

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

date 21 December 2016
Subject Reasoned opinion on EU proposals (COM(2016) 683), (COM(2016) 685) and (COM(2016) 687)
our reference 160408u

Courtesy translation
(only the text in Dutch is official)

Dear Mr Juncker,

In accordance with the prescribed procedure, the Senate of the States General has checked the following proposals for compliance with the principle of subsidiarity:

- Proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016) 683)¹;
- Proposal for a Directive on a Common Corporate Tax Base (CCTB) (COM(2016) 685)²;
- Proposal for a Directive on hybrid mismatches with third countries (COM(2016) 687)³

In doing so the Senate has applied Article 5 of the EU Treaty and Protocol 2 to the Treaty of Lisbon on the application of the principles of subsidiarity and proportionality.

I am writing this letter to inform you of the position taken by the Senate of the States General. Identical letters have been sent to the European Parliament, the Council and the Dutch government.

The majority of the Senate consider that the proposals for a Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)683)⁴, on a Common Corporate Tax Base (CCTB) (COM(2016)685)⁵ and on hybrid mismatches with third countries⁶ do not comply with the principle of subsidiarity.

The parliamentary parties, which have reached this opinion by majority vote, provide the following reasons for their view on the subsidiarity and proportionality of the proposals in question.

¹See dossier E160043 at www.europapoort.nl

²See dossier E160044 at www.europapoort.nl

³See dossier E160046 at www.europapoort.nl

⁴ This is the view of the following parliamentary parties: the VVD (13 seats), CDA (12 seats), PVV (9 seats), SP (9 seats), ChristenUnie (3 seats), PvdD (2 seats), SGP (2 seats) and 50Plus (2 seats).

⁵ This is the view of the following parliamentary parties: the VVD (13 seats), CDA (12 seats), PVV (9 seats), SP (9 seats), ChristenUnie (3 seats), PvdD (2 seats), SGP (2 seats) and 50Plus (2 seats).

⁶ This is the view of the following parliamentary parties: the VVD (13 seats), CDA (12 seats), PVV (9 seats), ChristenUnie (3 seats), SGP (2 seats) and 50Plus (2 seats).

Common Consolidated Corporate Tax Base - CCCTB (COM(2016) 683)

The proposal for a directive that is the predecessor of the two proposals for directives on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base was critically assessed by the Dutch government in 2011. This assessment led the government to conclude at that time that the proposal did not comply with the subsidiarity principle. The present proposals for directives will require further study in the course of the procedure they must still complete. The issues are wide-ranging and the consequences for government revenues are not sufficiently clear. A majority of the Senate agree with the government that the proposal does not comply with the principle of subsidiarity. The opinion reads as follows:

*'The government considers that the principle of subsidiarity is not complied with. It does not see any necessity for the consolidation and redistribution of profits to be arranged at European level. Agreements about transfer pricing (which differ from this international allocation ratio) already exist within the OECD.'*⁷

In addition, a majority of the Senate consider that the proposal does not comply with the principle of subsidiarity for the following reasons:

- There is no reason why consolidation should be made mandatory within the EU for groups with a consolidated turnover above EUR 750 million.
- No benefits for the internal market have been demonstrated as agreements on transfer pricing already exist within the OECD.
- The European Commission's impact assessment is based on unrealistic assumptions (namely that 16 countries, including the Netherlands, will raise their corporate tax rate).
- The risk that this will ultimately result in reduced corporate tax proceeds in the Netherlands is too great.
- The link with countering tax avoidance is too far-fetched.
- The proposal does not provide for a minimum rate of corporate tax, say 20%.

In addition, a majority of the Senate consider that the proposal does not comply with the principle of proportionality for the following reasons:

- The proposal is unduly complex and will result in complicated implementation (coexistence of three systems).
- The allocation ratio works to the detriment of a country such as the Netherlands which specialises in trade and services (turnover, fixed assets, combination of a wage bill and number of employees).
- Agreements about transfer pricing on the basis of which profits are allocated already exist within the OECD.

Common Corporate Tax Base - CCTB (COM(2016) 685)

A majority of the Senate agree with the government that the proposal does not comply with the principle of subsidiarity. The opinion reads as follows:

'The government considers that the principle of subsidiarity is not complied with. It can endorse the aims of this proposal, namely strengthening the internal market, creating a business-

⁷ Parliamentary Papers II 2016-2017, 34 604, no. 4, p. 11.

friendly environment within the EU and tackling tax avoidance. However, the proposals are of little if any help in achieving this objective.

The Commission states that a common corporate tax base to strengthen the internal market can only be adopted at EU level. In the government's view, it is not apparent from the proposals that a European solution would have added value for all parties involved in this issue. Having a partially optional system means that the authorities must operate two different corporate tax systems rather than one and has clear drawbacks for the effectiveness of implementation.

Moreover, the anti tax avoidance directive adopted during the Dutch Presidency of the EU has already brought about a significant degree of harmonisation of the tax base in the Member States with the aim of preventing abuse. The anti-abuse measures comparable to those in the anti tax avoidance directive are repeated in the CCTB proposal. The other measures in the CCTB proposal are of little if any help in achieving this objective. It is therefore questionable whether and, if so, to what extent this proposal provides additional ways of tackling abuse.⁸

A majority of the Senate have the following additional reasons for holding that the proposal does not comply with the principle of subsidiarity:

- The aims of creating a more business-friendly environment for investment within the EU and strengthening tax avoidance are not met.
- The EU's anti tax avoidance directive will itself produce the desired harmonisation of the tax base (largely through implementation of part of the Base Erosion and Profit Shifting (BEPS) package of measures).
- The proposal undermines the Dutch concept of taxable profit, limits the participation exemption and ends the innovation box (tax relief for innovation).
- The proposal unnecessarily goes further than the OECD (BEPS) package.

A majority of the Senate consider that the proposal does not comply with the principle of proportionality for the following reasons:

- The proposal is unduly complex and will result in complicated implementation (coexistence of three systems).
- The temporary and limited possibility for transferring losses may encourage the artificial importation of losses from other EU Member States.

Proposal for a Directive on hybrid mismatches with third countries (COM(2016) 687)

The proposal for a Directive on hybrid mismatches with third countries is basically intended to tackle aggressive forms of tax avoidance, but may also possibly affect structures of importance to the creation of employment in the Netherlands and the attractiveness of the Netherlands as a country in which to set up business, particularly for American companies. A majority of the Senate consider that the proposal does not comply with the principle of subsidiarity and mention the following specific reasons:

- The proposal undermines the Dutch taxation system.
- The proposal goes further than intended by the OECD.

⁸ Parliamentary Papers II 2016-2017, 34 604, no. 4, p. 11.

- The proposal creates a situation where tax is levied (or tax relief denied) although the value is added in a third country. It is there that tax should be levied. This puts non-EU companies that wish to operate in the internal market at a competitive disadvantage.

A majority of the Senate consider that the proposal does not comply with the principle of proportionality for the following reasons:

- A global approach (OECD-BEPS action point 2) would be preferable.
- The proposal is extremely disadvantageous for the Netherlands (in particular as regards investments by American companies plus concomitant employment).
- It would be better to first wait and see what tax policy is pursued by the incoming US administration as there is a real chance that hybrids may be less attractive in the future from an American perspective.

For these reasons, a majority of the Senate of the States General consider that the proposals for a directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016) 683), for a directive on a Common Corporate Tax Base (CCTB) (COM(2016) 685) and for a directive on hybrid mismatches with third countries (COM(2016) 687) conflict with the principles of subsidiarity and proportionality.

The President of the Senate of the States General

Ankie Broekers-Knol