

ECJ Advocate General Opines that Additional Solidarity Tax on Domestic Branches of Non-Resident Credit Institutions is Incompatible with Freedom of Establishment (*Cofidis v Autoridade Tributária e Aduaneira* (Case C-340/22) (Direct Tax)) – Details

28 July 2023

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Advocate General Pikamäe of the Court of Justice of the European Union (ECJ) has opined that national legislation that disallows branches of non-resident credit institutions to deduct their own funds and comparable debt instruments from their tax base for the purpose of additional solidarity tax on the banking sector (ASSB), is incompatible with the freedom of establishment. In the case of *Cofidis v. Autoridade Tributária e Aduaneira* (Case C-340/22), Pikamäe considered that branches of non-resident credit institutions (which do not have legal personality) are treated less favourably compared to resident credit institutions and subsidiaries of non-resident credit institutions (which have legal personality). Details of the opinion are summarized below.

(a) Legal background. In 2020, Portugal introduced the ASSB, aiming to balance out the VAT exemption applicable to most financial transactions and services.

The ASSB is payable on (i) liabilities calculated after deduction of own funds, deposits covered by certain guarantees, and deposits placed with the Central Bank by agricultural credit banks; and (ii) the notional value of off-balance sheet derivative financial instruments.

(b) Facts. Cofidis is a Portuguese branch of a credit institution registered in France. In 2020, Cofidis paid ASSB on the basis of self-assessment. In 2021, Cofidis requested the repayment of the related ASSB. This was refused by the authorities.

(c) Issue. The national court referred two questions for preliminary ruling, see [ECJ Preliminary Ruling Request: Cofidis \(Case C-340/22\) – Tribunal Arbitral Tributário \(Centro de Arbitragem Administrativa – CAAD\) Submits Referral On Additional Solidarity Tax On Banking Sector \(19 September 2022\)](#).

The issue examined as part of the AG's opinion was whether branches of foreign credit institutions (which do not have legal personality and therefore cannot deduct their own funds items from their tax base for ASSB purposes) are incompatible with the freedom of establishment.

(d) Advocate General's Opinion. Firstly, the AG analysed whether there is a discrimination in the case at hand.

The AG pointed out that the ECJ has repeatedly confirmed through settled case law that the freedom of establishment precludes a difference in tax treatment arising from the exercise of the activity of a non-resident company in the host Member State depending on whether it operates through a subsidiary or a branch, that difference in treatment amounts to discrimination on the grounds of nationality. Consequently, national legislation that affords more favourable treatment to subsidiaries than to branches ultimately treats resident companies more favourably than non-resident companies.

In the case at hand, the deduction of the value of a wide range of items comparable to own funds (which can only be issued by entities with legal personality) from the tax base for ASSB means, as with the deduction of own funds, that branches of non-resident credit institutions are treated less favourably than resident credit institutions and subsidiaries of non-resident credit institutions.

It follows that the legislation establishing the ASSB gives rise to indirect discrimination against non-resident credit institutions wishing to establish themselves in Portugal through a branch, with the result that it falls within the scope of the measures prohibited by article 49 of the [Treaty on the Functioning of the EU \(TFEU\)](#).

Next, the AG examined whether the legislation at hand relates to situations that are objectively comparable. The comparability between a cross-border and an internal situation must be examined with regard to the aim pursued by the national tax legislation at hand. In light of the aim enshrined in the ASSB, the AG opined that a non-resident credit institution operating in Portugal through a branch is comparable to a resident credit institution or a subsidiary of a non-resident credit institution. Thus, there is no difference between those situations that could justify any difference in treatment.

Further, the AG analysed whether the restriction can be justified by a legitimate aim, such as the need to safeguard the coherence of the tax system, guarantee the effectiveness of fiscal supervision, or prevent tax evasion, concluding that those justifications do not apply to the legislation in question.

Finally, the AG assessed whether the legislation at hand can be justified by the balanced allocation of taxing rights. The AG concluded that Portugal waived its powers of taxation by allowing not only resident credit institutions but also subsidiaries of non-resident credit institutions to deduct the value of debt instruments comparable to own funds from their tax base for ASSB. Thus, the balanced allocation of taxing rights cannot be used as a justification for the less favourable treatment of branches of non-resident credit institutions that are not able to deduct the value of those instruments from their tax base for ASSB.