

The Permanent Representative

Brussels, 23rd March 2017
Ref.: BRÜSSEL-ÖV/ALLG/0059/2017

Dear Chairman,

Please let me first apologise for the delayed transmission of Austria's response to the inquiry by the PANA Committee of the European Parliament as regards the investigations about alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion.

As relates the specific points of your inquiry, please find the consolidated reply as follows:

- The legal definitions of tax-related offences in Austria are to be found in the Finanzstrafgesetz/FinStrG (Fiscal Offences Act) which we include as Annex I to this reply. The legal definition of money laundering on the other hand is to be found in the Strafgesetzbuch/StGB (Criminal Code) and is included as Annex II to this reply. The Verbandsverantwortlichkeitsgesetz/VbVG (Austrian Federal Statute on the Responsibility of Entities for Criminal Offences) provides for general criminal liability of corporations, registered partnerships [Eingetragene Personengesellschaften] and European Economic Interest Groupings for all criminal offences in addition to and independent from the liability of the natural persons prosecuted for the same act.
- In relation to STRs, the Austrian FIU (A-FIU) has been established as a law-enforcement type FIU by the Bundeskriminalamt-Gesetz (Criminal Intelligence Service Act) and carries out the following central functions:

1. combating money laundering as required by all relevant laws in the field of AML/CFT, in particular by receiving, analysing and disseminating information and by conducting pertinent international correspondence,

2. combating financing of terrorism by receiving, analysing and disseminating information received and conducting pertinent international correspondence as required by the same laws mentioned above.

Reporting entities are obliged to report any cases, where the reporting entity has a suspicion or reasonable grounds to suspect,

1. that an attempted, upcoming, ongoing or previously conducted transaction is related to asset components originating from one of the criminal activities listed in Article 165 StGB (including asset components which stem directly from a criminal act on the part of the perpetrator) or

2. that an asset component originates from one of the criminal activities listed in Article 165 StGB (including asset components which stem directly from a criminal act on the part of the perpetrator) or

3. that the attempted, upcoming, ongoing or previously conducted transaction or the assets component is related to a criminal organisation pursuant to Article 278 StGB, a terrorist organisation pursuant to Article 278b StGB, a terrorist crime pursuant to Article 278c StGB or terrorist financing pursuant to Article 278d StGB.

The A-FIU can obtain necessary information independently and irrespective of a previous filed STR, as long as there is a suspicion of ML/TF activities. For AML/CFT purposes the A-FIU is authorised to establish and process the data required for this purpose from natural and legal persons, as well as from other legal entities. Moreover, A-FIU is authorised to use the personal data on the customer it has established when executing federal or state laws and to exchange such information with organisations in other countries that are responsible for the control of money laundering and terrorist financing.

In the course of its activity, A-FIU is conducting an operational analysis by making checks in the A-FIU data-base (whether the individual has previously been subject of suspicious transaction reports or inquiries by other police offices from Austria or abroad), comparisons with other data-bases (whether the individual has previously been subject of investigations conducted by Austrian law enforcement authorities) as well as checks in the registers accessible to A-FIU (e.g. Central Residence Register, conviction register). Depending on the facts of the case, additional information is collected in order to establish the economic background of the reported person and compare it to their transaction patterns (Austrian land register, companies register, checks with the tax authorities to find out about economic circumstances, inquiry with the main association of social insurance carriers). The information, resulting from STRs and other reporting or collaborating counter-parts is also analysed in regard to gain typologies, patterns and trends. That information is published in the annual report and finds usage during the participation in national and international projects. The gained information is exchanged with other stakeholders on the national and international level to identify common issues. It also is used to assess the national risks.

For the purpose of a better overview, you will find an organisation chart of the A-FIU included as Annex III to this reply.

- The Austrian Tax and Custom Administration is responsible for investigating fiscal offences (e.g. smuggling, evasion of import or export duties, tax fraud). Tax officials have the authority to provide information to the A-FIU regarding suspicions of tax fraud (which may be a predicate offence to ML). As far as tax offences qualify as predicate offences for ML, financial authorities and customs authorities pursue financial investigations. The rules on criminal procedure as laid down in the

Strafprozessordnung/StPO (Criminal Procedure Code) are, in so far as there are no special rules stipulated in the Fiscal Offences Act, also applicable in proceedings concerning tax offences which are dealt with by the courts. In such proceedings, the financial and customs authorities have the same competences as the criminal police authorities have in criminal proceedings.

The Austrian Ministry of Finance downloaded a list of 124 names associated with Panama Leaks in April, 2016, each of which could be allocated to an Austrian tax identification number. The list has been examined thoroughly by the „SOKO Offshore“ (Special Commission). SOKO Offshore has been established by the Ministry of Finance, Anti-Fraud Division, and consists of IT experts, tax investigators and offshore-experts of the Audit Unit for Large Traders and has been working on offshore-leaks since 2013. After having supplemented the list with further details from databases, the local tax offices were informed. All cases are still under examination.

The last bullet point particularly covers a very extensive range of authorities and their activities. Accordingly, it is virtually impossible to give a thorough but at the same time serious answer without exceeding the requested limitation of the reply. Therefore we would like to refer to the most recent reports about Austria, conducted by international organisations and other bodies, such as:

1. Global Forum on Transparency and Exchange of Information for Tax Purposes, Peer Review Austria
 - (a) Phase 2: Implementation of the Standard in Practice (2013)
 - (b) Phase 1: Legal and Regulatory Framework (2011)

In the so-called Supplementary Phase in 2015 Austria could even enhance its overall rating. The next Global Forum Peer Review is scheduled in 2018.

2. Financial Action Task Force (FATF), Anti-money laundering and counter-terrorist financing measures in Austria (2016)

Austria has been placed in the so-called Enhanced Follow-Up process and is currently implementing the recommendations of the report. A detailed overview will be available after publication by the FATF towards end-2017.

I hope that our reply to your request is sufficiently supporting the investigation efforts of the PANA Committee and your mandate, albeit timely limited, brings about a fruitful political discussion among European Union Member States.

Yours sincerely,



Walter GRAHAMMER
Ambassador

Mr Werner Langen
Chairman of the PANA Committee
Member of the European Parliament
Building ASP, 15E108
60, Rue Wiertz
1047 Brussels
E-mail: werner.langen@europarl.europa.eu

Attachment

TAX-RELATED OFFENCES IN AUSTRIA

All of the following provisions are articles of the Finanzstrafgesetz (Fiscal Offences Act)

Tax Evasion

Art. 33 (1) Guilty of tax evasion shall be anyone who in violation of a fiscal duty of notification, disclosure or truthfulness intentionally brings about a reduction of taxes.

(2) Guilty of tax evasion is also who intentionally

- a. brings about a reduction of value added tax (advance payments or credit) in breach of the obligation according to Art. 21 Value Added Tax Act of advance notification, or
- b. brings about a reduction of wage tax, of the employer contribution to the subsidy for family assistance or of additions to the employer contribution in breach of the violation to keep payroll accounts according to Art. 76 Income Tax Act and corresponding regulations

and does not only consider this possible, but knows it.

(3) A reduction of taxes according to para. 1 or 2 is effected,

- a. if taxes that have to be ascertained by official notification were set too low or could not be set by the end of the legal period of declaration (registration, notification deadline) due to the unawareness of the administrative authority of the emergence of the tax claim,
- b. if taxes that have to be self-calculated entirely or partly are not paid,
- c. if tax credits which are to be ascertained by official notification were set wrongly or too high,
- d. if tax credits which are not be ascertained by official notification were claimed wrongly or too high,
- e. if a tax was refunded wrongly or an extraordinary burden was compensated wrongly,
or
- f. if a tax claim was waived wrongly as a whole or in part.

(4) Guilty of tax evasion is also who intentionally brings about a reduction of taxes by using goods, for which a preferential tax treatment was allowed, for a different purpose as had been the condition for the allowance of the preferential tax treatment without notifying it to the tax authority beforehand.

(5) The evasion of taxes shall be punished with a fine of up to the twofold amount of the evaded taxes (or unjustified credits). This amount comprises only those taxes (unjustified credits) where the reduction was effected in connection with the irregularities which were

part of the intention of the perpetrator. In addition to the fine a custodial sentence shall be imposed subject to Art. 15.

(6) If the tax evasion concerns an excise duty, forfeiture shall be imposed subject to Art. 17. This includes raw materials, auxiliary materials, semi-finished products, equipment and devices.

Smuggling and the evasion of import or export duties

Art. 35 (1) Guilty of smuggling shall be anyone who

- a. intentionally and contrary to provisions in force introduces goods liable to import duties into the customs territory of the union or moves them from a free zone or a free warehouse to another part of the customs territory or removes those goods from customs supervision or
- b. intentionally and contrary to provisions in force moves goods liable to export duties out of the customs territory of the union without filing a customs declaration.

(2) Guilty of evasion of import or export duties is, in case of non-fulfilment of para. 1, whoever intentionally brings about a reduction of import or export duties in violation of a customs duty of notification, disclosure or truthfulness. The reduction of import or export duties is effected if a customs debt on importation or exportation is incurred and at the time of incurrance is not set or is set too low, as well as in those cases described in Art. 33 para. 3 lit. b to f.

(3) Guilty of evasion of import or export duties is also who intentionally and contrary to provisions in force brings about a reduction of such duty by moving, processing, storing, temporary storing, using or selling goods liable to import or export duties and does not notify it to the customs office beforehand.

(4) Smuggling shall be punished with a fine of up to the twofold amount of the import or export duty levied on the goods, the evasion of import or export duties up to the twofold amount of the fiscal reduction. If the defendant proves that the requirements to claim a preferential customs rate were fulfilled, the latter has to be taken as a basis instead of the normal customs rate. In addition to the fine a custodial sentence of up to two years shall be imposed subject to Art. 15. Forfeiture shall be imposed subject to Art. 17.

(5) Value added taxes and excise duties are to that extent to be taken as basis for the amount which determines the sanction, which they would have amounted to at the time of incurrance of the tax claim inland, unless the defendant proves their true extent by means of a legally binding official notification issued in the Member State in charge of the collection of taxes.

Avoidance of clearance; negligent reduction of import or export duties

Art. 36 (1) Guilty of avoidance of clearance shall be anyone who commits an offence as specified in Art. 35 para. 1 in a grossly negligent way.

(2) Guilty of a negligent reduction of import or export duties shall be anyone who commits offences as specified in Art. 35 para. 2 and 3 grossly negligently.

(3) Any avoidance of clearance shall be punished with a fine of up to the amount of the duty to be applied to the goods; any grossly negligent reduction of import or export duties shall be punished with a fine of up to the amount of the fiscal reduction. Art. 35 para. 4 second sentence and Art. 35 para. 5 apply.

Duty Fencing

Art. 37 (1) Guilty of duty fencing shall be anyone who intentionally

- a. buys, takes as security or otherwise acquires, conceals or deals in any goods or products of a good which have been object of smuggling, avoidance of clearance or reduction of excise duties or of import or export duties
- b. supports any perpetrator of a fiscal offence as listed in lit. a to conceal or deal in goods or products of a good which have been object of that fiscal offence.

(2) Duty fencing shall be punished with a fine of up to the twofold amount of the excise duties or import or export duties to be applied to the fenced goods or goods which are part of the fenced goods. In addition to the fine a custodial sentence of up to two years shall be imposed subject to Art. 15. Forfeiture shall be imposed subject to Art. 17.

(3) Whoever commits an offence as specified in para. 1 negligently, shall only be punished with a fine of up to the amount of the reduced taxes or dues.

(4) Art. 35 para. 4 second sentence and Art. 35 para. 5 apply.

(5) Duty fencing shall even be punished if the person who committed the offence of smuggling, avoidance of clearance or the reduction of excise duties or of import or export duties may not be punished.

Sanction in case of commercial perpetration

Art. 38 (1) With a fine of up to the threefold amount, which otherwise forms the threat of punishment, shall be punished whoever, without fulfilling Art. 38a or 39, commits an offence of smuggling, tax evasion or evasion of import or export duties or duty fencing according to Art. 37 para. 1, whereupon he is determined through recurring perpetration to procure regular tax benefit (commercial perpetration). In addition, a custodial sentence of up to three years shall be imposed subject to Art. 15; if the amount which determines the sanction exceeds EUR 500.000 up to five years. Moreover, forfeiture shall be imposed according to

the rules stipulated in Art. 33, 35 and 37, means of transport as defined by Art. 17 para. 2 lit. c number 3 included.

(2) A commercial perpetration commits anyone who acts with the intention of obtaining a non-minor tax benefit regularly and

1. uses special capabilities and assets, which suggest a recurring perpetration or
2. has already planned two more of such acts in detail or
3. has already committed two more of such acts or has already been punished for such an offence.

A non-minor tax benefit is a benefit that exceeds the amount of Euro 400 per month by an annual average.

Sanction in case of perpetration as member of a gang or violent perpetration

Art. 38a (1) Whoever, without fulfilling Art. 39,

- a. commits an offence of smuggling, tax evasion or evasion of import or export duties as member of a gang of at least three persons who conjoined for the purpose of the perpetration of the offence with the collaboration (Art. 11) of another member of the gang;
- b. commits an offence of smuggling at which he or, with him knowing, any other person involved carries a weapon or any other means, whereupon he is determined to overcome or prevent resistance of a person with it,

shall be punished according to para. 2.

(2) In case the imposition of penalty for a fiscal offence as specified in para. 1

- a. is exclusively reserved to the court, a custodial sentence of up to five years shall be imposed. In addition to a custodial sentence of up to four years, a fine of up to EUR 1,5 Million may be imposed. Legal entities shall be punished with a fine of up to the threefold amount which determines the sanction;
- b. is not reserved to the court, a fine of up to the threefold amount which otherwise forms the threat of punishment shall be imposed. In addition, subject to Art. 15 a custodial sentence of up to three months shall be imposed.

Moreover, forfeiture shall be imposed according to the rules stipulated in Art. 33, 35 and 37, means of transport as defined by Art. 17 para. 2 lit. c number 3 included.

(3) This threat of punishment only applies to those persons involved whose intention includes the aggravating circumstance as defined in para. 1.

Tax fraud

Art. 39 (1) Guilty of tax fraud shall be anyone who commits an offence of tax evasion, smuggling, evasion of import or export duties or duty fencing according to Art. 37 para. 1 in case the imposition of penalty is exclusively reserved to the court and

- a. false or falsified documents, false or falsified data or other pieces of evidence are used, with the exception of untrue tax declarations, registrations, notifications, records and determinations of taxable income, which are to be provided according to tax, monopoly or customs law or
- b. fictitious deals or other fictitious acts (Art. 23 Federal Tax Act) are used.
- c. false or falsified data of the order books are kept with the support of computers, with using a computer program.

(2) Guilty of tax fraud is also whoever, without fulfilling para. 1., commits an offence of tax evasion which has to be punished by court by claiming input VAT where there are no underlying supplies of goods and services with the purpose to obtain an unjustified tax credit.

(3) a. Whoever commits an offence of tax fraud shall be punished with a custodial sentence of up to three years. In addition to the custodial sentence a fine of up to EUR 1 Million may be imposed. Legal entities shall be punished with a fine of up to EUR 2,5 Million.

b. Whoever commits an offence of tax fraud where the amount which determines the sanction exceeds EUR 250.000, shall be punished with a custodial sentence of at least six months up to five years. In addition to a custodial sentence which does not exceed four years, a fine of up to EUR 1,5 Million may be imposed. Legal entities shall be punished with a fine of up to EUR 5 Million.

c. Whoever commits an offence of tax fraud where the amount which determines the sanction exceeds EUR 500.000, shall be punished with a custodial sentence of at least one year and up to ten years. In addition to a custodial sentence which does not exceed eight years, a fine of up to EUR 2,5 Million may be imposed. Legal entities shall be punished with a fine of up to the fourfold amount which determines the sanction.

Moreover, forfeiture shall be imposed according to the rules stipulated in Art. 33, 35 and 37, means of transport as defined by Art. 17 para. 2 lit. c number 3 included.

TAX-RELATED OFFENCES IN AUSTRIA

The following provision is an article of the Strafgesetzbuch (Criminal Code)

Money Laundering

Art. 165 (1) A person who conceals property items that derive from the crime of another person, a criminal act against property of other persons punishable with a prison term of more than one year or from a criminal act pursuant to Art. 223, 224, 225, 229, 230, 269, 278, 288, 289, 293, 295 or 304 to 309, from a criminal act against the provisions of the law on intellectual property rights committed for profit or the financial crimes of smuggling or evasion of import or export taxes falling within the competence of the courts, or disguises the origin thereof, particularly by giving in legal relations false information regarding the origin or true nature of such property items, the ownership of or other rights to them, the right to dispose of them, their transfer or their location, shall be sentenced to a prison term of up three years.

(2) Likewise a person shall be punished, who conscientiously acquires property items deriving from a criminal act listed in para. 1 committed by another person, holds them in custody, invests, administers, converts, realizes or transfers them to a third party.

(3) Likewise a person shall be punished, who conscientiously, acting on behalf or in the interest of a criminal organisation (Art. 278a) or a terrorist organisation (Art. 278b) acquires property items at the disposal of that organisation, holds them in custody, invests, administers, converts, realises or transfers them to a third party.

(4) A person who commits the criminal act involving items with a value exceeding EUR 50,000 or as the member of a criminal organisation associated for the purpose of continuous money laundering shall be sentenced to a prison term of between one and ten years.

(5) A property item shall be deemed to derive from a criminal act when the perpetrator has obtained it through the criminal act or received it for its perpetration or if it represents the value of the property item originally obtained or received.

Bundesministerium für Inneres (BMI)
(Ministry of the Interior)

Generaldirektion für öffentliche Sicherheit
(Directorate-General of Public Security)

Bundeskriminalamt (BK)
(Federal Criminal Intelligence Service)

Bundesamt für Verfassungsschutz
und Terrorismusbekämpfung (BVT)
(Federal Agency for State Protection
and Counter Terrorism)

Unit 7.2: Recovery of criminal proceeds

A-FIU

ARO