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TEXTS ADOPTED
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Hybrid mismatches with third countries *

European Parliament legislative resolution of 27 April 2017 on the proposal for a Council directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (COM(2016)0687 – C8-0464/2016 – 2016/0339(CNS))

(Special legislative procedure – consultation)

The European Parliament,

– having regard to the Commission proposal to the Council (COM(2016)0687),

– having regard to Article 115 of the Treaty on the Functioning of the European Union, pursuant to which the Council consulted Parliament (C8-0464/2016),

– having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Netherlands Senate, the Netherlands House of Representatives and the Swedish Parliament, asserting that the draft legislative act does not comply with the principle of subsidiarity,

– having regard to the other contributions submitted by the Czech Senate, the German Bundesrat, the Spanish Parliament and the Portuguese Parliament on the draft legislative act,

– having regard to its resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect[1],

– having regard to its resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union[2],

– having regard to its resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect[3],

– having regard to the Commission's decision of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, and to the

1 Texts adopted, P8_TA(2015)0408.
2 Texts adopted, P8_TA(2015)0457.
3 Texts adopted, P8_TA(2016)0310.

Commission's open investigations into Luxembourg's alleged aid to McDonald's and Amazon,

– having regard to the ongoing work of its Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion,

– having regard to Rule 78c of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs (A8-0134/2017),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to alter its proposal accordingly, in accordance with Article 293(2) of the Treaty on the Functioning of the European Union;

3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;

4. Asks the Council to consult Parliament again if it intends to substantially amend the Commission proposal;

5. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a directive
Recital 4

Text proposed by the Commission	*Amendment*
(4) Directive (EU) 2016/1164 provides for a framework to tackle hybrid mismatch arrangements.	(4) Directive (EU) 2016/1164 provides for a ***first*** framework to tackle hybrid mismatch arrangements***, which does not comprehensively and systematically eliminate hybrid mismatches and the scope of which is limited to the Union***.

Amendment 2

Proposal for a directive
Recital 4 a (new)

Text proposed by the Commission	*Amendment*
	(4a) Underlying the BEPS initiative is also the declaration of G20 leaders at their meeting in Saint Petersburg on 5-6 September 2013, expressing their wish to

	ensure that profits are taxed where economic activities deriving the profits are performed and where value is created. In practice, that would have required the introduction of unitary taxation with formulary apportionment of tax revenues to states. That goal has not been achieved.

Amendment 3

Proposal for a directive
Recital 5

Text proposed by the Commission	*Amendment*
(5) It is ***necessary*** to establish rules that neutralise hybrid mismatches in a comprehensive manner. Considering that Directive (EU) 2016/1164 only covers hybrid mismatch arrangements that arise in the interaction between the corporate tax systems of Member States, the ECOFIN Council issued a statement on 20 June 2016 requesting the Commission to put forward by October 2016 a proposal on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2, with a view to reaching an agreement by the end of 2016.	(5) It is ***of great importance*** to establish rules that neutralise hybrid mismatches ***and branch mismatches*** in a comprehensive manner. Considering that Directive (EU) 2016/1164 only covers hybrid mismatch arrangements that arise in the interaction between the corporate tax systems of Member States, the ECOFIN Council issued a statement on 20 June 2016 requesting the Commission to put forward by October 2016 a proposal on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2, with a view to reaching an agreement by the end of 2016.

Amendment 4

Proposal for a directive
Recital 5 a (new)

Text proposed by the Commission	*Amendment*
	(5a) The effects of hybrid mismatch arrangements should also be considered from the viewpoint of developing countries, and the Union and its Member States should aim to support developing countries in tackling such effects.

Amendment 5

Proposal for a directive
Recital 6

Text proposed by the Commission	*Amendment*
(6) Considering that[, amongst others, it is stated in Recital (13) of Directive (EU) 2016/1164 that] it is critical that further work is undertaken on other hybrid mismatches such as those involving permanent establishments, it is essential that hybrid permanent establishment mismatches are addressed in ***that*** Directive as well.	(6) Considering that[, amongst others, it is stated in Recital (13) of Directive (EU) 2016/1164 that] it is critical that further work is undertaken on other hybrid mismatches such as those involving permanent establishments, ***including disregarded permanent establishments,*** it is essential that hybrid permanent establishment mismatches are addressed in Directive ***(EU) 2016/1164*** as well***. In addressing such mismatches, regard should be had to the recommended rules included in the OECD's Public Discussion Draft of 22 August 2016 concerning BEPS Action 2 - Branch Mismatch Structures***.

Amendment 6

Proposal for a directive
Recital 7

Text proposed by the Commission	*Amendment*
(7) In order to provide for a ***comprehensive*** framework consistent with ***to*** OECD BEPS report on hybrid mismatch arrangements it is essential that Directive (EU) 2016/1164 would also include rules on hybrid transfers***,*** imported mismatches and ***dual resident mismatches***, in order to prevent taxpayers from exploiting remaining loopholes.	(7) In order to provide for a framework ***that is*** consistent with***, and no less effective than, the*** OECD BEPS report on hybrid mismatch arrangements***,*** it is essential that Directive (EU) 2016/1164 would also include rules on hybrid transfers ***and*** imported mismatches and ***addresses the full range of double deduction outcomes***, in order to prevent taxpayers from exploiting remaining loopholes. ***Those rules should be standardised and coordinated to the maximum extent possible between Member States. Member States should consider the introduction of penalties against taxpayers that exploit hybrid mismatches.***

Amendment 7

Proposal for a directive
Recital 7 a (new)

Text proposed by the Commission	*Amendment*
	(7a) Rules need to be laid down in order to put a stop to the use of different tax accounting periods in individual jurisdictions, which results in mismatches in tax outcomes. Member States should ensure that taxpayers declare payments in all jurisdictions involved within a reasonable period of time. The national authorities should, furthermore, look into all the reasons behind hybrid mismatches and should close any loopholes and prevent aggressive tax planning, rather than focusing solely on collecting tax revenue.

Amendment 8

Proposal for a directive
Recital 8

Text proposed by the Commission	*Amendment*
(8) Given that Directive (EU) 2016/1164 includes rules on hybrid mismatches between Member States, it is appropriate to include rules on hybrid mismatches with third countries in that Directive. Consequently, those rules should apply to all taxpayers that are subject to corporate tax in a Member State including permanent establishments of entities resident in third countries. It is necessary to cover all hybrid ***mismatch*** arrangements where at least one of the parties involved is a corporate taxpayer in a Member State.	(8) Given that Directive (EU) 2016/1164 includes rules on hybrid mismatches between Member States, it is appropriate to include rules on hybrid mismatches with third countries in that Directive. Consequently, those rules should apply to all taxpayers that are subject to corporate tax in a Member State including permanent establishments of entities resident in third countries. It is necessary to cover all hybrid ***mismatches or related*** arrangements where at least one of the parties involved is a corporate taxpayer in a Member State.

Amendment 9

Proposal for a directive
Recital 9

Text proposed by the Commission	*Amendment*
(9) Rules on hybrid mismatches ***should*** address mismatch situations which ***are the result of conflicting tax rules of two (or more) jurisdictions. However, those rules should not affect the general features of the tax system of a jurisdiction.***	(9) ***It is essential that*** rules on hybrid mismatches ***apply automatically whenever a payment comes across a border having been deducted at the paying end, without having to prove a tax avoidance motive, and*** address mismatch situations which ***result from double deductions, conflicts in the legal characterisation of financial instruments, payments and entities, or conflicts in the allocation of payments. As hybrid mismatches could lead to a double deduction or to a deduction without inclusion, it is necessary to lay down rules whereby the Member State concerned either denies the deduction of a payment, expenses or losses or requires the taxpayer to include the payment in its taxable income.***

Amendment 10

Proposal for a directive
Recital 9 a (new)

Text proposed by the Commission	*Amendment*
	(9a) Permanent establishment mismatches occur where differences in the rules for allocating income and expenditure between different parts of the same entity in the permanent establishment jurisdiction and those in the residence jurisdiction give rise to a mismatch in tax outcomes, including cases where a mismatch outcome arises due to the fact that a permanent establishment is disregarded as a result of the application of the laws of the branch jurisdiction. Those mismatch outcomes could lead to non-taxation without inclusion, a double deduction or a

	deduction without inclusion, and should therefore be eliminated. In the case of disregarded permanent establishments, the Member State in which the taxpayer is resident should require the taxpayer to include in its taxable income the income that would otherwise be attributed to the permanent establishment.

Amendment 11

Proposal for a directive
Recital 10

Text proposed by the Commission	*Amendment*
(10) In order to ensure proportionality it is necessary to address only the cases where there is a substantial risk of avoiding taxation through the use of hybrid mismatches. It is therefore appropriate to cover hybrid mismatch arrangements between the taxpayer and its associated enterprises and hybrid mismatches resulting from a structured arrangement involving a taxpayer.	***deleted***

Amendment 12

Proposal for a directive
Recital 11

Text proposed by the Commission	*Amendment*
(11) In order to provide for a sufficiently comprehensive definition of 'associated enterprise' for the purposes of the rules on hybrid mismatches, that definition should also comprise an entity that is part of the same consolidated group for accounting purposes, an enterprise in which the taxpayer has a significant influence in the management and reversely, an enterprise that has a significant influence in the management of the taxpayer.	***deleted***

Amendment 13

Proposal for a directive
Recital 12

Text proposed by the Commission	*Amendment*
(12) Mismatches that particularly pertain to the hybridity of entities should be addressed only where one of the associated enterprises has – at a minimum - effective control over the other associated enterprises. Consequently, in those cases, it should be required that an associated enterprise be held by, or hold, the taxpayer or another associated enterprise through a participation in terms of voting rights, capital ownership or entitlement to received profits of 50 percent or more.	***deleted***

Amendment 14

Proposal for a directive
Recital 15

Text proposed by the Commission	*Amendment*
(15) As hybrid entity mismatches involving third countries ***may*** lead to a double deduction or to a deduction without inclusion, it is necessary to lay down rules whereby the Member State concerned either denies the deduction of a payment, expenses or losses or requires the taxpayer to include the payment in its taxable income, as the case may be.	(15) As hybrid entity mismatches involving third countries ***in several cases*** lead to a double deduction or to a deduction without inclusion, it is necessary to lay down rules whereby the Member State concerned either denies the deduction of a payment, expenses or losses or requires the taxpayer to include the payment in its taxable income, as the case may be.

Amendment 15

Proposal for a directive
Recital 17

Text proposed by the Commission	*Amendment*
(17) Hybrid transfers may give rise to a difference in tax treatment if, as a result of	(17) Hybrid transfers may give rise to a difference in tax treatment if, as a result of

a transfer of a financial instrument ***under a structured arrangement***, the underlying return on that instrument is treated as derived simultaneously by more than one of the parties to the arrangement. The underlying return is the income related to and derived from the transferred instrument. This difference in tax treatment may lead to a deduction without inclusion or to a tax credit in two different jurisdictions for the same tax withheld at source. Such mismatches should therefore be eliminated. In case of a deduction without inclusion the same rules should apply as for neutralising a hybrid financial instrument or hybrid entity mismatch leading to a deduction without inclusion. In case of a double tax credit, the Member State concerned should limit the benefit of the tax credit in proportion to the net taxable income with respect to the underlying return.	a transfer of a financial instrument, the underlying return on that instrument is treated as derived simultaneously by more than one of the parties to the arrangement. The underlying return is the income related to and derived from the transferred instrument. This difference in tax treatment may lead to a deduction without inclusion or to a tax credit in two different jurisdictions for the same tax withheld at source. Such mismatches should therefore be eliminated. In case of a deduction without inclusion the same rules should apply as for neutralising a hybrid financial instrument or hybrid entity mismatch leading to a deduction without inclusion. In case of a double tax credit, the Member State concerned should limit the benefit of the tax credit in proportion to the net taxable income with respect to the underlying return.

Amendment 16

Proposal for a directive
Recital 19

Text proposed by the Commission	*Amendment*
(19) Imported mismatches shift the effect of a hybrid mismatch between parties in third countries into the jurisdiction of a Member State through the use of a non-hybrid instrument thereby undermining the effectiveness of the rules that neutralise hybrid mismatches. A deductible payment in a Member State can be used to fund expenditure under a structured arrangement involving a hybrid mismatch between third countries. To counter such imported mismatches, it is necessary to include rules that disallow the deduction of a payment if the corresponding income from that payment is ***set-off***, directly or indirectly, against a deduction that arises under a hybrid mismatch arrangement giving rise to a double deduction or a deduction	(19) Imported mismatches shift the effect of a hybrid mismatch between parties in third countries into the jurisdiction of a Member State through the use of a non-hybrid instrument thereby undermining the effectiveness of the rules that neutralise hybrid mismatches. A deductible payment in a Member State can be used to fund expenditure under a structured arrangement involving a hybrid mismatch between third countries. To counter such imported mismatches, it is necessary to include rules that disallow the deduction of a payment if the corresponding income from that payment is ***set off***, directly or indirectly, against a deduction that arises under a hybrid mismatch ***or related*** arrangement giving rise to a double deduction or a

without inclusion between third countries.	deduction without inclusion between third countries.

Amendment 17

Proposal for a directive
Recital 21

Text proposed by the Commission	*Amendment*
(21) The objective of this Directive is to improve the resilience of the internal market as a whole against hybrid ***mismatch arrangements.*** This cannot be sufficiently achieved by the Member States acting individually, given that national corporate tax systems are disparate and that independent action by Member States would only replicate the existing fragmentation of the internal market in direct taxation. It would thus allow inefficiencies and distortions to persist in the interaction of distinct national measures. This would thus result in a lack of coordination. That objective can rather, due to the cross-border nature of hybrid ***mismatch arrangements*** and the need to adopt solutions that function for the internal market as a whole, be better achieved at Union level. The Union may therefore adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective. By setting the required level of protection for the internal market, this Directive only aims to achieve the essential degree of coordination within the Union that is necessary to achieve its objectives.	(21) The objective of this Directive is to improve the resilience of the internal market as a whole against hybrid ***mismatches***. This cannot be sufficiently achieved by the Member States acting individually, given that national corporate tax systems are disparate and that independent action by Member States would only replicate the existing fragmentation of the internal market in direct taxation. It would thus allow inefficiencies and distortions to persist in the interaction of distinct national measures. This would thus result in a lack of coordination. That objective can rather, due to the cross-border nature of hybrid ***mismatches*** and the need to adopt solutions that function for the internal market as a whole, be better achieved at Union level. The Union may therefore adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union, ***including moving from a separate entity approach to a unitary approach as regards the taxation of multinational enterprises.*** In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective. By setting the required level of protection for the internal market, this Directive only aims to achieve the essential degree of coordination within the Union that is necessary to achieve its objectives.

Amendment 18

Proposal for a directive
Recital 21 a (new)

Text proposed by the Commission	*Amendment*
	(21a) In order to ensure clear and effective implementation, consistency with the recommendations included in the OECD publication entitled 'Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report' should be highlighted.

Amendment 19

Proposal for a directive
Recital 23

Text proposed by the Commission	*Amendment*
(23) The Commission should evaluate the implementation of this Directive ***four*** years after its entry into force and report to the Council thereon. Member States should communicate to the Commission all information necessary for this evaluation**,**	(23) The Commission should evaluate the implementation of this Directive ***every three*** years after its entry into force and report to the ***European Parliament and to the*** Council thereon. Member States should communicate to the Commission all information necessary for this evaluation**.**

Amendment 20

Proposal for a directive
Recital 23 a (new)

Text proposed by the Commission	*Amendment*
	(23a) Member States should be required to share all relevant confidential information and best practices with a view to combating tax mismatches and ensuring that Directive (EU) 2016/1164 is implemented in a uniform manner.

Amendment 21

Proposal for a directive
Article 1 – paragraph 1 – point -1 (new)
Directive (EU) 2016/1164
Article 1 – paragraph 1 a (new)

Text proposed by the Commission	*Amendment*
	(-1) In Article 1, the following paragraph is added:
	'Article -9a shall also apply to all entities that are treated as transparent for tax purposes by a Member State.'

Amendment 22

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point a
Directive (EU) 2016/1164
Article 2 – point 4 – subparagraph 3

Text proposed by the Commission	*Amendment*
(a) in point (4), the third subparagraph, is replaced by the following:	***deleted***
"For the purposes of Article 9 an associated enterprise also means an entity that is part of the same consolidated group for financial accounting purposes as the taxpayer, an enterprise in which the taxpayer has a significant influence in the management or an enterprise that has a significant influence in the management of the taxpayer. Where the mismatch involves a hybrid entity, the definition of associated enterprise is modified so that the 25 percent requirement is replaced by a 50 percent requirement";	

Amendment 23

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point a a (new)
Directive (EU) 2016/1164
Article 2 – point 4 – subparagraph 3

Text proposed by the Commission	*Amendment*
	(aa) in point 4, the third subparagraph is deleted;

Amendment 24

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 1 – introductory part

Text proposed by the Commission	*Amendment*
'(9) hybrid mismatch' means a situation between a taxpayer and ***an associated enterprise or a structured arrangement between parties in different tax jurisdictions*** where any of the following outcomes is attributable to differences in the legal characterisation of a financial instrument or entity**,** or in ***the treatment*** of a commercial presence as a permanent establishment:	'(9) 'hybrid mismatch' means a situation between a taxpayer and ***another entity*** where any of the following outcomes is attributable to differences in the legal characterisation of a financial instrument or ***a payment made under it, or is the result of differences in the recognition of payments made to, or payments, expenses or losses incurred by, a hybrid*** entity or ***permanent establishment, or is the result of differences in the recognition of a deemed payment made between two parts of the same taxpayer or*** in ***the recognition*** of a commercial presence as a permanent establishment:

Amendment 25

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) a deduction of a payment from the taxable base in ***the*** jurisdiction in which the payment ***has its source*** without a corresponding inclusion for tax purposes of the same payment in ***the*** other jurisdiction ('deduction without inclusion');	(b) a deduction of a payment from the taxable base in ***any*** jurisdiction in which the payment ***is treated as being made ('payer jurisdiction')*** without a corresponding inclusion for tax purposes of the same payment in ***any*** other jurisdiction ***where the payment is treated as being received ('payee jurisdiction')*** ('deduction

without inclusion');

Amendment 26

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 1 – point c

Text proposed by the Commission	*Amendment*
(c) in case of differences in the ***treatment*** of a commercial presence as a permanent establishment, non-taxation of income which has its source in a jurisdiction without a corresponding inclusion for tax purposes of the same income in the other jurisdiction ('non-taxation without inclusion')**.**	(c) in case of differences in the ***recognition*** of a commercial presence as a permanent establishment, non-taxation of income which has its source in a jurisdiction without a corresponding inclusion for tax purposes of the same income in the other jurisdiction ('non-taxation without inclusion')***;***

Amendment 27

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 1 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) a payment to a hybrid entity or permanent establishment giving rise to a deduction without inclusion where the mismatch is attributable to differences in the recognition of payments made to the permanent establishment or hybrid entity;

Amendment 28

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 1 – point c b (new)

Text proposed by the Commission	*Amendment*
	(cb) a payment giving rise to a deduction without inclusion as a result of a payment

to a disregarded permanent establishment.

Amendment 29

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 2

Text proposed by the Commission	*Amendment*
A hybrid mismatch only arises to the extent that the ***same payment deducted, expenses incurred or losses suffered in two jurisdictions exceed the amount of income*** that is included in both jurisdictions ***and which can be attributed to the same source.***	A hybrid mismatch ***that is the result of differences in the recognition of payments, expenses or losses incurred by a hybrid entity or permanent establishment or is the result of differences in the recognition of a deemed payment between two parts of the same taxpayer*** only arises to the extent that the ***resulting deduction in the jurisdiction of source is set off against an item*** that is ***not*** included in both jurisdictions ***where the mismatch has arisen. However, in the event that the payment giving rise to that hybrid mismatch also gives rise to a hybrid mismatch that is attributable to differences in the legal characterisation of a financial instrument or of a payment made under it, or is the result of differences in the recognition of payments made to a hybrid entity or to a permanent establishment, the hybrid mismatch only arises to the extent that the payment gives rise to a deduction without inclusion.***

Amendment 30

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b
Directive (EU) 2016/1164
Article 2 – point 9 – subparagraph 3 – introductory part

Text proposed by the Commission	*Amendment*
A hybrid mismatch also includes the transfer of a financial instrument ***under a structured arrangement*** involving a taxpayer where the underlying return on	A hybrid mismatch also includes the transfer of a financial instrument involving a taxpayer where the underlying return on the transferred financial instrument is

the transferred financial instrument is treated for tax purposes as derived simultaneously by more than one of the parties to the arrangement, who are resident for tax purposes in different jurisdictions, giving rise to any of the following outcomes:	treated for tax purposes as derived simultaneously by more than one of the parties to the arrangement, who are resident for tax purposes in different jurisdictions, giving rise to any of the following outcomes:

Amendment 31

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b a (new)
Directive (EU) 2016/1164
Article 2 – point 9 a (new)

Text proposed by the Commission	*Amendment*
	(ba) the following point is added:
	'(9a) 'hybrid entity' means any entity or arrangement that is regarded as a person for tax purposes under the laws of one jurisdiction and the income or expenditure of which is treated as income or expenditure of one or more other persons under the laws of another jurisdiction;'

Amendment 32

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point b b (new)
Directive (EU) 2016/1164
Article 2 – point 9 b (new)

Text proposed by the Commission	*Amendment*
	(bb) the following point is added:
	'(9b) 'disregarded permanent establishment' means any arrangement that is treated as giving rise to a permanent establishment under the laws of the head office jurisdiction and is not treated as giving rise to a permanent establishment under the laws of the jurisdiction in which the permanent establishment is situated;'

Amendment 33

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point c
Directive (EU) 2016/1164
Article 2 – point 11

Text proposed by the Commission	*Amendment*
(11) 'structured arrangement' means an arrangement involving a hybrid mismatch where the mismatch is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch.	***deleted***

Amendment 34

Proposal for a directive
Article 1 – paragraph 1 – point 1 – point c a (new)
Directive (EU) 2016/1164
Article 2 – point 11 a (new)

Text proposed by the Commission	*Amendment*
	(ca) the following point is added:
	'(11a) 'payer jurisdiction' means the jurisdiction where a hybrid entity or a permanent establishment is established or where a payment is treated as made.'

Amendment 35

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 1

Text proposed by the Commission	*Amendment*
1. To the extent that a hybrid mismatch ***between Member States*** results in a double	1. To the extent that a hybrid mismatch results in a double deduction of the same

deduction of the same payment, expenses or losses, the deduction shall be ***given only*** in the Member State ***where such payment has its source, the expenses are incurred or the losses are suffered.***	payment, expenses or losses, the deduction shall be ***denied*** in the Member State ***that is the investor jurisdiction.***
To the extent that a hybrid mismatch involving a third country results in a double deduction ***of the same payment, expenses or losses, the Member State concerned shall deny the deduction of such payment, expenses or losses, unless the*** third country ***has already done so.***	***In the event that the*** deduction ***is not denied in the investor jurisdiction, the*** deduction ***shall be denied in the payer jurisdiction. To the extent that a*** third country ***is involved, the burden of proof of demonstrating that a deduction has been denied by that third country shall be on the taxpayer.***

Amendment 36

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 2

Text proposed by the Commission	*Amendment*
2. To the extent that a hybrid mismatch ***between Member States*** results in a deduction without inclusion, the Member State ***of the payer shall deny the deduction*** of such payment.	2. To the extent that a hybrid mismatch results in a deduction without inclusion, the ***deduction shall be denied in*** the Member State ***that is the*** payer ***jurisdiction*** of such payment***. Where the deduction is not denied in the payer jurisdiction, the Member State concerned shall require the taxpayer to include the amount of the payment that would otherwise give rise to a mismatch in the income in the payee jurisdiction***.
To the extent that a hybrid mismatch involving a third country results in a deduction without inclusion:	
(i) if the payment has its source in a Member State, that Member State shall deny the deduction, or	
(ii) if the payment has its source in a third country, the Member State concerned shall require the taxpayer to include such payment in the taxable base, unless the third country has already denied the deduction or has required that payment to be included.	

Amendment 37

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 3

Text proposed by the Commission	*Amendment*
3. To the extent that a hybrid mismatch ***between Member States involving a*** permanent establishment ***results in non-taxation without inclusion***, the Member State in which the taxpayer is resident for tax purposes shall require the taxpayer to include ***in the taxable base the income attributed to the*** permanent establishment.	3. To the extent that a hybrid mismatch ***involves disregarded*** permanent establishment ***income which is not subject to tax in*** the Member State in which the taxpayer is resident for tax purposes, ***that Member State*** shall require the taxpayer to include ***in its taxable income the income that would otherwise be attributed to the disregarded*** permanent establishment.
To the extent that a hybrid mismatch involving a permanent establishment situated in a third country results in non-taxation without inclusion, the Member State concerned shall require the taxpayer to include in the taxable base the income attributed to the permanent establishment in the third country.	

Amendment 38

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 3 a (new)

Text proposed by the Commission	*Amendment*
	3a. Member States shall deny a deduction for any payment by a taxpayer to the extent that such payment directly or indirectly funds deductible expenditure giving rise to a hybrid mismatch through a transaction or a series of transactions.

Amendment 39

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 4

Text proposed by the Commission	*Amendment*
4. To the extent that a payment by a taxpayer to an ***associated enterprise*** in a third country is set off directly or indirectly against a payment, expenses or losses which due to a hybrid mismatch are deductible in two different jurisdictions outside the Union, the Member State of the taxpayer shall deny the deduction of the payment by the taxpayer ***to an associated enterprise*** in a third country from the taxable base, unless one of the third countries involved has already denied the deduction of the payment, expenses or losses that would be deductible in two different jurisdictions.	4. To the extent that a payment by a taxpayer to an ***entity*** in a third country is set off directly or indirectly against a payment, expenses or losses which due to a hybrid mismatch are deductible in two different jurisdictions outside the Union, the Member State of the taxpayer shall deny the deduction of the payment by the taxpayer in a third country from the taxable base, unless one of the third countries involved has already denied the deduction of the payment, expenses or losses that would be deductible in two different jurisdictions.

Amendment 40

Proposal for a directive
Article 1 – paragraph 1 – point 3
Directive (EU) 2016/1164
Article 9 – paragraph 5

Text proposed by the Commission	*Amendment*
5. To the extent that the corresponding inclusion of a deductible payment by a taxpayer ***to an associated enterprise*** in a third country is set off directly or indirectly against a payment which due to a hybrid mismatch is not included by the payee in its taxable base, the Member State of the taxpayer shall deny the deduction of the payment by the taxpayer ***to an associated enterprise*** in a third country from the taxable base, unless one of the third countries involved has already denied the deduction of the non-included payment.	5. To the extent that the corresponding inclusion of a deductible payment by a taxpayer in a third country is set off directly or indirectly against a payment which due to a hybrid mismatch is not included by the payee in its taxable base, the Member State of the taxpayer shall deny the deduction of the payment by the taxpayer in a third country from the taxable base, unless one of the third countries involved has already denied the deduction of the non-included payment.

Amendment 41

Proposal for a directive
Article 1 – paragraph 1 – point 3 a (new)
Directive (EU) 2016/1164
Article -9 a (new)

Text proposed by the Commission	*Amendment*
	(3a) The following Article is inserted:
	'Article -9a
	Reverse hybrid mismatches
	Where one or more associated non-resident entities, holding a share of profit in a hybrid entity that is incorporated or established in a Member State, is located in a jurisdiction or jurisdictions that regard the hybrid entity as a taxable person, the hybrid entity shall be regarded as a resident of that Member State and taxed on its income to the extent that the income is not otherwise taxed under the laws of that Member State or any other jurisdiction.'

Amendment 42

Proposal for a directive
Article 1 – paragraph 1 – point 4
Directive (EU) 2016/1164
Article 9a – paragraph 1

Text proposed by the Commission	*Amendment*
To the extent that a payment, expenses or losses of a taxpayer who is resident for tax purposes in both a Member State and a third country, in accordance with the laws of that Member State and that third country, are deductible from the taxable base in both jurisdictions and that payment, those expenses or losses can be ***set-off*** in the Member State of the taxpayer against taxable income that is not included in the third country, the Member State of the taxpayer shall deny the deduction of the payment, expenses or losses, unless the third country has already done so.	To the extent that a payment, expenses or losses of a taxpayer who is resident for tax purposes in both a Member State and a third country, in accordance with the laws of that Member State and that third country, are deductible from the taxable base in both jurisdictions and that payment, those expenses or losses can be ***set off*** in the Member State of the taxpayer against taxable income that is not included in the third country, the Member State of the taxpayer shall deny the deduction of the payment, expenses or losses, unless the third country has already done so. ***Such***

denial of deduction shall also apply to situations where a taxpayer is 'stateless' for tax purposes. The burden of proof of demonstrating that the third country has denied the deduction of the payment, expense or loss shall be on the taxpayer.