

**Case C-436/23****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

13 July 2023

**Referring court:**

Hof van Beroep te Gent (Belgium)

**Date of the decision to refer:**

13 June 2023

**Applicant:**

Belgisch Staat / Federale Overheidsdienst Financiën

**Defendant:**

Volvo Group Belgium NV

**Subject matter of the main proceedings**

This request was lodged in connection with proceedings concerning a statutory scheme which introduced a ‘fairness tax’. The Grondwettelijk Hof (Constitutional Court, Belgium) overturned that scheme but maintained its effects, including for the assessment years 2015 and 2016, thereby making the defendant liable for the fairness tax for the assessment years in question. The assessments in question were annulled at first instance. The Belgische Staat (Belgian State) has now appealed against that annulment.

**Subject matter and legal basis of the request**

In this request for a preliminary ruling under Article 267 TFEU, the referring court asks a question concerning the maintenance of the effects of legislative provisions imposing a fairness tax following their annulment by the Constitutional Court. Specifically, it asks whether the maintenance decision of the Constitutional Court constitutes an infringement of the freedom of establishment enshrined in Article 49 TFEU in a situation in which the referring court disapplies that decision

with regard to non-resident companies with a permanent establishment in Belgium because the provisions in question run counter to the freedom of establishment, resulting in those companies suddenly being treated more favourably than subsidiaries of non-resident companies, which are still liable to pay that fairness tax.

### **Question referred for a preliminary ruling**

Must Article 49 of the Treaty on the Functioning of the European Union be interpreted as precluding a national scheme, such as that being challenged before the Court (specifically that which was annulled by the Constitutional Court but whose effects were maintained, albeit with an infringement of the freedom of establishment as a result of which the maintained national scheme must be disapplied in respect of the profits distributed by companies established in another Member State with a Belgian permanent establishment), and whereby

- a tax is payable on the distribution of profits which were not included in the final taxable result of a resident company, in respect of which a company established in another Member State has such an influence on the resident company's management that it can determine its activities,
- whereas that tax is not payable on the profits concerned if that company, established in another Member State, carries on its activities in Belgium through a permanent establishment/branch?

### **Provisions of European Union law relied on**

TFEU, Article 49

### **Provisions of national law relied on**

Law of 30 July 2013 containing various provisions (*Belgian Official Journal*, 1 August 2013), Articles 43 to 51

Income Tax Code 1992 (WIB), Article 219b and Article 233(3)

Special Law of 6 January 1989 on the Constitutional Court, Article 8(3)

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 By Articles 43 to 51 of the Law of 30 July 2013 containing various provisions, the Income Tax Code 1992 ('WIB 92') was amended. This introduced a 'fairness tax', a tax distinct from corporate tax and non-residents' tax, which both resident and non-resident companies must pay when they distribute dividends which, owing to their use of certain tax advantages provided for by the national tax system, are not

included in their final taxable profits. The purpose of the fairness tax is to tax the profits that are distributed by companies without corporate tax or non-residents' tax having been paid on them.

- 2 On 31 January 2014, an action for annulment of the relevant articles of the Law of 30 July 2013 was brought before the Constitutional Court. In that context, the Constitutional Court referred questions to the Court of Justice for a preliminary ruling, giving rise to the judgment of 17 May 2017 (C-68/15, *X v Ministerraad*, EU:C:2017:379), in which the Court stated, inter alia, that the national court must examine whether the manner in which the taxable amount of the fairness tax is calculated in fact leads to non-resident companies being treated in a less favourable manner than resident companies and, if so, decide that there has been an infringement of the freedom of establishment.
- 3 The Constitutional Court annulled the statutory scheme for the fairness tax by a judgment of 1 March 2018, but essentially maintained the effects of the annulled provisions for the assessment years 2014 to 2018. Article 8(3) of the Special Law of 6 January 1989 gives the Constitutional Court the possibility itself to regulate by general order the scope of the maintenance of the effects of annulled provisions. The Constitutional Court has that possibility, in view of the principle of legal certainty, in order to mitigate the *erga omnes* and *ex tunc* effects thereof.
- 4 For the assessment years 2015 and 2016, the defendant in the main proceedings owed, for corporate tax purposes, inter alia, the fairness tax. It had raised objections to that.
- 5 The applicant declared the objections unfounded in view of the maintenance decision of the Constitutional Court.
- 6 The defendant in the main proceedings then brought an action before the rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (East Flanders Court of First Instance, Ghent Division), which annulled the corporate tax assessments in question for the assessment years 2015 and 2016.
- 7 In particular, the Court of First Instance was of the view that the maintenance decision of the Constitutional Court infringed the freedom of establishment. It follows from the judgment of the Court of Justice of 17 May 2017 namely that Article 233(3) WIB 92 – on the basis of which Belgian establishments of non-resident companies are in principle subject to fairness tax, even if the profits of the Belgian establishment do not form part of the dividends distributed by the non-resident companies – infringes the freedom of establishment, since it treats non-resident companies with a Belgian establishment less favourably than resident companies. That article must therefore be disapplied in respect of non-resident companies with a Belgian establishment, which in turn has the effect of treating those companies more favourably than resident companies, including subsidiaries of non-resident companies – such as the defendant in the main proceedings – since the fairness tax is maintained only in respect of resident companies.

- 8 The applicant in the main proceedings brought an appeal before the referring court, which decided to refer a question to the Court of Justice for a preliminary ruling.

### **The essential arguments of the parties in the main proceedings**

- 9 **The applicant** claims that no infringement of the freedom of establishment can be established since it is not clear how the taxable amount for Belgian establishments must be calculated, and it cannot therefore be established whether or not this method of calculation is less favourable than the calculation of the taxable amount in respect of Belgian companies. Even if a restriction of the freedom of establishment were found, there would be no infringement of the principle of equality or freedom of establishment, since Belgian permanent establishments and Belgian subsidiaries are in a different situation. Moreover, a restriction is also justified by overriding reasons in the public interest.
- 10 According to the applicant, the court at first instance should therefore have respected the maintenance decision.
- 11 The applicant also argues that the legislative provisions introducing the fairness tax are amenable to review under EU law, but the maintenance decision of the Constitutional Court is not.
- 12 **The defendant** alleges infringement of the freedom of establishment laid down in Article 49 TFEU. Having regard to the decision of the Constitutional Court to maintain the effects of the annulled provisions for the assessment years 2014 to 2018, and to the fact that Article 233(3) WIB 92 must, due to an infringement of the freedom of establishment, be disapplied in respect of non-resident companies with a permanent establishment in Belgium, the fairness tax does apply to resident companies (including subsidiaries of non-resident companies such as itself), but not to Belgian establishments of non-resident companies. As a result, the parent company, which normally can freely choose, under the principle of freedom of establishment, the legal form (branch, subsidiary or agency) in which to conduct its business in Belgium, is wrongly restricted in that choice. There is no justification for this, both categories of legal entity being in a similar situation in the light of the goal of the fairness tax.
- 13 Such a restriction of the freedom of establishment is also disproportionate, since its basis is in Article 8(3) of the Special Law of 6 January 1989, which offers the Constitutional Court the possibility to exclude from its maintenance decision claimants who have lodged an objection in a timely manner, such as the defendant in the main proceedings, and it is unforeseeable whether the Court will make use of that possibility (which it did not do in the present case), thereby infringing the principle of legal certainty.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 14 The referring court agrees with the opinion of the court at first instance in the sense that the effect of Article 233(3) WIB 92 is that a non-resident company with a permanent establishment in Belgium is treated less favourably than a resident company, including a subsidiary of a non-resident company – such as the defendant in the main proceedings – by the maintenance decision of the Constitutional Court, and that this provision therefore constitutes a restriction of the freedom of establishment laid down in Article 49 TFEU. For Belgian establishments of non-resident companies, the taxable amount of the fairness tax is in fact linked to the distribution of a fictional dividend formed by the portion of the gross dividends distributed by the non-resident company that corresponds proportionately to the positive share of the accounting result of its Belgian establishment in the overall accounting result of the non-resident company. The result of this is that the establishment is subject to fairness tax, even if the dividends from the non-resident company do not include profits of the Belgian establishment that fall under Belgian tax jurisdiction. In contrast, the taxable amount of the fairness tax for a resident company is always determined by the Belgian taxable result.
- 15 This restriction of the freedom of establishment does not pertain to situations which are not objectively comparable, nor can it be justified by overriding reasons in the public interest. That restriction must therefore be declared disapplied.
- 16 Given that the fairness tax, in the light of the maintenance decision and the fact that Article 233(3) WIB 92 is disapplied in respect of Belgian establishments of non-resident companies, does apply to subsidiaries of non-resident companies and not to permanent establishments thereof, the referring court questions whether this leads to an infringement of Article 49 TFEU.