

JUDGMENT OF THE COURT (First Chamber)

25 October 2007

(Article 56(1) EC – Directive 69/335/EEC – Article 12(1)(a) and (c) – Exception to the prohibition on double taxation of contributions of capital – Contribution of capital in the form of shares to a company established in another Member State – Exchange of shares – Capital transfer tax)

In Case C-240/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Korkein hallinto-oikeus (Finland), made by decision of 26 May 2006, received at the Court on 29 May 2006, in the proceedings brought by

Fortum Project Finance SA,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič (Rapporteur) and E. Levits, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2007,

after considering the observations submitted on behalf of:

- Fortum Project Finance SA, by M. Tunturi and T. Kanervo, asiamiehet,
- the Finnish Government, by E. Bygglin and J. Heliskoski, acting as Agents,
- the United Kingdom Government, by V. Jackson, acting as Agent, and R. Hill, Barrister,
- the Commission of the European Communities, by R. Lyal and P. Aalto, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2007,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 56(1) EC and Article 12(1)(c) 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 reference was made in the course of proceedings between Fortum Project Finance SA ('Fortum Project Finance'), a company incorporated under Luxembourg law, and the Uudenmaan verovirasto (Uusimaa Tax Office, Finland) concerning whether Finnish capital transfer tax (varainsiirtovero 'capital transfer tax') is chargeable on the entire holding of Fortum Oyj ('Fortum'), a company incorporated under Finnish law, in the capital of Fortum Heat and Gas Oy ('Fortum Heat and Gas'), another company incorporated under Finnish law, that Fortum would transfer as a contribution to Fortum Project Finance, which would issue new shares of its own as consideration for the transfer.

Legal context

Community legislation

- 3 Article 56(1) EC states:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between the Member States ... shall be prohibited.'

- 4 As is apparent from the first and second recitals in the preamble, Directive 69/335 aims to encourage the free movement of capital, a fundamental freedom 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 the raising of capital, in particular, in respect of contribution of capital to companies or firms, namely contributions by members or shareholders to their capital companies.
- 5 To that end, Articles 1 to 9 of Directive 69/335 provide for the charging of harmonised duty on contributions of capital to companies ('capital duty').
- 6 Article 4(1) of Directive 69/335 sets out the list of transactions subject to capital duty, including, in Article 4(1)(c), 'an increase in the capital of a capital company by contribution of assets of any kind'.
- 7 According to Article 7 of Directive 69/335, such a transaction involving a contribution of assets may be subject to a single rate not exceeding 1%.
- 8 Article 10 of Directive 69/335 provides that, apart from capital duty, Member States must not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever, inter alia in respect of the transactions referred to in Article 4 thereof.
- 9 Under Article 11 of Directive 69/335:

'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, or of the certificates representing such securities, by whomsoever issued;
 - (b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities’.
- 10 However, Article 12(1) of Directive 69/335 states that, notwithstanding Articles 10 and 11, Member States may charge, inter alia:
- ‘(a) duties on the transfer of securities, whether charged at a flat rate or not;
 - (b) 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;
 - (c) transfer duties on assets of any kind transferred to a company, firm, association or legal person operating for profit, in so far as such property is transferred for a consideration other than shares in the company;
- ...’

National legislation

- 11 Under Paragraph 15 of the Finnish Law on capital transfer tax (varainsiirtoverolaki (931/1996)), a tax is payable to the State by the transferee on the transfer of property in securities.
- 12 In accordance with Paragraph 20(1) of the Law on capital transfer tax, for transfers of securities the tax is to be 1.6% of the purchase price or of the value of other consideration.
- 13 Under point 1 of the first subparagraph of Paragraph 9 of the Finnish Law on income tax (tuloverolaki (1535/1992)) of 30 December 1992, a natural or legal person, a joint venture or the estate of a deceased person who resided or whose estate arose in Finland during the tax year is liable to tax on all income received in Finland or abroad.
- 14 The Finnish State does not levy capital duty within the meaning of Directive 69/335.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 15 Fortum would transfer its entire holding in the capital of Fortum Heat and Gas to Fortum Project Finance. The latter, having increased its capital by an amount equal to the value of the shares received, would issue new shares in favour of Fortum.
- 16 Following that transaction, Fortum Project Finance would have to pay capital duty of 1% in Luxembourg on the capital acquired by exchange of shares.

- 17 Since it was uncertain as to whether it would also be subject to capital transfer tax in respect of that acquisition, Fortum Project Finance referred the matter to the Uudenmaan verovirasto which took a preliminary decision ('the preliminary decision'), in which it confirmed that Fortum Project Finance would be liable to pay that tax at the rate of 1.6% of the value of the shares in Fortum Heat and Gas which it would receive as a contribution.
- 18 Fortum Project Finance brought an action seeking annulment of that decision before the Helsingin hallinto-oikeus (Administrative Court, Helsinki). It submitted, inter alia, that liability to capital transfer tax would have the effect of making the acquisition of capital subject to double taxation, which is contrary to Article 56(1) EC and Directive 69/335.
- 19 At the request of the Helsingin hallinto-oikeus, the Finnish Ministry of Finance issued an opinion in which it stated, first, that Directive 69/335 does not preclude Member States from charging a duty on the transfer of property in securities and, second, that an exchange of shares involves a transfer which is subject to such a duty. It added that the scope of Article 12(1)(c) of Directive 69/335 is, according to the judgments in Case C-42/96 *Immobiliare SIF* [1997] ECR I-7089 and Case C-236/97 *Codan* [1998] ECR I-8679, strictly defined.
- 20 Fortum Project Finance submitted in a reply that the judgment in *Codan* did not concern either the scope of Article 12(1)(c) of Directive 69/335 or the question of contributions. As far as concerns the judgment in *Immobiliare SIF*, it argued that the fact that the tax is expressed as a percentage is not in itself absolute proof of its fiscal nature.
- 21 The Helsingin hallinto-oikeus dismissed Fortum Project Finance's action and held that the capital transfer tax, which will apply not to the subscription of shares by Fortum in the context of the issue by Fortum Project Finance, or to the increase in share capital, but to the transfer of shares in Fortum Heat and Gas, could not, therefore, be regarded as contrary to Article 12(1)(c) of Directive 69/335.
- 22 The Helsingin hallinto-oikeus held that since the capital transfer tax will apply to the transfer of shares and not to the transfer of capital from one Member State to another, that tax must not be regarded as contrary to Article 56(1) EC and that there was no reason to amend the preliminary decision.
- 23 In its appeal Fortum Project Finance asked the referring court to set aside the judgment of the Helsingin hallinto-oikeus and to rule that capital transfer tax does not apply to shares to be received as consideration for a subscription price.
- 24 The referring court considers that the decision to be given in the main proceedings requires an interpretation of Article 56(1) EC and Article 12(1)(c) of Directive 69/335.
- 25 In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 56 EC and Article 12(1)(c) of ... Directive 69/335/EEC ... to be interpreted as precluding the charging of capital transfer tax where securities are transferred, as

described in the order for reference, as a contribution to a capital company which gives new shares of its own in return?’

The question referred for a preliminary ruling

- 26 By its question, the referring court asks essentially whether Article 56(1) EC and Article 12(1)(c) of Directive 69/335 preclude the charging of a duty, such as capital transfer tax, where securities are transferred as a contribution to a capital company which gives new shares of its own as consideration for that transfer.
- 27 It must be observed, first of all, that in this case there is no need to interpret Article 56(1) EC, since the law on capital transfer tax imposes taxation rules which are identical for national and cross-border transfers of securities, so that, in so far as may be inferred from the file submitted to the Court, that measure does not have any direct or indirect discriminatory effect.
- 28 Next, as far as concerns the application of Directive 69/335 in this case, the United Kingdom Government submits, as a preliminary point, that a transaction such as that at issue in the main proceedings does not fall within the scope of the directive in so far as it covers only transactions which raise capital to strengthen the economic potential of the participants. In this case, the exchange of shares would not result in the strengthening of the economic potential of the Fortum group taken as a whole.
- 29 That argument cannot, however, be accepted. The transaction concerned, consisting in an increase in capital as a result of a contribution of shares, is clearly within Article 4(1)(c) of Directive 69/335, which makes an increase in the share capital of a company by contribution of assets of any kind subject to capital duty, without making any reference to the economic effects of such a transaction on its participants.
- 30 Thus, in Case C-46/04 *Aro Tubi Trafilerie* [2006] ECR I-3009, the Court had the opportunity to define ‘increase in the capital’ within the meaning of Article 4(1)(c) of Directive 69/335 as a formal increase in a company’s capital by means of either an issue of new shares or an increase in the nominal value of the existing shares (paragraph 33 and case-law cited).
- 31 Since Directive 69/335 applies to a transaction such as that at issue in the main proceedings, that transaction would be subject to payment of capital duty in Luxembourg. It is therefore necessary to ascertain whether the Finnish tax authorities may also levy capital transfer tax or whether, on the contrary, the levy of that tax, as Fortum Project Finance and the Commission of the European Communities submit, is prohibited under Article 12(1)(c) of Directive 69/335.
- 32 In that connection, the Finnish and United Kingdom Governments submit that the tax at issue in the main proceedings is authorised under Article 12(1)(a) which applies to duties charged on the transfer of securities such as shares. According to those governments, Article 12(1)(c) of Directive 69/335 should be understood as applying to duties on the transfer of assets other than those covered by Article 12(1)(a) or (b) thereof, namely assets which are neither securities nor immovable property or businesses. In support of that reasoning, those governments rely on *Immobiliare SIF*

and *Codan* in which the Court, in circumstances similar to those in the main proceedings, did not interpret Article 12(1)(c) of Directive 69/335, but interpreted Article 12(1)(a) and (b) respectively.

- 33 The Commission, supported on this point by Fortum Project Finance, submits on the other hand that Article 12(1)(a) of Directive 69/335 constitutes the basic rule relating to taxation on the transfer of securities, while Article 12(1)(c) thereof lays down a more detailed rule relating to taxation of transfers of securities and other assets to a company by way of a contribution. *Immobiliare SIF* and *Codan* are not such as to call that analysis into question since, in those judgments, the Court did not interpret Article 12(1)(c) of Directive 69/335.
- 34 The reasoning of the Commission and Fortum Project Finance cannot, however, be accepted.
- 35 As the Advocate General pointed out, in point 51 of his Opinion, the key issue in this reference for a preliminary ruling is whether Article 12(1)(a) of Directive 69/335 permits Member States to tax transfers of securities, including where the company in receipt of such securities gives its own shares in exchange, without infringing Article 12(1)(c) of that directive. In other words, it must be determined whether Article 12(1)(a) of Directive 69/335 must be considered to be a special provision as compared with Article 12(1)(c), so that the first provision takes precedence over the second in the situations that it is specifically designed to regulate.
- 36 In that regard it should be recalled first of all that, according to the Court's settled case-law, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (Case C-434/97 *Commission v France* [2000] ECR I-1129, paragraph 21, and case-law cited).
- 37 While Article 12(1)(a) and (b) of Directive 69/335 concern specific categories of assets, namely securities, on the one hand, and immovable property and businesses, and on the other, Article 12(1)(c) applies to assets in general, that is 'assets of any kind' and, furthermore, makes the levy of transfer duties subject to the condition that such property is transferred 'for a consideration other than shares in the company'.
- 38 In those circumstances, according to the principle of effectiveness recalled in paragraph 36 of this judgment, the definition of 'assets of any kind' in Article 12(1)(c) of Directive 69/335 may extend only to assets of a kind other than those which are mentioned in Article 12(1) (a) and (b), that is 'securities' and 'businesses or immovable property' respectively.
- 39 As the Advocate General noted, in point 63 of his Opinion, interpreting Article 12(1)(c) of Directive 69/335 as referring to 'assets of any kind', including those covered in Article 12(1)(a) and (b), would have the effect of totally absorbing the content of those subparagraphs so that their existence would have no meaning or purpose.
- 40 Therefore, it must be held that in a situation such as that at issue in the main proceedings which concern, first, the transfer of securities and, second, consideration

for those securities given by way of shares in the company, Article 12(1)(c) of Directive 69/335 does not preclude the levying of a duty, such as capital transfer tax.

- 41 On the other hand, the transaction at issue in the main proceedings falls within the scope of Article 12(1)(a) of Directive 69/335 so that the charging of capital transfer tax is covered in this case by that provision.
- 42 Furthermore, for the reasons set out by the Advocate General in points 67 to 70 of his Opinion, such an interpretation is consistent with *Codan*, in which the Court held, in circumstances identical to those in the main proceedings, that Article 12(1)(a) of Directive 69/335 allows a duty to be charged in the event of a transfer of shares, in addition to the capital duty applicable as a result of the increase in share capital.
- 43 Having regard to all of the foregoing, the answer to the question referred must be that Directive 69/335 must be interpreted as meaning that Article 12(1)(c) does not apply to the charging of a duty, such as capital transfer tax, where securities are transferred as a contribution to a capital company which gives new shares of its own as consideration for that transfer. Article 12(1)(a) of the directive allows such a duty to be charged.

Costs

- 44 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, must be interpreted as meaning that Article 12(1)(c) does not apply to the charging of a duty, such as Finnish capital transfer tax (*varainsiirtovero*), where securities are transferred as a contribution to a capital company which gives new shares of its own as consideration for that transfer. Article 12(1)(a) of the directive allows such a duty to be charged.