

CAN THE PRIVATE REGISTRY OF BENEFICIAL OWNERS OF PANAMA BE USED FOR EXCHANGE OF TAX INFORMATION?

BY PUBLIO CORTÉS

November 2020 marked 4 years since the annual plenary meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes that took place in Tbilisi, Georgia in November 2016. It was my turn to lead the Panamanian delegation in that event due to the public position I held at that time.

The Global Forum is an organization of countries and jurisdictions which currently has 161 members and aims to promote regulations that can be applied in practice by all countries to strengthen transparency and cooperation between States to fight against international tax evasion. Ironically, despite the tense relations that certain vested interests within Panama have always had with this organization, our country has been a founding member of the Global Forum since 2009. ^[1]

Within the event, a panel was held where a few countries, including Panama, were asked to please share with the audience, the rapid progress being made in matters related to

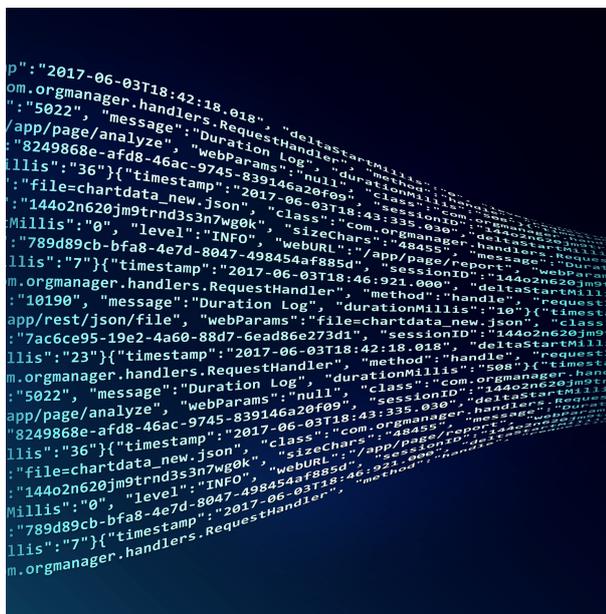
passing laws and changing systems to meet international standards. There was still much to be done in Panama, but change was becoming noticeable.



As I was reviewing my notes for the presentation, I was very respectfully approached by the British Majesty's representative and asked to endorse a note that several countries were signing, in which, without any commitment, they promoted as a good

[1] <https://www.oecd.org/tax/transparency/>.

idea to be supported in the future, the establishment of a general access registry to the beneficial owners of corporations in all countries. With the same kindness I was approached, I declined and responded that we would have to evaluate the matter.



Back then and now, I have been an advocate of the benefits that for Panama have transparency in general and in fiscal matters particularly. Given the innumerable reputational problems that these matters have represented for the country, the effective application of international standards is, the best business for the Republic of Panama, aside from being an ethical imperative which considers the interests of the majority and not just those of a particular group.

If we want to generate more jobs across the board, the best plan is not to focus so much on bemoaning falling into the export of secrecy, because it is obvious that it has gone out of fashion in this new world of Artificial Intelligence. We should rather focus on strengthening

the exports of goods and services from the real economy. The pandemic has done nothing more than emphasize on this fact.

Despite that approach, in 2016, to me it did not seem necessary to create a registry of any kind, of beneficial owners of legal entities incorporated in Panama, because I thought that, little by little, my fellow Panamanian Lawyers would understand that due to multiple factors the world had changed and that they would have the information of the Beneficial Owners at hand, in case the authorities of any kind, based on the Law, would request it to them in order to comply with international commitments.

I do not know what happened along the way (and not only in Panama), what is certain is that last year the Panamanian Government proposed and the National Assembly approved Law 129 of March 27th, 2020 *"That creates the private and single registry system of beneficial owners of legal persons"*.

The first thing that caught my attention is that they refer to the registry as "private" when it is in the hands of the Superintendence of Non-Financial Subjects, which is an *"autonomous organism of the State"*.^[2] What they really meant was that the registry will be confidential, because not everyone will have access, but only said Superintendence, in a very restricted way, to share information with the competent authorities.

The question arises here as to whether

[2] See Law 124 of 2020, which created the Superintendence, replacing the institution that previously played this role, which was a dependency of the Ministry of Economy and Finance.

the Panamanian Tax Administration (DGI) will have the right to request information from this registry to comply with tax information exchange commitments, especially the Exchange of Information on Request for Tax Purposes (EOIR), which would be the type of exchange where this question would be more specifically applicable.

How would this go about without Law 129 of 2020 and what question would arise regarding this Law?

The competent authority for EOIR is the Ministry of Economy and Finance (MEF), through the General Directorate of Revenue (DGI). Based on the Double Taxation Avoidance Agreements (DTA), the Tax Information Exchange Agreements (TIEA) or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC), all those International Agreements, countries may request information from Panama, subject to certain protocols and requirements.

When the request arrives, the DGI, as the competent authority, may request information from private and public sources. One of the private sources from which it may request information is from Lawyers or Law Firms, among other matters, to find out about the Beneficial Owners of legal entities.

The question that arises is the following: Will the DGI have access to the confidential Registry of Beneficial Owners created by Law 129 of 2020?

If the answer is yes, then the DGI's work



will be easier in the future, since, if it does not obtain the information from the Lawyers or Law Firms, it will always be able to resort to the information from the Single Registry.

Our Opinion

The need for this analysis is justified by the reading of Article 1 of Law 129 of 2020, which states:

“Article 1. Purpose. The purpose of this Law is to establish the regulatory framework for the creation of the Private and Single Registry System of Beneficial Owners in the Republic of Panama, with the aim of facilitating access on beneficial owners of corporations collected by lawyers or law firms that provide resident agent services to assist the competent authority in the prevention of money laundering crimes, terrorism financing and the



financing of the proliferation of weapons of mass destruction, according to the laws of the Republic of Panama.”

The reading of this regulation seems to leave no room for doubt: this registry only exists to assist the competent authority in the fight against money laundering. In other words, it does not leave room for it to be used for the exchange of international tax information. It is rather a matter of compliance with the standards promoted by the Financial Action Task Force (FATF).

So far it seems that the DGI does not have access. However, since Panama is Panama and we like *baseball*, the game is not over until it is over. Therefore, we must continue reading. Thus, we find numbered paragraph 2 in Article 2 of

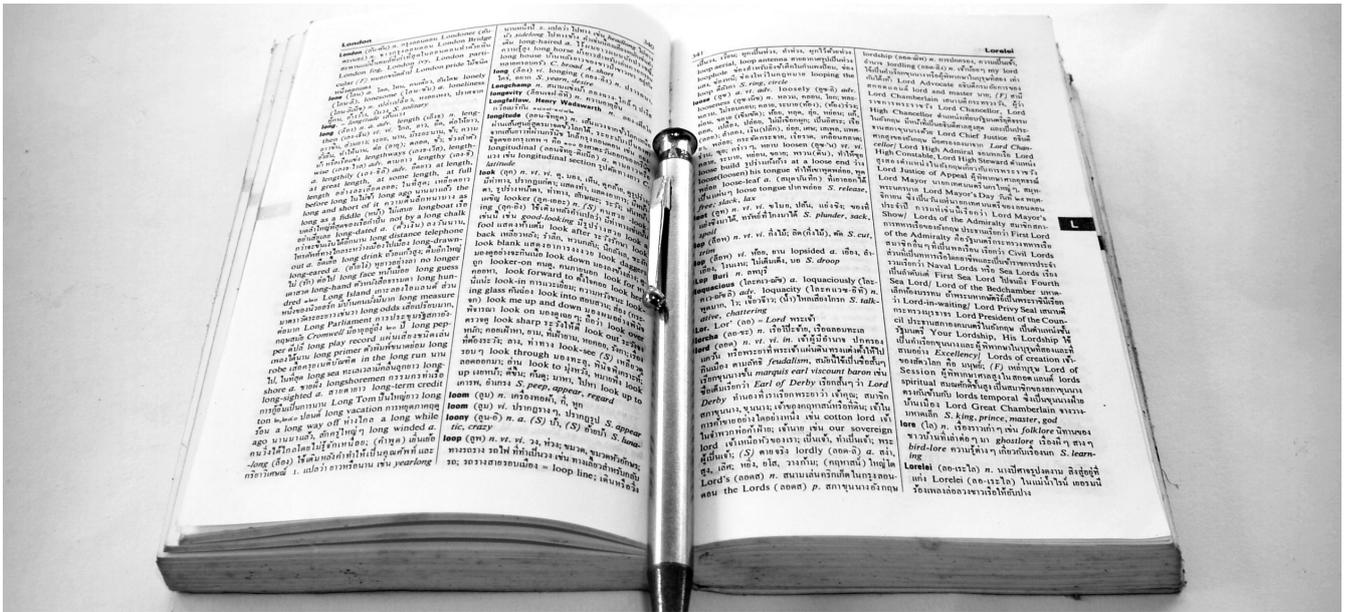
said Law which states:

“Article 2. Definitions. For the purposes of this Law, the following terms shall be understood as follows:

... ..

2. *Competent Authority*: The Superintendence of Non-Financial Subjects, the Financial Analysis Unit for the Prevention of Money Laundering Crimes and Terrorism Financing, the Public Prosecutor's Office, the Ministry of Economy and Finance of the Republic of Panama and any other institution or agency of the National Government to which is attributed competence in matters of prevention of money laundering, terrorism financing and the financing for the proliferation of weapons of mass destruction". (The underlined is ours).

This is when the first hint of the DGI in this neighborhood comes up. In fact, all the authorities in the list mentioned in the regulation have competences in the fight against money laundering, except one: MEF does not have competence in this matter. It used to, when the supervision of unregulated entities, including lawyers, was carried out by an agency of the MEF. However, this ended with the coming into force of Law 124 of January 7th, 2020, mentioned above, which created the Superintendence of Non-Regulated Subjects, which is an entity that is not part of the MEF, and which already existed at the time Law 129 of 2020, which established the Single Registry of Beneficial Owners, came into effect.



Now, if the MEF is the competent authority for the Single Registry of Beneficial Owners and considering that the MEF no longer has competent entities Money Laundering matters, everything seems to indicate that the mentioning of the MEF leads us to the DGI. However, this is still debatable, because the DGI does not apply anti-money laundering regulations, but only deals with the exchange of tax information, which is a different matter.

It is time to continue reading and we come across article 14 of Law 129 of 2020 which states:

“Article 14. Access. Access to the Single System shall be strictly limited to the resident agent of the corporations or corporations to which it renders its services as such and two officials appointed by the Superintendence of Non-Financial Subjects, who based on a risk analysis shall be assigned the type of access and their respective roles.

The official or officials designated by the superintendent may access the Single System for the exclusive purpose of making the required information available to the competent authority, in accordance with the provisions of Law 23 of 2015, its amendments and regulations, regarding the prevention of the money laundering crimes, terrorism financing, the financing of the proliferation of weapons of mass destruction and their predicate offenses, in accordance with the laws of the Republic of Panama, as well as to comply with the obligations of international cooperation established in the treaties or conventions ratified by the Republic of Panama, after verification of compliance with the requirements set forth therein.”

The rule is not clear. If we focus on the second paragraph there are two (2)

possible interpretations, neither of which is conclusive, namely:

First interpretation: The second paragraph would have two subparagraphs, regulating separate issues:

First subparagraph:

“The official or officials designated by the superintendent may access the Single System for the exclusive purpose of making the required information available to the competent authority, in accordance with the provisions of Law 23 of 2015, its amendments and regulations, in matters of prevention of money laundering crimes, terrorism financing, the financing of the

proliferation of weapons of mass destruction and their predicate offenses, in accordance with the laws of the Republic of Panama ...”

In this first subparagraph, the Law would be saying that the competent authorities in the fight against Money Laundering would have access. In this interpretation, the expression "laws of the Republic of Panama", includes both the domestic regulations with the rank of Law, as well as the Treaties and Conventions ratified by Panama in the matter of Money Laundering, because both the Domestic Law and the treaties are contained in "Laws of the Republic of Panama".

Second subparagraph:

“The official or officials designated by the superintendent may access the Single System for the exclusive purpose of making the required information available to the competent authority... to comply with the international cooperation obligations established in the treaties or conventions ratified by the Republic of Panama, after verification of compliance with the requirements set forth therein.”

In this second paragraph, the regulation would be contemplating that in addition to the Money Laundering matter, the Single Registry would **also** be available to comply with all **other** international cooperation agreements ratified by Panama, which would include agreements on tax information exchange. If this interpretation is imposed, it makes sense that the Law has included the MEF as the competent



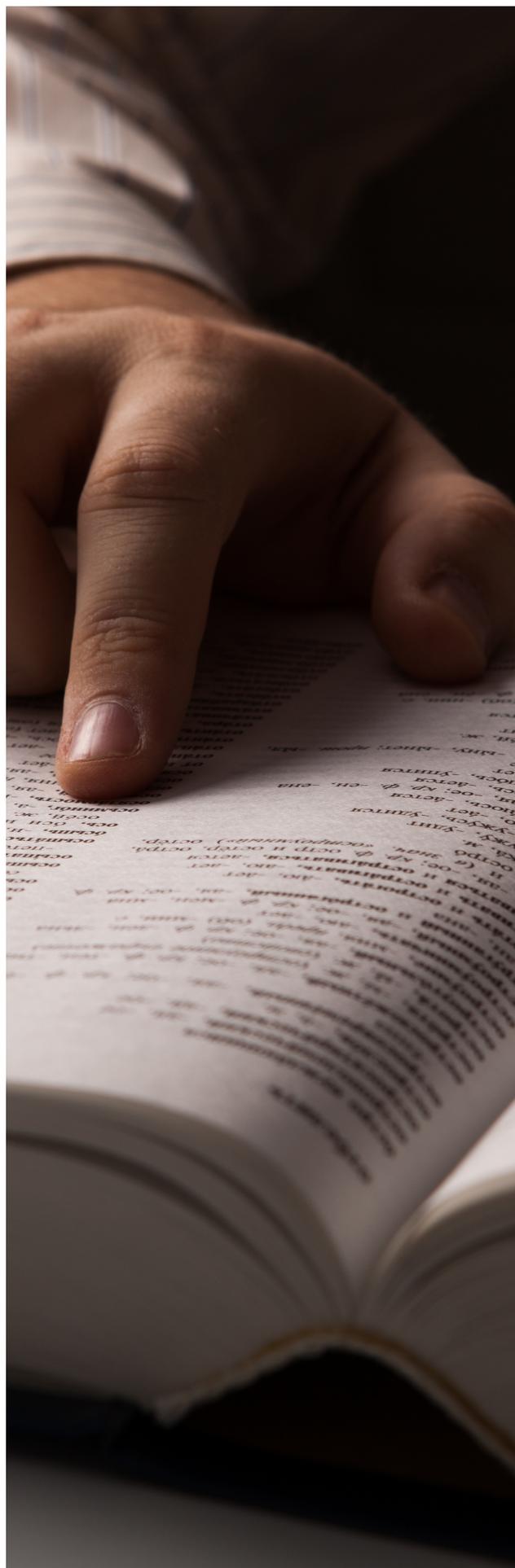
authority and, consequently, the DGI would have access to the Single Registry.

Second interpretation: The second paragraph would be referring only to a single idea. The key would be in the interpretation of the following section:

“...in accordance with the laws of the Republic of Panama, as well as to comply with the obligations of international cooperation established in the treaties or conventions ratified by the Republic of Panama...”

According to this interpretation, what the rule would mean is that the access to the Single Registry is only for the authorities related to the fight against Money Laundering, whether to apply the Domestic Law or the International Treaties and Conventions on the matter. In other words, according to this reading, the expression “laws of the Republic of Panama” does not include treaties but only domestic law, so the Legislator wanted to emphasize that access also refers to conventions and treaties but in a limited manner to those on the Fight against Money Laundering and its predicate offenses.

According to this interpretation, the MEF and the DGI would not have access to the Single Registry. It would remain unexplained why the MEF was included as competent authority.



Final Comments

Laws come into force without the need for regulation. Law 129 of 2020 is in force, although it is well known that it has neither been regulated nor implemented from a technological point of view. The Political Constitution of Panama states that it is the duty of the Executive Branch to "*regulate the Laws that require it for its better compliance*". Article 29 of the same Law acknowledges that it deserves regulation. It has been 10 months since the Law came into force. It is time for the Executive Branch to regulate it and it is important that it clarifies whether the MEF and the DGI will have access to the Single Registry of Beneficial Owners by these means.

Meanwhile, according to the newspaper CAPITAL FINANCIERO, in a news report dated November 2nd, 2020, the Superintendence and the MEF-DGI executed an administrative MOU. As far as I know that MOU is still a secret, nevertheless the news report says that one of the goals of the agreement is "*to ensure compliance with the role of the DGI as the delegated competent authority for exchange of information on tax matters, in order to comply with the international tax treaties an agreements signed by the Republic of Panama*".

In my opinion, after the above mentioned news report, we have good reasons to believe that the authorities adopted the First Interpretation explained in this Bulletin, it means that they understand the Law has included the MEF-DGI as the competent authority and, consequently, the DGI would have access to the Single Registry of Beneficial Owners in order to use that information for the exchange of information for tax purposes. Obviously as long as we are living in a Rule of Law country is advisable the authorities enact the Regulation as soon as possible in order to have a transparent understanding of the applicable rule.

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