

The Jurisconsult

11 May 1016

Note for the attention of:

Mr Martin SCHULZ, President of the European Parliament

Subject: Draft mandate for a committee of inquiry on "Panama Papers"

- 1. As a follow-up to your request of 11 May 2016, this note is aimed at providing a legal assessment of the draft mandate for a committee of inquiry on the facts linked to the so-called "Panama Papers" revelations. To that end, the Legal Service has analysed the draft mandate in light of the applicable legal standards concerning the exercise of Parliament's powers of inquiry and, more particularly, the setting up of a parliamentary committee of inquiry, as laid down in Article 226 TFEU and Rule 198 of Parliament's Rules of Procedure.
- 2. An exhaustive assessment of all the aspects of the draft mandate could not be carried out in the short time available, and hence this note is focused only on the salient points of the text which may give rise to legal concerns.
- 3. With this in mind, the Legal Service has identified the following aspect as matters of concern:
 - (1) according to the draft mandate, the proposed committee of inquiry should "assess the gradual implementation" of various legal acts of the EU, which however are not yet applicable. This appears to go beyond the scope of an inquiry within the meaning of Article 226 TFEU, whereby Parliament can investigate "alleged contraventions or maladministration in the implementation of Union law". Indeed no contravention or maladministration in the implementation of those acts can conceivably exist since they have not been implemented yet and the Member States may still implement those acts in time:
 - (2) likewise, the reference featuring in the draft mandate to the "failure by the Commission and Member States to enact adequate legislation at national or European level to protect the Union's interests" appears to be problematic in light of Article 226 TFEU. The Commission does not enact legislation, and has no general legal obligation to initiate it. Thus any general allegation of contravention or maladministration in that respect would not be plausible. As regards the Member States, they could indeed be under a specific obligation to enact legislation in the implementation of EU law, however the draft mandate remains unclear as to the specific instances where such a failure could have occurred;

- (3) the Legal Service understands that the draft mandate has been corrected in order to remove any reference to the fact that the proposed committee of inquiry should complete the work on potentially unresolved issues of the TAXE 2 special committee. However, the draft mandate still provides for the proposed committee of inquiry to "investigate alleged failure of the Commission to enforce and of the Member States authorities to implement effectively Directive 2011/16/EU". This is one of the responsibilities conferred on the existing TAXE 2 special committee (see paragraph 2 (d) of the TAXE 2 mandate). This apparent inconsistency in the text should be resolved in order to achieve the required legal clarity. The same applies to the suggested decision that any recommendations drawn up by TAXE 2 "should be dealt with by the relevant permanent committees". A decision on the follow-up of TAXE 2 activities appears to be redundant in the context of the draft mandate:
 - (4) the reference in the draft mandate to possible breaches of the duty of sincere cooperation enshrined in Article 4(3) TFEU does not appear to be in line with Article 226 TFEU in that it fails to specify the facts in respect of which allegations of contravention or maladministration may have been made;
 - (5) similarly, the references in the draft mandate to the implementation of various non-binding acts, such as the Commission Recommendation of 6 December 2012 or the Commission's External strategy for effective taxation, do not appear to be in line with Article 226 TFEU in that no potential contravention or maladministration in the implementation of EU law is identified.
- 4. For ease of reference, the comments above and some potential drafting suggestions have been included in the draft mandate (corrected version) (see Annex to this Note).
- 5. I remain at your disposal for any further questions you may have.

(signed)

Freddy DREXLER

Annex

¹ See Parliament's Decision of 2 December 2015 on setting up a special committee on tax rulings and other measures similar in nature or effect (TAXE 2), its powers, numerical strength and term of office (2015/3005(RSO). Paragraph 2(d) of that Decision provides that the TAXE 2 committee is vested with the power "to analyse and examine compliance with the obligations set out in [...] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation [...] regarding communication by Member States to other Member States since 1 January 1991, by spontaneous exchange, of information on tax rulings".