JUDGMENT OF THE COURT (Third Chamber)

15 June 2006 *

In Case C-264/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Amtsgericht Breisach (Germany), made by decision of 7 June 2004, received at the Court on 22 June 2004, in the proceedings

Badischer Winzerkeller eG

v

Land Baden-Württemberg,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, S. von Bahr (Rapporteur) and A. Borg Barthet, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2005,

after considering the observations submitted on behalf of:

— the Land Baden-Württemberg, by K. Ehmann, acting as Agent,

— the German Government, by A. Tiemann, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by L. Ström van Lier and F. Hoffmeister, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns 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) ('the directive').

2 The reference was made in the context of a dispute between the cooperative Badischer Winzerkeller eG ('Badischer Winzerkeller') and the Land Baden-Württemberg concerning the levying of a fee for rectification of the land register.

Legal context

Community legislation

3 Article 4(1) and (2) of the directive set out the transactions which are, and may continue to be, subject to capital duty.

4 According to Article 10 of the directive:

'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.'

5 Article 12(1)(b) of the directive states that, notwithstanding Articles 10 and 11, Member States may charge transfer duties, including land registration taxes, on the transfer, to a company, firm, association or legal person operating for profit, of businesses or immovable property situated within their territory.

6 According to Article 12(2) of the directive, the duties and taxes referred to in Article 12(1)(b) may not exceed those which are applicable to like transactions in the Member State charging them.

National legislation

7 Paragraph 82 of the Land Register Code (Grundbuchordnung), in the version published on 26 May 1994 (BGBl. 1994 I, p. 1114), provides:

'If, following a transfer of rights carried out outside the land register, the entry for the proprietor is no longer accurate, the Grundbuchamt [Land Registry] is required to compel the proprietor or the executor under a will administering the property to apply for rectification of the land register and provide the necessary documents.'

8 Paragraph 60(1) to (4) of the Federal Law on the Taxation of Transactions (Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit) of 26 July 1957 (BGBl. 1957 I, p. 960; 'the Kostenordnung') provides:

'1. The fee is charged at the full rate for entering a proprietor or co-proprietors.

2. Entry of the spouse, cohabitee or descendants of the registered proprietor is charged at half rate, even if such entry follows the dissolution of a community of property or the division of an estate, or if those persons are subsequently entered as co-proprietors of land held in common; where entry is made after the division of an estate or the dissolution of a community, it is immaterial whether or not, in the meantime, the heirs or those who carried on the community of property were entered in the land register.

3. Where fees are levied concomitantly pursuant to subparagraphs 1 and 2, the fee is first calculated at the full rate on the basis of the full value; the amount thus calculated is reduced by half in respect of persons whose entry pursuant to subparagraph 2 is subject to a fee at half rate.

4. Registration of the heirs of the registered proprietor is not subject to the fees in subparagraphs 1 to 3 if the application for registration is submitted to the land registry within two years following the death.'

The main proceedings and the questions referred for a preliminary ruling

9 The Amtsgericht Breisach (Local Court, Breisach) states that the merger and takeover of the cooperative Weinbau- und Vertriebsgenossenschaft Baden eG of Breisach am Rhein ('Weinbau') by Badischer Winzerkeller was registered on 3 August 1995 in the register of cooperatives of the Amtsgericht Freiburg (Local Court, Freiburg).

10 The Amtsgericht Breisach has stated that Weinbau was registered in the Breisach land register as the proprietor of several parcels of land.

11 On 10 June 1997, the Grundbuchamt rectified the name of the proprietor to Badischer Winzerkeller. For that rectification, in accordance with Paragraphs 19, 20

and 60(1) of the Kostenordnung, it claimed a sum of around EUR 5 100 on the basis of a land value of around EUR 3 400 000.

12 By letter of 19 March 2001, Badischer Winzerkeller brought an action against the fee notice, essentially based on the directive.

13 The Amtsgericht Breisach considers that the fee charged, pursuant to Paragraph 60 of the Kostenordnung, falls in principle within the prohibition laid down by Article 10(c) of the directive, as a 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.

14 According to the Amtsgericht Breisach, it needs to be examined whether, as certain German courts consider, that fee constitutes a transfer duty authorised by Article 12(1)(b) or (c) of that directive.

15 The Amtsgericht Breisach draws attention to the fact that, if the Court were to take the view that a fee such as that referred to in Paragraph 60 of the Kostenordnung falls within the derogation provided for by Article 12(1) of the directive, it should also verify that that fee is no higher than fees or taxes applicable to similar transactions in the Member State in question. In that regard, the Amtsgericht Breisach notes that Paragraph 60 of the Kostenordnung does not charge a fee for rectification of the land register in succession cases where the application for rectification is made within two years following the death.

16 In the light of those considerations, the Amtsgericht Breisach decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, in the version resulting from Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the directive concerning indirect taxes on the raising of capital, Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty, Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335/EEC concerning direct taxes on the raising of capital, and Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital (hereinafter referred to as "the directive") be interpreted as meaning that all operations referred to in Article 10(c) of the directive fall within the prohibition thereby enacted, irrespective of the conditions in Article 4?

(2) When applying the directive, should no distinction be made between fees for the provision of services by the State and taxes, with the result that "fees" under the Kostenordnung can be assimilated to taxes on the transfer of ownership?

(3) Should the Court answer the second question in the affirmative, should the last sentence of Article 12(2) of the directive be interpreted as meaning that an exception arises from the fact that Paragraph 60 of the Kostenordnung ..., for example, makes no provision for a fee for rectifying the land register in succession cases where the application for registration is made within two years following the death?'

The questions

The first question

17 By its first question, the national court essentially asks whether a fee charged for rectification of the land register in the case of the merger of two legal persons, as in this case, may fall within the prohibition laid down by Article 10(c) of the directive.

18 That provision prohibits Member States from levying taxes, apart from capital duty, 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.

19 The Court has already had occasion to point out that the prohibition under Article 10(c) of the directive is in addition to those set out in Article 10(a) and (b) of that directive, which refers to the scenarios described in Article 4 of the directive (see, to that effect, Case C-152/97 *AGAS* [1998] ECR I-6553, paragraph 21). That 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 (Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23, and *AGAS*, paragraph 21).

20 In order to determine whether a fee such as that at issue in the main proceedings falls within the prohibition under Article 10(c) of the directive, it therefore needs to be examined whether the conditions contained in that provision are fulfilled.

21 The order for reference shows that Badischer Winzerkeller is a legal person operating for profit for the purposes of Article 3(2) of the directive. Article 10(c) therefore applies to it.

22 It remains to be examined whether the fee at issue in the main proceedings is charged for registration or for any other formality required before the commencement of business to which a legal person may be subject by reason of its legal form.

23 As for whether the rectification of the land register at issue in the main proceedings is caused by the legal form of Badischer Winzerkeller, it should be noted that that rectification attests to the transfer of land from Weinbau to Badischer Winzerkeller, which is a direct consequence of the merger between those two cooperatives. The rectification is thus clearly a formality to which the company is made subject by reason of its legal form.

24 On the other hand, it does not appear that rectification of the land register is, in a strict sense, a formality required before the carrying-out of any business by a legal person such as Badischer Winzerkeller.

25 According to consistent case-law, it has to be determined whether rectification of the land register, while not formally constituting a procedure which is required before the legal person concerned commences business, is none the less necessary for the carrying-on of that business (see, in relation to the registration of increases in capital, Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 22, and Case C-56/98 *Modelo ('Modelo I')* [1999] ECR I-6427, paragraph 25).

26 In this regard, the Court has held many times that where a transaction carried out by a legal person, such as the increase of its company capital or the amendment of its constitution, is subject to legal formalities under national law, that formality is necessary for the carrying-on of that legal person's business (see, in particular, *Modelo I*, paragraph 26; Case C-19/99 *Modelo ('Modelo II')* [2000] ECR I-7213, paragraph 26; Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 24; Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 30; and Case C-426/98 *Commission* v *Greece* [2002] ECR I-2793, paragraph 30).

27 The same considerations necessarily apply in the case of a transaction such as that at issue in the main proceedings, namely a legal person's acquisition of land by means of a merger and takeover, which, under German law, is subject to compulsory rectification of the land register.

28 It follows that a fee charged for rectification of the land register, such as that at issue in the main proceedings, constitutes a tax levied for a prior formality to which a legal person operating for profit may be subject by reason of its legal form.

29 Having regard to the above considerations, the answer to the first question must be that a fee charged for rectification of the land register, such as that at issue in the main proceedings, falls in principle within the prohibition under Article 10(c) of the directive.

The second and third questions

30 By its second and third questions, the national court essentially asks whether a tax levied for rectification of the land register, such as that at issue in the main proceedings, may, under certain conditions, by way of derogation from Article 10(c) of the directive, be regarded as a transfer duty authorised by Article 12 of the directive.

31 Article 12(1) of the directive establishes an exhaustive list of the taxes and duties other than capital duty which may, notwithstanding Articles 10 and 11, be imposed on capital companies in connection with the transactions referred to in those latter articles (see, to that effect, Case 36/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 9, and Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 24).

32 The transfer duties referred to in Article 12(1)(b) of the directive must be regarded as registration fees levied in connection with certain transactions involving the transfer of businesses or immovable property, on the basis of general and objective criteria (Case C-42/96 *Immobiliare SIF* [1997] ECR I-7089, paragraph 34).

33 That provision draws no distinction between the kinds of transfer duties which may be levied by the Member States. It permits Member States, in general terms, to levy, separately from capital duty, duties in respect of which the operative event is objectively linked to the transfer of businesses or immovable property (see *Immobiliare SIF*, paragraph 35).

34 In this case, the Court finds that the tax at issue in the main proceedings, which is calculated by reference to general and objective criteria, namely, according to the order for reference, by reference to the value of the subject-matter of the transaction, is objectively linked to the transfer of ownership of the immovable property of Weinbau to Badischer Winzerkeller by means of the merger of Weinbau with, and the takeover of Weinbau by, Badischer Winzerkeller.

35 It therefore appears that the levying of a tax such as that at issue in the main proceedings constitutes a transfer duty within the meaning of Article 12(1)(b) of the directive.

36 However, that tax can be actually authorised only if, in accordance with Article 12(2) of the directive, it is not higher than the taxes or duties applicable to similar transactions in the taxing Member State.

37 In that respect, the national court has indicated that, in certain circumstances, national legislation does not impose a tax for rectification of the register in succession cases, where the application for rectification is made within two years following the death.

38 In order to determine whether the case of a succession may be regarded as similar to a transaction such as that at issue in the main proceedings, account must be taken of its purposes and its effects.

39 The transfer of land resulting from a succession cannot be compared, as regards its purposes and effects, with a transaction such as that at issue in the main proceedings which concerns the transfer of land resulting from the merger of two economic operators.

40 Moreover, the fact that national legislation does not impose a tax, or provides for a reduced tax, in relation to certain operations, such as succession, does not necessarily imply that the tax applicable to the transaction at issue in the main proceedings is contrary to Article 12(2) of the directive.

41 Such a conclusion may be reached only by means of an overall assessment of the duties or taxes applicable to operations which, in the light of their purposes and their effects, are similar to the transaction at issue in the main proceedings, namely the transfer of land from one cooperative to another as a result of their merger.

42 That assessment must be made in the light of the factual circumstances at issue in the main proceedings and requires an interpretation of national law.

43 In proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the interpretation of national law and any assessment of the facts in the case is a matter for the national court (see, in particular, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 29;

Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 37; and Case C-282/00 *RAR* [2003] ECR I-4741, paragraph 46).

44 It is therefore for the national court to verify whether the tax at issue in the main proceedings is higher than those applicable to similar operations in the taxing Member State.

45 Having regard to the above, the answer to the second and third questions must be that a tax such as that at issue in the main proceedings may, in derogation from Article 10(c) of the directive, be regarded as a transfer duty authorised by Article 12(1)(b) of the directive, provided it is not higher than those applicable to similar operations in the taxing Member State. It is for the national court to verify whether that tax complies with the provisions of Article 12(2) of the directive.

Costs

46 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 (Third Chamber) hereby rules:

1. **A fee charged for rectification of the land register, such as that at issue in the main proceedings, falls in principle within the prohibition under 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.

2. **A tax such as that at issue in the main proceedings may, in derogation from Article 10(c) of Directive 69/335, as amended by Directive 85/303, be regarded as a transfer duty authorised by Article 12(1)(b) of Directive 69/335, as amended by Directive 85/303, provided it is not higher than those applicable to similar operations in the taxing Member State.**

It is for the national court to verify whether that tax complies with the provisions of Article 12(2) of Directive 69/335, as amended by Directive 85/303.

[Signatures]