JUDGMENT OF THE COURT (Sixth Chamber)

17 October 2002

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Capital duty - Increase in a company's capital by the issue of new shares - Payments made upon the entry of a new member as a shareholder in the company - Payments made by the parent company of the new member - Payments made to the subsidiaries of the company increasing its capital - Payments not yet made)

In **Case C-339/99**,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Energie Steiermark Holding AG

and

Finanzlandesdirektion für Steiermark,

on the interpretation of Articles 4(1)(c) and 5(1)(a) 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 the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- Energie Steiermark Holding AG, by P. Csoklich, Rechtsanwalt,

- the Austrian Government, by C. Stix-Hackl, acting as Agent,

- the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Energie Steiermark Holding AG, represented by P. Csoklich, of the Finanzlandesdirektion für Steiermark, represented by H. Bavenek-Weber, acting as Agent, of the Austrian Government, represented by H. Dossi, acting as Agent, and of the Commission, represented by K. Gross, at the hearing on 26 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2002,

gives the following

Judgment

1. By order of 1 September 1999, received at the Court on 13 September 1999, the Verwaltungsgerichtshof (Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 4(1)(c) and 5(1)(a) 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 the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).

2. Those questions were raised in the course of proceedings between Energie Steiermark Holding AG (hereinafter 'ESTAG') and the Finanzlandesdirektion für Steiermark (Revenue Administration for the Land of Styria, hereinafter 'the Finanzlandesdirektion') concerning the levy of capital duty upon an increase in the capital of a capital company financed by an issue of new shares and the payment, by the parent company of the new member of the capital company, of various financial contributions.

Relevant provisions

Community legislation

3. As is apparent from the first recital in its preamble, the aim of Directive 69/335 is to promote the free movement of capital, which is considered to be one of the essential conditions for achieving an economic union whose characteristics are similar to those of a domestic market.

4. According to the sixth recital in the preamble to Directive 69/335 the pursuit of such an objective presupposes, as regards duty on the raising of capital, the abolition of the indirect taxes then in force in the Member States and the application instead of a single tax charged only once in the common market at a level which is the same in all the Member States.

5. Under Article 4(1) of Directive 69/335:

'The following transactions shall be subject to capital duty:

...

(c) an increase in the capital of a capital company by contribution of assets of any kind;

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

...'.

6. Article 4(2) of Directive 69/335 provides;

'The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:

(a) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;

(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares;

(c) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(d) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.'

7. Article 5 of Directive 69/335 is worded as follows:

'1. The duty shall be charged:

(a) in the case of formation of a capital company or of an increase in its capital or assets, as referred to in Article 4(1)(a), (c) and (d): on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution. Member States may postpone the charging of capital duty until the contributions have been effected;

...

(d) in the case of an increase in the assets, as referred to in Article 4(2)(b): on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services;

...

2. In the cases referred to in paragraph 1(a) and (b), Member States may base the amount on which to charge capital duty on the actual value of the shares in the

company allotted or belonging to each member. This does not apply to those cases in which contributions are made only in cash. The amount on which duty is charged shall in no circumstance be less than the nominal amount of the shares in the company allotted or belonging to each member.

...'

Austrian legislation

8. Under Paragraph 2(1), point 1, of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) of 16 October 1934 (DRGBl. 1934/1058, in its amended version as published in BGBl. 1995/21, hereinafter 'the KVG'), 'the acquisition by the first acquirer of rights in a domestic capital company' is subject to capital duty.

9. Under Paragraph 7(1)(a) of the KVG the basis of assessment on such an acquisition is made up of the value of the consideration, which also includes the costs of the company formation or increase in capital which are assumed by the members, but not the capital duty to be paid in respect of the acquisition of the rights in the company.

The main proceedings and the questions referred

10. ESTAG is a public limited company whose fully paid-up share capital, prior to the transaction which gave rise to the main proceedings, was ATS 500 000 000 and whose sole shareholder was the Land Steiermark (Land of Styria, hereinafter 'the Land'). ESTAG holds 98.8% of the shares in Steirische Wasserkraft- und Elektrizitäts-Aktiengesellschaft, 99.994% of the shares in Steirische Ferngas-Aktiengesellschaft and 99.996% of the shares in Steirische Fernwärme GmbH. ESTAG and its three subsidiaries make up the 'ESTAG Group.

11. On 22 and 27 January 1998, the Land and Électricité de France International SA (hereinafter 'EDFI'), a subsidiary of Électricité de France (hereinafter 'EDF'), entered into an equity participation agreement ('Unternehmensbeteiligungsvertrag'), the aim of which was the acquisition of a shareholding by EDFI in ESTAG by means of an increase in the capital of the latter by the issue of new shares.

12. As is apparent from the order for reference, the Land undertook to increase the capital of ESTAG by a nominal amount of ATS 166 668 000 by the issue of 166 668 bearer shares with a nominal value of ATS 1 000 each, that is an issue price of ATS 1 000 each. In addition, the Land was to waive its preemptive subscription right and permit only EDFI to subscribe for the newly issued shares.

13. EDFI, for its part, first of all undertook to subscribe for all the new shares and to transfer the sum of ATS 166 668 000 to an account designated 'capital increase 1998' held by ESTAG. By means of that increase in capital, EDFI was to become the owner of a holding equal to 25% plus one of the shares which constituted the new capital of ESTAG.

14. EDFI was also to pay, at the same time as the nominal amount of the new shares, a sum of ATS 5 083 332 000 as a non-refundable 'shareholder's contribution'. That sum was to be paid into the account of a trustee, who was required to pay it with accrued interest, as

a financial contribution, to ESTAG and/or to its three abovementioned subsidiaries. It was provided that, if the trustee had not received any joint instructions from the two parties to the contract in the fortnight following the issue of the new shares, he was to transfer the sum with accrued interest to ESTAG. EDFI was entitled to procure payment of that contribution in whole or in part by EDF.

15. Lastly, EDFI undertook to pay a sum of ATS 350 000 000 into another account, entitled 'guarantee account', held by the same trustee. That account was to be kept for a maximum period of two years during which EDFI was entitled, under certain conditions, to repayment of any sum in that account. At the end of a fixed period, the total amount or the balance of the guarantee account was to be paid to ESTAG or its subsidiaries as a non-refundable 'shareholder's contribution'.

16. The increase in capital was approved on 16 April 1998 at an Extraordinary General Meeting of ESTAG. The Land's representative at that meeting held a proxy authorising him to vote in favour of the report of ESTAG's management board on a capital injection by EDFI of ATS 5 600 000 000.

17. As is apparent from the file in the main proceedings, EDFI and EDF paid the amounts of ATS 166 668 000 and ATS 5 433 332 000 respectively to the recipients specified in the equity participation agreement.

18. By decision of 11 May 1998, the Finanzamt für Gebühren und Verkehrsteuern (tax office for fees and transaction tax) of Graz (Austria) assessed the capital duty payable by ESTAG using the amount of ATS 5 600 000 000 as the basis of assessment.

19. ESTAG appealed against that decision to the Finanzlandesdirektion claiming that only the amount paid by EDFI was subject to capital duty and that the sums paid by EDF amounted to 'parent company contributions' ('Großmutterzuschüsse') which were not subject to capital duty.

20. The Finanzlandesdirektion dismissed that appeal on the ground that Article 5(1)(a) of Directive 69/335 provides that the actual value of assets of any kind contributed or to be contributed by the members forms the basis of assessment.

21. ESTAG challenged that decision before the Verwaltungsgerichtshof. In support of its action it argued in particular that, under Directive 69/335, contributions which have not increased a company's capital as well as those in respect of which no rights in the company or comparable rights have been granted cannot be subject to capital duty, nor can payments which are not made by a member of the capital company which receives them. It also maintained that such an interpretation was even more justified when those payments are received not by the company which increases its capital but by its subsidiaries, that the amount of the capital duty payable must be deducted from the basis of assessment and that contributions not yet made are not to be included in the basis of assessment.

22. In the order for reference, the Verwaltungsgerichtshof observes that contributions made or to be made by a new shareholder in order to acquire shares in the capital of a company, even indirectly, namely through its parent company or to subsidiaries of the company in which it is becoming a shareholder, constitute the consideration to be taken

into account in the calculation of capital duty, since the payment of those contributions is, as in the main proceedings, a condition precedent of the acceptance of that shareholder into the company.

23. The referring court also considers that the concept of 'contribution of assets of any kind', referred to in Articles 4(1)(c) and (d) and 5(1)(a) of Directive 69/335, enables a distinction to be drawn not only between contributions in cash and contributions in kind, but also between direct and indirect contributions. In its view, if there is a causal link between a payment and the increase in the capital of a capital company, that payment is subject to capital duty under Article 4(1)(c) of Directive 69/335.

24. However, the Verwaltungsgerichtshof also points out that, in view of the Court's case-law, and in particular the judgment in Case C-4/97 *Nonwoven* [1998] ECR I-6469, a literal interpretation of Articles 4(1)(c) and (d) and 5(1)(a) of Directive 69/335 is conceivable.

25. In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the preemptive right of the existing shareholders is excluded), does not make itself but makes through its parent company amount to a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of Directive 69/335 ...?

(2) Do payments which a new shareholder, allowed to acquire the new shares on an increase in capital (where the pre-emptive right of the existing shareholders is excluded), makes not to the company increasing its capital but to its subsidiary companies amount to a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of Directive 69/335 ...?

(3) Do payments which have not yet been made amount to a 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of Directive 69/335 ...?

(4) Is the capital duty to be paid by the company a 'liability' or 'expense' which, in accordance with Article 5(1)(a) of Directive 69/335, is to be deducted from the basis of assessment ...?'

The questions referred

26. As a preliminary point it must be observed, first, that the payments mentioned by the referring court in its questions are payments made by the parent company of the company acquiring the shares issued, the latter company having paid only amounts corresponding to the nominal value of the shares acquired. Secondly, the national court has held that, in the main proceedings, the payments in issue were made to finance the acquisition of the newly issued shares and were a condition precedent of the admission of the new member as a shareholder in the issuing company.

The first question

27. By its first question, the national court is asking, in essence, whether Article 4(1)(c) of Directive 69/335 is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers the payments which a parent company makes to a capital company, which is increasing its capital by the issue of new shares, to enable the acquisition of those shares by a subsidiary of that parent company.

28. In order to reply to the question thus reformulated, it is appropriate, in the first place, to decide whether payments made on the occasion of an increase in the capital of a capital company, the amount of which exceeds the nominal value of that increase although they are a condition precedent of it, are capable of coming within the scope of Article 4(1)(c) of Directive 69/335.

29. In that regard, it should be pointed out that, under Article 4(1)(c) of Directive 69/335, an increase in the capital of a capital company by contribution of assets of any kind is to be subject to capital duty.

30. Where, on an increase in capital, the payment of a price to acquire a shareholding, which is greater than the nominal value of that holding, is an essential condition of the acquisition of that holding, as ESTAG has admitted in relation to the situation at issue in the main proceedings, the various payments made to make up that price are to be regarded as constituting the contribution conferring entitlement to that holding and, therefore, as coming within the scope of Article 4(1)(c) of Directive 69/335.

31. That interpretation is supported by Article 5(1)(a) of that directive, which provides that the basis of assessment for the charging of capital duty is made up of the actual value of the contributions made to finance the transaction in question.

32. In a transaction such as that in issue in the main proceedings, the actual value of the contributions made in connection with an increase in the capital of a capital company corresponds to the nominal value of the shares issued, plus the value of the additional payments received.

33. It follows that payments such as those in issue in the main proceedings come within the scope of Article 4(1)(c) of Directive 69/335, even though their amount exceeds the nominal value of the increase in capital which has taken place.

34. It is appropriate, in the second place, to consider whether such payments come within that provision even when they have been made not by the new member itself, but by its parent company.

35. In that regard, ESTAG claims that, having regard to the terms of Article 5(1)(a) of Directive 69/335, only contributions made by direct members of the capital company which receives them are subject to capital duty. Since payments such as those in issue in the main proceedings do not satisfy that criterion, they do not come within the scope of Article 4(1)(c) of that directive.

36. That interpretation cannot be accepted.

37. As is clear from paragraph 11 of the judgment in Case C-49/91 *Weber Haus* [1992] ECR I-5207, in order to decide whether or not a transaction falls within the scope of Article 4(2)(b) of Directive 69/335, it is necessary to adopt an economic approach, and not a formal one based solely on the source of the contributions.

38. By analogy, where it is a question of deciding whether contributions come within the ambit of Article 4(1)(c) of Directive 69/335, it is appropriate to ask who must be deemed to have paid them and not to limit the enquiry to the identification of their formal source.

39. In a situation such as that in the main proceedings, which is characterised, first, by the fact that the company which has contracted to make certain payments in order to acquire a holding in another company is the subsidiary of the company which has actually made those payments and, secondly, by the fact that such payment has discharged the liability of that subsidiary, the payment is to be regarded as having been made by the subsidiary in its capacity as a member of the company which is increasing its capital.

40. Furthermore, it should be pointed out, as did the Advocate General in point 32 of his Opinion, that the interpretation of Directive 69/335 advocated by ESTAG would result in its effectiveness being undermined, since a company belonging to a group could carry out a transaction coming, theoretically, within the ambit of that directive without that transaction attracting capital duty.

41. Having regard to the foregoing considerations, the answer to the first question must be that Article 4(1)(c) of Directive 69/335 is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers the payments which a parent company makes to a capital company, which is increasing its capital by the issue of new shares, to enable the acquisition of those shares by a subsidiary of that parent company.

The second question

42. By its second question, the referring court is asking, essentially, whether Article 4(1)(c) of Directive 69/335 is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers additional payments when they are made to subsidiaries of the capital company which is increasing its capital by the issue of new shares.

43. Although ESTAG maintains that, since the payments which its subsidiaries have received have not been in consideration of shares in the capital of those companies, there is no legal basis for making such payments subject to capital duty, the Austrian Government and the Commission contend that since ESTAG is, in its capacity as almost the sole shareholder of its subsidiaries, the indirect recipient of those payments, they come within the scope of Directive 69/335.

44. The latter position is adopted with good reason. In order to determine whether a transaction comes within the scope of Directive 69/335, it is appropriate not only to check that the transaction is one of those listed in Article 4 thereof, but also to take into

account the context in which it is carried out, as is clear from paragraphs 37 and 38 of this judgment.

45. Therefore, any payment which a new member of a capital company which is increasing its capital by the issue of new shares has made to a subsidiary of that company, when it is clear from the circumstances of the case that, from an economic point of view, the real recipient of those payments is that company, is to be regarded as covered by the expression 'contribution of assets of any kind' within the meaning of Article 4(1)(c) of Directive 69/335.

46. In a situation such as that in the main proceedings, in which the capital of the companies receiving the payments is almost entirely held by a single company and, in addition, as is clear from the order for reference, that company not only gives the instructions that those payments are to be made, but can freely decide the amount thereof which each of its subsidiaries is to receive, and even that it should be the sole recipient, that company is to be regarded as being, from an economic point of view, the real recipient of those payments.

47. In those circumstances, the answer to the second question must be that Article 4(1)(c) of Directive 69/335 is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers additional payments which a new member makes not to the capital company which is increasing its capital, but to subsidiaries of that company, when it is clear from the circumstances of the case that, from an economic point of view, the real recipient of those payments is that company.

The third question

48. By its third question, the referring court is asking, in essence, whether payments made subject to the fulfilment of a condition precedent amount to contributions within the meaning of Article 4(1)(c) of Directive 69/335.

49. In that regard, it is appropriate to point out that Articles 4(1)(c) and 5(1)(a) of Directive 69/335 do not specify the point at which the chargeable event for capital duty occurs.

50. However, as the Advocate General pointed out in point 39 of his Opinion, it is clear from Article 5(1)(a) of Directive 69/335 that future contributions may also give rise to the levying of capital duty. Payments which a natural or legal person is obliged to make and which are definite are to be regarded as coming within the scope of that provision.

51. Where, as in the main proceedings, the payment is made into the account of a third party but, because of the existence of a condition precedent, it is not certain that the payment is actually due, the member's obligation to make the payment in question becomes real and undisputed only at the time when that condition is fulfilled. Therefore, it is only as from that time that the said payment is to be regarded as amounting to a contribution within the meaning of Article 4(1)(c) of Directive 69/335.

52. Having regard to those considerations, the answer to the third question must be that payments made subject to the fulfilment of a condition precedent amount to contributions within the meaning of Article 4(1)(c) of Directive 69/335 only after that condition has been fulfilled.

The fourth question

53. By its fourth question, the referring court is asking, in essence, whether capital duty amounts to a 'liability' or an 'expense' within the meaning of Article 5(1)(a) of Directive 69/335.

54. In that regard, it is appropriate to recall that, in paragraph 17 of the judgment in Case C-249/89 *Trave-Schiffahrtsgesellschaft* [1991] ECR I-257, the Court held that, in the absence of particular expenses linked to the obtaining of an interest-free loan granted to a company by one of its members, the basis of assessment to be used under Article 5(1)(d) of Directive 69/335 for the calculation of capital duty is the amount of interest saved by the said company.

55. It is clear from that case-law, which applies by analogy to Article 5(1)(a) of Directive 69/335, that the amount of the capital duty is not to be taken into account in determining the basis of assessment and therefore does not amount to a 'liability' or an 'expense' within the meaning of Article 5(1) of Directive 69/335.

56. Therefore, the answer to the fourth question must be that capital duty does not amount to a 'liability' or an 'expense' within the meaning of Article 5(1)(a) of Directive 69/335.

Costs

57. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 1 September 1999, hereby rules:

1. **Article 4(1)(c) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers the payments which a parent company makes to a capital company, which is increasing its capital by the issue of new shares, to enable the acquisition of those shares by a subsidiary of that parent company.**

2. **Article 4(1)(c) of Directive 69/335, as amended by the abovementioned Act of Accession, is to be interpreted as meaning that the expression 'contribution of assets of any kind' used therein covers additional payments which a new member makes not to the capital company which is increasing its capital, but to subsidiaries of that company, when it is clear from the circumstances of the case that, from an economic point of view, the real recipient of those payments is that company.**

3. **Payments made subject to the fulfilment of a condition precedent amount to contributions within the meaning of Article 4(1)(c) of Directive 69/335, as amended by the said Act of Accession, only after that condition has been fulfilled.**

4. **Capital duty does not amount to a 'liability' or an 'expense' within the meaning of Article 5(1)(a) of Directive 69/335, as amended by the Act of Accession mentioned in paragraph 1 of the operative part of this judgment.**