

General Court Dismisses Action for Annulment of the Pillar Two Directive

On 15 December 2023, the General Court of the EU (the Court) rendered its judgment in *Fugro NV vs Council* regarding the action for annulment brought by the company against the Pillar Two Directive ([T-143/23](#)). The Court decided that the company does not have legal standing to challenge the Directive. As a result, the action was rejected, being considered inadmissible, and there was also no need for the Court to adjudicate on the applications to intervene made by the Kingdom of the Netherlands and other parties.

Background and facts

An action for annulment of an EU Directive is permissible under the conditions outlined in Article 263 of the Treaty on the Functioning of the European Union. To do so, the applicant must demonstrate that the act for which annulment is sought is of direct concern on one hand, and of individual concern on the other. According to the applicant, these conditions are met, and based on this assertion, the applicant sought the annulment of the Pillar Two Directive insofar as:

- first, Article 17 of that Directive excludes from its scope income from a shipping activity covered by an EU Member State's tonnage tax scheme authorised in accordance with EU State aid rules, other than 'international shipping income' and 'qualified ancillary income';
- secondly, 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';
- thirdly, that Directive does not lay down transitional measures for taxpayers that made substantial investments relying on a tonnage tax scheme.

In essence, the applicant alleges that the Pillar Two Directive, by not fully excluding income from a shipping activity covered by an EU Member State's tonnage tax scheme when computing the qualifying income or loss of a constituent entity, offsets the corresponding benefit from the application of the Dutch tonnage tax regime – authorized by the European Commission in 2010 and 2019 – through a potential top-up tax.

The General Court judgment

Before any discussion on the substance of the applicant's arguments, the Court had to examine whether the action for annulment is admissible, in other words, whether the applicant has the so-called *locus standi*. In that regard, the Court reiterated its established case law, affirming that to be considered individually concerned by a measure not directed at them (such as the Pillar Two Directive addressed to EU Member States), a natural or legal person must be 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. In that regard, the General Court ruled that this is not the case with the applicant since Article 17 of the Pillar Two Directive applies to all economic operators that satisfy certain objective conditions and, in particular, those carrying out an activity in the maritime sector, irrespective of the EU Member State in which those operators are established and of their tax scheme, which may be a general corporate income tax scheme or an authorised tonnage tax scheme. Therefore, as per the Court, the applicant is concerned by the Pillar Two Directive in the same way as any other economic operator that is, actually or potentially, in an identical situation.

Furthermore, as per the Court, where a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of persons. That can be the case particularly when the measure alters rights acquired by those persons prior to the adoption of the measure. However, the Court ruled that the applicant did not prove that it is part of a limited class of persons, amongst others, because the class of persons that benefit from the tonnage tax scheme (and are potentially affected by the Pillar Two Directive) was not made up exclusively of persons identified or identifiable at the date of adoption of that Directive and may yet be extended after that date.

Takeaway

In the present judgment, the General Court adhered to its settled case law on the assessment of individual concern when a natural person or legal person attempts to challenge a Directive. Allegedly, the assessment takes place under strict conditions, while it was also reiterated in the judgment that the fact that the applicant may suffer taxation as a result of an EU act does not suffice for establishing an individual concern.

The present judgment can still be appealed before the Court of Justice, which will have the final saying. Nevertheless, the compatibility of (aspects of) the Pillar Two Directive with EU law can still potentially be assessed by the Court of Justice through the preliminary ruling procedure initiated by national courts.

Let's talk

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