

JUDGMENT OF THE COURT (Second Chamber)

3 July 2014

(Request for a preliminary ruling — Taxation — Directive 69/335/EEC — Indirect taxes on the raising of capital — Article 10(c) — Conversion of a capital company into a different type of capital company not involving any increase in capital — Fees demanded for the drawing up of a notarial act recording that conversion)

In Case C-524/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Karlsruhe (Germany), made by decision of 27 September 2013, received at the Court on 3 October 2013, in the proceedings

Eycke Braun

v

Land Baden-Württemberg,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Braun, by himself,
- the *Land* Baden-Württemberg, by K. Ehmann, acting as Agent,
- the European Commission, by A. Cordewener and W. Roels, acting as Agents,

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

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10(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).
- 2 The request has been made in proceedings between Mr Braun, in his capacity as a notary employed as a civil servant, and the *Land* Baden-Württemberg, concerning the receipt, by the latter, of a share of the fees which Mr Braun himself charged when he drew up notarial acts recording various transactions relating to the conversion of capital companies.

Legal context

EU law

- 3 In the words of the seventh recital in the preamble to Directive 69/335, '[capital] duty should be harmonised, with regard both to its structures and to its rates'. The eighth recital in the preamble to that directive adds that, 'the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this Directive and those taxes should therefore be abolished'.
- 4 Article 4 of that directive provides as follows:
 - '1. The following transactions shall be subject to capital duty:
 - (a) the formation of a capital company;
 - ...
 - (c) an increase in the capital of a capital company by contribution of assets of any kind;
 - ...
 - (e) the transfer from a third country to a Member State of the effective centre of management of a company, firm, association or legal person, whose registered office is in a third country and which is considered in that Member State, for the purposes of charging capital duty, as a capital company;
 - (f) the transfer from a third country to a Member State of the registered office of a company, firm, association or legal person, whose effective centre of management is in a third country and which is considered in that Member State, for the purposes of charging capital duty, as a capital company;
 - ...

3. 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;
...'

5 Article 10 of the same directive provides as follows:

'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.'

6 Article 12(1)(e) of Directive 69/335 provided that, '[n]otwithstanding Articles 10 and 11, Member States may charge ... duties paid by way of fees or dues'.

7 Under Article 16 of Council Directive 2008/7/EC of 12 February 2008, concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11), Directive 69/335 was repealed with effect from 1 January 2009. However, since the authentication transactions which gave rise to the payment of the notarial fees at issue in the main proceedings were performed before the entry into force of Directive 2008/7, they remain governed by Directive 69/335.

German law

8 In accordance with Paragraph 114(1) of the Federal Code on the Notarial Profession (Bundesnotarordnung), the *Land* Baden-Württemberg recognises the profession of a notary employed as a civil servant, that notary being remunerated, on the one hand, by a salary fixed under the *Land* Law on the Remuneration of Civil Servants (Landesbesoldungsgesetz) and, on the other, by part of the fees received by him.

9 Paragraph 11(2) of the Law of Baden-Württemberg on costs incurred in the administration of justice (Baden-Württembergisches Landesjustizkostengesetz), as amended on 28 July 2005 (*Gesetzblatt für Baden-Württemberg* 2005, No 12, of 5 August 2005, p. 580) ('the LJKG BW'), provided as follows:

'The Treasury shall receive a share of the fees in accordance with Paragraphs 12 and 13 for

- (a) ...

- (b) the authentication of a conversion that does not lead to an increase in the capital of the company making the acquisition or changing its legal form,
- (c) ...'

10 The LJKG BW was amended by the Law amending the *Land* Law on costs incurred in the administration of justice and other laws (Gesetz zur Änderung des Landesjustizkostengesetzes und anderer Gesetze), of 13 December 2011 (*Gesetzblatt für Baden-Württemberg* 2011, No 21, of 16 December 2011, p. 545) and now provides that, in the cases referred to in Paragraph 11 of the LJKG BW, the *Land* shall waive any share of the fees mentioned in that provision with retroactive effect from 1 June 2002. However, Article 10, Paragraph 2, second sub-paragraph, of that law of 13 December 2011 provides for the following transitional arrangement:

‘So far as concerns the fees incurred until 31 December 2008 for

...

- 2. the authentication of a conversion that does not lead to an increase in the capital of the company making the acquisition or changing its legal form,

...

the legislation applicable to those authentications until now shall continue to apply.’

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

- 11 Between 2002 and 2005, Mr Braun, as a notary employed as a civil servant, drew up various authentications concerning the conversion of a capital company into a different type of capital company. The authenticated conversions did not lead to an increase in the capital of the company making the acquisition or changing its legal form.
- 12 By a notice of assessment of the President of the Landgericht Freiburg of 11 December 2008, adopted on the basis of Paragraph 11(2)(b) of the LJKG BW, the share to be paid to the Treasury by Mr Braun in respect of those authentications was fixed at EUR 8 124.62.
- 13 By letter of 23 December 2008, Mr Braun challenged that notice of assessment.
- 14 By notice of amendment of 19 August 2013, the Landgericht Freiburg made a slight alteration to the assessments set in the notice of 11 December 2008. However, so far as concerns the authentication transactions at issue in the main proceedings, the assessment remained unchanged on the basis of the transitional arrangement contained in Article 10, Paragraph 2, second sub-paragraph, of the law amending the *Land* Law on costs incurred in the administration of justice and other laws of 13 December 2011.
- 15 The case was then brought before the Amtsgericht Karlsruhe.

- 16 According to the referring court, conversion of a capital company into a different type of capital company, in accordance with Article 4(3)(a) of Directive 69/335, does not constitute the formation of a capital company within the meaning of Article 4(1)(a) of that directive and is not, consequently, subject to capital duty. Having recalled that Article 10(c) of that directive does not expressly cover the transactions referred to in Article 4 of that directive, unlike Article 10(a) and (b) thereof, that court takes the view that it is possible that the payment of part of the fees to the Treasury, as stipulated in the notices of 11 December 2008 and 19 August 2013, constitutes prohibited taxation under Article 10(c) of Directive 69/335.
- 17 The referring court is also of the opinion that it cannot be inferred from *Agas*, C-152/97, EU:C:1998:511 that the scope of Article 10(c) must be restricted to the formalities relating to the transactions listed in Article 4 of Directive 69/335.
- 18 In those circumstances, the Amtsgericht Karlsruhe decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is ... Directive 69/335... to be interpreted as meaning that the fees received by a notary employed as a civil servant for the drawing up of a notarial act recording a transaction concerning the conversion of a capital company into a different type of capital company constitute taxes for the purposes of that directive, even if the conversion does not lead to an increase in the capital of the company making the acquisition or changing its legal form?’

Consideration of the question referred

- 19 By its question, the referring court asks, in essence, whether Article 10(c) of Directive 69/335 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that the Treasury is to receive a share of the fees charged by a notary employed as a civil servant when he draws up a notarial act recording a transaction concerning the conversion of a capital company into a different type of capital company, and which does not lead to an increase in the capital of the company making the acquisition or changing its legal form.

Admissibility

- 20 Even though, as the *Land* Baden-Württemberg observes, the subordinate clause in the question referred does not contain a predicate, that finding does not result in that question being inadmissible, since the content of the question can be inferred with certainty from the order for reference.
- 21 The *Land* Baden-Württemberg also submits that the question must be declared inadmissible, in so far as the interpretation of EU law sought is not relevant in the context of the main proceedings between a notary employed as a civil servant and the public authorities. The fact that the national legislation is allegedly contrary to EU law would be relevant only in the context of proceedings between the party liable for the notarial fees, namely, the converted company, and the notary employed as a civil servant.

- 22 Admittedly, it follows from the Court's consistent case-law that the Court may refuse to rule on a question referred for a preliminary ruling from a national court where it is quite obvious, in particular, that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose (see, to that effect, *Rosenbladt*, C-45/09, EU:C:2010:601, paragraph 33 and the case-law cited, and *MA and Others*, C-648/11, EU:C:2013:367, paragraph 37).
- 23 However, that condition is not satisfied in the present case. Even if Mr Braun, as a notary employed as a civil servant, is not himself liable for the fees at issue in the case in the main proceedings, he cannot be forced to pay a share of those fees to the Treasury if it were to become evident that the obligation linked to the payment of that share infringed EU law. The request for a preliminary ruling, which is intended to allow the referring court to assess the lawfulness of the national arrangements at issue providing for such a share to be paid to the *Land* Baden-Württemberg, therefore has a direct connection with the purpose of the dispute in the main proceedings.
- 24 Consequently, the question referred for a preliminary ruling is admissible.

Substance

- 25 It must be recalled at the outset that Article 10 of Directive 69/335, read in conjunction with the eighth recital in the preamble to that directive, prohibits taxes with the same characteristics as a capital duty (see, inter alia, Judgment in *Ponente Carni and Cispadana Costruzioni*, C-71/91 and C-178/91, EU:C:1993:140, paragraph 29; *Denkavit International and Others*, C-2/94, EU:C:1996:229, paragraph 23; and *Albert Reiss Beteiligungsgesellschaft*, C-466/03, EU:C:2007:385, paragraph 48).
- 26 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 (*Albert Reiss Beteiligungsgesellschaft*, EU:C:2007:385, paragraph 49).
- 27 In this connection, the Court has previously held, in cases relating to legislation applicable in the *Land* Baden-Württemberg, that 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 public authority employing the notaries as civil servants and used to finance the public obligations of that authority (see, to that effect, the order in *Gründerzentrum*, C-264/00, EU:C:2002:201, paragraphs 27 and 28; *Längst*, C-165/03, EU:C:2005:412, paragraphs 37 and 41; and *Albert Reiss Beteiligungsgesellschaft*, EU:C:2007:385, paragraph 40).
- 28 As regards the issue of whether notarial fees, such as those in question in the main proceedings, are charged 'in respect of registration or any other formality required before the commencement of business to which a company ... may be subject by reason of its legal form' within the meaning of Article 10(c) of Directive 69/335, it is apparent from the Court's consistent case-law that that provision must 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 *Albert Reiss Beteiligungsgesellschaft*, EU:C:2007:385, paragraph 51 and the case-law cited).

- 29 In this regard, the Court has many times held 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 immovable property following a merger, is subject to legal formalities under national law, that formality is necessary for carrying on that company's business (*Albert Reiss Beteiligungsgesellschaft*, EU:C:2007:385, paragraph 52; see also, to that effect, *Commission v Greece*, C-426/98, EU:C:2002:180, paragraphs 12 and 30; and *Badischer Winzerkeller*, C-264/04, EU:C:2006:402, paragraphs 26 to 29).
- 30 In the case in the main proceedings, the notarial fees were charged on the drawing up of notarial acts recording various transactions converting capital companies into a different type of capital company. Since, under the *Land* Baden-Württemberg's legislation, such a conversion must be made by notarial act, that obligation must be regarded as a formality which is necessary for carrying on the business of the capital company thus converted (see, by analogy, *Albert Reiss Beteiligungsgesellschaft*, EU:C:2007:385, paragraph 54). The drawing up of such notarial acts is thus a prior formality to which a capital company is subject by reason of its legal form, within the meaning of Article 10(c) of Directive 69/335.
- 31 The *Land* Baden-Württemberg nevertheless points out that the conversions of the companies which gave rise to the dispute in the main proceedings did not lead to any increase in the capital of the companies making the acquisitions or changing their legal form. According to that *Land*, only taxation charged on a transaction which leads to an increase in the capital of the company concerned may fall within Article 10(c) of Directive 69/335.
- 32 That line of argument cannot be accepted.
- 33 It is clear from Article 4(3)(a) of Directive 69/335 that the Member States may not charge capital duty on 'the conversion of a capital company into a different type of capital company'. That provision necessarily concerns conversions of companies without any increase in capital. Conversion with an increase in capital is covered by Article 4(1)(c) of the directive. The objective pursued by Article 4(3)(a) of Directive 69/335 would be compromised if, on the conversion of a capital company into a different type of capital company, other taxes with the same effect as capital duty could be charged.
- 34 Moreover, it is apparent from the case-law referred to in paragraph 29 above that the scope of Article 10(c) of Directive 69/335 is not restricted to transactions leading to an increase in the capital of the company concerned.
- 35 Consequently, Article 10(c) of Directive 69/335 precludes national legislation, such as that at issue in the main proceedings, which provides that the Treasury is to receive a share of the fees charged by a notary employed as a civil servant when he draws up a notarially attested act recording a transaction concerning the conversion of a capital company into a different type of capital company, and which does not lead to an increase in the capital of the company making the acquisition or changing its legal form.

- 36 By contrast, Article 10(c) of Directive 69/335 does not prohibit a notary employed as a civil servant from receiving, when he draws up such attested acts, fees ultimately owed to him in so far as those fees are paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335.
- 37 On the basis of all the foregoing considerations, the answer to the question referred is that Article 10(c) of Directive 69/335 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that the Treasury is to receive a share of the fees charged by a notary employed as a civil servant when he draws up a notarial act recording a transaction concerning the conversion of a capital company into a different type of capital company, and which does not lead to an increase in the capital of the company making the acquisition or changing its legal form.

Costs

- 38 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 (Second Chamber) hereby rules:

Article 10(c) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that the Treasury is to receive a share of the fees charged by a notary employed as a civil servant when he draws up a notarial act recording a transaction concerning the conversion of a capital company into a different type of capital company, and which does not lead to an increase in the capital of the company making the acquisition or changing its legal form.