



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

22 February 2024*

(Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Directive 2008/7/EC – Cooperative credit banks having net assets above a certain threshold – National legislation obliging those banks to pay an amount equal to 20% of those net assets in order to transfer their banking business to a public limited company in exchange for securities of that company – Article 94(c) of the Rules of Procedure of the Court of Justice – Requirement to provide reasons justifying the need for an answer from the Court – Purely internal situation – Inadmissibility)

In Case C-660/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 11 October 2022, received at the Court on 20 October 2022, in the proceedings

Ente Cambiano società cooperativa per azioni

v

Agenzia delle Entrate,

THE COURT (Sixth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, P.G. Xuereb and I. Ziemele, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ente Cambiano società cooperativa per azioni, by A. Cevese, A. Dal Ferro, M. Miccinesi and F. Pistolesi, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by M. Cherubini and G.M. De Socio, avvocati dello Stato,

* Language of the case: Italian.

– the European Commission, by A. Armenia, M. Mataija and P. Messina, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU and of Articles 101, 102, 120 and 173 TFEU.
- 2 The request has been made in proceedings between Ente Cambiano società cooperativa per azioni and the Agenzia delle Entrate (Revenue Agency, Italy) concerning the reimbursement of an amount of 20% of the former's net assets as at 31 December 2015 paid to the latter agency to retain the legal form of a cooperative society while transferring its banking activity to a public limited company in exchange for securities of that company.

Legal context

European Union law

- 3 Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11), in accordance with Article 16 thereof, repealed and replaced, as from 1 January 2009, Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ English Special Edition: Series I Volume 1969(II), p. 412).
- 4 Article 1 of Directive 2008/7, entitled 'Subject matter', provides:

'This Directive regulates the levying of indirect taxes in respect of the following:

(a) contributions of capital to capital companies;

(b) restructuring operations involving capital companies;

(c) the issue of certain securities and debentures.'
- 5 Under Article 2 of that directive, entitled 'Capital company':

'1. For the purposes of this Directive "capital company" means:

(a) any company which takes one of the forms listed in Annex I;

(b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;

(c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.

2. For the purposes of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company.'

6 Article 3 of that directive, entitled 'Contributions of capital', provides:

'For the purposes of this Directive and subject to Article 4, the following transactions shall be considered to be "contributions of capital":

(a) the formation of a capital company;

(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;

(c) an increase in the capital of a capital company by contribution of assets of any kind;

...'

7 Article 4 of that directive, entitled 'Restructuring operations', provides, in paragraph 1 thereof:

'For the purposes of this Directive, the following restructuring operations shall not be considered to be contributions of capital:

(a) the transfer by one or more capital companies of all their assets and liabilities, or one or more branches of activity to one or more capital companies which are in the process of being formed or which are already in existence, provided that the consideration for the transfer consists at least in part of securities representing the capital of the acquiring company;

...'

8 Article 5 of Directive 2008/7, entitled 'Transactions not subject to indirect tax', provides, in paragraph 1 thereof:

'Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:

...

(d) alteration of the constituent instrument or regulations of a capital company, and in particular the following:

...

(iii) a change in the objects of a capital company;

...

- (e) the restructuring operations referred to in Article 4.’
- 9 Article 6 of that directive, entitled ‘Duties and value added tax’, provides, in paragraph 1 thereof:
‘Notwithstanding Article 5, Member States may charge the following duties and taxes:
- (a) duties on the transfer of securities, whether charged at a flat rate or not;
 - (b) transfer duties, including land registration taxes, on the transfer, to a capital company, of businesses or immovable property situated within their territory;
 - (c) transfer duties on assets of any kind transferred to a capital company, in so far as such property is transferred for a consideration other than shares in the company;
 - (d) duties on the creation, registration or discharge of mortgages or other charges on land or other property;
 - (e) duties in the form of fees or dues;
 - (f) value added tax.’

Italian law

- 10 Article 2, paragraphs 3-*bis* to 3-*quater*, of decreto-legge 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 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) of 14 February 2016 (GURI No 37 of 15 February 2016), converted into law, with amendments, by legge n. 49 (Law No 49) of 8 April 2016 (GURI No 87 of 14 April 2016), in the version applicable to the dispute in the main proceedings (‘Degree-Law No 18/2016’), provides:

‘3-*bis*. In derogation from Article 150-*bis*(5) of [decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 concerning the consolidated law on banking and credit services) of 1 September 1993 (GURI No 230 of 30 September 1993, Ordinary Supplement No 92)], there shall be no transfer in respect of cooperative credit banks which, within 60 days of the date of entry into force of the law converting this decree, submit an individual or joint request for authorisation to the [Banca d’Italia (Bank of Italy)], pursuant to Article 58 [of Legislative Decree No 385 of 1 September 1993], for the transfer of their respective banking businesses to the same existing or newly incorporated public limited 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 Treasury an amount equal to 20% of its net assets as stated in the financial statements as at 31 December 2015, 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 objects to exclude the performance of banking activity and shall undertake to uphold 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 transferee 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 transferred pursuant to Article 17 of Law No 388 of 23 December 2000. ...'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 11 Ente Cambiano, formerly Banca di Credito Cooperativo di Cambiano società cooperativa per azioni, a cooperative credit bank which had net assets of over EUR 200 million as at 31 December 2015, paid the Italian Treasury the amount of EUR 54 208 740, equal to 20% of its net assets as at that date, by exercising the 'exit' option, provided for in Article 2(*3-bis*) of Decree-Law No 18/2016.
- 12 Ente Cambiano subsequently submitted a request for reimbursement of that amount, since it was of the view that the obligation to pay it was contrary to both the Italian Constitution and EU law. Since the request for reimbursement of that amount submitted by Ente Cambiano was rejected by implied decision, it brought an action against that decision before the Commissione tributaria provinciale di Firenze (Provincial Tax Court, Florence, Italy). After that court dismissed that appeal, Ente Cambiano brought an appeal before the Commissione tributaria regionale della Toscana (Regional Tax Court, Tuscany, Italy), which dismissed that appeal by judgment of 15 November 2018.
- 13 Ente Cambiano brought an appeal on a point of law against that judgment before the referring court, la Corte suprema di cassazione (Supreme Court of Cassation, Italy), alleging both the unconstitutional nature of the national legislation at issue in the main proceedings and its incompatibility with EU law.
- 14 That court states, first of all, that it referred the questions of constitutionality concerning Article 2(*3-ter*) and (*3-quater*) of Decree-Law No 18/2016 to the Corte costituzionale (Constitutional Court, Italy), which declared those questions unfounded by judgment No 149/2021 of 9 July 2021.
- 15 The referring court then explains that those provisions were part of a reform of cooperative credit banks intended to remedy the structural weaknesses resulting from their economic model and governance as well as from the small size of most of them by strengthening their asset portfolio to withstand future crises. To that end, the main model envisaged by the Italian legislature would be for those banks to join a cooperative banking group headed by a parent holding company, in the form of a public limited company with at least EUR 1 thousand million in capital, majority owned by those banks, which would exercise powers of management and coordination in respect of them. Joining such a group would be of no consequence to their asset portfolio. Only cooperative credit banks with net assets above a set threshold could avoid joining such a group, by subjecting themselves to the obligations of Article 2(*3-bis*) to (*3-quater*) of Decree-Law No 18/2016, failing which their assets would be transferred to mutual funds for the promotion and development of cooperation.

- 16 The referring court adds that the grounds of appeal which allege an infringement of EU law concern, in particular, the principles of free competition and market preservation, enshrined in Articles 101, 102, 120 and 173 TFEU, and the principle of free movement of capital, as set out in Article 63 TFEU and defined by Directive 2008/7.
- 17 It explains that Ente Cambiano claims that the payment obligation in question infringes that directive in so far as the latter establishes the tax neutrality of capital transfers except in the cases provided for in Article 6 thereof which do not apply in the present case.
- 18 In that context, that court is uncertain whether Article 2(3-ter) and (3-quater) of Decree-Law No 18/2016 is compatible with EU law, explaining, first, that it shares Ente Cambiano's doubts as to the compatibility of that provision with the principles of free movement of capital, free competition and market preservation recognised by EU law and, secondly, that an interpretation of that provision in conformity with EU law does not appear possible to that court.
- 19 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do [Article 63 et seq., and Articles 101, 102, 120 and 173 TFEU] preclude national legislation which, like [Article 2(3-bis) and (3-ter) of Decree-Law No 18/2016], makes the payment of a sum equal to 20% [of] 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, [of] 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 upholding 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?'

Consideration of the question referred

- 20 According to the Court's settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44 and the case-law cited).
- 21 Since the order for reference serves as the basis for that procedure, the national court is required, in the order for reference itself, to set out the factual and legislative context of the dispute in the main proceedings and to provide the necessary explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it (see, to that effect, inter alia, judgment of 4 June 2020, *C.F. (Tax inspection)*, C-430/19, EU:C:2020:429, paragraph 23 and the case-law cited).

- 22 In that regard, it should also be noted that the information provided in orders for reference must enable, first, the Court to provide useful answers to the questions referred by the national court and, secondly, the governments of the Member States and other interested parties to exercise the right conferred on them by Article 23 of the Statute of the Court of Justice of the European Union to submit observations. It is the Court's duty to ensure that that right is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties (see, to that effect, judgment of 2 September 2021, *Irish Ferries*, C-570/19, EU:C:2021:664, paragraph 134 and the case-law cited).
- 23 Those cumulative requirements concerning the content of an order for reference are expressly set out in Article 94 of the Rules of Procedure of the Court of Justice, of which the referring court is supposed, in the context of the cooperation instituted by Article 267 TFEU, to be aware and which it is bound to observe scrupulously (order of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 21; judgment of 9 September 2021, *Toplofikatsia Sofia and Others*, C-208/20 and C-256/20, EU:C:2021:719, paragraph 20 and the case-law cited). They are also referred to in paragraphs 13, 15 and 16 of the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1).
- 24 In the present case, the referring court asks, in essence, whether Articles 63, 101, 102, 120 and 173 TFEU preclude national legislation which provides that the possibility, for cooperative credit banks having net assets of over EUR 200 million as at a specific date, instead of joining a cooperative banking group, of transferring their banking business to a public limited company in return for shares in that company is made conditional on the payment of an amount equal to 20% of their net assets as at that date. It is also apparent from the request for a preliminary ruling that Ente Cambiano relies, in the dispute in the main proceedings, on Directive 2008/7, which repealed and replaced Directive 69/335, in relation to the free movement of capital about which the referring court is uncertain.
- 25 As regards Articles 101, 102, 120 and 173 TFEU, that court does not explain the reasons for which it seeks to have those provisions interpreted or the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it, contrary to the requirements of Article 94(c) of the Rules of Procedure. Therefore, in so far as it concerns the provisions of the TFEU, the question referred for a preliminary ruling is inadmissible.
- 26 As regards Article 63 TFEU, as the European Commission noted in its written observations, the information in the request for a preliminary ruling indicates that the dispute in the main proceedings, between a company established in Italy and the Italian Revenue Agency, is confined in all respects within that Member State.
- 27 However, according to settled case-law, the provisions of the TFEU on the free movement of capital do not apply to a situation which is confined in all respects within a single Member State. In such a situation, it is for the referring court to indicate to the Court, in accordance with the requirements of Article 94 of the Rules of Procedure, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraphs 47 and 55 and the case-law cited).

- 28 More specifically, it follows from those requirements that, in order for it to be found that there is such a connecting link, the request for a preliminary ruling must clearly set out specific factors, that is, not hypothetical considerations but specific evidence, on the basis of which that link may be positively established, since the referring court may not merely submit to the Court evidence suggesting that such a link cannot be ruled out or which, considered in the abstract, could constitute evidence to that effect, but must, on the contrary, provide objective and consistent evidence enabling the Court to ascertain whether such a link exists (judgment of 2 March 2023, *Bursa Română de Mărfuri*, C-394/21, EU:C:2023:146, paragraphs 51 and 52 and the case-law cited).
- 29 In its request for a preliminary ruling, the referring court merely refers to the argument of Ente Cambiano that the payment, by cooperative credit banks having net assets as at 31 December 2015 of over a threshold of EUR 200 million, of an amount equal to 20% of their net assets as at that date, penalises the strongest cooperative credit banks, which are capable of attracting capital investments from other Member States. However, that court provides no specific evidence which would help to confirm that nationals of other Member States are interested in making use of the free movement of capital in the situation at issue in the main proceedings (see, by analogy, judgment of 20 September 2018, *Fremoluc*, C-343/17, EU:C:2018:754, paragraph 30). To the extent that that request does not fulfil the requirements set out in the case-law cited in paragraphs 27 and 28 above, the question referred for a preliminary ruling is also inadmissible in so far as it concerns Article 63 TFEU.
- 30 As regards Directive 2008/7, relied on in the dispute in the main proceedings by Ente Cambiano, according to the information in the request for a preliminary ruling, in accordance with Article 2(3-*bis*) to (3-*quater*) of Decree-Law No 18/2016, it appears that the payment to the Treasury disputed by Ente Cambiano, provided for by that decree-law, as well as the rate and basis of that payment, which do not correspond to some profit or gain of the applicant, but to its net assets as shown in its financial statements as at 31 December 2015, occurs when its banking business is transferred to a capital company in exchange for shares in that company. The chargeable event for that payment therefore lies in the completion of that specific transaction and not in the performance of an activity, while its binding character results from the penalty attaching to the failure to make that payment, also provided for in that provision.
- 31 While those factors serve to establish that Directive 2008/7 is applicable *ratione materiae* to the dispute in the main proceedings, so that it must be determined whether that payment should be classified as an ‘indirect tax’, within the meaning of that directive, affecting a restructuring operation referred to in Article 4(1)(a) of that directive, to which Article 5(1)(e) thereof refers, to the extent that the transfer of the business concerned was carried out by a capital company, that information does not demonstrate that that directive is applicable *ratione personae* to that dispute. The referring court has not addressed the question whether cooperative credit banks, such as the applicant in the main proceedings was before its restructuring and the alteration of its regulations after exercising the option provided for in Article 2(3-*bis*) of Decree-Law No 18/2016, are covered by the concept of ‘capital company’, within the meaning of Directive 2008/7, as defined in Article 2 thereof.
- 32 That court has also not provided, in that request, any evidence as to whether the exceptions to Article 5 of that directive, stemming from Article 6 thereof, are liable to apply in the present case.

- 33 In the light of the uncertainty as to the applicability of Directive 2008/7 to the dispute in the main proceedings, and the lack of any details concerning the possible classification of the payment in question as an ‘indirect tax’ within the meaning of that directive, it is clear that the request for a preliminary ruling does not contain the elements necessary for that directive to be considered applicable to that dispute, with the result that the Court is not able to determine to what extent an answer to that question is necessary to enable that referring court to give its decision.
- 34 It follows that the request for a preliminary ruling is also inadmissible in so far as it concerns that directive.
- 35 It should be borne in mind, however, that the referring court retains the right to submit a new request for a preliminary ruling by providing the Court with all the information enabling it to give an answer (see, to that effect, judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 41 and the case-law cited).
- 36 In those circumstances, the request for a preliminary ruling must be declared inadmissible.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

The request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy) made by decision of 11 October 2022 is inadmissible.

[Signatures]