OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 10 January 2002 [1]

1. By order of 16 December 1999, the Verwaltungsgerichtshof (Higher Administrative Court, Austria) referred to the Court of Justice for a preliminary ruling under Article 234 EC a question on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [2] (hereinafter 'the directive'). The question essentially concerns whether capital duty may be levied in accordance with Directive 69/335 when a partnership is converted into a capital company if the contributions have already been subject to a similar charge before entry into force of the directive.

Legal framework

Community law

2. The system of indirect taxes on the raising of capital is governed at Community level by Directive 69/335, the purpose of which is to promote the free movement of capital with the objective of creating an economic union whose characteristics are similar to those of a domestic market (first recital). That objective presupposes in particular that the taxes in question 'on the raising of capital within the common market by a company... 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). To that end, the directive provides for the harmonisation of capital duty with regard both to its structures and to its rates (seventh recital), and the abolition of other indirect taxes with the same characteristics (eighth recital).

3. In line with the objectives set out above, Article 1 of the directive provides that 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions' of the directive. The meaning of a 'capital company' and the transactions subject to 'capital duty' are set out in Articles 3 and 4.

1 — Original language: Italian.

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

4. Under Article 3(1), the following in particular are considered to be capital companies:

(a) companies known in the Member States as 'companies incorporated with limited liability';

'(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.'

5. Article 3(2) provides that 'for the purposes of the application of this directive, any other company, firm or 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'.

6. As regards the transactions subject to capital duty, they include under Article 4(1):

'(a) the formation of a capital company;

(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;

...'.

Article 4(3) states, however, that 'formation, within the meaning of paragraph 1(a), shall not include... the conversion of a capital company into a different type of capital company.'

7. In order to ensure effective harmonisation in this area and to avoid double charging, Article 10 of the directive provides that 'apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

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

(b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form'.

8. Finally, with reference to the payment of the duty, Article 6(1) of the directive, expressly mentioned in the order for reference, provides that 'each Member State may exclude from the basis of assessment, as determined in accordance with Article 5, the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company as well as the share of such a member in the company's assets'. Article 6(2) states that where a Member State exercises the power provided for in paragraph 1, the following, amongst others, shall be subject to capital duty: 'any transaction as a result of which the liability of a member is limited to his share in the company's capital, in particular when the limitation of liability results from the conversion of a capital company into a different type of capital company'.

National law

9. The order for reference states that before Austria's accession to the Community, under Paragraph 5 of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) (hereinafter 'the KVG') the following were deemed to be capital companies: 'companies known as Aktiengesellschaften, Kommanditgesellschaften auf Aktien, Gesellschaften mit beschränkter Haftung..., associations operating for profit where their members are liable for the debts of the association only in the amount of their individual shares and have the right to transfer their shares to third parties'.

10. Also prior to Austria's accession to the Community, Paragraph 33, item 16(1)(b), of the Gebührengesetz (Law on fees) (hereinafter 'the GebG') provided for a duty on legal instruments applicable to the following where assets were raised: 'constituent instruments, except those which relate to capital companies within the meaning of the Kapitalverkehrsteuergesetz, by which two or more persons agree to associate to operate for profit'. The duty was equal to 2% of the value of the stipulated contribution of assets or increase thereof, but not less than ATS 800.

11. When Austria acceded to the Community, important changes were made in this area. For our purposes it is sufficient to note that from 1 January 1995 the duty mentioned in Paragraph 33, item 16(1)(b), of the GebG was abolished and the definition of a 'capital company' was modified. Paragraph 4(1) of the KVG in the version in force from 1 January 1995 defines as capital companies 'companies known as Aktiengesellschaften and Gesellschaften mit beschränkter Haftung (GmbH)'. Under Paragraph 4(2), the following companies are deemed equivalent to capital companies: 'companies known as Kommanditgesellschaften (limited partnerships) (KG)', and 'companies known as Kommandit-Erwerbsgesellschaften (limited trading partnerships) (KEG), in which one of the personally liable partners is a capital company'.

12. As far as capital duty on capital companies is concerned, it must be observed that, for present purposes, under Paragraph 2(1)(1) of the KVG (in the version in force from 1 January 1995), 'the acquisition of rights in a domestic capital company by the first acquirer' is subject to capital duty. In applying that, moreover, Austria exercised its right under Article 6(1) of Directive 69/335 to exclude from the basis of assess-

ment the amount of capital contributed by a member with unlimited liability for the obligations of a capital company (Paragraph 5(1) of the KVG).

Facts and procedure

13. The Palais am Stadtpark Hotelbetriebs GmbH & Co KG (hereinafter: 'Palais') is a company formed in 1982 under Austrian law as a 'limited partnership' (KG) with the object of managing a hotel business. As it was not a capital company within the meaning of the rules then in force, duty was lawfully charged on the instrument of formation in accordance with Paragraph 33, item 16(1)(1)(b), of the GebG.

14. In March 1994 the corporate form of the appellant was changed to a 'limited trading partnership' (KEG). That change, however, did not signify that the company had become a capital company within the meaning of the national legislation in force.

15. By deed of 17 May 1996, the personally liable partners of Palais assigned their shares to Rudolf Hinteregger GmbH, which became the sole personally liable partner with unlimited liability. From the time that that capital company joined it as a personally liable partner with unlimited liability Palais was considered to be a capital company within the meaning of Paragraph 4(2) of the KVG. The Finanzamt (tax office) therefore held, by provisional assessment notice of 25 July 1996, that as a result of the transaction the limited partners of Palais had for the first time acquired rights in a capital company, and consequently levied capital duty in accordance with Paragraph 2(1) of the KVG.

16. On 26 August 1996 Palais appealed against that assessment, claiming that it was inconsistent with Directive 69/335. Since the contribution of the limited partners had already been taxed under Paragraph 33, item 16, of the GebG, it considered the new charge to be a form of 'double charging' prohibited by Article 10 of the directive.

17. By decision of 23 September 1996 the first-instance revenue authority dismissed the appeal as unfounded. It claimed that the duty referred to in Paragraph 33, item 16, of the GebG could not be equated to capital duty and that therefore there was no case of 'double charging' in this instance. The second-instance revenue authority was of the same opinion and, by decision of 3 September 1997, dismissed the appeal by Palais with a further statement of grounds stating that the charge could not be equated to 'double charging' prohibited by the directive since the duty referred to in Paragraph 33, item 16, of the GebG had

been applied before Austria's accession to the Community.

18. On 22 October 1997 that second decision was contested by Palais before the Verwaltungsgerichtshof which, by order of 16 December 1999, decided to make this reference to the Court of Justice for a preliminary ruling.

In the order for reference the Verwaltungsgerichtshof confirmed that the arrival of Rudolf Hinteregger GmbH as a limited partner in Palais meant that Palais had become a capital company: thus, under the national legislation, the limited partners of Palais made their 'first acquisition of rights in a capital company' subject to capital duty within the meaning of Paragraph 2(1)(1) of the KVG. The Verwaltungsgerichtshof emphasised, however, that at the time of the formation of Palais, those rights had already borne duty under Paragraph 33, item 16, of the GebG, which was, in its opinion, similar to capital duty, and for that reason it expressed grave doubts as to whether such 'double charging' was consistent with Directive 69/335. As regards the fact that the first charge was levied before Austria's accession to the Community, the order states that it would not be a question of applying the directive retrospectively in this case: rather, the duty charged in the first instance must be accepted as a circumstance of fact and a second charge on the same contributions following entry into force of the directive is to be avoided. In order, however, to remove any doubts as to the compatibility of the charge in issue with Community law, the Austrian court decided to refer to the Court of Justice under Article 234 EC the question:

'whether the provisions 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), and in particular Article 6, are to be interpreted as precluding a Member State from levying capital duty on the limited partners' contributions to a limited trading partnership (KEG) when a private limited company (GmbH) joins it as general partner, if the partnership capital on which duty is to be imposed had already been subject, before the entry into force of Directive 69/335/EEC, to a duty such as that referred to in Paragraph 33, item 16(1)(b), of the Gebührengesetz (Law on fees) 1957, BGBl. 267/1957?'

19. The Republic of Austria and the Commission intervened in the proceedings before the Court, submitting that the question referred by the Verwaltungsgerichtshof should be answered in the negative. Both maintain that the charge mentioned in Paragraph 33, item 16, of the GebG, applicable only to partnerships, does not constitute a *capital duty on a capital company* and, therefore, does not fall within the scope of Directive 69/335. The Austrian Government maintains, furthermore, that, as it is closely linked to the constitution of legal instruments, the charge in question does not have the char-

acteristics of a capital duty and, therefore, it may not be considered to be covered by the prohibition on 'double charging' in Article 10 of the directive.

neither the decision of the Republic of Austria to exercise the power referred to in paragraph 1 of that article, nor whether any of the transactions envisaged in paragraph 2 occurred is not contested. It is clear in fact from the order for reference and the question referred that in this case the matter in issue is the alleged breach of the prohibition on 'double charging' in Article 10 of the directive. In analysing the question, therefore, reference must be made to Article 10.

Legal analysis

20. The referring court seeks to ascertain by its question esstentially whether Directive 69/335 allows a charge to be levied on contributions when a limited trading partnership becomes a capital company (due to a capital company joining as a partner), if, when that company was formed (before the entry into force of the directive), a charge of the type set out in Paragraph 33, item 16, of the GebG had already been applied.

21. I should first point out that although the question mentions Article 6 of the directive 'in particular', that article in fact is not the relevant one in this instance. As I said before, Article 6 allows each Member State to exclude from the basis of assessment the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company (paragraph 1), requiring in such circumstances that particular transactions be subject to capital duty, including 'any transaction as a result of which the liability of a member is limited to his share in the company's capital' (paragraph 2). In this case, however, as the Commission has observed,

22. In that context, it may be recalled that the Court has already declared that 'Article 10 of the directive, read in the light of the last recital in the preamble, prohibits in particular indirect taxes with the same characteristics as capital duty. It thus applies, inter alia, to taxes in any form which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)), or in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form (Article 10(c)). That latter prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in

other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the directive.' [3]

23. In this case, as I have said, the referring court appears to believe that the duty levied when Palais became a capital company (because Rudolf Hinteregger GmbH had joined as a limited partner) is incompatible with Article 10 of the directive because the duty under Paragraph 33, item 16, of the GebG had already been levied when the company was formed. In coming to that conclusion, the national court assumes, on the one hand, that although that charge relates to the constitution of a legal instrument, it displays the characteristics of a capital duty; [4] and on the other hand, that the prohibition on 'double charging' mentioned in Article 10 of the directive applies even if the first 'tax' was charged before entry into force of the directive.

24. The solution put forward by the national court does not, however, appear to me to be convincing. Even assuming the two premisses on which it is based to be correct, I do not believe that there would be a breach of Article 10 of the directive in this instance; that is to say, in general terms, I do not consider that Article 10 prohibits the levying of capital duty when a partnership becomes a capital company if a similar charge has already been levied when the partnership was formed.

25. I would particularly point out in that respect that Article 4 of Directive 69/335 expressly mentions among the transactions subject to capital duty 'the conversion into a capital company of a company, firm, association or legal person which is not a capital company.' There can therefore be no doubt that a transaction leading to such a conversion must, in principle, be subject to capital duty in accordance with Article 4 of the directive.

26. On that basis, however, it must be considered whether that duty must nevertheless be ruled out in accordance with Article 10 in cases where a partnership has been formed and a duty similar to capital duty has been levied. To answer that question, it is, in my view, necessary to take into account, as Article 1 clearly states, the fact that Directive 69/335 is intended to harmonise the duty charged on 'contributions of capital to capital companies', calculating the structure and the applicable rates on a Community basis. The decision to restrict the scope of Community harmonisation to capital duty *levied on capital companies* was probably made on the basis that capital within those com-

3 — Case C-188/95 *Fantask* [1997] ECR I-6783, paragraph 21; see also to this effect Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23.

4 — The court cites to this effect Joined Cases C-71/91 and C-178/91 *Ponente Carni* [1993] ECR I-1915; *Fantask*, cited above; and Case C-347/96 *Solred* [1998] ECR I-937.

panies may circulate easily within the Community: it was those companies that might serve the objective of 'the promotion of the free movement of capital' in order 'to create an economic union whose characteristics are similar to those of a domestic market' (first recital of the directive). Confirmation that this is the aim of the Community legislature appears to be provided by the fact that, as well as the traditional companies with limited liability (Article 3(a)), the term 'capital company' within the meaning of the directive includes associations which have as their aim to permit or facilitate the circulation of stock:

— 'any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange' (Article 3(b))

— and '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' (Article 3(c)).

27. Admittedly the scope of the directive (defined as capital duty on capital companies) is indirectly extended by Article 3(2), which states that 'for the purposes of the application of this directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company.' However, the second sentence of that paragraph provides that 'a Member State shall have the right not to consider it as such for the purpose of charging capital duty.' If, therefore, a Member State decides not to consider particular companies, firms, associations or legal persons as 'capital companies', capital duty on those bodies does not fall within the scope of the directive and may therefore be freely regulated at national level.

28. If, then, the capital duty on partnerships is not harmonised by the directive, it follows — as the Commission and the Austrian Government also stress — that it does not fall within the prohibition on 'double charging' mentioned in Article 10. I have already stated that Article 10 'prohibits in particular indirect taxes with the same characteristics as capital duty', on the basis that 'their continued existence would... risk frustrating the aims of the directive'; the intention is to prevent Member States from getting round the provisions harmonising *capital duty on capital companies*, indirectly making *those capital contributions* subject to other charges with similar characteristics (which might for example lead to a substantial increase in the maximum applicable rate). If, however, the aim of Article 10 of the directive is to guarantee the harmonisation of capital duty on capital companies, it is

clear that the prohibition under Article 10 concerns only charges which affect, even indirectly, *capital contributions to capital companies*. Therefore, charges on *capital contributions to partnerships* may not be included in the prohibition on 'double charging' which, as I have said, are not governed at Community level but are the responsibility of the Member States.

29. It follows, in my view, for the purposes of this case, that if a tax is levied on capital contributions when a partnership is formed in a particular Member State, Article 10 of the directive does not prohibit the levying of a further charge if that company becomes a capital company. Such a case, in fact, would in no way constitute 'double charging' within the meaning of Article 10 of the directive, given that the charge levied at the time of the formation of the partnership does not in any way fall within the scope of that article.

30. Furthermore, indirect confirmation of the above is provided by the fact that while Article 4(1) of the directive requires capital duty to be levied in the case of 'the conversion into a capital company of a company, firm, association or legal person which is not a capital company', Article 4(3) provides that 'the conversion of a capital company into a different type of capital company' may not constitute a transaction subject to capital duty. That exception appears to me to be clearly justified by the need to avoid 'double charging' within the meaning of Article 10 of the directive, given that capital duty has already been levied by virtue of Article 4(1) when the capital company was formed. That requirement, however, does not apply when a partnership is converted into a capital company because, as I have said, capital duty on partnerships is not governed by the directive and, therefore, does not fall within the prohibition on 'double charging' under Article 10.

31. Having outlined the general position, I think it is easy to draw the appropriate conclusion for the case in hand, which is that it cannot be said to constitute a form of 'double charging' within the meaning of Article 10 of the directive.

32. As we have seen, Palais was formed in 1982 as a limited partnership and therefore constituted a partnership under the Austrian law in force at the time; for that reason the charge under Paragraph 33, schedule item 16, of the GebG was levied. At the time, constituent instruments of partnerships only were subject to that charge when assets were raised. The nature of Palais as a partnership remained intact following its conversion to a limited trading partnership in March 1994; and also following Austria's accession to the Community, given that Austria decided — in accordance with the last sentence of Article 3(2) of the directive — that Austria decided to include in the definition of

capital companies only limited partnerships and limited trading partnerships whose personally liable partners included a capital company (Paragraph 4(1) of the KVG). Only when Rudolf Hinteregger GmbH became sole limited partner did Palais became a capital company within the meaning of Paragraph 4(1) of the KVG with the result that the charge in question was levied.

33. Clearly, therefore, when the charge under Paragraph 33, item 16, of the GebG was levied, Palais was a partnership and remained such following the entry into force of the directive. It must therefore be concluded, in the light of the above, that the subsequent levying of capital duty when it became a capital company could not have constituted a form of 'double charging' prohibited by Article 10 of the directive.

Conclusion

34. In view of the foregoing, I propose that the Court should reply as follows to the question referred by the Verwaltungsgerichtshof:

The provisions of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, and in particular Article 10, should be interpreted as not precluding a Member State from levying capital duty on the limited partners' contributions to a limited partnership when a private limited company joins it as general partner, if the partnership capital on which duty is to be imposed had already been subject, before the entry into force of Directive 69/335/EEC, to a duty such as that referred to in Paragraph 33, item 16(1)(b), of the GebG (Law on fees) 1957, BGBl. 267/1957.