REPORT FOR THE HEARING
in Case C-50/91 *

I — Facts and procedure

A — *Facts and legislative background*

Commerz-Credit-Bank AG — Europartner (hereinafter 'Europartner') is a credit institution under German law, constituted in the form of an Aktiengesellschaft. Its shares are held by Commerzbank AG, Düsseldorf, and Crédit Lyonnais SA, Lyon.

In 1974 Commerzbank transferred to Europartner its five branches in Saarland (Germany) together valued at DM 9 000 000. The branches carried on banking business exclusively and were registered in the commercial registers of the competent district courts.

By a decision of 11 September 1981 the Finanzamt (Tax Office) Saarbrücken ordered Europartner to pay capital duty of 1% of the value of that contribution.

Europartner did not deny that the transfer was taxable, but claimed that a reduced rate of tax should be applied. In its opinion, each of the branches in question constitutes a branch of activity (*Teilbetrieb*) and such a transfer is taxable at the rate of 0.50% under Paragraph 9(2)(3) of the German Kapitalverkehrsteuergesetz (Capital Transfer Tax Law, hereinafter 'the tax law'). At the material time that provision stated as follows:

'(2) The tax shall be reduced by 50%

...

3. In the event of the acquisition of rights in a German capital company, if and to the extent that the entire assets or a business (*Betrieb*) or branch of activity (*Teilbetrieb*) of another capital company is transferred to that capital company as consideration ...'.

Relying on that argument, Europartner brought a complaint to the Finanzamt, but without success, whereupon it brought an action before the Finanzgericht des Saarlandes (Saarland Finance Court), which was dismissed on 30 June 1987. It appealed finally to the Bundesfinanzhof (Federal Finance Court).

The Bundesfinanzhof, seeking to classify the transfer made by Commerzbank, found firstly that under Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of

* Language of the case: German.

capital (OJ, English Special Edition 1969(II), p. 412, hereinafter 'the directive') the transfer of a 'part of a business' (in German: *Zweig einer Tätigkeit*) was taxed at a reduced rate. At the time that provision read as follows:

'1. Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph 2:

(a) the rate of capital duty may not exceed 2% or be less than 1%;

(b) this rate shall be reduced by 50% or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence.'

Secondly, the Bundesfinanzhof considered whether the concept of a part of a business (*Zweig einer Tätigkeit*) in Community law was the same as the concept of a branch of activity (*Teilbetrieb*) used in the tax law. It started by defining '*Teilbetrieb*'. In its opinion this was 'a part of the business endowed with a certain autonomy, viable on its own and whose economic assets taken as a whole are used in an activity which by its nature is clearly distinguished from the commercial activity of the rest of the undertaking'. It went on to point out that, according to this definition, a bank branch in Germany could not be a *Teilbetrieb*, since it was not autonomous in practice and it carried on the same operations as the other branches of the group. That definition of *Teilbetrieb* therefore, according to the Bundesfinanzhof, led to an unacceptable result: the transfer of a bank branch was subject to capital duty of 1%, since a branch was as a general rule not a branch of activity. The Bundesfinanzhof therefore suggested that a '*Zweig einer Tätigkeit*' should be defined less restrictively according to its function, as an aggregate of assets for carrying on an activity, without its being necessary for that activity to be clearly distinguished by its nature from the activity of the rest of the undertaking.

The Bundesfinanzhof added a second argument in support of its proposed definition. It notes that the assets of a capital company which are transferred to another capital company are in fact subjected to capital duty twice: duty is charged once when the assets are brought into the first company and again when they are transferred to the second company. In the opinion of the Bundesfinanzhof, it was to mitigate the effects of such double taxation that a reduced rate of capital duty was allowed to capital companies on transfer of part of their business to another capital company. In order to give practical effect to that aim, the concept of a part of a business should not be interpreted too restrictively.

The Bundesfinanzhof considered thirdly whether a branch (*Zweigniederlassung*) as understood in German commercial law was a part of a business. In its view a branch is a part of an undertaking, entered in the commercial register in accordance with Paragraph 13 of the Handelsgesetzbuch (Commercial Code), with a certain freedom to take decisions and able to carry out significant transactions on behalf of the undertak-

ing. The Bundesfinanzhof considers that branches such as those transferred by Commerzbank to Europartner are parts of a business, since they are aggregates of assets used for carrying on an activity and can thus be distinguished by their function.

B — *The questions referred for a preliminary ruling*

The Bundesfinanzhof considered that the outcome of the proceedings depended on the interpretation of the concept of 'part of a business' in Article 7 of the directive. By order of 31 October 1990 it stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty.

'1. Does the expression "one or more parts of their business" in Article 7(1)(b) of Directive 69/335/EEC presuppose the existence of a part of an undertaking, in the sense of a part of a larger undertaking which has a certain autonomy, is capable of existing independently and whose business assets, taken together, serve an activity which of its very nature is clearly distinct from the rest of the undertaking?

2. If the first question is answered in the negative:

(a) What are the essential characteristics of a "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?

(b) Is a branch within the meaning of Paragraph 13 of the Commercial Code "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?'

C — *Procedure before the Court*

The order for reference was received at the Court Registry on 4 February 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 18 April 1991 by the Finanzamt Saarbrücken, the defendant in the main proceedings, represented by Wolfgang Rapräger, Regierungsdirektor und Vertreter des Vorstehers, and by Alois Rosport, Regierungsdirektor, and on 26 September 1991 by the Commission, represented by Henri Étienne, Legal Adviser, acting as Agent.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry and assigned the case to the First Chamber, pursuant to Article 95(1) and (2) of the Rules of Procedure. However, it put a question to the Finanzamt Saarbrücken, which was answered within the time-limit set.

II — Written observations submitted to the Court

Question 1 (concepts of 'part of a business' and 'branch of activity')

The *Finanzamt* maintains that a part of a business and a branch of activity are identical concepts. The *Commission* disputes this.

According to the *Finanzamt*, a part of a business is a part of an undertaking which has a certain autonomy, is viable on its own, and whose business assets taken as a whole serve an activity which by its nature is clearly distinguished from the activity of the rest of the undertaking. The Finanzamt considers that its proposed definition is in accordance with the intention of the authors of the directive. It concedes that the reduced rate of 0.5% to a certain extent makes it possible to avoid the assets of a capital company being subjected to capital duty of 1% for a second time when they are put into another capital company. In its view, however, the purpose is not to allow a reduced rate for all capital contributions by a capital company. On the contrary, that advantage was reserved for operations by which one company transferred a sector of its business to another company. In the present case, Commerzbank has not given up a sector of its activity, but merely reduced the geographical extent of its banking network.

The Finanzamt refers for further details to its pleadings in the national proceedings, which are annexed to its observations. In those pleadings it examines whether the branches transferred to Europartner satisfy the criteria which, according to the case-law of the Bundesfinanzhof, make it possible to determine whether a unit can be regarded as a branch of activity (*Teilbetrieb*). Those criteria are as follows.

Firstly, according to the Finanzamt, a branch of activity must have 'structural autonomy'. The Commerzbank branches, however, carried on all their activities within the network of the undertaking. Thus they were bound by instructions from the head office, in particular with respect to the terms on which loans could be granted.

Secondly, the Finanzamt considers that a branch of activity must have its own capital. That is an essential point, in that authorization to carry on certain banking activities, including the taking of shareholdings in other companies and the granting of credit, depends on that condition. The Finanzamt argues that the Commerzbank branches did not have such capital. They were financed by the head office by means of an account opened in their name at the head office.

Thirdly, the Finanzamt considers that a branch of activity must have its own bookkeeping and its own clientele. In its opinion those conditions were not fulfilled in the present case either. Certain items on the balance sheets of the branches, such as overheads and revaluations of debts or bonds, were incorporated into the head office

accounts. Moreover, the branches did not have their own clients, in that the majority of their transactions could be effected only with the funds and approval of the head office.

Finally, the Finanzamt notes that according to the case-law of the Bundesfinanzhof, the profits of a branch of activity must be calculated separately, but does not examine whether that condition was fulfilled in the present case.

The *Commission* for its part considers that for a unit to be regarded as a part of a business, it is not necessary for it to carry on an activity which is clearly distinguished from that of the rest of the undertaking. It reaches this conclusion on the basis of the following arguments.

Firstly, the Commission argues that during the negotiations preceding the adoption of the directive the concept of a part of a business (*Zweig einer Tätigkeit*) was defined as the aggregate of the investment assets of a department in a company which from a technical point of view constitutes an autonomous department. It points out that Article 2(i) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1980 L 225, p. 1) defines the term 'branch of activity' ('*Teilbetrieb*' in the German text of the directive) in similar terms as 'all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means'. The Commission deduces from those two definitions that a part of a business is an autonomous entity but that its activity need not necessarily be distinct from that of the rest of the undertaking to which it belongs.

Secondly, the Commission considers that all the cases, including the contribution of a part of a business, in which capital duty is reduced or not payable should be given a wide interpretation. It deduces this from the intention of the Council when adopting the various directives on the taxation of movements of capital. The Council wished to abolish capital duty because of its 'detrimental' economic effects, but because of the financial needs of the Member States was unable to do so. The compromise was therefore to maintain capital duty on condition that its rate and scope were restricted as much as possible. Thus the contribution of any aggregate of assets benefited from a reduced rate of duty, later changed to an exemption.

Thirdly, the Commission considers that it is for traders to determine how they wish to reorganize their undertakings. The Community legislature should not interfere in that decision by allowing a reduced rate of tax to companies transferring a sector of activity, but refusing it to the same companies when they merely reduce the geographical extent of their activities.

On the basis of those arguments, the Commission suggests that the following answer should be given to the first question:

'The expression "one or more parts of their business" in Article 7(1)(b) of Directive 69/335/EEC does not presuppose the existence of a branch of activity (*Teilbetrieb*) in the sense of a part of a larger undertaking which has a certain autonomy, is viable on its own, and whose business assets taken as a whole serve an activity which by its nature is clearly distinguished from the commercial activity of the rest of the undertaking.'

Question 2 (the essential characteristics of a 'part of a business' and the concept of a 'branch')

The *Finanzamt* considers that since Question 1 must be answered in the affirmative, there is no need to give an answer to Question 2.

The *Commission* is of the opinion that an aggregate of assets which is capable of functioning autonomously, for example a branch, constitutes a part of a business. In its proposed answer to Question 2, it puts forward a different definition leaving aside the condition of autonomy. That answer is worded as follows:

'(a) A "part of a business" means any business whose transfer promotes the reorganization and development of undertakings.

(b) A branch within the meaning of Paragraph 13 of the German Commercial Code may be a "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC.'

III — Answer to the Court's question

The Court requested the Finanzamt to explain the concept of a branch (*Zweigniederlassung*) for the purposes of Paragraph 13 of the Handelsgesetzbuch.

In reply, the Finanzamt stated that this was a commercial establishment which — in its view — must have a certain permanence. A branch carried on the same activities as the main establishment, but not necessarily all of them. In carrying on its activities, it was 'partly dependent on the main establishment, partly independent of it'. A branch had its own commercial premises and separate bookkeeping; the manager of a branch was authorized to act independently 'in matters that were not altogether unimportant'.

R. Joliet

Judge-Rapporteur