**Case C-565/18**

**Request for a preliminary ruling**

**Date lodged:**

6 September 2018

**Referring court:**

Commissione Tributaria Regionale per la Lombardia (Regional Tax Court for Lombardy, Italy)

**Date of the decision to refer:**

2 July 2018

**Appellant:**

Société Générale SA

**Respondent:**

Agenzia delle Entrate — Direzione Regionale Lombardia Ufficio Contenzioso

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THE **REGIONAL** TAX COURT FOR

**LOMBARDY** […]

has issued the following

**ORDER**

- concerning Appeal No 17/2017

- against judgment […] issued by the Commissione Tributaria Provinciale di MILANO (Provincial Tax Court, Milan)

against:

DIREZIONE REGIONALE LOMBARDIA UFFICIO CONTENZIOSO (LOMBARDY REGIONAL REVENUE OFFICE, LEGAL DEPARTMENT)

**brought by the appellant:**

SOCIETE GENERALE SA

[…]

**[Or.2]**

[…]

**Contested measures:**

REFUSAL OF REFUND — APPLICATION OF 1 AUGUST 2014

**[Or.3]**

**[…]**

**BACKGROUND**

***[…]***

[…]

Facts:

1) On 28 March 2014, Société Générale SA, foreign tax identification number FR 27552120222, with its registered office in Paris (France) […], through its Italian branch established in Milan (Italy) […], filed a tax return for financial transaction tax (FTT), provided for and governed under Italian law by Article 1(491) to (500) of Law No 228 of 24 December 2012 (2013 Stability Law), and by the implementing Decreto Ministeriale (Ministerial Decree) of 21 February 2013, as amended by the Ministerial Decree of 16 September 2013.

2) The tax return, which concerned financial transactions in derivative instruments carried out by the French parent company during the 2013 tax year, showed that the total amount of tax due under Article 1(492) of Law No 228/2012 was EUR 55 207.00, corresponding to payments made during the reference tax period.

3) On 1 August 2014, the Italian branch, on behalf of the parent company, applied to the Agenzia delle Entrate (Italian Revenue Agency) for a refund of the amount paid, claiming the constitutional illegitimacy of the rules governing financial transaction tax on derivatives, insofar as they provided for the application of the tax based on the presumption of residence in Italian territory of the issuer of the security underlying the derivative, on the grounds of alleged infringement of the principles of formal equality and taxpaying ability enshrined in Articles 3 and 53 of the **[Or.4]** Italian Constitution, respectively, and alleged infringement of the customary international law relevant to the Italian constitutional system under Article 10 of the Constitution; the company also based its refund application on the alleged conflict between the Italian law in question

and EU law, and specifically Articles 18, 56 and 63 of the Treaty on the Functioning of the European Union.

4) The Italian Revenue Agency did not respond to the refund application, and so on 28 January 2015, after the 90-day period had elapsed following the submission of the application, the taxpayer brought an action before the Milan Provincial Tax Court against the tacit refusal, requesting that the Italian Revenue Agency be ordered to refund the tax paid, adducing the same grounds as those on which the refund application was based and seeking: a) the stay of the proceedings with simultaneous referral to the Constitutional Court regarding the alleged constitutional illegitimacy of Article 1(492) of Law No 228/2012, because it was contrary to Articles 3 and 53 of the Constitution; b) the disapplication of Italian legislation held contrary to Articles 18, 56 and 63 TFEU or, in the alternative, the stay of the proceedings and a reference for a preliminary ruling to the Court of Justice of the European Union, by virtue of the principle of uniform application of EU law, with the question 'should Articles 18, 56 and 63 TFEU preclude national legislation from imposing a financial transaction tax on the sole ground that the transactions concern a derivative based on a security issued by a company resident in the State?'; c) the suspension on the ground of [translator's note: word missing from source] with simultaneous referral to the Constitutional Court regarding the alleged constitutional illegitimacy of Article 1(492) of Law No 228/2012, as it was contrary to the principles of sovereignty and tax territoriality inherent in international and EU law, and therefore relevant to Italian constitutional law pursuant to Article 10(1) of the Constitution.

5) The Italian Revenue Agency — Lombardy Regional Office entered an appearance, requesting that the action be dismissed, contesting the applicant's arguments and insisting on the legitimacy of the refusal and of the legislation establishing the tax in question, pointing to the existence of an effective and objective link between the taxable derivative securities and the Italian legal system, if, as in the present case, the underlying security of the derivative had been issued by a company resident in Italy.

**[Or.5]**

6) The Milan Provincial Tax Court, by means of judgment No 4334/16 handed down on 17 May 2016, dismissed the action, finding that — contrary to the arguments put forward by the taxpayer — it was entirely legitimate to tax derivative transactions where the underlying was a security issued by a company resident in Italy, since, in the opinion of the Provincial Tax Court, the legislative reference to the residence of the issuer of the underlying security was sufficient to establish a genuine, effective and objective economic link between the taxable event and the expression of taxpaying ability referred to in Article 53 of the Constitution — namely, the trading of a derivative — and the Italian State.

7) According to the Provincial Tax Court, there was no substantive violation of the principle of equality enshrined in Article 3 of the Constitution, owing to the

indissoluble correlation between the value of the underlying security and the value of the derivative, expressed by the pay-off of the derivative itself — a correlation that, as noted by the Department and commented on by the Court, involves the possibility of using derivatives to place substitute trades in the underlying securities, such that to exclude the derivatives from the taxation of financial transactions (despite being an expression of taxpaying ability and objectively linked to the Italian legal system) would amount to tax evasion by financial market participants, to the clear detriment of the Revenue Agency.

8) The Provincial Tax Court did not consider there to have been an infringement of EU legislation, in the absence of differentiated tax regimes between taxable persons in Italy and in other Member States, nor of the international principle of territoriality and fiscal sovereignty of other States, since the above-mentioned link existed between the taxable economic event and the Italian State, and since the legislative power of other legal systems had not been undermined.

9) The taxpayer appealed the decision of the Provincial Tax Court, reiterating the arguments and grounds adduced at first instance and entering the same form of order, requesting that the contested judgment be set aside and seeking, in its principal action, the reimbursement of the financial transaction tax paid, based on an interpretation of Article 1(492) of Law No 228/2012 in line with the Constitution, and in the alternative, the stay of the proceedings and reference for a preliminary ruling on constitutional illegitimacy, since the provision in question was contrary to Articles 3 and 53 of the Constitution and the international principle of State territoriality and sovereignty **[Or.6]**, relevant to the national legal system pursuant to Article 10 of the Constitution; the appellant further requested a reference for a preliminary ruling to the Court of Justice of the European Union for the infringement of Articles 18, 56 and 63 TFEU.

10) The Italian Revenue Agency — Lombardy Regional Office responded with counter-arguments, contesting the other party's submissions and requesting confirmation of the judgment under appeal.

[national procedure]

[…]

## EXPLANATORY STATEMENT

### *Brief description of the factual and legal grounds of the decision pursuant to Article 36(2)(4) of Legislative Decree No 546/92*

The Court […] withdrew to deliberate in chambers as per the operative part.

Law:

11) This Court notes that the financial transaction tax referred to in Article 1(491) to (500) of Law No 228/2012 was introduced to ensure that persons who carry out transactions in financial instruments in the relevant markets and who have a link to the territory of the Italian State contribute to public expenditure.

12) Under paragraph 491 of the above Article, together with the relevant definitions in Article 1 of the Ministerial Decree of 21 February 2013 and the subsequent **[Or.7]** paragraph 494, the beneficiary of the transfer of the title to shares and other equity securities issued by companies resident in Italy, and of securities representing those instruments, is liable to financial transaction tax, regardless of the State of residence of the issuer of the representing security, provided that the represented security is issued by a company resident in Italian territory; the tax is calculated in proportion to the value of the transaction at a differential rate depending on the type of market where the trading takes place.

13) The above-mentioned provision is further supplemented by Article 2 of the Ministerial Decree of 21 February 2013, whereby 'residence shall be determined on the basis of its registered office. The tax shall also apply to the transfer of ownership of the representative securities, irrespective of the place of residence of the issuer of the certificate and the place of conclusion of the contract'.

14) Even if calculated differently — namely, with a fixed amount which rises incrementally in ranges of trading values and which varies according to the type of instrument traded and the value of the contract — the tax is due, under paragraphs 492 and 494 of the above-mentioned Article, from each of the counterparties to 'transactions in derivative financial instruments referred to in Article 1(3) of decreto legislativo 24 febbraio 1998, n. 58 (Legislative Decree No 58 of 24 February 1998), as amended, which mainly have as their underlying one or more of the financial instruments referred to in paragraph 491, or whose value mainly depends on one or more of the financial instruments referred to in that paragraph, and the securities transactions referred to in Article 1(1-bis)(c) and (d) of said Legislative Decree, mainly allowing one or more financial instruments referred to in paragraph 491 to be bought or sold, or involving a cash settlement determined mainly by reference to one or more of the financial instruments referred to in the preceding paragraph, including warrants, covered warrants and certificates' (see Article 1(492) of Law No 228/2012).

15) The above-mentioned provision, which is the subject of the grievances addressed in this judgment, states that: 'The tax is due regardless of the place of conclusion of the transaction and the State of residence of the contracting parties' (see Article 1(492) of Law No 228/2012), confirming the legislative intention to subject the transfer to tax.

16) Moreover, a similar parenthetical element can also be found in the previous paragraph 491, such that the legislative parallel between the two tax situations is clear.

**[Or.8]**

17) In the interests of completeness, it should be noted that in paragraph 495, the legislation in question also provides for a third type of tax situation subject to financial transaction tax, [stating that] 'transactions carried out in the Italian financial market are subject to a tax on high-frequency trading in relation to the financial instruments referred to in paragraphs 491 and 492'.

17a) However, the situation provided for in Article 1(495) of Law No 228/2012 is not directly within the scope of this judgment.

17b) The taxpayer's grievances concern the situations referred to in paragraphs 491 and 492, owing to the symmetry that exists between them, both being characterised by a link with the Italian legal system (the residence in Italy of the issuers of the financial instruments referred to in paragraph 491) and the irrelevance, for tax purposes, of the State of residence of the parties to the transaction.

18) Specifically, the taxpayer considers the link with the Italian legal system provided for by Article 1(492) of Law No 228/2012, which subjects derivative transactions to taxation, to be contrary to the constitutional principle enshrined in Article 53 of the Constitution, according to which the payment of taxes in Italy must take place on the basis of the taxpaying ability expressed within the State, since persons who are foreign nationals cannot be involved in the tax system.

19) The taxpayer asks what taxpaying ability could be expressed, as in the present case, by a non-resident trading in a foreign market a derivative issued by another non-resident and having as an underlying a security issued by an Italian company: no wealth would be expressed in Italy in transactions such as the one in the present case […].

18) The appellant, alleging the lack of manifestation of taxpaying ability in relation to derivative transactions similar to those carried out by the appellant, argues that the legislator, with reference to Article 1(491) and (492) of Law No 228/2012, has subjected different situations to the same 'tax mechanism' (page 16 of the appeal), contrary to the principle of formal equality enshrined in Article 3 of the Constitution.

**[Or.9]**

19) However, the taxpayer's argument concerning the alleged manifest constitutional illegitimacy of the legislation in question in the light of Articles 3 and 53 of the Constitution must be refuted.

20) On this point, it is observed that Article 53 of the Constitution permits the legislator to tax economic transactions — and thus direct or indirect expressions of wealth — that have a link with the territory and/or with the Italian legal system: the existence of such a link gives rise to a civic duty for the person (even if not

resident) to contribute to national public expenditure on account of the taxpaying ability thus expressed.

21) Indeed, in the present case and in the situations governed by Article 1(492) of Law No 228/2012, the chargeable event that expresses taxpaying ability can be identified effectively in derivative transactions where the underlying is a security issued by a person resident in Italy.

22) Such transactions have a link with Italian territory and/or with the Italian legal system which is entirely consistent with the situations referred to in paragraph 491 of the above-mentioned Article: like those who, regardless of their place of residence, whether in or outside Italian territory, trade in the securities referred to in Article 1(491) of Law No 228/2012 and benefit from a value that arises only to the extent that the Italian legal system exists and is operational as the issuing State of the securities traded (or represented by the securities traded), likewise anyone who engages in derivative transactions where the underlying assets are securities issued by Italian companies profits from a value that necessarily and closely depends on a security whose existence is based on the existence of the Italian legal system, which governs its issue.

23) In other words, there can be no question that the derivative, even if it can be traded separately from the underlying security, exists and is appreciable to the extent that the securities traded (or represented by the securities traded) are recognised by the Italian legal system as the issuing State, and that the value of the derivative necessarily depends on this, on the basis of a mathematical relationship.

24) It can therefore be concluded that with regard to trading in the derivative financial instruments referred to in Article 1(492) of Law No 228/2012, and in the securities referred to in Article 1(491) of Law No 228/2012, there is also **[Or.10]** an indissoluble, concrete and verifiable economic link between the financial instrument and the Italian legal system, and therefore between the transaction — considered a chargeable event to the extent that it is an expression of taxpaying ability — and the Italian legal system, regardless of the place of execution of the transaction and the place of residence of the parties to the transaction; therefore, the transaction cannot be considered ‘foreign’, even if it is carried out by persons not resident in Italy and outside Italian territory.

25) In this respect, it is consistent with Article 3 of the Constitution, there being no intrinsic difference — in terms of manifestation of taxpaying ability — between the transactions referred to in Article 1(491) of Law No 228/2012 and those referred to in Article 1(492) of the same Law.

26) The appellant submits, however, that the legislation in question undermines the functioning of the European internal market since a tax mechanism that, according to the appellant, appears to be the same for resident and non-resident taxable persons is in fact discriminatory, thus infringing Article 1(492) of Law

No 221/2012 and Article 18 TFEU, according to which 'any discrimination on grounds of nationality shall be prohibited'.

27) The application of the financial transaction tax to transactions carried out by non-residents, through persons who are also non-residents, even if the trading concerns derivatives where the underlying is a security issued by an Italian company, would entail, in the opinion of the taxpayer, a restriction on the freedom to provide services within the EU. This is contrary to the first paragraph of Article 56 TFEU, which states: 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

28) In other words, both the application of the tax and the laying down of additional administrative and declaratory requirements to settle the tax (namely, keeping records, filing returns and extrapolating from the amount of transactions carried out the individual derivative transactions where the underlying assets are securities issued by Italian residents) allegedly hinder the activity of derivatives intermediation and make it less attractive for non-resident intermediaries **[Or.11]** than for residents, creating a de facto restriction on the freedom to provide services, which is prohibited under TFEU; this is even more evident in the case of an intermediary established in a different State from the recipient of the service.

29) In the applicant's opinion, the tax in question, applied to derivatives transfers, together with the related administrative and declaratory requirements, impedes access to the market for derivatives where the underlying assets are securities issued by an Italian company, and by making the intermediation of such derivatives less attractive, is a deterrent both to the supply of and demand for such products.

30) In support of its arguments, the appellant refers to the following case-law of the Court of Justice of the European Union: judgments of 26 June 2003, *Skandia and Ramstedt*, C-422/01, paragraph 28; of 5 July 2012, *SIAT*, C-318/10, paragraphs 19 and 28; of 15 May 1997, *Futura*, C-250/95; regarding the existence of an infringement of the Treaty even if the restriction of a fundamental freedom is of limited scope or minor importance, judgments of 18 October 2012, X NV, C-498/10, paragraph 30; of 1 July 2010, *Dijkman*, C-233/09, paragraph 42; of 14 December 2006, *Dehkavit International*, C-170/15, paragraph 50; of 11 March 2004, *De Lasteryrie du Saillant*, C-9/02, paragraph 43; of 15 February 2000, *Commission* v *France*, C-34/98, paragraph 49.

31) The appellant further claims that subjecting derivative transactions where the underlying assets are Italian securities to the tax referred to in Article 1(492) of Law No 228/2012 is clearly contrary to Article 63 TFEU on capital and payments, according to which '… all restrictions on the movement of capital between Member States …' and 'all restrictions on payments between Member States … shall be prohibited'.

32) The infringement of the above-mentioned Treaty provision is supposedly confirmed by the fact that the tax referred to in Article 1(492) of Law No 228/2012 has the effect of discouraging operators in States other than Italy from investing in derivative instruments where the underlying assets are Italian securities, regardless of where they are issued and traded.

33) On this point, the appellant cites the Court of Justice judgment of 13 March 2014, *Bouanich*, C-375/12, paragraph 43, which upheld the prohibition on adopting national measures 'which are such as to discourage non-residents from making investments **[Or.12]** in a Member State or to discourage that Member State's residents from doing so in other States'.

34) This Court therefore wonders whether — with regard to the specific case at hand of financial transactions carried out between non-residents through persons who are also non-residents and concerning derivatives where the underlying is a security issued by an Italian company — the presumption of taxing those transactions and imposing the administrative and declaratory requirements necessary for payment of the tax by the contractual counterparties involved in the transactions is consistent with EU principles, given that financial transactions involving securities issued by Italian companies and carried out by Italian or foreign persons, regardless of the State of residence of the intermediary, are also subjected to a similar tax, imposed on the beneficiary of the transfer of title to the financial instruments.

35) Although it appears that there is no discrimination between the tax treatments referred to in Article 1(491) and (492) of Law No 228/2012, and while refuting the appellant's argument as to the absence of a territorial link between the tax pursuant to Article 1(492) of Law No 228/2012, to which the taxpayer was liable, and the Italian legal system, this Court finds it necessary to refer to the Court of Justice of the European Union for a preliminary ruling, having doubts as to the correct interpretation of EU law, and specifically the compatibility of the legislation introducing the financial transaction tax with Articles 18, 56 and 63 TFEU on the grounds argued by the taxpayer, as described and illustrated above.

**FOR THESE REASONS**

Having regard to Article 267 of the Treaty on the Functioning of the European Union (TFEU), Section 1 of the Regional Tax Court for Lombardy hereby issues an

**[Or.13]**

**ORDER**

**for a reference for a preliminary ruling**

to be submitted to the Court of Justice of the European Union, pursuant to and for the purposes of Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union, the following question:

> 'Should Articles 18, 56 and 63 TFEU preclude national legislation from charging a tax on financial transactions — irrespective of the State of residence of the financial market participants and the intermediary — which is payable by the counterparties to the transaction and consists of a fixed amount which rises incrementally in ranges of trading values and which varies according to the type of instrument traded and the value of the contract, and which is due by virtue of the fact that the taxable transactions concern the trading of a derivative based on a security issued by a company resident in the State imposing that tax?'

[…],

**stays**

these proceedings pending the ruling of the Court of Justice;

**orders**

the transmission of this order to the Registry of the Court of Justice, […]

*[…] Milan, […] 2 July 2018*