

JUDGMENT OF THE COURT (Second Chamber)

15 July 2004*

In Case C-415/02,

Commission of the European Communities, represented by R. Lyal and C. Giolito,
acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by B. van
de Walle de Ghelcke, avocat,

defendant,

APPLICATION for a declaration that:

- by imposing the tax on stock exchange transactions on applications made in Belgium for new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of a loan issue, and

* Language of the case: French.

- by imposing the tax on the delivery of bearer securities on the physical delivery of bearer securities relating to Belgian or foreign Government stocks, in the case of new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of 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 (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), F. Macken and N. Colneric, Judges,

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

having regard to the report of the Judge-Rapporteur;

after hearing the Opinion of the Advocate General at the sitting on 15 January 2004,

gives the following

Judgment

¹ By application lodged at the Court Registry on 19 November 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

- by imposing the tax on stock exchange transactions on applications made in Belgium for new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of a loan issue, and

- by imposing the tax on the delivery of bearer securities on the physical delivery of bearer securities relating to Belgian or foreign Government stocks, in the case of new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of 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 (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) (hereinafter 'Directive 69/335').

Legal background

Community legislation

2 Article 11 of Directive 69/335 provides:

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

- (a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued;

- (b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.'

3 Article 12(1) of Directive 69/335 provides:

'Notwithstanding Articles 10 and 11, Member States may charge:

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

...’.

4 The statement of reasons in the Commission’s Proposal for a directive of 14 December 1964 [COM (64) 526 final], which led to the adoption of Directive 69/335, is worded as follows:

‘[Indirect] taxes [on capital movements] include, first, those on the raising of capital and, second, those on transactions in securities. This draft directive concerns indirect taxes on the raising of capital, a category which includes capital duty on companies’ own capital, stamp duty on national securities, stamp duty charged on the introduction or issue on the national market of securities of foreign origin, and other indirect taxes with similar characteristics. As regards indirect taxes on transactions in securities, such as taxes on stock exchange transactions, they will form the subject-matter of another draft directive. This proposal therefore does not affect them.’

5 Under Article 2(1) of the Proposal for a Council Directive concerning indirect taxes on transactions in securities, submitted by the Commission on 2 April 1976 (OJ 1976 C 133, p. 1, hereinafter ‘the 1976 Proposal for a directive’), ‘a taxable transaction is the disposal or the acquisition of securities for valuable consideration, where the transaction is concluded in a Member State or in a non-member country by a resident of a Member State. Each disposal or acquisition of securities constitutes a separate taxable transaction’.

6 Article 4(1) of the 1976 Proposal for a directive provides:

'The Member States shall take the necessary steps to exempt from the tax the following transactions:

(a) the issue of securities, and the first acquisition of securities immediately consequent upon such issues;

...'

7 In Part V of the Annex to the 1976 Proposal for a directive, it is stated that, 'for the purposes of this directive, "issue of securities" means the allotment of securities by the issuer [cession], including that resulting from capitalisation of reserves'.

National legislation

8 The provisions of the Belgian legislation which are relevant in this case are set out in the Belgian Code des taxes assimilées au timbre (Code on taxes similar to stamp duty, hereinafter 'the CTAT') and are based on the Law of 14 April 1965 amending the Code des droits d'enregistrement, d'hypothèque et de greffe (Code of duties on registration, mortgage and registry charges), the Code des droits de timbre (Code on stamp duties) and the Code des taxes assimilées au timbre (Code on taxes similar to stamp duty) (*Moniteur belge* of 24 April 1965, p. 4430).

9 Article 120 of the CTAT provides:

‘The following transactions, concluded or executed in Belgium in respect of Belgian or foreign Government stocks shall be subject to the tax on stock exchange transactions:

- (1) any sale or purchase and, more generally, any disposal or acquisition for valuable consideration;
- (2) any allotment to a subscriber [*délivrance*] following an issue, offer or sale by means of a public offer.’

10 Under Articles 120(2) and 121(1) of the CTAT the tax on stock exchange transactions applies to the allotment to subscribers of stocks or debentures. Its rate varies between 0.07 % and 1 %.

11 Article 126(1)1 of the CTAT exempts from the tax on stock exchange transactions those in which no professional intermediary either acts or contracts on behalf of one of the parties or for his own account.

12 The first and second paragraphs of Article 159 of the CTAT are worded as follows:

‘Any delivery of bearer securities in respect of Belgian or foreign Government stocks shall be subject to the tax on the delivery of bearer securities.

“Delivery” means any physical delivery of the security which takes place following:

- (1) subscription;
- (2) acquisition for valuable consideration;
- (3) conversion of registered securities into bearer securities;
- (4) withdrawal of securities on deposit for safe custody and administration with a lending institution, a stockbroker, an asset management company or the Caisse interprofessionnelle de dépôts et de virements de titres (Interprofessional agency for deposit and payment of securities).⁷

¹³ Article 163(1) of the CTAT provides that the delivery of securities following their acquisition for valuable consideration in which no professional intermediary acts or contracts on behalf of one of the parties is exempt from the tax on the delivery of bearer securities.

¹⁴ Article 120(1) and (2) and Article 159 of the CTAT, which define the scope of the tax on stock exchange transactions and the tax on the delivery of bearer securities respectively, make no distinction between initial issues of securities and subsequent transactions in existing securities.

Pre-litigation procedure

- 15 Since it considers that the tax on stock exchange transactions and the tax on the delivery of bearer securities are contrary to Article 11 of Directive 69/335, the Commission gave the Kingdom of Belgium formal notice, by letter of 10 May 1999, to submit its observations within a period of two months.
- 16 By letter of 2 August 1999, the Belgian Government informed the Commission that it considered that the two taxes in question came within the scope of Article 12(1)(a) of Directive 69/335.
- 17 Since it did not regard that answer as satisfactory, the Commission sent a reasoned opinion to the Kingdom of Belgium on 26 January 2000, requesting it to adopt the necessary measures to comply with the opinion within two months of its notification.
- 18 By letter of 29 March 2000, the Belgian Government informed the Commission that it adhered to its view and requested that a meeting be arranged with the Commission's representatives. Since that meeting, which was held on 14 December 2000, did not enable a solution to be reached, the Commission decided to bring the present action.

The action

- 19 The Commission submits that by levying on new securities the tax on stock exchange transactions and the tax on the delivery of bearer securities, the Kingdom

of Belgium infringed Article 11 of Directive 69/335, which prohibits the Member States from subjecting to tax, in any form whatsoever, among other things, the issue of securities.

The complaint concerning the tax on stock exchange transactions

Arguments of the parties

- 20 According to the Commission, the tax on stock exchange transactions is contrary to Article 11 of Directive 69/335 to the extent that it applies to the subscription for new securities, created when a company or investment fund is being set up, following an increase in capital or as part of a loan issue.
- 21 The Commission submits that, contrary to the Belgian Government's contention, that tax does not come within the derogation provided for by Article 12(1)(a) of Directive 69/335, which, as an exception to the prohibition of the charge, is to be strictly interpreted and does not apply to newly created securities. That provision admittedly permits the Member States to charge tax on the transfer of securities, but the word 'transfer' assumes that the securities in question belonged to another owner prior to the transfer. That interpretation is confirmed, first, by the statement of reasons in the Proposal for a directive of 14 December 1964 and, second, by the Court's case-law (see Case 36/86 *Dansk Sparinvest* [1988] ECR 409 and Case 15/88 *Maxi Di* [1989] ECR 1391), from which it is clear that, in respect of the transactions mentioned in Article 11 of Directive 69/335, it is not permissible for a Member State to subject capital companies to tax other than taxes and duties provided for by Article 12 of that directive.

- 22 As regards the expression 'issue of securities', the Commission submits that it cannot be interpreted as covering the first transfer of such securities, since such an interpretation deprives the prohibition laid down by Article 11 of Directive 69/335 of any effect. The issue of securities cannot be separated from the acquisition thereof by the subscribers and the prohibition on taxing the issue is applicable, by analogy with the Court's decision in Joined Cases C-31/97 and C-32/97 *FECSA and ACESA* [1998] ECR I-6491, paragraphs 18 and 19, to the overall transaction, which includes the acquisition of the securities by the subscriber.
- 23 The Commission disputes the Belgian authorities' interpretation of Article 4(1) of the 1976 Proposal for a directive. Contrary to the Belgian Government's submission, while that provision prohibits taxation of the issue of securities and the first acquisition thereof, the prohibition cannot be interpreted as indicating that those two operations are separate or that that issue alone is covered by Article 11 of Directive 69/335. On the contrary, the repetition of the prohibition in the latter provision in another proposal for a directive is caused by a desire for clarity. Thus, the words 'first acquisition of securities immediately consequent upon such issues' only clarify the content of the prohibition laid down by Article 11.
- 24 As regards the scope of the tax on stock exchange transactions, the Commission claims that the fact that certain transactions are not subject to that tax does not excuse infringement of Article 11 of Directive 69/335. It adds that, contrary to the Belgian Government's submission, the subject of the charge to tax on stock exchange transactions is not confined to the execution of a transaction in securities pursuant to a stock exchange bargain. In any event, neither the action of professional intermediaries in the transactions subject to that tax nor the identity of the person liable thereto can be taken into account in determining the compatibility of that tax with the abovementioned provision.

25 The Belgian Government submits that Article 11(1)(a) of Directive 69/335 does not prevent the taxing of the first transfer of securities after their creation.

26 According to that Government, the use of the word 'dealing' in Article 11 of Directive 69/335 necessarily implies that there must be a series of subsequent transfers. The prohibition of any taxation on those transactions has a very wide scope which should however be restricted by the derogation in Article 12(1)(a) of that directive, which permits the taxation of transfers of securities.

27 The Belgian Government argues that the interpretation of the word 'issue' suggested by the Commission and the argument that 'transfer' presupposes the existence of a previous owner cannot be accepted. The expression 'issue of securities' does not cover the first acquisition of securities by the subscriber, but is confined to the issuing company's activity.

28 It follows from the 1976 Proposal for a directive that 'issue of securities' must be understood as referring to the first allotment of those securities and does not include their initial acquisition. Since that proposal has never been adopted, it is permissible for the Member States to charge taxes on the initial acquisition of securities. Further, it follows from Case C-236/97 *Codan* [1998] ECR I-8679 that the word 'transfer' in Article 12(1)(a) of Directive 69/335 is to be interpreted broadly, and that all transfers of securities, including stock exchange transfers, must be subjected to the same regime and are entitled to benefit from the derogation provided for by that provision.

- 29 The Belgian Government contends that Article 4(1) of the 1976 Proposal for a directive admittedly runs counter to the general prohibition under Article 11 of Directive 69/335, but that it follows from the distinction therein between the issue of securities and their acquisition that it is the issue alone which cannot be taxed. The second transaction, coming within the derogation set out in Article 12(1)(a) of that directive, escapes that prohibition.
- 30 In that regard, the Belgian Government adds that it is clear from the above-cited cases, *Dansk Sparinvest* and *Maxi Di*, that the prohibition on taxation in Article 11 of Directive 69/335 applies only to capital companies, that is to say the issuers, and that making investors or the initial acquirers subject to the payment of a tax is not contrary to that provision. Since investors alone are subject to the tax on stock exchange transactions, the Belgian legislation actually exempts the issue of securities as an overall transaction.

Findings of the Court

- 31 In order to rule on the Commission's first complaint, it is appropriate to recall that Article 11(a) of Directive 69/335 prohibits any form of taxation whatsoever on 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.
- 32 While it is true, as the Belgian Government submits, that that provision does not expressly mention the first acquisition of stocks, shares, or other securities of the same type, the fact remains, as the Advocate General pointed out in paragraph 14 of his Opinion, that to permit the levying of tax or duty on the initial acquisition of a

newly issued security amounts in reality to taxing the very issue of that security as it forms an integral part of an overall transaction with regard to the raising of capital. The issue of securities is not an end in itself, and has no point until those securities find investors.

33 For Article 11(a) of Directive 69/335 to have practical effect, therefore, 'issue', for the purposes of that provision, must include the first acquisition of securities immediately consequent upon their issue.

34 That finding is not put in question by the Kingdom of Belgium's arguments.

35 As regards, first, the argument that, since Article 11(a) of Directive 69/335 did not expressly mention the initial acquisition of securities following their issue, that operation does not come within the prohibition under that provision, it is appropriate to observe that, first, by mentioning the first acquisition of securities 'immediately consequent upon such issues', Article 4(1)(a) of the 1976 Proposal for a directive indicates that the first acquisition of securities forms an integral part of, and cannot be separated from, the more general operation of the issue of securities. Secondly, the fact that the Commission, taking appropriate account of differences in the interpretation or the application of the said Article 11(a), wished to ensure the uniform application of the directives applying to the same transactions by giving a clearer definition of the 'issue of shares' does not affect the finding that, from an economic point of view, the first acquisition of securities immediately consequent upon their issue must be regarded as forming part of that issue.

- 36 As regards, secondly, the argument that the tax on stock exchange transactions does not come within the scope of Directive 69/335, on the ground that those liable to that tax are not the capital companies covered by that directive but investors, it is sufficient to state that the prohibition on levying taxation other than capital duty and the other taxes and duties mentioned in Article 12 refers only to the capital transactions expressly listed, without it being necessary, in order to define them, to specify the identity of the person liable to the tax.
- 37 As regards, thirdly, the argument that the tax on stock exchange transactions is a duty on the transfer of securities, within the meaning of Article 12(1)(a) of Directive 69/335, which must therefore benefit from the derogation under that provision, it is appropriate to observe that, like any exception, that derogation must be strictly interpreted and cannot result in the principle from which it derogates being deprived of any practical effect.
- 38 To interpret the word ‘transfer’ in Article 12(1)(a) of Directive 69/335 in a way such as that suggested by the Belgian Government would deprive Article 11(a) thereof of its practical effect, with the result that the issue operation, which must not, according to that provision, be subjected to any tax or duty other than capital duty, could none the less be charged to tax or duty because newly issued securities are necessarily, consequent upon their issue, ‘transferred’ to their acquirers.
- 39 Accordingly, the first acquisition of securities immediately consequent upon their issue cannot be regarded as a ‘transfer’ within the meaning of Article 12(1)(a) of Directive 69/335, and therefore a tax on such initial acquisition cannot come within the derogation under that provision.

40 Having regard to those considerations, it must be held that to the extent that it is levied on new securities, issued when a company or investment fund is being set up or following an increase in capital or as part of a loan issue, the tax on stock exchange transactions is a tax within the meaning of Article 11(a) of Directive 69/335 the imposition of which is prohibited by that provision.

41 It follows that the Commission's first complaint is well founded.

The complaint concerning the tax on the delivery of bearer securities

Arguments of the parties

42 The Commission submits that its arguments regarding the tax on stock exchange transactions can be transposed, *mutatis mutandis*, to the tax on the delivery of bearer securities. It makes clear, however, that the latter tax is contrary to Article 11 of Directive 69/335 only to the extent that it applies to the delivery of securities as part of their issue.

43 The Belgian Government argues, first of all, that the Commission has given no sufficient reason for its case that the tax on the delivery of bearer securities is incompatible with Article 11 of Directive 69/335. The mere reference to the arguments developed in respect of the tax on stock exchange transactions is insufficient since the two taxes are very different.

- 44 The Belgian Government contends also that the tax on the delivery of bearer securities, the objective of which is to discourage the delivery of physical securities and to encourage the deposit of securities for safe custody and administration, complies with the prohibition in Article 11 of Directive 69/335, since only the physical delivery of securities is subjected to taxation. That operation is autonomous and independent of the issue of the securities. The fact that the securities issued are registered, computerised or deposited for safe custody and administration with a finance house does not give rise to a charge to that tax. In addition, the delivery of bearer securities cannot be described as ‘making available on the market’ or ‘dealing in’ those securities within the meaning of Article 11 of Directive 69/335.
- 45 The Belgian Government argues, finally, that taxing the delivery of bearer securities comes within the derogation in Article 12(1)(a) of Directive 69/335, since the word ‘transfer’, as interpreted by the Court in *Codan*, cited above, covers both the legal vesting of the securities and their physical delivery.

Findings of the Court

- 46 The Commission’s complaint is limited to the levying of the tax on the physical delivery of bearer securities immediately consequent upon their issue.

47 Even if, as the Belgian Government submits, the issue of bearer securities itself does not give rise to the levying of that tax, the physical delivery of that type of security to the initial acquirers thereof must, for the reasons stated in paragraph 35 of this judgment, be regarded as forming an integral part of the issue, within the meaning of Article 11(a) of Directive 69/335.

48 It is important to add that the physical delivery of bearer securities to their initial acquirers likewise does not come within the derogation in Article 12(1)(a) of Directive 69/335, since, as is clear from paragraph 37 of this judgment, the word 'transfer' is to be interpreted strictly and cannot, for the reasons set out in paragraph 38 above, cover the initial physical delivery of newly issued securities.

49 Contrary to the Belgian Government's submission, that finding does not conflict with the Court's interpretation of Article 12(1)(a) of Directive 69/335 in *Codan*.

50 As the Advocate General pointed out in paragraph 38 of his Opinion, in that judgment the Court did not uphold a broad interpretation of the expression 'transfer of securities', but confined itself to giving a uniform interpretation of the various language versions of Directive 69/335, in the case of divergences between them, by holding that Article 12(1)(a) thereof cannot be interpreted as meaning that it limits the Member States' ability to impose taxes on stock exchange transactions alone, as the German and Danish versions of that directive provide.

51 Having regard to those considerations, it must be held that, to the extent that it applies to the initial physical delivery of newly-issued bearer securities, the tax on the delivery of bearer securities constitutes a tax prohibited by Article 11(a) of Directive 69/335.

52 It follows that the Commission's second complaint is also well founded.

53 As a result, it must be held that:

- by imposing the tax on stock exchange transactions on applications made in Belgium for new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of a loan issue, and

- by imposing the tax on the delivery of bearer securities on the physical delivery of bearer securities relating to Belgian or foreign Government stocks, in the case of new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of a loan issue,

the Kingdom of Belgium has failed to fulfil its obligations under Article 11 of Directive 69/335.

Costs

- 54 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Declares that,

- **by imposing the tax on stock exchange transactions on applications made in Belgium for new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of a loan issue, and**

- **by imposing the tax on the delivery of bearer securities on the physical delivery of bearer securities relating to Belgian or foreign Government stocks, in the case of new securities issued when a company or investment fund is being set up or following the completion of an increase in capital or as part of 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, as amended by Council Directive 85/303/EEC of 10 June 1985;

2. Orders the Kingdom of Belgium to pay the costs.

Timmermans

Gulmann

Schintgen

Macken

Colneric

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass

C.W.A. Timmermans

Registrar

President of the Second Chamber