



## Corporate tax alert Belgium

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### **ECJ Advocate-General: fairness tax partly incompatible with EU law**

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

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

- does not violate the freedom of establishment in relation to profit of a non-Belgian resident company's Belgian permanent establishment; said profit being distributed by the former,
- does not violate the Parent-Subsidiary Directive, in the sense that the fairness tax does not constitute a withholding tax, and
- does violate the Parent-Subsidiary Directive, as far as it would lead to fairness tax being due upon the redistribution of dividend income falling within the Parent-Subsidiary Directive's scope of application.

As such, the AG's opinion leaves the fairness tax regime unaffected and only considers certain of its specificities incompatible with secondary EU law (i.e. the Parent-Subsidiary Directive), as far as it would render redistributed qualifying dividend income subject to the fairness tax.

The CJEU's ruling is expected in the near future. The court often follows the AG's opinion, but not systematically. The CJEU's ruling will be limited to the compatibility with primary and secondary EU law.

Subject to the CJEU ruling, the Belgian Constitutional Court will need to issue its own ruling, taking into account the CJEU's ruling and other possible internal grounds for annulment, such as the compatibility of the fairness tax regime with the Belgian Constitution or relevant double tax treaty provisions. The Belgian 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 double tax treaties.

Deloitte advises companies to review their fairness tax position, and consider initiating or complementing pending litigation.

In practice, the following actions to challenge the fairness tax are possible:

- Filing a tax complaint (réclamation / bezwaarschrift) with the competent Regional Tax Director within 6 months after a tax assessment.
- If the 6 month period has lapsed, filing a request for de-taxation (demande de dégrèvement d'office / verzoek tot ambtshalve ontheffing) with the competent Regional Tax Director, based on a "new fact" (i.e. the ruling of the CJEU or the subsequent ruling of the Belgian Constitutional Court). Such request may be filed up to 5 years from 1 January in the year during which the fairness tax was assessed.
- If the Constitutional Court annuls the fairness tax legislation, the filing of a tax complaint within 6 months after the Constitutional Court's ruling is published in the Official Journal (Moniteur Belge / Belgisch Staatsblad) is also a possibility. Such tax complaint can then cover all unlawful fairness taxes levied since the introduction of the fairness tax regime.

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## Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium

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