

JUDGMENT OF THE COURT (Sixth Chamber)

14 October 1999 \*

In Case C-439/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgerichtshof, Austria, for a preliminary ruling in the proceedings pending before that court between

**Sandoz GmbH**

and

**Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,**

on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC), and of Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5),

\* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn (Rapporteur) and G. Hirsch, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Sandoz GmbH, by P. Csoklich, Rechtsanwalt, Vienna,
- the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of the Economy, acting as Agent,
- the Portuguese Government, by L. Fernandes, Director of the Legal Service of the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and M.C. Ramos, Legal Adviser in the Legal Service of the Bank of Portugal, acting as Agents,
- the Commission of the European Communities, by H. Michard, of its Legal Service, and A. Buschmann, national civil servant seconded to the Commission's Legal Service, acting as Agents

having regard to the Report for the Hearing,

after hearing the oral observations of Sandoz GmbH, represented by P. Csoklich; of the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,

represented by H. Bavenek-Weber, Oberregierungsrätin, acting as Agent; of the Austrian Government, represented by C. Stix-Hackl and G. Glega, Ministerialrat at the Federal Ministry of Finance, acting as Agent; and of the Commission, represented by A. Buschmann, at the hearing on 4 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

### Judgment

- 1 By order dated 18 December 1997, which was received at the Court on 29 December 1997, the Verwaltungsgerichtshof (Administrative Court), Austria, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC) and of Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5, hereinafter 'the Directive').
- 2 Those questions were raised in proceedings between Sandoz GmbH (hereinafter 'Sandoz'), established in Vienna, and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland concerning the compatibility with Community law of Austrian legislation under which the tax authority may levy duty of 0.8% on the value of loans contracted by resident borrowers with non-resident lenders.

## Community legislation

3 Article 73b of the Treaty provides as follows:

'1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

4 Article 73d of the Treaty provides as follows:

'1. The provisions of Article 73b shall be without prejudice to the right of Member States:

- (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
- (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the

declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.'

5 Article 1(1) of the Directive provides:

'Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.'

6 Article 4 of the Directive provides as follows:

'This Directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information.

Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.'

- 7 Loans and credits granted by residents to non-residents are capital movements coming under Heading VIII entitled 'Financial loans and credits' of the nomenclature in Annex I to the Directive.

### **The Austrian legislation**

- 8 Article 15(1) of the Gebührengesetz (Law on duties, BGBl. 1957, No 267, as amended and published in the BGBl. 818/1993, hereinafter 'the GebG'), provides that:

'Legal transactions shall be subject to stamp duty only if they are recorded in a written instrument, unless otherwise provided for herein.'

- 9 As regards the chargeable event, Article 16 of the GebG establishes a distinction according to whether the document is drawn up in Austria or abroad. If the document is drawn up in Austria, duty is payable, in accordance with Article 16(1) of the GebG, either on the date when the document is signed by both parties or on the date of delivery or dispatch of the document by the sole signatory.
- 10 As regards documents drawn up outside the national territory, duty is payable, in accordance with Article 16(2)(1) of the GebG, on conclusion of the written

agreement or, under Article 16(2)(2)(b), on the date on which the document is brought into Austria.

- 11 Under the first subparagraph of Article 33 Tarifpost (hereinafter 'TP') 8 of the GebG loan agreements are subject to stamp duty at the rate of 0.8% of the value of the loan. The first sentence of subparagraph 4 of that provision provides:

'Where a loan is granted by a member of a company to that company or by a lender not domiciled or ordinarily resident in Austria or not having its headquarters or registered office there and the loan is not recorded in a written instrument attracting duty, the borrower's books and records of account which are to be kept in Austria in accordance with the relevant tax legislation and in which the loan is entered shall be deemed to constitute a written instrument for this purpose.'

### Facts and preliminary questions

- 12 On 20 January 1995, Sandoz contracted a loan of ATS 220 million with Sandoz Management Services SA, which has its corporate seat in Brussels. No written instrument was drawn up in respect of that loan, but Sandoz entered it in its books of account.
- 13 On 18 December 1995, the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Regional Finance Office for Vienna, Lower Austria and Burgenland) requested Sandoz to pay stamp duty on the basis of an 'equivalent'

document (Ersatzbeurkundung), at the rate of 0.8% of the amount of the loan, in accordance with the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG.

14 In its administrative appeal against that decision Sandoz argued, *inter alia*, that the aforementioned provision constituted an obstacle to the free movement of capital between a borrower residing in Austria and a lender established in another Member State which was likely to deter the borrower from turning to such a lender.

15 However, the Federal Minister for Finance, representing the defendant tax authority, contended that the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG came within the scope of Article 73d(1) of the Treaty. In his view, that provision did not discriminate against lenders established in a Member State other than that of the borrower but sought to ensure that loans to Austrian residents were granted under the same conditions from the point of view of tax, irrespective of whether they were made by lenders residing in Austria or by lenders in another Member State. If it were otherwise, loans granted by lenders not resident in Austria might escape duty because the documentation for such loans was drawn up abroad and remained in the custody of the lender. It was, therefore, only in order to ensure equality of tax treatment of borrowers that the concept of an equivalent document was introduced into the GebG.

16 Under those circumstances, the Verwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Article 73b of the EC Treaty, in conjunction with Article 73d (in particular Article 73d(3)), and Article 1(1) of Directive 88/361/EEC on the free movement of capital, in conjunction with Article 4 of that directive, preclude the maintenance in force of the first sentence of the fourth subparagraph of Article 33 TP 8 of the 1957 Gebührengesetz (in the version



published in BGBl. 818/1993), which provides that, where a loan is granted by a lender not domiciled or ordinarily resident or not having its headquarters or registered office in Austria without any written instrument being drawn up in a form attracting duty, the books and records of account which are to be kept in Austria in accordance with the relevant tax legislation and in which the loan is entered are to be deemed to constitute a written instrument?

- (2) Does the taxation of loans (in so far as they result in a flow of capital from one Member State to another) under the first subparagraph of Article 33 TP 8 of the GebG constitute arbitrary discrimination or a disguised restriction on the free movement of capital within the meaning of Article 73b(1) of the EC Treaty?’

## The second question

- 17 By its second question, which can be examined first, the national court is essentially asking whether Articles 73b(1) and 73d(1)(b) and (3) of the Treaty are to be interpreted as precluding the imposition of duty, under a provision such as the first subparagraph of Article 33 TP 8 of the GebG, on loans contracted in another Member State.
- 18 First of all, the prohibition in Article 73b(1) of the Treaty covers all restrictions on movements of capital between Member States and between Member States and non-Member States.
- 19 As the Advocate General points out at paragraphs 31 and 48 of his Opinion, legislation such as that at issue in the main proceedings deprives residents of a

Member State of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside the national territory. Accordingly, such a measure is likely to deter such residents from obtaining loans from persons established in other Member States (judgment in Case C-484/93 *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, paragraph 10).

- 20 It follows that such legislation constitutes an obstacle to the movement of capital within the meaning of Article 73b(1) of the Treaty.
- 21 It subsequently falls to be examined whether legislation such as that at issue in the main proceedings may be regarded as a requisite measure within the meaning of Article 73d(1)(b) of the Treaty.
- 22 Sandoz maintains that the objective pursued by the first subparagraph of Article 33 TP 8 of the GebG is to guarantee the legal certainty of the transaction. That provision, which renders chargeable to stamp duty any contract for a loan, whether entered into in Austria or in another Member State, fails to observe the principle of proportionality. According to Sandoz, the general practice in Austria is now no longer to draw up a written instrument for loan transactions or to replace it with another document which is not subject to payment of such duty. Since the provision at issue no longer accords with the financial requirements of the State, there is no longer any need for it and by increasing legal uncertainty it produces a result which runs counter to the objective in view.
- 23 The Austrian Government, on the other hand, contends that the purpose of the national legislation is to impose an internal indirect tax which, in the current state of partial harmonisation of tax law, is a matter within the Member States' competence. In its view, taxing loans contracted by Austrian residents in a written document outside Austria is justified by the need to observe the principle that

residents should be treated equally for tax purposes. The measure is therefore essential in order to prevent infringements of national tax law and regulations, as provided for in Article 73d(1)(b) of the Treaty.

- 24 As the Advocate General points out at points 73 and 74 of his Opinion, the main objective of legislation such as that at issue in the main proceedings, which, irrespective of the nationality of the contracting parties or of the place where the loan is contracted, applies to all natural and legal persons resident in Austria who enter into a contract for a loan, is to ensure equal tax treatment for those persons. Since the effect of such a measure is to compel such persons to pay the duty, it prevents taxable persons from evading the requirements of domestic tax legislation through the exercise of freedom of movement of capital guaranteed by Article 73b(1) of the Treaty. Legislation such as that at issue in the main proceedings is therefore essential in order to prevent infringements of national tax law and regulations, as provided for in Article 73d(1)(b) of the Treaty.
- 25 The last question to be examined is whether tax legislation such as that at issue in the main proceedings constitutes a means of arbitrary discrimination within the meaning of Article 73d(3) of the Treaty.
- 26 In answer thereto, it is sufficient to state that the duty provided for in the first subparagraph of Article 33 TP 8 of the GebG applies to all borrowers resident in Austria without distinction as to nationality or the place where the loan was contracted.
- 27 The reply to the second question must therefore be that Articles 73b(1) and 73d(1)(b) and (3) of the Treaty are to be interpreted as not precluding the

imposition of duty, under a national provision such as the first subparagraph of Article 33 TP 8 of the GebG, on loans contracted in another Member State.

### The first question

- 28 By its first question the national court is essentially asking whether Articles 73b(1) and 73d(3) of the Treaty, and Articles 1(1) and 4 of the Directive, are to be interpreted as precluding a provision of national law such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG.
- 29 That provision provides in substance that, where a natural or legal person resident in Austria concludes outside Austria a contract for a loan not set down in a written instrument and the existence of the loan is recorded by an entry in the borrower's books of and records account, he is liable to pay the duty provided for in the first subparagraph of that provision.
- 30 In the case of a loan contracted in Austria without being set down in a written instrument, Austrian legislation requires such a loan to be entered in the books of account. However, as is apparent from the case-file and was confirmed by the Austrian Government at the hearing, such a loan is not subject to the duty provided for by the first subparagraph of Article 33 TP 8 of the GebG.
- 31 It follows that that provision discriminates according to the place where the loan is contracted. Discrimination of that nature is likely to deter residents from

contracting loans with persons established in other Member States and therefore constitutes a restriction on the movement of capital within the meaning of Article 73b(1) of the Treaty.

- 32 That being so, the question to be examined next is whether a provision such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG may be justified with reference to the measures mentioned in Article 73d(1)(b) of the Treaty.
- 33 The Austrian Government maintains that the first sentence of the fourth subparagraph of Article 33 TP 8 pursues a twofold objective. First, it is intended to ensure for Austrian residents equal tax treatment, regardless of the borrower's nationality, and the place where the loan is contracted. Secondly, it seeks to overcome the fraudulent concealment by borrowers residing in Austria of the existence of loans contracted by means of a written instrument, that kind of fraud being made easier by the national tax authority's difficulties in establishing that the loan contract was indeed set down in writing in another Member State.
- 34 As regards the first argument, it is sufficient to observe that, inasmuch as it discriminates between Austrian residents according to whether they take out a loan without its being recorded in any written instrument in Austria or they do so in another Member State, the provision at issue in the main proceedings runs counter to the objective pursued, which is to ensure equal tax treatment of natural and legal persons resident in Austria, irrespective of the place where they contract loans.
- 35 As regards the second argument, as the Advocate General points out at paragraph 94 of his Opinion, the provision at issue in the main proceedings is not apt to prevent fraud by borrowers resident in Austria.

- 36 Accordingly, a provision such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG cannot be justified with reference to the measures mentioned in Article 73d(1)(b) of the Treaty.
- 37 There is therefore no need to examine whether that provision satisfies the requirements of Article 73d(3) of the Treaty and the second paragraph of Article 4 of the Directive.
- 38 Under those circumstances, the reply to be given to the first question must be that Articles 73b(1) and 73d(1)(b) of the Treaty preclude a provision of national law such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG.

## Costs

- 39 The costs incurred by the Austrian and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 18 December 1997, hereby rules:

1. Articles 73b(1) and 73d(1)(b) and (3) of the EC Treaty [now Articles 56(1) EC and 58(1)(b) and (3) EC] are to be interpreted as not precluding the imposition of duty, under a national provision such as the first subparagraph of Article 33 Tarifpost 8 of the *Gebührengesetz*, on loans contracted in another Member State.
2. Articles 73b(1) and 73d(1)(b) of the Treaty preclude a provision of national law such as the first sentence of the fourth subparagraph of Article 33 Tarifpost 8 of the *Gebührengesetz*.

Schintgen

Kapteyn

Hirsch

Delivered in open court in Luxembourg on 14 October 1999.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber