

The ECJ takes positive decision on Italian FTT

In its decision of 30 April 2020, dealing with the Italian Financial Transaction Tax (FTT), the European Court of Justice (ECJ) has ruled that there is no violation of the free movement of capital, to the extent that the Italian FTT does not discriminate on the basis of residence or nationality. The Court does not examine whether the administrative formalities imposed on non-residents go further than proportionally required in order to levy the tax.



The Italian FTT is levied on transactions with derivatives having as their underlying assets financial instruments issued by an Italian company, irrespective of the residence state of the contracting parties or the jurisdiction where the transaction is concluded. The ECJ was asked to decide whether the scope of the Italian financial transaction tax violates EU Law (Case C-565/18, *Société Générale*).

This case is interesting, as it concerns the question whether Italy has stretched its territorial competences to levy taxes too far. The scope of the Italian FTT is indeed broad, given that it applies to all kinds of transactions with derivatives where the underlying instrument is issued by an Italian company, even if the parties involved are non-residents or if the transaction takes place outside of Italy. The applicant argued that the tax is not in conformity with EU law, because (i) it discourages non-resident investors from

investing in derivatives that involve assets governed by Italian law; and (ii) the tax leads to administrative and reporting obligations in Italy, possibly on top of those applicable in the state of residence of the parties involved.

In his Conclusion of 28 November 2019, Advocate-General Hogan stated that the application of the EU fundamental freedoms has some specific characteristics in the field of taxation. According to him, the levy of a tax on a certain transaction carried out by non-residents always hinders or restricts the exercise of the fundamental freedoms in some way or another, even if the restriction does not discriminate or make a distinction between domestic and cross-border transactions. He added that the concept of 'restriction' has to be interpreted, however, in a more limited manner in the context of taxation. *In casu*, one should rather examine whether the Italian FTT makes it less attractive for non-residents, as compared to Italian residents, to invest in products derived from financial instruments issued by Italian companies. In that regard, both the A-G and the Court come to the conclusion that residents and non-residents are taxed equally on the (domestic and/or cross-border) transactions falling within the scope of the tax. Hence, the free movement of capital is not violated.

Non-residents confronted with the tax are nonetheless subject to certain formal obligations (e.g. filing a tax return). The ECJ was not able to decide whether these formal obligations violate EU Law, since the Italian referring court did not provide (sufficient) information on the administrative and filing formalities. It is important to note that the ECJ examined in a recent case whether certain formalities imposed on Belgian residents in order to levy the Belgian FTT on transactions involving a foreign intermediary could be considered a breach of EU Law (Case C-725/18, *A. Van Zantbeek VOF*). The ECJ decided that the Belgian rules indeed established a difference in treatment, but that the additional obligations were proportionate and could thus be justified. The Italian judge will have to determine whether the same can be said of the Italian rules.

Take-away

This case shows that, in the absence of further harmonization of these kinds of taxes at EU level, Member States are in principle allowed to set a broad territorial scope for these taxes. However, the practical implementation of such a broad scope will inevitably lead to burdensome obligations for the taxpayer.

Author

Matthias Vekeman

matthias.vekeman@tiberghien.com
T +32 2 773 40 00
Tiberghien
Tour & Taxis, Havenlaan | Avenue du Port 86C
BE-1000 Brussels, Belgium
www.tiberghien.com

Editorial Team

Koen Morbée

koen.morbee@tiberghien.com
T +32 2 773 40 00
Tiberghien
Tour & Taxis, Havenlaan | Avenue du Port 86C
BE-1000 Brussels, Belgium
www.tiberghien.com

Masoumeh Kangarani

mk@atlas.tax
T: +31 202 376 246
Atlas
Weteringschans 24, 1017 SG Amsterdam,
Netherlands
www.atlas.tax

Thomas De Meyer

thomas.demeyer@tiberghien.com
T +32 2 773 40 00
Tiberghien
Tour & Taxis, Havenlaan | Avenue du Port 86C
BE-1000 Brussels, Belgium
www.tiberghien.com

Matthias Vekeman

matthias.vekeman@tiberghien.com
T +32 2 773 40 00
Tiberghien
Tour & Taxis, Havenlaan | Avenue du Port 86C
BE-1000 Brussels, Belgium
www.tiberghien.com

Inés Blanco

ines.blanco@wts.com
T +32 (0)2 801 30 60
WTS Global
Esplanade Oscar van de Voorde 1
BE-9000 Ghent, Belgium
wts.com/global

About the "ETLC"

The WTS Global European Tax Law Center (ETLC) consists of dedicated tax experts from WTS Global specializing on recent news, developments and court decisions at EU level.

The ETLC newsflash will bundle the most relevant information and provide first hand analysis by tax experts from WTS Global.

About WTS Global

With representation in over 100 countries, WTS Global has already grown to a leadership position as a global tax practice offering the full range of tax services and aspires to become the preeminent non-audit tax practice worldwide. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

The member firms of WTS Global are carefully selected through stringent quality reviews. They are strong local players in their home market who are united by the ambition of building a truly global practice that develops the tax leaders of the future and anticipates the new digital tax world.

WTS Global effectively combines senior tax expertise from different cultures and backgrounds and offers world-class skills in advisory, in-house, regulatory and digital, coupled with the ability to think like experienced business people in a constantly changing world.

For more information please see: wts.com

Imprint

WTS Global
P.O. Box 19201 | 3001 BE Rotterdam
Netherlands
T +31 (10) 217 91 71 | F +31 (10) 217 91 70
wts.com info@wts.de

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the authors