Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 April 2014 [1]

Case C-377/13

Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, SA
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Portugal))

(Reference for a preliminary ruling — Concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU — Tribunal Arbitral Tributário — Admissibility — Directive 69/335/EEC — Indirect taxes on the raising of capital — Capital duty — Exempted transactions — Possibility of re-introducing capital duty)

1. The present case concerns the possibility of the Portuguese legislature re-introducing stamp duty — abolished in 1991 — on increases in the share capital of capital companies, pursuant to Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, [2] in the version resulting from Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335. [3] This issue would appear to be relatively easy to resolve on the basis of the directive and previous case-law. The more serious problem concerns the admissibility of the request for a preliminary ruling submitted in this case on account of the special nature of the body which is making it.

2. Therefore, in this Opinion I will first address the issue of the jurisdiction of the Court of Justice to reply to the question referred for a preliminary ruling and then deal briefly with the substance of the case and put forward a proposed decision.

Legal framework

EU law

3. The rules which are relevant *ratione temporis* in this case are the provisions of Directive 69/335, in the version resulting from Directive 85/303. Directive 69/335 unifies in the Member States the duty on contributions to capital companies which, under Article 1 thereof, are referred to as 'capital duty'.

1 — Original language: Polish.

2 — OJ, English Special Edition 1969 (II), p. 412.

3 — OJ 1985 L 156, p. 23.

4. Under Article 4(1)(c) and 4(2)(a) of Directive 69/335:

‘1. The following transactions shall be subject to capital duty:

…

(c) an increase in the capital of a capital company by contribution of assets of any kind;

…

2. The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:

(a) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;

…’

5. Article 7(1) and (2) of Directive 69/335 provides:

‘1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

…

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

…’

6. Under Article 10 of that directive:

‘Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to in Article 4;

…’

Portuguese law

Provisions governing the status of the referring body

7. According to the information contained in the order for reference and the observations of the Portuguese Government, it was possible to set up an arbitration system for tax cases on the basis of the authorisation given by Article 124 of Lei n.º 3-B/2010, de 28 de abril de 2010, Orçamento do Estado para 2010[4] (Law No 3-B/2010 of 28 April 2010 establishing the budget for 2010). That provision defines arbitration as ‘an alternative form of judicial settlement of disputes in the tax field’. Under Article 124(4)(a) to (q) of that law, arbitration is to cover any kind of dispute between taxable persons and the tax authorities.

4 — *Diário da República*, 1. seria, No 82, of 28 April 2010, p. 1466-(111).

8. Decreto-Lei n.º 10/2011, de 20 de janeiro de 2011, Regula o regime jurídico da arbitragem em matéria tributária [5] (Decree-Law No 10/2011 of 20 January 2011, approving the legal rules governing tax arbitration) was issued pursuant to the authorisation referred to in the previous paragraph. That Decree-Law lays down the jurisdiction, method of appointment and rules of procedure for courts of arbitration hearing tax cases, and also the effects of the decisions given by them and the available remedies against those judgments. The relevant provisions of Decree-Law 10/2011 will be dealt with later in my Opinion when analysing the admissibility of the reference for a preliminary ruling.

Provisions on capital duty

9. On 1 July 1984 increases in the capital of capital companies were subject in Portugal to stamp duty of 2% and capital increases made in cash were exempted from that duty. In 1991 the exemption covered increases in the capital of capital companies made in any form.

10. The provisions of Lei n.º 150/99, de 11 de setembro de 1999, Aprova o Código do Imposto do Selo [6] (Law No 150/99 of 11 September 1999 introducing the Stamp Duty Code), in the wording in force during the period from 2004 to 2006, apply in the main proceedings. Annex III to that law, entitled 'Tabela Geral do Imposto do Selo (em euro)' ('Schedule of Stamp Duties (in Euros)') sets the level of stamp duty on the individual transactions covered by it. Pursuant to Decreto-Lei n.º 322-B/2001, de 14 de dezembro de 2001 [7] (Decree-Law No 322-B/2001 of 14 December 2001), a paragraph 26 was added to that annex, subparagraph 26.3 of which is worded as follows:

'Increase in the capital of a capital company by contribution of assets of any kind; on the value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution — 0.4%.' [8]

The facts and the main proceedings

The facts, the main proceedings and the question referred

11. Between 15 December 2004 and 29 November 2006 Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA ('Ascendi'), a capital company incorporated under Portuguese law, carried out four capital increases through the conversion into capital of the claims of shareholders against the company. As a result of those transactions Ascendi paid a total of EUR 205 381.95 in stamp duty.

12. On 28 March 2008 Ascendi requested that the Autoridade Tributária e Aduaneira (Portuguese tax authority) refund the above amount, plus interest. That request was refused by decision of 6 August 2012, which forms the subject-matter of the main proceedings. On 3 December 2012 Ascendi applied for a court of arbitration to be constituted and for the above decision to be annulled.

13. The applicant pleaded that the decision of 6 August 2012 was unlawful since, in its view, the Portuguese legislature did not have the right to re-introduce in 2001 the stamp duty on increases in the capital of capital companies which had been abolished in 1991. However, in the view of the tax authority Article 7(2) of Directive 69/335 permits the introduction of capital duty on transactions which were covered by that duty on 1 July 1984 even though they were exempted from that duty after that date.

5 — *Diário da República*, 1. seria, No 14, of 20 January 2011, p. 370.

6 — *Diário da República* I seria A, No 213, p. 6264.

7 — *Diário da República* I seria A, No 288, p. 8278-(12).

8 — Paragraph 26 of the schedule of capital duties was subsequently amended and ultimately repealed, but that is not of relevance to the present case.

14. It is in this context that the Tribunal Arbitral Tributário decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 4(1)(c) and (2)(a), Article 7(1) and Article 10(a) of [Directive 69/335] preclude national legislation, such as Decree-Law No 322-B/2001 of 14 December 2001, which subjected to IS any increases in the capital of capital companies through the conversion into capital of the claims of shareholders in respect of ancillary services provided previously to the company, even if those ancillary services had been provided in cash, bearing in mind that, as at 1 July 1984, national legislation subjected those increases in capital, made in that way, to IS at the rate of 2%, and that, at the same date, it exempted from IS capital increases made in cash?'

Proceedings before the Court

15. The request for a preliminary ruling was received by the Court on 3 July 2013. Written observations have been lodged by Ascendi, the Portuguese Government, and the European Commission. The Court decided to hold a hearing, pursuant to Article 7(2) of the Rules of Procedure.

Analysis

Jurisdiction of the Court of Justice to reply to the question referred

Initial remarks

16. In the present case the admissibility of the reference for a preliminary ruling from the referring body is not contested. However, in its order for reference the Tribunal Arbitral itself acknowledges that this issue may give rise to uncertainty and advances arguments in favour of it being classified as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. The Portuguese Government and the Commission also analyse that issue in their written observations and conclude that the Court of Justice does have jurisdiction to reply to the question referred.

17. The uncertainty in this respect is connected with the fact that the Tribunal Arbitral Tributário does not form part of the basic system of general and administrative courts in Portugal, but rather constitutes an 'an alternative form of judicial settlement of disputes in the tax field', as it is defined by Law No 3-B/2010. As the very name of the referring body itself indicates, this alternative form of dispute settlement is based on the use of certain arbitration techniques in settling disputes between taxable persons and the tax authority. According to settled case-law of the Court, which I will deal with later in my Opinion, courts of arbitration established pursuant to an agreement do not constitute a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and the Court of Justice does not have jurisdiction to reply to questions which they refer for a preliminary ruling.

18. Therefore, it is necessary to examine whether the special nature of the Tribunal Arbitral Tributário excludes the possibility of that body referring questions for a preliminary ruling pursuant to Article 267 TFEU.

Exclusion of the possibility of courts of arbitration referring questions for a preliminary ruling

19. As a preliminary point, it should be noted that the mere use in the name of a body of the word 'arbitration' or 'arbitrator' does not necessarily mean that it is a court of arbitration in the strict sense of the term. It is frequently the case that bodies called upon to settle disputes in the Member States use in their activities rules of procedure which are characteristic of courts of arbitration (for example,

the possibility for the parties to appoint some members of the court, simplified procedure, and single-instance proceedings). That type of 'arbitration' must be distinguished from arbitration in the strict sense, which is based on the power (desire) to submit the dispute to a non-State (private) court. That distinction is of fundamental relevance to the body's classification from the point of view of Article 267 TFEU.

20. In its 1982 judgment in *Nordsee*[9] the Court ruled out the possibility of courts of arbitration constituted by agreement between the parties referring questions pursuant to Article 177 of the EEC Treaty (now Article 267 TFEU). In that case the Court did not consider that an arbitrator constituted a 'court or tribunal of a Member State' within the meaning of the treaty on the ground that it was too loosely connected with the established system of judicial protection in the Member State.[10] That case-law was subsequently confirmed in the judgments in *Eco Swiss*[11] and *Denuit and Cordenier*.[12]

21. According to the case-law of the Court, only bodies of the Member States or persons to whom those States have entrusted the performance of tasks relating to legal protection may make orders for reference since it is the Member States which are responsible for the application of, and compliance with, EU law in their territory. Courts of arbitration *sensu stricto* are not bodies of the Member States or persons who perform tasks relating to legal protection on behalf of those States, but private institutions.

22. At the same time, in one of the first judgments in which the Court was called on to interpret the term 'court or tribunal of a Member State' in the context of the admissibility of orders for reference, that is to say in the case of *Vaassen Göbbels* in 1966,[13] it allowed an order for reference from an arbitration body established under public law. Similar judgments were subsequently given in other cases,[14] and recently in the order in the case of *Merck Canada*[15] the Court of Justice allowed an order for reference made by a Portuguese body with a legal status similar, but not identical, to that of the Tribunal Arbitral Tributário.

23. Consequently, how should the Tribunal Arbitral Tributário be classified in the light of the above case-law?

24. I will start by saying that the essence of arbitration *sensu stricto* is its non-State nature. Courts of arbitration are private courts which are entrusted to consider and settle disputes upon the wishes of the parties and in place of State courts.[16]

25. The first of these features means that a court of arbitration derives its jurisdiction from an agreement between the parties (an arbitration clause). The parties — acting on their free will — take a decision to submit a dispute to the jurisdiction of the court of arbitration. The parties may also lay down the rules on the functioning of the court of arbitration, the rules of procedure, and also the rules under which the court of arbitration will give judgment on the substance of the dispute. Submission of a case to a court of arbitration entails the parties renouncing their right to have the case heard by a State court, that is to say the legal protection afforded by the State.[17]

9 — *Nordsee* (102/81, EU:C:1982:107).

10 — Paragraphs 10 to 13 of the judgment. Detailed consideration of the factors militating against allowing orders for reference from courts of arbitration was undertaken by Advocate General Reischl in his Opinion in *Nordsee* (EU:C:1982:31).

11 — *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 34).

12 — *Denuit and Cordenier* (C-125/04, EU:C:2005:69, paragraph 13).

13 — Judgment in *Vaassen-Göbbels* (61/65, EU:C:1966:39).

14 — See, for example, the judgment in *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383, paragraphs 7 to 9).

15 — Order in *Merck Canada* (C-555/13, EU:C:2014:92, paragraphs 15 to 25).

16 — As regards the essence of arbitration, see, for example: T.E. Carbonneau, *The Law and Practice of Arbitration*, New York 2007; T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warsaw 2008; J.P. Lachmann, *Handbuch für die Schiedsgerichtspraxis*, Cologne 2008; and A. Szumański (edit.), *Arbitraż handlowy*, Warsaw 2010.

17 — T. Ereciński, K. Weitz, op.cit., p. 21.

26. Submission of a dispute to the jurisdiction of a court of arbitration means that the parties have ruled out the jurisdiction of the State courts in that respect. If the parties had not concluded an arbitration clause, their dispute would fall within the jurisdiction of the State courts. Therefore, a court of arbitration is a private court. It should be noted that the very possibility of submitting a dispute to the jurisdiction of a court of arbitration must arise from statutory provisions. Those provisions determine inter alia what kind of dispute may be submitted to arbitration (zdatność arbitrażowa, arbitrability, arbitrabilité, Schiedsfähigkeit). In principle, they are disputes governed by private law. [18]

27. In the light of the foregoing considerations, I consider that the Tribunal Arbitral Tributário should not be regarded as a court of arbitration in the strict sense, which, for that reason alone, is not entitled to refer questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 TFEU.

28. The fact that it is a court which is not established pursuant to an agreement between the parties but rather the provisions of Portuguese law considered in points 7 and 8 above all support that conclusion. Arbitration in tax cases is a form of alternative dispute settlement in the sense that the applicant, namely the taxable person in that case, has the possibility of choosing the arbitration route or an administrative court. However, that right to chose the route to recovering claims exists in law and is enjoyed by every taxable person covered by Article 124(4)(a) to (q) of Law No 3-B/2010 and is not contingent on the parties expressing a prior desire to submit disputes to arbitration.

29. The type of legal relations for which the Tribunal Arbitral Tributário has jurisdiction, that is to say the area of taxable persons, also militates against regarding it as a court of arbitration *sensu stricto*. In that field, unlike in private-law relationships, not only the means of dispute settlement but above all the very existence of the legal relationship and the substance thereof do not result from the free wishes of the parties but are determined solely by statutory provisions which automatically link the arising of a tax obligation to specific events. Therefore, that matter does not have by nature the 'arbitrability' which allows disputes which have arisen in that respect to be submitted to a court established upon the wishes of the parties.

30. Finally, account must be taken of the fact that in the field of taxes one of the parties to the dispute is always the State tax authority exercising its public authority since the imposition and collection of taxes is today an exclusive prerogative of the State. That in itself shows that a body settling disputes in this field, such as the Tribunal Arbitral Tributário, is not a private court.

31. However, the finding that the Tribunal Arbitral Tributário is not a court of arbitration within the meaning of the case-law referred to in point 20 above does not determine whether or not that body is to be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. To answer that question, it is necessary to examine whether the other requirements arising from the Court's case-law in this regard are satisfied. Uncertainty may attach in particular to those aspects of the functioning of the body under examination in which techniques characteristic of courts of arbitration are used.

18 — In academic legal writings consideration is given primarily to whether they can be only property disputes or also non-property disputes, but the question of the arbitrability of disputes relating to tax law does not arise. See A. Szumański in: A. Szumański (edit.), op. cit., p. 8 and 9. See also B. Hanotiau, L'arbitrabilité, *Recueil des Cour de l'Académie de Droit International*, vol. 296 (2002), The Hague 2003.

Requirements which allow a referring body to be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU

32. The term 'court or tribunal of a Member State' within the meaning of Article 267 TFEU is a self-standing concept of EU law, but neither the treaty nor the Court's case-law contains a general definition of that term. In view the diversity of the bodies called upon to settle disputes in the individual Member States, consideration must also be given to whether such a definition is possible or necessary.

33. Since there is no general definition of the term 'court or tribunal', the Court is compelled — in cases of doubt — to carry out a case-by-case assessment of whether the body which referred a question for a preliminary ruling was entitled to do so.[19] However, in the case-law a set of requirements have been developed which are not decisive or exhaustive but which do provide a point of reference for determining the judicial nature of the body referring a question for a preliminary ruling. Those requirements can now be regarded as 'codified' in settled case-law[20] and were also referred to in paragraph 9 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings.[21]

34. Therefore, it is necessary to examine whether the requirements for regarding the Tribunal Arbitral Tributário as a national court or tribunal within the meaning of Article 267 TFEU are satisfied. In that regard, it should be borne in mind that, as I have pointed out, the alternative system of settling disputes in tax cases established in Portuguese law uses a number of techniques and rules of procedure which are characteristic of courts of arbitration and differ from the rules on the functioning of traditional courts. This is designed to ensure that the dispute is settled quickly and at the lowest possible cost, providing a genuine alternative to the administrative courts. That specific factor should be taken into account in considering whether or not the individual requirements are satisfied.

– Legal basis of the body's functioning and its permanent nature

35. According to settled case-law, questions for a preliminary ruling can be referred only by a body set up permanently pursuant to the law of a Member State. In my view, that condition is satisfied. As I have pointed out in point 28 above, arbitration in tax cases operates pursuant to Law No 3-B/2010 and Decree-Law No 10/2011. Those acts establish a permanent system of tax arbitration and lay down in detail the rules governing the functioning thereof.

36. The members of the court are appointed individually for each case at the request of the taxable person concerned, but the right of that person to request the constitution of a court of arbitration and the method by which its members are appointed are laid down in law. In this respect the taxable person's request is merely the action which triggers those provisions.

19 — A detailed, but critical, analysis of the relevant case-law in that regard was put forward by Advocate General Ruiz-Jarabo Colomer in his Opinion in Case C-17/00 *De Coster*, EU:C:2001:366.

20 — See inter alia: *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23); *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29); *Forposta (formerly Praxis) and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 17).

21 — OJ 2012 C 338, p. 1.

37. Similar reservations may apply as regards the permanent nature of the Tribunal Arbitral Tributário. Since its members exist only for the purpose of one case, can such a body be regarded as permanent? However, in my view that question should not be examined in terms of the individual composition of the court in specific cases but rather systematically. [22] The Tribunal Arbitral Tributário is not an ad hoc court, merely an element of the dispute settlement system which — although its activities manifest themselves in the form of ephemeral court compositions which cease to exist at the end of the case which they were called on to determine — are, as a whole, permanent in nature.

– Compulsory jurisdiction of the body

38. According to the principles laid down in the Court's case-law, submission of a dispute to the body which referred the question for a preliminary ruling must be compulsory for the parties and not be merely at their will, as it is in the case of courts of arbitration *sensu stricto*. The present case concerns a body which constitutes an element of an 'alternative dispute settlement system' in tax cases. That means that a taxable person who wishes to submit a dispute with the tax authorities for a judicial decision has a choice. He can refer the case to an administrative court or request that a court of arbitration hearing tax cases be constituted and the tax authority must comply with that decision of the taxable person. [23]

39. Therefore, one might wonder whether the jurisdiction of the Tribunal Arbitral Tributário should be regarded as compulsory for parties since the taxable person, and thus the party normally initiating proceedings in tax cases, does not have to refer the case to that body but may have recourse to the administrative court. The very fact that the tax authority is obliged to accept the taxable person's choice of court is, in my view, decisive because it is an inherent part of jurisdiction. The consequence of the applicant referring the case to the court having jurisdiction, either pursuant to the law or an agreement between the parties, is also that the defendant cannot effectively contest that jurisdiction. [24]

40. I consider that the feature of Portuguese tax arbitration which is of relevance to the issue under consideration is the fact that the taxable person's right to choose the arbitration route for recovering claims results not from his own initiative but from the wishes of the legislature which created two equal systems for settling disputes with the tax authority. Neither of those systems, taken individually, is compulsory, but the taxable person must choose one of them if he wishes to submit his dispute with the tax authority to a court. Under Article 3(2) of Decree-Law No 10/2011, submitting a request for the constitution of a court of arbitration rules out appealing that tax decision on the basis of the same pleas before the administrative court. Under Article 24(1) of that Decree-Law, an arbitration ruling on the substance of the case is to be binding on the tax authority. Therefore, tax arbitration is not an additional legal remedy in the hands of the taxable person, but a genuine alternative to the traditional courts. In this regard I consider that the requirement relating to the compulsory jurisdiction of the referring court is satisfied. [25]

22 — Advocate Lenz made a similar finding in his Opinion in *Handels- og Kontorfunktionærernes Forbund i Danmark* (EU:C:1989:228, point 21).

23 — According to Portaria n.º 112-A/2011, de 22 de março de 2011 (Order No 112-A/2011 of 22 March 2011, *Diário da República*, 1. seria, No 57), issued pursuant to Article 4(1) of Decree-Law No 10/2011, the jurisdiction of courts of arbitration hearing tax cases is compulsory for the tax authority in cases where the amount at issue in the dispute is under EUR 10 000 000.

24 — However, it should be noted that the compulsory jurisdiction of the referring body for the defendant was, in the view of the Court, sufficient to regard that criterion as having been met in *Handels- og Kontorfunktionærernes Forbund i Danmark* (EU:C:1989:383, paragraph 7).

25 — A similar position was expressed by Advocate General Ruiz-Jarabo Colomer at paragraph 29 of his Opinion in *Emanuel* (C-259/04, EU:C:2006:50). Also in *Broekmeulen* (246/80, EU:C:1981:218). The Court allowed a question referred for a preliminary ruling from a professional body even though the applicant had the alternative possibility of referring the case to an ordinary court (see paragraph 15 of that judgment).

– *Inter partes* nature of the procedure and application of the rules of law

41. Articles 15 to 20 of Decree-Law No 10/2011 lay down the rules of procedure before courts of arbitration in tax cases. Those rules guarantee inter alia the *inter partes* nature of that procedure and the equality of the parties. Under Article 8 of that Decree-Law, an infringement of those rules can form the basis for a review of the arbitration judgment by the administrative court.

42. Article 2(2) of Decree-Law No 10/2011 provides that courts of arbitration in tax cases are to adjudicate on the basis of statutory provisions and judgments *ex aequo et bono* are ruled out. This is also rather evident since it is for those courts to assess, in particular in terms of compatibility with the law, administrative decisions in the field of tax.

43. I therefore consider that the requirement relating to the *inter partes* nature of the procedure and adjudication on the basis of statutory provisions are undoubtedly satisfied in the case of the Tribunal Arbitral Tributário.

– Independence

44. The requirement relating to independence must be examined from two aspects.[26] The external aspect relates to the independence of the body and its members from persons and institutions who are third parties to the dispute — the executive and high-level bodies etc. The external aspect concerns the impartiality of the members of the body in relation to the parties to the dispute and the absence of any personal interest on their part in the specific adjudication.

45. Courts of arbitration in tax cases do not form part of the tax authority or other institutions of executive authority. They are an element of judicial authority and operate under the Centro de Arbitragem Administrativa (Centre for Administrative Arbitration), which provide their administrative/technical services. They are independent in their adjudications and obliged only to comply with the law and the case-law of the administrative courts and, in principle, their adjudications are final and enforceable (see point 51 above).

46. Courts of arbitration in tax cases give judgment with either one or three arbitrators. The method for appointing arbitrators and the deontological rules governing them are laid down in Articles 6 to 9 of Decree-Law No 10/2011. They are appointed by the Conselho Deontológico do Centro de Arbitragem Administrativa (Ethics Board of the Centre for Administrative Arbitration) from a list of arbitrators drawn up by that institution,[27] or possibly by the parties, in which case it is always composed of three members, the chairman of which is appointed with the agreement of the other two arbitrators or, in the absence of such agreement, by the abovementioned board.

47. Since the arbitrators are not professional judges, the guarantees of their personal independence have different bases than in the case of judges. In particular, it is difficult to speak of irremovability since arbitrators are appointed to a specific case at the end of which their role terminates. The independence of the arbitrators derives instead from the fact that they are persons with an independent position for whom the function of arbitrator is not their principal professional activity. Therefore, they do not have to fear negative consequences of the adjudications they make since any consequences will in any event have no bearing on their professional and material status.

48. As regards the impartiality of the arbitrators and their independence vis-à-vis the parties to the dispute, Articles 8 and 9 of Decree-Law No 10/2011 contain safeguards similar to those which apply to professional judges.

26 — See inter alia *RTL Belgium* (C-517/09, EU:C:2010:821, paragraphs 39 and 40).

27 — As was the case in the main proceedings.

49. In the light of the foregoing, I consider that the Tribunal Arbitral Tributário satisfies the criterion relating to independence.

Summary

50. Therefore, the Tribunal Arbitral Tributário is not a court of arbitration established upon the wishes of the parties. On the contrary, in my view it must be found that it constitutes an element of the Portuguese judicial system on a par with general and administrative courts. The specific feature of that institution lies merely in the fact that the Portuguese legislature decided to give taxable persons the possibility of referring their disputes with the tax authorities to a court which operates in a less formalised, swifter and cheaper manner than ordinary administrative courts. It is a manifestation of a trend, which is not encountered only in Portugal, to deformalise and simplify the judicial procedure by using techniques and instruments characteristic of private dispute resolution mechanisms. It is also an element of the specialisation of courts and judges which is necessary in the context of the increasing complexity of socio-economic relations and thus also disputes submitted to the courts. That, one could say post-modern, approach to justice results from the development of the judicial system and the legal system as a whole. The Court cannot remain deaf to that development but should instead adapt its practice, including the interpretation of Article 267 TFEU, accordingly.

51. Therefore, I consider that the Tribunal Arbitral Tributário must be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU because it satisfies the above requirements arising from the Court's case-law. Nor can I see any other reasons why it should be denied that character. This is further supported by the argument that under Articles 25 to 28 of Decree-Law No 10/2011 the judgments of that court can be contested solely on formal grounds, such as failure to state reasons or the incompatibility of those reasons with the content of the judgment, failure to give judgment or infringement of the rules of procedure and, as regards the merits only in exceptional cases of infringement of the constitution or incompatibility with the case-law of the administrative courts. Consequently, rejection of the possibility of courts of arbitration hearing tax cases from referring questions for a preliminary ruling would seriously deprive the Court of influence over Portuguese court rulings on tax issues and thus in a field which is largely harmonised in EU law and has a direct effect on the law and the obligations of individuals. Such a danger can be, according to the Court's case-law, one of the facts in favour of regarding a body as entitled to refer a question for a preliminary ruling. [28]

52. The reply which I am proposing to the question concerning the admissibility of the reference for a preliminary ruling in this case in no way opens up the way to allowing in future references for preliminary rulings from persons or institutions using different, alternative methods of dispute resolution, in particular in the form of negotiation or mediation. [29] According to the established case-law of the Court — and regardless of whether or not other criteria are satisfied — only bodies which give judgment 'in proceedings intended to lead to a decision of a judicial nature' [30] can refer questions for a preliminary ruling pursuant to Article 267 TFEU. The Tribunal Arbitral satisfies that condition since it acts as a body independent of the parties to the dispute and gives judgments which are binding on those parties and which are in principle final, in the same way as the judgments of traditional courts. Therefore, the purpose of the proceedings before the Tribunal Arbitral Tributário is not the conclusion of an agreement by the parties and the judgment given does not have the character of a non-binding recommendation or opinion. That feature clearly distinguishes that court from a mediator and other similar persons.

28 — See inter alia *Broekmeulen* (EU:C:1981:218, paragraph 16), and also *Gourmet Classic* (C-458/06, EU:C:2008:338, paragraph 32).

29 — For example, those laid down in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3).

30 — See inter alia the order in *Borker* (138/80, EU:C:1980:162, paragraph 4); *Weryński* (C-283/09, EU:C:2011:85, paragraph 44); *Below* (C-394/11, EU:C:2013:48, paragraph 39).

Substance

53. The present case is, in a sense, a continuation of the case of *Optimus — Telecomunicações*.[31] The Court will have an occasion to supplement the case-law initiated by that judgment.

54. It is first necessary to establish which provisions of Directive 69/335 apply to the facts of the case in the main proceedings. It should be noted that as a result of the amendments introduced by Directive 85/303 that directive does not provide an example of good legislative practice.[32] In the question referred the national court mentions inter alia Article 4(2)(a) of Directive 69/335, but it would appear that it does not apply in the main proceedings. Although the parties disagree as to the nature of the capital increases which form the subject-matter of the main proceedings — that is to say whether they consisted in cash or other contributions —[33] it is common ground that they did not take the form of 'capitalisation of profits or of permanent or temporary reserves' referred to in that provision of the directive. The transactions which form the subject-matter of the main proceedings fall within the category of 'an increase in the capital of a capital company by contribution of assets of any kind' referred to in Article 4(1)(c).

55. The referring court also mentions Article 7(1) of that directive. However, that provision cannot be read in isolation from paragraph 2 of that article since those two provisions together create a cohesive rule — Article 7(1) or (2) will apply depending on the legal position in a particular Member State on 1 July 1984. If it is considered, as the referring court does, that the main proceedings concern increases in capital through non-cash contributions and a transaction which was subject to stamp duty in Portugal on 1 July 1984,[34] Article 7(2) must apply.[35]

56. Therefore, the legal problem in this case concerns whether Article 7(2) of Directive 69/335 permits the re-introduction of capital duty on the transactions referred to in Article 4(1)(c) which were subject to that duty on 1 July 1984, but were subsequently exempted from it.

57. The original wording of Directive 69/335 laid down the rules for imposing capital duty on the transactions set out therein. Under Article 4 thereof, the transactions referred to in paragraph 1 are to be subject to that duty and the transactions referred to in paragraph 2 may be covered by it. Article 7 of the directive fixed the rates of capital duty. However, Article 7 of Directive 69/335 was completely reworded pursuant Directive 85/303. In relation to transactions which in individual Member States were exempted from capital duty or taxed at a rate of 0.50% or less on 1 July 1984, it requires that they be permanently exempted (Article 7(1)). In relation to other transactions, however, the Member States have a choice — they can also exempt them or they can charge duty on them at a single rate not exceeding 1% (Article 7(2)).

58. As grounds for this, the Community legislature stated in the preamble to Directive 85/303 that capital duty is detrimental to the development of undertakings and consequently the best solution would be to abolish it. However, since the losses of budget revenue from that duty would be unacceptable for certain Member States, it is necessary to enable them to continue to apply that duty at a single rate.

31 — *Optimus — Telecomunicações* (C-366/05, EU:C:2007:366).

32 — That is also the view of Advocate General Sharpston in her Opinion in *Optimus-Telecomunicações* (EU:C:2007:58, point 39).

33 — Ascendi claims that the conversion into capital of the claims of shareholders against the company should be regarded as an increase in capital made in cash. In that case the judgment in *Optimus — Telecomunicações* (EU:C:2007:366), which concerned precisely the compatibility with the directive of stamp duty on those transactions, should be applied directly in the present case. However, the referring court appears to take the view that the transaction forming the subject-matter of the main proceedings did not consist in cash contributions to the company. In any event, that involves an assessment the facts which it is for the referring court to make.

34 — See point 9 above.

35 — The Republic of Portugal did not accede to the European Community until 1 January 1986 but according to the judgment in *Optimus — Telecomunicações* (EU:C:2007:366, paragraph 32), 1 July 1984 must also be taken as the relevant date for the purpose of interpreting Directive 69/335 in relation to that Member State.

59. This altered the legislative nature of Article 4(1) of Directive 69/335, which no longer obliges the Member States to charge capital duty on the transactions referred to therein since that obligation was removed pursuant to Article 7 of the directive, as amended by Directive 85/303, which constitutes a *lex posterior* in relation to Article 4(1). Now that provision merely indicates the types of transaction to which the provisions on capital duty relate.

60. All that remains is to determine whether Article 7(2) of Directive 69/335 constitutes a standstill clause which only allows the Member States to maintain the tax applicable on 1 July 1984 (with the possible adjustment of the rate thereof) or whether, as the Portuguese suggests in its written observations, authorisation for the Member States, if they so wish, to abolish and re-introduce capital duty depending on the current tax policy and budget requirements.

61. I firmly support the first proposition. First, as the preamble to Directive 85/303 indicates, the intention of the legislature was to abolish capital duty and the possibility of maintaining it is merely an exception resulting from the fear of budget losses by the Member States. However, if a Member State has abolished capital duty, any associated losses of budget revenue have already occurred and therefore its re-introduction is not justified in the light of the objectives which the Community legislature sought to attain through Directive 85/303.

62. Second, the need to regard Article 7(2) of Directive 69/335 as a standstill clause is also indicated by the logic thereof, and in particular the reference to the legal situation in force on 1 July 1984. Although the legislature intended to give the Member States the freedom to maintain, abolish and possibly subsequently to reinstate capital duty, it does not make that authorisation contingent on the essentially random fact that that duty was in force at a particular rate on 1 July 1984. The reference to that specific date indicates unequivocally the legislature's desire to introduce a standstill clause in this case.

63. It should also be borne in mind that the Court took a similar position, albeit in relation to transactions referred in Article 4(2) of Directive 69/335, where the legal position is somewhat different, in its judgment in *Logstor ROR Polska*.[36] In paragraph 39 of that judgment it stated clearly that 'a Member State which has, in accordance with Article 7(2) of Directive 69/335, waived subjecting certain transactions to capital duty after 1 July 1984 cannot re-establish such taxation on the same transactions'.

64. Finally, it should be noted that according to subparagraph 26.3 of Annex III to Decree-Law No 322-B/2001 the capital increases which form the subject-matter of the main proceedings were subject to stamp duty at 0.4% and thus at a rate which, if it were in force on 1 July 1984, would have necessitated the abolition of that duty pursuant to Article 7(1) of Directive 69/335. Although that rate is consistent with the letter of paragraph 2 of that article,[37] it is particularly difficult to reconcile the re-introduction of that duty at that rate with the logic of Article 7 of Directive 69/335.

36 — *Logstor ROR Polska* (C-212/10, EU:C:2011:404).

37 — I should point out that it allows the duty to be applied 'at a single rate not exceeding 1%'.

Conclusion

65. In the light of the foregoing, I propose that the Court rule that the order for reference from the Tribunal Arbitral Tributário is admissible and reply to the question referred as follows:

Article 7(2) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, in the version resulting from Council Directive 85/303/EEC of 10 June 1985, in conjunction with Article 7(1) of Directive 69/335, must be interpreted as precluding the re-introduction by a Member State of capital duty on transactions referred to in Article 4(1)(c) of that directive which were subject to that duty on 1 July 1984 and were subsequently exempted from it.