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LEGAL OPINION

Re: Request for the setting-up of an inquiry committee on matters relating to tax rulings in the Member States – Compatibility with the applicable rules

I. Introduction

2. By letter dated 14 January 2015, accompanied by supporting signatures of 192 MEPs, the Co-Presidents of the *Greens/EFA Group* in the European Parliament, Ms HARMS and Mr LAMBERTS, transmitted to the President a “*Proposal to set up a Committee of inquiry to investigate alleged contraventions and maladministration in the application of EU law in relation to tax rulings by Member States*” (hereinafter referred to as P“the proposal of 14 January 2015”).
3. On 15 January 2015, a first discussion of this proposal took place in the Conference of Presidents (CoP). It was decided to ask the Legal Service for a legal evaluation of the proposal.
4. In this regard, the Legal Service is notably requested to verify the compatibility of the proposal of 14 January 2015 with Article 226 TFEU, with Article 2 of the Decision 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 (hereinafter “the Decision of 19 April 1995”)¹ and with Rule 198 of Parliament's Rules of Procedure (RoP).
5. In this context, the Legal Service considers it opportune also to clarify the applicable procedure, under the Parliament's Rules of Procedure, as regards the

¹ Decision 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, OJ L 113, 19.5.1995, p.1 (=Annex VIII to Parliament's Rules of Procedure).

internal processing of a request lodged with the CoP pursuant to Rule 198(1) and (3) RoP.

6. To the extent that the interpretation of provisions of Parliament's Rules of Procedure is concerned by the present legal opinion, the Legal Service must underline that its legal conclusions are without prejudice to their subsequent interpretation by the competent parliamentary committee, pursuant to Rule 226(3) RoP.

II. The legal framework

7. The possibility and modalities of the setting up of a committee of inquiry are defined by Article 226(1) TFEU, Article 2(1) and (3) of the Decision of 19 April 1995 and Rule 198(1) and (3) of Parliament's Rules of Procedure.
8. The following legal requisites stem from these rules, if read in conjunction, as to the setting up of a committee of inquiry:
 - the request for the setting-up must be lodged by at least one quarter (i.e. 188 MEPs) of the component Members of the European Parliament (Article 226(1) TFEU; Article 2(1) of the Decision of 19 April 1995 and Rule 198(1) RoP);
 - the request for the setting-up must be based, *prima facie*, on "*alleged contraventions or maladministration in the implementation of Union law*" (Article 226(1) TFEU; Article 2(1) of the Decision of 19 April 1995);
 - the alleged contraventions or maladministration in the implementation of Union law have to "*appear to be the act of an institution or a body of the European Communities, of a public administrative body of a Member State or of persons empowered by Community law to implement that law*" (Article 2(1) of the Decision of 19 April 1995);
 - the request to set up a committee of inquiry must specify precisely the subject of the inquiry and must include a detailed statement of the grounds for it (Rule 198(3) RoP);
 - the final decision as to the setting up of an inquiry committee and its composition is adopted by the plenary, upon proposal by the CoP (Rule 198(3) RoP).
9. As regards possible restrictions with regard to the setting up of an inquiry committee, the following rules apply:
 - Pursuant to Article 2(3)(1) of the Decision of 19 April 1995,
a temporary committee of inquiry may not investigate matters at issue before a national or Community court of law until such time as the legal proceedings have been completed.
 - Pursuant to Article 2(3)(2) of the Decision of 19 April 1995,

within a period of two months either of publication [...] or of the Commission being informed of an allegation made before a temporary committee of inquiry of a contravention of Community law by a Member State, the Commission may notify the European Parliament that a matter to be examined by a temporary committee of inquiry is the subject of a Community pre-litigation procedure; in such cases the temporary committee of inquiry shall take all necessary steps to enable the Commission fully to exercise the powers conferred on it by the Treaties.

10. Finally, pursuant to Rule 198(4) RoP,

“a committee of inquiry shall conclude its work by submitting a report within not more than 12 months. Parliament may twice decide to extend this period by three months.”

III. Preliminary remarks as to the applicable internal procedure

11. As regards the applicable internal procedure with respect to the processing of a request to set up an inquiry committee, it follows from the applicable rules that at least 188 of Parliament's component Members would have to support the request. Evidence is given of this support by the provision of the respective signatures in due form.

12. The Rules are silent, however, on the exact addressee of such request. It follows from the *ratio* of Rule 198(3) RoP that the request would exclusively have to be addressed to the CoP, as only this latter body is entitled to take a decision on whether the request shall be tabled with the plenary or not.

13. Despite these findings, it follows from an established practice that requests under Rule 198 RoP are constantly addressed to the President of the European Parliament, and not to the CoP as such. This circumstance can be explained by the tasks assigned to the President in the context of the CoP, pursuant to Rule 26 RoP.

14. Indeed, it is established parliamentary practice that such requests addressed to the President explicitly ask for the item being put on the agenda of one of the following meetings of the CoP. It follows from the foregoing that the President is apparently exclusively addressed, in this context, as chair of the CoP.

15. Under Rule 198(3) RoP, the President thus does not act on his own behalf as to the further processing of a request for the setting up of an inquiry committee, but on behalf of the CoP which is, under the applicable rules, the only parliamentary body competent to consider the matter. This conclusion, however, is without prejudice to the right and obligation of the President to take appropriate measures with a view duly to preparing the deliberations and the decision-making process of the CoP.

16. This legal situation is different to what was provided for under the then applicable Rules of Procedure before the entry into force of the Maastricht Treaty.

17. Indeed, the former Rule 109(3) of Parliament's Rules of Procedure (1989) provided for an active role of the President as regards the processing of a request

for the setting up of an inquiry committee. Pursuant to this rule, “[...] *the request shall indicate the matter to be investigated and contain a justification in sufficient detail for the President, without reference to Parliament, to decide whether the conditions are met*” (emphasis added).

18. Under this rule, an active role was attributed to the President with regard to the verification, *inter alia*, of the admissibility of such requests, whereas no active role was attributed to the CoP. As a consequence, the legality of such decisions of the President became even subject to legal proceedings before the Union courts².
19. Under current Rule 198 RoP, however, no such role for the President is any longer provided for. As a consequence, the President can only act on behalf of the CoP in this context.
20. As to the competences of the CoP with regard to the further processing of a request for the setting up of an inquiry committee, Rule 198(3) RoP simply states that this body is the only parliamentary body entitled to submit the request to the plenary. No further explicit indications are given as to the role of the CoP under this rule.
21. As a consequence, the CoP enjoys full political discretion on whether the request submitted by the relevant quorum will be forwarded to the plenary or not. Moreover, the CoP is the only parliamentary body entitled to assess the compatibility of a request to set up an inquiry committee with the applicable legal rules.
22. A restriction as to the competences of the CoP (as well as to those of the plenary) follows, however, from the relevant interpretation of Rule 198 RoP. Indeed, pursuant to the second paragraph of the relevant interpretative remarks under this rule, as adopted by the committee competent for the interpretation of Parliament's Rules of Procedure pursuant to Rule 226(3) RoP, it is stated that “*the subject of the inquiry, as defined by one quarter of Parliament's component Members (paragraph 3) and the period laid down in paragraph 4, are not open to amendments*” (emphasis added)³.
23. It follows from the foregoing that the CoP is not entitled, under Rule 198(3) RoP, to unilaterally modify or even “rectify” the very substance of the request as to the future mandate of the requested inquiry committee, as submitted by the signing MEPs. The same restriction applies to the plenary.
24. This restriction under the RoP serves the aim of protecting the (minority) rights of those MEPs who have lodged the request. Indeed, if the CoP or, in more general terms, a parliamentary majority were allowed to subsequently modify the requested mandate according to their respective political discretion, the parliamentary right of the (qualified) parliamentary minority under Rule 198(1) RoP to request the setting up of an inquiry committee with a *specific* mandate

² See Order of the Court of Justice of 4 June 1986 in Case 78/85, *Group of the European Right vs. European Parliament*.

³ This interpretation, as annexed to current Rule 198 RoP, was adopted by the committee responsible on 29 Mai 1996.

would become devoid of any sense, as this latter would no longer be in a position to politically determine the scope of the inquiry committee, as foreseen under Article 226(1) TFEU and Rule 198(1) RoP.

25. It can thus be concluded that the future mandate of the requested inquiry committee, as drafted by the requesting MEPs, may not be subject to subsequent (unilateral) modifications or rectifications by the CoP or by the plenary. It goes without saying, though, that the applicants themselves may withdraw or even modify their proposal, in the light of possible legal or political reservations of the CoP.
26. Such action, however, may only be taken with the consent of all MEPs who had initially signed the request. In the absence of such consent, a revised request would have to be considered a new request to be processed by the CoP accordingly. Such a new request would have to meet all formal requirements, including the fulfilment of the relevant quorum.
27. Against this background, the competences of the CoP can be summarised as follows:
 - Refusal of the request;
 - or
 - Approval of the request as it stands and forwarding to the plenary;
28. As a consequence of the foregoing, in case of requests considered, by the CoP, as either not fulfilling the relevant mandatory legal requirements or as being politically inappropriate, the only option for the CoP would be to reject the proposal. There exists no procedure to modify subsequently or to “rectify” a duly lodged request to set up an inquiry committee, without the consent of all signing MEPs.
29. In contrast to the foregoing, the Legal Service holds the view, however, that purely technical rectifications, such as the rectification of erroneous recitals or other purely technical elements of the request, are not covered by the foregoing prohibition.

IV. Compatibility of the request to set up an inquiry committee with the applicable rules

1. The proposal of 14 January 2015

30. The “*Proposal to set up a Committee of inquiry to investigate alleged contraventions and maladministration in the application of EU law in relation to tax rulings by Member States*” which was lodged on 14 January 2015 reads as follows:

“The European Parliament,

- having regard to Article 4(3) TEU,

- having regard to Article 107(1) TFEU,

- having regard to Article 108 TFEU,

- having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as subsequently amended,

- having regard to Rule 198 of its Rules of Procedure,

1. Decides to set up a Committee of Inquiry to investigate alleged contraventions and in the application of EU law in relation to tax rulings issued by Member States, without prejudice to the jurisdiction of national or EU courts.

2. Decides that the Committee of Inquiry shall:

- investigate alleged contraventions or maladministration in the application of Article 107(1) TFEU regarding a very high number of tax rulings issued in Member States at least since the early 1990s;

- assess the Commission's breach of its duty set out in article 108 TFEU to keep under constant review all systems of aid existing in Member States, to propose to the Member States appropriate measures required by the progressive development or by the functioning of the internal market, to check, whether the aid granted by a State or through State resources is compatible with the internal market and not misused, to decide that the State concerned shall abolish or alter such aid within a certain period of time and refer the matter to the Court of Justice , if the State concerned does not comply;

- investigate possible contraventions of obligations set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as subsequently amended, regarding the obligation to cooperate and provide all necessary documents;

- assess possible breach by some Member States of the sincere cooperation principles enshrined in Article 4(3) TEU, such as the obligations to facilitate the achievement of the Union's task and to refrain from any measure which could jeopardise the attainment of the Union's objectives, given the alleged large scale of aggressive tax planning facilitated by Member States, and the likely significant consequences this has had on public finances of and in the EU;

- make any proposals that it deems necessary in this matter.

3. Decides that the committee of Inquiry shall present an interim report to Parliament within 6 months of starting its work, with a view to presenting a final report to Parliament within 12 months of the adoption of this decision.

4. Decides that the Committee of Inquiry will be composed of X Members of the European Parliament”.

2. As regards formal requirements

31. Firstly, the proposal aiming at the setting up of a committee of inquiry to investigate alleged contraventions and maladministration with regard to tax rulings, lodged on 14 January 2015, was accompanied by supporting signatures of 192 MEPs. The Legal Service has been informed by the competent services of Parliament that a verification of these signatures, with a positive result, has taken place in the meantime. It can thus be concluded that the proposal complies with the requirement of the quorum defined under Rule 198(1) RoP.
32. Secondly, it is established practice that a decision of the European Parliament setting up a committee of inquiry explicitly refers to the relevant legal bases, being Article 226(1) TFEU, Article 2 of the Decision of 19 April 1995 and Rule 198(1) RoP. The proposal of 14 January, however, simply mentions Rule 198 RoP, along with other legal provisions such as Articles 4(3) TEU, 107(1) and 108 TFEU and Council Regulation (EC) No 659/1999.
33. Thirdly, Rule 198(3) RoP stipulates that the request to set up a committee of inquiry “*must specify precisely the subject of the inquiry*”. Under point 2, the proposal of 14 January 2015 provides several elements in this regard. However, as will be further demonstrated below⁴, the subject of the inquiry is defined in this context in general rather than specific terms. In conclusion, the Legal Service has serious doubts as to whether the proposal of 14 January 2015 really specifies the subject of the inquiry in a precise manner, as required under Rule 198(3) RoP.
34. Finally, pursuant to Rule 198(3) RoP, the request must “*include a detailed statement of the grounds*” for the inquiry. The proposal of 14 January 2015, however, lacks any such statement. Indeed, under point 2, it merely provides elements relating to the future mandate and tasks of the requested inquiry committee, without giving reasons for the appropriateness of setting up a committee of inquiry and without further elaborations on the alleged shortcomings and the political and factual background of the requested inquiry. Against this background, the Legal Service concludes that the proposal of 14 January 2015 fails to meet the mandatory requirement of providing a statement of the grounds foreseen under Rule 198(3) RoP.

⁴ See below, paragraphs 36 to 44.

3. As regards the substance of the proposed mandate

a) Compatibility of the proposal of 14 January 2015 with the applicable rules

35. Pursuant to Article 226(1) TFEU and Article 2(1) of the Decision of 19 April 1995, a committee of inquiry may investigate “*alleged contraventions or maladministration in the implementation of Union law*”.
36. Against this background, the question arises as to whether a request for the setting-up of an inquiry committee must be specific, as regards the “alleged contraventions” or “alleged maladministration” investigated by the future inquiry committee, or whether allegations of rather general and abstract nature could also be the subject of a valid mandate – and thus the setting up - of an inquiry committee.
37. The Legal Service has already had the opportunity to conclude on several occasions that a request for the setting up of an inquiry committee has to be very specific and fact based as to the allegations being the subject of the inquiry⁵.
38. This conclusion, which is reiterated in the context of the present legal analysis, is mainly based on the following considerations:
39. Firstly, the obligation for Parliament to duly delimit and restrict the scope on an inquiry under Article 226 TFEU follows from the specific and punctual nature of Parliament’s power to conduct inquiries, in contrast to Parliament’s general competence to exercise political control. As a consequence, the scope of the mandate of an inquiry committee has to be specified and fact based, by specifying the facts giving rise to the alleged contravention or maladministration⁶.
40. Indeed, in contrast to a “special committee” defined under Rule 197 RoP, an inquiry committee has purely investigative, and no preventive tasks to fulfil. Against this background, its tasks lie exclusively in the establishment of the veracity of specific facts and responsibilities as to the alleged contravention or maladministration⁷. The mandate of an inquiry committee must thus exactly reflect the alleged contravention or maladministration. It may not simply refer to problems or issues of a rather general nature, without exactly determining the exact behaviour or incident the inquiry is relating to.
41. Secondly, a clear definition of the scope of the inquiry is indispensable with a view to ensuring that those institutions or authorities of the Member States concerned by the inquiry are fully aware of the allegations (*respect of their right to defence*).

⁵ See the legal opinions SJ-0866/05, SJ-0858/05, SJ-0003/03, SJ-0074/95 and SJ-0172/95.

⁶ See Report A-4/0187/95 (Rapport FAYOT sur la modification de l’article 136 du Règlement du Parlement européen concernant les commissions temporaires d’enquête, p. 16, point 7, hereinafter referred to as « the FAYOT Report »).

⁷ See FAYOT Report, p. 13, point 5.2.

42. Finally, a clear delimitation of the inquiry is necessary to allow Parliament to duly respect the *sub judice* prohibition under Article 2 Article 2(3)(1) of the Decision of 19 April 1995. Indeed, in case of a vague or unclear mandate of an inquiry committee, the institution would not be in a position to verify to which extent the subject-matter of the inquiry could interfere with ongoing court proceedings.
43. The proposal of 14 January 2015, however, fails to comply with the mandatory requirement to be specific and fact based rather than general and abstract for the following reasons :
- i) Firstly, as regards the first subject-matter addressed by the proposal under the first indent of point 2, the proposal simply relates to “alleged contraventions or maladministration in the application of Article 107(1) TFEU regarding a very high number of tax rulings issued in Member States at least since the early 1990s”. This proposed subject-matter fails to specify the alleged contraventions or maladministration as well as the Member States concerned.
 - ii) As to the second subject-matter addressed by the proposal under the second indent of point 2, the proposal refers to “the Commission’s breach of its duty set out in Article 108 TFEU”. In this regard, the proposal also lacks any specification as to the exact facts and incidents at stake, nor does it delimit the relevant period of time in which the alleged contravention could have taken place. Finally, given the pending pre-litigation procedures opened by the European Commission in 2014 on the matter of tax rulings⁸ giving proof of just the opposite of the allegations, the proposal also lacks *prima facie* plausibility.
 - iii) As regards the third and the fourth proposed subject-matter, the Legal Service comes to similar conclusions. Indeed, with respect to the third indent of point 2 of the proposal, it remains completely unclear which entity or Member State shall be addressed by the inquiry. Moreover, the occasion at which the alleged contraventions might have occurred is not defined.
 - iv) Finally, as to the fourth indent of point 2 of the proposal, this latter simply refers to “some Member States” and thus fails to clearly identify the alleged author of the alleged contravention. Moreover, this point lacks any specification on the exact circumstances and time-frame of the alleged contravention and remains, as a consequence, vague and general.
44. In the light of all the foregoing, the Legal Service comes to the conclusion that the proposal of 14 January 2015 fails to identify duly and to specify the alleged “contravention” or “maladministration”, in compliance with the applicable rules, and thus fails to comply with these mandatory requirements for the setting up of an inquiry committee.

⁸ See below, paragraphs 49 to 50.

b) Obstacles arising from on-going prelitigation procedures

45. Pursuant to Article 2(3)(2) of the Decision of 19 April 1995, the Commission may notify the European Parliament that a matter to be examined by a temporary committee of inquiry is the subject of a Community prelitigation procedure. In such cases, the temporary committee of inquiry “*shall take all necessary steps to enable the Commission fully to exercise the powers conferred on it by the Treaties*”.
46. The “necessary steps” to be taken have to be decided on a case by case basis and in the light of the specific circumstances of the case under consideration, on the one hand, and of the obligation of Parliament to fully respect the investigative powers and prerogatives conferred by the Treaties on the European Commission, on the other⁹.
47. In general terms, Article 2(3)(2) of the Decision of 19 April 1995 prevents an inquiry committee from interfering with ongoing pre-litigation proceedings. In practical terms, this legal prohibition can even amount to a complete standstill of any investigatory activities of an inquiry committee in the event of notification of ongoing prelitigation procedures by the European Commission.
48. Indeed, given the obligation, for an inquiry committee, to submit its final report within 12 months¹⁰, the aforementioned circumstances might lead to a situation where a duly established inquiry committee would not be in a position to conduct any relevant investigation within this time-limit.
49. As to the knowledge of the Legal Service, at least the following formal investigations - i.e. prelitigation procedures – were opened in 2014 by the European Commission with respect to the subject-matter of individual tax rulings issued by Member States and are still pending :
- “*Amazon*” (Luxembourg)¹¹
 - “*Fiat finance and Trade*” (Luxembourg)¹²;
 - “*Starbucks*” (The Netherlands)¹³;
 - “*Apple*” (Ireland)¹⁴.

⁹ See Article 226(1) TFEU.

¹⁰ See Rule 198(4) RoP.

¹¹ See press release of the European Commission no. IP/14/1105 of 7 October 2014: http://europa.eu/rapid/press-release_IP-14-1105_en.htm

¹² See press release of the European Commission of 11 June 2014: http://europa.eu/rapid/press-release_IP-14-663_en.htm

¹³ See press release of the European Commission of 11 June 2014, *loc. cit.*

¹⁴ See press release of the European Commission of 11 June 2014, *loc. cit.*

50. By another press release dated 17 December 2014, the public was informed that the European Commission had enlarged its enquiry into the tax ruling practice under EU state aid rules to cover all Member States¹⁵. In this regard, the Commission addressed all Member States on the basis of its right to request any information from the Member States it deems necessary in the context of a state aid investigation.

c) Litispendence

51. Pursuant to Article 2(3)(1) of the Decision of 19 April 1995, “*a temporary committee of inquiry may not investigate matters at issue before a national or Community court of law until such time as the legal proceedings have been completed*”.
52. It follows from the foregoing that an inquiry committee may not be set up if the subject of the inquiry is subject to a pending court proceeding before a Union or a national court. If such court proceedings were instigated after the setting up of an inquiry committee, the latter would have to suspend its work.
53. Given the unclear scope of the subject of the inquiry, the Legal Service is not in a position to submit a final evaluation of this matter. Indeed, the subject of the inquiry is drafted in a way that any pending court case on EU or national level relating to the topic of tax rulings or, more generally, to state aids and the respect of Council Regulation (EC) No 659/1999 of 22 March 1999 might create a legal obstacle for a future committee of inquiry to duly conduct its work.
54. As regards the specific matter of tax rulings, the Legal Service is not aware of any pending court proceeding¹⁶. In case of a proposal submitted to the plenary with a view to setting up an inquiry committee on the subject-matter under consideration, this issue would require updated information before a final decision taken by the plenary.
55. Finally, the Legal Service underlines the fact that any of the aforementioned pending prelitigation procedures conducted by the European Commission could possibly result in a court proceeding before the Court of Justice. In such a case, a committee of inquiry set up in this context would have to immediately suspend its ongoing investigations.

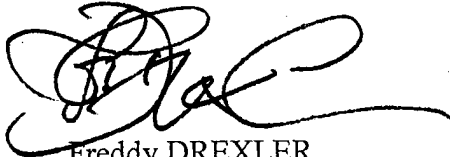
¹⁵ European Commission press release IP/14/2742 of 17 December 2014: http://europa.eu/rapid/press-release_IP-14-2742_bg.htm

¹⁶ Case T-258/14, *Luxembourg vs. Commission* and Case T-259/14, *Luxembourg vs. Commission*, both relating to the scope of a Member State’s obligation to provide the Commission with relevant documents in the context of the pending prelitigation procedures, were closed on 12 January 2015.

VI. Conclusions

56. On the basis of the foregoing, the Legal Service reaches the following conclusions:

- a) The proposal of 14 January 2015 to set up a committee of inquiry to investigate alleged contraventions and maladministration in the application of EU law in relation to tax rulings by Member States raises serious legal issues as to its compatibility with the mandatory rules applicable with respect to the setting up of inquiry committees. Indeed, there are grounds to come to the conclusion that the proposal of 14 January 2015 ;
 - fails to specify the subject of the inquiry, as required under Rule 198(3) RoP, in a sufficient manner;
 - fails to provide a statement of the grounds, as foreseen under Rule 198(3) RoP;
 - fails to provide in all cases sufficient elements which would allow to clearly identify the alleged “contraventions” or “maladministration” and the entities or Member States which are considered to be responsible for these shortcomings;
- b) A committee of inquiry set up on the basis of the proposal of 14 January 2015 risks being hindered in the due conduct of its investigations in the event of notification of ongoing prelitigation procedures by the European Commission relating to matters covered by the inquiry.
- c) In case of pending court proceedings on EU or on national level relating to a subject-matter interfering with its proposed mandate, the European Parliament is prevented from setting up a committee of inquiry. In case of pending prelitigation procedures currently conducted by the European Commission resulting in a court proceeding before the Court of Justice, a committee of inquiry set up in this context would have immediately to suspend its ongoing investigations.



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