Fugro v. Council: The story of a taxpayer "throwing down the glove" at the Minimum Taxation Directive

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The process involved with reaching a political consensus on the implementation of the Minimum Taxation Directive (2022/2523) (the Directive which implements Pillar Two of the OECD/G20 Global Agreement) was not easy – neither was agreeing on the mechanics of the complex rules involved. However, somehow, the Council of the European Union managed to do so, and, as a result, on 12 December 2022, the 27 EU Member States agreed to adopt the Directive, which – very broadly – establishes a minimum effective tax rate of 15% for large corporate groups in the European Union. This historic agreement also meant that the Directive had to be transposed domestically by the end of 2023. While – as of today – some Member States have yet to implement the rules and/or have not finalized the respective legislative procedures (the European Commission has not let these ones slide), others already face more "advanced" concerns.

The present note wishes to bring the readers up to speed with the status of *Fugro v. Council* – a case in front of the General Court of the European Union, in which the taxpayer requests the (partial) annulment of the Directive, arguing that the provisions whereby income from shipping activity is excluded from the computation of the qualifying income or loss of a constituent entity do not tie with EU (authorized) tonnage tax regimes.

Breaking down what has happened so far:

1. The action

On 15 March 2023, Fugro (previously identified as VF) – a Dutch tax resident – brought an action to the General Court (GC) against the Council of the European Union in (VF v. Council (Case T-143/23)). In its request, Fugro asked the GC to annul the Directive insofar as:

- article 17 (of that Directive) excludes from its scope income from a shipping activity covered by a Member States's tonnage tax scheme authorized in accordance with EU State aid rules, other than "international shipping income" and "qualified ancillary income";
- article 17 applies only if "the constituent entity demonstrates that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where [that] entity is located"; and,
- that Directive does not lay down transitional measures for taxpayers that made substantial investments relying on a tonnage tax scheme.

To put it differently, Fugro believes that the Directive should be annulled because the international shipping income exclusion in article 17 does not cover (income from) a shipping activity covered by the Dutch tonnage tax scheme, despite the latter (and the tax benefits emanating from its application) having been authorized by the Commission in various instances.

- ***The profile of the appellant (all data shared below are sourced from publicly available information)***

Fugro is a multinational public company headquartered in the Netherlands. The group is active in the field of geotechnical survey and geoscience services. Practically, Fugro analyses the "earth" (inclusive of the oceans) and collects data (to be precise, "Geo-data") which are then studied and applied to develop safer, more sustainable and more efficient operations.

For the purposes of its operations, the group operates through vessels, and, in fact, in December 2023, Fugro expanded its geotechnical fleet by purchasing two vessels.

- ***The Dutch tonnage tax regime***

The Netherlands introduced a special tax regime for maritime shipping companies (qualification and entry requirements apply) – the so-called tonnage tax regime – which has applied from 1 January 1996.

Broadly, the tonnage tax regime applies to profits derived from the exploitation of a ship or ships used for transportation in international seas or in connection with the exploration for or exploitation of natural resources at sea (including profits from towing services). Profits from other activities directly linked to activities previously mentioned fall within the scope of the tonnage tax regime.

The regime has been technically reviewed by the European Commission since its inception. Over the years (since 1996 until today), it has been confirmed that the Dutch tonnage tax regime does not constitute illegal State aid through a series of decisions in: for example, 2009 (SA.26525), 2010 (SA.30110) and recently in 2019 (SA. 51263).

2. The reply of the General Court

On 15 December 2023, the GC decided to dismiss the action in the case of *Fugro v. Council* (Case T-143/23) from a procedural standpoint due to the absence of locus standi (the taxpayer did not prove it was individually impacted by the Directive) and thus did not examine the substance of the case.

Based on settled case law, in order to be regarded as individually concerned by a measure not specifically addressed to a person, it should be proven that said person is affected by that measure by reason of certain attributes which are peculiar to them or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed by a decision. The GC explained that the Directive, and specifically article 17, applies to all economic operators that satisfy certain objective conditions and that Fugro is concerned in the same way as any other economic operator that is, actually or potentially, in an identical situation.

In light of the above, Fugro was not considered as individually concerned and thus did not have the standing to bring proceedings against the Directive as per article 263 of the Treaty on the Functioning of the European Union (TFEU).

3. The reaction of Fugro

On 23 February 2024, Fugro lodged an appeal against the reply of the GC claiming that it had erred in law by misinterpreting the concept of an "individual concern" within the meaning of article 263 of the TFEU (Case C-146/24 P). In its appeal, Fugro asks the Court of Justice of the European Union (ECJ) to declare its action permissible and send it back to the GC for it to rule on the substance.

Concluding thoughts:

The decision of the ECJ is likely to take some time, and while it is too early to make any prediction as to what its verdict will be, one thing is left to consider: will this case simply create an interesting precedent with respect to how taxpayers can defend themselves against EU Directives, or will it open a Pandora's box for other potential Minimum Taxation Directive (2022/2523) issues?

IBFD references

› For an overview of the implementation status of the Global Anti-Base Erosion (GloBE) rules, i.e. the Income Inclusion Rule (IIR), the Undertaxed Profits Rule (UTPR) and the related Domestic Minimum Top-Up Tax (DMTT) rules, please refer to the Global Minimum Tax Monitor Map.

› For an overview of the developments linked to the Minimum Taxation Directive (2022/2523) at the EU level, please refer to the European Union - Global Minimum Tax Monitor, Tables IBFD.

› EU tax law developments are reported in the daily IBFD Tax News Service.