Mr Jean-Claude Juncker
President of the European Commission
Rue de la Loi 200
B-1049 Bruxelles
Belgium

Re: Reasoned opinion (subsidiarity) regarding the EU proposals for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (COM(2018) 147), and a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (COM(2018) 148)

Dear Mr Juncker,

The House of Representatives of the Netherlands has examined the EU proposals for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (COM(2018) 147), and a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (COM(2018) 148) in terms of the principle of subsidiarity.

I am writing to inform you that the opinion of the House of Representatives with regard to the subsidiarity of the aforementioned proposals is negative.

The House of Representatives agrees that taxing the digital economy and reforming the financial system in order to achieve this are important goals, but takes the view that taxation and taxation policy are primarily a concern of the member states themselves, and that member states can also achieve this reform without European harmonisation or interference. The House also has its doubts about the potential benefits of a European proposal compared to a national approach, especially since member states are already working on a joint strategy in an OECD context.

As far as the legal basis is concerned, the House considers Article 115 of the Treaty on the Functioning of the European Union (TFEU) to be the appropriate legal basis for both proposals. The House therefore also disagrees with the European Commission's choice of basing the proposal COM(2018) 148 on Article 113 of the TFEU, because, in its view, it is clear that in this proposal the purpose of the taxation is also a levy on profit. As such, this proposal, as is also the case for proposal COM(2018) 147, does not actually concern indirect taxation, for which Article 113 is intended.

The annex sets out the contributions to the debate from the different parliamentary parties, in which they explain their standpoints with regard to subsidiarity and other matters in greater detail. I would appreciate your taking these contributions into consideration in your reply to this letter.

A copy of this letter will also be sent to the European Parliament, the European Council and the Government of the Netherlands.

Yours sincerely,

The Speaker of the House of Representatives,
Khadija Arib

Annex: Contributions of the different parliamentary groups to the debate

The House of Representatives of the Netherlands has 150 seats. These seats are distributed as follows:

- People's Party for Freedom and Democracy - VVD (33)
- Party for Freedom - PVV (20)
- Christian Democratic Appeal - CDA (19)
- Democrats 66 - D66 (19)
- Green Left - GL (14)
- Socialist Party - SP (14)
- Labour Party - PvdA (9)
- Christian Union - CU (5)
- Party for the Animals - PvdD (5)
- 50PLUS (4)
- Reformed Political Party - SGP (3)
- DENK (3)
- Forum for Democracy - FvD (2)

In evaluating the proposals in terms of subsidiarity, eight parliamentary groups provided an explanation of their views.

Standpoints regarding subsidiarity

The **members of the VVD parliamentary group** take the view that there are sufficient arguments for applying a subsidiarity test to the proposals under discussion. They have the following reasons for this.

*General***:**

- Taxes are primarily a concern of the member states themselves. A European solution should only be considered in the case of major, serious problems that the member states are unable to resolve themselves. The VVD members agree that the taxation of the digital economy and reform of the financial system to achieve this is important, but note that many member states are currently reaching solutions without European harmonisation or interference, such as the French tax on visual content and the Hungarian tax on advertisements. They therefore have doubts about the benefits of a European proposal, especially since these national measures can apparently resolve the problem effectively without European interference.
- Various member states have already joined forces in reviewing taxation for the digital economy within an OECD context. A definitive report outlining solutions for this issue is expected to be published in 2020. It therefore appears that member states are already proving able to reach joint solutions without European intervention.
- The House of Representatives has previously indicated that it will only consider solutions involving supranational measures on taxation in cases where national measures prove ineffective and it also previously applied a subsidiary test ('drew a yellow card') in the case of the proposals concerning the CCCTB. The current proposals are related to this and provide a stepping stone towards these – previously rejected – proposals. The VVD considers this to be problematic.

*European Commission's arguments***:**

- The Commission argues that the fact that companies conduct cross-border trade could itself be a reason for justifying European harmonisation. As far as the VVD is concerned, this is

jumping the gun. Any assessment of whether European intervention is necessary should in part be based on the fact that member states are themselves unable to resolve the problem. The general arguments outlined above demonstrate that the member states are already applying initiatives, both individually and jointly, to resolve the problem. For this reason, the Commission has not provided persuasive arguments to demonstrate that no solution could be found without European intervention.

- The Commission argues that European harmonisation has added value that transcends the actions of individual member states, jointly or otherwise. There is no further explanation provided for this, which makes it, in the view of the VVD, not convincingly proven. In addition, the Commission itself states that various member states are taking measures. It does not claim that these measures are inefficient and would therefore not be workable, but merely that this would result in a fragmented policy. As such, the Commission has not provided sufficient proof that supranational European policy should take precedence over national policy.
- The Commission argues that a joint, harmonised tax creates a level playing field with regard to competition. This is untrue for as long as the other fiscal provisions and taxes in the member states differ from each other. The Commission's proposal therefore fails to achieve its intended objective which raises the question of whether member states would be better advised to apply policy at national level.
- The Commission asserts that it would be undesirable for a member state to take 'unilateral' and 'divergent' action. The VVD takes the view that acting unilaterally and divergently is part of a member state's sovereignty. Enforced joint action can only be permitted if countries decide on it – jointly and divergently – or if a national solution alone provides no remedy. The VVD takes the view that the Commission has failed to prove this convincingly.
- The Commission argues that as soon as a measure affects the 'internal market as a whole', coordinated action at European level is the 'only' option. The VVD questions this argumentation, both in the case of the assumption that measures taken nationally will affect the internal market as a whole and the conclusion that, if this were the case, a European solution would be the only 'appropriate way forward'. They believe that this dismisses the principle of subsidiarity too easily.
- The Commission states that the proposed measure is proportionate and does not interfere with member states' freedom to set policy. The members of the VVD do not agree with this assertion, since it imposes an obligation to levy a specific (temporary) tax.
- The Commission argues that the member states cannot take national measures without 'hampering the single market'. The members of the VVD consider this to be a remarkable accusation in view of the right of a member state to set its own national policy that may possibly conflict with the principle of subsidiarity.

The members of the **PVV parliamentary group** consider this proposal to be at odds with the subsidiarity principle. They refute the argument that only an EU solution, implemented by the EU, is possible. The collection of taxes and taxation policy are a national power by definition, in which no EU interference is appropriate. If it should appear that actions are necessary, this should of course only be in an OECD context.

The opinion of the members of the **CDA parliamentary group** with regard to the subsidiarity of the long-term solution (COM(2018)147) is positive. It concerns an issue of profit attribution and these members recognise the advantages of maximum possible agreement between countries when it comes

to profit attribution. This means that coordination at OECD level takes preference over agreement at EU level and, if that proves unsuccessful, coordination at EU level takes precedence over national regulations. The taxation of digital services should not be seen as a stepping stone towards a CC(C)TB.

The opinion of the members of the CDA parliamentary group with regard to the subsidiarity of the temporary solution (COM(2018)148) is partly positive. The taxation of profit is not a concern of the European Union, but of the member states themselves. This also applies to the introduction of new taxes. However, indirect taxation is covered by the powers of the European Union and the temporary solution takes the form of an indirect tax on digital services. It is not clear to the members of the CDA parliamentary group whether the European Commission has opted for an indirect tax for practical reasons or because of its own powers.

The members of the **D66 parliamentary group** take a positive view with regard to the subsidiarity of the EU proposals on taxation in the digital economy. According to these members, the objectives of the proposal cannot be effectively achieved at the level of individual member states. Another key factor is that efforts made within an OECD and G20 context have so far achieved unsatisfactory results. The internet is a cross-border technology by definition. Companies in the digital economy often operate beyond national borders. Since these companies often have limited or no actual physical presence, measures are required in order to ensure that profit is as far as possible taxed where value is created and in order to protect the basis for taxation. For the digital internal market to operate effectively, it is therefore important that member states take concerted action in modernising taxation. The European Commission's proposals for a temporary and permanent solution contribute to achieving this. These proposals also help create a level playing field and are therefore in the interests of Dutch businesses and consumers. The D66 parliamentary group will monitor the further implementation, feasibility and interaction with other international initiatives.

The members of the **Green Left parliamentary group** agree with the analysis below by the European Commission, which describes why the two EU proposals are in line with the principle of subsidiarity:

"As digital businesses are able to operate across borders without having any physical presence, both inside the Union and from third countries, uniform rules are needed to ensure that they pay taxes where they make profits. Given the cross-border dimension of digital activities an EU initiative is needed and adds value as compared to what a multitude of national measures could attain. A common initiative across the internal market is required for a direct and harmonised application of the rules on a significant digital presence within the Union so as to ensure a level playing field for all member states and provides taxpayers with legal certainty. Unilateral and divergent approaches by each member state could be ineffective and fragment the single market by creating national policy clashes, distortions and tax obstacles for businesses in the EU. If the objective is to adopt solutions that function for the internal market as a whole, the appropriate way forward is only through coordinated initiatives at EU level."

The members of the **SP parliamentary group** takes the view that digital companies that operate 'without borders' should also pay tax. They believe that it is reasonable to apply a subsidiarity test to these proposals. They would like to see particular consideration given to the following issues:

- Taxation of turnover and profit is a competency of the member states. The fact that agreements are made for member states to collect this new tax from large digital companies

does not undermine the subsidiarity of collection. The SP would like to know how the European Commission's initiative will be assessed with regard to this (apparently) new tax base.

- In the Commission's proposal 147 the place of business is expanded to a digital presence, based on users, contracts and turnover. The members would like to know whether the determination of these criteria is at odds with or in line with the subsidiarity principle.
- Proposal 148 proposes a uniform tax of 3% in order to prevent fragmentation. The SP takes the view that this undermines the competency of member states to opt for a higher rate because the notion of a 'uniform rate' appears to rule out a higher percentage.
- The SP would like to know whether the levying of the tax can actually be seen as an indirect tax because it cannot be considered to be a 'surcharge' (like excise duty) or a fine since it is levied on profit at source. This raises the question of whether invoking Article 113 in the case of COM(2018) 148 is applicable.

The members of the **PvdD parliamentary group** take a negative view with regard to the subsidiarity of both Directives. It has not become clear from both proposals whether they concern a direct or an indirect tax, which stands in the way of a full-fledged subsidiarity check. In addition to this the PvdD thinks Member States should have maximum policy and tariff freedom, and these proposals do not make clear whether this is guaranteed.

The members of the **PvdA parliamentary group** consider this legislation to be in agreement with the subsidiarity principle. In general, they recognise that direct tax policies are in principle reserved for individual Member States. This does not detract from the fact that the Member States have large common interests in this area. There is a broad international consensus that tax avoidance is undesirable. There is also a broad consensus that tax avoidance can best be tackled internationally. In addition, harmonization of tax legislation contributes to the better functioning of the internal market, and harmonization helps to stop undesirable competition between Member States in the field of taxation.

Digital companies such as Facebook and Google are characterized by the fact that they are no longer tied to a physical location for their activities. Their profit derives from the provision of online services, which is difficult for the national profit tax systems of the Member States to get a grip on. The members of the PvdA parliamentary group note that the result is that these companies pay very little tax in the European Member States. In order to correct this, the 'fixed base' concept in the profit tax system needs to be adjusted. And because these digital companies operate online, independently of their location, they are international in nature. Because these large companies, which are the subject of this proposal, operate in all member states of the EU, there is an advantage to be gained from a European approach. The alternative is a fragmented approach to the taxation of digital companies, which can disrupt the digital economy that is still under development. In addition, a patchwork of tax rules will create new opportunities for tax avoidance by these companies. The purely cross-border business activities of the large tech companies in Europe justify taking a European approach above an individual Member State approach. In view of the damage caused by a fragmented approach as a result of different policies by individual member states, the members of the PvdA parliamentary group also consider the proposal proportionate. In conclusion, the members of the PvdA parliamentary group take a positive view of the subsidiarity of this EU proposal.

Standpoints regarding legal basis

The members of the **VVD parliamentary group** note that the Commission describes the tax as 'characteristic for an indirect tax'. The VVD members question this comment, since the new tax is intended to be levied on the profit of digital companies. Only because this is inherently problematical in view of the digital economy, is the turnover taxed instead. However, the purpose of the tax is still to tax profit. As such, in view of its purpose, the tax should be considered to be a direct tax (*sui generis*) rather than an indirect tax. The VVD therefore believes that another legal basis from the Treaty on the Functioning of the EU, for example Article 115 TFEU, would be more appropriate and suitable, if a positive approach is adopted to the proposal, than the chosen Article 113 TFEU.

The members of the **PVV parliamentary group** take the view that, with these proposals, the EU is acting unlawfully because there is no need to harmonise taxation in order to prevent distortions of competition.
Tax legislation is a national power and must remain so.

The members of the **CDA parliamentary group** believe the legal basis to be partially appropriate. The European Union sees Article 115 as the legal basis for the long-term solution (COM(2018)147) and Article 113 for the temporary solution (COM(2018)148). These members consider Article 115 to be the appropriate legal basis for both directives. The ultimate aim of the temporary solution is not to harmonise various turnover taxes on digital services, but the decision to tax turnover was taken, as the Commission itself admits, for practical reasons in order to harmonise taxation. The tax on turnover is therefore the means and not the end. The CDA members also have their doubts about the temporary nature of this tax on turnover of digital services, especially since the directive now contains no specified horizon.

The members of the **D66 parliamentary group** have a positive opinion with regard to the legal basis for both EU proposals and agree with the European Commission's arguments. The European Commission refers to Articles 46, 48, 53, paragraph 1, Article 62 and Article 91, paragraph 1 of the Treaty on the Functioning of the European Union. The members of the D66 parliamentary group consider this to be the right legal basis.

The members of the **Green Left parliamentary group** agree with the European Commission's arguments concerning the legal basis for the EU proposal.

The members of the **SP parliamentary group** take the view that proposal COM(2018) 147 falls within the scope of Article 115 of the Treaty on the Functioning of the European Union.

The members of the SP parliamentary group do not feel that proposal COM(2018) 148 falls within the scope of Article 113 of the Treaty on the Functioning of the European Union.

The members of the **PvdA parliamentary group** consider Article 46, Article 48, Article 53 (1), Article 62 and Article 91 (1) of the Treaty on the Functioning of the European Union the appropriate legal basis for both proposals.