mandamentos da directiva comunitária e a crise na relação cliente/advogado em razão do sigilo profissional). In SILVA, Luciano Nascimento; BANDEIRA, Gonçalo Sopas de Melo (Coord.). **Branqueamento de capitais e injusto penal**. Análise dogmática e doutrina comparada luso-brasileira. Lisboa: Editorial Juruá, 2010. p. 56.

To demand that the lawyer be a whistleblower of the client means to destroy the function of the lawyer, because, despite representing agents of crimes, they continue to deserve their trust and loyalty¹⁷.

The duty to refrain from any measure that can lead to money laundering is something that arises from professional deontology itself and, therefore, does not need to be regulated in the law to combat money laundering and terrorism financing. However, we emphasise that, given so many exceptions provided for in the law, situations in which the obligation to comply with these duties exists are, in fact, scarce, but such duties do exist¹⁸.

Needless to say that the role of a lawyer as an agent of justice – in particular their professional secrecy – will exist only when they serve the interest of justice. The role of the lawyer consists, above all, of defending the client, advising them on certain conducts and alerting them of their consequences, thus pursuing the achievement of justice. **CONCLUSIONS**

Act 83/2017, of August 18th, enshrines a legal regime to prevent and combat money laundering and terrorism financing. This is an Act that emerged by imposition of the European Union, and aims to establish a set of duties of certain entities where money laundering conducts are more likely to happen. Initially, it imposed such duties on financial and banking entities only, but today the expansion of those bound to fulfil them is of such magnitude that it encompasses almost all professional activities that require contact with money transactions.

This number of entities and duties leads us to conclude that States, without any doubt, cannot fight these crimes on their own. They must unite, apply measures that can produce effects in every country, but even when doing so, they need their citizens to help them in this fight; such citizens are those that deal with financing activities, those who deal with criminals themselves or even those with relation to people that have political or economic power.

When cataloguing such entities, a new concept emerges that shows the change in approach towards criminal behaviours: the politically exposed person (PEP). People who are relatives of politicians have a reinforced duty of due diligence. Just because of that relation and regardless of

17 In the words of Nuno Brandão: “The relation of trust between lawyers and clients is critical for the administration of justice and must, as such, be preserved above all. (...) In the eyes of the ordinary citizen, the lawyer will start to be a subject who, in certain circumstances (one does not know very well which), will be able to wear the clothes of a whistleblower.” BRANDÃO, Nuno. **Branqueamento de capitais: o sistema comunitário de prevenção**. Coimbra: Coimbra editora, 2002. p. 110.

18 Note that, with Act 83/2017, of August 18th, lawyers, in particular, and non-financial entities, in general, must comply with the duty of non-disclosure of the information they are required to provide, and that a criminal investigation or inquiry is or may be brought by judicial authorities to its clients. As provided for in Article (54) (1) c) of the Act on combating money laundering and terrorism financing.

committing any illegal behaviour or conduct. This measure shows that criminal law does not only take into account conduct, the fact, but also and especially the type of person involved. The criminal law of agents is about to emerge. One should pay much attention to this trend in order to avoid discrimination and ostracism.

Among those duties imposed on different entities, the obligations of lawyers established by Act 83/2017 are those that bring about more controversy in Portuguese legal doctrine.

As is known, the legal practice of lawyers is fundamentally guaranteed by professional secrecy. This is the foundation of this profession. Therefore, imposing on these professionals the obligation of being whistleblowers of their clients endangers their activity. A client must trust their lawyer and tell them everything in order to achieve the best legal advice and legal defence. As a result of imposing on lawyers the duties mentioned above, clients will not be able to trust them and the profession of lawyer will be destroyed.

In criminal law the need to balance restriction and defence of rights is constant. One must deeply review the need for the restriction, attending to what one wishes to protect or prevent with it. This, such an important task, must be done by everyone, but especially by legislators and law enforcers. That is why scientific research is so important; as it plays the role of being an instrument of control, as such becoming a democratic activity also.

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