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Case C-193/04

Fazenda Pública

v

Organon Portuguesa – Produtos Químicos e Farmacêuticos Lda

(Reference for a preliminary ruling from the

Supremo Tribunal Administrativo)

(Indirect taxes on the raising of capital – Directive 69/335/EEC – Disposal of shares of a limited company)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Indirect taxes on the raising of capital – Capital duty levied on capital companies

(Council Directive 69/335, Art. 12(1)(a))

Directive 69/335 concerning indirect taxes on the raising of capital, as amended by Directive 85/303, does not preclude national legislation which provides, in respect of the drawing-up of a notarial act recording a disposal of shares which is not linked to an increase in capital, for the charging of fees which are fixed by reference to a flat rate and/or the value of the shares being disposed of.

A tax constituted by such fees falls within the exception provided for in Article 12(1)(a) of Directive 69/335, which allows a tax to be charged in the event of a transfer of securities and, consequently, collection thereof is not contrary to the directive. The fact that the amount of those fees increases directly and without an upper limit in proportion to the value of the shares disposed of is not such as to affect this conclusion. By providing that the duties to which it refers may be 'charged at a flat rate or not', Article 12(1)(a) of Directive 69/335 allows the Member States freely to determine the rate thereof.

(see paras 21-25, operative part)

JUDGMENT OF THE COURT (First Chamber)

7 September 2006 (*)

(Indirect taxes on the raising of capital – Directive 69/335/EEC – Disposal of shares of a limited company)

In Case C-193/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Supremo Tribunal Administrativo (Supreme Administrative Court) (Portugal), made by decision of 17 March 2004, received at the Court on 26 April 2004, in the proceedings

Fazenda Pública

v

Organon Portuguesa – Produtos Químicos e Farmacêuticos Lda,

intervening party:

Ministério Público,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, E. Juhász (Rapporteur) and E. Levits, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 2005,

after considering the observations submitted on behalf of:

- Organon Portuguesa – Produtos Químicos e Farmacêuticos Lda, by I. Vieira, advogada,
- the Portuguese Government, by L. Fernandes and A.F. Ferreira, acting as Agents,
- the German Government, by A. Tiemann, acting as Agent,
- the Spanish Government, by F. Díez Moreno, acting as Agent,
- the Commission of the European Communities, by L. Ström, G. Braga da Cruz and M. Afonso, acting as Agents,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 4(3), 10(c) and 12(1)(e) 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 This reference was made in the context of proceedings between the Fazenda Pública (Treasury) and the Company Organon Portuguesa – Produtos Químicos e Farmacêuticos Lda ('Organon Portuguesa') concerning the payment of fees for the drawing-up of a notarial act recording a disposal of shares.

Legal context

Community legislation

3 The first recital in the preamble to Directive 69/335 refers to the EEC Treaty objective of promoting the free movement of capital, with a view to the creation of an economic union whose characteristics are similar to those of a domestic market.

4 In the second recital in the preamble to Directive 69/335, it is stated that the indirect taxes on the raising of capital in force in the Member States give rise to discrimination, double taxation and disparities which interfere with the free movement of capital and which must be eliminated by harmonisation.

5 To that end, the sixth and seventh recitals in the preamble to Directive 69/335 provide that duty on the raising of capital should be charged only once within the common market, at an equal level in all Member States and harmonised as regards its structure and rates. Finally, the eighth recital in the preamble to the directive envisages the abolition of all other indirect taxes with the same characteristics as that single capital duty.

6 Article 1 of Directive 69/335 provides that 'Member States shall charge on contributions of capital to capital companies a duty harmonised ...'.

7 Article 4(1) of Directive 69/335 sets out a list of transactions giving rise to the collection of capital duty. Those transactions concern in essence the formation of a capital company within the meaning of Directive 69/335 and the increase in the capital of such a company. Article 4(3) provides as follows:

'Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:

- (a) the conversion of a capital company into a different type of capital company;
- (b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;
- (c) a change in the objects of a capital company;
- (d) the extension of the period of existence of a capital company.'

8 Article 10 of Directive 69/335 provides:

'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.'

9 Article 11 of Directive 69/335 provides:

'Member States shall not subject to any form of taxation whatsoever:

(a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type ...

... '

10 Finally, Article 12 of Directive 69/335 provides:

'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;

... '

National legislation

11 According to Articles 228(1) of the Code of Commercial Companies and 80(2)(h) of the Code governing the notarial profession, a disposal of shares by a capital company must be formally recorded by a notarial act. The fees for the drawing-up of such an act are set in accordance with the table of notarial charges approved by Order No 996/98 of 25 November 1998 (*Diário da República* I, Series B, No 273, of 25 November 1998, hereinafter 'the Table'). Those fees include a fixed amount (Article 4 of the Table) and a variable amount, calculated on the basis of the total value of the transaction (Article 5(1) of the Table).

The main proceedings and the questions referred for a preliminary ruling

12 According to the case-file, Organon Portuguesa, a limited company governed by Portuguese law, which is, therefore, a capital company within the meaning of Article 3(1)(a) of Directive 69/335, had a disposal of shares recorded by a notarial act drawn up on 25 October 2001 in a notary's office in Lisbon. The disposal was not linked to an increase in the capital of the company.

13 For the drawing-up of that notarial act, required in accordance with the abovementioned legislation, and on the basis of the method of calculation laid down therein, Organon Portuguesa was obliged to pay notarial fees amounting to a total of PTE 2 577 150.

14 The Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Lisbon, upheld the action brought before it by Organon Portuguesa against the notice of assessment in respect of the said notarial fees. Contesting that judgment, the Treasury appealed to the Supremo Tribunal Administrativo, which decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the fees charged in respect of the drawing-up of a notarial document attesting to the

disposal of company shares covered by Article 4(3) [of Directive 69/335]?

(2) Is Article 5(1), in conjunction with Article 3(c) of the [T]able ... in the version in force at the material time, compatible with Articles 10(c) and 12(1)(e) of Directive 69/335 ... inasmuch as it provides for fees in an unlimited amount for documents drawn up in respect of the disposal of shares, which are fixed exclusively by reference to the value of the shares being disposed of, without being subject to any limit whatsoever and irrespective of the value of the service provided?'

The questions referred

15 By those questions, which it is appropriate to examine together, the referring court asks, in substance, whether Directive 69/335 precludes national legislation, such as that at issue in the main proceedings, which provides, in respect of the drawing-up of a notarial act recording a disposal of shares not linked to an increase in capital, for the charging of fees which are fixed exclusively by reference to the value of the shares being disposed of, without being subject to any limit whatsoever and irrespective of the value of the service provided.

16 The Court will limit itself to examining the provisions of Directive 69/335 which are relevant for the purposes of providing the referring court with a useful answer.

17 In accordance with the Court's settled case-law, 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 the directive, under a system, such as that at issue in the main proceedings, where notaries are employed by the State and the charges in question are paid in part to the latter for the financing of its official business (Case C-56/98 *Modelo* [1999] ECR I?6427, paragraph 23, and Case C-19/99 *Modelo* [2000] ECR I?7213, paragraph 23).

18 Article 11(a) of Directive 69/335 prohibits any form of taxation whatsoever on the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued.

19 Therefore, this provision also applies to any taxation imposed in respect of essential formalities linked to the disposal of shares, such as the notarial fees at issue in the main proceedings.

20 However, Article 12 of Directive 69/335 provides for exceptions to Articles 10 and 11. One of those exceptions, contained in Article 12(1)(a), relates to 'duties on the transfer of securities, whether charged at a flat rate or not'. It is common ground that the disposal of shares falls within the concept of transfer of securities.

21 In that respect, it is clear from the case-law of the Court (Case C-236/97 *Codan* [1998] ECR I?8679, paragraph 31, and the order of 5 February 2004 in Case C?357/02 *SONAEDistribuição*, not published in the ECR, paragraph 23) that Article 12(1)(a) of Directive 69/335 allows a tax to be charged in the event of a transfer of securities, irrespective of whether the company issuing the securities is listed on a Stock Exchange and of whether those securities are transferred on the Stock Exchange or directly from the transferor to the transferee.

22 Consequently, a tax such as that constituted by the fees at issue in the main proceedings falls within the exception provided for in Article 12(1)(a) of Directive 69/335 and, consequently, collection thereof is not contrary to the directive.

23 It should be added in that respect that the fact that the amount of those fees increases directly and without an upper limit in proportion to the value of the shares disposed of is not such as to affect this conclusion (order in *SONAE Distribuição*, paragraph 25).

24 By providing that the duties to which it refers may be 'charged at a flat rate or not', Article 12(1)(a) of Directive 69/335 allows the Member States freely to determine the rate thereof. Moreover, those duties are not deemed to constitute the consideration for a service rendered, with the result that the amount thereof need not be linked to the cost of that service and that the criteria established by the case-law (see, in particular, Case C-206/99 *SONAE* [2001] ECR I-4679, paragraphs 32 to 34, and the case-law cited) to distinguish duties paid by way of fees or dues, within the meaning of Directive 69/335, from those which do not come within that category are not applicable to them (order in *SONAE Distribuição*, paragraphs 26 and 27).

25 In the light of the foregoing, the answer to the questions referred must be that Directive 69/335 does not preclude national legislation which provides, in respect of the drawing-up of a notarial act recording a disposal of shares which is not linked to an increase in capital, for the charging of fees which are fixed by reference to a flat rate and/or to the value of the shares disposed of.

Costs

26 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:

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, does not preclude national legislation which provides, in respect of the drawing-up of a notarial act recording a disposal of shares which is not linked to an increase in capital, for the charging of fees which are fixed by reference to a flat rate and/or the value of the shares being disposed of.

[Signatures]

* Language of the case: Portuguese.