Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC'

(COM(2016) 450 final — 2016/0208 (COD))

(2017/C 034/19)

Rapporteur: **Javier DOZ ORRIT**

Referral	Council, 19.8.2016 European Parliament, 12.9.2016
Legal basis	Articles 50 and 114 of the Treaty on the Functioning of the European Union *(COM(2016) 450 final — 2016/0208 (COD))*
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	5.10.2016
Adopted at plenary	19.10.2016
Plenary session No	520
Outcome of vote (for/against/abstentions)	182/0/1

1. **Conclusions and recommendations**

1.1. The EESC believes that the fight against terrorism and its financing and efforts to combat money laundering and other related forms of economic crime should be permanent EU policy priorities.

1.2. The EESC welcomes in principle the measures included in the proposed amendment to the directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ([1]) and agrees that its transposition is urgent.

1.3. Given the global nature of these phenomena, the Committee calls on the EU and the Member States to take an even more prominent role in the future and to play a pioneering role in the international bodies and forums that are seeking to combat money laundering and the serious crime associated with it. Internationally and globally coordinated action and measures are needed to be able to act more effectively here and to achieve better results; Europe can lead the way in this process.

1.4. The Committee is aware of the effort that adapting to the directive demands of businesses and obliged entities, as well of the supervisory authorities. It is however an effort that all must make in order to achieve the objectives, which the EESC fully supports, that include protecting the financial system and other obliged entities from their use to commit crime. The Committee proposes that the impact of applying these measures be assessed.

([1]) Hereinafter referred to as 5AMLD: COM(2016) 450 final.

1.5. The EESC is concerned that a number of factors may seriously limit the practical effectiveness of the fourth and fifth anti-money laundering directives (AMLD). Firstly, the list of high-risk third countries, published on 14 July 2016, does not include many of the countries or jurisdictions which — on the basis of credible evidence — are believed to be acting as tax havens for money laundering, or any of the 21 territories mentioned in the Panama papers. Given that the enhanced due diligence measures mentioned in 5AMLD are applied only to third countries which are deemed to be high-risk, the EESC proposes that either a new list of high-risk third countries be drawn up, or the scope of the measures under Article 18a of 5AMLD be broadened. The EESC considers creating public national registers of the beneficial owners of bank accounts, businesses, trusts and transactions, and access to them by obliged entities, to be a priority.

1.6. The EESC urges the European institutions to strengthen their policies aimed at closing down tax havens. In particular, the Committee believes that all obligations laid down in the 5AMLD, especially those relating to the identification of the beneficial owners of bank accounts, businesses, trusts and transactions, should be extended to all territories or jurisdictions whose sovereignty resides with the Member States, including those which have special tax laws.

1.7. The fight against money laundering should be linked more closely with the efforts needed to combat tax fraud and avoidance, corruption and other connected crimes — trafficking in arms, drugs, people, etc. — and against the organisations running the criminal economy. Fresh initiatives need to be launched against all of them and their connections with laundering. Measures to tackle unfair tax competition should also be put in place.

1.8. The fight against terrorism and money laundering requires closer cooperation between the various intelligence and security services of the Member States, and between these services and Europol.

1.9. The EESC considers that free trade and economic partnership agreements should include a chapter on measures to tackle tax fraud and avoidance, money laundering and terrorist financing. The EESC calls on the Commission to include it as an EU proposal in the ongoing negotiations, in particular those on the TTIP, and in the treaties already in force when they come to be revised.

1.10. The work of the Member States' Financial Intelligence Units (FIUs) and their permanent coordination at European level are essential. The EESC believes that it would be useful to create a European tool for monitoring, coordinating and anticipating technological change.

1.11. Given the huge importance of the fight against money laundering and in order to ensure that the rules in this field are implemented uniformly and effectively across all Member States, it is crucial that the texts and concepts that frame the proposed measures be as clear as possible. This will also provide the necessary legal certainty for all those required to implement this legislation.

1.12. The legal treatment (definitions and penalties) of all crimes relating to money laundering, tax fraud, corruption and the financing of terrorism and its connections should be harmonised at European level, as should penalties resulting from failure to comply with the AML directives.

1.13. The EESC proposes the introduction of surveillance measures for the subsidiaries of obliged entities in high-risk third countries, so that not only their clients are monitored.

1.14. The Committee suggests that the Commission should explore additional steps to protect the rights of citizens against illegal use or abuse of the information recorded by the competent authorities or obliged entities.

1.15. The Committee welcomes the rapid processing of these proposals and hopes that they can come into effect quickly and in the short term without detriment to the quality of the results. A realistic timetable should be set out for the transposition and application of the legislation in the Member States and clear guidelines laid down.

2. **Background and Commission proposal**

2.1. The brutal terrorist attacks in France, Belgium and other European countries and the leaks concerning the laundering of money from criminal activities in tax havens, the most recent of which was the ICIJ ([2]) Panama papers leak, have led the Commission to propose new measures for the prevention of the use of the financial system for the purposes of money laundering and terrorist financing. On 5 July 2016, the Commission adopted, together with the proposed 5AMLD, another directive to facilitate access to anti-money-laundering information by tax authorities ([3]) and a communication on further measures to enhance transparency and the fight against tax evasion and avoidance ([4]).

2.2. A recent European Parliament study ([5]) points out that 'the "Panama Papers" have brought to light the role of offshore tax havens as enablers of tax avoidance, and the aggressive nature of some tax avoidance schemes, where the distinction between avoidance and evasion is masked. In that sense, opacity — resulting from secrecy, lack of traceability and failure to share tax information — has played an important role in cases of breaches of economic sanctions and obscured useful and necessary information regarding organised crime, including money laundering related to terrorist activity, corruption and the drugs trade'.

2.3. The ICIJ has published the Panama papers. Its Offshore Leaks Database ([6]) lists 45 131 EU companies ([7]). Of the 21 territories that Mossack Fonseca used for tax fraud and avoidance and money-laundering purposes, three are EU states and another three are dependent territories of one ([8]).

2.4. The 5AMLD develops some of the proposals of the *Action Plan for strengthening the fight against terrorist financing* ([9]), which involve amending the 4th directive (4AMLD) ([10]) and of the Directive on the coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies ([11]). The plan proposes to bring forward the date for transposing the 4AMLD from 26 June 2017 to 1 January 2017, which will also be the deadline for transposing the two proposals for directives of 5 July 2016.

2.5. The 5AMLD's complex political and legislative framework includes, in 2015 alone, two other initiatives: the *European Agenda on Security* ([12]) and the proposal for a *Directive on combating terrorism* ([13]), which establishes a new classification of offences linked to terrorist financing.

2.6. On 14 July 2016, the Commission adopted the Delegated Regulation on identifying high-risk third countries and an annexed list ([14]) comprising the list approved by the FATF at its meeting in Busan (South Korea) on 24 June 2016.

2.7. The proposed 5AMLD imposes some new due diligence obligations which obliged entities — financial institutions, related professionals, trust and gambling service providers, real estate agents, etc. — must apply to their clients, both new and existing. Above all, in Article 18a it provides for enhanced customer due diligence with respect to transactions involving high-risk third countries. Member States will also be able to apply countermeasures to high-risk jurisdictions, including a ban on establishing branches or representation offices or making financial transactions in these jurisdictions.

2.8. A new development is that virtual currency exchange platforms and custodian wallet providers will fall within the scope of the directive and will be considered as obliged entities for the purposes of the due diligence measures. Anonymity for the online use of prepaid cards is removed and the threshold for mandatory identification is reduced from EUR 250 to 150 when used face-to-face.

([2]) International Consortium of Investigative Journalists.
([3]) COM(2016) 452 final.
([4]) COM(2016) 451 final.
([5]) EPRS-EP: *The inclusion of financial services in EU free trade and association agreements: Effects on money laundering, tax evasion and avoidance. Ex-Post Impact Assessment*, p. 18.
([6]) Offshore Leaks Database.
([7]) EPRS, *op.cit.*, pp. 19 and 20.
([8]) EPRS, *op.cit.*, p. 21.
([9]) COM(2016) 50 final.
([10]) OJ L 141, 5.6.2015, p. 73.
([11]) OJ L 258, 1.10.2009, p. 11.
([12]) COM(2015) 185 final.
([13]) COM(2015) 625 final.
([14]) C(2016) 4180 final.

2.9. The 5AMLD also proposes: strengthening the competences of the FIUs and promoting cooperation between them; facilitating the identification of holders of bank and payment accounts by establishing national central automated registers of these accounts; and imposing the identification and registration of the true beneficial owners of companies (reducing the threshold for shareholding from 25 % to 10 %) and of trusts, foundations and similar entities, as well as allowing public access to this information under certain conditions.

3. **General comments**

3.1. The various types of crime that use money laundering and tax havens to the detriment of the fundamental rights of the entire population are very serious. Money laundering is expanding continuously in spite of the efforts made by the European and national authorities.

3.2. The liberalisation of financial flows around the world and the speed with which the new digital technologies are applied to such transactions hampers action to counter the use of the financial system for criminal purposes. Investigations into the most recent jihadist terrorist attacks in Europe have thrown light on methods of funding terrorism that are not covered by the 4AMLD. This justifies proposing its amendment even before it has come into force, and bringing forward the deadline for its transposition.

3.3. The EESC agrees in principle with the measures proposed in the 5AMLD and believes that they may prove useful in helping to put an end to terrorism and money laundering.

3.4. One reservation might concern the impact on fundamental rights, in particular protection of personal data, of the improper use by the competent authorities of a large volume of sensitive information. The 5AMLD proposal provides some safeguards in this respect. An awareness of how certain governments have behaved, as revealed by WikiLeaks (2010 and 2012) and the Snowden papers (2013), prompts us to suggest that the Commission should look into the possibility of introducing further measures to protect citizens' rights against the improper use of recorded information. More specifically, it should assess the practicality of a common classification of the unlawful use of personal information and data as a criminal offence. The EESC could help to carry out such a study.

3.5. Notwithstanding the current proposals and other initiatives and actions at European level that the Committee advocates in this opinion, it is crucial that, in future, the EU and the Member States take on a more leading and pioneering role and act as a driving force in the international bodies and forums working in the area of combating money laundering and the serious crime associated with it, which are global phenomena and generally cross-border in nature. Internationally and globally coordinated action and measures are needed to be able to act more effectively here and to achieve better results; Europe can lead the way in this process.

3.6. Many European citizens continue to suffer the impact of the crisis, adjustment policies and rising poverty and inequality, while learning how large multinational companies indulge in tax avoidance and evasion, and leading economic, political, cultural and sports figures evade taxes and launder money in tax havens. Some practices and territories are also used to fund terrorist organisations capable of committing the most atrocious crime in Europe and other parts of the world. This situation is completely unsustainable. Pressure must be put on European and national authorities to act effectively to put a stop to it.

3.7. Notwithstanding the comments made in point 3.2, achieving the objectives of the AML directives could be seriously compromised by the weakness of political action to close down tax havens, which are a crucial link in the money-laundering chain. This could also be caused by the insufficient link between initiatives to counter money laundering and those targeting the crimes that feed it (tax fraud, membership of terrorist or criminal organisations, trafficking in arms, drugs, people, etc.) against a backdrop of continuing unfair tax competition in the EU.

3.8. The list of high-risk countries published by the Commission on 14 July 2016 ([15]) includes none of the countries appearing on the Panama papers list. This is paradoxical given that one of the arguments put forward by the Commission for proposing the 5AMLD is the revelations contained in the papers. Only one non-cooperating high-risk country appears on the list: North Korea. Iran is in Group II, which includes countries which have undertaken to address deficiencies and have sought technical assistance to implement the FATF Action Plan. Nine countries are included in Group I, countries which have already developed an action plan that will remove them from the list once they meet its conditions (four of them are currently embroiled in conflict: Afghanistan, Iraq, Syria and Yemen). Some of the money that finances terrorism passes through these countries. However, all analyses and investigations into the question show that the money laundering generated by other forms of crime does not take place in them.

3.9. It is regrettable that a body such as the FATF, which carries out such important work in analysing international financial crime and in proposing means to combat it, has not found an appropriate way of drawing up its lists of high-risk countries. It is logical that the Commission should make use of the Recommendations ([16]) and other proposals of the FATF to combat money laundering. But in this case accepting its proposals could partially negate the effectiveness of the 5AMLD, given that the reinforced measures of Article 18a will apply only to high-risk third countries.

3.10. The EESC considers that, if the 5AMLD is to be effective, it will be necessary: either to revise the list of high-risk third countries to include countries or territories where the principal money laundering operations are carried out, or to extend the scope of application of Article 18a to all obliged entities and jurisdictions which, according to information in the possession of the FIUs, are suspected of money laundering. The EESC also proposes that a single list of jurisdictions that fail to cooperate in pursuing economic crime should be drawn up.

3.11. The fact that a significant proportion of money laundering operations are conducted in dependent territories of the Member States should encourage all the EU institutions to establish a firm political commitment to closing down tax havens on their territory. Specifically, the requirements for EU obliged entities under the 5AMLD proposal to identify the beneficial owners of bank accounts, companies, trusts and transactions should be extended to all territories whose sovereignty lies with Member States, including those with special tax regimes. It should be made possible for obliged entities also to rely on the data from the (official) national registers in order to comply with their obligations. Equally, the reinforced measures of Article 18a should apply to the dependent territories of EU Member States which carry out money laundering operations.

3.12. Tax evasion and avoidance are closely related to money laundering. Laundered money comes in part from tax fraud and avoidance. It is necessary to coordinate measures to prevent and prosecute both types of offence, through legislative and political action and the work of intelligence and police services and the courts. The EESC has welcomed the latest Commission initiatives to combat tax evasion and avoidance in the EU, but these are still insufficient, so that further measures are needed, to be coordinated with measures to tackle money laundering.

3.13. The fight against money laundering and the financing of terrorism require close cooperation between the various intelligence and security services of the Member States, and between these services and Europol. It has to be acknowledged that current levels of cooperation are insufficient. Despite public statements by national and European decision-makers and public support for closer cooperation, after every terrorist attack major failures of coordination come to light. Sometimes there are coordination failures between the different services of the same Member State. Every effort must be made to put an end to this situation.

([15]) Delegated Regulation C(2016) 4180 and Annex with list of countries: http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-4180-EN-F1-1-ANNEX-1.PDF

([16]) International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.

3.14. In recent years, the EU has negotiated or signed major free trade and economic association treaties. Currently, an important treaty, the TTIP, is being negotiated. These treaties offer an excellent opportunity to lay down bilateral or bi-regional measures for tackling tax evasion and avoidance, money laundering and financing of terrorism. The EESC calls on the Commission to study ways of incorporating chapters of this nature into the treaties currently under negotiation and when reviewing those that are already in place. On this point the EESC fully agrees with the conclusions of the EP study mentioned above ([17]).

4. **Specific comments**

4.1. Member States' FIUs must make significant efforts in the areas of information, surveillance and prevention, including anticipating rapid changes in technologies that could be used for money laundering and terrorist financing. Rapid national responses and the pooling of Europe's various investigations are absolutely necessary. The ongoing and flexible coordination of the FIUs is essential. The EESC believes that it would be useful to set up a European tool for surveillance, coordination and anticipating technological change.

4.2. The obliged entities, as defined in the 4th and 5th AMLDs, must carry out duties linked to the surveillance of and checks on suspicious persons and movements. However, these directives do not cover requirements or obligations relating to the activities of obliged entities in high-risk third countries. There should be an end to the situation whereby clients are subjected to more supervision than the entities themselves.

4.3. The following recommendations of EESC opinion CCMI/132 — Fighting corruption ([18]) — are particularly useful in relation to the present opinion: (a) developing a coherent and comprehensive 5-year anti-corruption strategy and accompanying action plan; (b) creating a European Public Prosecutor's Office and strengthening the capabilities of Eurojust; and (c) requiring multinational companies to report key financial data in the countries where they operate.

4.4. In the EESC's opinion it is necessary to harmonise at European level the legal treatment — definitions and penalties — of all offences relating to money laundering, tax fraud, corruption and the financing of terrorism and its connections. The Commission and the European Banking Authority should also promote the harmonisation of penalties for the failure of an obliged entity to fulfil an obligation.

4.5. The fight against money laundering is of major importance and should be carried out decisively, thoroughly and efficiently. It is therefore crucial that the texts and concepts in the proposed measures are as clear as possible. This both improves the necessary legal certainty for all those required to apply these texts and helps ensure uniform application throughout the European Union.

4.6. The Committee welcomes the speed of the work on these proposals and hopes they can be adopted and enter into force quickly and in the near future. At the same time, this should not impact on the quality of results. This calls for a realistic timetable for the transposition of the legislation and its application in the Member States and clear guidelines.

Brussels, 19 October 2016.

The President
of the Economic and Social Committee
Georges DASSIS

([17]) EPRS, *op. cit.*, p. 59.
([18]) OJ C 13, 15.1.2016, p. 63.