

Opinion of the European Economic and Social Committee Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries

[COM(2016) 687 final — 2016/0339 (CNS)]

(2017/C 075/13)

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Consultation	Council, 21 November 2016
Legal basis	Article 115 of the Treaty on the Functioning of the European Union
Section responsible	Section for Economic and Monetary Union and Economic and Social Cohesion
Adopted at plenary	14 December 2016
Plenary session No	521
Outcome of vote (for/against/abstentions)	176/1/4

1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) values the Commission's ongoing efforts in tackling aggressive tax planning, in the form of the Anti-Tax Avoidance Directive⁽¹⁾, which fits in well with the OECD's BEPS project⁽²⁾ and the requests from European stakeholders, such as civil society, the Member States and the European Parliament.

1.2. Although a precise economic analysis of the impact of hybrid mismatches is difficult to conduct, as also stated by the OECD, the EESC believes that the adoption of the Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries⁽³⁾ (hereinafter: the Directive) should significantly increase the proceeds from corporate income tax (CIT) in all Member States.

1.3. The EESC considers that this Directive will reach its full potential only if similar rules are implemented in third countries as well. The existence of a level playing field and fairness in global tax policy is of paramount importance to effective implementation. Without this, the single market could lose some of its attractiveness to the benefit of less regulated markets, while the positive impact of the Directive would be minimised.

1.4. The EESC agrees that mismatches must be addressed only when one of the associated enterprises has effective control over the other associated enterprise, through a participation in terms of voting rights, capital ownership or entitlement to profits of 50 % or more.

1.5. The Committee considers that special attention must be given to imported mismatches that undermine the effectiveness of rules intended to eliminate hybrid mismatches and believes that further clarification is needed in order to ensure coherent implementation in all Member States.

1.6. With regard to the different tax accounting periods that appear in different jurisdictions, the EESC agrees that the timing differences should not be a source of mismatches in tax outcomes. However, the taxpayer must announce the payment in both jurisdictions, within a reasonable period of time.

1.7. While it supports the current approach concerning hybrid mismatches, the EESC considers that the Member States should also look at the causes of hybrid mismatch arrangements, close the potential loopholes and prevent aggressive tax planning, rather than just seeking to obtain tax revenue.

⁽¹⁾ COM(2016) 26 final.

⁽²⁾ Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations, <http://www.oecd.org/ctp/beps/>.

⁽³⁾ COM(2016) 687 final

1.8. The EESC recommends all Member States to look into the possibility of introducing and applying sanctions to taxpayers benefiting from hybrid mismatch arrangements, in order to prevent and/or tackle such practices.

1.9. The EESC proposes that the Commission sets out to draw up a broad report describing the status of the implementation of the Directive in all Member States as well as the global picture in regard to hybrid mismatch arrangements.

1.10. The EESC considers that the Member States need to share relevant intelligence and best practices in order to speed up the process and ensure uniform implementation.

2. Background to the opinion, including the legislative proposal concerned

2.1. In January 2016, the Commission put forward an anti-tax avoidance package, part of the Agenda for fairer and more effective corporate taxation⁽⁴⁾. The Package contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU.

2.2. The package comprises an umbrella communication⁽⁵⁾ setting out the political, economic and international backdrop to the fight against aggressive tax planning and the main components of the package: an anti-tax avoidance directive⁽⁶⁾, a directive amending the directive on administrative cooperation⁽⁷⁾ (DAC), a Commission recommendation on tax treaties⁽⁸⁾ and a communication on the EU's external strategy⁽⁹⁾ on cooperation with third countries in the area of tax governance.

2.3. On 12 July 2016, the ECOFIN Council issued a statement on hybrid mismatches, asking the European Commission to put forward a proposal for rules consistent with and no less effective than those recommended in the OECD BEPS report on Action 2, regarding hybrid mismatches involving third countries. Most Member States have committed to implement these recommendations.

2.4. The Directive is an amendment to the Anti-Tax Avoidance Directive and part of a package that includes the Proposal for a Common Consolidated Corporate Tax Base (CCCTB) and the Proposal on a Common Corporate Tax base (CCTB), with the rules regarding the hybrid mismatches on these proposals being correlated with the ones in this Directive.

2.5. In view of the support of the Member States and the statements of the ECOFIN Council on this subject, the Commission has prepared a proposal to amend Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, such as hybrid permanent establishment mismatches, hybrid transfers, imported mismatches and dual resident mismatches.

2.6. Given that Member States cannot be bound by guidance, it is necessary to adopt binding rules to ensure that they effectively tackle these mismatches. Independent action by the Member States would only increase the fragmentation in the internal market, allow mismatches to persist and prevent significant tax collection.

2.7. The Commission's proposal is intended to address mismatch situations attributable to differences in the legal characterisation of an entity or a financial instrument. Furthermore, this proposal addresses mismatch situations arising from different rules on the treatment of a commercial presence as a permanent establishment. Under the rules contained in this proposal, Member States will be obliged to deny the deduction of a payment by a taxpayer or to require the taxpayer to include a payment or a profit in its taxable income, as the case may be.

2.8. Finally, this Directive does not imply full harmonisation, but is limited to tackling aggressive tax planning that uses hybrid mismatch arrangements, by addressing situations where there are deductions in one state without the inclusion of the income in the tax base of the other state or the non-taxation of income in one state without its inclusion in the other state, as well as rectifying double taxation cases.

⁽⁴⁾ http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en.

⁽⁵⁾ COM(2016) 23 final.

⁽⁶⁾ COM(2016) 26 final.

⁽⁷⁾ COM(2016) 25 final.

⁽⁸⁾ C(2016) 271 final.

⁽⁹⁾ COM(2016) 24 final.

3. General comments

3.1. The EESC acknowledges that the current corporate tax systems have been drafted according to the economic realities of a bygone era, when businesses were physically and legally connected to local markets. As this is no longer the general case, the tax framework must be adapted to the international environment and current challenges.

3.2. The EESC values the Commission's ongoing efforts in this area, in the form of the Anti-Tax Avoidance Directive, which fits in well with the OECD's BEPS project and the requests from European stakeholders, such as civil society, the Member States and the European Parliament.

3.3. The EESC supports the OECD/G20 BEPS conclusions and the regulations introduced through the present Directive.

3.4. The EESC recognises that the proposal pursues the hybrid mismatch arrangements identified in the OECD BEPS Action 2 Report⁽¹⁰⁾ and does not address situations where little or no tax is paid due to a low tax rate or due to a specific tax system of the jurisdiction.

3.5. Hybrid mismatch arrangements are considered a widespread technique of aggressive tax planning used by multinational enterprises (MNEs) that set up legal or commercial offices in multiple countries, whether we are talking about Member States or third countries. Since Council Directive 2016/1164/EC currently only tackles hybrid mismatches occurring at Member State level, the EESC agrees with the need to amend it with specific rules for cases where third countries are involved, with the sole purpose of protecting the single market. However, the EESC points out that the rules applicable in the EU are dependent on whether or not the third country applies hybrid mismatch rules to the specific situation.

3.6. The EESC has already indicated that aggressive tax planning erodes the tax base of Member States by EUR 50 to 70 billion per year⁽¹¹⁾, with hybrid mismatches accounting for a significant percentage and having an important negative impact on tax revenues as well as competition, fairness and transparency. Although a precise economic analysis of the impact of hybrid mismatches is difficult to conduct, as also stated by the OECD, the EESC believes that the adoption of this Directive will significantly increase corporate income tax (CIT) in all Member States.

3.7. No impact assessment was carried out for this proposal, with regard to the Directive it is amending, due to the strong link to the comprehensive OECD BEPS report, the Commission's Staff Working Document⁽¹²⁾ which provides an important analysis, the consultations already carried out, as well as the demand from the Council's Statement for this Directive to be put forward by October 2016. The Member States are obliged to adopt the laws, regulations and administrative provisions needed in order to comply with this Directive, and communicate them to the European Commission, by 31 December 2018 at the latest. The EESC agrees that no impact assessment is needed at this point.

3.8. The Commission is asked to evaluate and report to the Council on the implementation of this Directive four years after it enters into force. However, the EESC suggests that the Commission evaluate the status of implementation yearly, with an implementation assessment presented to the Council one year after the proposed deadline. This implementation assessment should include a study of the status of the legislation implementation in the Member States as well as a comprehensive study on third countries that have implemented or are in the course of implementation the OECD BEPS regulations and the position of the EU single market in the global picture. Furthermore, the EESC recommends that the Commission include in the report any disturbance of national legislative frameworks, meaning other tax, commercial or regulatory outcomes, should these situations occur.

3.9. Following the implementation assessment, the EESC recommends that the Commission draft a broad single market impact assessment of the effects of the Directive. This study should be carried out as soon as the necessary data from the Member States are available.

⁽¹⁰⁾ <http://www.oecd.org/ctp/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-9789264241138-en.htm>.

⁽¹¹⁾ OJ C 264 of 20.7.2016, p. 93.

⁽¹²⁾ SWD(2016) 345 final.

4. Specific comments

4.1. The present Directive adds a comprehensive definition of associated enterprises comprising the entities that are part of the same consolidated group for accounting purposes and enterprises that have a significant role in the management of the taxpayer or in which the taxpayer has a significant influence. The EESC agrees that mismatches must be addressed only when one of the associated enterprises has effective control over the other associated enterprise.

4.2. The EESC supports the additional rules introduced by the Directive. However, the existence of a level playing field and fairness in global tax policy is of paramount importance to effective implementation. Without this, the single market could lose some of its attractiveness, to the benefit of less regulated markets.

4.3. The EESC considers that, in the situation where hybrid mismatch is available, cross-border investments are certainly favoured, compared to domestic investments, causing an obvious distortion in the single market.

4.4. The Council has proposed 31 December 2018 as the deadline for Member States to incorporate the Directive into their legislative frameworks. The EESC sees the deadline as reasonable, but advises that the progress of implementation should be carefully supervised, so that all Member States attain the goals of the Directive by the proposed deadline. If the actions are not applied in a consistent manner, business competitiveness at EU level may be seriously harmed.

4.5. Given that the BEPS action plan is an agreement decided by consensus with no binding provisions and not all EU Member States are OECD members, the EESC values the support of the non-OECD Member States in the coordination and implementation of the BEPS Project. However, the EESC recommends that special attention be paid to the implementation process in these countries, regarding both the Directive and the Anti-Tax Avoidance Directive itself.

4.6. Sanctions for taxpayers are not proposed in the Directive, since it is within the competence of the Member States to apply them or not. The EESC recommends to the Member States that they look into this matter in detail and apply coercive actions, should they consider that this will prevent and/or tackle hybrid mismatches.

4.7. As the Anti-Tax Avoidance Directive fails to address other types of mismatches, such as hybrid permanent establishment mismatches, hybrid transfers, imported mismatches and dual resident mismatches, the EESC finds the expansion of Article 9 to be adequately detailed.

4.8. With regard to different tax accounting periods that appear in different jurisdictions, the EESC agrees that the timing differences should not be a source of mismatches in tax outcomes. However, in order to avoid a deduction without inclusion, the taxpayer must announce the payment in both jurisdictions, within a reasonable period of time.

4.9. The EESC recommends that all Member States look more closely into the root causes of hybrid mismatches, close the potential loopholes and prevent aggressive tax planning from happening, rather than just seeking to obtain tax revenue.

4.10. The Committee considers that special attention must be given to imported mismatches that undermine the effectiveness of rules intended to eliminate hybrid mismatches. The EESC endorses the Commission's efforts to counter double deductions or a deduction without inclusion, generated by imported mismatches as set out in Article 9(4) and (5)), but considers that further clarification is needed.

4.11. Lastly, the EESC recommends that all Member States share relevant intelligence and best practices during the implementation period, in order to speed up the process and ensure that it is coherent.

Brussels, 14 December 2016.

The President
of the European Economic and Social Committee
George DASSIS
