JUDGMENT OF THE COURT (First Chamber)

28 June 2007 *

In Case C-466/03,

REFERENCE for a preliminary ruling and a supplementary reference for a preliminary ruling under Article 234 EC from the Landgericht Baden-Baden (Germany), made by decisions of 20 October 2003 and 10 October 2005, received at the Court on 6 November 2003 and 31 October 2005 respectively, in the proceedings

Albert Reiss Beteiligungsgesellschaft mbH

v

Land Baden-Württemberg,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, E. Juhász, M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocates General: L.A. Geelhoed, subsequently V. Trstenjak,

Registrars: R. Grass, Registrar, subsequently B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 9 November 2006,

after considering the observations submitted on behalf of:

— Albert Reiss Beteiligungsgesellschaft mbH, by A. Feber and H. Sandweg, Rechtsanwälte,

— the Land Baden-Württemberg, by K. Ehmann, M. Steindorfner and F. Mauch, acting as Agents,

— the Commission of the European Communities, by R. Lyal and K. Gross, acting as Agents,

after hearing the Opinions of the Advocates General at the sittings on 16 June 2005 and 8 March 2007,

gives the following

Judgment

1 The reference for a preliminary ruling and the supplementary reference concern the interpretation of Articles 10 and 12 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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335').

2 The references were made in the context of a dispute between Albert Reiss Beteiligungsgesellschaft mbH ('Reiss mbH') and the Land Baden-Württemberg concerning the payment of notarial fees for the authentication of a transfer of shares in a limited liability company to Reiss mbH, that transfer having been made as a contribution in the course of an increase in the capital of that company.

Legal context

Community law

3 As is apparent from the first and second recitals in the preamble thereto, Directive 69/335 aims to encourage the free movement of capital which is regarded as essential for the creation of an internal market. In that regard, it seeks to eliminate tax barriers in the field of raising capital, in particular, in respect of capital contributions, namely contributions of capital by members or shareholders to capital companies.

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

5 Article 4 of Directive 69/335 sets out the transactions which the Member States may or must, as the case may be, subject to such capital duty.

6 Thus, Article 4(1)(c) of that directive states that the Member States are to subject to capital duty 'an increase in the capital of a capital company by contribution of assets of any kind'.

7 In addition, Article 10 of Directive 69/335, read in the light of the final recital in the preamble thereto, provides for the abolition of taxes with the same characteristics as capital duty ('taxes akin to capital duty').

8 Therefore, under Article 10(c) of that directive, apart from capital duty, Member States are not to charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever, 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.

9 However, under Article 12(1)(a) and (e) of Directive 69/335:

'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;

...'

10 As regards duty on the transfer of securities, the statement of reasons in the Commission's Proposal for a directive of 14 December 1964 [COM(64) 526 final], which led to the adoption of Directive 69/335, explains:

'[Indirect] taxes [on capital movements] include, first, those on the raising of capital and, second, those on transactions in securities. This draft directive concerns indirect taxes on the raising of capital, a category which includes capital duty on companies' own capital, stamp duty on national securities, stamp duty charged on the introduction or issue on the national market of securities of foreign origin, and

other indirect taxes with similar characteristics. As regards indirect taxes on transactions in securities, such as taxes on stock exchange transactions, they will form the subject-matter of another draft directive. This proposal therefore does not affect them.'

National law

11 Paragraph 15(3) of the German Law on limited liability companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) of 20 April 1892 (RGBl. 1892 I, p. 477) ('the GmbHG'), as applicable in the case in the main proceedings, provides that 'the transfer of shares by a shareholder shall be by notarially attested contract'.

12 The amount of the fees which notaries may charge is laid down in the Costs Regulations (Kostenordnung), of 26 July 1957 (BGBl. 1957 I, p. 960; 'the Kostenordnung'), as applicable in the case in the main proceedings.

13 Paragraph 32(1) of the Kostenordnung provides that the fixed charge for transactions of a value of up to EUR 1 000 is EUR 10. That basic duty increases:

— for transactions of a value of up to EUR 5 000, by EUR 8 for each additional EUR 1 000,

— for transactions of a value of up to EUR 50 000, by EUR 6 for each additional EUR 3 000,

— for transactions of a value of up to EUR 5 000 000, by EUR 15 for each additional EUR 10 000,

— for transactions of a value of up to EUR 25 000 000, by EUR 16 for each additional EUR 25 000,

— for transactions of a value of EUR 50 000 000, by EUR 11 for each additional EUR 50 000,

— for transactions of a value of up to EUR 50 000 000, by EUR 7 for each additional EUR 250 000.

14 Under Paragraph 36(2) of the Kostenordnung, 'twice the fixed charge is levied for the authentication of company contracts'.

15 In the Land Baden-Württemberg the internal relations between notaries employed as civil servants and the Staatskasse (State treasury) are defined, in particular, in the *Land* Law on costs in civil cases (Landesjustizkostengesetz) of 15 January 1993 (GBl. p. 110; 'the Landesjustizkostengesetz').

16 Initially that law provided that notaries employed as civil servants working within the jurisdiction of the Oberlandesgericht (Higher Regional Court) Karlsruhe (Germany) were not direct creditors for notarial fees charged for the authentication of an act, but that those fees went directly to the *Land*. Notaries employed as civil servants received their civil service salary, together with a variable amount equivalent to a proportion of the charges they generated. Thus, as regards, for example, fees received for the authentication of contracts referred to in Paragraph 15(3) of the GmbHG, they were entitled to 50% of those fees.

17 That system was amended, with retrospective effect from 1 June 2002, by the Law of 28 July 2005 (GBl. No 12 of 5 August 2005, p. 580).

18 Thus, under Article 10 of the Landesjustizkostengesetz, as amended:

'(1) Fees and expenses for the activity of a notary shall be levied by the State treasury.

(2) Fees and expenses for a notary's activities in terms of Paragraph 3(1) of the *Land* Law on non-contentious jurisdiction [(Landesgesetz über die freiwillige Gerichtsbarkeit)], and also any interest in terms of Paragraph 154a of the Kostenordnung are payable to the notary. ...

(3) The notary shall be entitled to the fees, expenses and interest referred to in the first sentence of subparagraph (2) ... in addition to the charges to which he is entitled under the *Land* Law on the remuneration of civil servants [(Landesbesoldungsgesetz)].'

19 Paragraph 11(1) of the Landesjustizkostengesetz, as amended, states that the State treasury is not to receive, in principle, more than 15% of the fees which notaries employed as civil servants of the *Land* charge for the authentication of documents pursuant to mandatory requirements of company law.

The main proceedings and the questions referred

20 On 30 July 2002 Reiss mbH decided to increase its company capital, by means of a non-cash capital contribution, to EUR 100 000. To that effect, the sole shareholder of the company, Mr Reiss, transferred, by notarial act of 30 July 2002 (drawn up by a notary employed as a civil servant in the jurisdiction of the Oberlandesgericht Karlsruhe) to Reiss mbH, the sole shareholding which he held in another limited liability company, namely Arku Maschinenbau GmbH ('Arku GmbH').

21 The increase in capital was entered in the commercial register at the Amtsgericht (Local Court) Baden-Baden (Germany) on 4 November 2002. Apart from other charges, the civil servant in charge of levying duty demanded from Reiss mbH payment of notarial fees in the amount of EUR 11 424 for the authentication of the transfer of the sole shareholding in Arku GmbH. That amount was calculated on the basis of a transaction value of EUR 3 763 443.90.

22 Reiss mbH brought an action challenging the validity of that taxation in the light of Community law.

23 The Amtsgericht Baden-Baden having dismissed that action, Reiss mbH brought an appeal against that decision before the referring court.

24 In those circumstances, the Landgericht (Regional Court) Baden-Baden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 10(c) of ... Directive 69/335 ... also encompass charges for the notarially attested transfer of shares in a private limited company?'

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

26 On 10 October 2005 the Landgericht Baden-Baden referred a supplementary question to the Court, in order to take account of the legislative amendment brought about by the Law of 28 July 2005:

'Do the notarial charges cease to constitute a tax for the purposes of Directive 69/335 if the State waives its claim to the portion of the charges due to it in respect of the legal transaction and therefore leaves the charges — minus a sum to recoup expenditure, at the flat rate of 15%, for the State — to the notary in the civil service himself, but the notary otherwise remains integrated into the administrative organisation and is remunerated by the State for the performance of public duties?'

27 By a document lodged at the Registry of the Court of Justice on 16 March 2007, Reiss mbH requested the Court of Justice to order the reopening of the oral procedure, under Article 61 of the Rules of Procedure, with a view to prescribing measures of inquiry within the meaning of Article 45 et seq. of the Rules of Procedure for the purposes of furnishing the proof of the facts referred to in point 50 of the Opinion of Advocate General Trstenjak.

The requests seeking the reopening of the oral procedure and the measures of inquiry

28 Reiss mbH seeks the reopening of the oral procedure so that the findings made by Advocate General Trstenjak in her Opinion on the economic risk and the liability of notaries employed as civil servants can be ascertained.

29 In that regard, it should be noted that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure, if it considers that it lacks sufficient information or that the case should be decided on the basis of an argument which has not been discussed between the parties (Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25).

30 In the present case, however, the Court takes the view, after hearing the Advocate General, that it has all the information necessary for it to answer the questions referred. The application for the oral procedure to be reopened must therefore be rejected.

31 In those circumstances, the application for measures of inquiry to be prescribed must also be rejected.

The questions referred

32 By its questions, which need to be examined together, the referring court asks, in substance, whether Directive 69/335 precludes the charging of notarial fees for the authentication of a transfer of shares in a company, made as a contribution in the course of an increase in the capital of a capital company, in a system characterised by the fact that the notaries are employed as civil servants and that the fees are, at least in part, paid to the State to subsidise public expenditure.

Admissibility

33 Maintaining that the first question should be answered in the negative, namely that the fees in dispute in the main proceedings do not fall within the field of application of Directive 69/335 and in particular Article 10(c) thereof, the government of the Land Baden-Württemberg submits that, in reality, the referring court has no need of an answer to the supplementary question and that it is therefore inadmissible.

34 In that regard, it must be recalled that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the

problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24 and the case-law cited).

35 However, that is not the situation in the case in the main proceedings. It is not quite obvious that the fees in dispute are outside the field of application of Directive 69/335 and that, consequently, the supplementary question should be regarded as being unrelated to the subject-matter of the case in the main proceedings.

36 The question whether those fees fall within the field of application of Directive 69/335 is not, furthermore, a question of admissibility but of substance and must be examined in that context.

37 The supplementary question therefore must be answered.

Substance

38 It must, first, be examined whether fees, such as those in dispute in the main proceedings, constitute a 'tax' for the purposes of Directive 69/335, then, whether those fees fall within the prohibition in Article 10 of Directive 69/335, and finally, if so, whether they could possibly come under one of the provisions laid down in Article 12 of that directive.

The meaning of 'tax' for the purposes of Directive 69/335

39 It is apparent from the case-law that, in the light of the objectives pursued by Directive 69/335, the meaning of 'tax' for the purposes of that directive must, in principle, be broadly interpreted (see, to that effect, Case C-426/98 *Commission* v *Greece* [2002] ECR I-2793, paragraph 25, and Case C-22/03 *Optiver and Others* [2005] ECR I-1839, paragraphs 30 and 31).

40 According to the case-law, notarial fees must be classed as 'tax' for the purposes of Directive 69/335 where they are charged for a transaction covered by that directive by notaries who are employed as civil servants and are, at least in part, paid to the State to subsidise public expenditure (see, to that effect, the order of the Court in Case C-264/00 *Gründerzentrum* [2002] ECR I-3333, paragraph 27; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 37; and Case C-193/04 *Organon Portuguesa* [2006] ECR I-7271, paragraph 17).

41 As regards the fees in dispute in the main proceedings, it should be recalled that the Court has already held that those conditions were met in the context of the system previously in force in the jurisdiction of the Oberlandesgericht Karlsruhe, of which the Amtsgericht Baden-Baden is part, where notaries were employed as civil servants and where the duties charged to notarially attest an act were paid in part to the State to finance its official business (see, to that effect, the order in *Gründerzentrum*, paragraph 28).

42 The changes made to that system by the Law of 28 July 2005 are not such as to justify a different conclusion in the case in the main proceedings.

43 The notaries remain civil servants employed by the State. Moreover, they are still required to pay part of those fees to the State. In addition, that law states explicitly that the fees and the costs relating to the activity of notaries are levied for the benefit of the State treasury.

44 That finding cannot be invalidated by the fact that notaries employed as civil servants in the jurisdiction of the Oberlandesgericht Karlsruhe are, since the Law of 28 July 2005, now themselves creditors of the fees in question and that the part which they have to transfer to the State is relatively moderate, namely 15% of the total fees.

45 First, in the cases which gave rise to the judgments referred to above, namely Case C-56/98 *Modelo* (*'Modelo I'*) [1999] ECR I-6427, paragraphs 19 and 23; Case C-19/99 *Modelo* (*'Modelo II'*) [2000] ECR I-7213, paragraphs 19 and 23; and *Längst* and *Organon Portuguesa* (see, respectively, paragraphs 41 to 43 and paragraphs 11 and 17), the fees in question were also initially made by notaries who were civil servants, and then transferred in part to the State.

46 Second, in those same cases and in the case which gave rise to the order in *Gründerzentrum*, the fees at issue were classed as 'tax' for the purposes of Directive 69/335 irrespective of the amount of the part transferred to the State. Although it may be inferred from the facts described in *Längst* that the State received approximately 66% of the fees, the Court did not find that fact to be relevant for the purposes of that classification. Similarly, none of the other judgments cited above specifies the amount of the part transferred to the State. Consequently, the question of the specific amount to be transferred to the State by a notary employed as a civil servant has no bearing, a priori, on whether fees may be classified as 'tax'.

47 It follows that, in the light of the case-law cited above, fees such as those at issue in the main proceedings constitute a 'tax' for the purposes of Directive 69/335.

The prohibition of taxes akin to capital duty (Article 10(c) of Directive 69/335)

48 It should be recalled at the outset that Article 10 of Directive 69/335, read in the light of the last recital in the preamble to the directive, prohibits taxes with the same characteristics as a capital duty (see, in particular, Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 29, and Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23).

49 Article 10(c) of Directive 69/335 thus encompasses, inter alia, taxes in any form which are payable in respect of registration or any other formal requirement before the commencement of business, to which a company may be subject by reason of its legal form.

50 That prohibition is in addition to those set out in Article 10(a) and (b) of that directive, which refer to the scenarios described in Article 4 of the directive, and 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 essential 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 might also frustrate the aims of that directive (see, to that effect, Case C-264/04 *Badischer Winzerkeller* [2006] ECR I-5275, paragraph 19, and the case-law cited).

51 The Court inferred from that that Article 10(c) of Directive 69/335 must, in principle, be broadly interpreted as including not only procedures which are formally required before the capital company commences business, but also the formalities which are necessary for carrying on the business of that company (see, to that effect, Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 22; Case C-347/96 *Solred* [1998] ECR I-937, paragraph 22; and *Badischer Winzerkeller*, paragraph 25).

52 In this regard, the Court has held many times that where a transaction carried out by a capital company, such as, for example, the increase of its company capital, the amendment of its statutes or the acquisition of immoveable property following a merger, is subject to legal formalities under national law, that formality is necessary for carrying on that company's business (see, to that effect, *Badischer Winzerkeller*, paragraphs 26 and 27, and the case-law cited).

53 Thus, the Court has, for example, held to be unlawful for the purposes of Article 10 (c) of Directive 69/335 taxes on the registration of a new company (*Ponente Carni and Cispadana Costruzioni*, paragraphs 30 and 31, and *Fantask and Others*, paragraph 22), on the authentication of the formation of a new company (the order in *Gründerzentrum*, paragraph 30), on the recording of an increase in share capital (*Fantask and Others*, paragraph 22; Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 25; and Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 31), on the authentication of an increase in share capital (*Modelo I*, paragraph 26), and on the authentication of the payment of the amount of the share capital not yet paid up (*Solred*, paragraph 23).

54 In the case in the main proceedings, as also pointed out by Advocate General Geelhoed in points 20 to 23 of his Opinion, the fees in dispute were charged for the authentication of the transfer of shares in a company (Arku GmbH), made in the form of a contribution in kind in the course of an increase in the share capital of a capital company (Reiss mbH). The authentication in question thus attests a

transaction on which the increase in the capital of a capital company is dependent. Since, under German law, such share transfer transactions must be authenticated, that authentication must be regarded as a formality which is necessary for carrying on the business of the capital company in question (Reiss mbH). The authentication in question is thus a prior formal requirement to which a capital company is subject by reason of its legal form.

55 It follows that fees such as those in dispute in the case in the main proceedings fall within Article 10(c) of Directive 69/335, which means that the charging of such fees is, in principle, prohibited.

56 It is still however necessary to assess whether such fees fall with the field of application of one of the provisions laid down in Article 12 of Directive 69/335.

The provision authorising the charging of duties on the transfer of securities (Article 12(1)(a) of Directive 69/335)

57 Article 12(1)(a) of Directive 69/335 states that Member States may charge duties on the transfer of securities.

58 Since Article 12(1)(a) of Directive 69/335 limits the prohibitions laid down in Articles 10 and 11 of that directive, it must be strictly interpreted and cannot be understood as extending to taxes other than 'duties on the transfer of securities' in the proper sense of the term.

59 It follows that, in so far as the fees at issue in the main proceedings do not constitute a duty on the transfer of securities, but, on the contrary, notarial fees which fall within Article 10(c) of Directive 69/335, they do not fall within the field of application of Article 12(1)(a) of Directive 69/335.

The derogation authorising duties paid by way of fees or dues (Article 12(1)(e) of Directive 69/335)

60 Article 12(1)(e) of Directive 69/335 states that Member States may charge duties paid by way of fees or dues.

61 It should be pointed out, in that regard, that 'duties paid by way of fees or dues' are duties charged in consideration for a service provided (see, to that effect, Case C-426/98 *Commission* v *Greece* [2002] ECR I-2793, paragraph 36).

62 Consequently, as stated by Advocate General Geelhoed in point 32 of his Opinion, only remuneration the amount of which is calculated on the basis of the cost of the service rendered can be qualified as 'duties paid by way of fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335. By contrast, 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 operating and capital costs incurred by the administrative body, it must be regarded as a tax falling exclusively within the prohibition laid down in Articles 10 and 11 of that directive (see, to that effect, *Ponente Carni and Cispadana Costruzioni*, paragraphs 41 and 42, and the order in *Gründerzentrum*, paragraph 31).

63 Thus, a charge, the amount of which is determined in relation to the value of the underlying economic transaction and which increases directly, without limit, in proportion to that value, cannot, by its very nature, constitute 'duties paid by way of fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335. Even though in some cases the complexity of a service rendered by the administrative body may be linked to the value of the underlying economic transaction, the amount of such a charge will generally bear no relation to the costs actually incurred by that administrative body (see, to that effect, *Modelo I*, paragraph 30, and *IGI*, paragraph 31).

64 In the case in the main proceedings, the amount of the fees in dispute increases directly in proportion to the value of the shares transferred, thus, in proportion to the underlying economic transaction. In addition, given that those fees are charged without any limit having been put in place, they are capable of amounting to a considerable sum. The German Government has not even submitted that it corresponds to the costs of the service rendered.

65 Accordingly, those fees are not paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335.

66 In the light of the above, the answer to the questions referred must be that Article 10(c) of Directive 69/335 precludes the charging of notarial fees for the authentication of a transfer of shares in a company made as a contribution in the course of an increase in the share capital of a capital company, in a system characterised by the fact that the notaries are employed as civil servants and that the fees are, at least in part, paid to the State to subsidise public expenditure.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

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, precludes the charging of notarial fees for the authentication of a transfer of shares in a company made as a contribution in the course of an increase in the share capital of a capital company, in a system characterised by the fact that notaries are employed as civil servants and that the fees are, at least in part, paid to the State to subsidise public expenditure.

[Signatures]