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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

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DRAFT REPORT

on the inquiry on money laundering, tax avoidance and tax evasion
(2017/2013(INI))

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

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CONTENTS

DRAFT CONCLUSIONS

of the inquiry into money laundering, tax evasion and tax avoidance

The Committee of Inquiry into Money Laundering, Tax Evasion and Tax Avoidance,

– having regard to Article 226 of the Treaty on the Functioning of the European Union (TFEU),

– having regard to Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry[1],

– having regard to the European Parliament decision of 8 June 2016 on setting up a 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, its powers, numerical strength and term of office[2],

– having regard to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[3],

– having regard to Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis[4],

– having regard to Directive (EU) 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC[5],

– having regard to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC[6],

– having regard to Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC[7],

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[1] OJ L 113, 19.5.1995, p. 1.
[2] Texts adopted, P8_TA(2016)0253.
[3] OJ L 309, 25.11.2005, p. 15.
[4] OJ L 214, 4.8.2006, p. 29.
[5] OJ L 141, 5.6.2015, p. 73.
[6] OJ L 176, 27.6.2013, p. 338.
[7] OJ L 64, 11.3.2011, p. 1.

– having regard to Council 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[1],

– having regard to Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC[2],

– having regard to Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC[3],

– having regard to Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts[4],

– having regard to Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers[5],

– having regard to Commission Recommendation 2012/771/EU of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters[6] and Commission Recommendation 2012/772/EU of 6 December 2012 on aggressive tax planning[7],

– having regard to the Commission communication of 28 January 2016 to the European Parliament and the Council on an External Strategy for Effective Taxation (COM(2016)0024),

– having regard to Rule 198 of the European Parliament's Rules of Procedure,

A. whereas on 8 June 2016 the European Parliament set up a 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);

B. whereas a contravention implies the existence of illegal conduct, namely an action or omission in breach of the law, on the part of Union institutions or bodies or Member States when implementing Union law;

C. whereas maladministration means poor or failed administration that occurs, for instance, if an institution fails to respect the principles of good administration, and whereas

[1] OJ L 359, 16.12.2014, p. 1.
[2] OJ L 157, 9.6.2006, p. 87.
[3] OJ L 158, 27.5.2014, p. 77.
[4] OJ L 158, 27.5.2014, p. 196.
[5] OJ L 156, 16.6.2012, p. 1.
[6] OJ L 338, 12.12.2012, p. 37.
[7] OJ L 338, 12.12.2012, p. 41.

examples of maladministration include administrative irregularities and omissions, abuse of power, unfairness, malfunction or incompetence, discrimination, avoidable delays, refusal of information, negligence, and other shortcomings that reflect a malfunctioning in the application of Union law in any area covered by this law;

D. whereas money laundering involves concealing illicit money to disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources; whereas such offences are known as predicate offences, and, under the Financial Action Task Force (FATF) 2012 Recommendations and the 4th Anti-Money Laundering Directive (AMLD), applicable as of 26 June 2017, include tax crime;

E. whereas this Committee was set up after the publication of the Panama Papers; whereas the revelations were the result of thorough investigative work by journalists from 107 media organisations in 80 countries, united in the International Consortium of Investigative Journalists (ICIJ), who analysed documents detailing the operations of Mossack Fonseca using state-of-the-art software to process the huge amount of leaked data;

F. whereas the Panama Papers illustrate the importance of free media and investigative journalism, which Parliament wholeheartedly embraces as an indispensable factor in functioning democracies;

G. whereas the Panama Papers constitute the biggest leak of information thus far; whereas the 2.6 terabytes of confidential information leaked from the law firm and licensed trust company Mossack Fonseca contained 11.5 million documents and represent more data than Wikileaks (2010), Offshore Leaks (2013), Luxleaks (2014) and Swissleaks (2015) combined;

H. whereas the leaked data included confidential records of 213 634 offshore companies, along with the names of twelve current and former heads of state, almost 200 politicians from around the globe and a number of celebrities from various fields; whereas Mossack Fonseca established and managed these offshore companies between 1970 and 2015, and at the time these data were leaked, 55 728 entities were still active; whereas the great majority of the entities that were still active – approximately 90 % – were based in the British Virgin Islands, Panama and the Seychelles;

I. whereas Mossack Fonseca is not the largest firm in the offshore secrecy business, which indicates that the Panama Papers can be construed as only the tip of an iceberg; whereas the company had a share of approximately 5 % to 10 % of this market and incorporated entities across 21 jurisdictions[1];

J. whereas PANA convened meetings, conducted fact-finding missions and commissioned studies in order to further investigate beyond the practices documented in the Panama Papers – for a complete list of activities, including the names of speakers, see part II of this report;

K. whereas tax fraud and tax evasion constitute illegal activities involving evading tax

[1] ‘Role of advisors and intermediaries in the schemes revealed in the Panama Papers’, Willem Pieter de Groen, Centre for European Policy Studies, April 2017.

liabilities, while, on the other hand, tax avoidance is the legal but improper utilisation of the tax regime to reduce or avoid tax liabilities, and aggressive tax planning consists in taking advantage of the technicalities of a tax system, or of mismatches between two or more tax systems, for the purpose of reducing tax liability;

L. whereas as a result of data leaks in recent years the awareness of money laundering, tax evasion, tax fraud schemes and corruption has increased considerably and these issues have become a major focus of international political concern;

M. whereas unreported and untaxed income is reducing national tax revenues and is a threat to the stability of the financial system[1]; whereas money laundering, tax avoidance and tax evasion undermine the fair distribution of tax contributions in the EU Member States; whereas massive tax avoidance by high net worth individuals and enterprises not only penalises ordinary taxpayers, public finances and social spending, but also threatens good governance, macroeconomic stability and social cohesion;

N. whereas public authorities are responsible for the regulatory and supervisory framework, as well as for taxation; whereas public authorities, via regulation, company registers, tax law and supervision, play an important role in the existence of tax havens and offshore financial centres; whereas, in fact, these centres can only exist when governments create the necessary conditions;

O. whereas offshore structures offering preferential regimes could not exist without the intervention of enablers and intermediaries such as banks, accounting firms, tax advisers, wealth managers and lawyers;

P. whereas some governments and jurisdictions have specialised in creating extremely preferential tax regimes to the benefit of multinational companies and high net worth individuals, who do not in fact have a real presence within these jurisdictions but are merely represented by shell companies;

Q. whereas the European Commission has cited previous estimates according to which the annual revenue losses owing to tax evasion and tax fraud amount to at least EUR 1 trillion within the European Union alone;

R. whereas as of 2014, at least 7.6 trillion of the world's total financial private wealth of USD 95.5 trillion was unaccounted for; whereas worldwide, 8 % of financial private wealth is held offshore, leading to global tax revenue losses of USD 190 billion; whereas an estimated USD 2.6 trillion of financial private wealth in Europe is held offshore, leading to tax revenue losses of USD 78 billion annually[2];

S. whereas in 2011 an estimated USD 3.1 trillion globally were lost each year via tax evasion and tax avoidance of large companies owing to secrecy[3];

T. whereas money laundering amounts to an estimated 2 %-5 % of GDP worldwide;

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1 ECB hearing.

2 Gabriel Zucman, 'The Hidden Wealth of Nations – The Scourge of Tax Havens', University of California, 2015.

3 Tax Justice Network, November 2011.

U. whereas several EU Member States and overseas countries and territories (OCTs) feature in the top 100 most secretive countries[1];

V. whereas the Panama Papers documented a systematic use of illegal practices such as backdating documents and revealed a blatant disregard of basic due diligence on the part of lawyers, wealth managers and other intermediaries, as documented by, for example, maintaining business relations with companies whose nominee director had been dead for several years;

W. whereas 79 countries so far, or one-third of all nations, have announced a total of 150 inquiries, audits or investigations by police, customs, financial crime and mafia prosecutors, judges and courts, tax authorities and parliaments, and by means of corporate reviews, according to global media reports and official statements; whereas thousands of taxpayers and companies are under investigation; whereas over the past eight months this has led to national authorities having already recovered tens of millions of dollars in taxes on previously undeclared funds[2];

1. Tax evasion and tax avoidance

1.1. Offshore structures

1. Notes that various definitions exist as to what constitutes an offshore financial centre (OFC), a tax haven, a secrecy haven, a non-cooperative tax jurisdiction or a high-risk country in terms of money laundering;

2. Recognises that offshore financial centres generally present the following features: 1) a primary orientation of business toward non-residents; 2) a favourable regulatory environment (low supervisory requirements and minimal information disclosure); 3) the existence of low (unspecified) or zero taxation schemes[3];

3. Welcomes the fact that the Commission is in the process of drawing up two different lists, namely a ‘common EU tax list of uncooperative tax jurisdictions’ and an ‘EU anti-money laundering list of high-risk third countries’;

4. Acknowledges that the two lists may overlap in terms of some of the countries they feature, although they have different objectives, different criteria, a different compilation process and different consequences; believes, nonetheless, that the two lists should complement each other in ensuring double protection for EU Member States’ tax bases and the proper functioning of the Single Market;

1.2. A common EU list of non-cooperative tax jurisdictions

5. Welcomes the fact that the Council is aiming to establish by the end of 2017 a ‘Common EU List of Non-Cooperative Tax Jurisdictions’, with the aim of addressing external risks to Member States’ tax bases posed by third countries that refuse to adhere

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[1] Financial Secrecy Index 2015, Tax Justice Network.
[2] ICIJ 2017, ‘Where Are They Now? A Year Later, Mixed Fortunes For Panama Papers Line-Up’.
[3] ‘Offshore activities and money laundering: recent findings and challenges’, Prof. Dr. Brigitte Unger, Utrecht University School of Economics, The Netherlands, February 2017.

to international tax good governance standards;

6. Notes that this list aims to provide a common EU methodology for assessing, screening and listing third-country tax jurisdictions, allowing Member States to identify jurisdictions playing a role in tax avoidance and evasion[1];

7. Welcomes the fact that in May 2016, the Council endorsed the proposed listing process and called for an EU list to be ready in 2017;

1.3. Exchange of information

8. Recalls that the OECD Common Reporting Standard (CRS) requires jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis; regrets that this has been implemented recently only by a small number of jurisdictions; recalls that on 15 February 2011 the Economic and Financial Affairs Council (ECOFIN) adopted Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (DAC 1); recalls that this Directive makes it mandatory for national tax administrations to supply information concerning a taxpayer of another Member State on request, even if this information is held only by a bank or other financial institution; notes that on 1 January 2013 the national laws, regulations and administrative provisions implementing this directive entered into force, with the exception of the provisions relating to automatic exchange of information for certain categories[2], which entered into force on 1 January 2015;

9. Recalls that DAC 2 was adopted in December 2014, extending the scope of the directive to include automatic exchange of tax information;

10. Recalls that on 8 December 2015 ECOFIN adopted DAC 3, which extended the scope of the mandatory automatic exchange of information to tax rulings and advance pricing agreements;

11. Recalls that on 25 May 2016 ECOFIN formally adopted DAC 4, which translates Action 13 of the OECD's Base Erosion and Profit Shifting (BEPS) project into EU law, and makes it mandatory for tax authorities to collect and automatically exchange country-by-country information;

12. Recalls that on 6 December 2016 ECOFIN formally adopted DAC 5, due to enter into force on 1 January 2018, extending the scope of the information exchange to national anti-money laundering information, in particular beneficial ownership and due diligence information;

13. Welcomes the Commission proposal on DAC 6 for mandatory automatic exchange of

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[1] A provisional scoreboard of third-country jurisdictions was published in September 2016 and comprises two sets of indicators for determining risks to EU Member States: 1) assessments of a jurisdiction's economic ties with the EU, the magnitude of financial services activity and financial stability factors; 2) assessment of the risk the jurisdiction poses, identifying whether jurisdictions are sufficiently transparent, have favourable corporate income tax regimes or zero corporate income tax rates.

[2] Income from employment, directors' fees, dividends, capital gains, royalties, certain life insurance products, pensions, and ownership of and income from immovable property.

information in the field of taxation in relation to reportable cross-border arrangements;

1.4. Findings

14. Observes that offshore entities are often set up as shell companies[1], without underlying economic rationale or substance within the country of establishment;

15. Underlines that motivations for the establishment of offshore entities most often include obscuring the origins of money and assets and concealing the identity of the ultimate beneficial owner (UBO)[2], the avoidance or evasion of inheritance or savings tax in the countries where the UBOs are residents[3], shielding assets from creditors or heirs, the evasion of sanctions, masking criminal activity and money laundering, or transferring assets from an individual or company to a new company without incurring the liabilities of the former;

16. Adds that in the case of multinational corporations, shell and letterbox companies are also used as part of corporate tax optimising strategies, to facilitate transfer pricing;

17. States that among the EU Member States, the United Kingdom had the largest number of offshore entities revealed in the Panama Papers (17 973 entities), followed by Luxembourg (10 877 entities) and Cyprus (6 374 entities), as well as Latvia, Ireland, Spain, Estonia and Malta[4];

18. Highlights that based on shareholders identified as natural persons, EU citizens own approximately 9 % of the offshore entities incorporated by Mossack Fonseca[5];

19. Underlines that at the time the data were leaked, 55 728 entities were still active and approximately 90 % were based in the British Virgin Islands (BVI), Panama and the Seychelles;

20. Notes that in offshore jurisdictions company registers and authorities often do not require the information necessary to identify beneficial owners, or do not share it; notes that the identification of UBOs in some countries relies only on self-declaration of beneficial ownership information, without any further verification[6];

21. Notes that in most offshore destinations tax and reporting obligations are non-existent;

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[1] As the OECD defines it, a shell company is a company that is formally registered, incorporated or otherwise legally organised in an economy but which does not conduct any operations in that economy other than in pass-through capacity.

[2] The ultimate beneficial owner is the natural person who is ultimately responsible for the entity.

[3] See, for example, Nordea (2016), '[Report on Investigation of Nordea Private Banking in Relation to Offshore Structures]', joint report by Nordea Group Compliance, Nordea Operational Risk and Mannheimer Swartling Advokatbyra.

[4] 'Role of advisors and intermediaries in the schemes revealed in the Panama Papers', Willem Pieter de Groen, Centre for European Policy Studies, April 2017.

[5] 'Role of advisors and intermediaries in the schemes revealed in the Panama Papers', Willem Pieter de Groen, Centre for European Policy Studies, April 2017.

[6] Intervention by Daniel Thelesklaf, Chairman of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) in PANA Committee hearing on 13 October 2016.

22. Notes that none of the three above-mentioned jurisdictions, namely the BVI, Panama and the Seychelles, are currently listed as ‘uncooperative tax havens’ by the OECD’s Committee on Fiscal Affairs; recalls that the BVI, the Seychelles and Panama were taken off the list between 2000 and 2002 after having made formal commitments to implement the OECD’s global standards of transparency and exchange of information;

23. Underlines that some jurisdictions offer the possibility of being resident in multiple jurisdictions using double passports or investor visa programmes that allow a residence permit to be obtained in exchange for an investment in these jurisdictions[1];

24. Stresses that each offshore jurisdiction provides services to individuals and companies which are tailored to their business model;

25. Notes that most of the offshore constructions revealed in the Panama Papers were set up from Luxembourg, the United Kingdom and Cyprus and that these countries could have suspected that this implied a loss of the tax base of other Member States where the UBOs were resident – in Luxembourg, for example, many offshore companies were set up purely to circumvent the withholding tax[2] (which only applied to natural persons, not to offshore companies), and some of those were still active after the entry into force of DAC 1;

26. Notes the lack of adequate human and financial resources available to regulators, supervisors and applicable tax law enforcement bodies;

27. Stresses that this lack of resources in tax administrations impedes the capacity to effectively comply with the spontaneous exchange of information under DAC, and that this is a systemic problem in the EU;

28. Concludes that the DAC provisions, especially Articles 1, 2 and 8(1) – on spontaneous information exchange – were not implemented effectively; highlights that Member States had grounds for supposing that there had been a loss of tax in other Member States owing to offshore constructions, but did not report this tax information to those other Member States;

2. Money laundering

2.1. Anti-Money Laundering legislation

29. Recalls that the FATF set the global standards for Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT), and that all its members, including the main offshore financial centres cited in the Panama Papers (BVI, Panama and the Seychelles), committed to implementing these standards;

30. Acknowledges that the EU framework for AML is the Anti-Money Laundering

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[1] Brooke Harrington, ‘Capital without borders, wealth managers and the one percent’, Harvard University Press, 2016.

[2] See, for example, Nordea (2016), ‘Report on Investigation of Nordea Private Banking in Relation to Offshore Structures’, joint report by Nordea Group Compliance, Nordea Group Operational Risk and Mannheimer Swartling Advokatbyra. This was also confirmed by the Belgian National Committee of Inquiry in a meeting with a PANA delegation.

Directive (AMLD), which identifies the money laundering risks at three levels, namely supranational level, Member State level and the level of the reporting entities as part of their customer due diligence (CDD);

31. Stresses that AMLD III comprises four key provisions, namely CDD, reporting obligations, record-keeping obligations and enforcement; recalls that the implementation date of AMLD III was 15 December 2007;

32. Notes that AMLD IV improves the scope of enhanced CDD for undertaking business with high-risk countries and the definitions and obligations concerning politically exposed persons and UBOs, lowers the cash payment threshold from EUR 15 000 to EUR 10 000 and extends the scope of reporting entities to include the entire gambling sector, and not just casinos; recalls that the threshold for identifying beneficial owners of corporate entities is a shareholding of 25 % plus one share or an ownership interest of more than 25 %; recalls that AMLD IV entered into force on 26 June 2017;

2.2. An EU anti-money laundering list of high-risk third countries

33. Recalls that on 14 July 2016 the Commission adopted, by delegated act, a list of eleven third countries having strategic deficiencies in their regimes on Anti-Money Laundering (AML) and Countering Financing of Terrorism (CFT), namely Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, the Lao People's Democratic Republic, Syria, Uganda, Vanuatu, Yemen, Iran and the Democratic People's Republic of Korea (DPRK);

34. Points to the fact that this is a duplicate of the list produced by the FATF;

35. Recalls that the Commission proposed to amend the list by removing Guyana and adding Ethiopia; reiterates Parliament's objections to these delegated acts, of 19 January and 17 May 2017;

36. Notes that the FATF has reviewed more than 80 countries since 2007 in terms of their compliance and deficiencies and that 59 countries have been put on the public list; reiterates the FATF's claims that since then, 49 countries have made significant progress in terms of putting in place legal and regulatory frameworks and reforms, committing themselves to upholding international tax standards such as the OECD's common reporting standards, so as to be taken off the list;

2.3. Financial Intelligence Units (FIUs)

37. Recalls that under AMLD III each Member State is obliged to establish an FIU in order to combat money laundering and terrorist financing, that each national FIU must be given adequate resources to fulfil its tasks, and that the FIUs have to be equipped to ensure timely access to the financial, administrative and law enforcement information they require to properly carry out their tasks;

38. Recalls that institutions and natural and legal persons covered by the directive[1] must inform the FIUs if they suspect that money laundering or terrorist financing offences are

[1] This directive applies to (Article 2): credit institutions; financial institutions; auditors, external accountants and tax advisors; notaries and other independent legal professionals; trust or company service providers; real estate agents; other natural or legal persons trading in goods, and casinos.

being or have been committed or attempted, as well as filling in Suspicious Transaction Reports (STRs), and that they are also required to provide all relevant information upon request;

39. Underlines that Member States must require that their credit and financial institutions have systems in place that enable them to respond fully and rapidly to enquiries from the FIU, in accordance with their national law;

40. Notes and welcomes the establishment of the FIU.net cooperation in the framework of Europol; recalls that the Egmont Group, an international body for the cooperation of FIUs, is composed of 154 FIUs worldwide;

2.4. Findings

41. Observes that a number of intermediaries did not adequately carry out the mandatory enhanced CDD measures, whether upon the establishment of the business relationship with their clients or during that business relationship, even when there was a suspicion of money laundering; highlights, therefore, the lack of reporting by obliged entities of suspicions of money laundering to the competent FIUs[1];

42. Finds that in many cases no, or insufficient, inquiries were carried out to identify the UBOs of offshore entities; highlights the consequential failure to define the ownership and control structure of the entity and/or to obtain information on the purpose and intended nature of the business relationship[2];

43. Underlines that as a result, insufficient documentation is available to national FIUs or other competent authorities to conduct the appropriate investigations and analysis in accordance with national law;

44. Notes that the lack of documentation and inquiry also applies to certain life insurance policies granted by insurance companies and offered to clients via insurance intermediaries or any other entity identified as a financial institution under AMLD III;

45. Notes that in some instances, tax or other administrations or supervisory bodies discovered the existence of offshore constructions but did not report them to the FIU[3];

46. Notes that EU FIUs have different structures, powers and often a lack of resources across the Member States, and that these differences affect the ways in which EU FIUs collect and analyse information, and ultimately impact the exchange of information

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1 The investigation into the private banking activities of Nordea showed that the bank did not comply with internal guidelines or regulatory requirements in Luxembourg. More specifically, it did not classify customers in the appropriate high-risk category, and the subsequent enhanced due diligence (EDD) reporting was incomplete. The EDD requirements include, for instance, collecting information on the source of the funds and the purpose of the accounts. Moreover, due diligence needs to be repeated regularly and reassessed. This so-called ‘ongoing due diligence’ (ODD) was, however, not systematically conducted. The information was in many cases not up to date according to the internal investigation of the bank (Nordea, 2016). Similar implementation and enforcement problems were indicated by a former compliance officer of the German Berenberg Bank that testified for the PANA Committee.

2 For 25 % of the MosFon entities that were still active in 2015, the UBO was unknown or anonymous.

3 ‘Fighting tax crimes – cooperation between Financial Intelligence Units’, Dr Amandine Scherrer and Dr Anthony Amicelle, European Parliamentary Research Service (EPRS), March 2017.

between them; underlines that this leads to fragmented, asymmetric and incomparable responses from the EU FIUs[1];

47. Regrets that the Commission is not able to conduct its own proper assessment of money laundering high-risk third countries as it does not have sufficient qualified staff to fulfil this obligation under the AMLD;

48. Points in particular to the increasing number of STRs driven by new legislation and to the fact that the lack of resources implies that the FIUs can deal with only a fraction of the problem[2];

49. Regrets that the current FIU.net platform under Europol is not efficient enough owing to the varying levels of use by the Member States and the lack of resources and competences at EU level;

50. Notes that time delays in responses to requests affect FIUs' cooperation and that the replies to these requests are often of poor quality and lacking in detail, thus constituting an obstacle to international cooperation by FIUs themselves;

51. Notes that not all EU FIUs are empowered to approach obliged entities with requests for information, and that in many cases these requests are conditional upon the prior receipt of STRs; notes, therefore, that some FIUs cannot request information from reporting entities on behalf of foreign FIUs if they do not have related suspicious transactions recorded in their database;

52. Notes that in some Member States there are no clear guidelines on mutual cooperation between national FIUs and national tax authorities in order to ensure tax compliance;

53. Notes that tax crimes have only recently been recognised as a predicate offence of money laundering under AMLD IV, the deadline for transposition of which expired on 26 June 2017; points out that the directive explicitly indicates that differences between national law definitions of tax crimes will not impede the ability of FIUs to exchange information; notes, however, that international cooperation between FIUs can still be refused on the grounds of the significant differences across Member States as to how predicate offences to money laundering are defined and criminalised;

54. Notes that the obligation to establish central UBO registers is included in AMLD IV; regrets that to date this obligation has not been fulfilled by all Member States and that not all FIUs have access to this information on UBOs;

55. Notes that the EU's FIU platform identified several shortcomings in its mapping exercise and gap analysis on FIUs; points out that this is owing to the non-implementation of AMLD III provisions, notably access to bank account information, and to significant discrepancies between national approaches;

56. Highlights that some Member State institutions in charge of implementing and enforcing rules as regards tax fraud and money laundering appear to be not entirely

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[1] EU FIU Platform mapping exercise and gap analysis on EU FIUs' powers and obstacles for obtaining and exchanging information, 15 December 2012.

[2] PANA FIU hearing of 21 June 2017.

independent from political influence[1];

57. Highlights that infringement letters were sent to several Member States for failing to implement AMLD III and that six Member States (Belgium, France, Spain, Ireland, Poland and Sweden) were brought to court; notes that the Polish case was withdrawn but that the other five Member States were sanctioned for failing to implement the directive on time; stresses, however, that this raises questions as to whether infringement procedures are sufficient to verify the quality of implementation by Member States;

58. Concludes that by not responding adequately to these shortcomings, Member States have allegedly failed to enforce AMLD III effectively; points also to the fact that the Commission has potentially failed to enforce these provisions by not initiating infringement procedures;

59. Regrets that the Commission, owing to a lack of staff, has failed to carry out proper supervision of AMLD implementation in the Member States; notes also that the Commission has failed to carry out an independent assessment of the EU anti-money laundering list of high-risk third countries;

3 Intermediaries[2]

3.1. Legal framework

60. Recalls that according to AMLD IV, the current definition of obliged reporting entities includes financial and credit institutions, auditors, accountants and tax advisors, notaries, trust and company service providers, real estate agents, providers of gambling services and other independent legal professionals;

61. Recalls the obligation of obliged entities to perform CDD and report money laundering suspicions under the AMLD; notes that for legal professionals this applies only when they are not covered by legal professional secrecy or privilege;

62. Recalls that enhanced CDD is required notably for clients who are politically exposed persons (PEPs), in order to establish the source of wealth and source of funds; recalls that credit and financial institutions are required to have systems in place that enable them to respond fully and rapidly to enquiries from FIUs, in accordance with their national law;

63. Notes that Member States have established a wide variety of supervisory bodies to control different types of obliged reporting entities under AMLD legislation and that advisors and intermediaries are therefore regulated and supervised by either government bodies or self-regulating professional bodies;

64. Underlines that in many Member States tax evasion, facilitated by those enablers, is not a predicate crime for money laundering, since it does not fall under serious crime in

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[1] PANA mission report to Malta – 20 February 2017.

[2] Percentages in this chapter are based on ICIJ data that have been analysed by the Centre for European Policy Studies (CEPS) at the request of the EP Committee of Inquiry into Money Laundering, Tax Evasion and Tax Avoidance.

their penal code, and that in some Member States tax evasion is a misdemeanour and therefore would only be considered an administrative offence; notes that AMLD IV, the transposition deadline for which expired on 26 June 2017, aims to harmonise this point;

65. Notes that the Council has invited the Commission ‘to consider legislative initiatives on mandatory disclosure rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes’;

66. Welcomes the Commission’s proposal on the automatic exchange of tax schemes proposed by intermediaries, published on 21 June 2017;

67. Recalls that Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) requires Member States to ensure that administrative penalties for financial institutions found liable for a serious breach of the national provisions adopted pursuant to AMLD III are applied;

68. Recalls that the Directive on Statutory Audits of Annual Accounts and Consolidated Accounts of 2006 (SAD 2006) should have been implemented by 29 June 2008;

69. Notes that the amended Directive on Statutory Audits of Annual Accounts and Consolidated Accounts 2014 (SAD 2014) and SARPIE (for public-interest entities) should have been implemented by 17 June 2016, with the exception of Article 16(6) of SARPIE, which should have been implemented by 17 June 2017;

3.2. Findings

70. Notes that the Panama Papers include in total 14 000 intermediaries, of which about 2 700, or 19 %, are located in the EU[1];

71. Notes that EU intermediaries mentioned in the Panama Papers are responsible for the creation of approximately 20 %, or 39 700, of all the entities established by Mossack Fonseca;

72. Notes that law firms, accountants, trust and fiduciary companies and banks are the most prevalent types of intermediaries but that many other self-regulated and non-regulated professionals can also provide these services;

73. Notes that wealth managers in particular remain insufficiently regulated in EU law, and in Member States’ and third countries’ national laws; finds that the multinational nature of their services provides a particular challenge for correct and proper monitoring and sanctioning of their activities;

74. Observes that whether intermediaries are supervised or self-regulated depends on the jurisdiction and the type of intermediary or advisor; notes that many of these structures are based outside the obliged entities’ jurisdiction and that many cases are therefore not covered by legislative requirements; notes that the majority of EU intermediaries are

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[1] ‘Role of advisors and intermediaries in the schemes revealed in the Panama Papers’, Willem Pieter de Groen, Centre for European Policy Studies, April 2017.

based in the United Kingdom, Luxembourg and Cyprus[1];

75. Observes that trusts and fiduciary companies as well as company service providers form the most important group demanding the creation of offshore entities from Mossack Fonseca, followed by accountants, tax advisors, lawyers and consultants, who are responsible for about one third of the established offshore entities[2];

76. Highlights that intermediaries help establish shell companies and open accounts, often providing a nominee director to manage the assets working on behalf of the real beneficiary, resulting in anonymity for the UBO;

77. Highlights that the real estate market provides a significant avenue for individuals to launder or invest illicitly gained funds, as property is purchased through anonymous shell companies or trusts without being subject to proper due diligence;

78. Highlights that obliged entities outsourced their CDD obligations to third parties in some cases, which often resulted in little or no CDD being carried out;

79. Notes that legal arbitrage between different jurisdictions was used by certain obliged entities to avoid compliance with mandatory CDD so as to ensure anonymity of the UBO;

80. Notes that in some countries tax evasion is not a criminal offence and that tax advisors are expected to identify the cheapest tax constructions for their clients, as they otherwise make themselves liable to pay damages to their clients;

81. Points to the lack of supervisory cooperation and information exchange between competent authorities within the Member States and across the EU as a whole;

82. Stresses that the EU legislation in place is not sufficiently enforced and that this allows intermediaries to formally fulfil their duties, such as CDD and other reporting obligations, while circumventing the spirit of the rules;

Roles and responsibilities of banks

83. Notes that banks, other financial institutions and wealth managers set up approximately one sixth of the entities revealed in the Panama Papers; highlights that banks intermediated in about 9 % of the offshore entities that were incorporated by Mossack Fonseca;

84. Recognises that banks were involved in four broad activities, namely providing and managing offshore structures, delivering bank accounts to offshore entities, providing other financial products and correspondence banking[3];

85. Stresses that banks are key actors in detecting suspicious transactions and reporting

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1 'Role of advisors and intermediaries in the schemes revealed in the Panama Papers', Willem Pieter de Groen, Centre for European Policy Studies, April 2017.
2 Based on a mapping exercise of intermediaries responsible for about 86 % of the entities in the ICIJ database.
3 Obermayer & Obermaier, 2016.

these to national FIUs;

86. Acknowledges that the intermediation by banks in the setting up of offshore constructions has significantly decreased since 2007, when it was revealed that banks were promoting the evasion of the European Savings Directive (2005) on a large scale; notes that reputational and regulatory risks in the aftermath of the financial crisis have also added to the decline in the offshore entities intermediated by banks since 2008[1];

87. Observes that private banking subsidiaries of large banks in financial centres played a key role in delivering services across national borders to high net worth individuals;

88. Highlights that private banking institutions did not always comply with their own internal guidelines or regulatory requirements (CDD), and that banks sometimes failed to classify customers in the appropriate high-risk category, and the subsequent enhanced due diligence (EDD) reporting was incomplete[2];

89. Observes that CDD checks are mainly based on self-declaration or box-ticking by entities opening a bank account, without a proper investigation of the profile[3];

Banking supervision

90. Notes that supervisory action carried out by competent authorities after the Panama Papers varied from a full cross-check of all supervised banks, to random checks, to no action at all;

91. Points out that in some Member States, competent authority powers are limited to supervising the existence of anti-money laundering controls;

92. Notes that the ability of competent authorities to verify the implementation of corporate group-wide policies and procedures is sometimes hampered by national data protection and bank secrecy legislation;

93. Notes that, according to information provided by the European Banking Authority (EBA), almost 1 300 banks had been approached by December 2016 through either off-site reviews or a combination of off-site reviews and on-site visits; awaits the final results by Q3 of 2017; highlights early indications of the results, which suggest that shortcomings have been identified in some cases;

94. Notes that few competent authorities tackled the Panama Papers case beyond money laundering, and that only a few made the obvious link to tax crimes;

95. Observes that Member State authorities failed to effectively supervise financial institutions even before the Panama Papers revelations, and that they did not adequately sanction the financial institutions subject to CRD IV that were found liable for serious breach of the national provisions adopted pursuant to AMLD III;

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[1] Report on Investigation of Nordea Private Banking in Relation to Offshore Structures, 20 June 2016, and mission to the Belgian Parliamentary Inquiry Committee, 26 April 2017.
[2] PANA Committee hearing, 9 February 2017.
[3] PANA Committee hearings, 13 October 2016 and 24 January 2017.

96. Notes that over 20 competent EU bank supervisory authorities took supervisory action directly as a result of the publication of the Panama Papers[1];

Lawyers and law firms

97. Points to the difficulties of regulating lawyers and law firms involved in setting up and maintaining offshore structures, as they often operate cross-border and in some cases are not subject to specific legislative requirements;

98. Highlights that lawyers and law firms often provide investment and tax advice and assistance in the setting-up of offshore entities, often in direct contact with UBOs;

99. Notes that the number of STRs by lawyers, as well as other predominantly self-regulated professions, is low[2], and notes also that reporting by lawyers is often triggered by revelations in the media;

100. Acknowledges that in most Member States the supervision of lawyers is carried out by professional bar associations, which do not actively supervise their members, but rather act on the basis of complaints by clients; regrets that statistics on sanctions or disciplinary measures implemented by national bar associations are not publicly available in all EU countries;

101. Notes that members of the legal profession are subject to strict sanctions (civil and sometimes criminal) for any failure to adhere to AMLD obligations; notes also, however, that these strict disciplinary procedures rarely lead to being struck off the bar[3];

102. Notes that the scope of the statutory provisions on the client-attorney privilege of certain designated professional practitioners such as lawyers and notaries to refuse to testify or give evidence in tax matters is not clear and consistent in all Member States, let alone across Member States;

103. Highlights especially that in many Member States, lawyers cannot be sanctioned for advising non-residents on how to evade tax or launder money in another jurisdiction as per the territoriality principle;

Accountants, accounting firms and auditors

104. Notes that accounting firm staff consist primarily of professional accountants, auditors and legal and tax experts;

105. Notes that offshore entities established in the main Panama Papers jurisdictions (BVI, Panama and the Seychelles, among others) do not have audit requirements; underlines, however, that when offshore entities are consolidated in parent enterprises they should

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[1] PANA Committee written answer contributions by EBA, PANA hearing, 13 October 2016.

[2] See, for example, FATF Mutual Evaluation Reports or 'Fighting tax crimes – cooperation between Financial Intelligence Units', Dr Amandine Scherrer and Dr Anthony Amicelle, European Parliamentary Research Service (EPRS), March 2017.

[3] Rules on independence and responsibility regarding auditing, tax advice, accountancy, account certification services and legal services, Ian Roxan and Saipriya Kamath (London School of Economics) and Willem Pieter De Groen (Centre for European Policy Studies), April 2017.

be subject to auditing; observes that supervisors in some jurisdictions require banks and other financial intermediaries to audit parts of their processes, for instance anti-money laundering procedures;

106. Notes that the role of accounting firms in the schemes revealed in the Panama Papers consisted primarily of advice and maintenance of offshore constructions and that auditors were not actively involved since the offshore entities often do not have an audit requirement;

107. Notes that accountancy firms often issue internal guidelines on the practices they consider acceptable;

108. Notes that the number of STRs by accountants is low[1];

Trusts and fiduciaries

109. Recalls that trust and fiduciary companies play an important role in the creation and maintenance of offshore entities;

110. Regrets that trust and fiduciary companies are hard to target for policymakers in onshore jurisdictions because of the companies' limited physical presence and the limited information available to legislators or authorities;

111. Notes that trust companies act on behalf of the UBOs, but that their direct clients in most cases are other intermediaries such as other trust companies, law and accounting firms and banks;

112. Notes that trusts can be stand-alone companies or owned by other types of service companies such as law firms or banks;

113. Stresses that trusts could become an even bigger instrument for misuse in the future as they are not legal entities and therefore, unlike companies, not subject to any form of accounting or legal disclosure requirements, for example of their annual accounts;

4. Third countries dimension

4.1. Findings

114. Recalls that the collection of UBO information for legal entities does not currently constitute an obligation according to legislation in some third countries[2];

115. Highlights that certain third countries use special tax regimes to attract businesses; points out that in certain jurisdictions, it is extremely easy to set up a company without disclosing identity as only very little information is required; observes that creating simple legal documents online only takes a few steps; regrets that this could lead to the

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1 See, for example, FATF Mutual Evaluation Reports or 'Fighting tax crimes – cooperation between Financial Intelligence Units', Dr Amandine Scherrer and Dr Anthony Amicelle, European Parliamentary Research Service (EPRS), March 2017.

2 PANA mission report to USA – 21 to 24 March 2017.

proliferation of practices used to avoid and evade taxes;

116. Observes that although US legislation on AML and UBO transparency is less ambitious than in the EU, the US enforcement is more effective;

117. Points to the tax deferral system in the US, which allows multinational enterprises (MNEs) to park their overseas profits offshore for an unlimited time, avoiding taxes due when repatriating those profits;

4.2. Developing countries

118. Stresses that at the same time that inequality is rising, less developed countries are disproportionately hit by tax evasion and money laundering via offshore constructions; notes that 30 % of African financial wealth is held offshore, leading to tax revenue losses of USD 14 billion[1];

119. Underlines that illicit financial flows have devastating effects on developing countries[2]; notes that in its report of December 2014, Global Financial Integrity (GFI) estimated that developing and emerging economies lost USD 6.6 trillion in illicit financial flows from 2003 to 2012, with illicit outflows increasing at a staggering average rate of 9.4 % per year[3];

120. Emphasises the controversy that some companies, often supported by fraudulent officials, use tax evasion and avoidance, transfer pricing and anonymous company ownership to maximise profits, while millions lack adequate nutrition, health and education[4];

121. Takes the view that developing countries are excluded from the OECD system for automatic information exchange, owing to lack of technical, human and institutional capacity; notes that regarding global cooperation, a common approach to simple principles is yet to be established so as to have an effective outcome;

122. Finds that Africa as a continent loses at least USD 50 billion annually in illicit financial flows, which is twice as much as it receives in international aid; hears the strong call from developing countries' representatives to outlaw tax havens, as they stock illegal business capital[5];

5. Whistle-blowers

123. Points to the fact that LuxLeaks, the Panama Papers, Swiss Leaks, Bahamas Leaks, Football Leaks and numerous other leaks have shown how crucial a role whistle-blowers can play when it comes to fighting money laundering, fraud, aggressive tax planning or corruption or otherwise shedding light on hidden behaviours; underlines,

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[1] Gabriel Zucman, Teresa Lavender Fagan and Thomas Piketty (2015), 'The hidden wealth of nations: The scourge of tax havens'. University of Chicago Press, 2015.
[2] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses', 2014, p. 15.
[3] Global Financial Integrity.
[4] Marc Tran, 'Tax Evasion Still Crippling Africa as Rich Countries Fail to Deliver Support', *The Guardian*, 10 May 2013.
[5] PANA hearing on developing countries, 6 April 2017.

therefore, that the protection of whistle-blowers can contribute to safeguarding the public interest, promoting good governance and strengthening the rule of law;

124. Regrets that some countries use the prosecution of whistle-blowers as a means to safeguard secrecy[1]; finds it highly regrettable that in the case of LuxLeaks, so far only the whistle-blowers have been prosecuted while the companies and intermediaries involved in the tax rulings exposed by the LuxLeaks documents remain unchanged;

125. Welcomes the fact that the Commission is currently assessing the scope for horizontal or further sectorial action at EU level to strengthen whistle-blower protection; notes that Parliament is in the process of drafting a non-legislative resolution to provide its recommendations on the issue;

6. Interinstitutional cooperation

126. Recalls that, according to Article 4(3) TEU, pursuant to the principle of sincere cooperation, the Union and the Member States are required, in full mutual respect, to assist each other in carrying out tasks from the Treaties;

127. Notes that the principle of sincere cooperation includes a requirement for the Member States to take all appropriate measures to preserve the scope and effectiveness of Union law; recalls that Member States should refrain from measures that could seriously jeopardise the accomplishment of the result prescribed by EU law;

128. Welcomes the good cooperation with the Commission with regard to invitations to President Juncker and Commissioners Jourová and Moscovici, as well as Commission officials, to attend committee meetings; regrets, however, that some of the answers provided during the exchange of views were unsatisfactory;

129. Welcomes the answers that were provided by the Finance and Justice Ministers of 25 Member States in response to the questionnaire sent by the Committee; regrets, however, the fact that Malta, Denmark and Hungary have failed to respond;

130. Points to the fact that it took six months to reach an agreement with the Commission on the access to non-classified confidential documents and that this delay constituted a major obstacle for the Committee's work; highlights that the documents received are not all updated and often heavily redacted, creating further major obstacles to the work of the Committee;

131. Notes that the Committee has invited the current and incoming Presidencies on several occasions to participate in hearings to discuss cooperation and the way forward in the area of anti-money laundering, tax evasion and tax avoidance, but that these requests have been declined on all occasions;

132. Notes that despite requests to the Council, no documents have been made available to the Committee; calls into question, therefore, the political will of the Council to enhance transparency and cooperation in the fight against tax evasion, tax avoidance and money laundering; stresses that Parliament feels that citizens should be able to see their

[1] 'Overcoming the shadow economy', Joseph E. Stiglitz and Mark Pieth, November 2016.

respective governments' positions on such important issues;

133. Notes that the Chair of the Council's Code of Conduct Group on Business Taxation declined the invitation to participate in a committee hearing;

134. Finds that cooperation from the Council and its Code of Conduct Group on Business Taxation has been very unsatisfactory so far and that this in itself has constituted a serious hindrance to the work and findings of the PANA Committee;

135. Concludes, therefore, that there has been a breach of the sincere cooperation principle for the above-mentioned reasons;

7. Conclusions

136. Concludes that the underlying problem embedded in the Panama Papers is the moving of money between different jurisdictions, both offshore and onshore, and that as long as these practices are tolerated all other efforts will have only limited impact;

137. Finds that through the use of trusts, shell companies, tax havens and complex international financial structures, some multinational companies and high net worth individuals have successfully shielded their fortunes from, for example, the tax authorities and others with legitimate financial claims against them, thereby rendering themselves immune by positioning their wealth in a legislative vacuum;

138. Concludes that the lack of cooperation and coordination on different pieces of legislation with regard to tax evasion, tax avoidance and money laundering is a systemic problem;

139. Concludes that some Member States tend not to provide relevant information in the desired quantity and quality and in general do not seem to exert genuine efforts to crack down on tax avoidance and tax evasion;

140. Recalls that transparency and exchange of information are key instruments in fighting tax evasion, tax avoidance and money laundering;

141. Concludes that the EU legislation in force was not sufficient before the Panama Papers revelations and was not always enforced effectively, thus allowing intermediaries to formally fulfil their duties, such as CDD and other reporting obligations, while circumventing the spirit of the rules; notes that since then a number of reviews have been carried out, for example on the DAC and the AMLD, and that new legislative proposals have been presented, such as country-by-country reporting and the regulation of intermediaries;

142. Concludes in particular that there has been a significant gradual improvement in terms of having a register of UBOs with accessibility based on legitimate interest; underlines that the ongoing AMLD revision aims to enhance the powers of the EU FIUs and to facilitate their cooperation, but that the scope is still too limited and that there is a need to share financial information to tackle all economic crime, but also to trace the proceeds from fraud-linked activities;

143. Concludes that proper identification of UBOs remains a key obstacle to stopping illegal tax avoidance schemes and that the international nature of financial flows and company structures uncovered by the PANA Committee exacerbates this problem;

144. Stresses that the creativity of tax avoiders is faster than the formulation of legislation and that intermediaries and enablers tend to stay on the right side of the law through creative compliance; highlights in this regard the use of regulatory mismatches between countries as a key enabler of such practices;

145. Concludes that wealth management remains a largely unregulated profession and that binding international rules and standards should be established to better regulate and define this group;

146. Notes that taxes should be levied at the point and place of profit creation; concludes that the actions and financial constructions revealed in the Panama Papers successfully circumvent this basic principle and that a dedicated EU approach is therefore needed to combat shell companies in third countries;

147. Concludes that this was made possible by insufficient implementation of legislation by the Member States and insufficient enforcement by the Commission;

148. Notes that the Commission is not sufficiently equipped in terms of resources to ensure full enforcement of EU legislation against money laundering, tax evasion and tax avoidance;

149. Concludes that FIUs are key instruments to fight money laundering; observes, however, the differing structures across the EU and the fact that they are not sufficiently equipped with personnel to cope with their tasks, including examining the increasing number of STRs driven by new legislation, and that they can deal only with a fraction of the problem;

150. Concludes that sanctions are not always applied or deterrent enough in relevant cases;

151. Concludes that on the basis of the PANA Committee findings, several cases of maladministration of EU legislation can be identified, namely regarding the DAC, the AMLD and the list of third countries with strategic deficiencies in their anti-money laundering regimes;

152. Regrets the lack of cooperation of certain EU institutions with the PANA Committee; believes that this constitutes a breach of the principle of sincere cooperation;

153. Concludes that the closed and secretive nature of the Council's Code of Conduct Group on Business Taxation is detrimental to the effective and expeditious formulation, adoption and implementation of vital anti-tax evasion legislation within the EU; underlines, therefore, the need for improved accountability and transparency regarding the actions, statements and positions of the Member States engaged in the group;

154. Deeply regrets that a high number of stakeholders have refused to meet with PANA delegations, or refused to appear before the PANA Committee, or did not answer questions in a satisfactory manner;

155. Concludes, therefore, that a number of questions remain unanswered in order to fully ascertain the scale of this issue and the methods employed in these schemes.