**Case C-712/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

24 September 2019

**Referring court:**

Tribunal Supremo (Spain)

**Date of the decision to refer:**

16 July 2019

**Appellant:**

Novo Banco S.A.

**Respondent:**

Junta de Andalucía

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**Subject matter of the main proceedings**

Appeal on a point of law lodged by NOVO BANCO, S.A. (formerly known as Banco Espirito Santo, S.A., sucursal en España) against the judgment given on 27 February 2017 by the Sala de lo Contencioso-Administrativo (Chamber for Contentious Administrative Proceedings) of the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) concerning the compatibility of Article 6 of Law 11/2010 on fiscal measures for the reduction of the government deficit and for sustainability (Ley 11/2010 de medidas fiscales para la reducción del déficit público y para la sostenibilidad) of 3 December 2010 — which governs the tax on customer deposits in Andalusian credit institutions (impuesto sobre los depósitos de clientes en las entitdades de crédito de Andalucía; 'IDECA') — with Articles 49, 56 and 63 of the Treaty on the Functioning of the European Union ('TFEU') and Articles 401 and 135(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').

## Subject matter and legal basis of the request for a preliminary ruling

The referring court has referred two questions for a preliminary ruling under Article 267 TFEU. By the first question, it asks for a determination of whether the IDECA is contrary to Articles 49, 56 and 63 TFEU, on the freedom of establishment, the freedom to provide services and the free movement of capital, in view of the fact that it offers tax advantages for the banks to which it applies if their head offices are situated in the Autonomous Community of Andalusia or on the basis of the number of branches which such banks have in that autonomous community or the loans and investments that those banks allocate to projects there. By the second question, the referring court seeks clarification of whether, despite the fact that Law 11/2010 categorises it as a direct tax, the IDECA can be classified as an indirect tax and whether, in that case, it is compatible with the VAT Directive, in the light of the provisions of Articles 401 and 135(1)(d) thereof.

## Questions referred for a preliminary ruling

1. Must Articles 49, 56 and 63 TFEU, which guarantee the freedom of establishment, the freedom to provide services and the free movement of capital, respectively, be interpreted as precluding, *inter alia*, a system of deductions like that laid down for the IDECA in points 2 and 3 of Article 6(7) of Andalusian Law 11/2010 of 3 December on fiscal measures for the reduction of the government deficit and for sustainability?

2. Must the tax on customer deposits in credit institutions in Andalusia (IDECA) be categorised as an indirect tax despite the fact that Article 6(2) of Andalusian Law 11/2010 classifies it as a direct tax, and, in that case, are its existence and chargeability compatible with VAT, in the light of the provisions of Articles 401 and 135(1)(d) of the VAT Directive.

## Provisions of EU law relied on

*European Union law*

Treaty on the Functioning of the European Union (OJ 2016 C 202, p. 1), Articles 49, 56, 63 and 267

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5)

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), Articles 401 and 135(1)(d)

*Case-law of the Court of Justice of the European Union*

Judgment of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439)

Judgment of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709)

Judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397)

Judgment of 6 June 2000, *Verkooijen* (C-35/98, EU:C:2000:294)

Judgment of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 22) et seq.

Judgment of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670)

**Provisions of national law relied on**

Law 11/2010 of 3 December on fiscal measures for the reduction of the government deficit and for sustainability (BOE No 314 of 27 December 2010), Article 6

**Succinct presentation of the facts and the procedure in the main proceedings**

1 See the section relating to the subject matter of the main proceedings.

**Essential arguments of the parties to the main proceedings**

2 The appellant, Novo Banco S.A., alleges that the following provisions of European Union law have been infringed:

– Articles 49 and 56 TFEU, as regards the freedom of establishment and the freedom to provide services.

The appellant argues that the rules governing the tax on customer deposits in Andalusian credit institutions (IDECA), laid down in Article 6 of Andalusian Law 11/2010 on fiscal measures for the reduction of the government deficit and for sustainability, which provide for general and specific deductions from the amount of tax (points 2 and 3 of paragraph 7), could breach those fundamental rights:

i) since the way the general deductions are applied creates a difference in treatment between institutions which are resident in Andalusia and those which are not, placing the latter at a disadvantage because a tax deduction is provided for on the basis that the head office or general operations are

situated in Andalusia, which has an effect on the freedom of establishment, and

ii) since it includes specific deductions related to regional interests and associated with the specific features of entities like savings banks and credit unions, established almost exclusively at regional level, which creates de facto discrimination between credit institutions according to whether they have a connection to the regional interests of Andalusia. In support of its position, the appellant cites the judgments of the Court of Justice of the European Union of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439) and of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709). Such differences in treatment constitute restrictions on the exercise of freedom of establishment by companies established in other Member States of the European Union or in other autonomous communities of the Kingdom of Spain, and, at the same time, constitute a barrier to the freedom to provide services.

– The appellant further contends that identical conclusions follow from the European Commission's letter of formal notice 2011/4057, served on Spain on 28 February 2012, concerning the tax on deposits in the autonomous communities of Extremadura and Andalusia, which reads: '… Spain may be in breach of the obligations incumbent on it under Articles 49, 56 and 63 TFEU and Articles 31, 36 and 40 of the EEA Agreement, because the legislation of some of its regions (Autonomous Community of Andalusia and Autonomous Community of Extremadura) offers tax advantages for the banks to which it applies if their headquarters are situated in the autonomous community or on the basis of the number of branches of such banks situated in that autonomous community or the loans and investments those banks allocate to that autonomous community's projects.

– Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (free movement of capital) and Article 63 TFEU on the free movement of capital.

The appellant submits that the rules governing the IDECA may affect the freedom of credit institutions to take decisions relating to the allocation of deposits collected in Andalusia and the decisions of investors regarding the placement of their savings. The appellant points out that providing for a difference in taxation based on the place of residence of the financial institution or the place of investment hinders the free movement of capital and it cites in that connection the judgment of the Court of Justice of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397). The appellant observes that the statement of reasons for the law governing the IDECA refers expressly to the fact that that tax is intended to address the chronic problem of the flight of savings affecting Andalusia. In the appellant's submission, the effective application of the IDECA distorts the management decisions of financial institutions which tend to transfer

their businesses to territories not subject to that tax or to base their businesses on products on which the tax is not levied.

– Articles 401 and 135(1)(d) of the VAT Directive.

The appellant claims that the judgment under appeal classifies the IDECA as a direct tax, whereas it cannot be a direct tax because, like VAT, it is based on business transactions; specifically, in this case, the provision of financial services. The appellant submits that the two taxes are levied on the same transactions and complains that the judgment under appeal takes the view that what is taxed is economic capacity derived from a transaction in liabilities (collection of deposits) in order to define the IDECA in such a way as to prevent it from being identical to VAT, especially where the IDECA is levied on a transaction which, literally, is subject to but exempt from VAT. The appellant further claims that, in its opinion, the assertion made in that judgment to the effect that the IDECA is levied on the potential return which may be assumed on deposits collected, as a revenue generating element, is contradictory in view of the fact that the economic capacity resulting from the financial activity using funds collected through deposits is taxed by means of corporation tax or the tax on economic activities.

3 For its part, the Junta de Andalucía contends that the IDECA is a direct tax which is not levied on the financial transactions of credit institutions and which, therefore, does not take into account the nationality of depositors. In its submission, the IDECA is a tax which is levied on the potential return which may be assumed on deposits collected by credit institutions physically established in the territory of the autonomous community, on the grounds that they have their head office or simply bank branches on that territory, regardless of whether those credit institutions are Andalusian, Spanish from another autonomous community, or even from another Member State. In support of its reasoning, the Junta de Andalucía cites the judgments of the Court of Justice of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 22) et seq., and of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670).

The Junta de Andalucía argues that, in accordance with the case-law of the Court of Justice of the European Union, the ultimate aim of the principle of free movement is the protection of the internal market, which, in matters relating to taxation, precludes, *inter alia*, the adoption of measures which fragment that market by creating differences between residents and non-residents without proper justification. The Junta de Andalucía contends that, therefore, the autonomous communities are entitled to create taxes or tax measures provided that these are not contrary to the freedom of movement, which will occur where, in addition to amounting to an obstacle to free movement, such taxes or tax measures cannot be justified or can be justified but are disproportionate in relation to their aim.

The Junta de Andalucía submits that, therefore, the first point to be determined is whether a measure like that laid down in Article 6(7)(2) and (3) of the Andalusian Law on the tax on deposits in credit institutions, pursuant to which it is possible to

reduce the amount payable in respect of a regional tax by making certain investments in the autonomous community, constitutes a barrier to the free movement of, in this case, capital, or has a genuine impact on the location of undertakings, thereby infringing the freedom of establishment. If that barrier or restriction is confirmed, it will then be necessary to examine whether any justification exists which would render the measure lawful and, moreover, whether that measure is proportionate.

The Junta de Andalucía submits that, on that basis, it can be concluded that the tax on the deposits of credit institutions does not constitute a barrier to freedom of movement, essentially because it is not levied on transactions but rather on the volume of deposits collected by taxable persons liable to the tax, meaning that it is not a measure liable to affect the movement of capital. The Junta de Andalucía adds that, in any event, the deductions referred to in Article 6(7)(2) and (3) do not create any difference in treatment between residents and non-residents in the autonomous community and, therefore, between Spaniards and nationals of other EU Member States, since its application is not dependent on the location of the registered office of the bank and instead it applies on an equal basis to all branches which are situated in Andalusia and are therefore subject to the tax.

The Junta de Andalucía contends that it must also be ruled out that the high amount of the deduction laid down in the provision concerned of Law 11/2010 means, de facto, that banks are required to make investments in certain socially useful projects, thereby limiting the free movement of capital. The Junta de Andalucía submits that this is an incentive or measure which is intended to encourage the reinvestment of profits in the autonomous community without, therefore, impeding other alternative investments.

In particular, as regards the deduction of EUR 200 000, the Junta de Andalucía maintains that this fulfils the requirements relating to the existence of a justification for the different treatment and the proportionality of the measure to the aim pursued, in view of the fact that the IDECA has a fiscal and also a non-fiscal basis because not only does it have the ultimate purpose of raising revenue but it also has the primary objective of encouraging investment in the autonomous community and promoting regional saving.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

4 As regards the first question referred for a preliminary ruling, the referring court, partially allowing the appellant's arguments, sets out its uncertainties relating to the compatibility of the IDECA with the freedoms referred to and, accordingly, with Articles 49, 56 and 63 TFEU which guarantee those freedoms, because an examination of the tax and its essential elements, especially the rate of tax in relation to the scope of the deductions, in particular the general deduction of EUR 200 000 for banks with their headquarters in Andalusia, leads to the conclusion that it is a tax intended de facto to be levied on banks which do not

have their headquarters in that autonomous community, including those which have their headquarters in other Member States of the European Union, to the extent that the provision itself stipulates that the deductions are to exceed the full amount of tax (Article 6(7)(4)). The referring court observes that the general deduction is so significant in relation to the amounts of tax provided for that it in fact transforms the nature of the tax, converting it into a tax on non-resident banks. That court expresses the same view in relation to the specific deductions intended to encourage investments in the autonomous community, in some cases targeted exclusively at a type of entity — savings banks or cooperative banks; it takes the view that there is de facto discrimination between credit institutions depending on whether they have a connection to the regional interests of Andalusia.

5 By the second question, the referring court asks the Court of Justice about the nature of the IDECA. In particular, it asks for clarification of whether the IDECA must be categorised as an indirect tax even though it is classified as a direct tax under Article 6(2) of Andalusian Law 11/2010, and whether, in that case, it is compatible with VAT, in the light of the provisions of Articles 401 and 135(1)(d) of the VAT Directive, regard being had to the fact that that tax is levied on the holding of deposits and these are subject to VAT, although exempt.