



## Newsflash

# CJEU AG opines fairness tax partly incompatible with EU law

On 17 November 2016, Advocate General (AG) Kokott of the Court of Justice in the European Union (CJEU) issued her opinion on the Belgian constitutional court's preliminary ruling request relating to the compatibility of the "fairness tax" with primary and secondary EU law.

The fairness tax, which was introduced as from 1 January 2014, is levied at a rate of 5.15% (5%, plus a 3% crisis surcharge) on resident and nonresident companies in relation to profits distributed by way of dividends (as defined under Belgian law), which were not taxed due to the reduction of the company's tax base through the notional interest deduction and/or the use of tax loss carryforwards. Exemptions apply, and the determination of the taxable base is subject to a specific computation methodology.

The Belgian constitutional court referred a case to the CJEU in 2015 because there were questions as to whether the fairness tax violates the Belgian constitution when read in conjunction with the EU freedom of establishment principle and the EU parent-subsidiary directive.

In summary, the AG is of the opinion that the Belgian fairness tax regime:

- Does not violate the freedom of establishment principle in the EU treaty with respect to profits of a Belgian permanent establishment of a nonresident company where the nonresident company makes a dividend distribution;
- Does not violate the Parent Subsidiary Directive (PSD) because the fairness tax does not constitute a withholding tax; but
- Does violate the PSD to the extent the fairness tax would become due upon the redistribution of dividend income that falls within the scope of the PSD.

As such, the AG's opinion only deems certain aspects of the tax to be incompatible with secondary EU law (i.e. the PSD), i.e. to the extent redistributed qualifying dividend income would be subject to the fairness tax.

### Comments

The CJEU's decision in the case is expected in the near future. The Belgian constitutional court then will need to issue its own decision, taking into account the conclusions of the CJEU and other possible domestic grounds for annulling the fairness tax, such as the compatibility of the regime with the Belgian constitution or Belgium's tax treaties. The constitutional court has the power to fully or partially annul the fairness tax legislation if it is found to be in breach of EU law, the Belgian constitution and/or tax treaties.

Potentially affected companies should review their fairness tax positions. In practice, the following actions to challenge the fairness tax are possible:

- File a tax complaint with the competent Regional Tax Director within six months after a tax assessment.
- If the six-month period has expired, file a request for "de-taxation" with the competent Regional Tax Director based on a "new fact" (i.e. the decision of the CJEU or the subsequent ruling of the Belgian constitutional court). Such request may be filed up to five years from 1 January of the year in which the fairness tax was assessed.
- If the constitutional court annuls the fairness tax legislation, it will be possible to file a tax complaint within six months after the decision is published in the official journal. Such a complaint can encompass all instances where the fairness tax was levied since the regime was introduced.

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