



# Euro Tax Flash from KPMG's EU Tax Centre



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#### **CJEU decision in the *Van der Weegen and Others* case**

Freedom to provide services — Consumer protection —  
Proportionality — Indirect discrimination — Banking services — Tax exemption reserved to interest payments by banks complying with certain conditions

On June 8, 2017, the Court of Justice of the European Union ('CJEU', or 'Court') rendered its decision in the *Van der Weegen and Others* case ([C-580/15](#)). The case concerned the refusal by Belgium to grant a tax exemption on income received from saving deposits held with banking institutions located in another Member State. The Belgian authorities argued that none of those institutions could demonstrate that the saving deposits complied with conditions similar to those applicable to regulated Belgian saving deposits.

The Court ruled that a national tax exemption system that imposes conditions for access to the local banking market on service providers established in other EEA Member States violates the freedom to provide services. It is for the referring court to verify whether the disputed Belgian legislation imposes such conditions.

## **Background**

The case concerned two Belgian taxpayers who held five saving deposits with banks located in another Member State and who applied for the tax exemption provided in Article 21(5) of the Belgian Income Tax Code (WIB 1992). The exemption system was amended following the CJEU's decision of June 6, 2013, in the *Commission v Belgium* case ([C-383/10](#)), wherein it ruled that by granting a tax exemption to only interest payments made by resident banks, Belgium had failed to fulfill its obligations under the

freedom to provide services. Following amendments made through the Law of April 25, 2014, the tax exemption is applicable without distinction to income from savings deposits held with banks established in Belgium or in another Member State of the European Economic Area (EEA). However, the Belgian tax authorities refused to grant the tax exemption for remuneration received from saving deposits held with non-resident banks, on the ground that none of the foreign financial institutions could demonstrate that those saving deposits complied with criteria similar to those applicable to regulated Belgian savings deposits, notably conditions regarding withdrawal limits and remuneration that must consist exclusively of basic interest and a fidelity premium.

The case was brought before the Court of First Instance for West Flanders, Bruges Division Belgium, which decided to ask the CJEU for a preliminary ruling on whether the disputed national tax exemption system, which requires compliance with conditions that are de facto specific to the Belgian market and therefore create an obstacle for foreign service providers offering their services in Belgium, is contrary to the freedom to provide services and the free movement of capital.

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### The CJEU's decision

The Court first held that the disputed national law must only be examined in the light of the freedom to provide services as, in this case, any restriction on the free movement of capital would inevitably lead to a restriction on the freedom to provide services and is therefore entirely secondary in relation to it. The Court also noted that it is established case law that national legislation, which restricts the provision of banking services without objective justification, violates the free movement of services. This may also be the case of legislation which, although applying without distinction to all services – irrespective of the place of establishment of the provider – makes the granting of an advantage conditional on criteria which are de facto specific to the national market and cannot be met by non-resident providers. The Court noted that there is no system related to saving deposits within the EU or the EEA that complies with the disputed Belgium criteria, in particular those concerning the remuneration structure.

The disputed Belgian legislation therefore has the effect of discouraging Belgian residents from using the services of foreign banks, which do not comply with the conditions laid down in that legislation. Consequently, that legislation is capable of violating the freedom to provide services if it imposes conditions for access to the Belgian banking market on service providers established in other Member States, which is for the referring court to verify.

As regards the justification put forward by the Belgian Government, i.e. consumer protection, the CJEU held that this is indeed a potential overriding reason in the public interest, which may justify a restriction on the freedom to provide services, and that it is for the referring court to satisfy itself that the disputed legislation does pursue this objective and that it does not go beyond what is necessary to achieve it.

However, according to the Court, even if the aim of the disputed tax system is consumer protection, this system is liable to exclude all income from saving accounts opened with banking institutions established in another Member State, which would enable the same objective as that pursued by that system, namely consumer protection. Furthermore, none of the arguments presented convinced the Court that the disputed conditions related to remuneration of deposits would be necessary to attain that objective. The Court therefore rejected consumer protection as a justification for the restriction on the freedom to provide services.

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### EU Tax Centre comment

It is important to note that the Court concluded that a tax exemption system, which imposes conditions that are specific to the local market and therefore cannot be met by foreign providers of services, has the effect of discouraging residents from using the services of such providers. This conclusion may be relevant in assessing other tax systems that apply, in theory, to all services – irrespective of where the provider is established, but where the provider cannot comply with local conditions in practice.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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