Case C-565/18, *Société Général S.A.*

Advocate General Hogan concludes that the Italian financial transaction tax is not contrary to EU law

Today, the Advocate General Hogan ("AG") issued his conclusion in the case C-565/18, *Société Général S.A.* Under the provisions governing the Italian financial transaction tax ("FTT"), the FTT is due, *inter alia*, on transactions concerning derivative financial instruments where the assets underlying those derivatives are securities issued by companies having their registered office in Italy. The applicant claimed that the levy of FTT in such cases was in breach of Articles 18, 56 and 63 of the TFEU as well as of certain provisions of the Italian Constitution.

First, the AG concluded that the case at stake might fall within the scope of both the freedom to provide services (where the derivatives have a hedging function) and the free movement of capital. The AG stated that, since "*derivatives always represent an investment for those who hold them and only constitute a hedging service under certain specific circumstances*", the case should be examined only in the light of the free movement of capital as any restriction on the freedom to provide services would be merely ancillary to a restriction on the former.

The applicant raised the argument that there is no effective and objective territorial link between the FTT and the Italian legal system, as the tax is exclusively due based on the fact that the underlying assets are financial instrument issued by Italian companies, regardless of the foreign establishment of the parties concluding the contract and of the intermediaries. Therefore, the FTT should be regarded as contrary to customary international law. In this respect, the AG stated that, even in the case such conclusions proved correct (a matter on which the AG did not take a stand), that alleged violation of international law would not entail any breach of the free movement of capital. Indeed, a violation of international law committed by a Member State in non-harmonized fields of law does not necessarily entail an obstacle to the internal market; nor the Court of Justice of the EU has any jurisdiction on whether Member States comply with international law.

Finally, the AG concluded that the FTT complies with the free movement of capital, as it does not trigger any overt or covert discrimination between comparable situations. This is because, first, the FTT is due regardless of the residence of the parties of the transactions and, therefore, it does not entail any discrimination based on the residence of the taxpayer. Second, although the FTT triggers a difference in treatment depending on whether the underlying assets of the derivatives are financial instruments issued by Italian companies, such difference in treatment is not discriminatory since it concerns non comparable situations (in the light of the objective of

the FTT, i.e. taxing derivatives having, as their underlying assets, financial instruments governed by Italian law). Third, as for the reporting obligations imposed in connection with the FTT (identifying the relevant transactions, keeping a special register, filing a tax return), the AG noted that they apply without distinction to resident and non-resident taxpayers and seem limited to what necessary to ensure the timely and effective enforcement of that tax.

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