

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 25 January 2007<sup>1</sup>

1. In the present case, the Supremo Tribunal Administrativo (Supreme Administrative Court), Portugal, asks the Court to interpret Article 7(1) of Council Directive 69/335/EEC,<sup>2</sup> as amended by Council Directive 85/303/EEC<sup>3</sup> concerning indirect taxes on the raising of capital. That provision obliges Member States to exempt from such taxes certain transactions involving the raising of capital. The Portuguese court asks whether Article 7(1) should be interpreted restrictively and whether it prohibits Member States from reintroducing stamp duty on a particular type of transaction from which, as at 1 July 1984, it was exempt under national law.

**Relevant legislation**

*Directive 69/335*

2. The first recital in the preamble to Directive 69/335 refers to the Treaty objective of promoting the free movement of capital, with a view to the creation of an economic union whose characteristics are similar to those of a domestic market.

3. The second recital states that indirect taxes on the raising of capital in force in the Member States give rise to discrimination, double taxation and disparities which interfere with the free movement of capital and which must be eliminated by harmonisation.

1 — Original language: English.

2 — Of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition, 1969 (II), p. 412).

3 — Of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital (O) 1985 L 156, p. 23).

4. The sixth and seventh recitals state that duty on the raising of capital should be

charged only once within the common market, at an equal level in all Member States and that its structure and rates should be harmonised. Finally, the eighth recital envisages the abolition of all other indirect taxes with the same characteristics as single capital duty.

5. To achieve those aims, Article 1 provides that 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9, hereinafter called "capital duty"'.<sup>4</sup>

6. Article 4(1) sets out a list of transactions which are to be subject to capital duty. In essence, those transactions concern the formation of a capital company within the meaning of Directive 69/335 and most types of increase in the capital of such a company, including, pursuant to Article 4(1)(c), 'an increase in the capital of a capital company by contributions of assets of any kind'.

7. Article 4(2) lists other transactions which Member States *may* subject to capital duty.<sup>4</sup>

8. Article 7 originally laid down the rates at which capital duty was to be charged. Pursuant to Article 7(1)(a) 'the rate of capital duty may not exceed 2% or be less than 1%'. However, Article 7(1)(b) provided that, in the case of certain company reconstruction operations involving the transfer of assets, 'this rate shall be reduced by 50% or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence'. Under Article 7(4), where a Member State exercised the power provided for in Article 4(2), as originally enacted, capital duty could be charged at a reduced rate.

9. Article 8 allows Member States to exempt partially or totally from capital duty the transactions referred to in Article 4(1) and (2), relating to capital companies which supply public services, where the State or regional or local authorities own at least half of the company's capital, and relating to capital companies which pursue exclusively and directly cultural, charitable, relief or educational objectives.

10. Article 9 provides that 'certain types of transactions or of capital companies may be the subject of exemptions, reductions or increases in rates in order to achieve fairness in taxation, or for social considerations, or to

<sup>4</sup> — Emphasis added.

enable a Member State to deal with special situations. ...'

(a) duties on the transfer of securities, whether charged at a flat rate or not;

11. Article 10 provides that 'apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(b) transfer duties, including land registration taxes, on the transfer, to a company, firm, association or legal person operating for profit, of businesses or immovable property situated within their territory;

(a) in respect of the transactions referred to in Article 4;

(c) transfer duties on assets of any kind transferred to a company, firm, association or legal person operating for profit, in so far as such property is transferred for a consideration other than shares in the company;

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

(d) duties on the creation, registration or discharge of mortgages or other charges on land or other property;

(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'.

(e) duties paid by way of fees or dues;

12. Article 12(1) provides that 'notwithstanding Articles 10 and 11, Member States may charge:

(f) value added tax'.

*Council Directive 73/79/EEC*<sup>5</sup>

13. Directive 73/79 extended the scope of Article 7(1)(b) of Directive 69/335 by allowing Member States to apply the reduced rate of capital duty to acquisition transactions carried out by exchanging shares. Article 1 of Directive 73/79 therefore inserted a new subparagraph bb) in Article 7(1)(b) which read:

‘(bb) the rate of capital duty may be reduced by 50% or more where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75% of the issued share capital of another capital company. ...’.

14. That provision goes on to lay down certain conditions relating to the manner in which the acquisition must occur for that reduction to apply.

5 — Of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the Directive concerning indirect taxes on the raising of capital (O) 1973 L 103, p. 13).

*Council Directive 73/80/EEC*<sup>6</sup>

15. With effect from 1 January 1976, Directive 73/80 reduced the common rates of capital duty in order to minimise obstacles to the development and functioning of a common market for capital.<sup>7</sup> The rate of capital duty contained in Article 7 of Directive 69/335 was to be 1%,<sup>8</sup> with reduced rates of between 0% and 0.5% for the ‘reconstruction’ transactions falling under Article 7(1)(b) and (bb).<sup>9</sup>

*Directive 85/303*

16. Directive 85/303 introduced substantial further amendments to Directive 69/335.

17. According to its preamble, Directive 85/303 seeks to minimise the negative economic impact of capital duty in the regrouping and development of undertakings in a difficult economic context.

18. Its third recital states that the best solution for attaining that objective would be to abolish capital duty. However, that solution was unacceptable to certain Mem-

6 — Of 9 April 1973 fixing common rates of capital duty (O) 1973 L 103, p. 15).

7 — See preamble.

8 — Article 1.

9 — Article 2.

ber States due to the revenue loss that would result. Member States were therefore given the opportunity to exempt from or subject to capital duty all or part of the transactions falling within the scope of Directive 69/335. However, they were required to exempt transactions which at 1 July 1984 were either exempted or subject to the reduced rate of capital duty.

19. The fifth recital explains that since, on 1 July 1984, no capital duty existed in Greece, provision should be made for the possibility of introducing such duty in Greece and of exempting certain transactions from it.

20. To achieve those aims, Directive 85/303 amended Directive 69/335 as follows.

21. The introductory phrase in Article 4(2) of Directive 69/335 now reads:

'2. 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.'<sup>10</sup>

22. The following subparagraph was added at the end of Article 4(2):

'However, the Hellenic Republic shall determine which of the transactions listed above it will subject to capital duty.'<sup>11</sup>

23. Article 7 of Directive 69/335 now reads:

'1. Member States shall exempt from capital duty transactions ... which were, as at 1 July 1984, exempted or taxed at a rate of 0.5% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.5% or less.

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

10 — Article 1(1) of Directive 85/303.

11 — *Ibid.*

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

...<sup>12</sup>

24. Article 7(4) of Directive 69/335 was repealed.

25. Article 3 of Directive 85/303 required Member States to take the measures necessary to comply with its provisions by 1 January 1986.

*The Treaty of Accession of Portugal to the Communities*

26. The Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties ('the Act of Accession')<sup>13</sup> is

annexed to the Treaty of Accession of Spain and Portugal to the EEC and to the EAEC.<sup>14</sup>

The only modifications introduced to Directive 69/335, as amended by Directive 85/303, as a result of the Act of Accession were made on the basis of Article 26 thereof, which provides for the adaptation of the Community acts listed in Annex I, as specified in that annex. Directive 69/335 is listed in Annex I. Article 3 of Directive 69/335, as amended by Directive 85/303, which defines which companies under national law are to be considered as a 'capital company' for the purposes of the directive, was thereby modified to include the relevant Spanish and Portuguese companies.

27. No other provision in the Act of Accession provides for any derogation from Directive 69/335, as amended by Directive 85/303, as regards Portugal, or for a different deadline for its implementation, or otherwise addresses the implementation in Portugal of Directive 69/335.

<sup>12</sup> — Article 1(2) of Directive 85/303.

<sup>13</sup> — OJ 1985 L 302, p. 23.

<sup>14</sup> — *Ibid.*, p. 9.

28. Portugal joined the EEC on 1 January 1986: the same date as the date by which Member States were required to comply with the amendments introduced into Directive 69/335 by Directive 85/303.<sup>15</sup>

in the capital of commercial companies, paid or contributed in cash, were exempted from stamp duty in Portugal. On 1 July 1984 such operations were thus exempted transactions. That exemption was still in force on 1 January 1986.

### *National legislation*

29. In Portugal, the rules concerning taxation of commercial companies were contained in the ‘Stamp Duty Code’, adopted by Decree No 12 700 of 20 November 1926 and in a table setting out rates of stamp duty (‘the General Table of Stamp Duty’), adopted by Decree No 21 916 of 28 November 1932.

32. With effect from 1 January 2002 Decree Law No 322-B/2001 (‘the 2001 Decree Law’) modified the General Table of Stamp Duty and reintroduced taxation on capital increases in commercial companies realised by contribution of assets of any kind. Under the new paragraph 26 of the General Table of Stamp Duty, such capital increases were taxed at a rate of 0.40% of the real value of the assets contributed or to be contributed by the shareholders.

30. According to Article 145, as amended, an increase in the capital of commercial companies was subject to a duty of 1% of the capital increase.

### **The main proceedings and the questions referred**

31. Decree Law No 154/84 of 16 May 1984, which entered into force on 21 May 1984, modified Article 145(2) of the General Table of Stamp Duty. As a consequence, increases

33. Optimus — Telecomunicações SA (‘Optimus’), a public limited company registered in Portugal and a ‘capital company’ within the meaning of Directive 69/335, increased its capital by EUR 100 000 000, all of which was paid in cash. On 12 November 2002, the capital increase and amendments to the statutes of the company were officially recorded by a notarial act, as required by law. Optimus paid stamp duty

<sup>15</sup> — See Article 3 of Directive 85/303.

of 0.40% (EUR 400 000) on that amount pursuant to paragraph 26(3) of the General Table of Stamp Duty, as amended by the 2001 Decree Law.

34. Optimus then challenged the assessment of stamp duty before the Tribunal administrativo e fiscal de Porto. It claimed that Article 7(1) of Directive 69/335, as amended by Directive 85/303, prohibited taxation of the capital increase in question since, at 1 July 1984, capital increases in commercial companies paid in cash were exempt from stamp duty under Portuguese rules.

35. The Tribunal administrativo e fiscal de Porto rejected the application on the basis that the standstill obligation under Article 7(1) did not apply to transactions listed in Article 4(1) of Directive 69/335, but only to those listed under Articles 4(2) and 8 thereof.

36. Optimus appealed that decision to the Supremo Tribunal Administrativo which has stayed proceedings and referred to the Court the following questions:

(1) Must Article 7(1) of [Directive 69/335], as amended by [Directive 85/303], be

interpreted restrictively so as to impose as a precondition for the obligation which it imposes on Member States to exempt certain transactions involving the raising of capital the requirement that the transactions in question must be those which, under the wording of the directive prior to 1985, could be exempted from the duty or taxed at a reduced rate — that is to say only those referred to in Article 4(2) and Article 8 — and which, in addition, were in that situation as at 1 July 1984?

(2) Must Article 7(1) of [Directive 69/335], as amended by [Directive 85/303], and Article 10 thereof be interpreted to the effect that they prohibit the levying of stamp duty, by virtue of national legislation such as Decree Law No 322-B/2001 of 14 December 2001, which inserted paragraph 26 — Capital Duty — in the General Table of Stamp Duty, on a limited company governed by Portuguese law when its capital is increased, by payments in cash, when, as at 1 July 1984, that transaction was subject to that duty but was exempted from it?

**Assessment**

*The first question*

37. By its first question the national court is asking, in essence, whether the mandatory exemption in Article 7(1) of Directive 69/335, as amended by Directive 85/303, is limited to those transactions listed under Article 4(2) and Article 8 of the same directive which at 1 July 1984 were exempted or taxed at a reduced rate of 0.5% or less.

38. It appears to be common ground that capital increases paid in cash (the transaction on which Optimus was charged and paid stamp duty) are to be classified as ‘an increase in the capital of a company by contribution of assets of any kind’ within the meaning of Article 4(1)(c) of Directive 69/335.

**Assessment**

39. Let me start by noting that Directive 69/335, as amended, is, to say the least,

intricate.<sup>16</sup> The difficulties in arriving at a correct interpretation of Article 7(1) are compounded by several factors. First, the preliminary reference arises in Portugal, which was not a Member State at the time when the original Directive 69/335 was adopted or when it was subsequently amended. Second, the deadline for the implementation into national law of the amendments introduced by Directive 85/303, namely, 1 January 1986, coincided with the date of Portugal’s accession to the then EEC. Third, the scope of Directive 69/303, as amended by Directive 85/303, is expressly defined by reference to the legal situation as regards capital duty at a date, 1 July 1984, at which Portugal, not being a Member State, was not bound by its provisions.

40. Optimus considers that Article 7(1) of Directive 69/335, as amended by Directive 85/303, must be broadly interpreted as applying to transactions falling under both Article 4(1) and Article 4(2) thereof. Thus, it prohibits levying capital duty on a transaction such as that in the main proceedings which was itself exempted under national law on 1 July 1984.

16 — On 4 December 2006 the Commission tabled a proposal for a ‘recasting’ of Directive 69/335. That proposal is justified, *inter alia*, by the need to ‘simplify a very complicated piece of Community legislation’. EC Commission, ‘Proposal for a Council Directive concerning indirect taxes on the raising of capital’, COM(2006) 760 final, p. 2.

41. Optimus submits that after the amendments introduced by Directive 85/303 entered into force, the abolition of capital duties replaced mere tax harmonisation as the main objective of the Community regime on capital duty. Article 7(1) of Directive 69/335 should be interpreted broadly in the light of that aim.

42. Optimus points out that capital increases paid in cash were exempted from capital duty in Portugal on 1 July 1984. As a result, Portugal was not entitled on joining the EEC to introduce stamp duty on those transactions. Neither the Treaty of Accession nor any other instrument of Community law confers an entitlement similar to that enjoyed by Greece under the final subparagraph of Article 4(2) of Directive 69/335, as amended by Directive 85/303, permitting Portugal to act in that way.

43. All things considered, I agree with Optimus that the first question should be answered in the negative.

44. The wording of Article 7(1) of Directive 69/335 as amended by Directive 85/303 is, as the Commission itself acknowledges, clear. It requires Member States to exempt from capital duty transactions that were, on 1 July 1984, exempted or taxed at a rate of 0.5% or less. The wording is mandatory. Thus, on a

purely literal interpretation, transactions that met those conditions had, in the absence of any provision to the contrary, to be exempted from capital duty with effect from the deadline for implementation of the amendments introduced by Directive 85/303. That deadline coincided with the date of Portugal's accession to the Community.

45. Where the wording of a Community law provision is clear and is not open to contradictory interpretations in the different language versions, a literal interpretation is a strong indication as to the correct meaning of the provision. Here, the wording of other language versions which I have examined does not differ in any significant manner from the English text.<sup>17</sup> *Prima facie*, therefore, the words 'Member States shall exempt' in Article 7(1) of Directive 69/335 (as amended) mean just what they say.

46. The Court has stated, however, that a purely literal interpretation of a provision is inadequate if it does not correspond to the

<sup>17</sup> — See the French, Italian and German versions.

intention of the legislator.<sup>18</sup> The Commission and Portugal argue that that is the case here. They submit that the legislator's true intention (namely, to restrict the scope of Article 7(1) of Directive 69/335, as amended by Directive 85/303, to the transactions listed under Article 4(2)) can only be discerned on the basis of an interpretation of the historical evolution of Directive 69/335. According to that 'evolutionary' approach, the latest version must be interpreted by reference to all the previous versions of Directive 69/335 and bearing in mind the factual situation that application of the previous versions has produced.

47. I must therefore examine whether the approach suggested by Portugal and the Commission carries sufficient weight to displace the literal reading of Article 7(1). Since their arguments are very similar, it is convenient to set them out together.

48. Portugal and the Commission review the evolution of the Community regime on capital duty in considerable detail. They submit that, in so far as relevant, *after* the amendments introduced by Directives 73/79 and 73/80 and *before* the amendments made

by Directive 85/303, the situation was as follows:

- Transactions listed under Article 4(1) of Directive 69/335 were subject to capital duty, either at the general rate of 1%<sup>19</sup> or at the reduced rate of 0.5% for particular cases concerning 'reconstruction operations'.<sup>20</sup> Capital increases of a capital company paid in cash fell within this category.

- Transactions listed under Article 4(2) of Directive 69/335 could be subject to capital duty, either at the general rate of 1% or at a lower rate to be defined by the Member State.<sup>21</sup>

49. The amendments introduced by Directive 85/303 permit and/or require Member States to exempt a large number of transactions which were previously compulsorily subject to capital duty.

18 — Case 118/79 *Knauf* [1980] ECR 1183, paragraph 5: 'it is not sufficient to find that on a purely literal interpretation the word "export" covers cases where goods leave the geographical territory of the Community under outward processing arrangements. It must in addition be considered whether such cases are also covered by the intention of the Community legislature ...'.

19 — Article 7(1)(a) as amended by Directive 73/80.

20 — Article 7(1)(b) and (bb) as amended by Directives 73/80 and 73/79.

21 — Article 7(4).

50. Article 4(1) continues to require Member States to subject the transactions listed therein to capital duty.

51. In contrast, Article 4(2) of Directive 69/335 as amended no longer requires Member States to subject all the transactions listed therein to capital duty. Rather, Member States could, under the new regime, continue to tax only those transactions that they had chosen, under the previous regime, to tax at the rate of 1%.

52. Article 7(1) of Directive 69/335 as amended now requires Member States to exempt all those transactions which, on 1 July 1984, were either exempted or taxed at a rate of 0.5% or less. In the Commission's view, the present wording of Article 7(1) was therefore intended to 'freeze' the situation as it stood at that date.

53. Article 7(2) of Directive 69/335 as amended governs all transactions *other* than those covered by Article 7(1) and provides that Member States may either exempt such transactions from capital duty or charge duty on them at a single rate not exceeding 1%.

54. Here the views of the Commission and Portugal differ slightly. The Commission submits that Article 7(2) should be interpreted in the sense that it offers Member States (and Portugal) a single, global choice in respect of all transactions not covered by Article 7(1): either to exempt them from capital duty altogether or to tax them at a single rate not exceeding 1%. Both parties consider that Article 7(1) of Directive 69/335 as amended does *not* require Member States to exempt transactions which they were obliged to subject to capital duty by virtue of the harmonised rules applicable before the entry into force of the amendments introduced by Directive 85/303.

55. Thus, Portugal and the Commission consider that the obligation to exempt in Article 7(1) applies only to transactions covered by Articles 4(2) and 7(4) of Directive 69/335 (i.e., those transactions that were subject to capital duty at the discretion of the Member States). It does not apply to an 'increase in the capital of a capital company by contribution of assets of any kind' falling within Article 4(1)(c) of Directive 69/335, which was subject to a rate of 1%. Before Directive 85/303 came into force, Member States never enjoyed the option of exempting such transactions or charging duty on them 'at a rate of 0.5% or less'. As a result, they may not be exempted under the new regime.

56. The ‘Greek derogation’ in Articles 4(2) and 7(1) of Directive 69/335, as amended by Directive 85/303, can be explained on that basis. Before 1 July 1984 no capital duty existed in Greece. Under Directive 85/303, it was thought necessary to grant Greece the option of determining which of the transactions falling within the scope of Article 4(2) were subject to capital duty and which transactions, amongst those which could be exempted or taxed at a reduced rate, were to continue to be exempted. Greece was thus granted a competence that other Member States already enjoyed under Directive 69/335.

57. I am not convinced that, in applying Directive 69/335 as amended by Directive 85/303 to an accession State, the (rather convoluted) interpretative approach suggested by Portugal and the Commission should prevail over an interpretation that is both literal and teleological.

58. First, nothing in Directive 69/335 itself, or the successive directives amending it, indicates that the Community legislature intended that the scope of the amendments those directives introduced had to be defined by reference to the previous versions of the directives or to the factual situation that their application had brought about.

59. Second, as Optimus rightly argues, the literal interpretation of Article 7(1) of Directive 69/335, as amended by Directive 85/303, corresponds with, rather than contradicts, the objectives pursued by Directive 85/303. The preamble to that directive makes clear that its ultimate aim is to ensure the free movement of capital — ideally, through the abolition of capital duty altogether. As the Commission observes, that aim was unachievable due to the opposition (for budgetary reasons)<sup>22</sup> of some Member States. Directive 85/303 does not therefore fully abandon (tighter) harmonisation of the legal regime on capital duty. However, its *primary* objective remains to minimise the effects of capital duty on the free movement of capital as far as possible, ideally through abolition. Reading the scope of the obligation to exempt in Article 7(1) as amended literally thus corresponds to the primary aim of Directive 85/303.<sup>23</sup>

60. Third, such an interpretation is, as Optimus rightly observes, in line with settled case-law requiring preference to be given to the interpretation that favours the realisation

22 — Since Portugal did not, on 1 July 1984, tax the transactions in question, it would not itself have been able to point to such budgetary difficulties.

23 — See for instance Case C-494/03 *Senior Engineering Investments* [2006] ECR I-525, at paragraph 43, where the Court held that Directive 69/335 favours and encourages both specific exemptions from capital duty (Articles 7(1) and (3), 8 and 9) and complete abolition (Article 7(2)).

of the fundamental freedoms in the EC Treaty.<sup>24</sup>

61. The Commission and Portugal may indeed be right in arguing that, if one considers the evolution of the Community regime on capital duty *in Member States which had been subject to that regime from its inception* and had correctly implemented Directive 69/335, faithfully following its various sequential amendments, capital increases paid in cash could not have been exempted or subject to a reduced rate at any stage of that evolution before the date for implementation of Directive 85/303 (1 January 1986).

62. However, it does not automatically follow that the scope of Article 7(1) of Directive 69/335, as amended by Directive 85/303, is necessarily restricted to the cases listed in Articles 4(2) and 8 thereof in all circumstances and, in particular, where an accession State is concerned.

63. First, as Optimus points out, the Court held in *Bautiaa*<sup>25</sup> that the merger transaction at issue in that case 'constituted an

increase of capital of a capital company by contribution of assets of any kind, within the meaning of Article 4(1)(c) of Directive 69/335, in the particular circumstances referred to in Article 7(1)(b), that is to say, the transfer by one or more capital companies of all of their assets and liabilities to one or more capital companies which are in the process of being formed or which are already in existence'.<sup>26</sup> After having clearly established that the transaction in question fell within Article 4(1)(c), the Court nevertheless went on to apply Article 7(1) of Directive 69/335, as amended by Directive 85/303.<sup>27</sup> The Court thus ruled that 'with effect from 1 January 1986, the maintenance of such a duty remained incompatible with the directive, Article 7(1) having been amended by Directive 85/303, which clearly provides for the mandatory exemption from all capital duties on increases of capital effected by means of the contribution by one company of the whole of its assets to another'.<sup>28</sup>

64. That ruling confirms that a reduced rate of 0.5% or less could also apply under the regimes prior to 1986 to the transactions provided for in Article 7(1)(b) and (bb) and that these provisions could also apply in connection with transactions that fall under

26 — At paragraph 34.

27 — 'It would appear, therefore, that transactions of the type at issue in the main proceedings fall within the scope of Directive 69/335, and that they must be examined in the light of Article 4(1)(c) of that directive (increase of capital by contribution of assets of any kind), with the ensuing consequences as regards the application of the rate of capital duty payable under Article 7(1), as amended by Directive 85/303' (at paragraph 38).

28 — At paragraph 42.

24 — See for instance Case 218/82 *Commission v Council* [1983] ECR 4063, paragraph 15; Case C-135/93 *Spain v Commission* [1995] ECR I-1651, paragraph 37.

25 — Joined Cases C-197/94 and C-252/94 [1996] ECR I-505.

Article 4(1). It follows that there are at least *some* transactions that are not covered by Articles 4(2) and 8, but fall within Article 4(1), and that are nevertheless governed by Article 7(1).

65. Second, I consider that (in the absence of any clear or express indication to the contrary in either Directive 69/335, as amended by Directive 85/303, or the Act of Accession) the reasoning suggested by Portugal and the Commission does not hold good for a new Member State (such as Portugal) acceding to the Communities on or after 1 January 1986.

66. Before joining the Community, such 'future' Member States were (self-evidently) free to regulate capital duty as they wished. They could apply whatever rate they deemed appropriate to any category of transactions. They could likewise exempt any category of transactions from capital duty. Upon accession, however, they became bound by the Community acquis in the terms established in their Treaty of Accession and corresponding Act. Directive 69/335, as amended by Directive 85/303, is part of that acquis. The only modification to that directive required by the Act of Accession of Portugal concerned Article 3, whose wording was modified in order to include Portuguese (and Spanish) capital companies within its scope.

67. If the accession negotiators had wished to allow a derogation from the Community regime on capital duty as regards Portugal on its accession to the Community, it may be presumed that they would have explicitly provided for one. Treaties of accession abound with provisions that allow new Member States to derogate on a temporary basis from the Community acquis in pre-defined areas. The accession negotiators could likewise have made provision (had they deemed it appropriate) for Portugal to *introduce* specific duties on all transactions not expressly covered by Articles 4(2), 7(4) and 8 of Directive 69/335, thus overriding the apparent standstill clause of Article 7(1) in favour of ensuring complete harmonisation (albeit at the expense of the directive's primary aim). They did not do so.

68. The standstill clause in Article 7(1) is clear and mandatory. The Commission's evolutionary approach would have required the acceding Member State to reconstruct the prior legislative history of Directive 69/335 as sequentially amended, to work out that a particular class of transactions exempt under domestic law at 1 July 1984 fell within Article 4(1)(c) and thus 'ought' to have been subject to capital duty and realise that the (apparently mandatory) wording of Article 7(1) did *not* apply to such transactions but that, as an acceding Member State, it was (on the contrary) obliged under Community law to introduce a *new restric-*

tion on the free movement of capital by imposing capital duty on such transactions. It seems to me that it would be undesirable for the Court to make such an assumption about the intention of the Community legislator.<sup>29</sup>

69. That view is reinforced by the existence of the explicit derogation in favour of Greece in Article 7 (and Article 4(2)) introduced in Directive 69/335 by Directive 85/303. The rationale for that derogation was that Greece had no capital duty in place in July 1984 and should therefore (in order to fit tidily within the pre-existing structure) be given the opportunity of introducing such duty and of exempting certain transactions from it. The same rationale could have been applied, *mutatis mutandis*, to Portugal. However, the Treaty of Accession did not include a similar derogation for Portugal. It seems reasonable to conclude that that was because the intention was not to do so.

70. I therefore consider that the first question should be answered as follows:

In the circumstances of the main proceedings, and in the absence of any specific

provision to the contrary in the Act of Accession, the mandatory exemption in Article 7(1) of Directive 69/335, as amended by Directive 85/303, must be interpreted as applying not only to the transactions which are referred to in Article 4(2) and Article 8 of that directive but also to any other transaction subject to capital duty under the directive which, at 1 July 1984, was exempted or taxed at a rate of 0.5% or less of capital duty in the Member State concerned.

#### *The second question*

71. By its second question the national court asks in essence whether the stamp duty on capital increases introduced by the 2001 Decree Law contravenes Articles 7(1) and 10 of Directive 69/335, as amended, when, as at 1 July 1984, that transaction was exempted from that duty in Portugal.

#### Submissions and assessment

72. The Portuguese Government argues that although on 1 July 1984 capital increases paid in cash in capital companies were not subject to stamp duty, those transactions were subject to registration and notarial fees,

<sup>29</sup> — See in this sense Case C-509/04 *Magyar VI* [2006] ECR I-4601, in which the Court interpreted Article 7(1)(b) and (bb) of Directive 69/335, at paragraph 39.

which were in effect equivalent to stamp duties. Such fees were charged at a regressive rate, starting at 1% on transactions of a value of up to PTE 200 000 (EUR 997.60) and reducing to 0.30% for transactions above PTE 1 000 000 (EUR 4987.98).

73. Since, under the case-law of the Court,<sup>30</sup> Portuguese registration fees and notarial fees are to be regarded as indirect taxes for the purposes of Directive 69/335, and since their cumulative effect in the instant case resulted in a tax rate superior to 0.5% (Portugal argues), capital increases paid in cash were not exempted in Portugal on 1 July 1984. Therefore, Article 7(1) of Directive 69/335, as amended, does not prohibit the introduction of a stamp duty (equivalent to capital duty) from 1 January 2002.

74. I agree with Portugal's reasoning to this extent: the case-law of the Court has declared that notarial and registration fees

in Portugal are taxes for the purposes of Directive 69/335, as amended.<sup>31</sup> However, that does not mean that those fees are to be equated to capital duty within the meaning of Article 4(1) of Directive 69/335. The Court in fact held in *Organon Portuguesa* that notarial fees in Portugal fell within the scope of Article 10 of Directive 69/335 (taxes that are *not* capital duty), but that Portugal was allowed to charge them because they were covered by the Article 12 exception to Article 10.<sup>32</sup> It seems to me that Portugal's argument on this point is therefore fundamentally misconceived. Registration and notarial fees are acceptable under Directive 69/335 only to the extent that they are protected by the Article 12 exemption. That (separate) regime cannot be used to say that because there was 'a tax' lawfully payable on 1 July 1984, that tax is to be treated not as an 'other tax' within the meaning of Article 10, but as an Article 4(1) capital duty in order to legitimise (once two components are added together) the charging of a new stamp duty on capital increases (which is indeed a capital duty) introduced in 2002.

75. Even if, *quod non*, notarial and registration fees were to be classified as capital duty

30 — Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 25: 'In the light of the aims of the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, registration duties collected by the State for an operation covered by the Directive, which are paid to the State in order to subsidise public expenditure, must be regarded as taxes for the purposes of the Directive (see Case C-56/98 *Modelo*, paragraph 22).'

31 — See, in addition to *SONAE*, Case C-193/04 *Organon Portuguesa* [2006] ECR I-7271, judgment of 7 September 2006.

32 — See in particular Case C-56/98 *Modelo* [1999] ECR I-6427, Case C-19/99 *Modelo* [2000] ECR I-7213, paragraph 23, and *Organon Portuguesa*.

for the purposes of Article 4(1) of Directive 69/335, I cannot agree with Portugal that, when determining the rate at which capital increases were taxed on 1 July 1984, Article 10 permits their cumulative effect to be considered together. To do so clearly contradicts the directive's principal objective of minimising the impact of capital duty on the free movement of capital and hinders its effectiveness. If notarial and registration fees are two autonomous 'taxes' regulated by different rules at national level — which it is for the national court to decide — they must, in the light of the aim of Directive 69/335, as amended by Directive 85/303, be treated as independent taxes whose rates may not be added together so as to circumvent the exemption obligation under Article 7(1).

76. The Commission justifies the adoption of the contested capital duty on capital increases as being a belated implementation (almost 16 years late) of Article 7(2) of Directive 69/335, as amended by Directive 85/303. On that reasoning, the relevant date for considering the internal legal situation for the purposes of Directive 69/335, as amended by Directive 85/303, is not 1 July 1984 (as explicitly provided for in Article 7(1) of that directive) but 1 January 1986 (when Portugal joined the then EEC). It was on 1 January 1986 that Portugal, like other Member States, was required by Article 7(2) to choose either to exempt from stamp duty

all transactions not mentioned in Article 7(1), in particular those falling within the scope of Article 4(1), or to continue to tax them at a single rate not exceeding 1%. In the Commission's view, Portugal was in fact belatedly exercising that choice by adopting the 2001 Decree Law. Article 7(1) does not therefore prevent the application of that domestic legislation.

77. I am not convinced by the Commission's interpretation. In the absence of any specific provision to the contrary in the Act of Accession,<sup>33</sup> the relevant date at which the Portuguese tax regime is to be considered for the purposes of Directive 69/335, as amended by Directive 85/303, is 1 July 1984. On that date, capital increases in capital companies paid in cash were exempted from capital duty. Article 7(1) as amended required them to remain exempted. On 1 July 1984, Portugal was not a Member State. If it had wished to enjoy a choice similar to that granted to Greece when Directive 69/335 was modified by Directive 85/303, it could presumably have negotiated terms to that effect as part of its accession package when it joined the Community. It did not do so.

<sup>33</sup> — See points 66 and 67 above.

78. Even if, *quod non*, the Commission is right in taking 1 January 1986 as the relevant date, the conclusion remains unaffected. On 1 January 1986, capital increases paid in cash were exempted from stamp duty and Portugal had not adopted any measures to render them subject to capital duty in compliance with Article 7(2) of Directive 69/335, as amended. Thus, by failing to exercise its alleged right under that provision by the deadline in the directive (1 January 1986), Portugal had, implicitly, chosen *not* to subject any of the relevant transactions to capital duty. It had foregone that right. The later adoption of a stamp duty by means of the 2001 Decree Law cannot be justified as the belated implementation by Portugal of Article 7(2).

79. As I have indicated earlier,<sup>34</sup> the Commission's argument in fact requires the acceding State to have looked at the mandatory wording of Article 7(1) and to have realised — notwithstanding the complete absence of relevant guidance in its Act of Accession — that in fact it was required *not* to 'freeze' the situation as of 1 July 1984 (or, according to the Commission, as of the date of accession, 1 January 1986) but, on the

contrary, that it was to introduce a new restriction on capital.<sup>35</sup>

80. That conclusion is supported by three further grounds. First, Portugal would otherwise benefit from its own negligence in not ensuring a derogation in the Act of Accession and/or in failing to adopt the required implementation measures by 1 January 1986. Second, holding that Portugal is entitled to introduce a capital duty 16 years after the directive's deadline for implementation would be contrary to the principle of legal certainty and might contravene the rights of bona fide third parties who could have legitimately expected, in the light of the directive's objective, that after 1 January 1986 the tax situation at national level was frozen. Third, it is clear from the preamble of Directive 69/335, as amended by Directive 85/303, that its primary aim is the abolition or, at least, the minimisation of the negative effects of capital duty. A belated introduction of capital duty by a Member State runs directly counter to that aim.

81. I therefore consider that the Court should answer the second question as follows:

35 — Perhaps, indeed, more than one new restriction: it is unclear whether there are other situations covered by Article 4(1) that, on the Commission's argument, should have been rectified by introducing new duties. It is also unclear to me why, on the Commission's 'fundamental choice' argument, Portugal was necessarily required (by Article 7(2)) to 'level up' by introducing the 'missing' duties on transactions falling within Article 4(1). It would have been equally logical to have required it to 'level down' and exempt other classes of transaction as well.

34 — See point 68 above.

Article 7(1) of Directive 69/335, as amended by Directive 85/303, and Article 10 thereof prohibit Portugal from levying stamp duty, by virtue of national legislation such as Decree Law 2001, on a capital company for

the purposes of those directives when its capital is increased, by payments in cash, when, as at 1 July 1984, that transaction was subject to that duty but was exempted from it.

## Conclusion

82. In view of the foregoing, I consider that the Court should answer the questions of the Supremo Tribunal Administrativo as follows:

- (1) In the circumstances of the main proceedings, and in the absence of any specific provision to the contrary in the Act of Accession, the mandatory exemption in Article 7(1) of Directive 69/335, as amended by Directive 85/303, must be interpreted as applying not only to the transactions which are referred to in Article 4(2) and Article 8 of that directive but also to any other transaction subject to capital duty under the directive which, at 1 July 1984, was exempted or taxed at a rate of 0.5% or less of capital duty in the Member State concerned.
- (2) Article 7(1) of Directive 69/335, as amended by Directive 85/303, and Article 10 thereof prohibit Portugal from levying stamp duty, by virtue of national legislation such as Decree Law 2001, on a capital company for the purposes of those directives when its capital is increased, by payments in cash, when, as at 1 July 1984, that transaction was subject to that duty but was exempted from it.