Editorial

"Panama Papers" conference in Madrid: "transparency vs confidentiality" – a conflict?

In January 2017, I had the honour of speaking at a conference organised by the European Parliament Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (the "PANA Committee"). The PANA Committee was set up in June 2016 following the leaks of the so-called "Panama Papers" to "investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion". The conference was ably chaired by Mrs Maite Pagazaurtundúa MEP, who is an active member of the said Committee.

I was particularly honoured as a legal scholar who assists in organising the annual Cambridge International Symposium on Economic Crime to join a panel of experts in law and accountancy and a journalist who, together with fellow journalists from around the world, has been deciphering the "Panama Papers", 2.7 terabyte of information containing 11.5 million documents which is the largest data leaks thus far for journalists to work on. As many of the readers are aware, the Economic Crime Symposium provides a neutral forum for key people in both public and private sectors and academia around the world to discuss ways and means of preventing and controlling economic crime, which spans widely and includes such crimes as fraud, corruption and tax evasion. And the common thread that links these different types of economic crime is money laundering which conceals the origins of money gained from these crimes and the extensive measures to prevent money laundering, which have been implemented around the world.

The present author's task at the aforementioned European Parliament conference was to discuss briefly the anti-money laundering (AML) measures that impose duties on banks to disclose information, which in turn may directly conflict with their duties of confidentiality owed to their customers (commonly referred to as "bank secrecy"), in the hope that this brief intervention, focusing on the tension between confidentiality and transparency, which has been intensified as a result of globally extensive AML measures to fight financial crime, including tax evasion, might add a perspective to the discussion on a complex set of issues that face the international community today[1].

In 2009, at the London Summit, the G20 countries famously declared that "[t]he era of banking secrecy is over". Since then, the OECD has been continuing to lead the initiative, which it launched in 1998, to improve countries' capacity to tackle tax evasion that, in its view, has been facilitated by offshore financial centres and bank secrecy. This initiative has received greater support from those governments around the world that have found themselves in serious need of securing tax revenues to restore the health of the public finances as they came under particular strain after the financial crisis. This has culminated in the G8 countries stating in their Declaration in 2013, "Tax authorities across the world should automatically share information to fight the scourge of tax evasion".

What has laid the foundation for the development of "information sharing" between tax authorities, endorsed by the G8 countries, are the information disclosure and sharing mechanisms that have been established worldwide through the introduction and implementation of AML and combating the financing of terrorism (CFT) regimes. The issues are intrinsically linked as the laundering process is a necessary element in tax evasion, which in turn is recognised as one of the predicate offences of money laundering.

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Furthermore, there are international initiatives to facilitate closer co-operation between tax and AML/CFT authorities.

As the readers are aware, the advent of AML regulation has had an enormous impact on the way in which banking and financial services are conducted worldwide, and it has been observed that its impact is considerably more significant than other forms of financial regulation introduced within the EU. Indeed, as it has been witnessed on many occasions, financial institutions have been made to stand on the front line to protect the global financial system from use by criminal and terrorist organisations.

The global fight against money laundering began in earnest with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention") in December 1989, which obligated the party states to criminalise money laundering. In the context of my intervention at the "Panama Papers" conference, what has been the most significant development is the establishment of the Financial Action Task Force (FATF) in June 1989 at the G7 meeting which discussed measures to protect the global financial system from money laundering and its 40 recommendations, the remit of which now extends not only to CFT but also to the financing of proliferation of weapons of mass destruction.

As for the issue of banks' duties of confidentiality owed to their customers (commonly referred to as "bank secrecy"), according to a study by the European Banking Federation, all EU member states, other European countries and the USA, Australia and Japan have in place measures to enable reporting by financial institutions to domestic competent authorities without breaches of bank secrecy laws. This is the case regardless of whether bank secrecy is established on a statutory basis, as in most civilian systems of law including Spain, or as an implied term of contract, as in many common law jurisdictions. The findings of this survey suggest that bank secrecy laws are no obstacles to disclosure obligations under the AML/CFT regime in those countries studied.

Furthermore, the initiatives by inter-governmental organisations have led to the signing of bilateral agreements, facilitating mutual legal assistance and cross-border disclosure of information not only in the context of AML/CFT but also now increasingly in tax-related matters. The OECD, for example, is pushing for multilateral agreements in tax matters to close any loopholes by encouraging countries to become signatories to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and to create a level playing field.

The OECD's efforts to facilitate exchange of financial information between jurisdictions on the basis of this Multilateral Convention have gone a step further whereby, as of 16 February 2016, 80 jurisdictions had signed the multilateral competent authority agreement which allows the automatic exchange of information between competent authorities in tax matters to be implemented from September 2017 onwards.

With the implementation of information exchange in tax matters between countries, are all the problems now solved? From the perspective of banks, the duty to disclose customer information has become very complex. Banks must disclose information in regard to tax matters to relevant tax authorities, whereas they must continue to disclose money laundering and terrorist financing matters to the so-called financial intelligence units. Furthermore, as a result of the inclusion of tax evasion as one of the predicate offences of money laundering, the FATF will, no doubt, continue to play a significant role in the fight against tax evasion.

As the international community faces global challenges posed by organised crime, terrorism, fraud, corruption and tax evasion, we, as citizens, should welcome measures to facilitate and enhance information sharing between "competent authorities" of different

countries. Nevertheless, the present author wishes to share a number of concerns as a scholar without any political or commercial imperatives. First, the banks which have been placed on the front line to "police" the global financial system are business entities in the private sector, and they are under increasing pressure to generate profits, even more so in a shareholder centric corporate governance environment, and they need to compete with their rivals for survival. Therefore, to what extent can these banks be expected, or is it appropriate to expect them to play the "policing role"? Of course, with record fines being imposed on banks for deficiencies in AML banks by the authorities of different countries, the international regulatory pressures on banks is likely to continue. Second, these fines have the potential of being used by various governments to punish the banks of other countries with the exclusion of their own – the criticisms raised by many commentators. Third, a fundamental question that we may ask ourselves is that even if we have nothing to hide, do we not wish to retain a certain level of confidentiality, and the global move for transparency may be infringing our "right to privacy" which is one of the fundamental human rights. Fourth, what happens to the customer information that is being disclosed to the authorities and then shared amongst these authorities? Can they be trusted to keep the information confidential and to use it only for legitimate purposes, particularly in the present world where there are said to be "rogue states"? And what about cybercrime, hacking, etc.? Can information be stored safely?

These are just a few of the questions to which we would like to find answers, but as the ongoing discussion in the international community indicates, there is no single solution for these complex issues, and, no doubt, these issues have been hotly debated again at the Economic Crime Symposium this year.

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Note

1. For further discussion, see Nakajima (2017).

Reference

Nakajima, C. (2017), "The international pressures on banks to disclose information", in Booysen, S.A. and Neo, D. (Eds), *Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres around the World*, Cambridge University Press, Cambridge.