

**Case C-660/22****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

20 October 2022

**Referring court:**

Corte suprema di cassazione (Italy)

**Date of the decision to refer:**

27 September 2022

**Appellant:**

Ente Cambiano società cooperativa per azioni

**Respondent:**

Agenzia delle entrate

**Subject matter of the main proceedings**

Appeal before the Corte suprema di cassazione (Supreme Court of Cassation) against the judgment by which the Commissione tributaria regionale della Toscana (Regional Tax Court, Tuscany) dismissed the action brought by Ente Cambiano (a limited liability cooperative society) against the refusal of a request which it submitted to the Agenzia delle Entrate (Revenue Authority) for reimbursement of the payment to the public exchequer of 20% of its net assets on the occasion of the transfer of its banking business to a limited liability company.

**Subject matter and legal basis of the request**

The reference for a preliminary ruling concerns the compatibility with European Union law, and in particular the principle of free movement of capital laid down in Articles 63 et seq. TFEU, and also the principles of free competition and protection of the market enshrined in Articles 101, 102, 120 and 173 TFEU, of national legislation which provided that cooperative credit banks which, as at 31 December 2015, had net assets of over EUR 200 million had the possibility of

not joining a cooperative banking group and transferring their banking business to a limited liability company ('way out' option). The above national legislation has, however, made this option subject to the obligation to pay 20% of the net assets to the public exchequer and required, in the event of failure to fulfil that obligation, that the assets of the transferring cooperative credit bank be transferred to mutual funds for the promotion and development of cooperation.

Article 267 TFEU

### **Question referred for a preliminary ruling**

Do Articles 63 et seq., 101, 102, 120 and 173 TFEU preclude national legislation which, like Article 2(3-ter) and (3-quater) of Decree-Law No 18 of 14 February 2016, converted, with amendments, by Law No 49 of 8 April 2016, in the version applicable *ratione temporis*, makes the payment of a sum equal to 20% net assets as at 31 December 2015 a condition for the possibility for cooperative credit banks having net assets of over EUR 200 million as at 31 December 2015, instead of joining a group, transferring their banking business to a public limited company, including a newly established one, authorised to perform banking activities, by amending their articles of association so as to exclude the performance of banking activities and at the same time maintaining the mutuality clauses set out in Article 2514 of the Italian Civil Code, and providing the shareholders with services which serve to maintain the relationship with the transferee public limited company relating to training and information on savings issues and the promotion of assistance programmes?

### **Provisions of European Union law relied on**

TFEU, Articles 63 et seq., 101, 102, 120 and 173

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital

Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital

Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and

exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

Charter of Fundamental Rights of the European Union, Articles 16 and 17

### **Provisions of national law relied on**

Decreto Legislativo 1° settembre 1993, n. 385 – Testo unico delle leggi in materia bancaria e creditizia ((Legislative Decree No 385 of 1 September 1993 – The Consolidated Law on banking and credit; ‘the Consolidated Law on Banking’), in particular Article 150-*bis*(5):

‘In cases of mergers and conversions provided for in Article 36, and also the transfer of legal relations en bloc and divisions resulting in a bank established in the form of a public limited company, the effects of devolution of the assets laid down in Article 17 of Law No 388 of 23 December 2000 shall remain unaffected’.

Decreto-legge 14 febbraio 2016, n. 18 – Misure urgenti concernenti la riforma delle banche di credito cooperativo, la garanzia sulla cartolarizzazione delle sofferenze, il regime fiscale relativo alle procedure di crisi e la gestione collettiva del risparmio (Decree-Law No 18 of 14 February 2016 on urgent measures concerning the reform of cooperative credit banks, the guarantee scheme for securitisations of non-performing loans, tax arrangements relating to crisis procedures, and the collective management of assets), converted, with amendments, by Law No 48 of 8 April 2016 (Decree-Law No 18/2016), in particular Article 2(3-*bis*), (3-*ter*) and (3-*quater*):

‘3-*bis*. In derogation from Article 150-*bis*(5) of Legislative Decree No 385 of 1 September 1993, there shall be no devolution in respect of cooperative credit banks which, within 60 days of the date of entry into force of the law converting this decree, submit a request, including a joint request, to the Bank of Italy, pursuant to Article 58 of Legislative Decree No 385 of 1993, for the transfer of their respective banking businesses to the same public limited company, including a newly incorporated company, authorised to perform banking activities, provided that the requesting bank or, in the case of a joint request, at least one of the requesting banks has, as at 31 December 2015, net assets of over EUR 200

million, as shown in the financial statements as at that date, on which the auditor has expressed an unqualified opinion.

*3-ter.* At the time of the transfer, the transferring cooperative credit bank shall pay to the State budget an amount equal to 20% of the net assets as at 31 December 2015, as shown in the financial statements as at that date, on which the auditor has issued an unqualified opinion.

*3-quater.* Following the transfer, the transferring cooperative credit bank, which retains the non-distributable reserves net of the payment referred to in paragraph *3-ter*, shall amend its object to exclude the performance of banking activity and undertake to maintain the mutuality clauses set out in Article 2514 of the Civil Code, and also to provide the shareholders with services which serve to maintain the relationship with the transferring public limited company relating to training and information on savings issues and the promotion of assistance programmes. (...) In the event of failure to fulfil the obligations laid down in this paragraph and paragraphs *3-bis* and *3-ter*, the assets of the transferor, or, as the case may be, of the cooperative credit bank, shall be devolved pursuant to Article 17 of Law No 388 of 23 December 2000 (...)'.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The legislation deriving from Article 2(*3-bis*) (*3-ter*) and (*3-quater*) of Decree-Law No 18/2016 is part of the reform of the regulation of cooperative credit banks in the Italian legal order. That reform aimed to overcome the structural weaknesses arising, inter alia, from the organisational arrangements and small size of most cooperative credit banks. The main model envisaged by the reform was for cooperative credit banks to join a cooperative banking group, headed by a parent company (holding company) in the form of a public limited company, majority owned by the affiliated cooperative credit banks themselves and endowed powers of direction and coordination.
- 2 By contrast, only in respect of the strongest banks, having net assets of over EUR 200 million as at 31 December 2015, did Article 2(*3-bis*), (*3-ter*) and (*3-quater*) of Decree-Law No 18/2016 provide for the possibility of not joining the group, by transferring their banking business to a public limited company, modifying their articles of association so as to exclude the perform of banking activity and maintaining, at the same time, the clauses relating to the prevalence of the company's objective based on mutuality ('way out' option). The transferring company could also remain a shareholder and acquire control of the transferee company.
- 3 Under Article 2(*3-ter*) and (*3-quater*) of Decree-Law No 18/2016, if the 'way-out' option was exercised, the transferring bank was required to pay to the public exchequer an amount equal to 20% of its net assets. In the event of failure to fulfil that obligation, the assets of the transferring bank were to be transferred to the mutual funds for the promotion and development of cooperation in accordance

with Article 17 of Law No 388 of 23 December 2000, pursuant to the general rule laid down in Article 150-bis(5) of the Consolidated Law on Banking.

- 4 Ente Cambiano società cooperativa per azioni ('Ente Cambiano'), which had net assets of over EUR 200 million as at 31 December 2015, exercised the 'way out' option, transferring its banking business to a public limited company, of which it acquired control. Pursuant to Article 2(3-ter) of Decree-Law No 18/2016, the appellant had to pay to the public exchequer, at the time of the transfer, the amount of EUR 54 208 740.00, equal to 20% of its net assets as at 31 December 2015.
- 5 The appellant thus submitted a request for reimbursement of that amount to the Agenzia delle Entrate, which did not grant it. Subsequently, Ente Cambiano lodged an appeal against that refusal before the Commissione tributaria provinciale (Provincial Tax Court) and then before the Commissione tributaria regionale della Toscana (Regional Tax Court, Tuscany), which, by judgement of 13 December 2018, dismissed the appeal.
- 6 Ente Cambiano therefore lodged an appeal on a point of law against the judgment of the Commissione tributaria regionale della Toscana, claiming, in particular, that the legislation governing the 'way out' option is incompatible with both European Union law and the Italian Constitution.
- 7 Since the Corte suprema di cassazione (Supreme Court of Cassation) found that the question of constitutionality raised by the appellant concerning Article 2(3-bis) and (3-ter) of Decree-Law No 18/2016 was not manifestly unfounded, it referred that question to the Corte costituzionale (Constitutional Court).
- 8 By judgment No 149/2021 the Corte costituzionale ruled that the above legislation is not unlawful. In particular, in that judgment it found that the payment of 20% of the net assets provided for in Decree-Law No 18/2016 does not constitute a tax. In the view of the Corte costituzionale, on the contrary, that payment does constitute a charge to which the pursuit of the transferring company's interest in continuing to exist as an autonomous mutual society is subject, without having to merge into a group and thus be subject to the management and coordination powers of a parent company.

### **The essential arguments of the parties in the main proceedings**

- 9 **In the view of the appellant**, the legislation at issue is incompatible with several provisions of European Union law.
- 10 Firstly, the payment obligation established by Article 2(3-ter) and (3-*quater*) of Decree-Law No 18/2016 is contrary to the principle of the free movement of capital laid down in Articles 63 et seq. TFEU. In that regard, Ente Cambiano notes that the principle of the free movement of capital has been specified in Directive

2008/7, which, by implementing Directive 69/335, established the tax neutrality of acts of transfer.

- 11 In that regard, the appellant recalls the judgment of the Court of Justice of 16 July 2020, *OC and Others v Banca d'Italia and Others*, C-686/18, EU:C:2020:567, in which it was held that any restrictions on the freedom of investment must meet objectives of general interest recognised by the European Union. However, in the view of Ente Cambiano, the payment obligation at issue does not contribute to the improvement of competition and the stability of the banking system, but, on the contrary, unjustifiably penalises precisely the strongest cooperative credit banks, which are capable, as such, of attracting capital investments from other Member States.
- 12 Secondly, the legislation at issue infringes Directive 2009/133 on the common system of taxation applicable to transfers of assets concerning companies of different Member States. In the Italian legal system, the scope of that directive, which provided that transfers of businesses must be subject to an ordinary tax neutrality regime, was extended also to transfers of domestic businesses by Article 176 of Decreto del Presidente della Repubblica 22 dicembre 1986, n. 917 – Approvazione del testo unico delle imposte sui redditi (Presidential Decree of No 917 of 22 December 1986 approving the codified law on income tax).
- 13 Thirdly, the contested legislation infringes the principles of free competition and protection of the market enshrined in Articles 101, 102, 120 and 173 TFEU.
- 14 Fourthly, the national legislation is incompatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union in that the contested payment obligation infringes the right of the Ente Cambiano to exercise free economic initiative.
- 15 **In the view of the Agenzia delle Entrate**, on the other hand, the contested legislation above all pursues the objective of strengthening the stability of the Italian banking system and is therefore in line with the provisions of EU law aimed at reducing the possibility of banking crises of a systemic nature. Those provisions include Regulation No 575/2013 and Directive 2013/36, which implement the Basel III Accord on bank capital requirements, and also Directive 2014/59 on the recovery and resolution of credit institutions.
- 16 The respondent further submits that the payment obligation at issue is also not incompatible with promotion of the market and competition since it does not unreasonably prejudice the transferring bank in comparison with other economic operators. On the contrary, the payment at issue constitutes the reasonable price of the advantage provided for in Decree-Law No 18/2016, which consists in the ability to avoid the transfer of the entire share capital to mutual funds for the promotion and development of cooperation.
- 17 Finally, the contested payment obligation would not infringe EU law even if it were classified as a tax. The Court of Justice has held that Directive 69/335, as

amended by Directive 85/303, does not preclude the charging of tax on undertakings' net assets (judgment of 27 October 1998, *Manifattura italiana Nonwoven SpA v Direzione regionale delle entrate per la Toscana*, C-4/97, EU:C:1998:507, and order of 15 March 2001, *Petrolvilla & Bortolotti SpA v Direzione delle Entrate per la Provincia di Trento*, C-279/99, C-293/99, C-296/99, C-330/99 and C-336/99, EU:C:2001:170).

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 18 The referring court considers that the conflict between the parties' arguments cannot be resolved by way of interpretation of national law in conformity with European Union law, given the strict wording of the contested provision, and therefore considers it necessary to refer the question to the Court of Justice of the European Union.

WORKING DOCUMENT