ORDER OF THE GENERAL COURT (Seventh Chamber)

15 December 2023 (*)

(Action for annulment – Taxation – Combating of tax avoidance – Directive (EU) 2022/2523 – Global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union – International shipping income exclusion – Challenge to the scope of that exclusion – Lack of individual concern – Inadmissibility)

In Case T-143/23,

Fugro NV, established in Leidschendam (Netherlands), represented by C. Docclo, lawyer,

applicant,

v

Council of the European Union, represented by K. Pavlaki, E. d'Ursel and G. Rugge, acting as Agents,

defendant,

THE GENERAL COURT (Seventh Chamber),

composed of K. Kowalik-Bańczyk (Rapporteur), President, I. Dimitrakopoulos and B. Ricziová, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure, in particular:

– the plea of inadmissibility raised by the Council by separate document lodged at the Court Registry on 13 June 2023,

– the applicant's observations on the plea of inadmissibility lodged at the Court Registry on 20 July 2023,

– the applications for leave to intervene lodged at the Court Registry by the Kingdom of the Netherlands on 14 June 2023, by Koninklijke Boskalis BV and Boskalis Offshore Transport Services NV on 15 June 2023, by Heerema Offshore Energy Solutions BV on 16 June 2023, by Van Oord NV and Vox Amalia SL on 16 June 2023, by Koninklijke Vereniging van Nederlandse Reders on 16 June 2023 and by the European Commission on 28 June 2023,

makes the following

Order

1 By its action under Article 263 TFEU, the applicant, Fugro NV, seeks the partial annulment of Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (OJ 2022 L 328, p. 1; 'the contested directive').

Background to the dispute

The Dutch tonnage tax scheme

2 In 1996, the Kingdom of the Netherlands implemented a specific tax scheme for corporate or personal income tax, called 'tonnage tax', available, on an opt-in basis and for a period of ten years, to taxpayers engaged in international maritime transport by ship or an activity directly related thereto ('the Dutch tonnage tax scheme'). Under that scheme, tax is calculated on the basis of the net tonnage of the fleet operated and not on the basis of the actual profit earned.

3 In 2009 and 2010, the Dutch tonnage tax scheme was amended to include new categories of vessels and beneficiaries.

4 The Dutch tonnage tax scheme and the amendments thereto were notified to the European Commission as aid schemes. The Commission declared that scheme and the amendments thereto compatible with the internal market on several occasions, in particular in Commission Decision C(2010) 2544 final of 27 April 2010 on State aid N 714/2009 – Netherlands – Extension of the tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels, as well as in Commission Decision C(2019) 5516 final of 26 July 2019 on State aid SA 51263 (2019/N) – Netherlands – Prolongation of the Dutch tonnage tax scheme for ship managers, large vessels and service vessels.

The applicant

5 The applicant is a company established in the Netherlands and incorporated under Netherlands law. It is the ultimate parent entity of a multinational enterprise group active in many countries both within and without the European Union. Its main activity consists of providing geotechnical, survey and geosciences services. It also carries out a ship management activity. Its consolidated turnover was EUR 1 461 million in 2021 and EUR 1 766 million in 2022.

6 The applicant is subject to corporate income tax in the Netherlands. By a letter of 23 December 2014, it requested to be taxed under the Dutch tonnage tax scheme. By decision of 5 January 2015, the Netherlands tax authorities granted that request with effect from the 2014 tax year.

The contested directive

7 On 14 December 2022, the Council of the European Union adopted the contested directive on the basis of Article 115 TFEU and acting in accordance with a special legislative procedure. Under Article 59 thereof, that directive is addressed to the Member States.

8 Under Article 1 thereof, the purpose of the contested directive is to establish common measures for the minimum effective taxation of multinational enterprise groups and large-scale domestic groups where their constituent entities are low-taxed. That minimum taxation takes the form of a top-up tax paid, as appropriate, by the parent entity or by the constituent entities of the group concerned.

9 In accordance with Article 2(1) thereof, the contested directive applies, in essence, to constituent entities located in a Member State that are members of a multinational enterprise group or of a large-scale domestic group which has an annual revenue of EUR 750 000 000 or more.

10 Chapter III of the contested directive defines the methods of computing the qualifying income or loss of a constituent entity. In that regard, Article 17 of that directive establishes an exclusion for international shipping income.

11 That exclusion applies to both 'international shipping income' and 'qualified ancillary international shipping income' ('qualified ancillary income'). Those two concepts are defined, respectively, in Article 17(1)(a) and (b) of the contested directive, by means of lists of the eligible activities.

12 Article 17(2) of the contested directive provides that 'the international shipping income and the qualified ancillary … income of a constituent entity shall be excluded from the computation of its qualifying income or loss, provided that [that] 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'.

13 Article 17(4) of that directive states that ‘the aggregated qualified ancillary … income of all constituent entities located in a jurisdiction shall not exceed 50% of those … entities’ international shipping income’.

Forms of order sought

14 The applicant claims that the Court should:

– annul the contested directive, in so far as:

  – first, Article 17 of that directive excludes from its scope income from a shipping activity covered by a Member State’s tonnage tax scheme authorised in accordance with State aid rules, other than ‘international shipping income’ and ‘qualified ancillary … income’;

  – secondly, Article 17 of that directive 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;

– order the Council to pay the costs.

15 The Council contends that the Court should:

– dismiss the action as inadmissible;

– order the applicant to pay the costs.

Law

The plea of inadmissibility

16 Under Article 130(1) and (7) of the Rules of Procedure of the General Court, the Court may give a decision on inadmissibility without going to the substance of the case if a defendant makes an application asking it to do so. In the present case, the Court considers that it has sufficient information from the material in the file and has decided to give a decision without taking further steps in the proceedings.

17 In its plea of inadmissibility, the Council submits that the applicant does not have standing to bring proceedings against the contested directive. It contends, in particular, that the applicant is neither directly nor individually concerned by the contested directive.

18 The applicant disputes the plea of inadmissibility. It claims that it is directly and individually concerned by the contested directive.

19 It must be borne in mind that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings for annulment of three types of act, namely, first, an act addressed to that person, secondly, an act which is of direct and individual concern to them and, thirdly, a regulatory act which is of direct concern to them and does not entail implementing measures.

20 It should be noted at the outset, first, that the contested directive is addressed to the Member States. It follows that, since it is not an addressee of that directive, the applicant has no right of action on the basis of the first limb of the fourth paragraph of Article 263 TFEU.

21 Secondly, the contested directive was adopted in accordance with a special legislative procedure and, therefore, is not a regulatory act but a legislative act. It follows that the applicant has no right of action

on the basis of the third limb of the fourth paragraph of Article 263 TFEU either.

22 In those circumstances, it remains to be examined whether the applicant has a right of action on the basis of the second limb of the fourth paragraph of Article 263 TFEU.

23 In that regard, it must be recalled that the conditions that the act of which annulment is sought should be of direct concern, on one hand, and individual concern, on the other, laid down in the second limb of the fourth paragraph of Article 263 TFEU, are distinct and cumulative (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 75 and 76 and the case-law cited).

24 In the circumstances of the present case, it is necessary to examine first whether the second condition, relating to whether the applicant is individually concerned, is satisfied.

25 In that regard, it must be borne in mind that it is settled case-law that, in order to be regarded as individually concerned by a measure not addressed to that person, 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 (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 93).

26 Consequently, the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgments of 22 November 2001, *Antillean Rice Mills* v *Council*, C-451/98, EU:C:2001:622, paragraph 52, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 94).

27 However, the fact that a provision is by its nature and scope a provision of general application, inasmuch as it applies to the persons concerned in general, does not of itself prevent that provision from being of individual concern to some (judgments of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 58, and of 23 April 2009, *Sahlstedt and Others* v *Commission*, C-362/06 P, EU:C:2009:243, paragraph 29).

28 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 its adoption (see, to that effect, judgments of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraphs 71 and 72 and the case-law cited, and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59).

29 In the present case, it is not disputed that the contested directive is of general application, in that it applies to objectively determined situations and produces legal effects with regard to a category of persons envisaged in general and in the abstract.

30 That is the case, in particular, in the first place, for the provisions of the contested directive which are not in themselves contested and which provide, in principle, for the minimum effective taxation of multinational enterprise groups and large-scale domestic groups. First, those provisions apply where the objective conditions linked, in particular, to the group concerned earning an annual revenue of EUR 750 000 000 or more and to one or more constituent entities being low-taxed are satisfied. Secondly, those provisions have legal effects for all the parent entities and constituent entities which satisfy those objective conditions.

31 The same is true, in the second place, of Article 17 of the contested directive, which is contested by the applicant in so far as, according to the applicant, the exclusion established by that provision has too narrow a scope.

32 The application of the exclusion provided for by article 17 of the contested directive is dependent on objective criteria. Those criteria are linked, in particular, first, to carrying out certain specific activities, consisting of international shipping and qualified ancillary activities, with those two types of activity being defined and listed, respectively, in Article 17(1)(a) and (b) of that directive, secondly, to observance of the restriction of the aggregated qualified ancillary income, that income not being allowed to exceed 50% of the international shipping income in accordance with Article 17(4) of that directive and, thirdly, to the place where the strategic or commercial management of the ships is carried on within the meaning of Article 17(2) of that directive.

33 Moreover, the provisions of Article 17 of the contested directive have legal effects for all the constituent entities which satisfy those objective criteria.

34 It appears, therefore, that the contested directive, and in particular Article 17 thereof, 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 Member State in which those operators are established and of their tax scheme, which may be a normal scheme or a tonnage tax scheme introduced by a Member State and authorised by the Commission.

35 It follows that the applicant is concerned by the contested directive only in its objective capacity as the parent entity of a multinational enterprise group active in the maritime sector, which it already recognises when it states, in essence, that it fulfils the 'objective criteria' which define the scope of that directive. Therefore, the applicant is concerned by that directive in the same way as any other economic operator that is, actually or potentially, in an identical situation. Accordingly, the applicant is not individually concerned by the contested directive.

36 That conclusion is not called into question by the arguments put forward by the applicant in order to establish that it is individually concerned.

37 In the first place, the applicant claims, in essence, that, in its capacity as the parent entity of a multinational enterprise group earning a consolidated turnover of more than EUR 750 000 000 and subject to an effective tax burden of less than 15%, it comes within the scope of the contested directive. It states that, to the extent that most of its income comes from providing geotechnical, survey and geosciences services and that it sometimes carries out its activities from a port located in the same jurisdiction as its area of operations, the exclusion provided for by Article 17 of that directive is not applicable to it, meaning that it is subject to the top-up tax provided for by that directive. It infers therefrom that it is not only directly concerned by the contested directive, but also, consequently, individually concerned by it. According to the applicant, any other interpretation would be contrary to the right to effective judicial protection enshrined, in particular, in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

38 In that regard, first, it should be noted that the applicant's argument stems from confusion of the two distinct and cumulative conditions relating to direct concern, on the one hand, and individual concern, on the other (see paragraph 23 above). Contrary to what the applicant claims, a natural or legal person directly concerned by a measure is not, by virtue of that fact alone, individually concerned by that measure. It follows that, even supposing it well founded, the applicant's argument that it comes within the scope of the contested directive and is, accordingly, directly concerned by it is not, in itself, capable of establishing that the applicant is also individually concerned by that directive.

39 Secondly, it must be recalled that Article 47 of the Charter is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union. Accordingly, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in that Treaty (see judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 97 and 98 and the case-law cited; judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraphs 43 and 44). Contrary to what the applicant claims, the protection conferred by Article 47 of the Charter does not require a person who comes within the scope of a measure to be unconditionally entitled to bring an

action for annulment against that measure when it does not affect him or her individually (see, to that effect, order of 8 June 2021, *Silver and Others* v *Council*, T-252/20, EU:T:2021:347, paragraph 64).

40 In the second place, the applicant claims, in essence, that it has been granted the benefit of the Dutch tonnage tax scheme by a decision of the Netherlands tax authorities and that it has made long-term investments on the basis of the Commission's decisions concerning that scheme. It maintains that it belongs to a limited and closed group of persons which benefit from that scheme, but are not covered by the exclusion provided for by Article 17 of the contested directive. The applicant states that, in the absence, in that directive, of any transitional measures or grandfathering rules allowing the scheme's effects to be maintained, it will be subject to a top-up tax which will offset the benefit of that scheme and, thus, will alter the rights it acquired prior to the adoption of that directive.

41 In that regard, it should be noted, first, that it is neither apparent from the file, nor otherwise alleged, that the contested directive, and in particular Article 17 thereof, was adopted taking into account the specific situation of persons benefiting from the Dutch tonnage tax scheme or the situation of the applicant in particular. On the contrary, it is apparent from recitals 2 to 6 of that directive that its subject matter and scope are broader and more general in so far as it implements, at EU level, model rules developed by the Organisation for Economic Cooperation and Development (OECD) aiming to establish a global minimum level of taxation. Moreover, it is apparent from recital 17 of that directive that it takes account of the specific characteristics of the shipping sector and of the need to allow different Member States to continue applying specific tax treatments to that sector in line with international practice and State aid rules. In that regard, the Council observes that tonnage tax schemes exist in several Member States other than the Netherlands. It follows that persons benefiting from the Dutch tonnage tax scheme, and the applicant in particular, are not specifically targeted by the contested directive (see, to that effect and by analogy, judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraphs 66 and 67).

42 Next, the applicant adduces no evidence as to the number or identity of the persons that benefit from the Dutch tonnage tax scheme and are capable of being affected by the contested directive. The applicant also does not dispute that any economic operator carrying out activities in the maritime sector and established in the Netherlands may benefit from that particular tax scheme if it requests to do so and satisfies the relevant conditions. It follows that the class of persons that benefit from that scheme and are potentially affected by the contested 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. However, a limited class of persons as defined in the case-law cited in paragraph 28 above may not be extended after the entry into force of the measure at issue (see, to that effect, judgment of 26 June 1990, *Sofrimport* v *Commission*, C-152/88, EU:C:1990:259, paragraph 11, and order of 7 September 2010, *Etimine and Etiproducts* v *Commission*, T-539/08, EU:T:2010:354, paragraph 105).

43 Lastly, the mere fact of benefiting from a favourable tax scheme, such as the Dutch tonnage tax scheme, the scope or effects of which are potentially affected by the contested directive is not an acquired right that is specific or exclusive to the applicant or to a limited class of persons. Other economic operators may benefit from the Dutch tonnage tax scheme or from a similar tax scheme in another Member State and may see the corresponding benefit offset by the top-up tax provided for in the contested directive (see, by analogy, judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 116, and order of 7 September 2010, *Etimine and Etiproducts* v *Commission*, T-539/08, EU:T:2010:354, paragraph 104). That finding is not called into question by the fact that the Netherlands tax authorities took a decision authorising the applicant to determine its taxable profit on the basis of the tonnage of its ships or the fact that the applicant made long-term investments in the knowledge that it benefited from a favourable tax scheme.

44 Therefore, for all the reasons set out in paragraphs 41 to 43 above, the applicant has not shown that it forms part of a limited class of persons within the meaning of the case-law cited in paragraph 28 above.

45 In those circumstances, it must be held that the applicant is not individually concerned by the contested directive. Accordingly, without it being necessary to examine whether the applicant is directly

concerned by that directive, it does not have standing to bring proceedings under the second limb of the fourth paragraph of Article 263 TFEU.

46 It follows from all of the foregoing that the Council is justified in maintaining that the applicant does not have standing to bring proceedings. Accordingly, the plea of inadmissibility must be upheld and the action must be dismissed as inadmissible.

The applications to intervene

47 Under Article 142(2) of the Rules of Procedure, the intervention becomes devoid of purpose if the application is declared inadmissible. In the present case, since the action is dismissed as inadmissible, there is no longer any need to adjudicate on the applications to intervene made by the Kingdom of the Netherlands, by the Commission, by Koninklijke Boskalis BV and Boskalis Offshore Transport Services NV, by Heerema Offshore Energy Solutions BV, by Van Oord NV and Vox Amalia SL and by Koninklijke Vereniging van Nederlandse Reders.

Costs

48 In the first place, under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered, in addition to bearing its own costs, to pay those of the Council, in accordance with the form of order sought by the Council, with the exception of those relating to the applications to intervene.

49 In the second place, under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before the application to intervene has been decided, the applicant for leave to intervene and the main parties are each to bear their own costs relating to the application to intervene. In the present case, the applicant, the Council and the applicants for leave to intervene referred to in paragraph 47 above are each to bear their own costs relating to the applications to intervene.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. There is no longer any need to adjudicate on the applications to intervene submitted by the Kingdom of the Netherlands, by the European Commission, by Koninklijke Boskalis BV and Boskalis Offshore Transport Services NV, by Heerema Offshore Energy Solutions BV, by Van Oord NV and Vox Amalia SL and by Koninklijke Vereniging van Nederlandse Reders.

3. Fugro NV shall bear its own costs and pay those of the Council of the European Union, with the exception of those relating to the applications to intervene.

4. Fugro, the Council and the applicants for leave to intervene referred to in point 2 of this operative part shall each bear their own costs relating to the applications to intervene.

Luxembourg, 15 December 2023.

V. Di Bucci K. Kowalik-Bańczyk

Registrar President

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* Language of the case: English.