

JUDGMENT OF THE COURT (Second Chamber)
10 March 2005

(Directive 69/335/EEC – Indirect taxes on the raising of capital – Duty on the gross profits of securities intermediaries)

In Case **C-22/03**,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank te Rotterdam (Netherlands), made by decision of 21 January 2003, received at the Court on 23 January 2003, in the proceedings

Optiver BV and Others

v

Stichting Autoriteit Financiële Markten, successor in title to the Stichting Toezicht Effectenverkeer,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), P. Kūris and G. Arestis, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 September 2004, after considering the observations submitted on behalf of:

- Optiver BV, Optrix BV and Optra BV, by H. Speyart and M. Scheele, advocaten,
- All Options International BV, by E. Kuijpers and G.J.G. Bolderman, advocaten,
- Robeco Obligatie DividendFunds NV and Others, by H. Speyart and A.J.P. Tillema, advocaten,
- the Stichting Autoriteit Financiële Markten, successor in title to the Stichting Toezicht Effectenverkeer, by H.J. Sachse, F. Leeftang and T. van Wagensveld, advocaten,
- the Netherlands Government, by S. Terstal and C. Wissels, acting as Agents,
- the United Kingdom Government, by P. Ormond, acting as Agent, and J. Stratford, Barrister,
- the Commission of the European Communities, by R. Lyal and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2004,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation 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 That reference was made in proceedings between Optiver BV and 38 other companies ('Optiver and Others'), which are securities intermediaries established in the Netherlands, and the Stichting Autoriteit Financiële Markten ('the AFM'), the successor in title to the Stichting Toezicht Effectenverkeer, concerning the levying of a duty on the gross profits received in respect of those companies' activities.

Legal background

Community rules

- 3 As stated in the first recital in the preamble thereto, Directive 69/335 is intended to promote the free movement of capital, regarded as 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, it is inherent in the pursuit of such an aim that, as regards taxation affecting the raising of capital, the indirect taxes hitherto in force in the Member States are to be abolished and replaced by a duty charged once in the common market and at the same level in all Member States.
- 5 Article 4(1) of Directive 69/335 provides:
'The following transactions shall be subject to capital duty:
 - (a) the formation of a capital company;
 - (b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;
 - (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'
- 6 Article 4(1)(e) to (h) of Directive 69/335 provides that the transfer of the effective centre of management or the registered office of a capital company from a non-member country to a Member State or from one Member State to another Member State is also subject to capital duty.
- 7 Article 4(2) of Directive 69/335 sets out the various transactions which may be subject to capital duty.
- 8 Directive 69/335 also provides, in accordance with the final recital in the preamble thereto, for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities where their retention might frustrate the aims

pursued by that directive. Those prohibited taxes are set out, in particular, in Article 10 of Directive 69/335, which 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, 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 Article 12(1) of Directive 69/335 is worded as follows:

‘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 rules

11 The Wet toezicht effectenverkeer 1995 (Law of 1995 on the control of trade in securities) of 16 November 1995 (Stbl. 1995, 574; ‘the 1995 Law’) regulates the supervision of securities transactions. In accordance with Article 1 that law concerns, among others, securities intermediaries and asset managers, both categories also being designated by the expression ‘securities institutions’.

12 Article 7(1) of the 1995 Law provides that persons not approved as securities intermediaries or asset managers are prohibited from offering or providing services in or from the Netherlands. In accordance with paragraph 4 of that article, the Minister for Finance is to grant approval where certain qualitative conditions are satisfied.

13 Article 42 of the 1995 Law provides:

‘The Minister or a legal person to whom tasks and powers have been entrusted pursuant to Article 40 may charge the expenditure incurred in carrying out those tasks and exercising those powers, in accordance with the rules laid down by the Minister, to operators of stock exchanges, institutions at whose expense securities quoted on one of the stock exchanges approved pursuant to article 22 have been issued, securities intermediaries, applicants for approval as referred to in Article 7(1) ...’

- 14 The authority to which the powers were entrusted in application of Article 40 of the 1995 Law is the AFM. The amount of the costs which it can pass on to the establishments in possession of the authorisation provided for in Article 7(1) of the 1995 Law is determined according to the AFM's budget.
- 15 The amounts payable by the securities institutions are made up of (i) fees for specific services actually provided to those institutions and (ii) a duty calculated in accordance with the gross profits made by those institutions during the financial year preceding the year in respect of which the AFM's budget is drawn up (hereinafter 'the duty').
- 16 Article 5(1) of the *Regeling toezichtskosten Wet toezicht effectenverkeer 1995* (Decree relating to the costs of supervision entailed by the 1995 Law on the supervision of trade in securities), as amended in 2000 (Stcrt. 2000, No 137, p. 10; 'the Decree'), states: 'An amount fixed on the basis of the bands, referred to in paragraph 3, of the income received during the year preceding the budget by securities intermediaries established in the Netherlands and approved in accordance with Article 7(1) of the Law shall be charged each year to those securities intermediaries.'
- 17 Article 5(3) of the Decree fixes those bands and provides for 10 different income brackets.
- 18 It follows from the grounds of the Decree that 'income' means gross profits from ordinary business operations, provided that they are the proceeds of activities such as those provided for in Article 7(1) of the 1995 Law. That income may, inter alia, derive from commission or brokerage for services relating to securities, from net trade, from commission on the placing of orders, from asset management, from 'repo' transactions, from the proceeds of quotations connected with securities-related transactions, from the repurchase and placing of issues, from custody and the administration of custody transactions, 'clearing' and 'settlement' activities and from income from market regulation.
- 19 Article 3 of the *Vaststellingsregeling bedragen Regeling toezichtskosten Wet toezicht effectenverkeer 1995 voor 2000* (implementing decree fixing the amounts for 2000 relating to the decree on the costs of supervision entailed by the 1995 Law on the supervision of trade in securities, Stcrt. 2000, p. 9) fixes the amounts referred to in Article 5(1) of the Decree.

Main proceedings and question referred to the Court

- 20 Optiver and Others were authorised to carry out securities operations such as those referred to in Article 7(1) of the 1995 Law.
- 21 By decisions of 15 August 2000, the AFM charged the plaintiffs in the main proceedings, in respect of the year ending 31 December 2000, a duty on their income derived from securities.
- 22 Optiver and Others took the view that the duty was contrary to Directive 69/335 and lodged complaints against those decisions. Those complaints were rejected and the dispute came before the *Rechtbank te Rotterdam*; the plaintiffs allege that the duty,

which affects the making available on the market and also dealing in securities, is incompatible with Article 11 of Directive 69/335.

23 The AFM maintains that the duty is not a duty on dealing in securities but that it applies to the income obtained from operations carried out in relation to those securities. In the alternative, it claims that such a duty comes under one of the exceptions provided for in Article 12(1)(a) and (e) of Directive 69/335.

24 The Rechtbank te Rotterdam considered that the outcome of the dispute before it called for the interpretation of Directive 69/335 and decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does ... Directive [69/335], and in particular the interpretation of Articles 11 and 12, preclude the imposition of a levy ... on securities institutions in respect of their gross profit from securities-related activities?’

The question

25 By its question, the national court is seeking in essence to ascertain whether Directive 69/335 must be interpreted as meaning that it precludes the levying on securities intermediaries of a duty, such as that at issue in the main proceedings, on the gross profits from activities related to those securities.

26 In order to provide a useful answer to that question, it is necessary to determine whether the duty falls within the scope of Directive 69/335.

27 In that regard, it must be borne in mind that it follows from Directive 69/335 that that directive seeks to abolish indirect taxes, other than capital duty, which have the same characteristics as that duty, namely those applied to the transactions covered by that directive.

28 As regards the characterisation as taxation of a duty such as that at issue in the main proceedings, it should be observed that, under the Netherlands legislation, securities intermediaries and asset managers must have obtained approval in the Netherlands in order to offer their services in that Member State.

29 In accordance with the provisions of the 1995 Law, the exercise of the power to supervise securities-related transactions conferred on the Minister for Finance is entrusted to the AFM. The AFM is authorised to pass on its operating costs, in particular, to securities intermediaries, by levying in particular the duty imposed on those intermediaries, which is calculated annually, on a scale established by the Decree, depending on the gross profits made by those intermediaries during the financial year preceding the year in respect of which the AFM’s budget is drawn up.

30 It follows that such a duty, payable pursuant to a legal rule laid down by the State, is paid by private persons to an entity carrying out a public mission in order to finance that mission.

31 As the Commission correctly contends, while it is true that, in the light of those characteristics, it cannot be validly maintained that the duty is not a tax, the fact remains

that that duty does not constitute a tax prohibited by Directive 69/335, since it does not fall within the scope of that directive.

- 32 First, the event giving rise to the duty is not the carrying-out of a specific transaction such as those referred to in Articles 4, 10 and 11 of Directive 69/335 but the exercise of a wide range of activities in connection with securities in general.
- 33 Second, as the taxable base is made up of the gross profits made by the securities intermediaries in the exercise of various activities, the duty is more in the nature of a direct tax on income and therefore falls within a category of taxes not covered by Directive 69/335 (see, in particular, Case C-287/94 *Frederiksen* [1996] ECR I-4581, paragraph 21, and Case C-113/99 *P.P. Handelsgesellschaft* [2000] ECR I-471, paragraphs 24 and 27).
- 34 In those circumstances, it must be held that a duty such as that at issue in the main proceedings does not fall within the scope of Directive 69/335 and does not therefore constitute a prohibited tax for the purpose of that directive.
- 35 The answer to the question referred to the Court must therefore be that Directive 69/335 is to be interpreted as meaning that it does not preclude the levying on securities intermediaries of a duty, such as that at issue in the main proceedings, on the gross profits from activities related to those securities.

Costs

- 36 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) rules as follows:

Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital is to be interpreted as meaning that it does not preclude the levying on securities intermediaries of a duty, such as that at issue in the main proceedings, on the gross profits from activities related to those securities.