Is Offshoring Ethical?

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Finalist

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* The views expressed herein are those of the authors and do not necessarily reflect those of the Organization he is affiliated with or of the Jury.

In the post-Panama Papers world, there was much cause for optimism. The largest financial leak in history led to all kinds of encouraging soundbites and consensus appeared to be reached regarding what legislative steps were necessary to bring about meaningful change.

However, 2018 was a year that must have ravaged even the most ardent optimist's cheer. Notwithstanding another series of major financial scandals, including Danske Bank and 1MDB, it was also - most importantly - a year in which the capacity and willingness of monsters to lash out in the most deplorable fashion was publicly demonstrated, over and over and over again.

Eighty journalists and media workers were killed last year (RSF 2018, p.3). Among them were Ján Kuciak, a 27-year-old Slovak, who was "shot dead in his home together with his fiancée, Martina Kusnirova, on 21 February", and Victoria Marinova, a 30-year-old Bulgarian broadcaster who "had been beaten, raped and strangled" (RSF 2018, p.11). Both murders were committed in the EU. Both victims were comfortably young enough to make submissions for the Ethics and Trust in Finance Prize.

This paper will make the following series of arguments:

(i) Any discussion pertaining to ethics in finance needs to put the offshore system at its centre. Otherwise, the discussion is, in large part, a waste of time;

(ii) The legislative solutions to produce better outcomes are already known and in the process of being implemented;

(iii) As a matter of the utmost urgency, much greater protections need to be offered to journalists and whistleblowers, who often expose the worst kinds of wrongdoing;

(iv) Incentives are key. At present, bad incentives are driving the behaviour of governments, corporate interests, media reporting and private citizens, with predictably unfortunate outcomes.

A brief commentary will conclude the paper.

The Ethics of Offshore Jurisdictions

The offshore system can be difficult to nail down. For the purposes of this paper, it refers to "jurisdictions that deliberately create legislation to ease transactions undertaken by people who are not resident in their domains, with a purpose of avoiding taxation and/or regulations, which they facilitate by providing a legally backed veil of secrecy to obscure the beneficiaries to those transactions" (Palan, Murphy & Chavagneux 2010, p.45).

Regardless of the scope of the above definition, it is appropriate to point out that there are legitimate reasons for actors to engage in such a system. For instance, an offshore jurisdiction may provide access to more developed and stable banking and legal institutions while companies may simply wish to shield expansion plans and property acquisitions from competitors. In both instances, there is a good argument to be made for using offshore facilities.

L'ambiguïté fait partie du monde de l'offshore. Le débat peut faire rage en ce qui concerne les termes et le langage utilisés (par exemple, un centre financier offshore, un paradis fiscal, etc.), les définitions et les avantages d'un tel système. Même s'il y a des aspects légitimes à l'offshore, toute analyse honnête doit conclure que les dommages qu'il provoque sont supérieurs aux avantages qu'il procure. Les chiffres cités dans le texte illustrent ce point. Même en laissant une marge d'erreur énorme et en accordant une grande crédibilité aux arguments des partisans de l'offshore, si l'on supposait que pour chaque chiffre cité, il s'agissait d'une surestimation grossière, les chiffres resteraient tout à fait ahurissants. En outre, le système offre une protection aux plus dangereux et aux plus impitoyables d'entre nous. Il ne s'agit donc pas d'une question purement économique, elle concerne le fondement de notre compréhension de la démocratie.

A Brief History of Leaks and the Value of Offshore Jurisdictions

There have been numerous leaks over the last few years, including: the HSBC Suisse leak (2006); the UBS and LGT leaks (2008); Julius Baer (2008); Luxleaks (2012); the British offshore tax havens leaks (2013 & 2014); the Panama Papers (2014); and the Bahamas leak (2016) (Oei & Ring 2017, pp. 11-27). More recently, the Paradise Papers has resulted in a further increase in interest in offshore systems, as the industry's size and scope becomes clearer.

The figures involved are staggering. For example, the following are indicative of the stakes:

- "The European Union alone loses out on a thousand billion euros a year due to tax fraud and tax evasion." (Obermayer & Obermaier, 2016, p.312).
- "A 2008 US Senate staff report estimates that 'offshore tax abuses' result in an annual loss to the US Treasury of $100 billion in tax revenue" (Omartian, 2016, p.1).
- There has been "a fivefold surge in tax related profit shifting in the last fifteen years alone, now costing governments $300-650 billion per year" (Shaxson, 2018, p.246).
- With respect to revenues lost

to tax havens, the OECD "estimates such practices cost governments between $100 billion and $240 billion in lost revenue each year" (Trautman 2017, p.844).

- "Expert (but conservative) estimates of the amount of money parked in offshore tax avoidance schemes reach to at least 20-30 trillion dollars" (Dillon, 2016, p.56).
- Regarding the relationship between foreign aid to developing countries and financial flows from those countries to offshore jurisdictions, "for every dollar that we have been generously handing out across the top of the table, we in the West have been taking back some $10 of illicit money under the table". (Shaxson, 2011, p.27).

Les solutions législatives pour contenir le phénomène sont connues. Elles sont doubles : l'échange mondial d'informations relatives aux comptes bancaires et un registre des entreprises transparent à l'échelle mondiale. Les choses deviennent de plus en plus compliquées, mais malgré de nombreuses raisons d'être pessimiste, les développements récents incitent à un peu d'optimisme. Par exemple, outre l'intensification de l'effort législatif des deux côtés de l'Atlantique, les résultats publiés par l'OCDE l'année dernière dans «Tax Transparency 2018: Report on Progress» étaient tout simplement sensationnels - 500'000 personnes ayant communiqué des informations sur leurs actifs offshore - et 93 milliards d'euros collectés à la suite de ces efforts législatifs.

You get the picture. The ugly reality is that when "governments try to crack down on offshore tax secrecy, for instance, an army of (…) experts step up, targeting policy makers, denigrating the reformers, persuading offshore centres like the Caymans to write new laws to spike the reforms" (Shaxson 2018, p.179). It is thus clear that there can be a massive degree of complexity and pressure for governments to negotiate.

On ethics, Grayling (2003, p.184) warned against the use of "scholastic superfluities of intricate jargon and technical refinement of use to no one but at best a few colleagues". Following this line, it should be incumbent upon anyone with an interest in the topic to be clear. Accordingly, the system described above stinks. No amount of smart talk from well-paid advocates will change that fact.

In a rare intervention last year with respect to economic policy, The Holy See (2018, p.13) lamented that "it is not possible to ignore the fact that those *offshore* sites (…) have become usual places of recycling dirty money, which is the fruit of illicit income (thefts, frauds, corruption, criminal associations, mafia, war booties etc)." The implication is clear. The game of supranational regulatory arbitrage is offering protection to the worst kind of thugs: the kind that send men in the night to visit the most courageous of youngsters living outside Bratislava. Explicitly stated, "international mafias and weapons dealers actually depend on offshore centers, for it is through this option that they manage to launder revenues from illicit activities" (Ferreira & Madeira 2010, p.6).

In this context, I believe that offshore jurisdictions and the protections they offer (and to whom) must be the focus of any serious discussion about ethics in finance. To be clear, while corporate ethics training programmes are nice, they will not make a meaningful difference. The discussion needs to center on offshore jurisdictions.

Green Shoots

Despite my gloom, there are reasons to be hopeful. The legislative solutions for tackling offshore jurisdictions are known and a consensus appears to be forming about their effectiveness. These measures have already reaped some encouraging results. Concisely, the "first big step would be to introduce an effective system for the global exchange of information about bank accounts", with the second step being "a globally transparent register of companies", where true beneficial owners could be readily identifiable, and the provision of false information made a criminal offence, with tough sentences for breaches (Obermayer & Obermaier 2016, p.305). The devil may be in the detail but that is as complicated as it gets.

Les efforts législatifs déployés sont impressionnants et leur intensification au cours des cinq dernières années est particulièrement remarquable. Ces efforts incluent l'adoption par l'UE du cadre OCDE/G20 Echange automatique d'informations (AEOI), du projet Erosion de la base d'imposition et transfert de bénéfices (BEPS) de l'OCDE et de l'accord du G5 pour un échange automatique d'informations. Le Département de la Justice (DOJ) et la Securities and Exchange Commission (SEC) des États-Unis sont particulièrement méritants de fiat de l'application d'instruments tels que la FATCA et la Kleptocracy Asset Recovery Initiative au cours des dernières années - qui a permis de collecter plus de 6,5 milliards de dollars, et a garanti des revenus en centaines de millions de dollars à la population de pays comme le Nigéria, le Kazakhstan, la Corée du Sud, le Pérou et le Nicaragua.

As alluded to, there have been "significant developments in coordinated global action to increase cross border transparency and information exchange" (Oei & Ring 2017, p.4). For example:

- Ioannides (2016, p.35) notes that for the EU, "the implementation of the OECD/G20's automatic exchange of information (AEOI) was adopted in December 2014".
- Oei and Ring (2017, p.21) continue that following two special committees established by the EU in 2015 (i.e. TAXE 1 and TAXE 2), the "creation of a beneficial ownership register and a proposed framework for whistleblower(s)" was recommended.
- "In October 2015, the OECD's Base Erosion and Profit Sharing (BEPS) project published its final report, requiring companies to divulge where they earn their profits, carry out operations and pay tax" (Ioannides 2016, p.51).
- Further, the "G5 countries have agreed (…) to develop a global multinational multilateral system for an automatic exchange of beneficial ownership information" and "in 2016 the EC adopted a proposal for full public access to beneficial ownership registries for certain legal entities" (Oei & Ring 2017, p.25).
- The EU also adopted the Anti-Avoidance Directive in 2016 (Dillon 2016, p.23).

Jallow (2016, p.11) cites US legislative efforts such as FATCA (Foreign Account Tax Compliance Act), passed in 2010, which "primarily aims to prevent tax evasion by US taxpayers by using non-US financial institutions and offshore investment instruments". The same author proceeds to make twelve broad recommendations, including: enhanced powers for tax authorities to gain access to bank data; establishment of an anti-global tax avoidance and evasion commission; coordinated information sharing between

tax administrations and central banks; and an institutionalised whistleblowing system, with laws that protect the identities of whistleblowers (pp. 13-14).

What are the results of this increased urgency? Are the efforts paying dividends? By any measure, the answer is a resounding yes. The OECD (2018, p.39) reports that, as of July 2017, "in response to disclosure initiatives and similar measures put in place prior to start of exchanges, approximately 500,000 individuals have already disclosed offshore assets worldwide, and some EUR 93 billion in additional tax revenue has been collected". This equates to a massive investment fund for hospitals, schools, police forces, homeless shelters, drug rehabilitation programmes and other public spending projects which cash-strapped governments would otherwise have not been able to afford.

The figure includes the following publicly-reported tax revenues that were recovered (OECD 2018, pp. 40-41):

Brazil – approximately EUR 12 billion;

France - EUR 7.8 billion;

India - EUR 6 billion;

Indonesia - more than USD 10 billion;

Mexico – approximately EUR 826 million;

Burkina Faso – USD 2.4 million (from the first seven information requests).

In this context, even the most entrenched pessimist must admit that things are moving in the right direction.

Results on both sides of the Atlantic

Furthermore, Trautman (2017, pp. 851-855) reports that the US Department of Justice (DOJ) brought approximately 60 cases against individuals and more than 60 against corporations between 2009 and 2017, using the FATCA and other laws. This litigation led to the collection of more than $4 billion in penalties. In the same period, the Securities and Exchange Commission (SEC) initiated proceedings against more than 85 companies and around 35 individuals, resulting in the collection of around $2.5 billion. Lastly, the DOJ has helped recover hundreds of millions of dollars for the people of nations such as Nigeria, Kazakhstan, South Korea, Peru and Nicaragua, using the Kleptocracy Asset Recovery Initiative (2010).

This is just the beginning. The OECD reports that The Global Forum on Transparency and Exchange of Information for Tax Purposes ("The Global Forum"), increased its membership to 154 in 2018, with nine new jurisdictions joining last year, while "nearly 90 governments have begun automatically exchanging information on financial accounts of non-residents" (OECD 2018, p.4), partly motivated by the successes of the early adopters. It is also noteworthy that, in line with the

policy prescriptions cited earlier, "at the request of the G20, the Global Forum and the Financial Action Task Force (FATF) work together on the ways to improve the availability of beneficial ownership information and its international exchange" (OECD 2018, p.11).

The agenda for 2019 represents a heavy workload. It envisages the delivery of existing AEOI commitments; assessments of legal frameworks; expansion of support for developing countries; the publication of 30 reports; and an intensification of technical assistance, with a view to "a strong priority being placed on the availability of, and access to, beneficial ownership information" (OECD 2018, p.43). A cynical analysis of these developments might conclude that these are just more examples of bureaucracy. However, once this system of coordination matures, it may well have the capacity to hold the nefarious to account when future scandals occur, by depriving them access to the shadows in which they hide.

The Assassin's Veto: Terrifying Developments for A Free Press

"'There are crooks everywhere you look now', Daphne Galizia wrote. 'The situation is desperate.' Those were the last words she ever published. The 53-year-old journalist was killed when her car exploded later that day" (CPJ 2018, p.12). That particular horror unfolded in a European capital on a dark day in October 2017.

Holding power to account is a dangerous business. Earlier, I cited a figure of 80 journalists killed in 2018, of whom 49 were deliberately targeted (RSF 2018, p.6). Regrettably, that does not reveal the full extent of the danger. Consider, for example, that in 2018 348 journalists were detained, 60 were held hostage, while a further three went missing (RSF 2018, p.3). It was a year "in which journalists are accused of terrorism on the basis of a single word or a single phone contact" (RSF 2018, p.15).

The figures for mortality and impunity rates during the past decade make for even grimmer reading. In a UNESCO-cited report, the IMS (International Media Support) notes that 827 journalists were killed in the last ten years. Frighteningly, with "only 8% of cases reported as resolved (63 out of 827), impunity for these crimes is alarmingly high. This impedes the free flow of information that is so vital for sustainable development, peace- building, and social welfare of humankind. This widespread impunity fuels and perpetuates a cycle of violence that silences media and stifles public debate" (IMS 2017, p.18).

Put yourself in a journalist's shoes. Is taking on serious topics and seeking to hold power to account wise, given this reality? Do these horrors not serve as a *de-facto* warning amounting to a borderline

Des dizaines de meurtres, dont certains de nature simplement macabre, des détentions, des prises d'otages, des personnes portées disparues sont la terrifiante réalité à laquelle sont confrontés les journalistes qui effectuent un travail d'enquête sérieux. Les meurtres de Ján Kuciak et de Victoria Marinova démontrant que l'âge n'a aucune importance pour les plus impitoyables. Ce qui est choquant, c'est que ces cas se soient produits en Europe, en 2018, où la plupart des gens (y compris moi-même) auraient aimé croire que des institutions et des systèmes juridiques matures étaient en mesure de prévenir tels meurtres. Ces cas ont également mis en évidence le fait que quiconque a des principes et est cherche à apporter un changement positif est en danger. Cela aurait pu être toi. Ou moi. Ou un de vos fils ou de vos filles.

Au sujet des lanceurs d'alerte, il y a une raison d'être optimiste. Chaque État peut choisir de ne pas poursuivre ceux qui rendent publiques des informations sensibles. Cependant, l'absence d'un mandat démocratique pour les lanceurs d'alerte pose des problèmes. Le fait que nos gouvernements, nos services de sécurité et nos services secrets soient mieux placés que Wikileaks pour déterminer quelles informations sont adaptées à une utilisation publique, n'a pas été contesté par un seul auteur. En dépit des meilleures intentions des lanceurs d'alerte et des organisation correspondantes, la possibilité de divulgations irresponsables et de conséquences inattendues reste de mise. Elle peut également mettre en danger des personnes bien intentionnées. L'auto-immunité des lanceurs d'alerte qui passent par les canaux publics est la solution ici. Les informations fournies peuvent être correctement vérifiées, les prochaines étapes déterminées et les lacunes relatives à un mandat démocratique comblées.

veto on serious investigative reporting? Should we be surprised that, as consumers of news, we routinely find headlines such as; "Curious cockatoo inspects traffic camera" (Sky News), and "The Korean island in love with sex" (BBC)?

These headlines appeared on the homepages of the major news outlets at the date of writing (28 March 2019). It is not to diminish the importance of cockatoos or sex, but these are hardly topics that will make thugs think twice. With respect to the impunity documented above, I find it difficult to blame the journalists or editorial teams for pursuing such "human-interest" stories. If civil society is apathetic about the need to have a serious conversation about protections for journalists, then the adage "garbage in, garbage out" may apply.

A Space for Supranational Governance Organisations to Demonstrate Competence

The only good news is that there is acknowledgement of the problem at the supranational level. The UN Plan of Action on the Safety of Journalists and the Issue of Impunity, adopted in 2012, is one such example (IMS 2017, p.11). It "outlines more than 120 measures to improve safety and combat impunity through the coordinated responses of states, NGOs, media, and international organisations" (IMS 2017, p.20). Further, "five resolutions have been adopted across the UN system since 2012, including by the UN General Assembly, the UN Security Council and the UN Human Rights Council" (IMS 2017, p.57).

IMS has also proposed a framework based on its experiences (IMS 2017, pp.37-45) which merits consideration. However, traction on the issue is clearly difficult to achieve. It is still the case that in "only a small number of countries do journalists have access to state-supported programmes for protection, and even in these countries, many journalists at risk fall through the cracks" (IMS 2017, p.19).

Whistleblowers are facing difficulties of a different nature. Oei and Ring (2017) report the experiences of some of those who were behind the variety of leaks reported earlier, regarding offshore jurisdictions. For example:

- For his part in the HSBC Suisse Leak (2006), Hervé Falciani "was tried *in absentia* in Switzerland and convicted of aggravated industrial espionage in November 2015. (…) He faces a five-year prison term if he ever returns to Switzerland" (Oei & Ring 2017, p.15).
- With respect to the UBS leaks (2008), Bradley Birkenfeld was "charged by federal prosecutors on one count of conspiracy to defraud the U.S., to which he pled guilty and was sentenced to 40 months in prison (…) subsequently awarded a $104

million whistleblower award." (Oei & Ring 2017, p.12).

- For the Luxleaks (2012), prosecutions were brought against the whistleblower (Antoine Deltour) and the journalist who broke the story (Edouard Perrin). They were charged with "theft, breach of confidentiality, trade secrets violation, and fraudulent access to automated data processing systems", and "theft, complicity in theft, whitewashing, and accessing protected databases" (Oei & Ring 2017, p.22). They were fined and received suspended sentences.

Who would dare blow the whistle, regardless of the transgressions, in the face of almost certain prosecution by the state? It is clear that whistleblowers are being aggressively disincentivised. It is in this context that "John Doe" (the source behind the Panama Papers) writes: "Legitimate whistle-blowers who expose unquestionable wrong-doing, whether insiders or outsiders, deserve immunity from government retribution, full stop" (Obermayer & Obermaier 2016, p.347). This argument is hard to dismiss, given the clear risks to whistleblowers' reputations, job prospects and liberty.

The Indispensability of Democratic Mandate

The above, however, needs to be qualified. In a New Statesman debate (2011), Julian Assange appeared on the same stage as the British author Douglas Murray. Mr. Murray put a series of questions to Assange that are similarly difficult to dismiss. Among other questions, Murray asked: "Who funds Wikileaks?"; "Who works for you?"; "Who are you involved with?" "Where are you even based?" Importantly, Murray also asked: "What gives you the right to decide what should be known to the public and what should not? Governments are elected, you, Mr. Assange, are not."

Oei and Ring (2017, p.44) also cite challenges in this respect, stating that "leakers have obvious discretion over whose information to collect, when to collect, what kinds of information to collect, and what date ranges to capture". Referring to the organisations that ultimately disseminate the leaks, the authors note that they "may have independent and potentially conflicting agendas that may shift over time and that may not be primarily about optimizing tax compliance, enforcement or social welfare" (Oei & Ring 2017, p.46).

The need to provide whistleblowers with protections, whilst acknowledging the absence of a democratic mandate for whistleblowing organisations thus needs to be balanced. Can this goal be achieved? I would suggest that auto-immunity for leaks made through public channels, such as EULeaks, launched in 2016, could help close the gap in this respect. It seems reasonable that if individuals

are incurring enormous personal risks to protect what they believe to be in the public interest, then public institutions should seek to protect them in return. Of course, pitfalls exist. For example, it could well be that the leaker gets quashed if submissions are made on a national level, where the subject of the leak has both power and an interest in suppressing the information. It seems to me that such a system could only function at the supranational level. Even then, consensus around the idea and how this system would work in practice would clearly be difficult to achieve.

However, it is noteworthy that in March 2019 the European Parliament "reached a provisional agreement on the first EU-wide rules on protecting whistle-blowers when they report on breaches of EU law" (EU Parliament 2019). Key aspects of the proposed legislation include ensuring safe reporting channels and safeguards against reprisals. This is certainly a commendable step in the right direction.

Incentives

In *The Power of the Powerless* (1978, p.9), Havel wrote of Soviet era communism that "individuals confirm the system, fulfil the system, make the system, are the system." Havel's words still hold a compelling logic with regard to the two major topics addressed in this paper: – the system of offshore jurisdictions and threats to journalists and whistleblowers.. There is no conspiracy. There are just individuals acting in line with the prevailing structure of incentives. Against this background, this section will highlight a series of heuristic approaches for different players which merit consideration.

1. **Government**

The present situation: Governments that maintain an offshore economic model do so to attract foreign investment and jobs to their local jurisdictions. Any narrative that challenges the merits of such an approach is zealously defended against on the grounds of *tax competition* or *tax sovereignty,* etc.

Heuristic approaches:

(i) Political Isolation: In *Why Nations Fail* (Acemoglu & Robinson 2012, p.74-75), the authors cite the importance of inclusive economic institutions as critical to a nation's success, with characteristics including "secure private property, an unbiased system of law, and a provision of public services that provides a level playing field in which people can exchange and contract…". This point is made with respect to individual nations. However, a double standard is present if economic institutions are inclusive in nature at a national level, but extractive by nature when orientated towards external players. The authors continue: "The most common reason why nations fail today is because they have extractive institutions" (Acemoglu & Robinson 2012, pp.368-369). How the

Les incitations sont essentielles au vu des actions qu'elles déclenchent. À ce jour, les acteurs (gouvernements, entreprises, médias et particuliers) se sont retrouvés dans un environnement où les révélations d'information menaçantes pour le système donnent suite à des sanctions affligeantes et prévisibles. Cependant, un ensemble puissant d'incitations concurrentielles commence à émerger, ce qui peut amener des réactions différentes permettant d'aller de l'avant. Prenons les gouvernements, par exemple, la défense zélée des modèles offshore est parfaitement compréhensible dans un contexte de peur, qu'il s'agisse de pertes d'emplois, de pertes d'impôts ou de la diminution de la croissance économique de chaque État. Cependant, l'isolement politique, le principe de la réciprocité, l'effet dissuasif des prélèvements fiscaux massifs antérieurs et des informations sur d'autres prélèvements fiscaux énormes pourraient s'avérer dissuasif et modifier le calcul à l'avenir.

inclusive versus extractive nature of institutions works between countries is thus of critical importance.

Palan *et al.* (2010, p.238) note that "tax havens raise important questions about the sovereign rights of smaller countries; they also raise questions about the nature of sovereignty more broadly; especially where the rights of one state impinge, or are perceived to impinge, on the sovereign rights of other states".

Questions of sovereignty are thus on the table, although perhaps not in the manner originally conceived, if a country is actively contributing to the failure of other nations via the extractive orientation of her institutions, in the context of targeting foreign-based citizens and businesses. Reputational risk, financial risk, willingness of other nations to make new agreements and to honour existing ones (on bilateral and multilateral levels) may all come into play. The risk of political isolation and diminished standing in the international order should not be underestimated.

(ii) A Two-Way Street: It follows that if government *abc* seeks to frame its offshore economic model as a matter of tax sovereignty, then the same logic holds if government *xyz* starts targeting businesses in the jurisdiction of *abc*. The principle is also applicable if everyday citizens who dutifully pay their taxes in a given jurisdiction notice that there are multinational corporations paying nothing to state coffers. By persisting with this demonstrable unfairness, governments are incentivising their own tax-paying citizens to explore tax avoidance schemes.

(iii) Massive tax takes foregone: In terms of reputation protection and seeking to be perceived as a reliable partner in commitment to offshore, governments run the risk of foregoing enormous tax takes. In the case of Ireland, for example, in September 2018 there was still EUR 14.3 billion sitting in an escrow account, paid in by Apple following an EU ruling that state aid had been provided *vis-à-vis* a favourable tax regime (The Guardian, 2018). The matter is still progressing through an appeals process.

Furthermore, disincentivising whistleblowers in the manner discussed reduces the likelihood of being able to tap into enormous reserves of untaxed wealth.

Competing Incentives in the Private Sphere

2. Corporate Executives

The present situation: Corporate executives are incentivised to pursue offshore tax reduction strategies because their firms might be left at a competitive disadvantage if they do not. In addition, their fiduciary duty may compel them legally to pursue such strategies.

Heuristic approaches:

(i) Share price and reputation effects: Consider that the Panama Papers data leak "erased US$135 billion in market capitalization

Les fuites ne disparaitront pas. Dans le monde moderne, tout ce qu'il faut, c'est un enfant de 12 ans doté d'une formidable compétence informatique, ainsi qu'une raison pour être en colère et le résultat final peut être une fuite. C'est dans ce contexte que l'on peut bâtir un argument valable en faveur sens éthique et responsable dans la vue des affares. La participation au jeu offshore par les intérêts des entreprises est logiquement motivée par la protection des bénéfices et le désir de ne pas subir de désavantage concurrentiel. Cependant, les pertes énormes subies par les entreprises impliquées dans le scandale des Panama Papers (en termes de capitalisation boursière), les coûts en flèche liés à la conformité et une volonté politique manifeste d'imposer de lourdes amendes pourraient remettre en cause la compréhension jusqu'à présent bien établie de l'obligation fiduciaire. Si ces facteurs se conjuguent et dépassent la valeur des activités offshore, les dirigeants de sociétés pourraient être tenus légalement responsables vis-à-vis des actionnaires d'une manière qui n'avait pas été prise en compte auparavant.

La presse libre est continuellement attaquée et toute personne concernée par la démocratie doit être inquiète. La situation est urgente et il n'y a pas de solution facile. Le nouveau statu quo est peut-être le fait de se méfier des histoires à grand retentissement et d'observer quelle sera l'efficacité des récents efforts législatifs. Certains efforts ont été déployés en matière de reportage coordonné en ce qui concerne les meurtres de journalistes, mais il faut les renforcer. La tendance à la concentration dans l'industrie pourrait en réalité être une bonne chose à cet égard. Si Google s'engage par exemple à afficher les informations sur chaque journaliste assassiné sur sa page d'accueil - ou que Newscorp s'engage à mettre sur sa page de couverture des articles sur ce sujet - un ou deux monstres pourraient être enclins à penser que cela ne vaut pas la peine de s'y risquer, car il en résulterait une perte pour leurs affaires.

among 397 firms with direct exposure to the revelations (…), reflecting 0.7 percent of their market value" (O'Donovan, Wagner & Zeume 2017, p.26). That is $340 million on average. The leak "wiped a total of 220-230 billion dollars of market capitalizations of firms around the world" (Wagner, 2016). Interestingly, "high reputation firms are significantly more negatively affected when implicated" (O'Donovan et al. 2017, p.5). In the context of continuing leaks, it is thus a significant risk for corporate executives to continue pursuing offshore strategies.

(ii) Compliance costs: Compliance costs can be enormous in a changing regulatory landscape. When the US initiated FATCA, for example, "UK business face(d) one-time implementation costs of £2-3 billion to comply with its provisions, followed by ongoing costs of £100-170 million annually" (Omartian 2016, p.6). It stands to reason that if firms are not engaged in the offshore game, then substantial compliance costs can be eradicated, if not greatly reduced. It is in this context that "regulators need to focus on 'nudging' – encouraging, persuading and empowering – companies to recognise and embrace the commercial and other strategic benefits of more open communication" (Fenwick & Vermeulen 2016, p.7).

(iii) Political willingness to leverage massive fines: The ICIJ reports that the "global tally of fines and back taxes resulting from the Panama Papers investigation's exposure" now exceeds $1.2 billion" (ICIJ, 2019). Furthermore, the same publication notes that this figure "almost certainly understates total revenue raised as a result of the Panama Papers given that many countries do not disclose information on tax settlements".

(iv) Inverted Fiduciary Duty: McGee (2016, p.8) notes that "corporate board members have a fiduciary duty to their shareholders to safeguard the assets of the corporation. (…) Thus, the argument could be made that the top management of a corporation has a fiduciary duty to export profits if doing so is in the best interests of the shareholders."

The calculus could be changing with respect to the implications of fiduciary duty, given the impact on the share prices of companies caught up in leaks, compliance costs, and the demonstrated willingness of governments to leverage heavy fines. For instance, there could be a legal basis for shareholders to argue that the executives acted in contravention of their fiduciary duty, if taxes saved via offshore jurisdictions are exceeded by compliance costs, share price hits and fines (in the instance of a disclosure).

Does Violence Need to be Inevitable?

3. **Media Organisations**

The present situation: It has become truly dangerous for

media outlets, journalists and whistleblowers to hold power to account. Hence, a shying away from difficult topics may be emerging.

Heuristic approaches:

(i) Coordinated disincentivising of monsters: Considering the dangers and examples of impunity highlighted earlier, I find it impossible to blame media organisations that are reluctant to take on hard-hitting stories. The solutions might come from "concerted efforts through national coalitions and partnerships or under state-led mechanisms (that) can build a safer climate in which the media can work" (IMS 2017, p.49).

Yet the most effective tool for better outcomes may be the global media platforms themselves. Whenever a journalist is murdered, coordinated news coverage across networks may just serve as a strong disincentive. The reporting would ideally follow the work of the deceased, and provide in-depth analysis of the business holdings and individuals the journalist was investigating. However, this would necessarily require broad participation, because a small number of players sticking their heads above the parapet would be extremely dangerous for them to do so.

4. **Private Citizens**

The present situation: High levels of apathy exist with respect to the integrity of politics and business, reinforced by repeated scandals and seemingly impenetrable opacity.

Heuristic approaches:

(i) Democracy as a vehicle for accountability: Apathy is understandable in the face of the opacity that characterizes offshore jurisdictions. However, these matters do not simply concern finance and economics, but also speak to the vitality of democracies, considering that "opaque jurisdictions contribute to the creation of an extreme concentration of wealth, which may cause economic instability and long recessions" (Ferreira & Madeira 2010, p10). A good case can be made for individuals to be a little less apathetic. "People who often feel hopeless about prospects for change often forget that democracy is a mighty weapon, and it remains very much alive" (Shaxson 2018, p.273).

Les citoyens ont également un rôle à jouer. Tant qu'un système largement démocratique prévaut, les gens ont la possibilité de faire entendre leur voix. Pourquoi la grande majorité des gens ne participe-t-elle pas au système offshore? Une absence d'information? Les coûts de coordination? L'irrationalité économique? Aucune de ces réponses ne l'explique.
Il est plutôt vrai que la vaste majorité des gens savent qu'il existe un lien entre les impôts qu'ils paient et la possibilité d'appeler la police ou une ambulance en cas d'urgence, la possibilité de conduire sur de bonnes routes ou d'avoir leurs enfants éduqués. Il y a de la dignité et de la valeur dans cela.

Conclusion

This paper set out to make four arguments and the success with which each has been made is for others to decide. I believe there is a clear relationship between the two main topics of offshore jurisdictions and protections for journalists and whistleblowers. Opacity kills by endangering those who seek to reduce it. When tackling it in public policy forums, this should perhaps be borne in mind, as it packs more of an emotional punch than purely numerical and statistics-based arguments. I hope that (a) something akin to a Treaty of Westphalia can be negotiated with respect to tax avoidance and evasion; and (b) the free press, as most people understand it, is upheld, supported

and protected by all available means.

Lastly, the following comments seem particularly pertinent regarding each of the topics addressed. On offshore jurisdictions, the former US Attorney General Loretta E. Lynch remarked that "acquiescence is the very opposite of good government – hoping for right to come from what is profoundly wrong – inserts a cancer into the ethical life of a society" (Trautman 2017, p.840). If such sentiments are reflected in public policy moving forward, then the future can be very bright indeed.

Although protections for journalists and whistleblowers are not a laughing matter, an old Soviet joke neatly captures the absurdity of the situation:

"A big crowd of people is quietly standing in a lake of sewage coming up to their chins. Suddenly a dissident falls in it and starts shouting and waving his hands in disgust: 'Yuk! I cannot stand this! How can you people accept these horrible conditions?!' To which the people reply with a quiet indignation: 'Shut up! You are making waves!'" (Yurchak 2005, p.278).

I hope you agree that if we find ourselves standing around in sewage up to our chins and one of us happens to fall, directing our anger at that particular person will not help change anything in the long run. •

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