JUDGMENT OF THE COURT (Fifth Chamber)

30 June 2005 *

In Case C-165/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Stuttgart (Germany), made by decision of 7 April 2003, received at the Court on 10 April 2003, in the proceedings

Mathias Längst,

interested parties:

SABU Schuh & Marketing GmbH,

Präsident des Landgerichts Stuttgart,

Bezirksrevisor des Landgerichts Stuttgart,

* Language of the case: German

THE COURT (Fifth Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, R. Schintgen (Rapporteur) and J. Makarczyk, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 November 2004,

after considering the observations submitted on behalf of:

— Mr Längst, by himself,

— the Präsident des Landgerichts Stuttgart, by K. Ehmann, acting as Agent,

— the Bezirksrevisor des Landgerichts Stuttgart, by G. Firnau, Bezirksrevisor,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Spanish Government, by E. Braquehais Conesa, acting as Agent,

— the Commission of the European Communities, by R. Lyal and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2005,

gives the following

Judgment

1 This 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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23; hereinafter 'Directive 69/335').

2 It has been made in the context of a complaint which Mr Längst, a notary employed as a civil servant within the jurisdiction of the Oberlandesgericht Stuttgart (Stuttgart Higher Regional Court), made at the direction of his superior, the Präsident des Landgerichts Stuttgart (President of the Stuttgart Regional Court), about a fee note which Mr Längst himself had drawn up.

Law

Community legislation

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 that directive, 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.

Article 4(1) of that same directive 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 the directive sets out the various transactions which may be subject to capital duty.

8 The same directive also provides 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 the directive, as stated in the final recital in the preamble thereto. 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 the directive 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 legislation

11 Under Paragraph 2 et seq. and Paragraph 53(2) of the Law on limited liability companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) of 20 April 1892 (RGBl. p. 477), as applicable in the case in the main proceedings, a resolution by the members of a 'Gesellschaft mit beschränkter Haftung' (GmbH — limited liability company) to amend the company statutes must be attested by a notary.

12 It follows from Paragraph 116 of the Federal code on notaries (Bundesnotarordnung) of 24 February 1961 (BGBl. 1961 I, p. 98), as applicable in the case in the main proceedings (hereinafter 'the BNotO'), in conjunction with Paragraph 3(2) of the Regional law on non-contentious jurisdiction (Landesgesetz über die freiwillige Gerichtsbarkeit) of 12 February 1975 (GBl. p. 116), also as applicable in the case in the main proceedings, that, within the jurisdiction of the Oberlandesgericht Stuttgart, documents can be attested not only by notaries who are civil servants but also by notaries who are self-employed.

13 The amounts of the fees which notaries can charge are laid down by the Federal Law on the taxation of matters of non-contentious jurisdiction (Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit — Kostenordnung) of 26 July 1957 (BGBl. 1957 I, p. 960), as applicable in the case in the main proceedings (hereinafter 'the KostO'). Those amounts are uniformly applicable throughout Germany and are valid for notaries employed as civil servants as well as for self-employed notaries.

14 Notaries employed as civil servants who practise within the jurisdiction of the Oberlandesgericht Stuttgart receive a fixed salary determined according to the same

criteria as apply to other civil servants of the Land, together with a variable amount equivalent to a proportion of the charges they generate. However, unlike notaries who are civil servants and practise within the jurisdiction of the Oberlandesgericht Karlsruhe, the notaries themselves are owed the charges due from those liable to pay them. They simply have to remit a fixed portion of those charges to the State Treasury of the Land. The latter can collect the charges itself only where they have not been recovered, despite a letter of formal notice having been sent.

15 Under Paragraph 156(1) of the KostO, objections to the calculation of the costs, including those concerning the obligation to pay and implementation of the enforcement clause, must be communicated in the form of a complaint to the Landgericht within the jurisdiction of which the notary has his office. Before issuing judgment, the Landgericht must hear the parties and the notary's superior. If the person liable for the charges challenges the notary's calculation of the costs, the latter may ask the Landgericht to act as arbiter.

16 Paragraph 156(6) of the KostO provides that the authority to which the notary is subject may, in any event, invite the latter to seek a decision of the Landgericht and to appeal against that decision. The resulting judicial decision may also have the effect of increasing the amount in the fee note.

The dispute in the main proceedings and the questions referred

17 In his capacity as a notary employed as a civil servant, Mr Längst notarised a number of resolutions relating to SABU Schuh & Marketing GmbH (hereinafter 'SABU'). A

statement of charges was drawn up in respect of the associated fees and expenses in the sum of EUR 2 892.46 (hereinafter 'the statement of charges').

18 The resolutions which Mr Längst was asked to notarise related to the consolidation of company shares into a single share, the conversion of the subscribed capital and the company shares into euro, a capital increase from company funds and a change of company name.

19 By the statement of charges, SABU was invoiced for fees and expenses of EUR 2 493.50, excluding VAT, for the notarisation of documents. That figure includes a fixed 'resolution' charge of EUR 1 584 — calculated on a total transaction value of EUR 484 007 — in respect of the capital increase and the amendment of the company statutes. Of that sum, the amount due to the State is EUR 1 183.83 and the amount due to the notary is EUR 400.17.

20 Taking the view that the order in Case C-264/00 *Gründerzentrum* [2002] ECR I-3333 concerning notaries employed as civil servants within the jurisdiction of the Oberlandesgericht Karlsruhe applies equally to notaries employed as civil servants within the jurisdiction of the Oberlandesgericht Stuttgart, the President of the Landgericht Stuttgart considered that the statement of charges was in breach of Directive 69/335 so far as the capital increase and the amendment to the company statutes were concerned. Accordingly he directed Mr Längst to refer the matter to the Landgericht Stuttgart pursuant to Paragraph 156(6) of the KostO in order to obtain a ruling on the legality of the statement of charges, and requested that he reduce it to EUR 1 465.66.

21 Mr Längst complied with that direction and referred the matter to the Landgericht Stuttgart. He argued before that court that the statement of charges was justified and that the KostO as well as the BNotO prohibited him from reducing the charges to the level required by the President of the Landgericht Stuttgart. Furthermore, he considers that the order in *Gründerzentrum*, cited above, does not apply to charges levied by notaries employed as civil servants within the jurisdiction of the Oberlandesgericht Stuttgart.

22 According to the referring court, the legal position of notaries employed as civil servants within the jurisdiction of the Oberlandesgericht Stuttgart differs in two respects from that of the notaries employed as civil servants referred to in the order in *Gründerzentrum*. First, it is possible, within the jurisdiction of the Oberlandesgericht Stuttgart, to use the services not only of notaries who are civil servants but also of self-employed notaries, which means that the charges referred to will not necessarily be remitted to the Land. Secondly, the legislation that governs claims to the charges in question is different and justifies another approach. Unlike the situation in the jurisdiction of the Oberlandesgericht Karlsruhe, notaries employed as civil servants within the jurisdiction of the Oberlandesgericht Stuttgart are owed the charges levied. It is only once they have been paid those charges that a fixed portion is remitted to the State Treasury. The latter can collect the charges in question directly only in exceptional cases.

23 In those circumstances, the Landgericht Stuttgart decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) In a legal system such as that of the Württemberg region of Baden-Württemberg (in the jurisdiction of the Oberlandesgericht Stuttgart), where there are both notaries who are self-employed and notaries who are employed as

civil servants and the notary himself is always the person to whom the charges are due, but where, if the services concerned are carried out by a notary employed as a civil servant, he must remit a fixed portion of the charges to the State, which is his employer and which uses those proceeds to fund its activities, are the charges of the notary employed as a civil servant for the notarisation of a legal transaction covered by Directive 69/335, as amended, to be regarded as tax for the purposes of that directive, in contrast to the situation that gave rise to the order in ... *Gründerzentrum* ... [cited above]?

(2) If so: if the State waives its claim to the portion of the charges due to it in respect of that legal transaction, thereby ceasing to enforce the legal provision requiring a portion of the charges to be remitted to the State, do the charges cease to constitute a tax for the purposes of Directive 69/335?'

Jurisdiction of the Court of Justice

24 Mr Längst and the Bezirksrevisor (District Auditor) of the Landgericht Stuttgart expressed doubts as to whether the Court has jurisdiction to give a preliminary ruling under Article 234 EC in proceedings brought pursuant to Paragraph 156(6) of the KostO by a notary employed as a civil servant at the direction of his superior. In their view, the proceedings in which the referring court is called upon to give a ruling do not constitute inter partes proceedings within the meaning of the case-law of the Court (Case C-111/94 *Job Centre* [1995] ECR I-3361, and the order in Case C-447/00 *Holto* [2002] ECR I-735). The Landgericht Stuttgart does not have a true dispute to determine within the meaning of that case-law.

25 In that regard, it must be pointed out that, according to the settled case-law of the Court, it follows from Article 234 EC that national courts or tribunals may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, the orders in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4, Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and *Holto*, cited above, paragraph 17).

26 It is clear from the relevant national legislation as well as the information provided by the referring court at the request of the Court of Justice that, in the proceedings before the referring court, all the interested parties were heard, and that the subsequent decision is intended to resolve a dispute. Furthermore, that decision is enforceable by the person to whom the charges in the statement of costs are owed as well as by the person owing those charges, and becomes binding on all interested parties if none of them appeals to the Oberlandesgericht Stuttgart; any such appeal can be based only on a question of law and must be authorised by the referring court.

27 Given those characteristics, it cannot reasonably be argued that, in the case in the main proceedings, the referring court is not seised of a dispute, and that the decision it has to give is not of a judicial nature.

28 Accordingly, it must be held that the Court has jurisdiction to rule on the questions submitted by the Landgericht Stuttgart in its order for reference of 7 April 2003.

Admissibility of the second question

29 In the observations submitted to the Court by the parties to the main action, the German and Spanish Governments as well as the Commission of the European Communities, doubts have been cast on the admissibility of the second question on the ground that it is of a hypothetical nature. The Land has not yet waived its claim to the portion of the charges due to it, and the second question thus envisages a legal situation that does not yet exist.

30 In that regard it must be pointed out that it is clear from the settled case-law of the Court that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, in particular, Cases C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20).

31 In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (*Schneider*, cited above, paragraph 21 and the case-law cited therein).

32 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Schneider*, cited above, paragraph 22).

33 The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (*Schneider*, cited above, paragraph 23).

34 In the present case, it is clear from the order for reference as well as the observations submitted to the Court by the German Government that an amendment to the national legislation in question, which would enable the Land to waive its claim to the portion of the fees which notaries employed as civil servants charge for notarisation of documents within the scope of Directive 69/335, is certainly envisaged but has not yet been adopted. It follows that the legal context referred to in the second question is hypothetical.

35 Therefore, it must be held that that question is inadmissible.

The first question

36 By its first question, the referring court is asking, in essence, whether Directive 69/335 must be interpreted as meaning that the charges of a notary employed as a civil servant for the drawing up of a notarially attested act recording a transaction covered by that directive constitute taxes for the purposes of that directive where, under the relevant national legislation, notaries authorised to practise are not all civil servants and are themselves owed the charges in question, and, in addition, those notaries who are employed as civil servants are required to remit a portion of those charges to the public authority which uses that revenue for the financing of its official business.

37 To give a useful answer to that question, it must be pointed out that, in paragraph 34 of the order in *Gründerzentrum*, the Court held that Directive 69/335 must be interpreted as meaning that charges constitute taxes for the purposes of that directive where they are payable for the drawing up of a notarially attested act recording a transaction covered by that directive, under a system where the notaries are civil servants and the charges are paid in part to the public authority which employs them and used for the financing of its official business, such as the system in force in the jurisdiction of the Oberlandesgericht Karlsruhe.

38 As the system at issue in the main action is in substance identical to that referred to in the order in *Gründerzentrum*, it is necessary to consider whether the differences described by the referring court between the system which applies in the jurisdiction of the Oberlandesgericht Karlsruhe and that in force in the jurisdiction of the Oberlandesgericht Stuttgart are such as to justify a different answer to the question submitted in the present case than that which was given in the aforementioned order.

39 As regards, first of all, the argument that the charges at issue in the main action are not necessarily remitted to the State since notaries authorised to practise in the jurisdiction of the Oberlandesgericht Stuttgart are not all civil servants but include self-employed notaries or lawyer-notaries, it must nevertheless be pointed out that it is clear from paragraph 13 of the order in *Gründerzentrum* that the system at issue in the preliminary reference in that case was similar since, under both systems, anyone requiring an official act to be drawn up can call on any notary practising in Germany, whether civil servant or self-employed, and an act thus drawn up must be recognised throughout Germany.

40 It follows that the first argument submitted by the referring court provides no basis for assessing the system concerned in the main action differently from the system involved in the preliminary reference in the *Gründerzentrum* order cited above.

41 As regards, secondly, the fact that notaries employed as civil servants and practising in the jurisdiction of the Oberlandesgericht Stuttgart are themselves owed the charges in question, unlike their colleagues in the jurisdiction of the Oberlandesgericht Karlsruhe, it must be pointed out, as the Advocate General does at point 40 of his Opinion, that it is settled case-law that charges of notaries who are civil servants for transactions covered by Directive 69/335 constitute taxes within the meaning of the directive, where those charges are, at least in part, paid to the public authority which employs them and are used to finance that authority's official business (see, in particular, Cases C-56/98 *Modelo I* [1999] ECR I-6427, paragraph 23; C-19/99 *Modelo II* [2000] ECR I-7213, paragraph 23, and the order in *Gründerzentrum*, paragraph 34).

42 It is clear from that case-law that it is not so much the identity of the person collecting payment or of the person to whom the payment is initially due that

determines the categorisation of the charges as taxes for the purposes of Directive 69/335, as the identity of the final recipient. Thus, in *Modelo I*, *Modelo II* and *Gründerzentrum*, cited above, the charges were first made by notaries who were civil servants, and then transferred to the public authority which employed them. It is that transfer and the use of those charges or part of them which determine how those charges are categorised in relation to Directive 69/335.

43 It must be stated that, in the main action, whilst it is true that notaries employed as civil servants are owed the charges in question, they are nevertheless required to transfer part of those charges to the public authority which employs them and which uses those monies for the financing of its official business.

44 It follows that legislation such as that which is in force in the jurisdiction of the Oberlandesgericht Stuttgart is no different in that respect from that which was considered by the Court in *Gründerzentrum*.

45 In the light of those considerations, the answer to the first question must be that Directive 69/335 must be interpreted as meaning that the charges of a notary employed as a civil servant for the drawing up of a notarially attested act recording a transaction covered by that directive constitute taxes for the purposes of that directive where, under the relevant national legislation, notaries authorised to

practise are not all civil servants and are themselves owed the charges in question, and, in addition, those notaries who are employed as civil servants are required to remit a portion of those charges to the public authority which uses that revenue for the financing of its official business.

Costs

46 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 (Fifth 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 the charges of a notary employed as a civil servant for the drawing up of a notarially attested act recording a transaction covered by that directive constitute taxes for the purposes of that directive where, under the relevant national legislation, notaries authorised to practise are not all civil servants and are themselves owed the charges in question, and, in addition, those notaries who are employed as civil servants are required to remit a portion of those charges to the public authority which uses that revenue for the financing of its official business.

[Signatures]