ACCOUNTANCY EUROPE.

FORMAL RESPONSE TO PANA COMMITTEE WRITTEN QUESTIONS

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I am pleased to contribute to the PANA Public Hearing on Monday 6 March and to respond to the questions below.

I have answered to the best of our knowledge, but due to the short time-frame the information below is not based on extensive research or consultation. For the same reason, and because of the short preparation time for these responses, the comments put forward below have not been approved following the normal due process of Accountancy Europe.

1. Could you explain your role, whom you represent and how the accounting sector is organised in the European Union?

Accountancy Europe unites 50 professional organisations from 37 European countries.

Our member bodies are national institutes of professional accountants or chambers of auditors (not audit firms or practitioners).

The members of these institutes or chambers are individual accountants/auditors and (in some countries) accounting or auditing firms.

These individual accountants/auditors can work in accounting or auditing firms (for example advising clients), in businesses of all sizes (for example as CFO), in the public sector (for example in finance ministries or national audit offices) or in education (for example teaching at universities). Generally, accountants advising clients can provide a wide range of services, like bookkeeping, preparing financial reports, providing tax advice or auditing (as allowed by national legislation and independence standards and rules).

The way in which the accountancy profession is organised across the EU varies country by country. Depending on the country, all or only parts of the accountancy profession can be regulated. Where regulation exists, the rules can cover, for example, education and qualification, the use of professional titles as well as membership in professional institutes and supervision. Where regulation does not exist, everyone can provide accountancy services or tax advice. It appears that in a number of EU Member States there are certain rules regarding the provision of tax advice, but the situation is fragmented.[1]

Only for statutory audit services, harmonisation at EU level ensures a certain degree of harmonisation. (see question 2).

For further details on how the accountancy profession is organised in the EU on a country by country basis, please refer to our survey which provides a comprehensive overview: https://www.accountancyeurope.eu/publications/fee-survey-on-structure-and-organisation-of-the-accountancy-profession-across-30-european-countries/ (although this survey dates back from 2012, it is broadly still relevant).

[1] See CFE European Professional Affairs Handbook for Tax Advisers, 2013, page 6 http://www.cfe-eutax.org/sites/default/files/CFE%20European%20Professional%20Affairs%20Handbook%20for%20Tax%20Advisers_2nd%20edition_2013.pdf

2. **The rules of conduct of accountancy profession including ethical responsibilities are typically set out at the Member State level. Do you have information as to how (self-regulation or legislation) this is organised in the countries included in your network?**

The accountancy profession is subject to EU law for statutory audit, national legislation, and elements of self-regulation, an International Code of Ethics and global or individual codes of networks or firms.

EU STATUTORY AUDIT LEGISLATION

At the EU-level, the recently amended audit legislation (Directive 2014/56/EU and Regulation 537/2014) establishes in EU-law strengthened provisions for statutory auditors and audit firms on professional ethics, independence and objectivity (Article 22 of the Directive) as well as prohibited non-audit services for public interest entities (Article 5 of the Regulation).

These revised rules address, notably, concerns in relation to potential conflicts of interest and threats to the auditor independence.

They are currently being implemented across EU Member States. Once the revised legislation is fully implemented and enforced, it will become possible to assess its impact; another revision before that would not be necessary or appropriate and would not follow the principles of better regulation.

NATIONAL RULES

At EU Member State level, there is little consistency as to how the accountancy profession is regulated for services other than statutory audit. There are countries which regulate a certain profession or certain services, others do not.

In Germany, for example, tax adviser is a fully regulated profession. Detailed professional rules are laid down in federal law (including criminal law), tax advisers need to be registered with the regional chamber of tax advisers and are subject to supervision.

A similar situation exists in Austria, where the accountancy profession is fully regulated with legislation that provides detailed rules, including the framework for ethical responsibility and the supervision is delegated to the chamber of accountants.

In the UK, in common with many other countries, neither accountant nor tax adviser are regulated professions, but there is a strong tradition for roles in finance to be undertaken by members of professional bodies, for whom entry examinations, practical work experience requirements and the respect of professional codes of conduct are mandatory.

INTERNATIONAL CODE OF ETHICS

On the international level, the International Ethics Standards Board for Accountants (IESBA, an independent standard setting board) issues ethical standards for professional accountants worldwide.

The IESBA Code of Ethics for Professional Accountants applies to all professional accountants, whether in public practice or in business (including education, the public sector, and the not-for-profit sector). The IESBA Code serves as the foundation for codes of ethics developed at national level.

This Code is reviewed and amended periodically via a public and solid due process overseen by the Public Interest Oversight Board (PIOB), which includes representatives from international institutions and regulatory bodies.

The Code states, notably, that a "*professional accountant in public practice shall not knowingly engage in any business, occupation, or activity that impairs or might impair integrity, objectivity or the good reputation of the profession*". Other areas addressed by the Code include conflicts of interest and independence.

IESBA has also recently issued a framework[2] for auditors and for professional accountants on what actions to take if they become aware of a potential illegal act committed by a client or employer. Accountants in practice or business should raise the issue with management, disclose the matter to an appropriate authority and withdraw from the engagement and client relationship.

GLOBAL AND INDIVIDUAL CODES OF NETWORKS AND FIRMS

Global accountancy networks have global codes of ethics and business conduct that apply to all partners and employees around the world. These global codes are accompanied by codes of ethics issued by the national firms.

3. To what extent do Member States require members of the three accountants to implement anti-money laundering (AML) measures, such as KYC (know your client) and other due diligence rules? How frequently and under what changed circumstances are professionals required to update such due diligence?

I understand the 'three accountants' as meaning auditors, external accountants, and tax advisors, which are subject to the AML Directive.

These professionals need to carry out client due diligence measures for every new client and also monitor ongoing client relationships. This includes for example a verification of the beneficial ownership. Enhanced due diligence measures are required, if for example politically exposed persons are involved. In case an auditor, external accountant or tax advisor finds a suspicious transaction, he or she needs to file a report with the competent authority.

Member States are required to ensure that non-compliance leads to administrative sanctions and measures. Member States can also choose to introduce criminal sanctions for non-compliance.

Accountancy Europe is currently carrying out a project to gather an overview of the implementation of the 4th AML Directive in Member States, including which detailed rules are in place in each country for auditors, external accountants, and tax advisors to carry out client due diligence measures and report suspicious transactions.

The 4th AML Directive has specific rules for when an accountancy firm has branches or majority-owned subsidiaries that are located in 3rd countries where the minimum AML requirements are less strict than those of the Member States.

4. To what extent and in which Member States do rules of conduct for accountants restrict the participation of professionals in advising on the use of complex offshore structures to the effect of obscuring the beneficial ownership of assets, investments or businesses?

Offshore structures as such – even complex ones – can be established for legitimate business purposes.

However, if such structures are established for the purpose of obscuring the beneficial ownership of assets, investments or businesses, the rules against tax evasion or money laundering apply and no professional accountant should be involved in such activities.

Auditors, accountants and tax advisers will always – and for every client – need to verify the beneficial ownership, report suspicious transactions to the competent authority and refrain from advising clients on tax evasion or money laundering.

For legitimate structures, offshore or not, all facts about the structures and the beneficial owners will usually have to be disclosed to the tax authorities. In practice, this can for example be part of the tax declaration, like in Germany.

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[2] *Responding to Non-compliance with Laws and Regulations* (NOCLAR) will become effective 15 July 2017

Apart from the laws against tax evasion and money laundering and the disclosure rules to tax authorities, which are covered by EU and national law, I am not aware of specific codes of conduct restricting the use of complex offshore structures in general.

The UK Professional Code Relating to Tax (PCRT) can serve as an example for specific disclosure rules and anti-abuse rules: "*tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts*" and "*Members must not create, encourage or promote tax planning arrangements or structures that […] are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.*" I think that the PCRT is a particularly interesting good practice.

The Code is available from:
https://www.tax.org.uk/sites/default/files/PCRT%20Effective%201%20March%202017%20FINAL_211216.pdf

5. **To what extent and in which Member States are accountants required to report transactions by clients that could constitute tax evasion or aggressive tax planning, that could create a structure including offshore entities that would obscure beneficial ownership, or that raises potential AML compliance issues? To what extent would such disclosures be limited or precluded by confidentiality privileges?**

TAX EVASION, OBSCURE BENEFICIAL OWNERSHIP, AML COMPLIANCE

The 4th AML Directive requires auditors, accountants and tax advisers to file a suspicious activity report to the authorities when they suspect that funds are the proceeds of 'criminal activity'. The Directive clarifies that this includes all offences, including tax crimes relating to direct taxes and indirect taxes and, additionally, those as defined in the national law of the Member States. Breaches are punishable by sanctions, such as deprivation of liberty or a detention order for a period determined by national law.

Accountants, auditors and tax advisers are only exempted from reporting obligations for any client information that they receive in the course of ascertaining their client's legal position or when defending/ representing a client in/concerning judicial proceedings.

In Germany, for example, as in other countries, tax advisers must advise their clients against undertaking tax evasion. If the client does not follow the advice, the tax adviser must terminate the engagement.

TAX PLANNING

Tax planning is a legal activity and not a crime, and is therefore not a reportable activity under the AML Directive (except where there would be in addition a suspicion that related illegal activities have or will take place).

As far as I am aware, fewer than 10 countries worldwide require reporting of tax avoidance schemes, of which three (UK, Ireland and Portugal) are EU Member States. Both the UK and Ireland disclosure schemes have quite a narrow (albeit enlarging) focus – acting as an early warning system for mostly pre-packaged tax avoidance schemes sharing characteristics (such as contingency fee arrangements, confidentiality clauses, standardised products etc.) or covering particular taxes or tax avoidance schemes (employment schemes, conversion of income into capital).

The Portuguese disclosure scheme covers all taxes and is triggered by operations involving entities based in low tax jurisdictions, as well as financial operations and operations on insurances. In France, I also understand that the tax authorities produce a list of certain tax avoidance structures that they believe to be abusive.

On an international level, BEPS Action 12 *Mandatory Disclosure Rules* provides a modular framework of guidance drawn from best practices for use by countries without mandatory disclosure rules that wish to obtain early information on aggressive tax planning. The recommendations represent a minimum standard and countries are free to choose whether to implement them. I am not aware that any EU Member States are

working on implementing this Action although several countries outside the EU are thought to be working on implementation.

At the EU-level, the European Commission has taken the first steps for potential pan-European action on this matter with the public consultation on Tax Intermediaries, to which Accountancy Europe has submitted a response. The response is available from:

https://www.accountancyeurope.eu/consultation-response/european-commissions-consultation-disincentives-advisors-intermediaries-potentially-aggressive-tax-planning-atp-schemes/

6. **In which Member States have regulatory bodies for accountants investigated potential infringements of the rules of conduct in instances that relate to tax planning? Have any of these investigations resulted in proceedings being brought against any professionals involved, and if so with what result?**

Accountancy Europe does not have information as to the frequency with which accountants are subject to disciplinary sanctions in respect to tax planning.

Generally, tax matters are investigated by the tax administrations. I am not aware of publicly available statistics across Europe on such cases.

Financial Intelligence Units, which are responsible for AML, may publish reports, which however do not include tax planning, because it is not (and legally cannot be) a defined predicate offence.

On EU level, only statutory audit is subject to supervision, which does not include tax advice. Supervisory authorities will undertake periodic, risk-based, compliance visits that focus on compliance with statutory audit regulation and standards but may also include other aspects such as internal organisation and control within an audit firm. Any breaches identified during compliance visits will be dealt with according to the severity of the breach.

On national level, where the provision of tax advice is regulated or self-regulated, supervision and investigation take place, but disciplinary action is not always made public unless it is of such a severe nature as to warrant public disclosure.

Overall, it would be very difficult for anyone in a regulatory role to determine on a case-by-case basis whether a particular piece of tax planning advice breaches a relevant code of conduct. However, discussions on good tax governance at country level, as initiated by NGOs, have sometimes resulted in guiding principles on tax strategy.

Another way in which disciplinary proceedings arise is through complaints by clients about the service that they have received from their accountant. In such cases, the complaints tend to be about failure to adequately complete the services that the accountant was contracted to do (i.e. the failure to submit a tax return on behalf of the client) or because of the inadequacy of the advice that they have received. In the latter case, the complaint is likely to arise because the client believes that the accountant has failed to do everything possible to reduce their tax liability. Conversely, it is highly unlikely that a client would report their accountant for giving advice that they regard as overly aggressive, particularly as the taxpayer has the final responsibility for agreeing to the tax planning strategy suggested.

7. **Frequently, accountancy firms claim that they are required to help clients achieve highest level of tax planning as they could get sued otherwise. Are the accounting firms (including the Big 4) ever sued by their clients in any Member State for not providing efficient tax advice? If they are sued, what proportion of cases do the clients win?**

In most Member States accountants owe their clients a duty of care and if they fail to satisfy that duty of care they could be reported to their regulatory body and\or sued for a breach of contract.

This duty of care includes making the client aware of all legal means of optimising their tax liability.

However, it is the final choice of the taxpayer whether to use tax planning schemes. The accountant must make the client aware of their existence but is free to decide not to be involved in implementing such schemes.

Where different national tax rules result in, for example, perceived unfair tax competition with other countries, accountants would still be obliged to inform their clients about such rules if they could be advantageous to the client. While giving such advice, they would be required to make clear to their client any risks related to the tax planning in question, including reputational risk. Accountants' responsibility is to inform their clients of the content of the different laws and instruments available to them; clients decide on the way to go; lawmakers' responsibility is to draw these laws and regulations.

There are many examples of cases of accountants being sued and many more will be settled out of court between the client, the accountant and their professional indemnity insurer (which therefore logically go unreported).

In Austria and Germany, rules of conduct require tax advisors to advise clients of all legal possibilities to minimise the client's tax burden. However, it is stated in law that the ultimate decision to proceed is that of the taxpayer only.

In Germany, this has resulted in numerous cases of jurisprudence about tax advisers being sued for not having exploited fully the advantages for their tax clients, including judgements by the highest court of revision[3].

France, for its part, has a Code of Conduct that imposes a duty on French chartered accountants to advise their client on how to best minimise their tax liability – obviously, the advice must comply with the letter of the law and should also respect the Legislator's intent. Failure to comply with this obligation could result in the accountant being sued by the clients for lack of advice or inappropriate advice.

In the UK, case law established that a practitioner could be sued for not providing tax advice where such advice would be normal for an advisor of equivalent competence.[4] Since then, the larger networks of accountants are held liable by the courts to a higher duty of care because their resources are greater. Consequently, they have an increased risk of being sued for negligence if they do not make clients aware of even very niche tax planning schemes that could be of potential benefit.

8. **If a tax planning structure based on advice provided by accountants is subsequently overturned in a court of law or a tribunal, is there any financial penalty in any Member State to individual professionals involved in providing the tax advice, or is there any financial penalty on the taxpayer that is passed on in whole or in part to individual professionals involved in providing the tax advice?**

Generally, the overturning by the courts of a tax structure, which is not considered tax evasion, will result in the taxpayer having to pay the tax plus the interest on the underpaid tax. There has been an increasing move by tax authorities to also impose penalties on the taxpayers in such circumstances, although these tend to be linked to advance disclosure requirements.

In such cases, the client can usually sue the adviser. In practical terms, where a tax planning scheme fails before the courts, the taxpayer that has lost the case may pursue a civil action for negligence where the advice given by the adviser was inadequate, e.g. the adviser failed to give sufficient risk warnings or where the planning was not properly implemented.

[3] For example: BGH (decision of 23.02.2012) IX ZR 92/08, BGH (decision of 20.10.2011) IX ZR 08/09, OLG SH (ruling of 02.09.2011) 17 U 14/11, OLG Celle (ruling of 24.02.2010) 3 U 170/09, OLG Celle (ruling of 03.02.2010) 3 U 194/09, LG Paderborn (ruling of 08.05.2009) 2 O 399/08

[4] Mehjoo v Harben Barker

Regarding prior declaration, in Portugal for example if the taxpayer or promoter fails to disclose a scheme within 20 days of the scheme being proposed, fines of up to 100 000€ for promoters and 80 000€ for taxpayers can be levied.

In Austria, if a tax structure is overturned in a court of law the advisor will not face a penalty provided that (1) all relevant information was properly disclosed to the tax authorities on a timely basis, and (2) the structure was set up by the client based on an arguable interpretation of the law and the court overturned the structure based on a different interpretation of the law.

In Germany, it is the taxpayer that is responsible for complying with their obligations under tax law. The professional tax adviser is responsible for giving the taxpayer a comprehensive overview of various tax benefits and risks (both financial and reputational). The tax adviser can become liable to the taxpayer if he or she does not give a full overview of the benefits of various legal tax situations and the taxpayer has, therefore, paid 'too much tax'. He or she can also become liable if the taxpayer has to pay more tax than expected because the risk of additional tax payments has not been made clear to the client.

In the UK, at the end of 2016, new provisions were announced whereby every member of the "supply chain" that assist in tax planning could potentially be fined up to the value of the tax that they helped their clients avoid, up to a maximum of £3000. The legislation is still in draft and was subject to public consultation up to 1 February 2017.

9. **To what extent do professional service firms (diversified accounting firms, including the Big 4) share clients between different advisory functions: auditing, accounting, legal services, tax advice, other consulting? How frequently do the services provided to such shared clients include tax advice? How frequently do the services provided to such shared clients include both auditing and tax advice?**

This question refers to the practices of individual firms. Depending on the firm and the jurisdiction in question, the answers would differ significantly.

Accountancy Europe, as the representative of national institutes of professional accountants, does not have data on how individual firms manage their clients' portfolios.

On these matters, the firms themselves would be better placed to elaborate. The firms have already published some information on the topic.[5]

It should be noted that the mix of skills referred to in the question is a necessity considering the complexity of clients' demands. The Code of Ethics and independence rules regulate the provision of non-audit services to audit clients and prevent conflicts of interests. In addition, the networks and firms themselves have codes of conduct in place, and as elaborated in our response to Question 2, there are multiple layers of codes and rules governing the conduct and practices of the accountancy profession at international, EU and national levels.

At the EU-level, the recently amended audit legislation (Directive 2014/56/EU and Regulation 537/2014) establishes in EU-law strengthened provisions on professional ethics, independence and objectivity (Article 22 of the Directive) as well as on prohibited non-audit services for public interest entities (Article 5 of the Regulation).

10. **Do you have an estimation of the percentage of turnover of the professional service firms (accounting firms) arises from providing tax advice? Within the tax advice function, what**

[5] Deloitte: https://www2.deloitte.com/global/en/pages/about-deloitte/articles/global-report-2015.html
KPMG: https://home.kpmg.com/xx/en/home/campaigns/2016/12/international-annual-review.html#financials_financials-global-revenue
PwC: http://www.pwc.com/gx/en/about/global-annual-review-2016.html
EY: http://www.ey.com/gl/en/about-us/our-global-approach/global-review/global-review-2016-facts-and-figures

percentage of turnover is generated from strictly helping taxpayers comply with legislation such as filing tax returns, and what percentage is earned from tax planning?

As described in Question 1, Accountancy Europe represents national institutes of professional accountants and chambers of auditors which, in turn, directly represent their individual members. These members work in a variety of functions and sectors, including smaller and larger firms, companies as well as the public sector.

Consequently, we do not have information on the percentages of turnover of accountancy firms stemming from specific activities. This is a question better directed at the firms. Some information on such firms' global revenues is publicly available. Please see the links provided in the response to question 9 above.

11. **From the experience of previous hearings, the analysis of experts and the information exposed in the Panama Papers, it has been observed that on many occasions tax advisors are assisting their clients in the construction of structures that comply with national legislations; but at the same time arbitrate between different tax, legal and financial systems in order to minimize the global tax burden, hide the proceeds from creditors, or effectively launder the proceeds of crime. Could you provide your experienced opinion on the use of arbitration techniques for tax evasion, tax avoidance and money laundering?**

Tax evasion and money laundering are crimes, in which no accountant should be involved. As mentioned previously, the accountancy profession does not collude with illegal acts such as tax evasion and must report any suspicious transaction. Conversely, using the differences between laws is tax planning and as such legal.

Regarding tax systems in general, there are indeed mismatches between different countries' treatment of the same financial instruments or legal structure, as well as mismatches for example between the taxation of capital and income. These mismatches derive from national law and provide loopholes. Taxpayers may seek to take advantage of such loopholes and may consult advisors to provide them with the relevant information. Consequently, what countries could do is to enhance the drafting quality of their own tax laws and their coordination with other jurisdictions internationally – such as via the consistent implementation of the OECD's BEPS Actions.

The accountancy profession can also play its role – one example being the UK's PCRT, which states that members of the relevant professional bodies *must not* create, encourage or promote tax planning arrangements or structures that

i. set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or
ii. are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation

12. **Between 1/3 and 1/5 of the global offices of the Big 4 are located in tax havens (as revealed by their own websites and compiled in a study by Magdalena Rua (2014). Your members are from the EU, but EU accountancy firms work in associations with such advisors located in tax havens (as revealed by the Panama Papers, but also by the number of tax advisors in such jurisdictions). Can you please provide your opinion on the work of your members with such entities in tax havens?**

The "Big 4" are not direct members of Accountancy Europe. We do not have access to information about the number of their global offices in so-called tax havens, the number of staff employed in these jurisdictions, or the activities that they undertake. Requests for such detailed information should be addressed to the relevant firms directly.

We have had insufficient time to thoroughly review and check the study referred to above, which seems to only exist in Spanish and dates back from 2014 at a time where we observe considerable changes in practice,

therefore we are unable to comment on it[6]. Additionally, we do not have access to detailed specifics of the leaks from the law firm Mossack Fonseca, so we are unable to discuss the specifics of any arrangements identified in the leaks.

Generally, international business may be drawn into various jurisdictions for genuine commercial reasons other than mere tax avoidance, for example solid company law, skilled workforce, or good infrastructure.

By extension, for accountancy firms there are also legitimate reasons to have a branch or subsidiary or establishment in many jurisdictions, because they need to serve their clients.

EU Member States are currently working on setting up a common EU list of non-cooperative jurisdictions – including an appropriate sanctions regime.

Accountancy Europe expects that accountants and accountancy firms abide by all laws, and strongly condemns any involvement in illegal and criminal activities, irrespective of the jurisdiction in which they are based.

Accountancy Europe has stimulated the profession to reflect on its evolving role and responsibilities and clearly suggested that accountants and accountancy firms refrain from contributing to tax avoidance schemes based on purely artificial structures using loopholes and mismatches in tax legislation.[7]

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[6] The conclusion of the study appears to be based on a list of countries drawn by the Argentinian tax legislation whose sole criteria is "countries with low or zero corporate income tax". This differs from the list of the 30 non-cooperative jurisdictions consisting of those countries or territories that feature on at least 10 member states' blacklists as published by the European Commission in July 2015.

[7] https://www.accountancyeurope.eu/wp-content/uploads/1510_The_accountancy_profession_and_taxation-1.pdf