

OPINION OF ADVOCATE GENERAL

TIZZANO

delivered on 15 January 2004¹

1. In the case before us, the European Commission claims that the Kingdom of Belgium has failed to fulfil its obligations under Article 11 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (hereinafter 'Directive 69/335' or 'the directive')² because in breach of that provision it charges tax on the allotment of new securities and also, for bearer securities, on the delivery of those securities to subscribers, when a company or investment fund is being set up, or when an increase in capital or a loan issue is made.

'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;³
- (b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;

I — Legal background

Community legislation

- (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.'

2. Article 10 of Directive 69/335 provides:

¹ — Original language: Italian.

² — OJ, English Special Edition 1969 (II), p. 412.

³ — Article 4 lists the transactions which must be subject to capital duty, such as, for example, the formation of a capital company or an increase in the capital of a capital company by contribution of assets of any kind (Article 4(1)(a) and (c)); as well as the transactions which may be subject to this tax, such as, for example, loans taken up by a capital company if the creditor is entitled to a share in the profits of the company (Article 4(2)(c)).

3. Article 11 of the same directive also provides that:
- (a) duties on the transfer of securities, whether charged at a flat rate or not’.

‘Member States shall not subject to any form of taxation whatsoever:

National legislation

- (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.’
5. Under Articles 120 and 121 of the Belgian Code on taxes similar to stamp duty (‘Code des Taxes Assimilées au Timbre’; hereinafter ‘the CTAT’), the tax on stock exchange transactions (‘taxe sur les opérations de bourse’; hereinafter ‘the TOB’) concluded or operated in Belgium applies, among other things, to any allotment (‘délivrance’) to the subscriber of shares or debentures relating to Belgian or foreign capital, following the issue, offer or sale of those securities by means of a public offer.
6. Furthermore, by virtue of Article 159 of the CTAT, among other things any physical delivery (‘livraison’) of bearer securities, relating to Belgian or foreign capital, following subscription, is also subject to the tax on the delivery of bearer securities (‘taxe sur les livraisons de titres au porteur’; hereinafter ‘the TLT’).

4. However, Article 12 provides:

II — Facts and procedure

- ‘1. Notwithstanding Articles 10 and 11, Member States may charge:
7. The Commission took the view that the TOB and the TLT are at variance with Article 11 of Directive 69/335, and sent a letter of

formal notice to the Kingdom of Belgium on 10 May 1999 asking it to present its observations within two months. The Belgian authorities responded to that letter on 2 August 1999. The Commission was not satisfied with the responses, and in a reasoned opinion dated 26 January 2000 asked the Kingdom of Belgium to take the necessary steps to end the infringement. Following its refusal to comply with the opinion, the Commission brought this action before the Court on 19 November 2002.

when a company or investment fund is set up or on the occasion of an increase in capital or a loan issue.

10. The Belgian Government challenges this view, relying on various arguments which I will address below.

8. The Commission and the Kingdom of Belgium submitted written observations before the Court.

11. For my part, I believe that in order to view the question in context we should first of all remember that, as the Court of Justice has stated, the aim of Directive 69/335 is '[to encourage] the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market'.⁴

III — Legal analysis

9. As I have already pointed out, the Commission contends that by charging the two taxes at issue, the Kingdom of Belgium is in breach of the prohibition in Article 11 of Directive 69/335 on making the issue of securities subject to any form of taxation. It is the Commission's view that the prohibition necessarily extends to the taxes concerned because, as they include operations such as the allotment and delivery of new securities, they affect in fact the actual issue of those securities, whether on the issue of shares

12. To that end the directive set up a basic system whereby the raising of capital is subject to a single tax (capital duty) 'charged only once in the common market and at the same level in all the Member States',⁵ excluding any other tax of a different nature or amount, except for those mentioned specifically in Article 12 of the directive.⁶

4 — Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 19.

5 — *Ponente Carni*, at paragraph 19.

6 — Case 36/86 *Dansk Sparinvest* [1988] ECR 409.

13. That is shown clearly both by the report accompanying the proposal for the directive, where it is stated that ‘this draft directive provides for *the abolition of all indirect taxation on the raising of capital, with the exception of capital duty*’,⁷ and by the last recital in the preamble to the directive itself, which explains 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.’

issue and thus, essentially, to taxing the raising of the capital which they represent.

15. It follows that the term ‘issue’ in Article 11 should be understood to include the allotment (or, in the case of bearer securities, the delivery) of the securities to the subscribers.

14. The Commission therefore rightly argues that the prohibition on the taxation ‘in any form whatsoever... [of] the issue... of stocks, shares or other securities of the same type’ laid down in Article 11 of the directive must be understood to refer not only to the actual issue of new securities by the issuing company, but also, and necessarily, to the allotment and delivery of those securities to the subscriber; for the simple reason that capital does not move in a vacuum and therefore raising it — whether with a view to setting up a company, increasing capital, or issuing a debenture loan — cannot take place without the allotment or delivery of the new securities to the subscribers. From an economic point of view, therefore, taxing these operations is equivalent to taxing their

16. That also appears to be confirmed indirectly by the case-law of the Court, which has expressed a clear view in favour of the need for a broad interpretation of the provision in question to suit the aims of the directive.

17. In Joined Cases C-31/97 and C-32/97 the Court made it clear that ‘Article 11(b) of the Directive must be interpreted as meaning that the prohibition of taxation on debenture loans extends to taxation on the repayment of such loans’. And this is because ‘it is ... true that [the article] *does not expressly mention the repayment of debenture loans*; nevertheless, prohibiting the levying of duty when debenture loans are issued but author-

7 — Document IV/COM (64) 526 def. of 14 December 1965, pp. 7 and 8. Emphasis added.

ising it when such loans are repaid would have the effect, contrary to the objective pursued by the Directive, of taxing loans *as overall operations for raising capital*'.⁸

18. The absolute prohibition on taxation 'in any form whatsoever' of the issue of securities does indeed concern 'overall operations for raising capital' and therefore also the operations which are essential for it to be carried out.

19. However, according to the Belgian Government, the 'issue' of securities as stated in Article 11 is separate from the receipt of those securities by the subscribers, with the result that the prohibition of taxation applies only to the former and not the latter.

20. In the opinion of that Government, this is confirmed above all indirectly by a proposal for a directive, which was never implemented, concerning indirect taxation on transactions in securities (hereinafter 'the proposal for a directive of 1976').⁹ This proposal referred explicitly to 'the issue of

securities, and the first acquisition of securities immediately consequent upon such issues',¹⁰ defining the issue as 'the allotment of securities by the issuer',¹¹ and specifically provides for the prohibition on the taxation of both operations.

21. In the opinion of the Belgian Government, as the proposal was not implemented, the Member States retain the right to tax the first acquisition of securities immediately consequent upon the issue, with only the possibility of taxing the 'issue' of those securities remaining precluded, within the meaning of Article 11 of Directive 69/335.

22. The argument is rather forced, in my view; but apart from that, I should point out that, as the Commission itself rightly mentions, the purpose of the distinction stated in the proposal was quite different. Article 2(1) of the proposal provided that 'each disposal or acquisition of securities [and therefore, I should emphasise, also the issue and acquisition of securities as part of the issue] constitutes a separate taxable transaction'. It had therefore to be made clear that if the

8 — Joined Cases C-31/97 and C-32/97 *FECSA and ACESA* [1998] ECR I-6491, paragraphs 18 and 19. Emphasis added.

9 — OJ 1976 C 133, p. 1.

10 — See Article 4(1)(a) of the proposal. The issue is defined in the proposal as 'the allotment of securities by the issuer, including that resulting from capitalisation of reserves'.

11 — See paragraph V of the Annex to the proposal.

proposal was translated into a directive, the prohibition in Article 11 of Directive 69/335 would have remained in force for both the operations described. In short, therefore, the proposal merely confirms the provisions of Article 11 of the directive.

23. Next, as regards the TOB in particular, the Belgian Government, also referring to the Court's case-law,¹² points out that the prohibition imposed upon the Member States on taxing the operations mentioned in Article 11 of the directive concerns 'capital companies' (or those issuing securities) and not investors (or the first subscribers to those securities). Moreover, it does not apply to all operations on securities, but only to those in which professional intermediaries are involved, because its purpose is to tax transactions in stocks and shares under a stock exchange order. Consequently, it is not the issuing companies which pay the TOB, but only the stock exchange dealers who act as intermediaries as regards the securities on behalf of their own clients (purchasers, vendors, or subscribers), even if the latter are then liable for the tax in question. According to that Government, it thus follows that the tax does not fall within the scope of the directive.

24. However, I should point out first of all that the support this argument may find in the Court's case-law consists only of the fact that up to now the Court has given decisions with regard to Directive 69/335 only in disputes concerning taxes on 'capital companies'. However, it is clear to me that this is a purely accidental circumstance, and therefore cannot constitute a valid argument in itself.

25. Apart from that, I cannot see how the Belgian Government's observation can be relevant to the issue. As the Commission emphasises, the directive merely prohibits taxes on the raising of capital other than capital duty and the taxes listed in Article 12 regardless of who is liable to pay the tax, whether they are intermediaries or their investor clients (who are then liable for the tax). The problem of the legality of the TOB therefore remains unchanged.

26. Nor am I persuaded by the Belgian Government's argument as regards the TLT (see paragraph 6 above) that that tax does not fall within the prohibition laid down in Article 11 of the directive. It states that the issue of the securities, which is 'non-physical', should be distinguished from the 'physical' operation of delivery ('livraison') to the subscriber. In its view, the latter operation is quite separate from and inde-

¹² — The Belgian Government refers to the same cases as those mentioned by the Commission, and in particular to *Dansk Sparinvest* and Case 15/88 *Maxi Di v Ufficio del registro di Bolzano* [1989] ECR 1391.

pendent of the first and may therefore be taxed autonomously. This may be justified in any case by the function served by the TLT in a country like Belgium, where bearer securities still exist in physical form. In fact, it was to modernise the Belgian financial markets and encourage investors to carry out 'non-physical' transactions in securities that the provision at issue introduced a tax similar to stamp duty on the delivery of bearer securities.

27. Precisely in relation to that last statement, however, it may be observed that, on the contrary, the last recital in the preamble to the directive indicates among other things that it is specifically the *'indirect taxes with the same characteristics as ... the stamp duty on securities'* [which] might frustrate the purpose of the measures provided for in this directive and those taxes should therefore be abolished'.¹³

28. It might also be objected that it is not relevant for these purposes, and thus cannot represent a valid justification of the TLT, that its function is to discourage the physical delivery of securities in order to modernise the Belgian financial markets. That objective could have been and could be achieved, as it

was in other Member States, by other means more compatible with the obligations arising from the directive, such as, for example, prohibiting capital companies from issuing bearer securities.

29. But the decisive argument against the importance claimed by the Belgian Government of the distinction between issue of bearer securities and their delivery to the subscriber, in order to justify the tax in question, seems to me to be above all one already put forward (paragraph 14). I allude to the fact that the two operations constitute, for the purposes of the raising of capital, two sides of the same coin, and that therefore to tax even only the second is the same as placing a further tax on the raising of capital, in addition to capital duty. This is clearly at variance with the stated aims of the directive.

30. That enables me to conclude that the events giving rise to the two taxes in question — that is, the allotment of new securities to subscribers (in the case of the TOB) and the physical delivery of newly-issued bearer securities to the subscribers (in the case of the TLT) — must both be considered to fall within the concept of the 'issue' of securities within the meaning of Article 11 of Directive 69/355 and therefore

¹³ — Emphasis added.

be regarded as operations which are not taxable within the meaning of that provision.

ment, sanctioned a broad interpretation of Article 12.¹⁴

31. It remains to be considered whether those operations may be taxed by virtue of Article 12(1)(a) of the directive, which, as we have seen, allows taxation on 'the transfer of securities', notwithstanding Article 11 (and Article 10) of the directive.

34. That view is contradicted by the Commission by means of arguments which immediately appear to me to be more persuasive.

32. According to the Belgian Government, this article is worded in terms which explicitly derogate from the provisions which precede it and therefore in such a way as to limit the scope of the prohibitions laid down by those provisions. Therefore the allotment (or delivery) of securities to the subscribers falls likewise within its scope.

35. It makes the general preliminary observation that this article, as a derogating provision, must be interpreted restrictively, to have the least possible effect on the aims and scope of the general rules of the directive. I might add that it is therefore not Article 12 which should not be deprived of content by a broad interpretation of Article 11; it is exactly the opposite!

33. In the opinion of that Government, that conclusion cannot be undermined by the argument that, as the Commission states, the concept of 'transfer' of securities in Article 12 necessarily presupposes the existence of a previous owner of those securities and therefore that they have already been allotted, or, in the case of bearer securities, have already been delivered to the subscribers. This interpretation is not only not borne out by the wording of and the preparatory work for Directive 69/335, but is also contrary to the *Codan* judgment, which, according to the Belgian Govern-

36. This choice of interpretation, which clearly reflects a firm trend in Community case-law, does not appear to me to be contradicted in this instance by the *Codan* judgment on which the Belgian Government sought to rely.

14 — Case C-236/97 *Codan* [1998] ECR I-8679.

37. It is worth recalling that in that case a capital company with its head office in Denmark had challenged the application to it by the Danish Tax Authorities of the tax on the transfer of shares, arguing that Article 12(1)(a) of the directive allowed Member States to collect a tax only on transactions on securities carried out on the stock exchange, or relating to companies quoted on the stock exchange. In support of its argument, the company looked at the Danish and German language versions of Article 12, which contain the expression 'stock exchange turnover taxes' instead of the expression 'taxes on the transfer of securities' used in all the other language versions of the directive. The Court, however, rejected this argument and above all the claim that different interpretations of the provision could be made according to the different versions. It made it clear that 'to disregard the clear wording of the great majority of the language versions of Article 12(1)(a) of the directive, and so distinguish between those companies which are listed on the stock exchange and those which are not, would not only run counter to the requirement that the directive be interpreted uniformly but could result in competition being distorted and dissuade certain companies from becoming listed on the stock exchange' (paragraph 29).

38. The Court's concern in that case was not therefore whether to opt for a broad interpretation of Article 12(1)(a) of the directive, but to ensure a uniform interpretation to avoid distortion of competition. I therefore

do not believe that the judgment supports the argument put forward by the Belgian Government in this case.

39. That being so, the Commission's argument, with which I concur, is that Article 12 must be interpreted, in so far as is relevant, to mean that the provision refers to all 'transfers' of securities, but excluding their actual allotment (or their delivery, in the case of bearer securities) to the subscribers.

40. By nature those transactions do not technically entail any 'transfer' but represent rather the 'original' acquisition of the security, so to speak, sanctioning the first ownership. It is only after that that one can refer to a true 'transfer'.

41. In this regard, it is clear that if we interpret Article 12(1)(a) as meaning that the Member States are also authorised to tax the allotment of securities to the subscriber by the issuing company, the prohibition in Article 11 on taxing the issue of securities

would be deprived of any meaning, and clearly in contradiction to the criterion of interpretation mentioned above (paragraph 35).

the directive and the case-law which refers to it. I do not believe it can seriously be doubted that the fact that some States, and not others, maintain an indirect tax on the acquisition of new securities constitutes one of the obstacles to the free movement of capital which the directive is intended to eliminate, irrespective of those to whom it applies.

42. It is true that, as indicated by the proposal for a directive of 1976, prohibiting the taxation of all 'transactions in securities would have been the most desirable means ... with regard to the proper functioning of the capital market'.¹⁵ However, in the same proposal, the Commission had also explained that strict application of that prohibition would not have been possible because of the 'budgetary requirements of Member States'.

45. I therefore propose that the Court declare that, by imposing a tax on the allotment of new securities and, in the case of bearer securities, on the delivery of those securities to the subscribers, when a company or investment fund is being set up or on the occasion of an increase in capital or during a loan issue, the Kingdom of Belgium has failed to fulfil its obligations under Article 11 of Directive 69/335.

43. To cater for those requirements, therefore, Directive 69/335 authorised, in Articles 11 and 12(1)(a), only the taxation of transfer operations which, as they are subsequent to the allotment (or delivery) of the securities, are not connected with the raising of capital and constitute more properly 'transactions in securities'.

IV — Costs

44. The opposite interpretation would, in my view, run counter to the stated aims of

46. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if these have been applied for. Since the Commission has applied for costs and having regard to my recommendation as to how this case should be decided, I consider that the Commission should be awarded costs.

¹⁵ — See the fourth recital in the preamble to the proposal for a directive.

V — Conclusion

47. In view of the foregoing I therefore propose that the Court declare that:

- '(1) By imposing a tax on the allotment of new securities and, in the case of bearer securities, on the delivery of those securities to the subscribers, when a company or investment fund is being set up or on the occasion of an increase in capital or during a loan issue, the Kingdom of Belgium has failed to fulfil its obligations under Article 11 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital.
- (2) The Kingdom of Belgium is ordered to pay the costs.'