JUDGMENT OF THE COURT (First Chamber)

7 June 2007 *

In Case C-178/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 18 April 2005,

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by S. Chala and M. Tassopoulou, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

supported by:

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, R. Schintgen, A. Tizzano, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, as a result of its legislation relating to the charging of capital

duty in the event of transfer of the registered office or the effective centre of management of a company and to the exemption from that duty of all agricultural cooperative organisations, of associations or consortia thereof of any kind, and of co-ownership of vessels, shipping consortia and any form of shipping company, the Hellenic Republic has failed to fulfil its obligations under Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335').

Legal context

Community legislation

2 As is clear from the first and second recitals in its preamble, the purpose of Directive 69/335 is to promote the free movement of capital, a fundamental freedom regarded as essential for the creation of an internal market. Accordingly, it seeks to eliminate fiscal obstacles to the raising of capital, including, in particular, contributions of capital to companies, that is to say contributions of capital that are made by members or shareholders to the capital companies owned by them.

3 For that purpose, Articles 1 to 9 of Directive 69/335 provide for the charging of a harmonised duty on contributions of capital to capital companies ('capital duty').

4 According to the sixth recital in the preamble to Directive 69/335, capital duty should be charged once only in the European Community and its level should be the same in all Member States.

5 Thus, Article 1 of Directive 69/335 provides that 'Member States shall charge on contributions of capital to capital companies a duty ...'.

6 Article 3(1) and (2) of Directive 69/335 defines 'capital companies' covered by the directive as follows:

'1. For the purposes of this Directive the expression "capital company" means:

(a) companies under ... Hellenic ... law ...:

— ... Ανώνυμος Εταιρία [public limited company] ...;

— ... Ετερόρρυθμος κατά μετοχάς Εταιρία [limited partnership with shares] ...;

— ... Εταιρία Περιωρισμένης Ευθύνης [private limited company] ...;

...

(b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;

(c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.

2. ... any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

7 Article 4 of Directive 69/335 sets out the transactions upon which the Member States may or must, as the case may be, charge capital duty.

8 Thus, Article 4(1) provides that the Member States are to charge capital duty on:

'(a) the formation of a capital company;

...

(g) the transfer from a Member State to another Member State of the effective centre of management of a company, firm, association or legal person which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State;

(h) the transfer from a Member State to another Member State of the registered office of a company, firm, association or legal person, whose effective centre of management is in a third country and which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State'.

9 Article 4(3)(b) of Directive 69/335 makes it clear that 'formation' of a capital company, within the meaning of Article 4(1)(a), does not include 'the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company'.

10 Article 7(2) of Directive 69/335 provides:

'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%.'

11 Article 8 of Directive 69/335 authorises Member States to 'exempt from capital duty the transactions referred to in Article 4(1) and (2) concerning:

— capital companies which supply public services, such as public transport undertakings, port authorities or undertakings supplying water, gas or electricity, in cases where the State or regional or local authorities own at least half of the company's capital;

— capital companies which, in accordance with their regulations and in fact, pursue exclusively and directly cultural, charitable, relief or educational objectives'.

12 Article 9 of Directive 69/335 is worded as follows:

'Certain types of transactions or of capital companies may be the subject of exemptions, reductions or increases in rates in order to achieve fairness in taxation, or for social considerations, or to enable a Member State to deal with special situations. The Member State which proposes to take such a measure shall refer the matter to the Commission in good time, having regard to the application of Article [97] of the Treaty.'

National legislation

13 Article 17 of Law No 1676/86 of 24 December 1986 determining rates of value added tax and regulating other matters (FEK A' 204) provides that a 'tax on the raising of capital' is to be charged essentially on (i) commercial companies and business consortia and (ii) cooperative organisations of whatever level.

14 Article 18 of the Law defines taxable transactions. Under Article 18(2), they include:

'(c) the transfer to Greece, from [another] Member State ..., of the effective centre of management of a legal person which is covered by Article 17 and which is not subject to duty in [that other] Member State ...;

(d) the transfer to Greece, from [another] Member State ..., of the registered office of a legal person covered by Article 17 whose effective centre of management is in a third country ... and which is not considered to be subject to duty in [that other] Member State ...'.

15 Article 18(4)(d) provides that 'the transfer to Greece, from [another] Member State ..., of the effective centre of management or of the registered office of a legal person which is covered by Article 17 and is subject to duty in [that other] Member State ...' is not taxable inasmuch as it does not constitute the raising of capital.

16 Article 22(1) of Law No 1676/86 exempts from the tax on the raising of capital:

'(a) agricultural cooperative organisations of whatever level and associations and consortia thereof of any kind;

(b) co-ownership of vessels, shipping consortia and any form of shipping company'.

Facts and pre-litigation procedure

17 After giving the Hellenic Republic an opportunity to submit its observations, on 22 December 2004 the Commission sent it a reasoned opinion stating that certain

aspects of the national regime relating to the tax on the raising of capital seemed incompatible with Directive 69/335. The Commission therefore called upon the Hellenic Republic to comply with its obligations under Community law within a period of two months from notification of the reasoned opinion.

18 Since the Commission was not satisfied with the Greek authorities' response by letter of 28 February 2005, it decided to bring the present action.

19 By order of the President of the Court of 19 September 2005, the Kingdom of Spain was granted leave to intervene in support of the Hellenic Republic.

The action

20 In support of its action, the Commission puts forward a single complaint which is essentially in three parts, namely:

— the incorrect transposition into domestic law of Article 4(1)(g) and (h) and (3)(b) of Directive 69/335 by the national rules providing for capital duty to be charged on intra-Community transfers of the effective centre of management or registered office in so far as the company concerned is not subject to capital duty in the Member State of origin ('the transfer rules at issue');

— the incorrect transposition into domestic law of Articles 1 and 3 of Directive 69/335 by the national rule exempting agricultural cooperative organisations, and associations or consortia thereof of any kind, from capital duty ('the agricultural cooperative exemption at issue'); and

— the incorrect transposition into domestic law of Articles 1 and 3 of Directive 69/335 by the national rule exempting co-ownership of vessels, shipping consortia and any form of shipping company from capital duty ('the shipping company exemption at issue').

The first part of the complaint, relating to the transfer rules at issue

Arguments of the parties

21 The Commission submits that the transfer rules at issue, according to which capital duty is charged on intra-Community transfers of the effective centre of management or registered office in so far as the company concerned is not liable to that duty in the Member State of origin, incorrectly transpose Article 4(1)(g) and (h) and (3)(b) of Directive 69/335.

22 Contrary to the requirements of the directive, those rules allow tax to be charged on the transfer of the effective centre of management or the registered office of companies which are considered in the Member State of origin to be 'capital companies' for the purposes of charging capital duty.

23 The Hellenic Republic submits, on the other hand, that the transfer rules at issue refer not to the 'actual taxation' of capital companies in the Member State of origin, but to their being 'subject to' duty in that State.

24 While the Hellenic Republic acknowledges that this distinction has not been clearly drawn until now and may have led to a degree of confusion, it nevertheless considers that the criterion of being 'subject to' duty is in accordance with the 'capital company' criterion prescribed by Directive 69/335 and thus correctly transposes Article 4(1)(g) and (h) and (3)(b) of the directive.

Findings of the Court

25 A preliminary point to note is that, under the first paragraph of Article 10 EC, the Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community. Such action includes directives which, pursuant to the third paragraph of Article 249 EC, are binding as to the result to be achieved upon each Member State to which they are addressed. This obligation involves adopting, within the framework of the national legal system, all the measures necessary to ensure that a directive is fully effective, in accordance with the objective which it pursues (see, in particular, Case C-336/97 *Commission* v *Italy* [1999] ECR I-3771, paragraph 19, and the judgment of 10 March 2005 in Case C-531/03 *Commission* v *Germany*, not published in the ECR, paragraph 16).

26 It is clear from Article 4(1)(g) and (h) of Directive 69/335 that capital duty is chargeable on transfers, from a Member State to another Member State, of the effective centre of management or registered office of companies, firms, associations

or legal persons which are considered in the latter Member State, for the purposes of charging capital duty, to be capital companies, but are not so considered in the former Member State.

27 Those provisions do not therefore provide for capital duty to be charged on transfers of the effective centre of management or registered office of companies, firms, associations or legal persons which are considered, for the purposes of charging capital duty, to be 'capital companies' in both the Member States concerned.

28 Article 4(3)(b) of Directive 69/335 makes it clear that such transfers cannot be subject to capital duty under Article 4(1)(a) either.

29 However, as the Greek Government itself acknowledges, the criterion of being 'subject to' duty that is used in the transfer rules at issue can result in capital duty being charged in Greece even if the company concerned is also considered as a 'capital company' in the Member State of origin. That is so in particular where the latter State exempts all transactions pursuant to Article 7(2) of Directive 69/335 or where it applies a nil rate.

30 Therefore, the criterion of being 'subject to' duty used in the transfer rules at issue does not correspond to the 'capital company' criterion prescribed in Article 4(1)(g) and (h) and (3)(b) of Directive 69/335. On the contrary, it allows capital duty to be charged in cases where Directive 69/335 does not so envisage.

31 Since Directive 69/335 harmonises exhaustively the cases in which the Member States may impose capital duty, the transfer rules in question must therefore be regarded as transposing Article 4(1)(g) and (h) and (3)(b) of the directive incorrectly.

32 This finding cannot be affected by the argument put forward by the Kingdom of Spain that the criterion of being 'subject to' duty is necessary in order to prevent tax avoidance. In so far as Directive 69/335 harmonises exhaustively the cases in which the Member States may impose capital duty and does not contain any provision expressly authorising the Member States to take general measures to prevent tax avoidance, the Member States can prevent the application of Community law only in specific circumstances entailing an abusive or fraudulent practice. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see to this effect, in particular, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 69, and the case-law cited). In the present case however, first, the transfer rules at issue are not limited to combating abuse in a particular case. Second, exercise of a right created by Community law, such as establishment of a company in another Member State or transfer of its effective centre of management or registered office, cannot in itself warrant suspicion of abuse.

33 Furthermore, inasmuch as the Hellenic Republic acknowledges that the distinction between 'actual taxation' and being 'subject to' duty was not clearly made in the transfer rules at issue and may have led to a degree of confusion, it should be added that, in any event, such rules do not satisfy the requirements established by the case-law concerning transposition of directives. According to that case-law, it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling

them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see to this effect, in particular, Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 48). The rules cannot be regarded as establishing a clear and precise legal situation of that kind.

34 Accordingly, the first part of the complaint put forward by the Commission in support of its action is well founded.

The second part of the complaint, relating to the agricultural cooperative exemption at issue

Arguments of the parties

35 The Commission submits that agricultural cooperatives are not a specific category of company to which Directive 69/335 accords individual treatment and that their exemption consequently amounts to an incorrect transposition of Articles 1 and 3 of the directive.

36 On the other hand, the Hellenic Republic contends that, given the distinction drawn in Greek law between four different categories of cooperative, namely agricultural, civil, liberal and mandatory cooperatives, agricultural cooperatives constitute a distinct category of company, whose exemption from capital duty is permitted pursuant to Article 3(2) of Directive 69/335.

Findings of the Court

37 Article 1 of Directive 69/335 provides that Member States are to charge capital duty on contributions of capital to capital companies.

38 In order to define 'capital company' for the purposes of Directive 69/335, Article 3(1)(a) refers to certain types of company under Member States' national law, including the Ανώνυμος Εταιρία (public limited company), Ετερόρρυθμος κατά μετοχάς Εταιρία (limited partnership with shares) and Εταιρία Περιωρισμένης Ευθύνης (private limited company) in Greek law.

39 Article 3(1)(b) of Directive 69/335 covers companies, firms, associations or legal persons the shares in whose capital or assets can be dealt in on a stock exchange and Article 3(1)(c) refers to companies, firms, associations or legal persons operating for profit whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.

40 In addition, Article 3(2) of Directive 69/335 in principle deems any other company, firm, association or legal person operating for profit to be a capital company.

41 In the present case, the agricultural cooperatives in question do not fall within the scope of Article 3(1) of Directive 69/335. It is apparent from the file, first, that shares

in an agricultural cooperative cannot be dealt in on a stock exchange and, second, that members of such a cooperative can dispose of the shares that they hold only after a decision of the board and if the statutes authorise such disposal, which may only be to other members of the cooperative.

42 However, as the Advocate General has observed in point 60 of her Opinion, the agricultural cooperatives in question engage in an economic activity which, without being intended specifically to make financial gain, is nevertheless presumed to enhance the economic and social development of their members. Those cooperatives thus operate for profit and must be considered to be deemed capital companies under Article 3(2) of Directive 69/335.

43 This interpretation is borne out by the objective of that provision, which is to prevent the choice of a particular legal form from resulting in the different fiscal treatment of transactions which, from an economic point of view, are equivalent. Article 3(2) of Directive 69/335 is intended to apply, with a view to the charging of capital duty, to companies, firms, associations or legal persons which, while having the same economic function as capital companies properly so called, namely the earning of a profit by the pooling of capital in a separate set of assets, do not satisfy the criteria to be a 'capital company' as defined in Article 3(1) (see, to this effect, Case 112/86 *Amro Aandelen Fonds* [1987] ECR 4453, paragraphs 10 and 11).

44 Article 3(2) of Directive 69/335 leaves Member States free, however, to limit the scope of the deeming clause that it contains, by allowing them to exempt certain categories of deemed capital companies from liability to capital duty (see, to this effect, Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 3, and *Amro Aandelen Fonds*, paragraph 12).

45 As the Advocate General has stated in points 64 to 67 of her Opinion, this exception must be understood as referring to forms of company and not simply individual companies or companies operating in a given economic sector.

46 In the present case, it is apparent from the file that the agricultural cooperatives in question do constitute an independent form of company in Greek law. A distinction is drawn in Greek law between four different categories of cooperative, namely agricultural, civil, liberal and mandatory cooperatives. As the Advocate General has observed in points 68 and 69 of her Opinion, agricultural cooperatives are subject to an autonomous statutory regime which includes specific rules concerning their structure, their formation and their organisation. Accordingly, they are not simply cooperatives that operate in a particular economic sector.

47 The Hellenic Republic was therefore entitled to exempt agricultural cooperatives and associations and consortia thereof from capital duty, as it did in Article 22(1)(a) of Law No 1676/86.

48 In those circumstances, the second part of the complaint put forward by the Commission in support of its action must be rejected as unfounded.

The third part of the complaint, relating to the shipping company exemption at issue

Arguments of the parties

49 The Commission contends that, since the exemptions provided for in Articles 3(2), 7, 8 and 9 of Directive 69/335 are not applicable to shipping companies, the fact that

shipping companies have been exempted from capital duty means that Articles 1 and 3 of the directive have been transposed incorrectly.

50 On the other hand, the Hellenic Republic contends that, in the absence of an explicit decision of the Council of the European Union adopted pursuant to Article 80(2) EC, Directive 69/335 does not apply to capital companies in the maritime sector.

51 Furthermore, the exemption from capital duty which shipping companies enjoy is necessary to boost a crucial sector and is, for that reason, even encouraged by Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport (OJ 2004 C 13, p. 3).

Findings of the Court

52 Far from excluding the application of the Treaty to sea transport, Article 80(2) EC provides only that the specific provisions of the Treaty relating to the common transport policy, which are set out in Title V of Part Three of the Treaty, will not automatically apply to that sphere of activity. Whilst under that provision, therefore, sea transport is excluded from the rules of Title V so long as the Council has not decided otherwise, it remains, like other modes of transport, subject to the general rules of the Treaty. It follows that the application of Directive 69/335 to the sphere of sea transport is not optional but obligatory for Member States (see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraphs 30 to 33). Contrary to the Hellenic Republic's submissions, Directive 69/335 therefore also applies to capital companies in the maritime sector.

53 As has already been stated in paragraphs 37 to 39 of the present judgment, Article 1 of Directive 69/335 provides that Member States are to charge capital duty on contributions of capital to capital companies.

54 In order to define 'capital company' for the purposes of Directive 69/335, Article 3(1) refers, first, to the Ανώνυμος Εταιρία (public limited company), Ετερόρρυθμος κατά μετοχάς Εταιρία (limited partnership with shares) and Εταιρία Περιωρισμένης Ευθύνης (private limited company) and, second, to the ability to deal in the shares on a stock exchange (Article 3(1)(b)) and the freedom to dispose of them where they represent the shareholder's liability (Article 3(1)(c)) (see, to this effect, *Amro Aandelen Fonds*, paragraph 8).

55 In the present case, the Hellenic Republic does not dispute that the shipping company exemption at issue concerns, inter alia, capital companies referred to in Article 3(1) of Directive 69/335.

56 Therefore, contributions of capital to such companies must, in principle, be subject to capital duty.

57 However, under Articles 8 and 9 of Directive 69/335 it is possible to exempt certain categories of capital company.

58 Under Article 8, Member States may exempt contributions of capital concerning capital companies which supply public services in cases where the State or regional or local authorities own at least half of the company's capital and concerning capital

companies which pursue exclusively and directly cultural, charitable, relief or educational objectives.

59 Article 9 provides that Member States may, after notifying the Commission in good time, exempt certain types of capital companies in order to achieve fairness in taxation, or for social considerations, or to deal with special situations.

60 As the Advocate General has observed in point 74 of her Opinion, the conditions required by Articles 8 and 9 of Directive 69/335 in order for an exemption from capital duty to be granted are not satisfied in the present case. First, while it is possible that a given shipping company does supply public services and is at least 50% owned by the State or regional or local authorities, in accordance with the premiss envisaged in Article 8, the fact remains that there is nothing in the file to indicate that that would be true of all the shipping companies covered by the national rule at issue. Second, the Hellenic Republic has not complied with the notification procedure prescribed in Article 9.

61 Since Directive 69/335 does not provide for any other possibility of exempting a category of 'capital companies' within the meaning of Article 3(1), the Hellenic Republic was not entitled to exempt co-ownership of vessels, shipping consortia and any form of shipping company from capital duty, as it did in Article 22(1)(b) of Law No 1676/86.

62 This finding cannot be affected by the argument which the Hellenic Republic has put forward to defend itself that the exemption from capital duty which shipping companies enjoy is necessary to boost a crucial sector and is, for that reason, even

encouraged by Communication C(2004) 43. The incompatibility of the exemption of shipping companies with Directive 69/335 cannot be remedied by the fact that such an exemption may be compatible with Community measures adopted in other fields, such as that of State aid.

63 Accordingly, the third part of the complaint put forward by the Commission in support of its action is well founded.

64 It must therefore be held that, as a result of its legislation relating to the charging of capital duty in the event of transfer of the registered office or the effective centre of management of a company and to the exemption from that duty of co-ownership of vessels, shipping consortia and any form of shipping company, the Hellenic Republic has failed to fulfil its obligations under Directive 69/335.

Temporal effects of the Court's judgment

65 Both the Hellenic Republic and the Kingdom of Spain request that, should the Court find that the Hellenic Republic has failed to fulfil its obligations as alleged, a limit be placed, by way of exception, on the temporal effects of the judgment.

66 According to those Member States, the requests for repayment to which the judgment could give rise would entail serious economic loss for the Hellenic Republic.

67 As to those submissions, even if judgments delivered under Article 226 EC were to have the same effects as those delivered under Article 234 EC and, therefore, considerations of legal certainty might make it necessary to limit their temporal effects (see Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 92) provided that the conditions laid down by the Court's case-law in the context of Article 234 EC are met (see, in particular, Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51), it need merely be stated that in the present case the Hellenic Republic is not justified in claiming that a risk of serious economic repercussions within the meaning of that case-law exists.

68 As the Advocate General has stated in point 86 of her Opinion, the Hellenic Republic has not put forward any argument capable of establishing such a risk of serious economic repercussions. It has merely adopted the submissions set out in the statement of intervention of the Kingdom of Spain. The latter did no more than raise generally the economic losses which could result for the Member State concerned from a judgment of the Court finding that it had failed to fulfil its obligations as alleged.

Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been largely unsuccessful, the Hellenic Republic must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, as a result of its legislation relating to the charging of capital duty in the event of transfer of the registered office or the effective centre of management of a company and to the exemption from that duty of co-ownership of vessels, shipping consortia and any form of shipping company, the Hellenic Republic has failed to fulfil its obligations under Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Hellenic Republic to pay the costs.**

[Signatures]