



Tweede Kamer

DER STATEN-GENERAAL

The President of the European Commission
Mr Jean-Claude Juncker
B-1049 Brussels
Belgium

The Hague, 23 December 2016

Re: Reasoned opinion (subsidiarity) regarding the EU proposal concerning hybrid mismatches with third countries – COM(2016) 687

Dear Mr Juncker,

The House of Representatives of the States-General has assessed the EU proposal concerning hybrid mismatches with third countries (COM(2016) 687) against the principle of subsidiarity.

By means of this letter, I am informing you that the House of Representatives of the States-General has come to a negative assessment of the subsidiarity of the aforementioned proposal.

Enclosed with this letter, appendix 1 contains the text of the motion proposed by MPs Harbers (VVD), Omtzigt (CDA) and Dijkgraaf (SGP) on 21 December 2016. This motion was adopted by the House of Representatives on 22 December 2016. Appendix 2 features the contributions from the parliamentary groups, in which they outline their positions regarding concerns, including the subsidiarity, in more detail. I would appreciate it if you could take these contributions into consideration in your response to this letter.

The European Parliament, the Council and the Dutch government will receive a copy of this letter.

Yours sincerely,

Khadija Arib
Speaker of the House of Representatives
of the States-General

Appendix 1. Motion proposed by Harbers, Omtzigt and Dijkgraaf

HOUSE OF REPRESENTATIVES OF THE STATES-GENERAL
Session 2016-2017

34 620 Autumn 2016 memorandum

Nr. 3 MOTION FROM MP HARBERS et al.
Proposed on 21 December 2016

The House,

having heard the deliberations,

observing that an impact assessment has not been conducted for the proposal concerning hybrid mismatches with third countries, while the House of Representatives unanimously voted in favour of such an assessment;

observing that there is still a lack of clarity and great deal of uncertainty regarding the consequences of Brexit, and regarding the United States' new taxation plans;

observing that OECD Action 2 first and foremost places responsibility for neutralising the effects of the hybrid mismatch with the third country itself;

pronounces that it will draw a 'yellow card' regarding the proposals concerning hybrid mismatches with third countries,

and proceeds to the order of the day.

Harbers
Omtzigt
Dijkgraaf

Appendix 2. Contributions of parliamentary groups

Please find below the contributions from the various parliamentary groups regarding this EU proposal.

There are 150 seats in the House of Representatives of the States-General. These seats are distributed as follows:

- Volkspartij voor Vrijheid en Democratie (People's Party for Freedom and Democracy) - VVD (40)
- Partij van de Arbeid (Labour Party) - PvdA (35)
- Socialistische Partij (Socialist Party) - SP (15)
- Christen Democratisch Appel (Christian Democratic Appeal) - CDA (13)
- Partij voor de Vrijheid (Party for Freedom) - PVV (12)
- Democraten 66 (Democrats 66) - D66 (12)
- ChristenUnie (Christian Union) - CU (5)
- GroenLinks (Green Left) - GL (4)
- Staatkundig Gereformeerde Partij (Reformed Political Party) - SGP (3)
- Partij voor de Dieren (Party for the Animals) - PvdD (2)
- 50PLUS (1)
- Group Kuzu/Öztürk - GrKÖ (2)
- Group Bontes/van Klaveren - GrBvK (2)
- Houwers (1)
- Klein (1)
- Monasch (1)
- Van Vliet (1)

Eight parliamentary groups submitted contributions regarding the assessment of the subsidiarity of the proposals.

Subsidiarity

The members of the **VVD parliamentary group** observed that an impact assessment of the consequences of this proposal has yet to be conducted. They also recalled that the House of Representatives earlier voted unanimously for an impact assessment for proposals such as this. An initial indication revealed that in excess of 77,000 jobs at American companies could be affected by this – a huge number. The members of the VVD parliamentary group do not want to jeopardise any Dutch jobs.

The members of the VVD parliamentary group also suggested that as a result of this proposal, the Netherlands and other member states will levy taxes on profit that does not belong to us, but to another country – in this case, often to the US. The proposal therefore contradicts the principle that tax should be levied on profit where the profit is made.

The members of the VVD parliamentary group also wrote that the OECD report on Action 2 places the responsibility for neutralising the effects of the hybrid mismatch with the country of origin. In the case of hybrid mismatches in third countries, it will primarily concern American companies. The American President-Elect Trump has already announced his plans to levy this tax. The members of the VVD parliamentary group believe that it would be beneficial to wait for these developments, in light of the aforementioned aspect of the OECD report. There is also a notable lack of clarity regarding Brexit.

The members of the VVD parliamentary group argued that a proposal for hybrid mismatches with third countries can potentially only be made with a lengthy transitional period and in combination with a lower corporation tax rate.

The members of the **PvdA parliamentary group** offered a positive assessment of the subsidiarity of the proposal. There is a broad international consensus regarding the undesirability of tax avoidance. There is also a broad consensus that an international approach to tackling tax avoidance would be the most effective one. In an effort to combat tax avoidance, the European member states have unanimously adopted the Anti Tax Avoidance Directive (ATAD). When

adopting the ATAD, the member states unanimously voted that the European Commission would present a proposal for how to also tackle hybrid mismatches with third countries. This proposal has now been tabled. In light of the fact that the member states requested these proposals, the PvdA parliamentary group believe that subsidiarity has been satisfied.

The members of the PvdA parliamentary group also argued that the directive under consideration contributes to strengthened internal market operation. Non-European – especially American – companies are able to operate in the European market with an extremely low effective rate of tax on profits through using hybrid structures that result in double non-taxation or the effective perpetual deferment of taxes. This has an anti-competition effect, as European companies are required to pay taxes in Europe. This directive brings an end to these practices, thereby improving the operation of the internal market, which is in the interest of all member states.

The members of the **SP parliamentary group** are of the opinion that the European Commission proposal satisfies the principles of subsidiarity.

The members of the **CDA parliamentary group** believe that the EU is not the correct organisation to implement the OECD regulations with regard to Action 2. Action 2 features clear agreements, stating that the home country should take the initiative. The members of the CDA parliamentary group are of the opinion that – in line with these agreements – there is no place for an EU initiative, and certainly not for an initiative that extends beyond the agreements reached within the context of the OECD. Such action would damage the position of the EU. If a third country – in this case, the United States – does not implement the OECD agreements in a timely fashion, it is the responsibility of the other OECD countries to press for implementation. The members of the CDA parliamentary group believe that it is not in keeping with the OECD agreements to take pre-emptive measures as source countries.

The members of the **PVV parliamentary group** are of the opinion that it has been insufficiently established that action from the EU is preferential to separate action by the individual member states. In the case of OECD BEPS, recommendations were made regarding hybrid mismatches – recommendations that each country could interpret as they saw fit. The members of the PVV parliamentary group believe that the recommendations – regarding tackling undesirable hybrid mismatches – can therefore be recorded in national legislation without the requirement of a relevant directive. It is possible that action at the national level will not succeed in completely neutralising the mismatches, but the members of the PVV parliamentary group do not believe that this justifies a violation of national fiscal sovereignty, as would be the case with the proposed directive. Just as a so-called holey patchwork quilt of national regulations cannot be used to tackle the problem of hybrid mismatches, the proposed directive can also not completely prevent the holes.

A joint initiative for the entire market is therefore also unnecessary. The members of the PVV parliamentary group are of the opinion that the proposal does not satisfy the principles of subsidiarity.

Lastly, the members of the PVV parliamentary group believe that the EU action extends beyond what is required to realise the objectives of the Treaty and therefore adjudge the proposal to be disproportionate.

The members of the **D66 parliamentary group** supported a European approach to tax avoidance. They are of the opinion that tax avoidance due to hybrid mismatches with third countries can only be effectively tackled at the European level, because it always concerns mismatches between different tax systems. The members of the D66 parliamentary group therefore offered a positive assessment of the subsidiarity of tackling hybrid mismatches.

The members of the **ChristenUnie parliamentary group** offered their approval of the proposed directive from the Council regarding the amendment to directive 2016/1164 concerning hybrid mismatches with third countries. To these members, it is evident that tackling the effects of mismatches should be conducted at the European level. They believe that the approach, as outlined in the proposed directive currently being addressed, is accordingly in line with the subsidiarity principles outlined in article 5 of the Treaty on European Union.

The members of the **GroenLinks parliamentary group** offered a positive assessment of the subsidiarity of the directive regarding hybrid mismatches and endorse the conclusion reached by the European Commission. This proposal tackles damaging differences between member states: a

subject that most certainly can – and should – be dealt with at the European level. More than that, the members of the GroenLinks parliamentary group argued that the roots of the problem lie in a lack of coordination. The most fundamental and comprehensive solution is therefore a single format for the tax system throughout the Union. The members of the GroenLinks parliamentary group are of the opinion that this proposal certainly makes a positive contribution to this objective. The proposal also strengthens the internal market by protecting it from misuse due to potential variations between tax systems. The members therefore also offered a positive assessment of the proportionality, in light of the fact that there is still the possibility of tax avoidance, and that this can only be tackled at this level and in this way.

The members of the GroenLinks parliamentary group also stated that they would naturally prefer to see the immediate introduction of a global regulation, but that they viewed this as a major step in the right direction. Lastly, the members considered the postponement of the commencement date to be completely unnecessary.

Legal basis

The members of the **PvdA parliamentary group** considered article 115 of the Treaty on the Functioning of the European Union (TFEU) to be the correct legal basis for the proposed measure. The ATAD directive also has its roots in article 115 of the TFEU.

The members of the **SP parliamentary group** are of the opinion that the European Commission proposal has sufficient legal basis.

The members of the **CDA parliamentary group** believe that the European Commission rests on the correct legal basis.

The members of the **PVV parliamentary group** are of the opinion that the Treaty on the Functioning of the European Union (TFEU) does not offer a legal basis for the implementation of the proposal concerning hybrid mismatches. The members of the PVV parliamentary group argued that as a whole, the TFEU offers no sound basis for measures regarding direct taxation. Where direct taxation is concerned, individual member state sovereignty is applicable. Articles 110 to 113 of the TFEU outline stipulations regarding indirect taxation. After all, the case in question concerns levying corporation tax, which is considered to be direct tax.

The members of the PVV parliamentary group also argued that article 115 of the TFEU therefore does not offer a sound legal basis for the proposed directive, as the article relates to the operation of the internal market, not direct taxation. Even if the proposed directive endeavoured to tackle this behaviour (a word is missing here, I assume: tax avoidance), there still needs to be a direct influence on the operation of the internal market. The members of the PVV parliamentary group asserted that there is no direct influence as required by article 115 of the TFEU.

The members of the PVV parliamentary group emphasised that the potential application of article 115 of the TFEU means that the Council will need to vote unanimously for this directive.

The members of the **D66 parliamentary group** offered a positive assessment of the legal basis of the EU proposal.

The members of the **ChristenUnie parliamentary group** considered the appeal to article 115 of the TFEU justified for this directive.

The members of the **GroenLinks parliamentary group** offered a positive assessment of both the legal basis and the European Commission itself.