

# ***Belgium asks European Court of Justice for preliminary ruling on ‘fairness tax’***

*February 13, 2015*

## ***In brief***

The Belgian Constitutional Court (BCC) has asked the European Court of Justice (ECJ) for a preliminary ruling on the Belgian fairness tax, which was introduced in 2013.

The fairness tax is a separate assessment, imposed at a 5.15% rate, on dividends distributed by large Belgian companies or Belgian branches of foreign companies. The fairness tax applies if notional interest deductions or tax loss carryforwards offset the taxpayer's taxable basis for the relevant tax period.

## ***In detail***

### ***Complaint to the BCC***

In January 2014, the BCC received a complaint regarding the fairness tax — specifically, that the fairness tax would violate Belgian constitutional law, the Treaty on the Functioning of the European Union (TFEU), and the EU Parent-Subsidiary Directive (PSD).

The BCC, on January 28, 2015, asked the ECJ to rule whether the fairness tax violates EU law. The request relates to whether the fairness tax law complies with the freedom of establishment provisions of the TFEU (articles 49-54) and the PSD.

### ***Freedom of establishment***

Regarding freedom of establishment, the BCC's request notes that:

- A foreign company with a Belgian permanent establishment (PE) could be subject to the fairness tax when distributing a dividend, whereas a foreign company with a Belgian subsidiary would not be subject to the fairness tax when distributing a dividend.
- A foreign company with a Belgian PE could be subject to the fairness tax even if its Belgian profits are fully reserved, but a Belgian subsidiary that

keeps its similarly full profit reserves would not be subject to the fairness tax.

### ***Parent-subsidiary Directive***

Regarding the PSD, the BCC asks:

- Does the fairness tax constitute a withholding tax that violates the PSD since a Belgian subsidiary could be subject to the fairness tax when distributing its profits to its parent company, while these profits would not be subject to the fairness tax if kept by the Belgian subsidiary?

- Does the PSD prevent dividends qualifying for participation exemption that are received by a Belgian company from resulting in a higher fairness tax basis when redistributed in a later year, when they would result in a lower

fairness tax basis if redistributed in the same year?

### ***The takeaway***

The BCC's request is particularly relevant to taxpayers that have been liable for fairness tax. In addition, the

outcome will be relevant to non-Belgian taxpayers because other EU Member States have introduced, or are considering introducing, similar tax rules.

### ***Let's talk***

For a deeper discussion of how this might affect your business, please contact:

#### ***International Tax Services, United States***

Kristof Vandepoorte

+1 646 471 3990

[kristof.m.vandepoorte@us.pwc.com](mailto:kristof.m.vandepoorte@us.pwc.com)

#### ***International Tax Services, Belgium***

Axel Smits

+32 3 259 3120

[axel.smits@be.pwc.com](mailto:axel.smits@be.pwc.com)

Evi Geerts

+32 3 259 3161

[e.geerts@be.pwc.com](mailto:e.geerts@be.pwc.com)

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