OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 16 June 2005 [1]

I — Introduction

1. By its preliminary reference in this case the Landgericht (Regional Court) Baden-Baden (Germany) asks the Court whether charges imposed in respect of the authentication by a public notary of a contract by which shares in one company are transferred to another company as a contribution towards increasing the capital of the latter are prohibited under Article 10(c) of Directive 69/335 concerning indirect taxes on the raising of capital. [2] In the course of the proceedings before the Court the question was further raised as to whether such charges may be permitted under the exception contained in Article 12(1)(a) of the directive in respect of duties on the transfer of securities.

1 — Original language: English.

2 — Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, OJ L 249, p. 25; English Special Edition 1969 (II), p. 412, as amended by Directive 85/303/EEC of 10 June 1985, OJ 1985 L 156, p. 23 (hereinafter: 'Directive 69/335').

II — Relevant provisions

A — *Community law*

2. The provisions of Directive 69/335 which are relevant to this case are the following.

'Article 3

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

(a) companies under Belgian, German, French, Italian, Luxembourg and Netherlands law known respectively as:

...

— société de personnes à responsabilité limitée/ personenvennootschap met beperkte aansprakelijkheid, Gesellschaft mit beschränkter Haftung, société à responsabilité limitée, società a responsabilità limitata, société à responsabilité limitée;

— ...

Article 4

1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

...

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

...

Article 10

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) n 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.

Article 12

1. Notwithstanding Articles 10 and 11, Member States may charge:

(a) duties on the transfer of securities, whether charged at a flat rate or not;

...

(e) duties paid by way of fees or dues;

...'

B — *National law*

3. Under Paragraph 36(2) of the Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit (Federal Law on the taxation of matters of non-contentious jurisdiction; also referred to as: Kostenordnung, hereinafter: KostO),[3] twice the fixed charge is levied for the authentication of contracts.

4. Paragraph 15(3) of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung[4] (Law on private limited companies; hereinafter: GGmbH), determines that the transfer of shares by partners should occur by a notarially attested contract.

III — Facts, procedure and preliminary question

5. On 30 July 2002 Albert Reiss Beteiligungsgesellschaft mbH (hereinafter: ARBmbH) decided to convert its ordinary capital with a par value of DEM 100 000 into EUR and to increase it to EUR 100 000 through a non-cash capital contribution. The capital contribution consisted of the sole shareholding in ARKU Maschinenbau GmbH. At this time Mr Albert Reiss was

3 — Act of 26 July 1957 (BGBl. I p. 960) as modified by Act of 22 February 2002 (BGBl. I p. 981).

4 — Act of 20 April 1892 (RGBl., p. 477) as modified by Act of 19 July 2002 (BGBl. I p. 2681).

the sole shareholder of both companies. The contract concerning the capital contribution was annexed to the formal deed recording the decision to increase the capital.

6. The increase in capital was entered in the commercial register at the Amtsgericht (Local Court) Baden-Baden on 4 November 2002. In addition to other charges, a so-called '20/10 duty' (twice the rate of the normal duty) was imposed under Paragraph 36(2) of the KostO in respect of the transfer of the shareholding in ARKU Maschinenbau GmbH in the sum of EUR 11 424.00 plus value added tax, on the basis of a transaction value corresponding to the actual value of the shareholding transferred of EUR 3 763 443.90.

7. ARBmbH challenged that assessment in an action before the Amtsgericht Baden-Baden. The action was declared unfounded by that court on the grounds that Article 10(c) of Directive 69/335 is not relevant, that the specific formal requirements for transferring shares in a private limited company are founded on Paragraph 15(3) of the GGmbH and that the obligation to pay fees applies to the person liable irrespective of whether a capital company or a natural person is involved.

8. Subsequently, ARBmbH brought an appeal against that order before the Landgericht Baden-Baden, submitting that the duties in respect of the notarial attestation, required under Paragraph 15(3) of the GGmbH, of a contract concerning the transfer of a shareholding in a private limited company, constitute a tax prohibited under Article 10(c) of Directive 69/335.

9. Considering that the outcome of the proceedings before it depends on the interpretation to be given to Article 10(c) of Directive 69/335 in these circumstances and having established that the requirements for an exception under Article 12 of Directive 69/335, in particular Article 12(1)(e), are not met, the Landgericht Baden-Baden decided to stay the proceedings and to refer the following question for a preliminary ruling under Article 234 EC:

'Does Article 10(c) 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, also encompass charges for the notarially attested transfer of shares in a private limited company?'

10. Written observations were submitted by the Government of the Land Baden-Württemberg (hereinafter: the Land) and by the Commission.

11. In considering this case, the Court initially decided to give its ruling by reasoned order under Article 104(3) of the Rules of Procedure of the Court of Justice. However, following objections by the Land that not all aspects of the answer to the preliminary question could be clearly deduced from existing case-law, it reconsidered that course and decided to give a judgment on the preliminary reference.

IV — Substance

12. The preliminary question referred by the Landgericht is drafted in quite general terms and does not contain all the elements which are relevant for providing an answer which will be useful to resolving the case before it. It should be specified on the basis of the information in the case-file that the question refers to the situation in which the charges concerned are imposed by notaries who are officials of the Land and that the transfer of shares is related to the increase of the capital of a capital company. Furthermore, it appears from the written observations submitted by the Land that the outcome of the case may also depend on the possible applicability of the exception contained in Article 12(1)(a) of Directive 69/335. It is therefore necessary to answer the question referred taking these aspects into account.

13. The Land submits that the question referred must be answered in the negative. It observes that the authentication requirement laid down in Paragraph 15(3) of the GGmbH is not addressed to the company whose shares are transferred (ARKU Maschinenbau), but to the previous shareholder (Mr Albert Reiss) and the new shareholder (ARBmbH). It is they who are liable to pay the duty, not the company whose shares have been transferred. For this reason the transaction, in its view, falls outside the scope of Article 10(c) of Directive 69/335. The Land next indicates that, if at all, the charge may be caught by Article 10(b) of Directive 69/355, as the charge imposed is consideration for the provision of a service as part of a transaction referred to in Article 4 of Directive 69/355, i.e. the increase in the capital of ARBmbH. However, whether or not the charge at issue contravenes Article 10(c) of Directive 69/335, it must be regarded as a duty on the transfer of securities within the meaning of Article 12 (1)(a) of Directive 69/335 and is therefore exempt from the prohibition in the former provision.

14. The Commission takes the opposite view and refers to the Court's consistent case-law

establishing that charges levied by public notaries in respect of formalities required for the increase of capital are prohibited under Article 10(c) of Directive 69/335. [5] Although indicating that the notarial authentication of the transfer of shares as such is independent of the legal form of the contracting parties, it points out that in the present case the transfer is an imperative condition for the increase of ARBmbH's capital. This is borne out by the fact that the contract concerning the transfer of shares is annexed to the deed recording the increase in capital. As the transfer of shares must be regarded as an integral part of the capital increase operation and the charge is imposed in respect of a formality connected with that operation, it must be regarded as being prohibited by Article 10(c) of Directive 69/335. It adds that under Article 12(1)(e) of Directive 69/335, such charges cannot be imposed beyond the level of the costs effectively made.

15. Although the exact issue raised in the preliminary reference has not yet been dealt with explicitly by the Court, the case-law on Directive 69/335 provides sufficient guidance to answer the question as to the applicability of Article 10(c) of the directive in the circumstances of the present case. The aspect concerning the applicability of Article 12(1)(a) of the directive, on the other hand, is relatively new, and needs to be given closer attention.

16. Firstly, it is useful to recall the function of Article 10(c) of Directive 69/335 in the system of the directive as a whole. Directive 69/335 replaces the various types of indirect taxes imposed by the Member States on the raising of capital by a single capital duty. This duty is to be charged only once on the basis of a harmonised structure and harmonised rates. The prohibition in Article 10 of other taxes with similar characteristics to the capital duty is intended to protect this system of a single capital duty and to ensure that it is not circumvented, either intentionally or unintentionally, by the introduction of such levies. [6] This objective has clearly been the guiding principle for the Court in determining the scope of this provision.

17. The question as to whether notarial charges, such as those at issue in the main proceedings, belong to the category 'any taxes whatsoever' within the meaning of Article 10(c) of Directive 69/335 has already

5 — Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 22, Case C-56/98 *Modelo* [1999] ECR I-6427, paragraph 25, and Case C-19/99 *Modelo Continente* [2000] ECR I-7213, paragraph 25.

6 — See the final consideration to the preamble. See, too, Case C-56/98 *Modelo*, cited in the previous footnote, at paragraph 27 of the judgment.

been answered by the Court in *Modelo* [7] and, in its wake, its Order in *Gründerzentrum.* [8] The latter applied, in fact, to the situation in the Land Baden-Württemberg. According to that case-law [9] charges constitute taxes for the purposes of Directive 69/335 where:

— they are collected for drawing up notarially attested acts recording a transaction covered by Directive 69/335,

— under a system where notaries are employed by the State

— and the charges in question are paid in part to that State for the financing of its official business.

In view of the fact that the Court has already established that the notarial system of the Land Baden-Württemberg is of this type, the charges concerned are by their nature taxes within the meaning of Article 10 of Directive 69/335 and are prohibited to the extent that they relate to an operation or transaction coming within the scope of that provision.

18. The prohibition of Article 10(c) of Directive 69/335 applies to taxes 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. Explaining the rationale of this prohibition, the Court observed in *Denkavit Internationaal* [10] that it is justified by the fact that even though the taxes in question are not levied on capital contributions as such, they are nevertheless levied on account of formalities connected with the company's legal form, that is to say, on account of the instrument employed for raising capital. Their continued existence would risk frustrating the aims of the Directive. [11]

19. More specifically, the Court has held that the prohibition laid down in Article 10(c) of Directive 69/335 covers not only charges paid for the registration of new companies, but also duties payable by companies for the registration of increases in capital since these, too, are levied on

7 — Case C-56/98 *Modelo*, cited in footnote 5.

8 — Case C-264/00 *Gründerzentrum* [2002] ECR I-3333.

9 — See paragraph 27 of the Order. See, too, Case C-56/98 *Modelo*, cited in footnote 5, at paragraph 22 of the judgment.

10 — Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827.

11 — At paragraph 23 of the judgment, and Case C-56/98 *Modelo*, cited in footnote 5, at paragraph 24 of the judgment.

account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital is not, strictly speaking, a formality required before the commencement of business by a company, it is none the less necessary for the carrying on of that business. [12]

20. The charge at issue in the main proceedings is imposed in respect of the notarial attestation of the transfer of shares by members of the capital company. This is an essential formality for the effectuation of such a transfer under Paragraph 15(3) of the GGmbH. In a general sense, this requirement applies irrespective of the legal form of the transferor and transferee. As such, the charge imposed in respect of this formality would, therefore, appear to fall outside the terms of Article 10(c) of Directive 69/335. However, this result is not justified in the light of the circumstances of the present case in which there is a direct legal and economic relationship between the transfer of shares and the increase of the capital of ARBmbH. I agree with the Commission that, in this situation, the transfer of shares must be regarded as an integral part of the capital increase operation. Indeed, the transfer was earmarked for the financing of the increase of capital of the recipient capital company and the contract was attached to the deed recording the increase of capital. In such circumstances, all charges imposed in respect of formalities laid down by national law for the completion of the various elements of the capital increase operation are connected with the legal form of the company concerned and must be considered to be taxes prohibited by Article 10(c) of Directive 69/335.

21. To decide otherwise would amount to permitting the imposition of an additional levy on a capital-raising operation. This would be contrary to the principle of the single capital duty and undermine the effectiveness of Article 10(c) of Directive 69/335 in protecting this principle.

22. By contrast, where there is no economic and legal link between the transfer of shares and the raising or increase of the capital of a capital company, as is the situation in a parallel case currently pending before the Court, [13] any charges imposed by a public notary in a system as described in paragraph 17 above for the completion of formalities in respect of the transfer of

12 — Case C-188/95 *Fantask and Others*, cited in footnote 5, at paragraph 22 of the judgment.

13 — Case C-193/04 *Organon Portugesa*, in which the Court, in application of Article 20(5) of the Statute of the Court of Justice, will give its judgment without an Opinion of the Advocate General.

shares will fall outside the scope of Article 10(c) of Directive 69/335.

23. I would remark, finally, on the applicability of Article 10(c) of Directive 69/335 that the fact that the company whose shares are being transferred (ARKU Maschinenbau) is not the debtor of the notarial charges in respect of the attestation of the transfer, as was submitted by the Land, is irrelevant. What matters is that a charge is imposed which is formally connected with a transaction coming within the scope of the directive and which may potentially discourage the free flow of capital.

24. The next question to be discussed is whether, as was submitted by the Land, the charge in respect of the transfer of shares may be excluded from the prohibition of Article 10(c) of Directive 69/335 as being 'a duty on the transfer of securities' within the meaning of Article 12(1)(a) of the directive. According to this provision, 'notwithstanding Articles 10 and 11', such duties may be imposed by the Member States whether or not at a flat rate.

25. In *Codan*,[14] the Court had occasion to interpret Article 12(1)(a) of Directive 69/335 in the context of a case which resembled the case in the main proceedings. *Codan* arose from the imposition in Denmark of a tax on the transfer of shares in a situation in which the acquiring company increased its capital by an amount equal to the value of the shares transferred. The question referred to the Court by the national court focused on whether Article 12(1)(a) of the directive applied to duties on the transfer of securities, irrespective of whether the company which issued those shares was admitted to trade on a Stock Exchange and irrespective of whether the share transfer was effected through the Stock Exchange or directly between the transferor and the acquiring party. The national court did not refer any questions on the possible applicability of Article 10 of Directive 69/335, given the fact that parties to the main proceedings agreed that the transaction fell within the scope of the directive. Consequently, the Court provided an answer to the precise question submitted by the Danish court and did not deal explicitly either with the exact scope of Article 12(1)(a) or with the relationship between this provision and Articles 10 and 11 of the directive.

26. The relationship between Article 12 on the one hand and Articles 10 and 11 on the

14 — Case C-236/97 *Codan* [1998] ECR I-8679.

other hand is determined by the first words of the former provision which refer directly to the latter two provisions. However, the way in which this has been expressed appears to differ in the various language versions of Article 12. Whereas some language versions clearly state that Article 12 is a derogation from Articles 10 and 11 ('Par dérogation', 'In Abweichung', 'in deroga', 'In afwijking', 'Em derrogação', 'poiketen'), other language versions use terminology which suggests that Article 12 seeks to demarcate its scope vis-à-vis Articles 10 and 11 ('Notwithstanding', 'No obstante', 'Uanset', 'Utan hinder'). This difference is significant. If Article 12 of the directive is to be seen as a derogation from Articles 10 and 11, this would imply that the duties listed in this provision may be imposed despite the fact that they come within the scope of the prohibitions contained in the latter two provisions. If, by contrast, it demarcates the scope of Articles 10 and 11, this would suggest that any of the duties concerned may only come within the scope either of Articles 10 and 11 or of Article 12.

27. The principles for interpreting a provision of Community law in case of a divergence in the language versions are well established. Stressing the need for uniformity of interpretation, the Court has consistently held that in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [15]

28. So far as the purpose of Directive 69/355 is concerned, the Court, again in *Codan*, referring to the recitals of the preamble to the directive, recalled that 'it is intended ... to encourage the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States.' [16] As I pointed out in point 16 of this Opinion, Article 10 of the directive more specifically is aimed at ensuring that the single capital duty is not circumvented either intentionally or unintentionally by the introduction of other levies on the raising or increasing of capital.

29. Both the objective of Directive 69/335 and the function of Article 10 in the system of the directive should therefore be decisive in determining the way in which Article 12

15 — *Codan*, cited in the previous footnote, at paragraph 26 of the judgment and the cases referred to there. See, too, Case C-257/00 *Nani Givane* [2003] ECR I-345, at paragraph 37.

16 — At paragraph 27 of the judgment.

should be interpreted. This provision should not, at any rate, be interpreted in a way which would risk affecting the effectiveness or 'effet utile' of the directive.

30. Following this line of reasoning, it would seem to me that to permit, under Article 12 of the directive, the imposition of a charge which has been found to constitute an indirect tax on the raising of capital within the meaning of Article 10 of the directive, would deprive the latter provision of its purpose. It is for this reason that I consider that Article 12 cannot be regarded as a derogation from the prohibition contained in Article 10. Rather, it demarcates the scope of that provision by indicating categories of duties which by their nature usually will not impede the raising of capital.

31. In the light of the interpretation given above to Article 10(c) of Directive 69/335, Article 12(1)(a) of the directive cannot, therefore, exempt duties on the authentication of transactions which are economically and legally connected with the raising of capital or with the increasing of the capital of a capital company. It can only apply to duties on the transfer of shares where no such relationship exists. If Article 12(1)(a) were to be interpreted otherwise, this would risk undermining the effectiveness of the system of the single capital duty introduced by Directive 69/335.

32. Finally, in view of the fact that this aspect was mentioned by the Commission, I would add that neither can the notarial charges at issue be excluded under Article 12(1)(e) of Directive 69/335, which provides for an exception to Articles 10 and 11 of the directive in respect of 'duties paid by way of fees or dues'. It is well established that 'the distinction drawn between taxes prohibited by Article 10 of Directive 69/335 and duties paid by way of fees or dues, which can lawfully be imposed, implies that the latter comprise only remuneration the amount of which is calculated on the basis of the cost of the service rendered. Where the amount payable is wholly unrelated to the cost of the service in question or is calculated, not by reference to the costs of the transaction for which it constitutes the consideration, but to all the operational and capital costs incurred by the office responsible for that transaction, it must be regarded as a tax falling exclusively within the prohibition laid down in Article 10 of Directive 69/335.' [17]

17 — See, among other cases, Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, at paragraphs 41 and 42, Case C-56/98 *Modelo*, cited in footnote 5, at paragraph 29 of the judgment, Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 32, and Case C-264/00 *Gründerzentrum*, cited in footnote 8, at paragraph 31 of the judgment.

V — Conclusion

33. In the light of the foregoing considerations, I conclude that the question referred by the Landgericht Baden-Baden should be answered as follows:

Article 10(c) 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, prohibits charges for the notarially attested transfer of shares in a private limited company in the circumstances of the case in the main proceedings, i.e. where the notaries are civil servants and the charges are paid in part to the public authority which employs them, and used for the financing of its official business, and where the transfer of shares is connected economically and legally with the increase of the capital of a capital company. Such a charge cannot be considered to be 'a duty on the transfer of securities' within the meaning of Article 12(1)(a) of Directive 69/335.