

ATOZ ALERT

Unconstitutionality of the minimum net wealth tax regime for companies holding predominantly financial assets

22 November 2023

Introduction

On 10 November 2023, the Constitutional Court (the “**Court**”) concluded that the minimum net wealth tax regime for companies holding predominantly financial assets is unconstitutional ([n° 00185](#)).

As a consequence, a legislative reform of the minimum net wealth tax regime (“**minimum NWT**”) is to be expected. Pending the reform, taxpayers subject to minimum NWT applicable to companies considered as SOPARFIs for minimum NWT purposes should be subject to the minimum NWT applicable to Non-SOPARFIs whenever this is more favourable.

The facts leading up to the reference for a preliminary ruling as well as the Court’s reasoning are set out below.

Background

The minimum NWT provides that Luxembourg resident companies are, in principle, subject to a minimum NWT which is generally determined according to the nature and the size of their balance sheet.

For purposes of determining the amount of minimum NWT due, the Luxembourg NWT law makes a distinction between, on the one hand, companies whose accounts 23, 41, 50 and 51 of the Luxembourg standard chart of accounts (i.e. financial assets, amounts owed by affiliated companies, transferable securities and cash at bank; hereafter referred to as the “**qualifying assets**”) exceed both (i) 90% of their total balance sheet and (ii) a threshold of EUR 350,000 (“**SOPARFIs**”), and, on the other hand, the other companies (“**Non-SOPARFIs**”). Usually, holding companies meet the conditions to be treated as SOPARFIs for NWT purposes.

A fixed amount of minimum NWT of EUR 4,815 applies to “SOPARFIs”¹. For the so-called “Non-SOPARFI” companies, the amount of minimum NWT is progressive and can range from EUR 535 to EUR 32,000² depending on the value of their total balance sheet.

In the case leading to the reference for a preliminary ruling, a corporate taxpayer, treated as a SOPARFI under NWT legislation, considered they were discriminated because the NWT provision which sets a minimum wealth tax of EUR 1,605 for a Non-SOPARFI having a total balance sheet greater than EUR 350,000 and less than or equal to EUR 2,000,000 is more favourable than the minimum flat-rate tax of EUR 4,815 provided for a SOPARFI having a total balance sheet of more than EUR 350,000. As a result, the taxpayer decided to appeal against the tax assessments before the Administrative Tribunal on the basis of the differential treatment between companies of equal size solely due to the criterion of the composition of their balance sheet.

In a judgement dated 18 April 2023 ([n° 45910](#)), the Administrative Tribunal referred to the Court the question³ of whether the difference in treatment between SOPARFIs and Non-SOPARFIs with regard to minimum NWT complies with article 10*bis* of the Luxembourg Constitution (i.e. the principle of equality before the law).

Ruling of the Constitutional Court

On 10 November 2023, the Court concluded that the minimum NWT applicable to SOPARFIs (§8, (2), (a) VStG) is contrary to article 10*bis*, §1 of the Constitution (article 15 of the new Constitution applicable as from 1 July 2023).

In the opinion of the Court, the question of the differential treatment raised to its attention by the Administrative Tribunal is not solely based on the 90% threshold, since this is not the cause of the difference in tax regime for taxpayers (i.e. application of either the progressive or the flat-rate amount of minimum NWT). What distinguishes taxpayers exceeding the 90% threshold is the condition related to the threshold of EUR 350,000. Indeed, it is only when accounts 23, 41, 50 and 51 of the standard chart of accounts exceed the 90% threshold in relation to their total balance sheet that taxpayers are distinguished by the addition of the condition relating to the EUR 350,000 threshold.

The Court ruled that the minimum NWT provisions result in a differential treatment between taxpayers in comparable situations.

The Court recalled that the legislator may, without violating article 10*bis*, §1 of the Constitution (i.e. the constitutional principle of equality), subject certain categories of persons to different legal regimes, provided that the difference instituted arises from objective disparities, that it is rationally justified, appropriate and proportionate to its aim.

In the case at hand, the Court noted that no justification could be provided by the government representative or inferred from the parliamentary documents for the differential treatment established and is thus to be regarded as not being rationally justified a priori, to the extent the threshold of EUR 350,000 is concerned.

Furthermore, the Court ruled that the principle of equality before the law is applied in tax matters through the principle of contribution according to the taxpayer's ability to contribute. According to the Court, distinguishing between the taxpayers considered as SOPARFIs and Non-SOPARFIs by adding a second criterion based on the threshold of EUR 350,000 fails to take account of the taxpayers' tax contribution ability.

This ruling and the reasoning of the Court raises questions, notably due to a very light and lacunar motivation. However, in the light of this decision, an upcoming legislative reform of the minimum NWT regime is to be

¹ §8, (2), (a) Vermögensteuergesetz (« VStG »).

² §8, (2), (b) VStG.

³ “Le paragraphe 8, alinéa 2, point a) VStG en ce qu’il prévoit un impôt minimum de ... euros par application du seul critère que le total du bilan inclut plus de 90% du total du bilan des montants comptabilisés aux comptes 23, 41, 50 et 51 du plan comptable normalisé, alors qu’en cas d’un non-dépassement de la limite de 90% du total du bilan, le montant de l’impôt minimum s’élèverait seulement à 1.605 euros par application de l’échelle définie au point b) du même alinéa 2, est-il conforme à l’article 10*bis*, alinéa 1er de la Constitution en ce qu’il s’applique aux contribuables dont le total du bilan est dans le deux cas supérieur à 350.000 euros et inférieur ou égal à 2.000.000 euros ?”

expected. Pending the legislative reform, the Court rules that taxpayers subject to minimum NWT applicable to SOPARFIs should be subject to the minimum NWT applicable to Non-SOPARFIs whenever this is more favourable.

Please do not hesitate to contact us if you have any questions about the impact of this ruling on your company. In the light of this decision, actions to be taken should be analysed on a case-by-case basis.

Do you have further questions?



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