OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 21 June 2007 [1]

1. The Linz Office of the Unabhängiger Finanzsenat (Independent Finance Tribunal, Austria) has referred two questions for a preliminary ruling regarding the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, [2] as amended by Council Directive 85/303/EEC of 10 June 1985. The main proceedings concern a company that has transferred its effective centre of management from a Member State that does not levy capital duty to a Member State that does. The referring court essentially seeks to know whether the directive allows the Member State of destination to treat the transfer as a transaction that is subject to capital duty. The Court recently addressed a nearly identical problem in Case C-178/05 *Commission* v *Greece*. [3]

I — Facts and reference for a preliminary ruling

2. On 9 September 1999, a company, the formation of which had been declared on 28 July 1999, was entered into the Companies Register of the Republic of Austria under the name of 'Bausoftware GmbH'. Its sole member was the public limited company Nemetschek AG, which had its registered office in Munich (Germany). The effective centre of management of Bausoftware GmbH was in Germany, which does not levy capital duty within its jurisdiction.

3. On 16 September 1999, Nemetschek AG made a contribution of ATS 102 000 000 to Bausoftware GmbH. By a contract of transfer of 22 September 1999, Bausoftware GmbH acquired the unregistered one-man undertaking 'Ing. Auer "Die Bausoftware"' located in Mondsee (Austria).

4. The transfer was decided upon at the general meeting of Bausoftware GmbH held

1 — Original language: Portuguese.

2 — OJ, English Special Edition 1969 (II), p. 412, last amended by Council Directive 2006/98/EC of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 129).

3 — [2007] ECR I-4185. See also points 34 to 52 of the Opinion of Advocate General Kokott in that case.

on 22 September 1999. At the same meeting, Mr Auer, who resided in Austria, was appointed as additional managing director and a resolution was passed concerning his special right to manage the business. Lastly, Bausoftware GmbH was renamed 'Ing. Auer — Die Bausoftware GmbH'.

5. Under Paragraph 2(5) of the Austrian Kapitalverkehrsteuergesetz (Law on tax on the movement of capital) ('KVG'), [4] the transfer of the centre of management of a foreign company to Austria is subject to capital duty if, through that transfer, the company becomes an Austrian capital company.

6. Following a tax inspection carried out by the Finanzamt Freistadt Rohrbach Urfahr, the Austrian fiscal authorities ordered Ing. Auer — Die Bausoftware GmbH ('the appellant'), by a decision of 6 June 2005, to pay capital duty in the amount of EUR 104 680.20, namely 1% of the value of the shares in the company.

7. The appellant brought an appeal against that decision before the Unabhängiger Finanzsenat, which has referred the following questions to this Court for a preliminary ruling:

'(1) If the effective centre of management of a company, firm, association or legal person is transferred from a Member State which has abolished capital duty before its formation to another Member State which charges capital duty at that time, is that company, firm, association or legal person precluded from being classified as a capital company "for the purposes of charging capital duty" within the meaning of Article 4(1)(g) of Directive 69/335 ..., as amended by Directive 85/303 ..., and Article 4(3)(b) of Directive 69/335 ..., as amended by Directive 85/303 ..., by the fact that the first-mentioned Member State has waived the charging of capital duty by repealing the relevant national legal basis for that duty?

(2) Does Article 7(2) of Directive 69/335 ..., as amended by Directive 85/303 ..., prohibit the Member State to which a capital company transfers the effective centre of management, on the occasion of the transfer of the effective centre of management, from charging capital duty on the transactions described in Article 4(1)(a) and (g) of Directive 69/335 ..., as amended by Directive 85/303 ..., if the transactions took place at the time when the capital company had its effective centre of management in a Member State which, prior to the formation of the capital company, had waived the charging of capital duty by repealing the relevant national legal basis for that duty?'

4 — BGBl, 629/1994.

II — Assessment

8. Member States which levy indirect taxes on the raising of capital must do so according to the common system laid down in Directive 69/335. In so far as of interest to the present case, that system works as follows.

9. Article 2 specifies the place of taxation. According to Article 2(1) 'transactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated'.

10. The meaning of 'capital company' is explained in Article 3. Article 3(1)(a) sets out, for each Member State, which type of companies are to be considered a capital company. It provides, for example, that companies under Austrian law known as 'Gesellschaft mit beschränkter Haftung' are capital companies for the purposes of the directive. In addition, Article 3(1) specifies two further categories of capital companies. For instance, pursuant to Article 3(1)(b), any company the shares in whose capital or assets can be dealt in on a stock exchange is a capital company. Finally, Article 3(2) provides that, in principle, any other company operating for profit is to be deemed to be a capital company, but that 'a Member State shall have the right not to consider it as such for the purpose of charging capital duty'.

11. It is possible for a company established under the law of one Member State to have its effective centre of management in another Member State. If that company falls under Article 3(1), both Member States must consider it as a 'capital company' for the purposes of the directive. However, if the company falls under Article 3(2), it is possible for a discrepancy to arise, if one Member State deems it to be a 'capital company' while the other Member State does not. Hence, it may happen that a company is created under the law of a Member State which considers it as a 'capital company'; yet, that company will not be treated as such if it has its effective centre of management in another Member State which does not consider it a 'capital company'.

12. Article 4(1) lists several kinds of transactions which are subject to capital duty. The

list includes the formation of a capital company. It also includes, in Article 4(1)(g), 'the transfer from a Member State to another Member State of the effective centre of management of a company ... 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'. In other words, Article 4(1)(g) applies when a company has its effective centre of management in a Member State which does not deem it to be a 'capital company' and decides to transfer its effective centre of management to another Member State which does consider the company to be a 'capital company'. The Member State of destination must treat such a transfer in the same way as it would treat the formation of a capital company within its own jurisdiction. In effect, in the context of a transfer of the effective centre of management of a company from one Member State to another, Article 4(1)(g) deals with the discrepancy that may arise as a consequence of Article 3(2).

13. The directive thus provides a common system for the levying of capital duty. However, it does not actually oblige Member States to levy capital duty. Most Member States, including Germany, have abolished the duty on the raising of capital. Article 7(2) of the directive allows Member States to do so. Indeed, the preamble to Directive 85/303, which amended Directive 69/335, affirms that 'the economic effects of capital duty are detrimental to the regrouping and development of undertakings' and that the best solution to stimulate investment 'would be to abolish capital duty', but that 'the losses of revenue which would result from such a measure are unacceptable for certain Member States'. Consequently, some Member States still levy capital duty in accordance with the common system laid down in Directive 69/335, while other Member States have opted not to levy capital duty at all. [5]

14. It is clear from the order for reference that the company at issue in the main proceedings falls within the scope of Article 3(1)(a) of the directive. Thus, the referring court essentially asks the following question: 'Does Article 4(1)(g) of Directive 69/335 as amended by Directive 85/303 cover the transfer from a Member State to another Member State of the effective centre of management of a company which constitutes a capital company for the purposes of charging capital duty within the meaning of Article 3(1)(a) of the same directive, in circumstances where the former Member State has exempted all transactions from capital duty, pursuant to Article 7(2) of the directive?'

5 — Only Greece, Spain, Cyprus, Luxembourg, Austria, Poland and Portugal continue to levy capital duty. See Commission Press Release IP/06/1673 of 4 December 2006.

15. To this question, the directive only allows a negative reply. The notion of 'capital company' as it appears in Article 4(1)(g) is defined in Article 3 of the directive. Article 3(1) provides a comprehensive definition of what constitutes a 'capital company'. Article 7(2) allows Member States to exempt from capital duty companies that fulfil that definition, but, as the Court made clear in *Commission* v *Greece*, [6] the fact that a Member State has decided to avail itself of the option not to levy capital duty is of no importance to the question whether a company which has its effective centre of management in that Member State is a 'capital company' within the meaning of Article 3(1) of the directive. [7] A capital company may thus find itself in the fortunate position of being exempted from capital duty, but that does not mean it ceases to be a capital company.

16. Yet, the analysis of the problem confronting the national court should not stop there, without addressing the concerns raised by the Austrian Government relating to the prevention of tax avoidance.

17. The directive does not contain specific provisions dealing expressly with the prevention of tax avoidance. However, Article 2(1) provides that transactions subject to capital duty are only to be taxable in the Member State in whose territory the effective centre of management of a capital company is situated. This provision must be read in the light of the prohibition of abuse of Community law, which operates as a general principle of interpretation throughout the case-law of this Court. [8] As the Court stated in *Halifax*, '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'. [9]

18. Accordingly, in *Cadbury Scweppes and Cadbury Schweppes Overseas*, [10] which concerned provisions of the Treaty on freedom of establishment, the Court distinguished the genuine exercise of the right to freedom of establishment from establishment solely for the purpose of taking advantage of a more favourable tax regime in another Member State. It observed that the aim of the right to freedom of establishment is to allow a Community national to participate, on a stable and continuous basis, in the economic

6 — Case C-178/05, cited in footnote 3.

7 — See, to that effect, paragraphs 29 to 31 of the judgment. See also, by analogy, Case C-494/03 *Senior Engineering Investments* [2006] ECR I-525, paragraph 43.

8 — See my Opinion in Case C-255/02 *Halifax and Others* [2006] ECR I-1609, points 64 and 71.

9 — *Halifax and Others*, cited in footnote 8, paragraph 69. See also point 57 of the Opinion of Advocate General Kokott in Case C-321/05 *Kofoed*, currently pending before this Court.

10 — Case C-196/04 [2006] ECR I-7995.

life of a Member State other than his State of origin. [11] The concept of establishment in Article 43 EC thus presupposes actual establishment in the host Member State and the pursuit of genuine economic activity there, but does not include 'wholly artificial arrangements which do not reflect economic reality'. [12] Consequently, 'nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation'. [13]

19. That same principle may be applied as regards the directive. The aim of Article 2 of the directive is to ensure that a transaction which may be subject to capital duty will constitute a taxable event in only one Member State. However, companies are not allowed, under cover of that provision, improperly to circumvent their national legislation. The notion of 'effective centre of management' in Article 2(1) must therefore be interpreted in such a way as to exclude situations that were created artificially for the sole purpose of obtaining a tax advantage. [14]

20. It is for the national court, however, to verify, on the basis of objective evidence, whether action constituting an abusive practice has taken place in the case before it. [15]

11 — *Cadbury Schweppes*, cited in footnote 10, paragraph 53. See also Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25.

12 — *Cadbury Schweppes*, cited in footnote 10, paragraph 55.

13 — *Cadbury Schweppes*, cited in footnote 10, paragraph 35. See also the notion of 'twofold neutrality' in point 67 of my Opinion in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837.

14 — See, by analogy, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569; Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraph 22; and *Halifax and Others*, cited in footnote 8, paragraphs 82 and 86.

15 — *Agip Petroli*, cited in footnote 14, paragraphs 21 and 24; *Halifax and Others*, cited in footnote 8, paragraph 86.

III — Conclusion

21. In view of the foregoing, I suggest that the Court give the following answer to the Unabhängiger Finanzsenat:

Article 4(1)(g) of 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, does not cover the transfer from a Member State to another Member State of the effective centre of management of a company which is a capital company within the meaning of Article 3(1)(a) of the directive. It is immaterial, in that regard, whether the former Member State has exempted all transactions from capital duty, pursuant to Article 7(2) of the directive.

The notion of 'effective centre of management' in Article 2(1), read in the light of the prohibition of abuse of Community law, does not apply to situations that were created artificially for the sole purpose of obtaining a tax advantage. It is for the national court to verify, on the basis of objective evidence, whether action constituting an abusive practice has taken place in the case before it.