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After the Panama Papers... a More Transparent Corporate Business Model?

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ABSTRACT

Five years ago, the International Consortium of Investigative Journalists revealed the ventures of Mossack Fonseca and their partners in different jurisdictions through the Panama Papers. This scandal unveiled the suspicious, unlawful, and unethical activities of multiple members of civil society and the political sphere. The Panama Papers intensified the debate about the use of offshore companies as facades to disguise financial and other crimes, and raised questions about the effectiveness of the Anti-Money Laundering Regulations. The scandal proved that illegalities were still being committed despite these international standards. After the leak, several nations tightened their Anti Money Laundering laws to curb the misuse of corporations by requiring the disclosure of the ultimate owner and by incentivizing the transnational collaboration.. This essay questions the adequacy of policies adopted by different jurisdictions after the media disclosure that are aimed at creating a more transparent corporate business model and toward preventing corporations from concealing illegalities.

Keywords: Anti-money laundering regulation, Corporate vehicles, Nominee directors, Offshore companies, Shell companies

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INTRODUCTION

The Panama Papers (PP) refers to an infiltration suffered in 2015 by Mossack Fonseca (MF), a now-defunct Panamanian law firm, which exposed the use of corporations to conceal funds and commit other financial crimes. According to the company's website, which is no longer in existence, the firm had offices in Zurich, London, Hong Kong, and 39 other jurisdictions. The leak also uncovered the practice of appointing intermediaries and nominee directors to hide the identity of a company's beneficial owner. These practices strengthened the idea that offshore corporations have mainly been used for unlawful acts in jurisdictions classified as tax havens in line with the criteria set out in the Organization of Economic Development (OECD)'s Harmful Tax Competition Report, or which appear in Non-Cooperative Countries and Territories (NCCT) lists compiled based on compliance with Financial Action Task Force (FATF)' standards.

The PP portrays an image of offshore corporations as evil entities that should be removed from the market, while dismissing the legitimate uses that an offshore corporation may have, e.g.: diversifying assets outside of countries that can represent a risk because of currency and political instability (Trautman 2017), or for stock holding, collecting income from intangible assets, supporting company mergers, or as an investment vehicle for shifting assets (Floros and Sapp 2011). Moreover, some of the illegalities exposed by the PP were committed in developed and developing countries that had enacted Anti Money Laundering (AML) policies and regulations, as well as in nations ranking highly in the global economy as per FATF's assessment, which questions the validity of these protocols.

In response, nations are implementing more rigorous Know Your Customer Policies (KYCP) and Anti-money Laundering Regulations (AMLR) to avoid being branded as tax haven jurisdictions, and they are introducing systems to require the registration of beneficial owners. Nevertheless, statutes and case law in these jurisdictions remain vague regarding the notion of nominee directors, and silent about the role of intermediaries in the corporate business model. Although, KYCP and AMLR could be useful mechanisms to prevent certain illegalities, the absence of legislative reforms defining the concept, role, and liabilities of nominee directors and intermediaries in offshore companies will create legal loopholes that may enable the use of offshore corporations to commit financial crimes, or to hide the proceeds of such crimes and allow terrorists to access them. Furthermore, governments need to establish rules to

determine the circumstances in which intermediaries may act and the financial and legal implications of this role.

This article debates the issue of whether AML policies and standards are effective at making corporate business more transparent[1], and it starts by focusing on the impact of AMLR in jurisdictions that have implemented such laws. Second, we expand on our methodology before examining the roles of third-party professionals in the corporate business, with an emphasis on the role of nominee directors and intermediaries who buy and re-sell offshore corporations. In this section, we analyze a case from our research on the use of nominees to hide the identity of the true owners before discussing the actions taken by some nations to deter financial crimes as a consequence of the PP.

THE REPERCUSSIONS OF IMPLEMENTING AML LAWS AND FAILURE TO COMPLY

AMLR is "a key part of the reporting and compliance requirements for banking and financial services across the globe" (Naheem 2020, 26). They are aimed at making financial sectors more transparent while reducing predicate crimes and money laundering (ML) (Sharman 2011). They are also defined as a set of standards and rules imposed by states as "a prerequisite for accessing the global economy" (Hall 2011, 100) that do not take into account local context, which often makes these policies, procedures, and standards inappropriate, ineffective and costly (Sharman 2011). For others scholars, AML policies are a form of "symbolic legislation" (Tsingou 2010; Zoppei 2015) because it is uncertain whether these policies have any effect on suppressing crimes in a world were technology facilitates transactions of all types in ways that cannot be detected (Levi and Reuter 2006). There is "yet no agreed consensus on what constitutes the best method to assess AML laws' (Zoppei 2015, 131). Also, 'limited available information suggest that the global AML regime has made progress in the general area of prevention, but without much effect on the incidence of underlying crimes" (Truman and Reuter 2004, 192). Moreover, research

1 For the purpose of this research, we based our concept of a transparent corporate business model on the Business Dictionary's definition of transparency. Accordingly, a transparent corporate business model is one without hidden agendas accompanied by a full shareholder and tax information' disclosure, which allows a better collective decision-making process within the national sphere and advocates for international collaboration and cooperation.

indicates that "while there is theoretical support for the perception that AML policies have contributed to a decrease in the incidence of ML, there is no evidence that this goal has actually been achieved" (Unger et al. 2014, 217, as cited in Zoppei 2015, 142-143), and while "it is possible to estimate what AML cost, it is almost impossible to quantify their benefits" (Unger et al. 2014, 218, as cited in Zoppei 2015, 131; see also Ferwerda 2018). As an example, between €3,2 and €4,2 billion is laundered in the Netherlands in spite of the enactment of AMLR, while €14 to €21 billion for laundering flows into the country from the top twenty countries that generate such illicit funds (Unger et al 2006; see also Ferwerda 2018).

A failing grade in the FAFT's assessment of a country's level of compliance with the 49 recommendations can undermine the country's international image and reputation. Once a country is stigmatized as a tax haven, it falls in the worldwide ranking, has its international rating lowered, and becomes excluded from the global financial market and financial networks. A negative assessment can result in an outward flow of capital to more flexible jurisdictions, causing a fall in revenue. In contrast, compliance with the 49 recommendations opens the doors for foreign investment while building and preserving access to international banking networks (Sharman 2011). The scope of the reputational damage caused by poor compliance is more difficult to calculate when other international organizations judge and grade countries on their implementation, effectiveness, and compliance with such regulations. Furthermore, governments often delegate part of the compliance with FATF 49 recommendations to the private sector. This can lead to a backlash against these private entities if they neglect their duties and fail in the implementation of AML standards, although it is debatable whether such damage is due to the association with criminals or because of sanctions imposed by regulators (Verhage 2009; Sharman 2011). For instance, the perception that MF had been serving criminals damaged the firm's reputation, and eventually led to its closing. The International Consortium of Investigative Journalists (ICIJ) revelations also produced a domino effect. For example, the workload of some Corporate Services Providers (CSPs) was reduced because many of their clients withdraw from Panama in search of more accommodating jurisdictions. On the other hand, CSPs who remained in the market experienced an increase in the amount of work because of compliance-related issues. Small CSPs struggled to "afford the high costs of regulation or fees associated with non-compliance" (Naheem 2020, 30; Lord et al. 2019), and also found it difficult to cope with

the demanding and expensive regulatory requirements, including due diligence. This was especially true for CSPs that supplied their clients with certain arrangements such as nominee directors or intermediaries, which had been singled out as the root cause of opacity in the corporate business model.

The PP seems to prove the failure of AMLR, since MF was able to operate even in jurisdictions with increasingly stringent financial and legal controls. Both the firm itself and financial institutions (such as banks) where MF's clients held funds were also responsible for taking preemptive measures to know their customers and potential clients and screen those "who pose a high risk of either engaging in illegal activities or having connections to blacklisted individuals and organizations" (Vail 2017, 139). Despite this, the Financial Intelligence Unit (FIU) and those responsible for ensuring that banks and firms diligently performed their AML responsibilities were unable to detect any unlawful activities connected with MF's clients. Accordingly, it is appropriate to question the validity of AMLR and whether regulations are an advantage or a hindrance in countries that enforce them. Previous research has found that AMLR have a large impact on the finances of nations obliged to implement such policies (Sharman 2011; Ferwerda 2018; Lord et al. 2019). This is amplified by the fact that the majority of AML costs are borne by public finances, financial and non-financial institutions, professionals, and customers, as the financial sector passes on the costs of monitoring transactions and training staff (Truman and Reuter 2004; FAFT 2011; Ferwerda 2018). At the same time, banks spend up to USD 500 million each year to improve and manage their KYC and AML processes (Reuters 2016; Callahan 2018). However, research suggests that despite this USD 500 million "investment," the number of fines and sanctions imposed on banks for non-compliance has not declined (KPMG n.d.).

METHODOLOGY AND FINDINGS

The findings in this article are based on data generated as part of comparative research in different jurisdictions such as Panama, the US, Hong Kong, the UK, Switzerland, and the EU. We conducted a literature review incorporating peer-reviewed journals and grey literature, which included a vast collection of studies on the Panama Papers, nominee directors, intermediaries, and beneficial ownership registration. We also conducted qualitative analysis on one case where nominee directors were

used in the Republic of Panama. The case was selected to provide an illustrative account of how nominees are used as a means of distancing the real owners from illicit activity. Furthermore, we examined some proposed bills that seek to strengthen AMLR to tackle financial crimes. Our core findings included:

1. The implementation of AMLR has a significant impact on nations compelled to follows these strict standards, such as high administrative costs borne by the government and the private sector, which ultimately transfer these costs on to customers (Truman and Reuter 2004; Tsingou 2010; Sharman 2011; Reuters 2016; Callahan 2018).
2. The role of third parties such as nominee directors and intermediaries is not clearly defined; nor are the implications of the role they play in the incorporation process (Lord 2018).
3. The PP led to more rigorous AMLR, which included the creation of the register of beneficial owners and the adoption of tax exchange agreements aimed at achieving greater data integration (Del Mundo 2019).
4. Normative fault-lines may be used by criminals to continue illegal activities. According, removing ambiguities and achieving consistency between laws across jurisdictions could stymie the unlawful use of corporations and other legal entities (Lord et al. 2018; Lord 2019; Del Mundo 2020).
5. The money laundering problem should be addressed through a multilateral and multidimensional approach that investigates its root cause. There is also a need to enhance global cooperation and explore preventive measures aimed at reducing the need to impose further regulations (Gilmour 2020).

Discussion

The PP highlighted the necessity of assessing the effectiveness and flaws of AMLR. There is a need to address questions such as why it is so easy for kleptocrats to deposit their ill-gotten wealth in countries with AMLR and nations ranking high in the global economy. However, when lawmakers and those in powerful positions are the ones hiding their ill-gotten capital, it is challenging to create a system of AMLR that works in practice and is capable of narrowing the gap between stated commitments and real action. Furthermore, governments need to view corporations as entities that pursue public interest goals as well as tools

for achieving individual objectives. This approach would enable corporate and tax law to be crafted in a way that supports investors, shareholders, and other stakeholders while preventing the outflow of wealth and tax evasion at the same time (Radon and Achuthan 2017)[2]. Also, a more equitable distribution of taxes would help to boost the credibility of the tax system, enhance national wealth, and improve national finances. The PP provide significant proof that AML policies alone are not effective at combating financial crimes, especially those stemming from corruption, bribery, and the concealment of funds arising from embezzlement. Nevertheless, the debate has focused on the ethics of corporate business and the role of third parties in the formation of these entities, forcing governments to strengthen KYCP and AMLR with a view to create a more transparent corporate business model through global governance.

There is a need for more thorough studies and research on not only how offshore companies came to proliferate as a mechanism to avoid high tax rates, but also the relationship between financial crimes and stringent tax systems which encourage taxpayers to structure their business in a way that channels income towards states with more "friendly" tax policies. In this sense, by adjusting current tax policies, some nations could prevent their citizens from taking advantage of complex tax structures involving offshore companies to avoid the payment of excessive taxes. The fight against money laundering also demands that governments and the private sector work in concert. There is a need for a global effort between jurisdictions to promote consistency in cross-border regulations, enforcement practices, and information sharing, while also ensuring adequate protections for information shared (FAFT 2017).

THE ROLE OF THIRD PARTIES IN CORPORATE BUSINESS STRUCTURES

Instead of facilitating the detection of illegalities by raising red flag alerts, AMLR has simply encouraged an "increase in the complexity of ML schemes" (Naheem 2020, 32). The PP exposed how entangled corporate structures between companies in different jurisdictions were used to commit unlawful acts and hide the proceeds of crimes. It is a common practice

2 The theory of shareholders, stakeholders, and enlightened shareholder value may play a significant role during the policymaking process of an effective corporate governance reform package aiming at balancing interests to produce laws that benefit all parties involved, including the government. See Ho 2010, and Andreadakis 2012.

to use intermediaries and nominees in corporate business structures to create this spiderweb of relationships, which enabled the actual owners of corporations and other legal entities to keep their identity secret. A report on the use of corporate and financial structures by beneficial owners to conceal money trails by hiding their interests behind the corporate veil and attorney lawyer privileges listed the challenges faced by investigations aiming to lift this veil and recover stolen assets (Van der Does de Willebois et al. 2011).

The first of these challenges is a lack of information about the beneficial owner either because this information was not collected when the corporations was registered or the willful blindness or negligence of service providers in collecting such information or keeping it updated. Bank secrecy or anonymity laws also impede access to beneficial ownership information. Second, certain types of companies also represent an obstacle. For example, trusts are private in nature, IBCs companies are not required to have a physical presence in the jurisdiction of their incorporation, and LLC structures allow a company to be formed with only a single member. Third, intricate structures that include layers of corporate vehicles and the use of multiple jurisdictions. Fourth, a lack of cooperation between jurisdictions for several reasons such as the absence of a legal basis for collaboration or practical barriers such as a lack of staff to carry out requests for assistance. Fifth, the lack of consistency between international standards allows criminals to incorporate in a jurisdiction with lax customer due diligence (CDD) and record-keeping requirements, or work with professionals that are not bound to follow AML standards. Sixth, the use of attorney-client privilege and transferring money through attorney-client trust accounts. Seventh, the use of professional intermediaries or informal "strawmen" such as family members or close associates, as well as formal nominees, including professional intermediaries, who may be innocent agents in the scheme. In some cases, the available information on beneficiaries is actually about intermediaries who act as the beneficial owners. Also, Van der Does de Willebois et al. (2011) enumerate as obstacles, the use of bearer shares, nominee directors and nominee shareholders. Financial institutions and other CSPs are still using some of these practices despite the existence of AML standards and policies, which brings the effectiveness of these measures into question. We will proceed to examine two of these practices, namely the use of nominee directors and intermediaries.

Nominee Directors in Offshore Structures

A periodically elected board of directors or similar body has authority over corporate affairs in a company (Kraakman et al. 2009). Therefore, it is reasonable to believe that corporate business is conducted by these board members. However, in some jurisdictions, CSPs often offer nominee director arrangements as part of their services to guarantee anonymity and distance the true owners from potential criminality (Gilmour 2020). Accordingly, in offshore structures it is typical for the appointor of directors (i.e., shareholders or beneficial owners) to make the real decisions in practice. For instance, in jurisdictions such as Hong Kong, appointing nominee directors is a common practice. CSPs openly advertise these directors as a mechanism for separating the entity from the owners by preventing the personal information of shareholders or beneficial owners from becoming public through reporting in public records. Consequently, the final beneficiaries sign several confidential documents such as a nominee service indemnity agreement, to assume liability. In return, the directors grant a Power of Attorney to the appointor, which effectively returns control of the corporation to the final beneficiary. Nominees also sign an undated resignation letter that can be used either by the director to avoid liability in case of a catastrophic event, or by the beneficial owners if they wish to remove or replace the director. Offshore corporations with bank accounts are also more attractive to those seeking to transfer funds. In this situation, the nominee will become a shareholder and sign an undated share transfer form to preserve the real owner's identity. The nominee will also sign a declaration of trust to ensure that the account will be managed in accordance with the instructions of the final beneficiaries (AsiaBC 2015).

Other jurisdictions such as Switzerland do not recognize the practice of appointing nominee directors (GFAR 2018) within the definition used by the FATF[3]. In the UK, where a substantial amount of corporations were involved in the PP scandal, the law does not distinguish between nominee and nominated directors (Department of Business Innovation and Skills, Transparency and Trust, 2013), so all directors owe the same duties to the company (UK Company Directors Disqualification Act 1986;

3 According to FATF, the use of nominee directors and nominee shareholders is a means to obscure information about the beneficial owners. The FATF classifies nominee shareholders and directors as formal or informal. The latter refers to cases where the nominator's identity is undisclosed, and the second to when information about the beneficial owners can be obscured by designating close associates or family members. (FATF 2014).

UK Company Act 2006, Section 171 to 177). However, in the Nominee Director and Alternate Directors Report (1989), nominee directors are defined as "persons who, independently of the method of their appointment, but in relation to their office, are expected to act in accordance with some arrangement which creates an obligation or mutual expectation of loyalty to some person other than the company as a whole" (para. 3). A consultation paper on directors' duties described them as "a board of directors who act in accordance with the instructions of someone else—the shadow director" (Law Commission and Scottish Law Commission 1998, 277).

Accordingly, the term nominee refers to a person who represents the interests of an appointor who can replace or remove the nominee due to an implicit understanding of who has the real power regarding company decisions (Eisenberg 1989). Similar to the UK, Panama Corporate Law (Law 32 of February 26, 1927) does not distinguish between nominee and nominated directors. The law requires three directors to be appointed as part of the conditions for incorporation (Art. 2, Subsection 9). Directors can be natural or legal entities, nationals or foreigners, and are in charge of administering and directing corporate business (Art. 49, 50, 68, Law 32). There is no obligation to either register nominee appointments or notify third parties of such an arrangement. Similar to Hong Kong, it is a common practice among Panamanian corporate lawyers, the main CSPs in Panama, to appoint nominees, prepare documents to relieve themselves of any liability, and protect the beneficial owners from any responsibility. In most cases, the persons acting as nominee directors are regular employees of law firms, and they receive bonus compensation for participating in such deals. They are usually unfamiliar with the provisions of the law. In other words, the majority of nominee directors are ignorant of the nature of these corporate positions, their fiduciary duties, and the consequences of breaching such duties; nor are they informed about the legal proceedings that can be filed if a transaction that they approved under the nominator's instructions turns sour. Some commenters have called them "the exploited underclass of the offshore world" (Obermayer 2015, 324, as cited in Del Mundo 2019, 93). To illustrate this, we can refer to MF's released statement addressing the topic of nominee directors. The firm indicated that "usually a director or company/corporate secretary has no economic interest or commercial link to the company's activity, and he/she does not endorse, participate or assist in the commercial or passive roles of a company in any way. Following pre-established guidelines, the secretary appoints agents and attorneys that carry out the

administration of the company" (Mossack Fonseca 2016c).

The accountability of nominee directors has subsequently been called into question. Therefore, implementing clear regulations on corporate governance might create a more transparent corporate business model. Some examples of these regulations include rewriting the definition of nominee directors to be consistent with FATF terminology, promoting legislative reforms that define the role and duties of nominees as well as the vicarious liability of their appointor, compelling corporations to specify in their articles of association the circumstances in which adopting nominee boards is permitted, and creating a register for disclosing a director's status as a nominee, the identity of their appointor, and the nature of their commitment (Redmond 1987).

The diethylene glycol case

One example that illustrates the role of a nominee is a 2006 case in which more than 100 Panamanians died of mass poisoning caused by a corporation distributing TD glycerin (diethylene glycol), an industrial application product, instead of CD glycerin, which is for pharmaceutical use. The public prosecutor's general office initiated criminal proceedings against the company's legal representative, resident agent, and two directors[4]. The person responsible for the company's operations was found guilty of offenses against public health, but the identity of the beneficial owner could not be confirmed. On the other hand, the Second Chamber of Criminal Procedures of the Supreme Court of Panama absolved the directors of any responsibility because they did not receive any remuneration for acting as members of the corporation or signing documents, and because despite being directors, they were not involved in the decision-making process regarding the company's operations. With this decision, it seems that the Supreme Court of Panama acknowledged the use of nominee directors as a regular practice and that the liability of these nominees

4 Criminal proceeding against Angel De La Cruz for crimes against public health and others. Second Superior Court of the First Judicial District of Panamá. First Instance Court Ruling No. 18 (July 26, 2016). Criminal proceeding against Angel De La Cruz for crimes against public health and others. Criminal Chambers of the Supreme Court of Panama, as Appellation Court (April 11, 2017). Criminal proceeding against Marco Antonio Murillo Argüelles, Yipsa Edith Avila Donate De Burnett, Alejandro De Cruz Soto, Alexander Geovanni De Sedas Ortiz, and others, for alleged crimes against collective security, specifically against public health, under Chapter V, Title VII Second Book of the Criminal Code of 1982. Second Chamber of Criminal Procedures of the Supreme Court of Panamá. 662-F (August 11, 2014).

will be determined based on whether they receive any compensation for their services. Accordingly, the outcome of the case would probably have been different if the nominee directors who signed contracts and other documents had received any compensation. Even in that scenario, a nominee may still be ignorant of the financial and legal repercussions that flow from the signed document. Likewise, assessing a nominee's level of understanding about a transaction could be challenging (Redmond 1987).

The diethylene glycolis case demonstrated that beneficial owners sometimes prefer to remain in the shadows to avoid liability if an undesirable event occurs, and "to separate themselves jurisdictionally from the victims of their crimes, law enforcement and regulatory authorities, creating a level of insulation for offenders" (Lord et al. 2018, 17). Further, the probabilities of lifting the corporate veil and recovering any assets obtained through unlawful activities are very low when the real and final beneficiary of an offshore corporation also employs professional intermediaries to act on their behalf.

Intermediaries in the Incorporation Process

There is a market for corporate vehicles supplied by intermediaries, and there is high demand for such products and associated services (Lord et al. 2019). The services provided by MF's are examples of this widespread practice. The firm stated that they usually dealt directly with intermediaries concentrated in Switzerland, Hong Kong, Jersey, Luxembourg, and the UK (Harding 2016), who were often lawyers, accountants, banks, and trusts (Mossack Fonseca 2016a; Bild 2016). In their 2018 statement, MF acknowledged that "approximately 90% of [our] clientele consisted of professional clients, such as international financial institutions, trust companies and prominent law and accounting firms who act as intermediaries and are regulated in the jurisdiction of their businesses. These clients are obliged to perform due diligence on their clients following the [Know Your Customer] and [Anti-Money Laundering] regulations to which they are subject" (2). The statement also added that MF's clients request services "after being duly advised by qualified professionals in their places of business" (2).

The practice of buying and reselling through intermediaries, also referred to as facilitators or enablers (see Lord et al. 2019), raised questions about whether CSPs should keep private records of those acting as intermediaries in order to fulfill requests from authorities, or whether every jurisdiction should authorize a public registry of intermediaries in corporate business.

The core of the debate concerns intermediaries who buy shell corporations for later resale. As a result, in many cases, even the intermediaries are unaware of the final beneficiaries of a corporation when they initially buy it from another facilitator. This creates a tangled chain of businesses, wittingly in some cases and unwittingly in others, with both cases resulting in social harm (Lord et al. 2019). If these relationships were broken down, we would have at one end of the spectrum the CSPs located in Panama, who deals with intermediaries that probably resell the companies to other CSPs located in different jurisdictions, who then purchase the corporation as per the instructions of a financial advisor of the final beneficiary. This spider web of relationships makes it difficult to trace the final beneficiary or any connection between the parties and the true owner.

Davilas (2014) indicated that "one of the fundamental risks that firms face when dealing with foreign correspondent accounts is not knowing their customers' customers" (4), an issue that MF acknowledged. According to their statements, the firm never worked directly with the true beneficial owners in some cases. Instead, the actual clients on record were intermediaries and the final beneficiaries were clients of the intermediary (Mossack Fonseca 2016a; Mossack Fonseca 2016b; Mossack Fonseca 2016c; Mossack and Fonseca Mora 2018). MF also pointed out that before the enactment of Law 23 in Panama on April 27, 2015 (hereinafter Law 23), which adopted measures to prevent money laundering, the financing of terrorism and the proliferation of weapons of mass destruction, the firm had no obligation to know the identity of the final owner of a corporation because attorneys were only required to observe due diligence regarding final beneficiaries since the enactment of the law, and MF was able to comply with Panamanian regulations at the time simply by obtaining information about intermediaries (Mossack and Fonseca Mora 2018). The firm also stated that once the law was enacted, they were attempting to identify the final beneficiaries at the time when the scandal broke out (Mossack and Fonseca Mora 2018). However, on February 1, 2011, the Panamanian government passed Law 2 that regulate the KYC measures for resident agents of existing legal entities organized according to the laws of the Republic of Panama, and this law in its article 6 stipulates that "every resident agent is bound to apply KYC measures, for which he/she will require the client to provide satisfactory evidence of his/her identity; when the client acts on a third party's behalf, he/she shall provide satisfactory evidence of the third party; and, when the share certificates representing the title over the juridical entity are issued to the bearer, the client shall provide satisfactory evidence of the identity of the

shareholders." This provision requires resident agents to identify the final beneficiaries. Accordingly, if MF acted as a resident agent of a corporation, the firm had a duty to complete CDD to the extent that it could identify the final recipient of corporate benefits.

As Lord et al. (2018) point out, "opportunities for misusing corporate vehicles have arisen as a result of an interesting mix of permissive and enduring legal and financial frameworks (domestically and internationally), the emergence of a professionalized market of third-party intermediaries, and a fragmented and asymmetrical (global) regulatory and supervisory architecture" (1228). Therefore, amendments to corporate law that include the scope of the role of intermediaries, the circumstances in which they may act, and the legal and financial repercussions of the intermediary role and actions could enhance transparency and enable the correct allocation of responsibility when a corporation has been used improperly. Nevertheless, it is uncertain whether the misuse of corporate vehicles can be reduced by enhancing AML and KYC standards in a manner that defines the role of intermediaries, "improving the regulation and supervision of third-party professionals", and toughening other policies (Lord et al. 2018; Lord et al. 2019, 1234). The PP proved that AMLR failed to fulfill its goal[5] and the regulatory bodies in charge of detecting illegalities neglected their duties, because it was the ICIJ who ultimately uncovered the web of corporate relationships behind legally established offshore structures. While strengthening AML laws to require the registration of the financial beneficiary may lead to a change in the corporate business model, it will be difficult to root out financial crimes unless laws about the duties of intermediaries are adopted.

ARE STRONGER AML LAWS AN EFFECTIVE RESPONSE TO THE PANAMA PAPERS?

Several nations have revised their legislation regarding the disclosure of beneficial owners and information exchanges, based on an understanding that "the use of companies that obscure the real owners are the single greatest obstacle to fighting money laundering and other financial crimes" (Sharman 2011, 74). Institutions such as Transparency International (2016) are calling for a Public Beneficial Ownership Registers system (see also G20 2014) while others advocate a central share register. Moreover, FATF

5 For detailed research about AML' goal and effectiveness see Ferwerda 2018.

Recommendations 24 and 25 (Recommendations 33 and 34 as per the old numbering) compel countries "to ensure that adequate, accurate and timely information on the beneficial ownership and control of legal persons and trusts can be obtained or accessed in a timely fashion by competent authorities." (FAFT 2019). Despite these recommendations, many nations with AMLR in place did not have a means of verifying the final beneficiary of a legal entity, as the PP revealed that a vast number of intermediaries act on behalf of others.

A system to disclose information on beneficial owners is advantageous to those seeking to curb corruption and financial crimes. Radon and Achuthan (2017) notes that the beneficial owners' disclosure it also serves companies by "identifying questionable business partners" (94) and allows the public to know "whether companies are owned by or connected to public officials" (95). The government could hold the true owners of a company accountable if a catastrophic event occurs, and crimes such as the diethylene glycol mass poisoning would not go unpunished. Furthermore, the true beneficial owners would be liable in the event that a national contract they were involved in fails, preventing governments from using public funds to bear the cleanup costs of unfinished or abandoned projects. It also enables governments to make informed decisions when signing contracts and learn more about the reliability, veracity, capability and controlling owners of contracting partners (Radon and Achuthan 2017). Nevertheless, the path to transparent corporate business is filled with numerous challenges, as fraudsters, tax evaders, and criminals will become more sophisticated in their methods and will adapt to any government attempts to strengthen AMLR (Naheem 2015).

The Republic of Panama

The Panama government was committed to building a more transparent corporate and financial system even before the PP. Before the PP, the government implemented a custodian regime for bearer shares and enacted several laws to comply with international standards regarding ML and terrorist financing. These laws require both financial and non-financial institutions, as well as some professionals, to report on their customers. CSPs and other professionals were required to practice KYC and comply with other AMLR. Law 2 of February 1, 2011, compels resident agents to implement due diligence procedures to identify both their clients and the commercial and financial ventures of their clients. This law also entitles the public prosecutor's general office, the judicial branch, and administrative

authorities such as the Directorate of Revenue of the Ministry of Economy and Finance to demand such information in some instances. Law practitioners who refuse to cooperate can face sanctions. Law 23 also requires lawyers, real estate brokers, and other financial and non-financial institutions to report transactions over USD 10,000.00. They must also report any clients included in the terrorist list published by the Security Council of the United Nations. Although provisions about reporting suspicious activities already existed, it was not until 2015 and 2017 that the Panamanian government built a platform to enforce these provisions.

Under Law 23, the reporting entity can preemptively freeze their clients' assets (Title VI), and information provided to the Supervisory Entity[6] and the FIU can only be shared with the Public Prosecutor's Office, agents involved in criminal investigations, and jurisdictional authorities that are legally responsible for revealing such data (Title VIII). In Article 56, the law exempts the reporting entity from criminal and civil liability for submitting such reports. Moreover, through Law 47 of August 6, 2013[7], the government approved a system of custody for bearer shares. With this new system, the Panamanian government purported to diminish the use of bearer shares by requiring shareholders to deposit share certificates and to identify the beneficial owner with an authorized custodian duly registered in the Supreme Court Book of Bearer Shares Custodians.

Following FATF recommendations, the government also enacted Law 129 of March 17, 2020, which create a beneficial owner's registry. Nevertheless, the European Union (EU) included the country on the "list of non-cooperative jurisdictions in fiscal matters" (Council of the European Union 2020; see also "European Union confirms" 2020). In line with this, European banks must carry out Enhance Customer Due Diligence (ECDD) on any funds coming from Panamá, disregarding several years of work to improve administrative procedures and practices (Brunsden and Peel 2019).

Panama is also engaged in efforts to tackle financial crimes internationally,

6 The supervisory entities are the Superintendence of Banks of Panama, The Superintendence of Insurance and Reinsurance of Panama, The Superintendence of the Securities Market, The Panamanian Autonomous Cooperative Institute and any other public institution provided by law, to ensure the supervision of activities described in Law 23 or when the risk profile of the activities requires supervision.

7 Law 47 of August 6, 2013, subsequently modified by Law 18 in April 2015. Also, see Agreement No. 307 of April 24, 2015, of the Supreme Court of Justice of Panama, which creates the registry of authorized custodians for lawyers, and Agreement No. 004-2015 of May 11, 2015, of the Superintendence of Banks of Panama, which regulates the procedure for the registration of custodians of bearer shares for financial entities supervised by the Superintendence.

and remains committed to assisting other nations. To this end, Panama exchanges information with 33 other jurisdictions. Law 51 of October 27, 2016, establishes the regulatory framework for the implementation of information exchanges for tax purposes, and Executive Decree 122 of June 11, 2018, covers the topic of reportable jurisdictions[8].

The UK

The UK amended the Sanctions and Anti-Money Laundering Bill to establish a central register of beneficial ownership information that should be publicly available in crown dependencies and British Overseas Territories. The dependencies and overseas territories, such as Isle of Man, Bermuda, Cayman Islands and the Virgin Islands, are required to implement this registry by the end of 2020. However, the amendment stipulated that this applies where "a system of public registers of beneficial ownership of companies has been introduced in a relevant territory," and a system will be deemed to have been introduced "when the law of that territory includes public registration provision which is in force." In this context, public registration provision means provisions regarding information about people with significant control[9]. The UK Company Act, Part 1 of Schedule 1A, specifies that who directly or indirectly hold more than 25 percent of the shares of the company, or hold more than 25 percent of the voting rights, or appoint or remove a majority of the board of directors, or exercise significant influence or control over the company, meet the conditions to be deemed as a person with significant control. However, the 25% threshold set for disclosure is meaningless, as criminals can easily arrange to hold less than that to evade reporting. Accordingly, proposals to eliminate this threshold are gaining ground. (Leon 2016; Radon and Achuthan 2017; Gilmour 2020).

The European Union (EU)

The EU is proposing ECDD measures for dealing with natural or legal entities established in high-risk third-party countries. These measures place the responsibility on the private sector, with severe penalties for

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8 As per OECD (2014) a reportable jurisdiction is a jurisdiction (i) with which an agreement is in place pursuant to which there is an obligation in place to provide specific information about accounts and accounts holders, and (ii) which is identified in a published list.

9 See Part 1 of Schedule 1A of The Company Act, 2006, and House of Commons. (2018, May 1), Considerations of Bill (Report Stage) https://www.legislation.gov.uk/ukpga/2006/46/schedule/1A

failing to comply (Vail 2018). There is also a cross-border campaign, both judicially and through law enforcement, for a global register of beneficial owners, and this has already been agreed upon in the EU Member States Anti-Money Laundering Directive (AMLD). This cross-border cooperation can be achieved through the signing of multilateral agreements between member states and systematic links between national registers "to perform data comparisons and create stronger global efforts in tracking down corrupt and fraudulent financial activities" (Del Mundo 2019, 106; see also Federal Ministry of Finance 2016).

The EU advocates the exchange and sharing of information between member states and the creation of more uniform rules because "the differences in legal frameworks can also be exploited by criminals and terrorists who could carry out financial transactions where they perceive anti-money laundering measures to be weakest" (European Commission 2016, para. 3). The EU Commission has also recommended implementing a shared registry to collect, store, and access information on the ultimate beneficiaries/owners of companies, with penalties for non-compliance (Vail 2018; EU 2015/849). To this end, France (Ordinance n° 2016-1635), Germany (Geldwäschegesetz, "GWG"), Spain (Circular N° 57/201), and Sweden (Sw. Lag 2017, 631) have implemented regulations about reporting the ultimate beneficial owners of legal entities in a centrally held register[10].

Switzerland

In Switzerland, only individuals can be beneficial owners, and SA and SARLs are obliged to maintain a shareholder's register and a list of beneficial owners. A similar obligation is imposed on companies issuing bearer shares[11]. Also, acquirers of bearer shares from companies not listed on a stock exchange shall report such acquisitions within a month of the date of procurement; otherwise, the holder loses their shareholder's rights, including voting rights and the right to receive dividends (Global Forum on Asset Recover 2018). Moreover, Switzerland shares financial information with 63 countries and receive financial data from 75 countries (SWI swissinfo.ch. 2019).

10 For a status overview on Ultimate Beneficial Owners register in Europe, see Nauta Dutilh International Law Firm 2017.

11 See the Federal Act on Combating Money Laundering and Terrorist Financing AMLA (Geldwäschereigesetz, GwG), and also Art. 697j1 K, 697 m1 K, 697l1 K, 697k1 K of the Code of Obligations (OR).

The US and Singapore

For the USA[12] and Singapore[13], the PP was a perfect justification for enacting legislation to oblige citizens to report their accounts and assets in foreign jurisdictions and require the assistance of financial and non-financial institutions around the world in fulfilling this task. However, the PP revelations were not enough to tackle the incorporation of LLCs with unknown beneficial owners in the USA. Therefore, in states such as Nevada, Wyoming, and Delaware, it is still possible to register a company without reporting the beneficial owner.

The American Bar Association (ABA) is opposed to the beneficial ownership transparency reform based on the cost of compliance and infringement on lawyer-client confidentiality (Bass 2018; Stephenson 2018). Lawyers and law firms may become a new category of financial institutions under the Bank Secrecy Act (BSA), and would be subject to the strict AML and Suspicious Activity Report (SAR) requirements of the BSA. This reporting duty may infringe upon legal privilege and confidential client information, and the bill "would impose burdensome, costly, and unworkable new regulatory burdens on small businesses, their agents who help them form corporations or LLCs, and the states" (Bass 2018, 2). ABA also emphasized that the Financial Crimes Enforcement Network (FinCEN) issued a new Customer Due Diligence Rule that has been in effect since May 11, 2018 (FinCEN 2018), which requires "banks and other financial institutions to collect certain specific beneficial ownership information regarding entities that establish new bank accounts"[14]. Thus, it is "unnecessary to create a costly and duplicative new regulatory regime that would impose unfair burdens and costs on millions" (Bass 2018, 3).

CONCLUSION

The PP have directed renewed attention at the effectiveness of AMLR

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12 Foreign Account Tax Compliance Act https://www.irs.gov/pub/irs-utl/froug.pdf

13 Agreement Between the Government of the Republic of Singapore and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA, Sing.-U.S., November 13, 2018, accessible via INLAND REVENUE AUTHORITY OF SINGAPORE (IRAS.Gov) https://www.iras.gov.sg/irashome/fatca/

14 The FinCEN new CDD Rule for financial institutions and their customers in effect since May 11, 2018, "has four core elements: (1) customer identification and verification, (2) beneficial ownership identification and verification, (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and maintaining and updating customer information" (FinCen 2018).

and its validity in preventing the use of legal structures as vehicles to perpetrate or cover up financial crimes, particularly since it was the ICIJ who unearthed a series of dubious activities that should have been detected by current AML and counter-terrorism task forces, the FIU, or by those responsible for screening clients as per the regulations. Also, the PP have led to an implied global commitment to follow up on international guidelines that contribute to greater transparency of legal entities in an effort to combat ML, tax evasion, and the financing of terrorism. Accordingly, numerous international jurisdictions have been strengthening their AML and KYC laws, with a focus on identifying final beneficiaries and allowing the exchange of information with other jurisdictions. The disclosure of beneficial ownership will allow "openness, fairness, accountability, and transparency," which "help foster competition, reduce cronyism and corruption, and create a reliable investment environment" (Radon and Achuthan 2017, 93). However, without monitoring and enforcement processes, registers may be utopian and ineffective in some circumstances (Interamerican Bank Development and The Secretariat of Global Forum on Transparency and Exchange of Information for Tax Purposes 2019).

The fight against ML and other financial crimes is a transnational effort that requires transnational collaboration. It is also a collective responsibility. KYC and AMLR are good tax governance in a globalized world where technology allows the automatic exchange of information. Nevertheless, without political will and the collaboration of the public and private sectors, these regulations are insufficient to curtail the use of corporations as tax evasion instruments or a vehicle for committing financial crimes or supporting terrorism. To achieve a more transparent corporate business model and for AMLR to accomplish their purpose it demands CSPs that obeys the regulations, shareholders that promote good corporate governance practices, and governments that enforce appropriate legislative reforms not only creating a corporate business model with a defined concept of the roles of the parties involved, but also applying egalitarian fiscal reforms and implementing appropriate structures to supervise compliance with regulations. A lack of effort towards setting up compliance platforms and ambiguity in tax and corporate law may be perceived as encouraging the continued existence of shady corporate practices and tacit support for corruption and other financial crimes.

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