Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 13 July 2023 [1]

Case C-340/22

Cofidis
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD)), Portugal)

(Reference for a preliminary ruling – Direct taxation – Article 49 TFEU – Levy on credit institutions for the purpose of financing social security – Deductions from the tax base available to entities with legal personality – Justification – Balanced allocation between the Member States of the power to impose taxes)

1. In the present case, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal) has asked the Court to give a preliminary ruling on the interpretation of Article 49 TFEU and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. [2]

2. At the request of the Court, this Opinion deals only with the second question referred for a preliminary ruling. That question gives the Court the opportunity to provide further clarification on the scope of the freedom of establishment, enshrined in Article 49 TFEU, in the field of direct taxation, and the scope of the overriding reasons in the public interest which may justify an obstacle to that freedom, such as the need to preserve the balanced allocation between the Member States of the power to impose taxes.

[1] Original language: French.
[2] OJ 2014 L 173, p. 190.

Legal framework

European Union law

3. Article 49 TFEU is relevant to the present case.

Portuguese law

4. Article 18 of and Annex VI to Lei No 27-A/2020 da Assembleia da República, que aprova o Orçamento Suplementar para 2020 (Law No 27-A/2020 of the Parliament of the Portuguese Republic approving the supplementary budget for 2020) of 24 July 2020 introduced the Adicional de Solidariedade sobre o Sector Bancário (additional solidarity tax on the banking sector; 'the ASSB').

5. Under Article 1(2) and Article 9 of Annex VI to that law, that levy was introduced with the aim of strengthening the financing arrangements for the social security system through the allocation of all of the revenue thereby obtained to the Fundo de Establização Financeira da Segurança Social (Social Security Financial Stabilisation Fund). According to those provisions, the creation of the ASSB is intended to offset the exemption from value added tax ('VAT') enjoyed by the banking sector on most financial services and transactions, so as to bring the tax burden borne by that sector closer to that of other economic sectors.

6. Under Article 2(1) of Annex VI, the following are taxable persons liable to the ASSB: (a) credit institutions resident in Portugal, (b) subsidiaries in Portugal of credit institutions resident in other States, and (c) branches in Portugal of credit institutions resident in other States.

7. The material scope of the ASSB is defined in Article 3 of Annex VI, in accordance with which:

'The ASSB is payable on:

(a) liabilities calculated and approved by taxable persons after deduction, as appropriate, of liability items which form an integral part of own funds, deposits covered by the guarantee of the Deposit Guarantee Fund, the Mutual Agricultural Credit Guarantee Fund or a deposit guarantee scheme officially recognised in accordance with Article 4 of Directive 2014/49/EU [of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149)] or considered to be equivalent pursuant to Article 156(1)(b) of the General Rules on Credit Institutions and Financial Companies, within the limits stipulated in the applicable legislation, and deposits placed with the Central Bank by agricultural credit banks belonging to the integrated agricultural credit scheme in accordance with Article 72 of the Regime Juridíco do Crédito Agrícola Mútuo e das Cooperativas de Crédito Agrícola (Legal Rules governing Mutual Agricultural Credit and Agricultural Credit Cooperatives), adopted as an annex to Decreto-lei nº 24/91 (Decree-law No 24/91) of 11 January 1991;

(b) the notional value of off-balance sheet derivative financial instruments determined by taxable persons.'

8. Article 4 of Annex VI, concerning the quantification of the basis of assessment for the ASSB, provides:

‘1. For the purposes of Article 3(a), “liabilities” shall mean all items entered in the balance sheet which, irrespective of their form and type, represent a debt to third parties, with the exception of the following:

(a) items which, in accordance with the applicable accounting rules, are treated as own funds;

(b) liabilities connected with the recognition of obligations derived from defined benefit schemes;

(c) deposits covered by the Deposit Guarantee Fund and the Mutual Agricultural Credit Guarantee Fund, only to the extent that they are covered by those funds;

(d) liabilities derived from the valuation of derivative financial instruments;

(e) deferred revenue, disregarding any such revenue corresponding to debit transactions; and

(f) liabilities in respect of assets which have not been derecognised in securitisation transactions.

2. For the purposes of Article 3(a), the following rules shall apply:

(a) the value of own funds, including tier 1 own funds and tier 2 own funds, includes the positive items which are entered in the accounts for the purposes of their calculation in accordance with Part II of Regulation (EU) No 575/2013 [of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1)], taking into account the transitional provisions laid down in Part X of that regulation, which, at the same time, come within the concept of liabilities as defined in the previous paragraph;

(b) deposits covered by the guarantee of the Deposit Guarantee Fund, the Mutual Agricultural Credit Guarantee Fund or a deposit guarantee scheme officially recognised in accordance with Article 4 of [Directive 2014/49], or considered to be equivalent pursuant to Article 156(1)(b) of the General Rules on Credit Institutions and Financial Companies, within the limits stipulated in the applicable legislation, shall be taken into account only up to the amount actually covered by those Funds.’

Facts of the dispute, the procedure in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

9. The applicant in the main proceedings is a Portuguese branch of a credit institution the registered office of which is in France. In that capacity, it is subject to the ASSB, namely a levy on the banking sector introduced by the Portuguese Republic in order to provide financial support for social security and to restore the balance between the tax burden borne by that sector, which benefits from a VAT exemption on most financial services and transactions, and that borne by all other sectors of the Portuguese economy.

10. On 11 December 2020, the applicant carried out a self-assessment for the ASSB in respect of the first half of 2020. On the basis of that self-assessment it paid the sum of EUR 364 229.67. On 5 January 2021, the applicant submitted with the tax authorities an application for review seeking the repayment of that amount. By decision of 21 May 2021, the tax authority dismissed that application.

11. On 23 August 2021, the applicant brought an action before the referring court challenging the decision dismissing the application. In support of its action, it claimed, inter alia, that the ASSB is contrary to EU law.

12. In particular, according to the applicant, the creation of the ASSB is contrary to Directive 2014/59 and to the alleged tax harmonisation resulting from that directive, as regards credit institutions' resolution contributions. It is already taxed in the Member State in which its registered office is situated, namely in France, under that directive, and therefore the Portuguese Republic cannot impose on it a similar levy with the same basis of assessment.

13. Moreover, the applicant considers that the ASSB infringes Article 49 TFEU by discriminating against branches of foreign credit institutions. As they do not have legal personality, those branches are unable to deduct certain own fund items from their tax base for the ASSB.

14. It was in that context that the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD)) decided to stay the proceedings and to submit the following questions to the Court of Justice for a preliminary ruling:

'(1) Does [Directive 2014/59] preclude the taxation in a Member State of branches of financial institutions resident in another Member State of the European Union, pursuant to legislation such as the Portuguese national rules governing the [ASSB], which is levied on the adjusted liabilities and notional value of off-balance sheet derivative financial instruments and from which the revenue collected is not allocated to national financing arrangements for resolution measures or to the financing of the Single Resolution Fund?

(2) Does the freedom of establishment enshrined in Article 49 TFEU preclude national legislation such as that laid down in the Portuguese national rules governing the [ASSB], which permits the deduction from the liabilities, as determined and approved, [of] certain liability items which are taken into account for the purposes of the calculation of tier 1 and tier 2 own funds, in accordance with the provisions of Part II of [Regulation No 575/2013], taking into account the transitional provisions laid down in Part IX of that regulation, which may be issued only by entities with legal personality, in other words, which may not be issued by branches of non-resident credit institutions?'

15. Written observations were submitted by Cofidis, the Portuguese Government and the European Commission.

16. The same parties presented oral argument at the hearing held on 20 April 2023.

Analysis

17. As stated in the introduction, this Opinion will focus solely on the second question referred for a preliminary ruling.

The second question

18. By the second question, the national court seeks to ascertain, in essence, whether the freedom of establishment enshrined in Article 49 TFEU must be interpreted as precluding national legislation which allows only resident credit institutions and subsidiaries of non-resident credit institutions, having legal personality – to the exclusion of branches of non-resident credit institutions, which do not have legal personality – to deduct their own funds and comparable debt instruments from the tax base in respect of a tax on the liabilities of those entities.

Admissibility

19. In its written observations, the Portuguese Government argued that the present question is inadmissible in so far as it is based on an allegation made by the applicant in the main proceedings that it is impossible for branches of non-resident credit institutions to deduct own funds from their tax base for the ASSB. That allegation, which is a matter of Portuguese law, is challenged by the tax authorities in the dispute in the main proceedings and has not yet been verified by the referring court, therefore the Portuguese Government considers that the question referred is, at this stage, purely hypothetical and abstract.

20. It should be recalled that, according to settled case-law, it is solely for the national court to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Where the questions referred concern the interpretation of EU law, those questions are considered to be relevant and the Court is in principle required to give a ruling. Such a presumption of relevance may be rebutted only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred to it.

21. In that regard, it is common ground that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define, under its own responsibility, the factual and legal context of the questions it is asking, the accuracy of which is not a matter for the Court to determine. [3]

22. It is apparent from paragraph 9 of the request for a preliminary ruling that the national court has doubts as to whether the Portuguese legislation at issue is compatible with the freedom of establishment on the grounds that, under that legislation, branches of non-resident credit institutions are not able to deduct own-fund items, since these may be issued only by entities with legal personality. It follows that, contrary to what the Portuguese Government maintains, the referring court has already confirmed the applicant's allegation regarding the interpretation of the Portuguese law.

[3] Judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraphs 47 to 50).

23. With that in mind, it must be considered that the Court has before it the legal material necessary to give a useful answer to this question. The question is therefore not hypothetical or abstract in nature and therefore the presumption of relevance cannot be called into question. In conclusion, I propose that the Court declare the second question admissible.

Substance

– *The existence of discrimination*

24. The freedom of establishment guaranteed by Articles 49 and 54 TFEU includes, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency. [4]

25. The measures prohibited by Article 49 TFEU are, according to the case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment. [5]

26. In other words, that provision prohibits not only overt discrimination based on the location of the registered offices of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [6] In particular, the Court has held that a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies which have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU. [7]

27. In the present case, it is common ground that the Portuguese legislation at issue applies without distinction to resident credit institutions, to Portuguese subsidiaries of non-resident credit institutions and to Portuguese branches of non-resident credit institutions. As regards the rules for determining the tax base, the ASSB is charged on the liabilities of those entities, namely ‘all items entered in the balance sheet which, irrespective of their form and type, represent a debt to third parties’, with the exception, where appropriate, of liability items which form an integral part of own funds.

28. The applicant is of the view that the deduction of own funds from the tax base for the ASSB is not available to entities which do not have legal personality, such as branches of non-resident credit institutions, since those entities are legally devoid of own funds. It follows that, as a result of the legislation at issue, non-resident credit institutions which have decided to establish themselves in Portugal through a branch are in a less favourable position than resident credit institutions and subsidiaries of non-resident credit institutions.

[4] Judgment of 16 February 2023, *Gallaher* (C-707/20, EU:C:2023:101, paragraph 70 and the case-law cited).

[5] Judgment of 11 May 2023, *Manitou BF and Bricolage Investissement France* (C-407/22 and C-408/22, EU:C:2023:392, paragraph 20 and the case-law cited).

[6] Judgment of 6 October 2022, *Contship Italia* (C-433/21 and C-434/21, EU:C:2022:760, paragraph 35 and the case-law cited).

[7] Judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 43).

29. In its written observations, the Commission took the view that any indirect discrimination may thus arise not from the Portuguese rules themselves, but from the legal status of branches, which are legally unable to have their own funds as they have no legal personality. Nevertheless, according to the Commission, such a difference in treatment between subsidiaries and branches falls within the tax sovereignty of the Member States. In support of that conclusion, it cites the judgment of 10 June 2015, *X AB* (C-686/13, 'the judgment in *X AB*', EU:C:2015:375).

30. To me, that argument is unconvincing for two reasons.

31. First, it is inconsistent with the relevant case-law. It should be recalled, in that regard, that the Court has repeatedly held, since the judgment in *Commission* v *France*,[8] that, in so far as the second sentence of the first paragraph of Article 49 TFEU expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions.[9]

32. In the judgment in *CLT-UFA*, the Court went on to clarify that the freedom to choose the appropriate legal form primarily serves to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities *under the same conditions as those which apply to subsidiaries.*[10]

33. It is therefore clear from the case-law that that freedom precludes a difference in tax treatment arising from the exercise of the activity of a non-resident company in the host Member State depending on whether it operates through a subsidiary or a branch, that difference in treatment amounting to discrimination on grounds of nationality.[11]

34. The logic underlying such an interpretation is that branches which do not have legal personality are the mere emanation abroad of their parent company, whereas subsidiaries of non-resident companies are, in their State of establishment, autonomous legal entities for tax purposes and therefore companies resident in that State. Consequently, national legislation which affords more favourable treatment to subsidiaries than to branches ultimately treats resident companies more favourably than non-resident companies.

35. That equivalence is expressed more explicitly by the Court in paragraph 44 of the judgment in *Saint-Gobain ZN*,[12] in accordance with which 'the difference in treatment to which branches of non-resident companies are subject in comparison with resident companies as well as the restriction of the freedom to choose the form of secondary establishment must be regarded as constituting *a single composite infringement* of Articles [49 and 54 TFEU]'[13] and, more recently, in paragraph 36 of the judgment of 17 May 2017, *X* (C-68/15, EU:C:2017:379), according to which 'the application of national tax legislation, such as that at issue in the main proceedings, to a

[8] Judgment of 28 January 1986 (270/83, EU:C:1986:37).

[9] Paragraph 22 of that judgment.

[10] Judgment of 23 February 2006 (C-253/03, EU:C:2006:129, paragraph 15). See also judgment of 6 September 2012, *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 14).

[11] See, in that regard, Opinion of Advocate General Kokott in *X* (C-68/15, EU:C:2016:886, points 24 and 25). For a critical view of the comparability between subsidiaries and branches, see, inter alia, Wattel, P.J., 'Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality', *EC Tax Review, No* 4, 2003, p. 196.

[12] Judgment of 21 September 1999 (C-307/97, EU:C:1999:438).

[13] Emphasis added.

resident subsidiary of a non-resident company and to a resident permanent establishment of such a company [[14]] involves the tax treatment of a resident company and a non-resident company respectively'.

36. Secondly, the finding made by the Court in paragraph 33 of the judgment in *X AB* does not appear to me, contrary to what the Commission suggests, to be transposable to the present case. It is appropriate to turn our attention to that judgment briefly.

37. The Swedish legislation at issue in that case excluded from the basis of assessment for corporation tax capital gains realised on the transfer of shares in certain types of companies and, at the same time, did not provide for any deduction of capital losses in respect of such transactions, including where those losses resulted from currency losses. For the purposes of that legislation, it was irrelevant whether the companies whose shares were transferred were established in Sweden or in another Member State.

38. Ruling on the question whether investments in shares made in a Member State other than the Kingdom of Sweden were treated more unfavourably than similar investments made in Sweden, having regard to the non-deductibility of currency losses resulting from Swedish legislation, the Court applied, in paragraph 33 of that judgment, the principle that freedom of establishment cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of another Member State in order to ensure, in all situations, taxation which eliminates any disparity arising from national tax rules, since the decisions taken by a company as to the establishment of commercial structures abroad may, depending on the circumstances, be more or less advantageous or disadvantageous for that company. [15]

39. The present case differs, in my view, from that case in so far as the indirect discrimination is not the result of the combined effect of the taxation in force in the State in which the registered office of the company to which the branch belongs is established and the tax due in the State in which that branch is situated, but only of the latter tax.

40. In the light of the foregoing, I am of the opinion that the fact that it is impossible for entities without legal personality to account for own funds in their balance sheet and, to that end, to deduct them from their ASSB tax base, results in branches of non-resident credit institutions being placed at a disadvantage compared with resident credit institutions and subsidiaries of non-resident credit institutions.

41. It should nevertheless be noted that the Portuguese Government has firmly disputed, both in its written observations and at the hearing, the accuracy of the assertion that branches of non-resident credit institutions cannot account for their start-up capital as own capital. More specifically, the Portuguese Government argued that, in accordance with Portuguese legislation, such a branch is free to classify in its accounts the funds allocated to it as liabilities or as own funds, depending on the possibility of remuneration or the permanent nature of those funds.

[14] It is important to note that the term 'resident' permanent establishment is used in that part of the judgment as a synonym for 'active in that Member State'.

[15] The Court also stated that that conclusion was not inconsistent with that drawn in the judgment of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129), in which it had held, in essence, that German legislation constituted an obstacle to the freedom of establishment in so far as it excluded the deductibility of currency losses suffered by a company with a registered office in the territory of Germany upon the repatriation of start-up capital granted to its permanent establishment in another Member State. In the Court's view, the legal context of the *Deutsche Shell* case was different since, unlike the Swedish legislation, the legislation at issue in that case provided, as a general rule, for the taxation of currency gains and, at the same time, for the deductibility of currency losses. See, in particular, paragraph 38 of the judgment in *X AB*.

42. In that regard, I would simply point out that, when hearing a reference for a preliminary ruling from a national court, the Court must base its reasoning on the interpretation of national law as described to it by that court.[16] As explained above, it is apparent from the request for a preliminary ruling that the national court adopted an interpretation of Portuguese law corresponding to that given by the applicant.

43. Moreover, according to the applicant, branches of non-resident credit institutions are treated in a discriminatory manner compared to resident entities in so far as there is a wide range of items which are comparable to own funds which can be issued only by entities with legal personality. These include, inter alia, convertible bonds, profit-sharing bonds, redeemable preference shares and contingent convertible bonds. That interpretation was not disputed by the Portuguese Government either in its written observations or at the hearing.

44. There is little doubt, in my view, that the deduction of the value of those debt instruments that are comparable to own funds from the tax base for the ASSB means, as with the deduction of own funds, that branches of non-resident credit institutions are treated less favourably than resident credit institutions and subsidiaries of non-resident credit institutions.

45. It follows that the legislation establishing the ASSB gives rise to indirect discrimination against non-resident credit institutions wishing to establish themselves in Portugal through a branch, with the result that it falls within the scope of the measures prohibited by Article 49 TFEU.[17]

46. According to settled case-law, an impediment to the freedom of establishment is permissible only if it relates to situations which are not objectively comparable or if it is justified by overriding reasons in the public interest.[18] It is therefore necessary to assess whether the legislation at issue in the main proceedings, which, as has been recognised, is such as to restrict the freedom of establishment, is covered by one of those two situations.

– *Whether the situations are objectively comparable*

47. With regard to the objective comparability of situations, it is settled case-law that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national tax legislation concerned.[19]

48. In that regard, I observe that the ASSB was introduced with the aim of strengthening the financing arrangements for the social security system by allocating to the Social Security Financial Stabilisation Fund the revenue obtained through the collection of that levy. In particular, it is apparent from the order for reference that the introduction of the ASSB and its exclusive application to the banking sector constitute a form of offsetting the exemption from VAT of most financial services and transactions, thereby placing the tax burden borne by the financial sector on an equal footing with that levied on other sectors.

[16] Judgment of 27 October 2022, *Instituto do Cinema e do Audiovisual* (C-411/21, EU:C:2022:836, paragraph 16 and the case-law cited).

[17] The situation might be different if, following an overall assessment of the various components of the tax base for the ASSB, the referring court had to conclude that the method for determining that tax base led, in fact, to a credit institution wishing to establish itself in Portugal through a branch not being treated in a less advantageous manner than a resident company. See, in that regard, judgment of 17 May 2017, X (C-68/15, EU:C:2017:379, paragraph 44). That said, I note that there is nothing in the file that seems to indicate that that is the case.

[18] Judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 91 and the case-law cited).

[19] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

49. Having regard to the objective pursued by that tax legislation, there is no doubt that the situation of a non-resident credit institution operating in Portugal through a branch is comparable to that of a resident credit institution or a subsidiary of a non-resident credit institution. There is therefore no objective difference between those entities' situations which could justify a difference in treatment in the light of the rules for determining the taxable base of the ASSB.[20]

– *Whether there is justification*

50. As to the overriding reasons in the public interest capable of justifying the restriction thus established of the freedom of establishment, it should be noted at the outset that the Court has recognised as such the need to safeguard the coherence of the tax system, the need to guarantee the effectiveness of fiscal supervision, the need to prevent tax evasion and the need to maintain the balanced allocation between the Member States of the power to impose taxes.

51. The need to safeguard the coherence of the tax system means that a direct link must be established between the tax advantage granted by the legislation at issue and the offsetting of that advantage by a particular tax levy.[21] In the present case, there is no evidence that the deduction of own-fund items from the tax base for the ASSB that is available to resident credit institutions and subsidiaries of non-resident credit institutions is offset by a tax levy imposed on those institutions.

52. The need to protect the effectiveness of fiscal supervision means, in essence, that the Member States are authorised to apply measures which enable the taxable amount to be ascertained clearly and precisely.[22] It is clear to me that the Portuguese legislation at issue, which provides for a method of calculating the tax base which necessarily leads to a higher result for branches of non-resident credit institutions, has no connection with such an objective.

53. Nor can the need to prevent tax abuse and evasion be invoked in the present case since the Portuguese legislation establishing the ASSB does not specifically seek, as is required by the case-law, to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage.[23]

54. The need to preserve the balanced allocation between the Member States of the power to impose taxes remains to be examined.

55. In that regard, the Commission argued at the hearing that the indirect discrimination suffered by branches on the ground that they cannot issue debt instruments comparable to own funds could be justified by the need to ensure a balanced allocation between the Member States of the power to impose taxes.

56. The Commission pointed out in that respect that, under the Portuguese legislation at issue, subsidiaries of non-resident credit institutions may only deduct from the tax base for the ASSB the value of debt instruments comparable to own funds that they have issued themselves and not

[20] See judgment of 25 February 2021, *Novo Banco* (C-712/19, EU:C:2021:137, paragraph 26).

[21] Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 45 and the case-law cited).

[22] Judgment of 19 July 2012, *A* (C-48/11, EU:C:2012:485, paragraph 33 and the case-law cited).

[23] Judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 60 and the case-law cited).

that of instruments issued by their parent companies. Similarly, branches may not deduct the value of instruments issued by their parent companies where those instruments do not relate to the activity of those branches.

57. According to the Commission, the underlying objective of that legislative choice is to prevent non-resident credit institutions operating in Portugal through a branch from being free to choose the scope of their tax base for the ASSB by artificially linking debt instruments comparable to own funds to the activity carried out by that branch in Portugal.

58. The response I wish to propose to that argument by the Commission requires a number of preliminary remarks regarding the preservation of the balanced allocation between the Member States of the power to impose taxes.

59. Accepted for the first time in the judgment in *Marks and Spencer*,[24] in connection with the need to avoid losses being used twice and the risk of tax avoidance, the preservation of the balanced allocation between Member States of the power to impose taxes was subsequently recognised by the Court as being an autonomous justification.

60. In order to do that, the Court took account of the fact that the levying of direct taxes is at the centre of the Member States' powers of taxation. In the absence of harmonisation at EU level, it is for the Member States to define the criteria for allocating their powers of taxation between themselves by the conclusion of double taxation conventions or by unilateral measures.[25]

61. That justification is thus an expression of the principle, which is widely recognised at international level, of the territoriality of States' powers of taxation. More specifically, the need to maintain a balanced allocation between the Member States of the power to impose taxes is accepted by the Court where, in particular, the system in question is designed to prevent conduct liable to jeopardise the right of a Member State to exercise its power of taxation in relation to activities carried out within its territory.[26] By way of example, companies cannot be left entirely free to transfer their profits from one Member State to another, or to elect to have their losses taken into account in the Member State in which they are established or in another Member State, on the ground that such practices would have the effect of increasing the tax base in one Member State and reducing it in another, according to the choice made by the company concerned, to the extent of the profits or losses transferred.[27]

62. The Commission considers in essence that the legislation at issue is intended to protect the Portuguese State's powers of taxation as regards activities carried out on its territory, in so far as that legislation has the effect of preventing non-resident credit institutions operating in Portugal through a branch from including in that branch's balance sheet debt instruments which are comparable to own funds which do not fall within the scope of the activity carried out by that branch in Portugal, thus reducing the amount of that branch's tax base for the ASSB.

63. In my view, justification relating to the need for a balanced allocation between the Member States of the power to impose taxes cannot validly be relied on in the manner advocated by the Commission.

24 Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763).

25 Judgment of 18 July 2007, *Oy AA* (C-231/05, 'the judgment in *Oy AA*', EU:C:2007:439, paragraph 52).

26 Judgment of 13 October 2022, *Finanzamt Bremen* (C-431/21, EU:C:2022:792, paragraph 39 and the case-law cited).

27 See, to that effect, the judgment in *Oy AA*, paragraph 56, and judgment of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 34).

64. It should be noted that a Member State which intends to argue that its national legislation seeks to prevent any infringement of the territoriality of its powers of taxation must, according to settled case-law, satisfy a requirement of *consistency*.

65. More specifically, it follows from that case-law that, where a Member State has chosen to grant a tax advantage to companies established in its territory and has thus reduced the exercise of its powers of taxation with regard to those companies, that State cannot rely on the need to safeguard the balanced allocation between the Member States of the power to impose taxes in order to justify the taxation of companies established in another Member State. [28]

66. In the present case, the Portuguese State waived the exercise of its powers of taxation when it conferred on resident credit institutions and subsidiaries of non-resident credit institutions, which I would point out are autonomous legal entities for tax purposes and therefore companies resident in that State, a tax advantage consisting in the possibility of deducting the value of debt instruments comparable to own funds from their tax base for the ASSB.

67. With that in mind, the Portuguese State cannot validly rely on the territoriality of its powers of taxation in order to justify the less favourable treatment of branches of non-resident credit institutions which, for the reasons set out above, are not able to deduct the value of those instruments from their tax base in respect of the tax in question.

Conclusion

68. In the light of the foregoing considerations, I propose that the Court answer the second question referred for a preliminary ruling by the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal) as follows:

The freedom of establishment enshrined in Article 49 TFEU must be interpreted as precluding national legislation which allows only resident credit institutions and subsidiaries of non-resident credit institutions, having legal personality – to the exclusion of branches of non-resident credit institutions, which do not have legal personality – to deduct their own funds and comparable debt instruments from the tax base in respect of a tax on the liabilities of those entities.

[28] See, inter alia, judgments of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraphs 58 and 59), and of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 67).