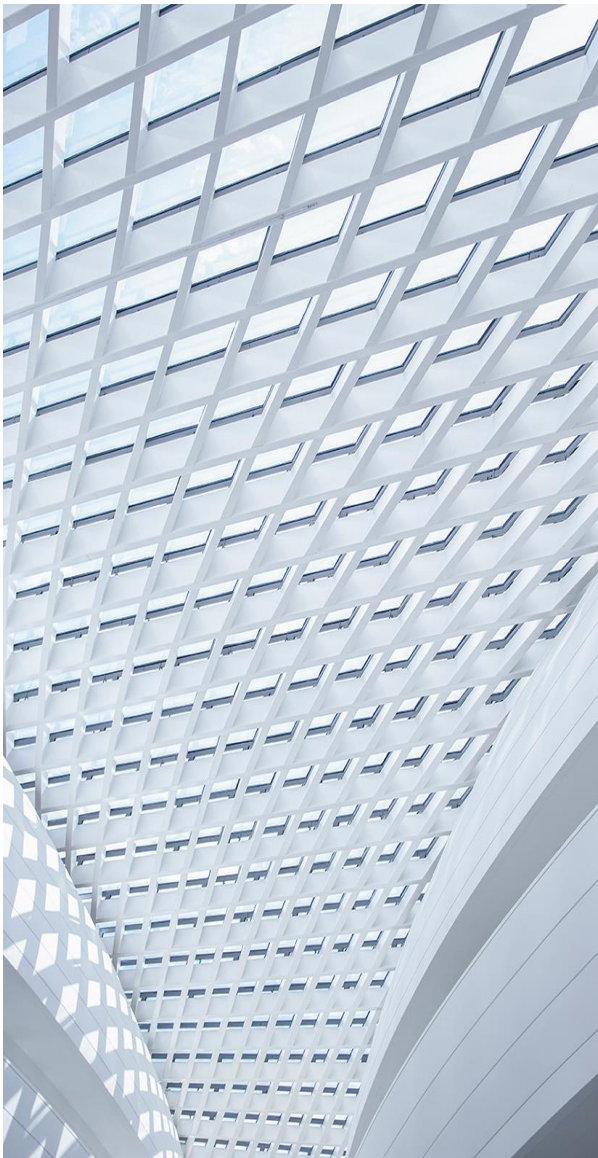

CJEU: Stamp duty on fees for placing bonds and commercial paper on the market

Incompatibility with the Capital Raising Directive

Portugal - Legal Update

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Key aspects

- > The Court of Justice of the European Union (“CJEU”) has confirmed that imposing stamp duty—as defined in paragraph 17.3.4 of the General Stamp Duty Table (“GSDT”)—on fees charged for placing on the market negotiable securities, such as bonds and commercial paper, is incompatible with article 5.2.b) of the Capital Raising Directive (“CRD”).
- > This incompatibility is not contingent on any legal requirement for the service in question to be provided by third parties.
- > Recently, the CJEU ruled (in Case C-656/21) that imposing stamp duty on fees for marketing services connected to new capital contributions for subscribing newly issued fund units is also incompatible with the CRD.



Incompatibility with CRD

In a reasoned decision dated July 19, 2023, within the scope of Case C-335/22, the CJEU ruled that imposing stamp duty on fees for placing securities (such as bonds and commercial paper) on the market is contrary to Council Directive 2008/7/EC of February 12, 2008, concerning indirect taxes levied on the raising of capital (the “CRD”). Similarly, on December 22, 2022, the CJEU had already followed this line of reasoning in case *IM Gestão de Ativos* (Case C-656/21) regarding stamp duty on fees for marketing services connected to new capital contributions aimed at subscribing newly issued fund units.

In short, under paragraph 17.3.4 of the GSDT, stamp duty is imposed on any “fees and payments for financial services, including amounts relating to card-based payment transactions” charged by financial entities.

In turn, article 5.2.b) of the CRD states the following:

“Member States shall not subject the following to any form of indirect tax whatsoever: (...) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.”

When questioned whether the stamp duty imposed on the above fees is compatible with article 5.2.b) of the CRD, the CJEU (reiterating the ruling in Case C-656/21 and in line with the established caselaw) reaffirmed:

- the need for a broad interpretation of the prohibition of indirect taxes on the raising of capital (other than capital contributions) established in the CRD, in order to ensure its effective application;
- that the market placement—intended to inform the public about negotiable securities offers and promote their subscription and acquisition—is so closely linked to the issuance and placement of securities in circulation, within the meaning of the CRD, that it must be considered an integral part of an overall transaction from a raising-of-capital perspective; and
- that this link is in no way contingent on the existence of a legal requirement for this service to be provided by third parties.

This opens the door for taxpayers—using the administrative and judicial proceedings available and considering the applicable deadlines—to request the recovery of any stamp duty paid on fees charged for placing negotiable securities on the market, on the grounds that it is incompatible with the CRD.



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