OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 7 February 2002 [1]

1. By order of 1 September 1999, the Verwaltungsgerichtshof (Higher Administrative Court), Austria, referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions concerning the interpretation of 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, 'the Directive'). Essentially the Austrian court is asking the Court whether capital duty can be charged on certain payments made in consideration of the acquisition of shares in a public limited company upon an increase in the capital of the company.

Relevant legislation

Community legislation

2. According to the first recital in its preamble, the purpose of Directive 69/335 is to promote the free movement of capital in order to create an economic union whose characteristics are similar to those of a domestic market. It is inherent in this objective that duty 'on the raising of capital... by a company or firm should be charged only once and that the level of this duty should be the same in all Member States so as not to interfere with the movement of capital' (sixth recital). The Directive therefore envisages the harmonisation of the duty with regard both to its structures and to its rates (seventh recital).

3. With a view to such harmonisation, the chargeable transactions are expressly set out by Article 4 of the Directive; paragraph 1 of that article provides, in so far as concerns us here, that the following transactions are to be subject to capital duty:

'...

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

1 — Original language: Italian.

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

...'.

4. Article 4(2) (as amended) [2] provides that '[t]he 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;

(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares;

...'.

5. As regards the basis of assessment, Article 5(1) provides, in so far as concerns us here, that '[t]he duty shall be charged:

(a) in the case of formation of a capital company or of an increase in its capital or assets, as referred to in Article 4(1)(a), (c) and (d): on the actual 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. Member States may postpone the charging of capital duty until the contributions have been effected;

...

2 — Article 4(2) of Directive 69/335 was amended by Article 1 of Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

(d) in the case of an increase in the assets, as referred to in Article 4(2)(b): on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services;

...'.

National legislation

6. According to the order for reference, capital duty in Austria is regulated by the Kapitalverkehrsteuergesetz ('the KVG'). For present purposes, it may be noted that under Paragraph 2 of the KVG '[c]apital duty is chargeable on:

1. the acquisition by the first acquirer of rights in a domestic capital company;

...'.

7. As regards the basis of assessment, Paragraph 7 of the KVG provides that '[t]he duty shall be computed:

1. in the case of an acquisition of rights in the company (Paragraph 2(1)):

(a) if consideration is to be furnished: on the value of the consideration. The consideration shall include the costs of the company formation or capital increase borne by the members, but not the capital duty payable in respect of the acquisition of rights in the company;

...'.

Facts and procedure

8. Energie Steiermark Holding AG ('ESTAG') is a public limited company having a share capital, prior to the disputed transaction, of ATS 500 000 000. The company was at the time in the sole ownership of the *Land* of Styria ('the *Land*') and itself held virtually all the shares in three operating companies (Steirische Wasserkraft- und Elektrizitäts-Aktiengesellschaft, Steirische Ferngas

Aktiengesellschaft and Steirische Fernwärme GmbH), together with which it formed the 'ESTAG Group'.

9. In January 1998, the *Land* and Électricité de France International SA ('EDFI'), a subsidiary of Électricité de France ('EDF'), signed an 'equity participation agreement' ('Unternehmensbeteiligungsvertrag'), under which EDFI was to acquire a substantial holding in ESTAG.

10. Under the terms of the agreement, the *Land* was to increase ESTAG's capital by issuing 166 668 new shares with a nominal value of ATS 1 000 each, bringing the share capital up to ATS 666 668 000. It also bound itself not to exercise its right of pre-emption and to permit only EDFI to subscribe for the new shares, with a view to the latter acquiring a holding of 25% of ESTAG's share capital plus one share.

11. EDFI, in return, agreed:

(i) to subscribe for the 166 668 new ESTAG shares in respect of a cumulative nominal value of ATS 166 668 000;

(ii) to pay the sum of ATS 5 083 332 000 by way of a non-refundable 'shareholder's contribution' into the account of a trustee who would immediately invest the funds and shortly afterwards transfer same (plus accrued interest) to ESTAG and/or its operating companies; [3]

(iii) to pay the sum of ATS 350 000 000 into another account of the same trustee ('the guarantee account'). This account was to remain open for a maximum of two years, during which time EDFI would have the right, in specified circumstances, to repayment of the funds lodged therein. [4] If that right was not exercised, the sum paid into the 'guarantee account' was to be transferred to ESTAG and/or its operating companies as follows: ATS 100 000 000 to be transferred 13 months after the new shares were issued and the balance of ATS 250 000 000 after 25 months.

12. It is important to point out that the excerpts from the equity participation agreement quoted by the national court appear to indicate that all the payments

3 — The trustee was to transfer the sum to ESTAG and/or to its operating companies in accordance with the parties' written instructions; if no instructions were received within the fortnight following the issue of the shares, he was to transfer the sum to ESTAG.

4 — Although not explicitly stated in the order for reference, it would appear from the case-file that EDFI would be entitled to repayment if the information supplied by the *Land* on the economic and legal situation of ESTAG proved to be incorrect.

referred to were to be made by EDFI, which had undertaken that obligation vis-à-vis the *Land*. But from the reconstruction of the facts undertaken before the Court by the Commission and ESTAG, it would appear that in fact the agreement entitled EDFI to have its parent company EDF pay all or part of the sum of ATS 5 083 332 000 (the 'shareholder's contribution' it was required to make).

13. In accordance with the terms of the agreement, a resolution was passed at an extraordinary general meeting held on 16 April 1998 to increase the nominal share capital of ESTAG by ATS 166 668 000. At that meeting, the shareholders also waived their pre-emption rights and permitted EDFI to subscribe for the new shares.

14. Between April and May 1998, the order for reference appears to indicate, EDFI paid ESTAG the sum of ATS 166 668 000, equal to the nominal value of the new shares, while EDF paid the balance of ATS 5 433 332 000 into the trustee's accounts. Evidently, the trustee then transferred the 'shareholder's contribution' of ATS 5 083 332 000 to ESTAG and its operating companies [5] and retained the balance of ATS 350 000 000 in the 'guarantee account'.

15. On 11 May 1998, the relevant tax administration (Finanzamt für Gebühren und Verkehrssteuern Graz) assessed capital duty on the complex transaction described above, taking as the basis of assessment the figure of ATS 5 600 000 000, in other words the whole of the consideration agreed for the acquisition of the equity interest in ESTAG (ATS 166 668 000 as the nominal value of the shares, ATS 5 083 332 000 by way of a 'shareholder's contribution' and a further ATS 350 000 000 payable into the 'guarantee account').

16. ESTAG appealed against this assessment to the Finanzlandesdirektion, arguing that EDFI had paid only ATS 166 668 000 and that under Directive 69/335 the further sums paid by EDF — which were described as 'parent company contributions' ('Großmutterzuschüsse') — should not have been assessed to capital duty. The Finanzlandesdirektion dismissed the appeal, ruling that the disputed assessment was fully in accordance with Community law given that the basis of assessment was 'the actual value of assets of any kind contributed or to be contributed' within the meaning of Article 5(1)(a) of the Directive.

17. ESTAG then challenged that decision before the Verwaltungsgerichtshof, arguing essentially that the decision was incompatible with the Directive, in that the

5 — It appears that ATS 3 733 332 000 was paid to ESTAG, ATS 950 000 000 to Steirische Wasserkraft und Electrizitäts, ATS 300 000 000 to Steirische Ferngas and ATS 100 000 000 to Steirische Fernwärme.

disputed payments had not increased its capital, had been made by an outsider (EDF) and had accrued in large part to third parties (its operating companies), that the charge to capital duty should in any case have been deducted from the basis of assessment, and that payments not yet made should not have been included in the basis of assessment in the first place.

18. In order to decide these difficult issues, the Verwaltungsgerichtshof deemed it necessary to refer the following questions to the Court of Justice under Article 234 EC:

'(1) Do payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), does not make itself but makes through its parent company amount to a "contribution of assets of any kind" within the meaning of Article 4(1)(c) of Directive 69/335...?

(2) Do payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), makes not to the company increasing its capital but to its subsidiary companies amount to a "contribution of assets of any kind" within the meaning of Article 4(1)(c) of Directive 69/335...?

(3) Do payments which have not yet been made amount to a "contribution of assets of any kind" within the meaning of Article 4(1)(c) of Directive 69/335...?

(4) Is the capital duty to be paid by the company a "liability" or "expense" which, in accordance with Article 5(1)(a) of Directive 69/335, is to be deducted from the basis of assessment...?'

19. The parties to the proceedings before the Court were ESTAG, the Republic of Austria and the Commission, which submitted their observations in writing and at the hearing held on 26 September 2001.

Legal analysis

The first two questions

20. By the first two questions, which are best taken together, what is being asked in

effect is whether under Directive 69/335 capital duty can be charged on payments made, as in the present case, for the acquisition of an interest in a company through subscribing for shares issued on an increase in capital, if the payments are made by the acquirer's parent company or are made to subsidiaries of the company increasing its capital.

21. It should be added that the questions do not relate to the issue price of the new shares, equal to their nominal value, but to additional payments made for the acquisition of a shareholding the actual value of which exceeds the nominal value of the shares. The dispute in the main proceedings, as we have seen, does not concern the duty assessed on the ATS 166 668 000 paid by EDFI but the charge imposed in respect of the further sum of ATS 5 433 332 000 paid by EDF, which in effect represents the premium on the shares allotted to its subsidiary. It is thus common cause that the payment by EDFI of the issue price of the new shares constituted an 'increase in the capital of a capital company by contribution of assets of any kind', which is subject to capital duty under Article 4(1)(c) of the Directive. The parties are at odds, however, as to whether, and on what basis, the payment of the premium by EDF can be charged to capital duty under the Directive.

22. According to the Commission, this payment constituted 'an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares', within the meaning of Article 4(2)(b) of the Directive, and is therefore liable to capital duty on that basis. The Austrian Government, on the other hand, maintains that the payment in question cannot be segregated from the payment of the issue price of the new shares, in combination with which it constituted the true basis of ESTAG's capital increase: hence, it too was subject to capital duty by virtue of Article 4(1)(c) of the Directive. The Commission and the Austrian Government are in agreement, however, that it is immaterial for the purposes of the charge to capital duty that the premium on the shares allotted to EDFI was paid by its parent company or accrued to ESTAG's subsidiaries.

23. ESTAG, on the other hand, takes the diametrically opposed view, contending that the payments by EDF could not be subject to capital duty since they constitute neither an increase in ESTAG's capital, within the meaning of Article 4(1)(c) of the Directive, nor an increase in its assets 'in consideration... of rights of the same kind as those of members', within the meaning

of Article 4(1)(d). Critically, in ESTAG's view, the payments in question were not made by a member — as required by Articles 4(2)(b) and 5(1)(a) of the Directive — and they accrued in part to companies other than the company which increased its capital.

24. For my part, let me say straight away that, of the different ways of construing the disputed transaction, the best, in my view, is that suggested by the Austrian Government.

25. I share that government's view that under Article 4(1)(c) of the Directive the duty must be assessed on *all assets contributed* with a view to an increase in a company's capital and in return for shares in that capital. [6] If the actual value of the shares issued in connection with a capital increase exceeds the issue price, therefore, that provision means that the duty must also be charged on any premium paid in consideration of the capital increase and of the subsequent allotment of the new shares.

26. This view finds confirmation, I believe, in the provisions of the Directive setting out the basis of assessment for the various transactions subject to capital duty. In the case of capital increases, as provided for under Article 4(1)(c) of the Directive, Article 5(1)(a) provides that the duty is to be charged 'on the *actual value* of assets of any kind contributed or to be contributed by the members' and not 'on the *nominal amount* of such increase' as is provided, for example, in the case of 'an increase in the capital by capitalisation of profits, reserves or provisions' (Articles 5(1)(c) and 4(2)(a) respectively). [7] If the duty is thus to be charged on the actual value of the assets contributed on a capital increase in consideration of shares in the capital, it seems clear to me that it must be charged also on any premium paid for that purpose.

27. That having been established, the next point to be considered is whether in transactions of this kind a charge to capital duty arises if the premium is paid not by the company subscribing for the new shares (EDFI, in this case) but by its parent company (EDF, in this case), or if it is paid, at least in part, to subsidiaries of the company increasing its capital (here,

6 — The condition that there must be consideration of 'shares in the capital' follows by contrary implication from Article 4(1)(d) of the Directive. To this effect, see the Opinion of Advocate General Cosmas in Case C-8/96 *Locamion* [1997] ECR I-7055, in which it is noted that 'points (c) and (d), when construed in conjunction with one another, show that contributions which entail an increase in capital must be in consideration of shares in the capital' (point 36).

7 — Emphasis added.

ESTAG's operating companies). The question is whether these circumstances in effect have no bearing on the charge to duty, as the Commission and the Austrian Government maintain, or whether they preclude it, as ESTAG has argued.

28. To begin with the case in which the premium is paid by the parent company, it is ESTAG's contention that the charge to duty cannot arise in that event because the party furnishing the consideration does not receive shares in the capital of the investee company in return (these go instead to its subsidiary) and hence does not acquire the status of member. That consideration cannot therefore be subject to duty since, in the case of an increase in the capital of a capital company, within the meaning of Article 4(1)(c), '[t]he duty shall be charged... on the actual value of assets of any kind contributed or to be contributed *by the members*'. [8]

29. But this approach, to my mind, is unduly formalistic and ultimately unconvincing. In the scenario under examination, the parent makes the payment on behalf of its subsidiary so that the latter may be allotted the shares issued by way of the capital increase. That being so, it is fair to say that while the premium is formally paid by a third party, the payment is in reality attributable to the subsidiary, which, in return, is given the right to subscribe for the newly issued shares and thereby to acquire the status of member. In practice, the situation brought about by the parent company making the payment is no different from what would ensue if the parent simply put the subsidiary in funds in order to make the payment, since in both cases it is still the subsidiary that obtains the benefit of the transaction and in both cases a credit of like value is (or ought to be) created in favour of the parent and against the subsidiary.

30. Looking beyond the formal arrangement, therefore, it may be seen that the chargeable transaction was carried out, albeit indirectly, by the subsidiary: that is, by a company obtaining shares in the capital in return. If this proposition is accepted, there is clearly no further basis for ESTAG's submission that the relevant payment cannot be assessed to capital duty on the ground that it was made by a third party on whom the status of member was not conferred.

31. There is, moreover, a specific precedent in the Community case-law for the 'substantive' approach proposed here, according to which the charge to duty must encompass indirect contributions of assets. As noted by the Commission, the Court has held — with reference to the services contemplated by Article 4(2)(b) of the Directive — that '[a] transfer of profits from

8 — Emphasis added.

one company to another, both being controlled by one and the same member, must be regarded as a service provided by a member within the meaning of the aforesaid provision of the Directive if it is clear from the circumstances of the case that the transfer in fact constitutes a payment by that member to one company through the other'. [9] In that case, therefore, the Court treated as services provided by a member, within the meaning of the Directive, payments made by a member through the intermediary of a company under its control, the Court thereby seeing fit to look beyond the formal arrangement and identify the party which was 'in fact' behind the payments in question. By the same token, but with roles reversed, I believe that assets contributed by a member in the form of a payment made (on its behalf) by its parent company must be attributed to the member in question.

32. It is also clear, to my mind, that this interpretation is necessary in order to preserve the effectiveness of the Directive and to avoid the harmonised duty being easily circumvented. The effect of Article 4(1)(b) would be substantially diminished, if not entirely undermined, if companies belonging to a group could avoid the duty by simply having other companies in their group pay on their behalf the consideration due for shares allotted to them by way of a capital increase.

9 — Case C-49/91 *Weber* [1992] ECR I-5207, paragraph 11.

33. The same reasoning applies, in my view, where part of the consideration is paid to subsidiaries of the company increasing its capital.

34. The only argument advanced by ESTAG against the imposition of capital duty in that situation is that the assets were not contributed in consideration of shares in the capital of the recipient companies. But this argument is easily refuted by pointing out, as the Commission and the Austrian Government have done in effect, that the company undertaking the capital increase is still an indirect recipient of the assets contributed. That company stands to gain a clear economic advantage from the contribution of assets to its subsidiaries, which may result in higher profits and will in any event mean a substantial increase in the value of its equity holdings.

35. That being so, and turning to the present case, it appears clear to me that the premium on the new ESTAG shares allotted to EDFI cannot escape capital duty merely by virtue of the fact that it was paid by the parent company, EDF. It was, after all, EDFI that entered into an agreement with the *Land* to acquire the interest in ESTAG, that agreed to pay the entire consideration of ATS 5 600 000 000, and that in fact received in return a substantial shareholding in the Austrian company. The fact that part of the agreed figure (the

portion representing the premium on the new shares) was paid by EDF on behalf of its subsidiary is therefore immaterial, to my mind, for the purposes of the charge to capital duty. Likewise, I do not believe that it is material that part of the consideration was paid to ESTAG subsidiaries (of which it holds virtually the entire share capital), since ESTAG still derived a certain, albeit indirect, economic advantage.

36. In the light of the foregoing, I conclude that the answers to be given to the first two questions are:

— that payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), does not make itself but makes through its parent company do amount to a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of the Directive; and

— that payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), makes not to the company increasing its capital but to its subsidiary companies also amount to a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of the Directive.

The third question

37. By the third question, which obviously refers to the ATS 350 000 000 paid into the 'guarantee account', the national court asks whether payments not yet made constitute a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of the Directive.

38. ESTAG submits that this question should be answered in the negative, arguing that, until the assets are transferred, not only is the beneficiary's identity not known but nor is it possible to determine whether the conditions for the charging of capital duty are in fact fulfilled. The Commission, on the other hand, contends that in the cases contemplated by Article 4(1)(a), (c) and (d) the Directive allows Member States to 'postpone the charging of capital duty

until the contributions have been effected' (Article 5(1)(a)), but does not prevent them from charging it before that time. It was therefore for Member States to specify the time at which the duty became payable, provided that the charge became final only upon the happening of the chargeable event. The Austrian Government, finally, argues that assets not yet contributed can be assessed to capital duty provided that the claim on the assets has already accrued; if the claim was subject to conditions precedent, the duty could not be charged until those conditions had been fulfilled.

39. On this point, too, the approach I find most convincing is that suggested by the Austrian Government. For it is indeed the case, as the Commission observes, that Article 5(1)(a) of the Directive allows Member States to charge the duty before the assets are contributed; moreover, it seems to me that this proposition is supported by the fact that, according to the same provision, the duty is to be charged 'on the actual value of assets of any kind *contributed or to be contributed* by the members'. [10] I agree with the Austrian Government, however, that the charge to duty cannot arise before the fulfilment of any conditions precedent to which the chargeable payment is subject: for it is only upon those conditions being met that the chargeable event materialises. Once the conditions are fulfilled and the claim on the stipulated assets has become payable, the Member States may, under Article 5(1)(a) of the Directive, charge the duty immediately or wait 'until the contributions have been effected'.

40. I therefore take the view that the answer to be given to the third question is that payments not yet made do constitute a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of the Directive, provided that the conditions precedent to which they are subject have been fulfilled.

The fourth question

41. By the fourth and final question, the Court is asked whether the capital duty to be paid by the company constitutes a 'liability' or 'expense' deductible from the basis of assessment under Article 5(1)(a) of the Directive, which provides that, in the cases contemplated by Article 4(1)(a), (c) and (d), the duty is to be charged 'on the actual 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'.

10 — Emphasis added.

42. ESTAG submits that this question should be answered in the affirmative, arguing that tax expenses, and capital duty charges in particular, must be regarded as deductible expenses. The opposite view is taken by the Commission and the Austrian Government, which maintain that capital duty is not deductible from any of the transactions giving rise to payment of same.

43. For my part, I do not believe there is any doubt that payment of capital duty cannot constitute a deductible expense under Article 5(1)(a) of the Directive. Without dwelling on the matter, suffice it to note that the determination of the basis of assessment necessarily precedes the charging of the duty, the amount of which naturally depends upon the sum on which it is computed. Clearly, therefore, to make allowance for the amount of the charge to duty in determining the basis of assessment would constitute a serious error not only of logic, but also in law.

44. I therefore take the view that the answer to be given to the fourth question is that the capital duty payable by the company does not constitute a 'liability' or 'expense' deductible from the basis of assessment under Article 5(1)(a) of the Directive.

Conclusion

45. In the light of the foregoing considerations, I suggest that the questions referred by the Verwaltungsgerichtshof be answered as follows:

(1) Article 4(1)(c) of Directive 69/335/EEC must be interpreted as meaning that payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is

excluded), does not make itself but makes through its parent company do amount to a 'contribution of assets of any kind' within the meaning of that provision.

(2) Article 4(1)(c) of Directive 69/335 must be interpreted as meaning that payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), makes not to the company increasing its capital but to its subsidiary companies do amount to a 'contribution of assets of any kind' within the meaning of that provision.

(3) Article 4(1)(c) of Directive 69/335 must be interpreted as meaning that payments not yet made do constitute a 'contribution of assets of any kind' within the meaning of that provision, provided that the conditions precedent to which they are subject have been fulfilled.

(4) Article 5(1)(a) of Directive 69/335 must be interpreted as meaning that the capital duty payable by the company does not constitute a 'liability' or 'expense' deductible from the basis of assessment under that provision.