



Reports of Cases

Case C-340/22

Cofidis

v

Autoridade Tributária e Aduaneira

(Request for a preliminary ruling
from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD))

Judgment of the Court (First Chamber) of 21 December 2023

(Reference for a preliminary ruling – Direct taxation – Article 49 TFEU – Freedom of establishment – Introduction of a tax on the liabilities of credit institutions for the purpose of funding the national social security system – Alleged discrimination against branches of foreign credit institutions – Directive 2014/59/EU – Framework for the recovery and resolution of credit institutions and investment firms – Scope)

1. *Economic and monetary policy – Economic policy – Recovery and resolution of credit institutions – Directive 2014/59 – Subject matter and scope – Harmonisation of the taxation of credit institutions active in the European Union – Not included – Introduction of a national tax on the liabilities of credit institutions – Revenues intended to fund the national social security system – Tax unconnected to the recovery and resolution of those credit institutions – Whether permissible – Similarities between the method of calculating the tax and the method of calculating the contributions paid under Directive 2014/59 – Irrelevant
(European Parliament and Council Directive 2014/59, Art. 1)*

(see paragraphs 22-27, operative part 1)

2. *Freedom of movement for persons – Freedom of establishment – Companies – Determination of the connection with the legal system of a State – Criterion – Place of establishment of the head office – Application of national tax legislation – Tax treatment of a resident company and a non-resident company, respectively – Scope – Branch of a non-resident company – Included
(Arts 49 and 54 TFEU)*

(see paragraph 36)

3. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope – Activity carried out by a company resident in another Member State through a permanent establishment – Included – Economic operators' freedom to choose the*

*appropriate legal form in which to pursue their activities in another Member State –
Limitation by discriminatory tax provisions – Not permissible
(Arts 49 and 54 TFEU)*

(see paragraphs 37-42, 47)

4. *Freedom of movement for persons – Freedom of establishment – Tax legislation –
Financing of the national social security system – National legislation providing for a tax
applicable to resident credit institutions and subsidiaries and branches of non-resident credit
institutions – Basis of assessment consisting of the liabilities of credit institutions –
Deduction of own funds and debt instruments comparable to own funds – Branches, as
entities without legal personality, being unable to issue such instruments and unable to
deduct own funds from their tax base – National legislation not permissible
(Arts 49 and 54 TFEU)*

(see paragraphs 44, 65, operative part 2)

Résumé

Cofidis is a Portuguese branch of a credit institution that has its registered office in France. As such, it is subject to the adicional de solidariedade sobre o sector bancário (additional solidarity tax on the banking sector; ‘the ASSB’), a tax on the banking sector levied on the liabilities¹ of credit institutions. That tax was introduced by the Portuguese Republic in order to financially support the national social security system and to restore the balance between the tax burden borne by that sector, which benefits from a value added tax (VAT) exemption on most financial services, and that borne by all other sectors of the Portuguese economy.

The following are liable to the ASSB: credit institutions that have their registered office in Portugal, Portuguese subsidiaries of credit institutions that have their registered office in the territory of another State, and Portuguese branches of non-resident credit institutions.

On 11 December 2020, Cofidis carried out a self-assessment for the ASSB in respect of the first half of 2020. However, being of the view that the ASSB is contrary to Directive 2014/59² and Article 49 TFEU, Cofidis challenged its liability to that tax before the referring court.³

By its judgment, the Court of Justice finds that Directive 2014/59 does not preclude a national law introducing a tax such as the ASSB, the method of calculation of which is allegedly similar to the method of calculating the contributions paid by credit institutions under that directive, where the revenue received from that tax is not allocated to national financing arrangements for resolution measures, unlike the contributions provided for by that directive. By contrast, the Court finds that the freedom of establishment guaranteed by Articles 49 and 54 TFEU precludes such national legislation.

¹ The ASSB is payable inter alia on liabilities calculated and approved by taxable persons after deduction.

² Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 2014, L 173, p. 190).

³ In the present case, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal).

Findings of the Court

First, the Court finds that the contributions paid pursuant to Directive 2014/59 do not constitute a tax but, rather, are based on an insurance-based logic. Therefore, since Directive 2014/59 does not have the objective of harmonising the taxation of credit institutions active in the European Union, it cannot constitute a barrier to the establishment of a national tax such as the ASSB. The fact that the method of calculation of such a tax has some similarities with the method of calculation of the contributions paid under Directive 2014/59 is entirely irrelevant in that regard.

Second, the Court notes that the freedom of establishment allows economic operators to choose freely the appropriate legal form in which to pursue their activities in another Member State and, inter alia, to exercise their activity through a branch under the same conditions as those which apply to subsidiaries, without that freedom of choice being limited by tax provisions that are directly or indirectly discriminatory.

In particular, a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU.

In the present case, the national legislation at issue in the main proceedings applies without distinction to resident credit institutions and to Portuguese subsidiaries and branches of non-resident credit institutions. The basis of assessment for the ASSB is the liabilities of those entities, namely all items entered in the balance sheet which, irrespective of their form and type, represent a debt to third parties, with the exception, inter alia, of items which, in accordance with the applicable accounting rules, are treated as own funds.

The Court notes that such national legislation is liable to make pursuing their activity in Portugal by means of a branch less attractive for non-resident companies. Unlike resident credit institutions and subsidiaries of non-resident credit institutions, branches of non-resident credit institutions are unable, because they do not have legal personality, to deduct own funds from their ASSB tax base and are unable to issue debt instruments that are comparable to own funds. That difference in treatment, which is capable of restricting the freedom to choose the appropriate legal form, is liable to constitute a restriction on the freedom of establishment guaranteed by Articles 49 and 54 TFEU.

In order for such a difference in treatment to be compatible with the provisions of the FEU Treaty on the freedom of establishment, it must relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest.

In the present case, nothing seems to indicate that the situation of a non-resident credit institution pursuing its activity through a branch is not objectively comparable to that of a resident credit institution or a resident subsidiary of a non-resident credit institution.

Moreover, the Court finds that the restriction of freedom of establishment at issue cannot be justified by the need to preserve the coherence of the national tax system, invoked by the Portuguese Government, or by the need to maintain a balanced allocation of the power to impose taxes between the Member States, claimed by the European Commission. In that regard,

where a Member State has chosen not to tax entities established in its territory,⁴ it cannot rely on the argument that there is a need to safeguard the balanced apportionment of the power to tax between the Member States in order to justify the taxation of entities established in another Member State.

⁴ In the present case, the Portuguese Republic chose not to tax resident credit institutions and subsidiaries of non-resident credit institutions in so far as concerns debt instruments comparable to own funds.