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From:	Legal Service
To:	Permanent Representatives Committee (Part 2)
Subject:	Legal remarks on the Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion (PANA Committee)

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### I. INTRODUCTION

1. On 8 June 2016, the European Parliament decided to set up a committee of inquiry "PANA" (hereinafter referred to as "the PANA committee") to investigate "alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion"<sup>1</sup> (hereinafter referred to as "the EP decision"). The decision followed the agreement in the EP's Conference of Presidents on 2 June on the mandate for the committee.

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<sup>1</sup> P8\_TA-PROV(2016)0253.

2. The present contribution aims at setting out the legal framework within which the European Parliament can exercise its right of inquiry and at providing a legal assessment of the mandate adopted for the "PANA" committee, with a view to facilitating the coordination by the Council and the Member States of their response to possible requests for participation in its proceedings.

## II. LEGAL AND FACTUAL BACKGROUND

3. The legal framework within which a committee of inquiry can be set up by the European Parliament is defined by Article 226 TFEU and by Decision 1995/167/EC of the Parliament, the Council and the Commission of 6 March 1995<sup>2</sup> (hereinafter referred to as "the 1995 Decision"). The 1995 Decision was adopted on the basis of the predecessor of Article 226 TFEU, a provision which was drafted in terms very similar to the latter.<sup>3</sup>
4. Pursuant to Article 226 TFEU, "*(i)n the course of its duties, the European Parliament may (...) set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings (...).*"
5. The same Article also provides that "*(t)he detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission.*"

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<sup>2</sup> Decision of the European Parliament, the Council and the Commission of 6 March 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, *OJ L 78 of 6.4.1995, p. 1.*

<sup>3</sup> Detailed modalities governing the exercise of the right of inquiry by the Parliament are set out in Rule 198 of the Parliament's Rules of Procedure, <http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf>

6. These detailed provisions are currently laid down in the 1995 Decision. Inter alia, Article 2(1) thereof provides that the decision to set up a temporary committee of inquiry shall specify in particular its purpose. This entails in particular, as the Parliament itself has laid down in Rule 198(3) of its Rules of Procedure, that the subject of the inquiry be precisely specified and that a detailed statement of grounds be included. Article 2(2) of the 1995 Decision also requires that the temporary committee of inquiry carry out its duties in compliance with the powers conferred by the Treaties on the institutions and bodies of the Union.
7. Article 3 of the Decision sets out the modalities of the exercise by the EP of its right of inquiry:
- A committee of inquiry may invite a Union<sup>4</sup> institution or body or the Government of a Member State to designate one of its members to take part in its proceedings (paragraph 2);
  - On a reasoned request from the committee of inquiry, the Member States concerned and the Union institutions or bodies shall designate the official or servant whom they authorise to appear before the committee, unless grounds of secrecy of public or national security dictate otherwise by virtue of national or Union legislation (first subparagraph of paragraph 3);
  - The officials or servants in question shall speak on behalf of and as instructed by their Governments or institutions. They shall continue to be bound by the obligations arising from the rules to which they are subject. (second subparagraph of paragraph 3);
  - The authorities of the Member States and the institutions or bodies of the Union shall provide a temporary committee of inquiry, where it so requests or on their own initiative, with the documents necessary for the performance of its duties, save where prevented from doing so by reasons of secrecy or public or national security arising out of national or Union legislation or rules (paragraph 4);
  - Paragraphs 3 and 4 shall be without prejudice to any other provisions of the Member States which prohibit officials from appearing or documents from being forwarded (paragraph 5).

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<sup>4</sup> Text adapted to the current reality.

8. The EP has in 2012 agreed on a proposal for a Regulation on the right of inquiry to replace the 1995 Decision, through which it seeks to strengthen its investigative powers. The CLS has analysed the EP's proposal at two occasions.<sup>5</sup> Until today, the institutions have not been able to make much progress on this file.
9. The mandate by the Parliament's conference of presidents of 2 June refers to the grounds for the establishment of the PANA committee, i.e., the revelations by the International Consortium for Investigative Journalism (ICIJ) of 11.5 million documents from Mossack Fonseca, a law firm based in Panama (the "Panama papers"), where cases of tax evasion and avoidance and money laundering were uncovered. The EP decision establishing the committee simply calls on the PANA committee to investigate "*alleged contraventions, and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion*" (see point 1 of the EP decision), without however making any link between the alleged contraventions and maladministration and the Panama papers case.

### **III. LEGAL ANALYSIS**

#### **1) Examination of the EP decision to set up a committee of inquiry**

10. The current legal framework, as set out above, requires that a decision to set up a committee of inquiry: i) specifies precisely the facts that are the subject matter of the inquiry; ii) specifies precisely which provisions of Union law are alleged to have been implemented in a manner constituting contravention or maladministration. However, the EP decision does not meet any of these two requirements.
11. First, the mandate of a committee of inquiry has to refer to specific facts and must not be general and abstract. Specifying the subject of the inquiry in a sufficiently precise manner is a requisite for enabling the institutions and Member States concerned to prepare their participation in the works of the committee properly. It is also a condition, as will be shown (paragraphs 21 and following below), for Member States and institutions to be in a position to ascertain the extent of their obligations towards a committee of inquiry.

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<sup>5</sup> See documents 6056/12 and 9540/15.

12. The subject matter of the PANA committee is described in very broad terms, as related to "*money laundering, tax avoidance and tax evasion*". Not only does this mandate not specify the relevant facts object of inquiry, it does not specify the Member States concerned either. Thus, any Member State could be the subject of an inquiry with regard to any case of money laundering, tax avoidance and tax evasion, according to the EP decision.
13. Furthermore, the overall context around the creation of the committee, i.e. the "Panama papers" revelations to which the mandate of the conference of Presidents refers, does not add any degree of accuracy, as those revelations regard an enormous amount of operations and transactions, which makes it impossible to identify the object of inquiry *ex ante* with a sufficient level of specificity.
14. Second, since the EP decision does not contain any specific presentation of the facts that form the object of the inquiry, it also fails to show in what ways contraventions or cases of maladministration in the implementation of the law of the Union may have taken place.
15. The EP decision enumerates a long list of Directives<sup>6</sup> in different fields, i.e., money laundering, exchange of tax information, financial services and company law, without however linking them to any alleged case of contravention or maladministration in the implementation of EU law or indicating which of their provisions are involved.
16. The pieces of legislation on financial services, company law and money laundering which are cited in the EP decision do not concern taxpayers' relations with tax administrations or the procedures to establish their tax obligations.

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<sup>6</sup> Point 2 of the decision.

17. In fact, at its current state of development, with EU law in this field containing hardly any provision aiming at preventing and combatting tax evasion and avoidance, Member States remain competent to regulate on these matters by means of their internal legislation or through double taxation agreements. Accordingly, the facts underlying the creation of the PANA committee, i.e. the "Panama papers" case to which the mandate of the Conference of the EP presidents refers, do not fall within the scope of application of Union law but within the scope of application of domestic tax laws and of double taxation agreements with third countries. The only precise reference in the EP decision to a tax provision of Union law is the one to Article 9(1) of Directive 2011/16/EU in the third indent of point 2 of the EP decision. Again, the EP decision fails to specify how tax avoidance and evasion is linked to the failure by Member States to implement that provision. Besides, it is recalled that that provision concerns cooperation between tax authorities of Member States and not of third countries.
18. In addition, a great number of the Directives cited in the EP decision have been adopted only rather recently, which means that the time-period for their implementation has not expired yet or has only just expired<sup>7</sup>. Any investigation on alleged contraventions or maladministration in the implementation of those acts would thus be premature.
19. Likewise, the EP decision fails to show in what manner "*money laundering, tax avoidance and tax evasion*" would amount to a failure of Member States to enforce State aid provisions under Articles 107 and 108 TFEU, as referred to in the fourth indent of point 2 of that decision, nor does it specify the Member States that are allegedly breaching their State aid obligations.

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<sup>7</sup> This is acknowledged in the EP decision by reference in the text to "*taking into account the obligation of timely and effective implementation*". See for instance, Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing that shall be transposed by Member States by 26 June 2017; Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation that applies as from 1 January 2016. The provisions of Directive 2011/16/EU relevant to the automatic exchange of information are applicable as from 1 January 2015.

20. Finally, the EP decision does not provide any element permitting to conclude that Member States have breached the duty of sincere cooperation incumbent on them by virtue of Article 4(3) TEU, as referred to in the penultimate indent of point 2 of the EP decision.

## **2) Implications for Member States and for the Council**

### *a) The obligation of the Member States and of the Council to participate in the PANA committee*

21. The unspecific and generic character of the facts and of the law on which the EP decision is based does not allow neither the Member States nor the Council to assess their obligation to participate in the works of the committee of inquiry.
22. On the one hand, it does not allow them to ascertain the possible application of the exemptions for participation referred to above in paragraph 7 (reasons of secrecy, public or national security arising from national or Union legislation, or provisions of Member States preventing officials from appearing or documents from being forwarded). On the other hand, the failure to specify the relevant facts and the Member States concerned does not permit to verify compliance with the *sub judice* prohibition under Article 226 TFEU and Article 2(3) of the 1995 Decision, thus making unfeasible to determine whether the subject-matter of the inquiry interferes with any ongoing court proceedings. Finally, as explained above (paragraph 11), it does not allow Member States and the Council to ensure a due preparation for their participation in the proceedings of the committee.
23. In the absence of an adequate level of specificity by the EP Decision, the "reasoned request" on which individual Member States or the Council may be called to contribute to the works of the PANA committee, should identify in sufficiently clear, precise and unequivocal terms the factual and legal elements which form the object of the inquiry, so that the former are in a position to determine their obligation to participate and, if applicable, invoke any of the exemptions not to do so laid down under Article 226 TFEU and the 1995 Decision. Were this not the case, Member States and the Council may validly refuse participation so that their rights and interests are preserved.

*b) The principles of inter-institutional balance and of conferral of powers*

24. As referred to above, Article 226 TFEU stipulates that the inquiry must be without prejudice to the powers of other institutions or bodies. It must be carried out with due account to the principle of conferral of powers of the Union and its institutions (Article 5(2) TEU and 13(2) TEU).
25. However, as explained, the adoption of laws and regulations addressed at preventing and combating tax evasion and avoidance remains, in principle, the competence of Member States. Noteworthy, the governments and administrations of Member States are not accountable before the EP when applying their domestic law.
26. The Union holds the competence to harmonise national laws, regulations and administrative provisions in the field of taxation that directly affect the establishment or functioning of the internal market (Articles 113 and 115 TFEU). If, arguably, the Union may legislate on matters related to tax evasion (as long as this were necessary for the establishment or functioning of the internal market), this should be decided by the Council, acting on a proposal by the Commission, after consultation of the Parliament.
27. It remains a fact, however, that as long as the Union has not acted on this basis, the matter continues to belong to the competence of Member States. By seeking to exercise a general and unqualified control over the manner in which Member States apply their national laws and regulations to combat tax evasion, the active role which the EP assigns itself by setting up this committee of inquiry with a very wide mandate extends the current powers of the Union in the field of taxation, encroaching thus upon those that remain with the Member States. It would also risk affecting the inter-institutional balance laid down in the Treaties that confer upon the Council, acting as sole legislator, the power to harmonise national tax laws and regulations.



28. The Parliament would give itself an institutional role of a general character in the control of the implementation by the Member States of their national law and of the policies of the Union as regards taxation<sup>8</sup>. However, it is recalled that the task of monitoring the implementation of Union law by the Member States is a task which the Treaties assign to the Commission.<sup>9</sup>
29. The power to investigate specific circumstances of fact that likely constitute maladministration or contravention of the law of the Union, that the Parliament has under Article 226 TFEU, has to be clearly distinguished from a general power of review of the implementation by Member States of their domestic law and of EU law - which it does not have either on the basis of Article 226 TFEU or of any other Treaty provision. It is specifically noted that the Parliament's power of political control to which Article 14(1) TEU refers has to be exercised "*as laid down in the Treaties*" – thus in compliance with Article 226 TFEU and the principle of conferral - and cannot become a general clause of accountability of Member States before the Parliament. The purpose of a committee of inquiry cannot be to substitute itself for the Commission by asking Member States to provide it with information on the transposition and implementation of Union acts, unless this request is duly founded through a link with alleged contraventions or facts of maladministration in the application of these acts of Union law.

*c) Coordination among Member States*

30. In view of the above, it seems opportune that Member States and the presidency, in its quality of representative of the Council, coordinate their decisions to participate in the works of the PANA committee so that the scope and modalities of such participation (or their decision not to do so) respond to a unified approach.

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<sup>8</sup> The EP has recently sought to obtain, without success, such a general role in the oversight of the application by Member States of Union law in the framework of the negotiation of the Inter-institutional Agreement on Better Regulation.

<sup>9</sup> Article 17 TEU '[the Commission] shall ensure the application of the Treaties and of the measures adopted by the institutions pursuant to them. It shall oversee the application of Union law [...]']

31. In particular, such coordination may include, i) a common assessment on whether the reasoned requests for participation received from the Parliament are sufficiently clear, precise and unequivocal in the sense explained previously; ii) a common identification of the PANA committee's questions and requests in respect of which Member States and the presidency intend - or not - to participate; iii) a common language and elements of response in relation to identical or analogous questions and requests from the PANA committee, as appropriate.
32. As the case has been in analogous previous exercises (i.e, the coordination of the Member States' position on the Parliament's request for privileged access to Code of Conduct – business taxation - documents), that coordination could take place within the framework of the Code of Conduct (business taxation) or Tax Questions working groups.
33. Finally, in view of the legal remarks presented in this note, it is recalled that the Member States or the Council, if so authorised by a majority of its members, may contest the legality of the EP decision, under the conditions laid down by Article 263 TFEU<sup>10</sup>.

#### **IV. CONCLUSIONS**

34. The EP decision on setting up a committee of inquiry to investigate alleged contraventions and maladministration in relation to money laundering, tax avoidance and tax evasion
  - does not specify with a sufficient level of precision the facts that are the subject matter of the inquiry, nor the provisions of Union law that have been implemented in a manner constituting contravention or maladministration;
  - as such, does not allow Member States, nor the Council, to assess their obligation to participate in the works of the committee, neither to ensure a due preparation of any such participation;

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<sup>10</sup> In particular, actions for annulment shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. This procedural time-limit shall be extended on account of distance by a single period of 10 days (Article 51 Rules of Procedure of the Court of Justice).

- institutes a general power of control on the application by Member States of their national laws and of the policies of the Union as regards taxation, beyond the framework of Article 226 TFEU and of the competences of the Parliament as laid down in Article 14 TEU;
- risks altering the inter-institutional balance laid down in the Treaties that confer upon the Council, acting as sole legislator, the power to harmonise national laws and regulations in the field of taxation.

35. It is advised that any possible decision of Member States to take part in the works of the PANA committee - or their decision not to do so - be subject to prior coordination within the preparatory bodies of the Council so that the scope and modalities of their respective contributions respond to a unified approach.

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