

Case C-685/23**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:**

15 November 2023

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Portugal)

Date of the decision to refer:

10 November 2023

Applicant:

Corner and Border SA

Defendant:

Autoridade Tributária e Aduaneira

Subject matter of the main proceedings

This request for a preliminary ruling arises in the context of a dispute between Corner and Border SA ('C&B'), on the one hand, and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal; 'the Tax Authority'), on the other, in which the former is seeking a declaration of unlawfulness in respect of – and the consequent setting aside of – an assessment for stamp duty made on 27 January 2022, for an amount of EUR 2 093 400, in connection with a number of guarantees provided for a series of debentures intended to finance payment of the purchase price of the shares in two companies and to refinance the debt of those companies.

Subject matter and legal basis of the request

This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) and Article 6(1)(d) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11).

Questions referred for a preliminary ruling

- (1) Must Article 5(2)(b) of Council Directive 2008/7/EC of 12 February 2008 be interpreted as precluding taxation in the form of stamp duty on guarantees consisting of pledges of shares, bank account balances and shareholder loans, and of transfers of credits by way of collateral, provided in relation to a transaction to issue debentures?
- (2) Would the answer to the first question referred differ according to whether the provision of the guarantees constitutes a legal obligation or whether it is optional and has been agreed voluntarily?
- (3) Would the answer to the first question referred be different where the guarantees were provided in the context of a transaction to issue debentures, subject to private subscription by a bank, whose position as subscriber may be transferred at the discretion of the issuing entity, even if such a transfer is subject to certain conditions and to penalties/commissions?
- (4) Must Article 6(1)(d) of Council Directive 2008/7/EC of 12 February 2008 be interpreted as meaning that it includes guarantees consisting of pledges of shares, bank account balances and shareholder loans, and of transfers of credits by way of collateral, provided in relation to a transaction to issue debentures falling within the scope of Article 5(2)(b) of that directive?

Provisions of European Union law relied on

Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital: Article 1, Article 5(2)(a) and (b) and Article 6(1)(d)

Judgment of 19 October 2017, *Air Berlin*, C-573/16, EU:C:2017:772, paragraph 32

Judgment of 22 December 2022, *IM Gestão de Ativos and Others*, C-656/21, EU:C:2022:1024, paragraph 28

Order of 19 July 2023, *A (Tax on the marketing of securities)*, C-335/22, EU:C:2023:603, paragraphs 24 to 28

Provisions of national law relied on

Código do imposto do selo (Stamp Duty Code): Article 1, and item 10.3 of the Tabela Geral do Imposto do Selo (Schedule of Stamp Duties)

Article 1

Objective scope

1. Stamp duty shall be charged on all transactions, contracts, documents, securities, papers and other legal matters or situations provided for in the Schedule of Stamp Duties, including transfers of assets free of charge.

[...]

10. Debenture guarantees, whatever their nature or form, in particular, bill guarantees, security, autonomous bank guarantees, collateral security, mortgages, pledges and contingency insurance, except where they are substantially incidental to contracts already subject to taxation under this schedule and are created at the same time as the guaranteed debenture, even if that is in a different instrument or security, for its respective value, according to the term [of the guarantee], with any extension to the term of a contract being regarded as a new transaction:

[...]

10.3 Guarantees which are not subject to a term or have a term of five years or more 0.6%.

Succinct presentation of the facts and procedure in the main proceedings

- 1 C&B is a Portuguese company limited by shares, having its registered office in Lisbon and whose shares are wholly owned by ONEX RENEWABLES Sàrl, a limited liability company recorded in the Luxembourg Trade and Companies Register (RCS Luxembourg) under number B255771 and having a similar Portuguese company identification number ('ONEX').
- 2 On 21 July 2021, ONEX acquired from EDP RENEWABLES, SGPS, SA, a Portuguese company limited by shares ('EDPR'), all of the share capital of ÉOLICA DO SINCELO, SA, a Portuguese company limited by shares and having its registered office in Oporto ('ES') and of ÉOLICA DA LINHA, SA, a Portuguese company limited by shares and having its registered office in Oporto ('EL').
- 3 On 29 July 2021, ONEX assigned to C&B its contractual position in the contract for the purchase of the shares in ES and EL mentioned in the previous paragraph.
- 4 On 27 January 2022, C&B concluded a financing agreement known as the Facilities Agreement, under which it issued a series of debentures, made up of registered debentures held in book-entry form, with a face value of EUR 100 000 per security, for a total amount of EUR 348 900 000, divided into two classes of debentures ('A' and 'B'), which were subscribed in their entirety by BANCO SANTANDER TOTTA, SA ('BST').
- 5 The Facilities Agreement established that C&B, in its capacity as the issuing entity, could decide to transfer the contractual position of subscriber assumed by BST, subject to the payment of penalties/commissions.

- 6 The debentures issued had to be registered with, and placed in the custody of, Interbolsa, in its capacity as a Comissão dos Valores Mobiliários (Securities Commission) management company for settlement systems and centralised systems for securities.
- 7 The Facilities Agreement was concluded in order to finance payment of the purchase price of the shares in ES and EL and to refinance the debt of those companies.
- 8 In order to guarantee compliance with all of the obligations and liabilities assumed under the Facilities Agreement, ONEX, C&B, ES and EL provided certain security interests or personal guarantees under a contract known as the Security Agreement, concluded between those companies, in their capacity as guarantors, and BST, in its capacity as beneficiary and security agent.
- 9 Under the Security Agreement, ONEX provided the following guarantees and guarantee commitments:
 - first-ranking pledge over the shares in C&B and over the corresponding inherent rights;
 - promise of a pledge over new shares issued by C&B and over the corresponding inherent rights;
 - first-ranking pledge over any existing credits (resulting from ancillary contributions, additional contributions, loans or other subordinated debts, other types of quasi-capital or other forms of financing in kind or in cash (shareholder loans)) belonging to ONEX, in its capacity as the parent company of C&B; and
 - promise of a pledge over future shareholder loans obtained by ONEX.
- 10 Under the Security Agreement, C&B provided the following guarantees and guarantee commitments:
 - first-ranking pledge over the shares in ES and EL and over the corresponding inherent rights;
 - promise of a pledge over new shares issued by ES and EL and over the corresponding inherent rights;
 - first-ranking pledge over any existing shareholder loans belonging to C&B, in its capacity as the parent company of ES and EL;
 - promise of a pledge over future shareholder loans obtained by C&B.
 - first-ranking pledge over any credits belonging to C&B and capable of being pledged, including the right to receive amounts under the ‘Hedging Agreement

Rights’, ‘Project Document Rights’ and ‘Insurance Agreement Rights’ provided for in the Security Agreement;

- transfer by way of guarantee of any credits obtained by C&B and which are not included in the pledge set out in the previous indent, including the right to receive amounts under the ‘Future Hedging Agreement Rights’, ‘Future Project Document Rights’ and ‘Future Insurance Agreement Rights’ provided for in the Security Agreement;
 - first-ranking pledge over the balance of the bank accounts belonging to C&B on the date on which the Security Agreement was concluded; and
 - promise of a first-ranking pledge over the balance of new bank accounts opened by C&B after the conclusion of the Security Agreement.
- 11 Under the Security Agreement, ES and EL provided the following guarantees and guarantee commitments:
- first-ranking pledge over the balance of the bank accounts belonging to those companies on the date on which the Security Agreement was concluded;
 - promise of a first-ranking pledge over the balance of new bank accounts opened by those companies after the conclusion of the Security Agreement;
 - first-ranking pledge over any credits belonging to those companies and capable of being pledged, including the right to receive amounts under the ‘Project Document Rights’ and ‘Insurance Agreement Rights’ provided for in the Security Agreement; and
 - transfer by way of guarantee of any credits obtained by those companies and which are not included in the pledge set out in the previous indent, including the right to receive amounts under the ‘Future Project Document Rights’ and ‘Future Insurance Agreement Rights’ provided for in the Security Agreement.
- 12 The conclusion of the Security Agreement and the provision of the guarantees listed above formed necessary and essential requirements for the conclusion of the Facilities Agreement and for the consequent issuance of the series of debentures.
- 13 On 27 January 2022, the notary who drew up and authorised the instrument relating to the Facilities Agreement and the Security Agreement calculated the stamp duty in accordance with item 10.3 of the Schedule of Stamp Duties, applying a rate of 0.6% to the value of EUR 348 900 000, thereby resulting in a tax liability of EUR 2 093 400.
- 14 C&B authorised the amount of EUR 2 093 400 to be debited from its bank account.

- 15 On 3 August 2022, C&B lodged an appeal for reconsideration of the stamp duty assessment.
- 16 On 3 December 2022, the Tax Authority having said nothing on the matter, the required period of time had elapsed to regard the appeal for reconsideration as having been tacitly rejected.
- 17 On 2 March 2023, C&B brought the arbitration claim which has given rise to the present proceedings.

The essential arguments of the parties in the main proceedings

- 18 These proceedings concern the taxation in the form of stamp duty, in application of item 10.3 of the Schedule annexed to the code regulating that tax, of all of the above-mentioned guarantees, provided in relation to the series of debentures agreed by C&B and BST in order to finance payment of the purchase price of the shares in ES and EL and to refinance the debt of those companies.
- 19 In the arbitration claim, C&B principally argues that the assessment for stamp duty violates EU law, in particular, Article 5(2)(b) of Directive 2008/7, providing that certain transactions should not be subject to taxation, and, secondarily, that that assessment infringes national law, a matter which it is the responsibility of the referring court to determine.
- 20 With regard to the violation of EU law, C&B argues that the taxation of the guarantees provided in order to formalise the series of debentures is unlawful, as it infringes the provisions of Article 5(2)(b) of Directive 2008/7. It asserts that the objective pursued by that directive is to prohibit the taxation of all transactions, including ancillary transactions, relating to capital raising operations. According to C&B, even though the guarantees provided were agreed voluntarily and freely with BST, they were an essential requirement for the viability of the series of debentures. In that regard, C&B maintains that the guarantees constituted formally autonomous transactions, but relating, from a functional and financial point of view, to the issuance of debentures, such that taxing them in the form of stamp duty would equate to taxing the entirety of the capital raising viewed as a whole.
- 21 C&B also maintains that the exception under Article 6(1)(d) of Directive 2007/8 to the prohibition set out in Article 5(2)(b) of that same directive only includes guarantees created against real property and, therefore, it is not applicable to the present case, given that the guarantees forming the subject matter of the present proceedings are fundamentally pledges and promises of pledges over shares, bank account balances and shareholder loans and transfers of credits by way of guarantee.
- 22 For its part, the Tax Authority asserts that, in the present case, the issuance of debentures accompanied by the provision of guarantees is materially equivalent to the conclusion of a bilateral loan agreement secured with collateral, since the

debentures issued were negotiated directly with a bank and there could be no expectation that such securities were principally destined to be traded on the market. Accordingly, it maintains that the taxation in the form of stamp duty of the guarantees provided cannot give rise to ‘discrimination, double taxation and disparities which interfere with the free movement of capital’ (recital 2 of Directive 2008/7) and, therefore, there is no basis for relying on the prohibition imposed by Article 5(2)(b) of Directive 2008/7.

- 23 Moreover, according to the Tax Authority, the guarantees provided by C&B were not a valid requirement for the issuance of the debentures they were intended to protect (that is, they were not mandatory), nor may they be regarded as an incidental transaction (as would be the case with the recording of the issue in the relevant ledger, registration of the debenture holders, the possible certification of company minutes, inclusion in trade registers and the publication of the resolutions to issue [the debentures] adopted by the company), such that they do not fall within the scope of the prohibition provided for in Directive 2008/7.
- 24 The Tax Authority further argues that, in the present case, the exception provided for in Article 6(1)(d) of Directive 2007/8 is, in any event, applicable, as the concept of ‘other charges on land or other property’ referred to in that provision includes the pledging of collateral and the wording of the provision does not imply that it is confined to rights created over real property.

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

- 25 According to the referring court, it must, therefore, be determined whether the guarantees listed in paragraphs 9 to 11 above, provided to ensure the performance of, and safeguard compliance with, all of the obligations and liabilities arising from the series of debentures agreed by C&B and BST, constitute ‘formalities relating’ to the series of debentures, for the purposes of Article 5(2)(b) of Directive 2008/7.
- 26 With regard to the interpretation of that provision, the referring court refers to the case-law of the Court of Justice contained in the judgments given in Case C-573/16 (paragraph 32) and Case C-656/21 (paragraph 28) and in the order made in Case C-335/22 (paragraphs 24 to 28), from which, according to the referring court, it emerges that the ‘formalities relating’ to the loans included in the prohibition on taxation contained in Article 5(2)(b) of Directive 2008/7 are those which are closely related [to them], that is, those which are integrated into or fall within a capital raising operation viewed as a whole.
- 27 The referring court emphasises that, notwithstanding the breadth of the interpretation which emerges from the above-mentioned case-law of the Court of Justice, the truth is that the ‘formalities relating’ referred to in those judgments – clearing services relating to the sale of shares on a stock exchange and services relating to the marketing of shares in collective investment undertakings – differ from each other and also from those forming the subject matter of the present

case, which concerns the provision of guarantees in the context of the subscription of debentures.

- 28 Given that those judgments make no reference to the prohibition of indirect taxation in relation to the provision of guarantees in respect of capital raising operations, nor to the ancillary nature of the provision of such guarantees in the context of the operation viewed as a whole, the referring court considers that that case-law of the Court of Justice cannot simply be extrapolated to the present case.
- 29 Nor, moreover, was the applicability of the exception provided for in Article 6(1)(d) of Directive 2008/7 discussed in those cases and, in particular, what is to be understood by ‘other charges on land or other property’, in view of the apparent differences in meaning which emerge from the different wordings and versions of that directive.
- 30 The differences or conflicting positions as regards the interpretation of EU law are clearly expressed in the opinions defended by the parties in their submissions, such that both C&B and the Tax Authority have requested that questions be referred to the Court of Justice for a preliminary ruling.
- 31 The referring court recalls that, in accordance with the case-law of the Court of Justice, the reference for a preliminary ruling is an instrument of judicial cooperation, whereby the national court and the Court of Justice, within the ambit of their respective competences, must cooperate to reach a decision which ensures the uniform application of EU law in all of the Member States. It further recalls that the national court is entitled not to have recourse to that instrument on the basis of the *acte clair* doctrine.
- 32 In view of all of the considerations set out above, the referring court considers that the prerequisites for the application of the *acte clair* doctrine are not satisfied and, therefore, there is an obligation to refer questions to the Court of Justice for a preliminary ruling on interpretation and on the compatibility of the provisions of national law with the provisions of EU law.