

Case C-416/22

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:

21 June 2022

Referring court:

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

Date of the decision to refer:

20 June 2022

Applicant:

EDP – Energias de Portugal, S.A.

Defendant:

Autoridade Tributária e Aduaneira

Subject matter of the main proceedings

The issue raised in the present case is whether, in accordance with the case-law of the Court of Justice and in the context of the exemption from the Imposto do Selo (stamp duty) of transactions involving (i) an offer for the cash purchase of debentures, (ii) the issue of debentures and (iii) a public offer for subscription of shares, those transactions must be considered ‘overall transactions’, such that the expression ‘formalities relating [to]’ [used in Article 5(2)(b) of Council Directive 2008/7/EC of 12 February 2008] those transactions for the raising of capital covers financial intermediation services purchased in relation to those transactions, and, accordingly, whether such services must be deemed to be excluded from the scope of the stamp duty provided for under national law.

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

Interpretation of EU law, in particular Article 5(2)(b) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11) – Article 267(b) TFEU

Questions referred for a preliminary ruling

1. Must transactions involving (i) an offer for the cash purchase of debentures, (ii) the issue of debentures and (iii) a public offer for subscription of shares be considered ‘overall transactions’ within the meaning of the case-law of the Court of Justice resulting from the judgments in *Isabele Gielen* (C-299/13) and *Air Berlin* (C-573/16)?
2. Must the expression **formalities relating thereto**, used in Article 5(2)(b) of Council Directive 2008/7/EC of 12 February 2008, be interpreted as covering the purchase of financial intermediation services that are ancillary to transactions involving (i) an offer for the cash purchase of debentures, (ii) the issue of debentures and (iii) a public offer for subscription of shares?
3. Can Article 5(2)(b) of Council Directive 2008/7/EC of 12 February 2008 be interpreted as precluding the levying of stamp duty on fees charged for financial intermediation services provided by a bank in relation to (i) the repurchase of debt securities, (ii) the issue and placing on the market of negotiable securities and (iii) the increase of capital through a public subscription of the shares issued, where such services include the obligation to identify and contact investors in order to distribute transferrable securities, receive subscription or purchase orders and, in some cases, purchase the transferrable securities to which the offer relates?
4. Must the above questions be answered differently depending on whether the provision of financial services is required by law or optional?

Provisions of European Union law relied on

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

Provisions of national law relied on

Articles 1(1) and 4(2)(c) of the Código do Imposto do Selo (Code on stamp duty; ‘the CIS’)

Tabela Geral do Imposto do Selo (General scale for stamp duty; ‘the TGIS’), annexed to the CIS, point 17.3.4

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a commercial company established in Portuguese territory that engages in the direct or indirect promotion, revitalisation and management of undertakings and activities in the energy sector, at national and international level, in order to ensure the growth and improved performance of all the companies in its group.
- 2 The applicant is considered a 'major taxpayer' for the purposes of Article 68-B of the Lei Geral Tributária (General Law on Taxation).
- 3 In the 2019 and 2020 financial years, the applicant calculated that the total amount of stamp duty payable, in accordance with point 17.3.4 of the TGIS, was EUR 1 383 137.62 on the value of fees owed to resident and non-resident credit institutions for intermediation services supplied by those institutions in relation to transactions involving offers for the cash purchase of debentures, transactions involving the placing and subscription of new debentures issued during those financial years, and the increase in capital by public subscription. Point 17.3.4 of the TGIS provides for the application of a rate of 4% to 'other fees and charges for financial services'.
- 4 The applicant carried out a self-assessment for stamp duty in a number of contexts.
- 5 First, specifically in the context of a transaction involving an offer, by the applicant, for the cash purchase of debentures issued by a company in its group (EDP Group), the applicant offered to agree to repurchase transferrable debt securities issued by that company to the respective holders of securities in the nature of bonds. The purpose of the offer was, in particular, to optimise EDP's portfolio of financial liabilities.
- 6 In connection with that transaction, the applicant concluded a dealer manager agreement with credit institutions, pursuant to which the latter undertook, inter alia, to provide services to identify and make contact with the debenture holders concerned, to whom they would forward the applicant's purchase offer.
- 7 The applicant paid fees for the provision of those services, the amount of which was indexed to the number of debentures actually acquired in the offer and was subject to stamp duty, in respect of which the applicant carried out a self-assessment.
- 8 Second, in the specific context of a transaction involving the issue of debentures, the applicant concluded a contract with a number of non-resident banks (deal managers) for the placing and subscription on the market of debentures issued by it.
- 9 Pursuant to that contract, the deal managers undertook, inter alia, to subscribe to and acquire directly the debentures issued or, alternatively, to make efforts to

sound out the market with a view to identifying a buyer to subscribe partially or fully to the debentures issued. As consideration, the applicant paid intermediation fees in an amount equivalent to a percentage indexed to the amount of the issue. The amount of the fees was subject to stamp duty, which was paid by the applicant.

- 10 Third, in the specific context of a contract for the placing and subscription on the market of transferrable securities representing its capital, the applicant carried out the relevant transaction with a group of non-resident banks.
- 11 The aim of that increase in capital was to raise the capital needed to finance the acquisition by EDP, inter alia, of 100% of another company's renewable energy business.
- 12 In addition to providing the applicant with assistance to determine the price of the public offer for subscription of the transferrable securities concerned, the banks that participated in the transaction also supplied negotiation services for the subscription of the offer in question by potential investors. As consideration, the applicant paid intermediation fees. The fees were subject to stamp duty, which was paid by the applicant.
- 13 The tax assessments referred to in the previous paragraphs were carried out in the following periods: January to March 2019, January 2020, March to June 2020 and August to September 2020.
- 14 On 15 February 2021, the applicant brought an action for review in respect of the self-assessments for stamp duty, for the total amount of EUR 1 383 137.62, relating to the stamp duty paid by the applicant on the fees owed to resident and non-resident credit institutions for financial services supplied in connection with the offer for the cash purchase of debentures, the issue of debentures and the increase in capital described above. The assessments were carried out in accordance with point 17.3.4 of the TGIS.
- 15 In that action for review, the applicant sought the annulment of the assessments in question and the resulting refund of the duty paid, together with default interest on that amount.
- 16 By letter of 27 May 2021, the applicant was informed that the intention was to dismiss its action for review and that it had the right to participate in the decision through a prior hearing, a right which it did not exercise.
- 17 The applicant was informed by letter of 13 July 2021 that a decision dismissing the action for review had been adopted. That decision found that the total amount of EUR 1 303 137.62 was owed in respect of the 2019 and 2020 financial years, since the fees examined fulfilled cumulatively the objective and subjective conditions laid down in point 17.3.4 of the TGIS and, accordingly, were subject to stamp duty pursuant to Article 1(1) of the CIS; therefore, no unlawfulness had been identified.

- 18 On 12 October 2021, the applicant filed with the referring court, the Tribunal Arbitral Tributário (Tax Arbitration Tribunal, Portugal), an application for arbitration proceedings which are being heard by that tribunal. The defendant is the Autoridade Tributária e Aduaneira (Tax and Customs Authority).
- 19 The applicant seeks a ruling from the referring court on the decision dismissing the action for review and on the lawfulness of the disputed assessments, claiming that the decision dismissing the action for review and the underlying assessments for stamp duty should be declared unlawful and should also be annulled on the grounds that they breach EU law; in addition, the applicant seeks a refund of the amounts paid but not due together with the other legal consequences, in particular, the payment of default interest.
- 20 Furthermore, the applicant also lodged with the referring court a request that it make a request for a preliminary ruling in the event that any uncertainties remain.
- 21 On 4 February 2022, the defendant lodged a defence claiming that the application for arbitration proceedings should be ruled inadmissible and that it should be excused from meeting any of the claims.

Essential arguments of the parties in the main proceedings

The applicant's arguments

- 22 The applicant submits that the assessments for stamp duty carried out under point 17.3.4 of the TGIS, as a result of which that duty was levied on the fees paid to a number of banks which acted as intermediaries in the transactions in question, are contrary to the provisions of Directive 2008/7/EC in view of the fact that such fees are formalities relating to transactions which should not be subject to indirect taxation, in so far as the taxation of those transactions limits economic development and access to the financial resources needed for the raising of capital.
- 23 The applicant claims its need for financing led it to use the financial intermediation services for which it paid the fees.
- 24 Those fees were paid as consideration for services purchased solely in relation to the (main) transactions carried out by the applicant, involving the offer for the purchase of debentures, the issue of debentures and the increase in capital. It is clear, therefore, that the intermediation services performed were not an aim in themselves since they were completely dependent on the main transactions with which they were associated.
- 25 Accordingly, since the formalities concerned relate [to certain transactions] within the meaning of EU law, the fees at issue are not subject to stamp duty.

- 26 Article 1(1) of the CIS provides that stamp duty ‘shall apply to all acts, contracts, documents, instruments, [commercial] papers and other facts or legal situations provided for in the [TGIS], including transfers of property free of charge’, while point 17.1 of the TGIS provides that the use of credit after it has been granted is to be subject to that tax; in other words, financing is, as a general rule, subject to that tax.
- 27 The applicant claims that point 17.3.4 of the TGIS provides that ‘other fees and charges for financial services’ are to be subject to stamp duty, while Article 4(2)(c) of the CIS provides that the fees paid by the applicant are to be subject to stamp duty in Portugal, even though those fees were charged by credit institutions or financial companies established abroad.
- 28 The applicant adds that, in accordance with Article 3(3)(g) of the CIS, it is the applicant itself which must ultimately bear the tax burden, which means that, under domestic law, no provision exists which provides that the financial intermediation fees at issue which it paid are not subject to or are exempt from tax, which is why those fees are subject to and not exempt from stamp duty if domestic law alone is applied.
- 29 However, the applicant maintains that that is not the case, citing in that respect the exemption from tax provided for in Directive 2008/7/EC, which governs the levying of indirect taxes by Member States, including stamp duty, in relation to (i) contributions of capital to capital companies, (ii) restructuring operations involving capital companies and (iii) the issue of certain securities and debentures (Article 1 of Directive 2008/7/EC).
- 30 In that connection, the applicant relies on Article 5(2) of Directive 2008/7/EC, in accordance with which Member States are not to subject the transactions listed therein to any form of indirect tax whatsoever.
- 31 The applicant submits that the exemption of the transactions referred to in Article 5(2)(a) and (b) of Directive 2008/7/EC from indirect tax is the general rule, to which the exceptions laid down in Article 6(1) of that directive apply. However, the applicant claims that it makes no sense to assert, as the defendant does, that, if the EU legislature had intended not to make charges resulting from contracts for the issue of debentures and commercial papers received by credit institutions in their capacity as financial intermediaries subject to stamp duty, it would have been sufficient for it to provide for this in Article 5(2)(a) and (b) of Directive 2008/7/EC, something which it did not do.
- 32 In fact, the applicant submits that the situation is exactly the opposite: since the EU legislature opted not to make all transactions of certain types taxable – in particular, transactions which constitute formalities relating to those explicitly mentioned in Article 5(2) of Directive 2008/7/EC – and specified the exceptions, if it had intended to make the charges at issue subject to stamp duty, it would have

been sufficient for it to have indicated as much in the different points of Article 6(1) of that directive, something which it did not do.

- 33 Thus, in the applicant's submission, both the fees in respect of which it paid stamp duty and the services underlying those fees may be covered by the concept of formalities relating to the offers for the cash purchase of debentures, the issue of debentures and the increase in capital, from which it follows that that duty may not be levied on those transactions.
- 34 The applicant claims that the exemption from indirect taxes – such as stamp duty – in accordance with Directive 2008/7/EC has already been examined extensively in the case-law of the Court of Justice. It follows from that case-law that the best interpretation of the case of liability provided for in that directive is that put forward by the applicant.
- 35 In that respect, the applicant submits that the interpretative differences regarding the extent and scope of the concept of formalities relating [to certain transactions], referred to in Directive 2008/7/EC, can be resolved only in the manner indicated by the Court of Justice. That means that the prohibition on taxing transactions for the raising of capital must also apply to transactions that should be considered an integral part of an overall transaction from the point of view of the raising of capital. The applicant refers in that connection, *inter alia*, to the judgment of 19 October 2017, *Air Berlin* (C-573/16, EU:C:2017:772, paragraph 36), in which the Court of Justice held that the prior transfer of all the shares in an undertaking to a central depository institution for transferrable securities, which has no impact on the beneficial ownership, cannot be considered to be a transfer of securities forming an independent transaction on which duty may be charged under Article 12(1)(a) of the then Directive 69/335. That transfer must be regarded as merely an incidental transaction, integral to the transaction admitting the shares to listing on the stock exchange, which, in accordance with Article 11 of Directive 69/335, could not be subject to any form of taxation whatsoever.
- 36 The applicant maintains that it is quite clear that the fees payable for the financial intermediation services that it purchased, which were absolutely essential in connection with the transactions involving the acquisition of debentures, the issue of debentures and the public offer for subscription of shares, are covered by the concept of formalities relating to those transactions to which Directive 2008/7/EC refers.
- 37 The applicant adds that, as regards the increase in capital carried out, the purchase of the services in question and, accordingly, the payment of the fees due were not a decision taken at its own discretion but rather an obligation laid down in Article 113 of the *Código dos Valores Mobiliários* (Securities Code), non-compliance with which would have resulted in the prohibition of the increase in capital.

- 38 The applicant submits that point 17.3.4 of the TGIS, interpreted as meaning that stamp duty must be levied on fees payable for financial intermediation services which constitute formalities relating to transactions for the raising of capital, to which the exemption from taxation under Article 5(2) of Directive 2008/7/EC applies, should be regarded as unconstitutional, since it infringes the principle of the primacy of EU law which is referred to in the Portuguese Constitution.
- 39 Accordingly, the applicant submits that the defendant is required to interpret the national provisions in accordance with EU law, without creating obstacles and without jeopardising the practical effect of directly applicable EU rules, like those resulting from the prohibition on levying stamp duty in relation to the transactions concerned or transactions relating thereto.

The defendant's arguments

- 40 For its part, the defendant contends that, properly speaking, it is not the debentures or shares on which the duty is levied but rather the remuneration paid to the credit institutions by the applicant for the provision of a financial intermediation service which includes intermediation in the transfer (purchase and/or sale) of those securities to potential investors. In addition to not being prohibited, that situation is, moreover, permitted under Article 6(1)(a) of Directive 2008/7/EC. The defendant submits that the financial intermediation fees (plus the stamp duty applicable thereto) payable on account of the financial services purchased by the applicant fall within the scope of Directive 2008/7/EC and reiterates that this is not a situation that can be regarded as a formality relating to certain transactions.
- 41 The defendant contends that there are no parallels between the taxation of contributions of capital to a capital company, restructuring operations and the issue of certain securities and debentures – which is prohibited by the directive – and the taxation of financial intermediation fees – which is the matter at issue in this case.
- 42 The defendant asserts that, important as the provision of financial intermediation services may have been to the success of the transactions in question, the contracts concerned are merely incidental to and legally distinct from the transaction for the raising of capital in the strict sense and cannot be confused with that transaction. Thus, the disputed assessments, carried out in accordance with point 17.3.4 of the TGIS, are not incompatible with the provisions of Directive 2008/7/EC. Accordingly, point 17.3.4 of the TGIS is not unlawful or unconstitutional on the grounds of infringement of the principle of the primacy of EU law.
- 43 The defendant also argues that the fact that the applicant does not have a legal obligation to use the financial intermediation services the fees for which were taxed through the contested assessments for stamp duty means that the case of exemption from tax concerned is not applicable.

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

- 44 In the order for reference, the referring court refers to the judgment of the Court of Justice of 19 October 2017, *Air Berlin* (C-573/16, EU:C:2017:772), in relation to the levying of tax on certain share transfers. In the case that gave rise to that judgment, no tax was levied on contributions of capital but stamp duty was levied on certain documents which effect the transfer of shares.
- 45 The referring court draws attention to the applicant's position in the light of that case-law of the Court of Justice in accordance with which the intermediation services provided are not an end in themselves and the fees paid are formalities relating [to such transactions] which are not subject to stamp duty. The applicant draws attention to the essential and dependent nature of the financial intermediation services in relation to the (main) transactions carried out involving the offer for the purchase of debentures, the issue of debentures and the increase in capital. In particular, the applicant points out that, for the purpose of increasing capital, national law imposes the obligation to use financial intermediation services. The applicant uses the essential nature of the financial intermediation services to justify the exemption of those services from tax pursuant to Article 5(2)(b) of Directive 2008/7/EC.
- 46 The referring court states that, although the applicant's position makes sense as to the explanation and the legal framework, it continues to have doubts in relation to the position adopted by the applicant and the position adopted by the defendant.
- 47 The referring court considers that the defendant's position makes no sense, partly as a result of the hierarchy of norms, in accordance with the principle of the primacy of EU law, and partly because that position is contradictory because the defendant states that the financial intermediation services may be linked in some way to the transactions for the raising of capital.
- 48 The referring court points out that it follows from the judgment in *Air Berlin* (paragraph 31) that Article 5 of Directive 2008/7/EC must be interpreted broadly and that the prohibition of the taxation of transactions for the raising of capital also applies to transactions which are not expressly covered by that prohibition, where such taxation is tantamount to taxing a transaction forming an integral part of an overall transaction with regard to the raising of capital (paragraph 32).
- 49 However, the transactions at issue in *Air Berlin* concerned the transfer of shares (Article 5(1)(c) and (2)(a) of Directive 2008/7/EC) and differ from those at issue in this case, which concern financial intermediation services for placing debt instruments, debentures and commercial papers and for the increase in capital (Article 5(2)(b) of that directive).
- 50 Therefore, the referring court continues to harbour doubts as to the interpretation of the concept of 'formalities relating' to transactions for the raising of capital.

- 51 It follows therefrom that the matter in contention concerns the application of EU law, since it must be determined whether the transactions at issue fall within the scope of Article 5(2)(b) of Directive 2008/7/EC, as a result of which the taxation of those transactions would be prohibited and the levying of stamp duty on those transactions pursuant to a literal application of the provisions of domestic law would be incompatible with EU law.
- 52 Consequently, in accordance with Article 267 TFEU, the referring court has decided to stay the proceedings and to refer the questions set out above to the Court of Justice for a preliminary ruling.

WORKING DOCUMENT