



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 18 December 2014¹

Case C-357/13

Drukarnia Multipress sp. z o.o. w Krakowie
v
Minister Finansów

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Krakowie (Poland))

(Taxation — Directive 2008/7/EC — Article 2 — Indirect taxes on the raising of capital — Subjection to capital duty of capital contributions to a partnership limited by shares — Whether such an entity can be classified as a capital company — Exemptions — Rules applicable to entities operating for profit which are not regarded as capital companies)

I – Introduction

1. This reference for a preliminary ruling relates essentially to the interpretation of the term ‘capital company’ within the meaning of Article 2(1)(b) and (c) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.²
2. The main proceedings are between a limited company incorporated under Polish law, Drukarnia Multipress sp. z o.o., of Cracow, (‘Drukarnia’) and the Minister Finansów (Minister for Finance, ‘the Minister’) and concern the Minister’s refusal to recognise a partnership limited by shares under Polish law (‘PLS’) as a capital company within the meaning of Directive 2008/7 for the purposes of the levying of national tax in connection with the conversion of Drukarnia into a PLS.
3. This case illustrates the autonomous nature of Directive 2008/7 with regard to the particularities of national company law, in that determining the scope of the concept of ‘capital company’ for the purposes of that directive involves going beyond the formal classification of the entity in question under national law.

¹ — Original language: French.

² — OJ 2008 L 46 p. 11.

II – Legal framework

A – EU law

4. Under Article 2(1) of Directive 2008/7:

‘For the purposes of this Directive “capital company” means:

- (a) any company which takes one of the forms listed in Annex I;
- (b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;
- (c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.’

5. Article 2(2) of Directive 2008/7 provides that ‘[f]or the purposes of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company’.

6. Article 9 of Directive 2008/7 provides:

‘Member States may for the purposes of levying capital duty choose not to regard as capital companies the entities referred to in Article 2(2).’

B – Polish law

7. Article 1(1) of the Law on the tax on civil law acts (‘the PCC Law’)³ provides that the tax is chargeable on civil law acts including the founding documents of a company or partnership and amendments to those documents which give rise to an increase in the tax base for the purposes of the tax on civil law acts.

8. Article 1(3) of the PCC Law states that, in the case of a partnership, an amendment to the document includes ‘a contribution or increased contribution whose value leads to an increase in the assets of the partnership or an increase in its capital’ and, in the case of a capital company, ‘an increase in the capital from contributions or from resources of the company and additional payments’.

9. Contributions to a PLS are thus subject to the same tax as contributions to a capital company. Article 2(6) of the PCC Law nevertheless exempts from tax the founding documents of a company or partnership and amendments to them which result from a contribution to a capital company, in return for shares in the company, of the business of a capital company or an organised part of it, or of shares in another capital company giving a majority of voting rights in it. This provision implements the

³ — Ustawa o podatku od czynności cywilnoprawnych, 9 September 2000 (Dz.U. 2010, No 101, item 649).

obligation to transpose the provisions of Article 5(1)(e)⁴ in conjunction with Article 4(1)(b)⁵ of Directive 2008/7, or in other words the obligation on Member States not to subject capital companies to any form of indirect tax in respect of restructuring operations. This exemption provided for by the PCC Law applies to capital companies, and consequently excludes PLSs, which are treated as partnerships under Polish law.

III – Background to the dispute, the questions referred and the procedure before the Court of Justice

10. With a view to converting itself into a PLS and then increasing its capital by means of a contribution in kind made up of shares in another PLS, shares in a share company and shares in a limited liability company, Drukarnia filed a request with the Polish tax authorities on 21 September 2012 for an interpretation of the provisions relating to the tax on civil law acts. As the Wojewódzki Sąd Administracyjny (Poland) points out, the PCC Law governs the imposition of capital duty within the meaning of Directive 2008/7.⁶

11. Drukarnia maintained that PLSs were capital companies within the meaning of Article 2(1)(b) of Directive 2008/7. On that basis, it argued that the combined effect of Article 4(1)(b) and Article 5(1)(e) of that directive was that the conversion operations described above could not be subjected to the tax.

12. By written rulings of 20 November 2012, the Minister decided that a PLS under Polish law did not fall within the scope of Directive 2008/7. He observed, first, that only some of the shares and members of a PLS fulfilled the criteria for it to be regarded as a capital company within the meaning of Article 2(1)(b) or (c) of Directive 2008/7. Furthermore, the Republic of Poland had chosen not to include PLSs in Annex I⁷ to Directive 2008/7, and had preferred to exercise the option granted by Article 9 of that directive, so that PLSs could not be considered to be capital companies under Article 2(2) of the directive either. Consequently, Articles 4, 5 and 7 of Directive 2008/7 were not applicable to a PLS.

13. Drukarnia brought an action before the referring court seeking annulment of those written rulings, on the ground that they infringed, amongst other provisions, Article 2(1) of Directive 2008/7. The Minister repeated his earlier reasoning and sought dismissal of the action.

4 — Article 5(1)(e) of Directive 2008/7 is in the following terms:

‘Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:

...

(e) the restructuring operations referred to in Article 4.’

5 — Article 4(1)(b) provides:

‘For the purposes of this Directive, the following restructuring operations shall not be considered to be contributions of capital:

...

(b) the acquisition, by a capital company which is in the process of being formed or which is already in existence, of shares representing a majority of the voting rights of another capital company, provided that the consideration for the shares acquired consists at least in part of securities representing the capital of the former company. Where the majority of the voting rights is reached by means of two or more transactions, only the transaction whereby the majority of voting rights is reached and any subsequent transactions shall be regarded as restructuring operations.’

6 — See judgment in *Logstor ROR Polska* (C-212/10, EU:C:2011:404).

7 — Annex I to Directive 2008/7 comprises a list of the companies regarded as ‘capital companies’ in accordance with national law. I note with regard to French, German, Italian and Spanish law that partnerships limited by shares were included in Annex I.

14. In those circumstances, the Wojewódzki Sąd Administracyjny stayed the proceedings and referred the following two questions to the Court for a preliminary ruling:

- (1) Should Article 2(1)(b) and (c) of [Directive 2008/7] be interpreted as meaning that a [PLS] should be regarded as a capital company within the meaning of those provisions if it follows from the legal nature of that partnership that only some of its capital and partners are able to meet the requirements set out in Article 2(1)(b) and (c) of the directive?
- (2) If the first question is answered in the negative, should Article 9 of [Directive 2008/7], which allows a Member State to choose not to recognise the entities referred to in Article 2(2) of the directive as capital companies, be interpreted to mean that that Member State is also free to choose whether or not to levy capital duty on such entities?

15. The request for a preliminary ruling was registered at the Court Registry on 27 June 2013. Written observations were lodged by Drukarnia, the Minister, the Polish Government and the European Commission. Drukarnia, the Polish Government and the Commission appeared at the hearing on 22 October 2014.

IV – Question 1

A – *Introductory remarks*

16. The main proceedings revolve around the interpretation of Article 2 of Directive 2008/7. This provision refers to four categories of companies or partnerships, the categorisation being independent of the specific form of the entity concerned.⁸ Thus, under Article 2(1)(a), the concept of ‘capital company’ means, first, capital companies which the Member States have chosen to include in Annex I to Directive 2008/7. Under Article 2(1)(b), the concept of ‘capital company’ includes in addition any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange. Under Article 2(1)(c), the concept of ‘capital company’ also refers to any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are responsible for the debts only to the extent of their shares. Finally, the fourth category is provided for by Article 2(2) of the directive, under which ‘any other company, firm, association or legal person operating for profit’ is deemed to be a capital company for the purposes of the directive.

17. In the present case, the national court asks the Court whether the conditions laid down in Article 2(1)(b) and (c) of Directive 2008/7 must be fulfilled in respect of all of the capital and partners of the partnership, or whether it is sufficient, having regard to the legal nature of the partnership, for those conditions to be fulfilled in respect of some of its capital and partners.

⁸ — See also the typology based on three categories of entities, proposed by Advocate General Darmon in his Opinion in *Amro Aandelen Fonds* (112/86, EU:C:1987:338, points 7 and 8).

18. With regard to the distinction between partnerships and companies, it is apparent from the case-file that a PLS has some hybrid characteristics, it being noted that Polish law classifies it as a partnership.⁹ A PLS therefore enables an active investor (the general partner) and a passive investor (the shareholder) to form an entity.¹⁰

19. As the referring court explains, the members of a PLS must include at least one general partner and at least one shareholder. The regime applicable to the general partner is the same as for a partner in a commercial partnership or limited partnership, while the regime applicable to the shareholder is the same as for a shareholder in a capital company. Moreover, the provisions relating to share companies apply by analogy to all matters which are not specifically regulated, except for the legal relations of general partners, which are governed by the provisions relating to commercial partnerships, these being a paradigmatic example of a partnership.

20. In view of its hybrid nature, the capital of a PLS is made up of two kinds of capital: on the one hand, the capital (*kapitał zakładowy*) corresponding to the shares, which is governed *mutatis mutandis* by the provisions of the Polish Code of Commercial Companies ('the CCC')¹¹ relating to share companies, and on the other, the capital representing the contributions of the general partners (*kapitał udziałowy*), which is governed by the provisions applicable to partnerships within the meaning of the CCC.

21. In this regard, in their observations Drukarnia and the Commission have argued for the interpretation under which PLSs are capital companies within the meaning of Article 2(1)(b) and (c) of Directive 2008/7, on the basis that those provisions do not require the entirety of the capital shares and members to fulfil the conditions laid down. The Polish Government and the Minister for their part take the opposite view. They maintain, first, that taking account of their predominantly personal nature, the Republic of Poland did not include this form of entity in Annex I to Directive 2008/7 and, secondly, that there is no indication in Article 2(1)(b) or (c) of the directive that it is sufficient for an entity to fulfil the conditions in respect of only part of its capital and members.

B – The interpretation of Article 2(1)(b) and (c) of Directive 2008/7

1. The objectives and general scheme of Directive 2008/7

22. It is settled case-law that, in interpreting a provision of EU law, account must be taken of its wording and the objectives it pursues as well as its context, while the origins of the provision may also provide information relevant to its interpretation.¹²

23. Furthermore, the need for a uniform application of EU law and the principle of equal treatment require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous interpretation throughout the European Union.¹³ Article 2(1) of Directive 2008/7 lays

9 — It is apparent from oral submissions at the hearing that partnerships under Polish law, including PLSs, do not have legal personality. In this regard, while acknowledging that Directive 2008/7 is based on the concept of a legal person (in that it is applicable to companies, associations and other legal persons), it remains the case that the concept of a legal person is not harmonised in EU law. It follows that the academic debate on this subject is not relevant for the purposes of applying Directive 2008/7. In any event, it is clear from the case-file that a PLS has the capacity to be a party to proceedings and may hold rights and be subject to obligations in its own name.

10 — Kidyba, A., *Komentarz aktualizowany do art. 1-300 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych*, commentary on Article 1(6) and Article 125 of the Polish Code of Commercial Companies; Lewandowski, R., *Polska koncepcja legislacyjna spółki komandytowo akcyjnej*, Kluwer 2007, point 1.1 et seq.

11 — Ustawa Kodeks spółek handlowych, 15 September 2000, Dz.U. 2013, item 1030.

12 — See, to that effect, in particular, judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 50 and the case-law cited).

13 — See, to that effect, judgment in *Ekro* (327/82, EU:C:1984:11, paragraph 11).

down, in a mandatory and uniform manner for all Member States, the entities which are to be regarded as capital companies within the meaning of that directive.¹⁴ In my opinion, it follows that that provision establishes an autonomous concept of ‘capital company’ and assimilated entities, while requiring such companies to be companies, firms, associations or other legal persons under national law.¹⁵

24. In the present case, the wording of Article 2(1) of Directive 2008/7 does not lend itself to a literal interpretation, which means that there is no easy answer to the question.

25. On a purposive approach, it is stated in recitals 2 to 14 in the preamble to Directive 2008/7, which recast Directive 69/335,¹⁶ that indirect taxes on the raising of capital give rise to discrimination, double taxation and disparities which interfere with the free movement of capital, and that the best solution would be to abolish capital duty. However, since the losses of revenue which would result from the immediate application of such a measure were unacceptable for Member States which then applied capital duty, those Member States were given the opportunity to continue to subject certain operations to a harmonised capital duty,¹⁷ except in relation to certain restructuring operations, including contributions of assets to a capital company.¹⁸

26. Nevertheless, it is common ground that Directive 2008/7 is intended to promote the free movement of capital, which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market.¹⁹ Directive 2008/7 thus seeks to limit as far as possible the negative effects of capital duty on the free movement of capital and conditions of competition within the European Union, and to bring about the abolition of indirect taxes on the raising of capital.²⁰

27. Furthermore, since Directive 2008/7 adopted, in Article 2, the concept of ‘capital companies’ as used in Directive 69/335, the case-law of the Court of Justice relating to the latter directive remains entirely relevant to the interpretation of Directive 2008/7.

28. It is apparent from that case-law, in particular, that ‘the definition of capital company is ... wide and not tied to any specific form of company’,²¹ which points, in my view, in favour of a broad interpretation of the concept in the light of the general scheme and objectives of Directive 2008/7.²² Accordingly, the Court has held that the directive applied to all raising of capital for the purpose of earning profit by pooling capital in a separate fund, even in the absence of legal personality.²³

14 — See, *mutatis mutandis*, judgment in *ING. AUER* (C-251/06, EU:C:2007:658, paragraph 28).

15 — See, in relation to the definition in Article 5(2) 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), judgment in *Felicitas Rickmers-Linie* (270/81, EU:C:1982:281, paragraph 14).

16 — This directive had a twofold objective, namely (i) an exhaustive harmonisation of taxes on the raising of capital (capital duty, stamp duty and duty on restructuring operations) in relation to both structure and rates, and (ii) to prevent Member States from creating or collecting other taxes with the same characteristics.

17 — The Commission is required to report every three years on the operation of the directive, with a view to abolishing this duty.

18 — By virtue of Article 4(1)(b) in conjunction with Article 5(1)(e) of Directive 2008/7.

19 — Judgment in *Gielen* (C-299/13, EU:C:2014:2266, paragraph 20).

20 — The Court has held that this was the ‘primary objective’ of Directive 69/335; see, to that effect, judgments in *Senior Engineering Investments* (C-494/03, EU:C:2006:17, paragraph 43), *Optimus — Telecomunicações* (C-366/05, EU:C:2007:366, paragraph 31); and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 49). Nevertheless, recent legislative proposals seem to have given new relevance to capital duty via the concept of a financial transaction tax (Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 final); see *JurisClasseur Europe*, Fasc. 1650, *Fiscalité indirecte*, updated 1 October 2012.

21 — Judgment in *Amro Aandelen Fonds* (112/86, EU:C:1987:488, paragraph 8), relating to Article 3(1) of Directive 69/335.

22 — See judgment in *Commission v Greece* (C-178/05, EU:C:2007:317, paragraph 43).

23 — Berlin, D., ‘Chronique de jurisprudence fiscale européenne’, *Revue trimestrielle de droit européen*, 24(2), April-June 1998, p. 380, commentary on *Amro Aandelen Fonds* (EU:C:1987:488).

29. As Advocate General Darmon emphasised, it was not a question of producing an exhaustive catalogue of the entities whose legal structure was to be assimilated to capital companies, but ‘solely of covering as widely as possible all bodies likely to engage in the taxable transactions’.²⁴

2. Examination of the conditions laid down in Article 2(1)(b) of Directive 2008/7

30. Article 2(1)(b) of Directive 2008/7 provides that ‘capital company’ is to mean ‘any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange’.

31. It should be observed at the outset that that provision does not lay down a threshold beyond which a company is to be considered as fulfilling the criteria for a ‘capital company’.²⁵

32. Furthermore, the directive does not require that the shares in a company have actually been dealt in on a stock exchange. On the contrary it is apparent that the mere possibility of such dealing is sufficient for the purposes of classifying an entity as a capital company within the meaning of the directive.²⁶

33. It should nevertheless be borne in mind that it is apparent from Directive 2008/7 that it is intended to apply only to capital companies, as defined by the directive, and to companies, firms, associations or legal persons operating for profit which are deemed to be capital companies. According to the judgment in *Palais am Stadtpark*, such entities are also to be considered as capital companies by Member States for the purposes of charging capital duty.²⁷ Consequently, I consider that an entity which meets the criteria set out in Article 2(1) of the directive cannot be excluded from the scope of the concept of a ‘capital company’, within the meaning of that directive, by virtue of national law.

34. In the present case, although it is not disputed that the Polish PLS does not appear in Annex I to Directive 2008/7, as referred to in Article 2(1)(a) of the directive,²⁸ this form of partnership is not unknown to EU legislation, being mentioned in particular in Article 1 of the first company law directive, as codified.²⁹ Accordingly, the safeguards intended to protect the interests of both members and third parties apply to it. A PLS is also subject to the provisions of the fourth company law

24 — See Opinion of Advocate General Darmon in *Amro Aandelen Fonds* (EU:C:1987:338, point 6).

25 — The legislative materials do not indicate that such a threshold was even considered. See in this regard the Proposal for a Council directive concerning indirect taxes on the raising of capital, COM(2006) 760 final, the draft report on the proposal for a Council directive concerning indirect taxes on the raising of capital (COM(2006)0760-C6-0043/2007-2006/0253(CNS)), PE 388.476v01-00, and the report on the proposal for a directive A6-0472/2007.

26 — On the classification of an agricultural cooperative whose shares cannot be dealt in on a stock exchange under Greek law, see judgment in *Commission v Greece* (EU:C:2007:317, paragraph 41).

27 — C-508/99, EU:C:2002:295, paragraph 26. I note that the present case is to be distinguished from *Palais am Stadtpark*, which related to the charging of capital duty on the conversion of a partnership into a capital company in a particular chronological context. By contrast the present case, from the point of view of national law, relates to the conversion of a capital company (sp. z o.o.) into a partnership under Polish law (PLS).

28 — It is apparent from the case-file that a partnership limited by shares is regarded as a capital company *inter alia* in French, German, Italian, Luxembourg, Portuguese and Spanish law.

29 — First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968(I), p. 41). This directive was repealed by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11).

directive.³⁰ In accordance with Article 1 of Directive 2013/34, read in conjunction with Annexes I and II to the directive, the EU legislature has clearly classified a PLS as a capital company, while an ordinary limited partnership under Polish law is outside the scope of that directive, unless its general partner is a capital company, including a PLS.³¹

35. Furthermore, the CCC³² provides for the provisions governing share companies to apply to PLSs in relation to all aspects comparable with those of a capital company. Consequently, they are subject *inter alia* to Directive 2001/34/EC.³³ That directive was transposed into Polish law by the Law on transactions in financial instruments,³⁴ which defines securities in such a way as to include shares.³⁵

36. It follows that the shareholders' shares in a PLS can be dealt in on a stock exchange in the same way as shares in a share company.³⁶ On the other hand the general partners' shares cannot be dealt in on a stock exchange, as is clear from the case-file.

37. I note in this context that the idea of 'incompleteness' of the securities which can be admitted to official listing occurs elsewhere in EU law, in that it is also permitted by Directive 2001/34.³⁷ Thus an acceptance in the present case that only part of the capital can be dealt in on a stock exchange finds a place in the wider context of EU company law.

38. Furthermore, while a PLS may be regarded as the most complex form of partnership, borrowing aspects of its legal regime from capital companies, it nevertheless remains, from the point of view of national law, a partnership.³⁸ It should be noted, however, that national law allows of cases which go beyond a mere symmetry between the status of general partner and that of shareholder by permitting, under certain conditions, their roles to be confused.³⁹

30 — Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11). This directive was repealed by Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

31 — Under Article 1 of Directive 2013/34:
'The coordination measures prescribed by this Directive shall apply to the laws ... of the Member States relating to the types of undertakings listed:

(a) in Annex I;
(b) in Annex II, where all of the direct or indirect members of the undertaking having otherwise unlimited liability in fact have limited liability by reason of those members being undertakings which are:
(i) of the types listed in Annex I; or
(ii) not governed by the law of a Member State but which have a legal form comparable to those listed in Annex I.'
The PLS appears in Annex I to the directive.

32 — See Article 126(1)(2) of the CCC.

33 — Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ 2001 L 184, p. 1), as amended by Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 (OJ 2003 L 345, p. 64) ('Directive 2001/34').

34 — Ustawa o obrocie instrumentami finansowymi, 29 July 2005 (Dz U. 2005, No 183, item 1538), Article 2(1)(1) of which, read in conjunction with Article 3(1)(a), relates to shares.

35 — In this regard, the Polish Government's argument that the capital of a PLS would not be capable of being dealt in on a stock exchange if the shareholder held only registered shares cannot be accepted, as that is purely a possibility arising from the CCC. Furthermore, the Government accepts that a shareholder in a PLS may hold bearer shares capable of being dealt in on a stock exchange.

36 — See also the case-law of the Polish Supreme Administrative Court, which shows that a PLS contains an element of capital contribution (*element wkładu kapitałowego*), which entails that its shares may be listed, in particular on a stock exchange. Hence it is not the partnership itself but the financial instruments it issues which are capable of being traded in a regulated market (judgment of the Supreme Administrative Court, II FSK 1667/12, accessible at www.orzeczenia.nsa.gov.pl).

37 — See Articles 43(4) and Article 49 of Directive 2001/34.

38 — See Kidyba, A., *op. cit.*; Osajda, K., *O mankamentach regulacji spółek osobowych w KSH*, PPH, October 2012.

39 — Thus, under Article 127(3) of the CCC, a legal person may be a general partner, which means, in principle, that a limited liability company or even a share company can play that role. Furthermore, Article 132 of the CCC does not prevent the general partner, subject to certain conditions, from making a contribution to the share capital of the PLS. Although an increase of capital consequent on a contribution to the share capital by the general partner is prohibited, such an increase is permitted following a subscription for registered shares by a shareholder, even where that shareholder is a general partner: see Nowacki, A., *Kapitały własne spółki komandytowo-akcyjnej*, PPH, March 2008.

39. Finally, it is apparent from the case-file that the classification of the PLS as a capital company has been considered in national case-law, in particular that of the Polish Supreme Administrative Court, which has ruled in favour of such a classification of a PLS.⁴⁰

40. All of those factors support the view that the PLS has the characteristics of an entity within which capital is pooled, capital which ought to be able to move freely within the European Union in accordance with the objective of Directive 2008/7.

41. As Advocate General Tizzano has pointed out, '[t]he decision to restrict the scope of Community harmonisation to capital duty *levied on capital companies* was probably made on the basis that capital within those companies may circulate easily within the Community: it was those companies that might serve the objective of the promotion of the free movement of capital ... [T]he term capital company within the meaning of the directive includes associations which have as their aim to permit or facilitate the circulation of stock ...'.⁴¹

42. The foregoing observations thus lead me to conclude that a Polish PLS is a 'capital company' within the meaning of Article 2(1)(b) of Directive 2008/7.

3. A secondary issue: examination of the conditions in Article 2(1)(c) of Directive 2008/7

43. Under Article 2(1)(c) of Directive 2008/7, the concept of 'capital company' also extends to 'any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares'.

44. In the present case, it is apparent from the case-file that the general partner has unlimited liability for the debts of the partnership and that, in principle, the transfer of the general partner's rights and obligations is subject to the agreement of the members. Conversely, the shareholder is not liable in respect of the obligations of the partnership, and shares in a PLS are transferable. The transfer of registered shares can be subjected to the consent of the partnership or otherwise limited in the same way as for shares in a share company.⁴² Finally, it is common ground that a PLS is an entity operating for profit.

45. Having regard to the arguments developed in points 35 to 37 above concerning the lack of any requirement of completeness, the analysis of Article 2(1)(c) of Directive 2008/7 also militates in favour of the view that a PLS should be regarded as a capital company within the meaning of that directive.

46. In any event, in reply to the argument presented by the Polish Government at the hearing, to the effect that Article 12(2) of Directive 2008/7 precludes a PLS from falling within the scope of the directive, it seems to me that the wording of that provision, which is intended to prevent double taxation and concerns an exclusion from the basis of assessment for capital duty, points entirely in the opposite direction. It provides that a Member State may exclude from the basis of assessment for capital duty inter alia the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company. Such a structure is possible only in a PLS or a similar hybrid entity, which confirms that a PLS does indeed fall within the scope of Directive 2008/7.

47. In the light of the above, I suggest that Question 1 should be answered to the effect that a Polish PLS is a capital company within the meaning of Directive 2008/7.

40 — See the judgment of the Polish Supreme Administrative Court of 7 May 2014, II FSK 1980/12, and the academic analysis arguing in favour of such a classification in Szymaniak, K., *Opodatkowanie podatkiem od czynności cywilnoprawnych przekształcenia spółki kapitałowej w komandytowo-akcyjną a dyrektywa Rady 2008/7/WE*, Przegląd Podatkowy, April 2014, p. 41.

41 — Opinion of Advocate General Tizzano in *Palais am Stadtpark* (C-508/99, EU:C:2002:9, point 26).

42 — See Article 337(2) of the CCC.

V – Question 2

48. In the present case, the national court asks the Court a second question in the event that the first is answered in the negative. Although the first question should in my opinion be answered in the affirmative, there is an observation I none the less wish to make about the scope of Article 9 of Directive 2008/7. Essentially, by its second question the national court wishes to know whether Article 9 of Directive 2008/7 allows Member States to exempt PLSs from capital duty, or whether, on the other hand, it allows Member States to exclude duty on capital contributions to PLSs from the scope of Directive 2008/7.

49. The Commission's proposal in relation to Directive 2008/7 explained that '[t]he object of Article 2(2) is to prevent the choice of a particular legal form from leading to a different fiscal treatment of activities which are in principle equivalent. The second sentence of ex-Article 3(2) has been moved to Article 9 for editorial reasons. Under this provision Member States are not obliged to consider certain entities as capital companies for the purpose of charging capital duty'.⁴³

50. In this regard the Court has held that Article 3(2) of Directive 69/335 (now Article 2(2) of Directive 2008/7) is intended to apply, with a view to the charging of capital duty, to companies, firms, associations or legal persons which, while having the same economic function as capital companies properly so called, namely the earning of a profit by the pooling of capital in a separate set of assets, do not satisfy the criteria to be a 'capital company' as defined in Article 3(1). Article 3(2) of Directive 69/335 leaves Member States free, however, to limit the scope of the deeming clause that it contains, by allowing them to exempt certain categories of deemed capital companies from liability to capital duty.⁴⁴

51. Accordingly, where a Member State decides not to treat certain entities which are outside the scope of Article 2(1) of Directive 2008/7 as capital companies, using the power granted by Article 9 of Directive 2008/7, capital duty on contributions to such entities falls outside the scope of the directive and can thus be governed freely by national law.⁴⁵ The margin of appreciation thus left to Member States, which does not exist in relation to the entities referred to in Article 2(1) of Directive 2008/7, may therefore lead to a particular entity being deemed to be a capital company in one Member State but not in another.⁴⁶

52. Consequently, Article 9 of Directive 2008/7 allows Member States to exclude the entities concerned from the scope of the directive.

VI – Conclusion

53. In the light of the considerations set out above, I propose that the Court should answer the first question referred by the Wojewódzki Sąd Administracyjny in the following terms:

Article 2(1)(b) and (c) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital should be interpreted as meaning that a partnership limited by shares under Polish law, such as that at issue in the main proceedings, in which only some of the capital and partners can fulfil the conditions laid down by those provisions, is to be regarded as a capital company within the meaning of Directive 2008/7.

43 — Proposal for a directive COM(2006) 760 final, paragraph 2.

44 — Judgment in *Commission v Greece* (EU:C:2007:317, paragraphs 43 and 44).

45 — See, to that effect, judgment in *Palais am Stadtpark* (EU:C:2002:295).

46 — Judgment in *ING. AUER* (EU:C:2007:658, paragraph 32).