

JUDGMENT OF THE COURT (Grand Chamber)

26 October 2006*

In Case C-199/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Cour d'appel de Bruxelles (Belgium), made by decision of 28 April 2005, received at the Court on 9 May 2005, in the proceedings

European Community

v

Belgian State,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann and A. Rosas, Presidents of Chambers, R. Schintgen, P. Kūris, E. Juhász (Rapporteur), J. Klučka, K. Schiemann, J. Makarczyk, U. Löhmus and E. Levits, Judges,

* Language of the case: French.

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 February 2006,

after considering the observations submitted on behalf of:

- the Belgian Government, by E. Dominkovits and M. Wimmer, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by A. Cingolo, avvocato dello Stato,

- the Council of the European Union, by A. Vitro, acting as Agent,

- the Commission of the European Communities, by J.-F. Pasquier and I. Martínez del Peral, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the second and third paragraphs of Article 3 of the Protocol on the Privileges and Immunities of the European Communities, originally annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities, signed on 8 April 1965, then, by virtue of the Treaty of Amsterdam, to the EC Treaty ('the Protocol').

- 2 The reference was made in proceedings between the European Community, represented by the Commission of the European Communities, and the Belgian State concerning the collection of registration duties which must be paid following decisions of national courts and tribunals ordering payment of money or liquidation of securities ('registration duties').

Relevant provisions

Community legislation

- 3 Under the first paragraph of Article 28 of the Treaty establishing a Single Council and a Single Commission of the European Communities, then, following the entry into force of the Treaty of Amsterdam, Article 291 EC, the Community is to enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol.

4 Under Article 3 of the Protocol:

‘The Communities, their assets, revenues and other property shall be exempt from all direct taxes.

The governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Communities make, for their official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Communities.

No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.’

National legislation

- 5 Article 35(3) of the Belgian Code des droits d’enregistrement, d’hypothèque et de greffe (Code of registration duties, mortgage duties and registry fees) reads as follows:

‘The obligation to pay duties arising from decisions of courts and tribunals ordering payment or liquidation or determining priority for creditors lies with:

1. defendants, in the proportion determined by the decision ordering payment or liquidation or determining priority for creditors made or established against them, and defendants jointly and severally in the event that they are ordered to pay jointly and severally;

2. plaintiffs, in the proportion determined by the decision ordering payment or liquidation or determining priority for creditors obtained by each of them; however, that amount shall not exceed half of the amounts of money or securities that each of them receives in payment.

...

Duties and any fines shall be paid within one month from the date of dispatch by registered post of the demand for payment by the collector.'

6 Article 142 of that Code provides:

'Duty shall be set at 3% in respect of decisions of courts and tribunals, given in all matters, ordering payment of money or liquidation of securities, whether final, provisional, principal, subsidiary or conditional, including court decisions determining priority for creditors in respect of such money and securities.

In the case of decisions ordering payment of money or liquidation of securities duty shall be calculated on the cumulative principal amount arising from those decisions

payable by the same person, with no account taken of interest not calculated by the court, and costs. In the case of a decision determining priority for creditors, duty shall be calculated on the total amount distributed to the creditors.'

- 7 Article 150 of the Code provides:

'In order to secure collection of the duties and any fines payable under this section, a preferential right to draw on the money and securities covered by the orders for payment or liquidation or determining priority for creditors is established in favour of the State.

The duties and fines referred to in the first paragraph shall have priority over all claims of the beneficiaries of the orders for payment or liquidation or determining priority for creditors.'

The main proceedings and the questions referred for a preliminary ruling

- 8 The performance of a contract concluded in 1993 between the Commission and the public limited company MCFE gave rise to proceedings which were brought before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) (Belgium). By judgment of 25 January 1994, that court ordered the Commission to pay MCFE the provisional sum of BEF 10 845 935, or ECU 269 589, together with interest thereon and costs.
- 9 By letter of 14 June 1994, the collector of the Naiveté bureau de l'Enregistrement de Bruxelles (Brussels Registration Office No 9) requested the Commission to pay registration duties in the sum of BEF 325 470 in accordance with that order. On

2 August 1995, the Belgian Administration de l'Enregistrement (Registration Administration; 'the Administration') requested the Commission to pay the aforesaid amount within 15 days, plus a fine for late payment and interest thereon at the statutory rate and legal costs.

10 On 15 January 1996 the collector of the Brussels Registration Office No 9 called on the Commission to pay, by 25 January 1996, a total amount of BEF 363 470 and issued a payment order against it.

11 By registered post of 19 January 1996, the Commission replied to the Administration, through its lawyer, that it was exempt from registration duties and all indirect taxes under Article 3 of the Protocol. On 25 January 1996 the Administration replied that the duties in question were to be regarded not as a tax on consumer goods but as charges for court services.

12 By letter of 28 April 1997, the Commission's lawyer was informed that the Administration's position on the matter had been upheld by a ministerial decision of 18 April 1997.

13 On 15 July 1997 the Commission lodged an opposition to the payment order of 15 January 1996 and brought proceedings against the Belgian State before the Tribunal de première instance de Bruxelles for the annulment of that payment order.

14 By judgment of 6 June 2001, the Tribunal de première instance de Bruxelles declared the opposition to the payment order admissible but unfounded, and dismissed the Commission's case. That court held that the registration duties chargeable to the Commission did not amount merely to charges for public utility services within the

meaning of the third paragraph of Article 3 of the Protocol, since they are a tax intended to provide for the general expenses of public authorities. On the other hand, such duties are not included in the price to be paid for the services of the public limited company MCFE but derive from the judgment ordering payment by the Commission. The exemption sought by the latter could therefore not be granted. Furthermore, that court took the view that it was unnecessary to make a reference to the Court of Justice for a preliminary ruling, as in its opinion there was 'no reasonable doubt' that those duties do not fall within the second paragraph of Article 3 of the Protocol.

15 By application lodged at the Registry of the Cour d'appel de Bruxelles (Court of Appeal, Brussels) on 14 September 2001, the Commission appealed against that judgment.

16 The Cour d'appel de Bruxelles, taking the view that, as regards treaties and international agreements, even that which is clear can be interpreted and that it is not for the national court to interpret the Protocol, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the second paragraph of Article 3 of the Protocol ... , which provides that the governments of the Member States are to take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes, to be interpreted as meaning that a proportional duty levied in respect of decisions of courts and tribunals, given in all matters, ordering payment of money or liquidation of securities falls within its scope?

(2) Is the third paragraph of Article 3 of the Protocol ... , which provides that no exemption is to be granted in respect of a mere charge for a public utility

service, to be interpreted as meaning that the charge made at the outcome of proceedings to the losing party ordered to pay a specified amount constitutes merely a charge for a public utility service?’

The questions

- 17 It should be observed as a preliminary point that the national court, presenting the facts of the case before it, notes that the Tribunal de première instance de Bruxelles took the view that the registration duties at issue in the main proceedings were an indirect tax, which was not disputed by the parties in the national proceedings. The national court itself declared that ‘the European Community and the Belgian State disagree on the manner in which the second and third paragraphs of Article 3 of the Protocol on the Privileges and Immunities of the European Communities should be interpreted.’ The Belgian Government, the Italian Government and the Commission likewise did not call in question that characterisation in their observations before the Court. Accordingly, it is in that context that the questions referred to the Court on the interpretation of the second and third paragraphs of Article 3 of the Protocol will be examined.

The second question

- 18 By that question, which should be examined first, the national court asks whether duties such as registration duties amount merely to charges for public utility services within the meaning of the third paragraph of Article 3 of the Protocol, for which no exemption is to be granted.

- 19 The Belgian Government, supported on that point by the Italian Government, submits that the registration duties are indirect duties which represent consideration for a given public utility service in so far as their purpose is to remunerate the service rendered by the Belgian judicial authorities. Belgian case-law and learned writers also take that approach. Payment of those duties could also be demanded, to a certain extent, from the plaintiff in favour of whom the order is made, which shows that that service is rendered to the two parties and charges for that service are proportional to the financial value of the action.
- 20 By contrast, the Commission submits that, in order for a levy to be considered to amount merely to a charge for a public utility service, a direct and proportional link must be established between the charge for such a service and the benefit received. In this case there is no such link, since a complex case could result in the payment of limited registration duties, whereas a simple case could lead to considerable duties. In addition, in accordance with the budgetary principles of universality and non-appropriation, the proceeds from the duties in question are allocated to the general budget of the State and do not specifically finance public court services.
- 21 As the Court has already held, the distinction between a tax intended to provide for the general expenses of public authorities and a charge which constitutes consideration for a given service is expressly recognised by Article 3 of the Protocol. The Court pointed out that the very concept of consideration for a specific service presupposes that that service is provided, or at least may be provided, to those paying the charge (Case C-191/94 *AGF Belgium* [1996] ECR I-1859, paragraphs 25 and 26).
- 22 Even accepting that that criterion is the decisive factor for the purposes of drawing the distinction referred to in the preceding paragraph, it is unlikely that that criterion is satisfied in the present case, given that the duties in question in the main proceedings may be chargeable to persons who have not in any way called on the services of the judicial authorities of the Member State concerned or have not even

intended to do so. As observed by the Belgian Government, even if, on the basis of the legislation at issue in the main proceedings, registration duties may be demanded from either the defendant or the plaintiff, in practice those duties are generally always sought first from the party against whom the order is made.

23 Furthermore, as noted by the Advocate General in points 27 to 30 of her Opinion, the criterion of consideration for a service rendered is not the only factor which is decisive in this case.

24 In accordance with the settled case-law of the Court in a field of Community law which involves a similar notion to that at issue in this case, namely ‘duties paid by way of fees or dues’ referred to in Article 12(1)(e) 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), duties with no upper limit which increase directly in proportion to the nominal value cannot, by their very nature, constitute duties paid by way of fees or dues for a service rendered. The amount of such a duty will generally bear no relation to the costs actually incurred by the Administration in drawing up the instrument in question (see, to that effect, Case C-19/99 *Modelo* [2000] ECR I-7213, paragraph 33, and Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 34).

25 According to that case-law the characterisation of a duty as a charge for public utility services requires there to be a direct and proportional link between the actual cost of that service and the duty paid by the recipient, that is to say a correlation between the price paid by the latter in consideration for a specific service and the real cost incurred by the Administration through performance of the service.

- 26 That criterion of a direct and proportional link between the service rendered and the charge paid, which is capable of being applied in respect of the third paragraph of Article 3 of the Protocol, has not been satisfied in this instance.
- 27 It is common ground, first, that the amount of registration duties at issue in the main proceedings has no upper limit and increases directly in proportion to the amount of the payment ordered by the competent national court, with no account taken of the actual cost of the service rendered by the judicial authorities. Accordingly, the necessary correlation between the amounts paid and the service rendered is lacking. Moreover, the fact that registration duties are levied only where there is an order to pay, whereas the actual cost of the service rendered by the judicial authorities ought to be the same in the event that an action is dismissed, confirms that those duties are not intended to cover the actual cost of the service.
- 28 Secondly, as found by the Tribunal de première instance de Bruxelles, those duties constitute a tax intended to provide for the general expenses of public authorities. Thus the amounts paid by way of those duties are not actually used for financing public court services.
- 29 The answer to the second question must therefore be that duties such as the registration duties do not amount merely to charges for public utility services within the meaning of the third paragraph of Article 3 of the Protocol.

The first question

- 30 By that question, the national court asks, essentially, whether the second paragraph of Article 3 of the Protocol is to be interpreted as meaning that duties such as registration duties fall within the scope of that provision.

- 31 For the purposes of answering that question, it should be pointed out that, unlike the first paragraph of Article 3 of the Protocol, which provides, unconditionally and in general, for the exemption of the Communities and their assets, revenue and other property from all direct taxation at national level, the exemption from taxation laid down in the second paragraph of that article is not unlimited. The latter provision establishes, under certain conditions which are clearly specified, the remission or refund of indirect taxes or sales taxes charged on property bought by the Communities for their official use. The Court has interpreted the second paragraph of Article 3 of the Protocol as meaning that all types of purchase, including obtaining a supply of services, which are necessary for the accomplishment of the Communities' task fall within its scope (see *AGF Belgium*, cited above, paragraph 36).
- 32 The most significant condition of those specified in the second paragraph of Article 3 of the Protocol, which is stated twice in that provision, is that the indirect taxes must be included in the price of the property or services covered by contracts concluded by the Communities.
- 33 The Belgian Government, which submits its observations on that question in the alternative, argues, supported by the Italian Government in this respect, that since the registration duties at issue in the main proceedings are levied following a court decision and not on the basis of the purchase of property or services, they cannot be considered to be included in the purchase price of property or services. In addition, the wording of the second paragraph of Article 3 of the Protocol makes it clear that the exemption covers exclusively transactions to purchase property or services and cannot apply to all transactions and situations. Finally, in this case the duties in question relate to a judicial measure penalising non-performance of contractual obligations.

34 The Commission contends that the intervention of the national court competent to hear an action such as the one in the main proceedings was necessary in connection with the performance of the contract for the provision of services which the Commission had entered into in the course of carrying out its task. The judgment given by the referring court therefore had its origin in the contractual relationship between the parties, so that the registration duties connected with that judgment are included in the price of that contract. That interpretation takes into account the aims of Article 3 of the Protocol.

35 That approach cannot be followed.

36 It should be noted, first, that the nature and effect of national duties such as the registration duties at issue in the main proceedings must be sought and ascertained not only on the basis of their application with regard to the Community, but also by taking into account their overall scope, with regard to all natural and legal persons who, actually or potentially, are or may become parties to proceedings before the courts and tribunals of the Member State concerned. Proceedings to which the Community is party before a national court are only a minute proportion of the total number of proceedings which give rise to the payment of such duties.

37 According to the case-file, those duties are payable in all circumstances where a legal relationship between natural or legal persons gives rise to court action leading to a decision of the court ordering payment of money. Thus at issue are not only contractual relationships, but also non-contractual relationships of all kinds in which there can be no question of including the amount of money to which the order relates in the purchase price of property or services.

38 Secondly, indirect duties may be regarded as being included in the price of purchases made by the Communities within the meaning of the second paragraph of Article 3 of the Protocol only when they are foreseeable and their amount may be calculated in advance with a certain degree of precision, in order that the national authorities may be able to remit or refund them at the request of the Community institutions.

39 The performance of a contract does not automatically give rise to disputes between the parties, and the likelihood that they will arise cannot, in any event, be assessed at the stage of conclusion of the contract. Moreover, the subject-matter and extent of any such disputes remains uncertain and they do not necessarily have to be settled through legal action, since non-contentious dispute resolution is another possible approach. Finally, the outcome of any court action is equally uncertain, as is the amount of the payment order issued against one of the parties. In those circumstances, the contract price cannot include, as refundable indirect taxes, a future, uncertain and indefinite element such as the registration duties at issue in the main proceedings.

40 The argument put forward by the Commission which refers to point 23 of the Opinion of Advocate General Jacobs in the case which gave rise to the judgment in *AGF Belgium*, cited above, also cannot be accepted. According to that argument, by collecting such registration duties the Member State concerned would gain an unjustified advantage by diverting to the national treasury funds contributed to the budget of the Communities. Apart from the fact, noted in paragraph 36 of this judgment, that proceedings to which the Community is party at national level are only a minute percentage of the total number of court proceedings which give rise to the payment of such duties, it cannot be accepted that in such proceedings, the number, subject-matter and scale of which cannot be known in advance, an order to pay will automatically be made against the Community.

- 41 Moreover, having regard to the situation which gave rise to the main proceedings, nothing requires the Commission to conduct its contractual relations in such a way that the national courts of one and the same Member State automatically have jurisdiction for the disputes to which it is party.
- 42 As regards, thirdly, the argument concerning the interpretation of the second paragraph of Article 3 of the Protocol in the light of the aims of that article, it should be recalled that the fiscal immunity necessary for the performance of its tasks, which the Community enjoys on the basis of Article 291 EC, is granted 'under the conditions laid down in the Protocol'. An interpretation in the light of the context and aims of a provision cannot have the result of depriving the clear and precise wording of that provision of all effectiveness (see to that effect, as regards the privileges and immunities of the European Central Bank, Case C-220/03 *ECB v Germany* [2005] ECR I-10595, paragraph 31).
- 43 In any event, even if it might be accepted that exemption from the registration duties in question in the main proceedings would confer a financial advantage on the Community, the Commission has not adduced any conclusive evidence to show that the payment of those duties may adversely affect the independence of the Community and hinder its proper working.
- 44 In the light of all those considerations, the answer to the first question must be that the second paragraph of Article 3 of the Protocol is to be interpreted as meaning that duties such as the registration duties do not fall within the scope of that provision.

Costs

⁴⁵ 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 hereby rules:

- 1. Duties such as the registration duties which must be paid following decisions of national courts and tribunals ordering payment of money or liquidation of securities do not amount merely to charges for public utility services within the meaning of the third paragraph of Article 3 of the Protocol on the Privileges and Immunities of the European Communities.**
- 2. The second paragraph of Article 3 of that Protocol is to be interpreted as meaning that duties such as the registration duties which must be paid following decisions of national courts and tribunals ordering payment of money or liquidation of securities do not fall within the scope of that provision.**

[Signatures]