

CJEU Rules That Portuguese Additional Solidarity Tax on the Banking Sector Legislation Is Not in Line With EU Law

On 21 December 2023, the Court of Justice of the European Union ("CJEU") rendered its judgment in *Cofidis* ([C-340/22](#)) regarding the request for a preliminary ruling brought by the Portuguese arbitration court ("CAAD"). The CJEU interpreted Articles 49 and 54 of the Treaty on the Functioning of the European Union ("TFEU") – the EU freedom of establishment – as opposing to an EU Member State's additional solidarity tax on the banking sector when the deduction of credit institution's own funds/equity (and debt instruments that are comparable to own funds/equity) is in essence not available for entities that cannot issue the said instruments due to the fact that they do not have legal personality. This is the case of branches of credit institutions whose registered office is located in an EU Member State other than Portugal as these branches do not have legal personality.

Background and facts

The applicant requested the constitution of an arbitration court to give ruling on the annulment of an administrative decision regarding the Portuguese additional solidarity tax on the banking sector ("ASBS"). Simply put, the applicant brought to the arbitration court's attention that the ASBS is levied on the entity's liability after deduction of items that are treated as own funds/equity and of certain deposits. However, since branches of credit institutions that have their registered office in an EU Member State other than Portugal do not have legal personality, such entities have no funds of their own/equity to deduct. According to the applicant, this constitutes a difference in treatment of branches of non-resident credit institutions when compared to entities located in Portugal (i.e., resident credit institutions and subsidiaries in Portugal of non-resident credit institutions). Additionally, the applicant invoked that the ASBS is contrary to Directive 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms, and to the alleged tax harmonisation introduced by that Directive as regards credit institutions' resolution contributions.

CJEU judgment

As to the compatibility of the ASBS with the Directive 2014/59, according to the CJEU, such Directive is not aimed at harmonising the taxation of credit institutions in the EU. Instead, it aims, among other things, to ensure that shareholders and creditors of credit institutions bear the risk of insolvency, rather than taxpayers. Consequently, the Directive does not prevent the imposition of ASBS, even if its tax revenues are allocated to the Portuguese national social security system and have no connection to the recovery and resolution measures of the country where the headquarters are located.

However, the CJEU found that the ASBS legislation infringes on Article 49 par. 2 TFEU. This Article gives economic operators the possibility to freely choose the appropriate legal form to pursue their activities in an EU Member State. By not allowing branches of non-resident credit institutions to act in the same conditions applied to a subsidiary of a non-resident credit institution, the ASBS legislation rendered the exercise of the aforementioned freedom less appealing by non-residents when opting to operate a branch in Portugal. The CJEU considered that the Portuguese legislation on this matter, albeit being applicable without distinction on the liabilities of subsidiaries and branches of non-resident credit institutions effectively constituted a covert form of discrimination against said branches that have no funds of their own/equity to deduct.

The Portuguese tax authorities justified the difference in treatment by claiming that the tax advantage given to both resident credit institutions and subsidiaries in Portugal of non-resident credit institutions derived from the need to ensure the coherence of the tax system. The CJEU rejected this justification because, in accordance with its prior judgments, accepting such a justification requires establishing a direct link between the tax advantage in question and its offset through an additional tax burden. This link was not demonstrated in the present case, as per the CJEU's assessment.

In addition, the European Commission observed that not conceding such deductions to branches of non-resident credit institutions could be justified by a balanced allocation of taxing powers between EU Member States. However, the CJEU rejected this justification since Portugal chose not to tax both resident credit institutions and subsidiaries in Portugal of non-resident credit institutions in so far as concerns debt instruments comparable to own funds/equity.

Takeaway

The current judgment reaffirms, once more, that legislation rendering one legal form less attractive for economic operators compared to another is not in line with EU law. It further emphasizes that covert discriminations encompass not only those based on the location of a company's seat but also any covert forms of discrimination that, through the application of other differentiation criteria (such as the legal operating form), result in the same discriminatory outcome.

Let's talk

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