

Fugro v. Council: Fugro loses its appeal on standing – should we be (individually) concerned?

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1. Introduction

This note outlines the legal proceedings between [Fugro](#) and the Council of the European Union regarding the [Minimum Taxation Directive \(2022/2523\)](#) (the Directive), which was adopted by the Council on [12 December 2022](#). The case centres on whether Fugro was individually concerned by the Directive, which broadly imposes a minimum effective tax rate of 15% for large corporate groups in the European Union. It describes the outcome of the Court of Justice of the European Union (ECJ) decision in *Fugro v. Council* (C-146/24 P), in which the taxpayer requested the (partial) annulment of the Directive.

2. The action

Fugro started its action on [15 March 2023](#) against the Council of the European Union (*VF v. Council* ([Case T-143/23](#))). Fugro is a multinational public company established in the Netherlands. It is part of a group which is active in the field of geotechnical surveys and geoscience services. To exercise its operations, the group operates through vessels.

Fugro requested to partially nullify the Directive because income obtained from a shipping activity covered by the Dutch tonnage tax regime – which is authorized by the Commission as compatible with the EU state aid rules – is not included in the international shipping income exclusion of article 17 of the Directive. Practically, this meant that its income from these activities could be subject to an additional top-up tax under the Directive.

Under the Dutch tonnage tax regime, which has applied since 1996, tax is not imposed on actual profits but on profits which are equal to a flat rate based on net vessel tonnage (i.e. taxable profit is calculated using a fixed formula based on the size of the ships). This method often results in lower taxable profit, and, as a result, the effective tax rate often drops below 15%. This method 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.

3. The General Court's decision

On [15 December 2023](#), the General Court (GC) dismissed the action in the case of *Fugro v. Council* ([Case T-143/23](#)), on the grounds that Fugro failed to prove that it was individually impacted (concerned) by the Directive. The GC held that Fugro was affected only in its objective capacity as a parent entity in the maritime sector, not as an individually concerned party.

4. The appeal by Fugro

On [23 February 2024](#), Fugro lodged an [appeal](#) against the decision of the GC, arguing that it had misinterpreted the concept of an “individual concern” (Case [C-146/24 P](#)). Based on [article 263 of the Treaty on the Functioning of the European Union \(TFEU\)](#), Fugro requested that the ECJ declare its action permissible and send the case back to the GC in order to rule on the substance, or declare the Directive of individual concern to Fugro and send the case back to the GC for a ruling on direct concern.

5. Arguments

Fugro, in its single ground of appeal, argued that the GC had erred in law by misinterpreting the concept of “individual concern” within the meaning of article 263(4) of the TFEU, for the following reasons:

- contrary to the GC's finding that the Directive applies to Fugro only in its objective capacity as parent of a multinational maritime group, established case law indicates that a measure of general application can still give rise to individual concern;
- the GC used an incorrect definition of the concept of a limited class of operators; and
- the GC erred by ruling that Fugro was not part of a limited class of operators at the time the Directive was adopted.

On this last point, Fugro argued that:

- such a class was identifiable through approvals of tonnage tax schemes by the competent national authorities; and
- it is affected by the Directive as, after already basing long-term investments on the approved state aid decisions, it is now forced to introduce changes to its business model within a short timeframe, and it will end up in a less favourable competition position than previously held because additional tax may become due.

The Council and the Commission claim that the single ground of appeal should be rejected as unfounded.

6. Decision

In response to the arguments presented by Fugro, the ECJ with reference to its decisions in *Sahlstedt and Others v. Commission* (C-362/06), *Stichting Woonpunt and Others v. Commission* (C-132/12) and *Ackermann Saatzucht and Others v. Parliament and Council* (C-408/15 P and C-409/15), first held that the GC had correctly held that Fugro was concerned by the Directive only in its objective capacity as parent entity of an MNE group. In addition, on the basis of the cited case law, the GC had correctly assessed that Fugro was not member of a “limited class of persons” that could also potentially qualify as individually concerned.

On the definition of the concept of “limited class of operators”, the ECJ observed that the GC had correctly found that the definition relied on by Fugro, namely “...a class of persons benefiting from the Dutch tonnage tax scheme as approved by the Netherlands tax authorities and validated by the Commission”, does not constitute a limited class of operators. The Dutch tonnage tax regime is not an acquired right that is specific or exclusive to Fugro or a

limited class of persons. Specific approval from the relevant authorities does not change that. The ECJ held that the GC had not misread or wrongly interpreted the concept as relied on by Fugro.

If a measure affects a group of persons who were identified or identifiable when that measure was adopted, those persons *might* be individually concerned as members of a limited class of persons. This can be so if the measure alters rights acquired by those persons prior to the adoption of the measure (see e.g. *Stichting Woonpunt and Others v. Commission* (C-132/12) and *Ackermann Saatzucht and Others v. Parliament and Council* (C-408/15 P and C-409/15)).

Fugro's argument that the GC had erred in ruling that it was not part of a limited class of operators at the time the Directive was adopted was also roundly rejected by the ECJ.

Citing the abovementioned case law, the ECJ noted that an act only individually concerns persons who prove it affects them because of specific qualities or circumstances unique to them, which set them apart from everyone else. In this way, they are distinguished individually, much as if the measure were directly addressed to them.

Continuing on this point, the ECJ noted that persons belonging to a group can be individually concerned only if they were identified or identifiable when the contested act was adopted. In other words, a limited group whose membership cannot be extended after the entry into force of that act could be individually concerned by that measure. As any economic operator in the maritime sector meeting the relevant criteria could benefit from the tonnage tax scheme (even after adoption of the Directive), the ECJ noted that the GC had correctly held that Fugro (and other maritime operators in the same position) did not form part of such a limited group.

Further, the ECJ affirmed the GC's finding that Fugro making long-term investment decisions based on the fact that it was benefiting from the tonnage tax regime, and the regime receiving state aid approval, were not relevant factors in its decision. Consequently, the ECJ entirely rejected Fugro's appeal.

7. Concluding thoughts

On the one hand, article 263(4) of the TFEU and the related case law seek to provide EU citizens and entities with an avenue through which to challenge EU acts. On the other, they seek to provide a safeguard against frivolous challenges to those acts. As both aspects are essential to the healthy functioning of the European Union, a balance between the two is of critical importance.

Based on the facts in *Fugro*, the ECJ ruled in line with its own case law. Had it relaxed the strict test it has maintained in the 60-something years since *Plaumann & Co v. Commission* (C-25/62) – the founding precedent for cases regarding individual concern – and opened the door to a ruling on substance, then this could have led to a drastic increase in the number of challenges, not only against the Directive, but also other EU (tax) acts.

Indeed, accepting that Fugro was part of a qualifying limited class of persons would likely – considering the nature of the contested measure – lead other taxpayers benefitting from incentives regimes to challenge the Directive, possibly successfully. This, in turn, would somewhat nullify one of the issues the Directive was meant to tackle – that of the lower effective tax rates.

A key takeaway from *Fugro* is that an activity requiring significant investment or state aid approval does not appear to be a factor in determining whether individual concern exists.

In the end, *Fugro* reminds taxpayers seeking to successfully challenge the Directive (and other EU (tax) acts) that individual concern lies on relatively barren land and that other grounds might prove more fertile.

IBFD references:

- > EU tax law developments are reported on the daily IBFD [Tax News Service](#).
- > Angelika Xygka, “*Fugro v. Council*: the story of a taxpayer “throwing down the glove” at the [Minimum Taxation Directive](#)”, EU Tax Focus (28 May 2024).
- > 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, see the [Global Minimum Tax Monitor Map](#).
- > For an overview of the developments linked to the Minimum Taxation Directive (2022/2523) at the EU level, see the [European Union - Global Minimum Tax Monitor, Tables IBFD](#).