# JUDGMENT OF THE COURT

11 June 1996 *

In Case C-2/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the College van Beroep voor het Bedrijfsleven (Netherlands) for a preliminary ruling in the proceedings pending before that court between

**Denkavit Internationaal BV,**

**Galveston BV,**

**Heklicht Scheepvaartbelangen BV,**

**C. Roeleveld Beheer BV and Others,**

**R. J. Schippefelt,**

**Sigarenhandel Ben Sterk vof,**

**J. H. van Werkhoven Holding Maarssen BV**

* Language of the case: Dutch.

and

**Kamer van Koophandel en Fabrieken voor Midden-Gelderland,**

**Kamer van Koophandel en Fabrieken voor 's-Gravenhage,**

**Kamer van Koophandel en Fabrieken voor Amsterdam,**

**Kamer van Koophandel en Fabrieken voor Utrecht en Omstreken**

on the interpretation 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet (Rapporteur) and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and L. Sevón, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Denkavit Internationaal BV, by H. R. Buys, Director,

— Heklicht Scheepvaartbelangen BV, by A. J. H. W. M. Versteeg, of the Amsterdam Bar,

— R. J. Schippefelt, by W. F. Mars, Legal Adviser, acting as Agent,

— the defendants, by C. J. J. C. van Nispen, of the Hague Bar, and E. H. Pijnacker Hordijk, of the Amsterdam Bar,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Danish Government, by P. Biering, Head of Division at the Ministry of Foreign Affairs, acting as Agent,

— the Government of the Hellenic Republic, by P. Kamarineas, Deputy Legal Adviser at the State Legal Service, A. Rokofyllou, Special Adviser to the Deputy Minister for Foreign Affairs, and M. Basdeki, Legal Representative at the State Legal Service, acting as Agents,

— the United Kingdom, by S. L. Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by S. Richards and R. Thompson, Barristers,

— the Commission of the European Communities, by B. J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Denkavit Internationaal BV, represented by I. L. Buys, of the Utrecht Bar, Heklicht Scheepvaartbelangen BV, represented by A. J. H. W. M. Versteeg, the defendants, represented by C. J. J. C. van Nispen and E. H. Pijnacker Hordijk, the Danish Government, represented by P. Biering, the Government of the Hellenic Republic, represented by P. Kamarineas, A. Rokofyllou and M. Basdeki, the Netherlands Government, represented by M. Fierstra, Deputy Legal Adviser at the Ministry of Foreign Affairs, the United Kingdom, represented by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Wyatt QC and R. Thompson, and the Commission, represented by B. J. Drijber, at the hearing on 30 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 7 March 1996,

gives the following

## Judgment

1 By order of 23 November 1993, received at the Court on 5 January 1994, the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation 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; hereinafter 'Directive 69/335').

2 The questions arose in proceedings between, on the one hand, the companies Denkavit Internationaal (hereinafter 'Denkavit'), Galveston, Heklicht Scheepvaartbelangen, C. Roeleveld Beheer and Others, R. J. Schippefelt, Sigarenhandel Ben Sterk vof and J. H. van Werkhoven Holding Maarssen, and, on the other, the defendants, which are the Chambers of Trade and Industry for Midden-Gelderland, The Hague, Amsterdam, and Utrecht and its environs, concerning the payment to the Chambers of a levy on registration.

3 The documents in the main proceedings show that, in the Netherlands, Chambers of Trade and Industry are responsible under Article 1 of the Trade Register Law of 26 July 1918, as amended, for keeping and maintaining the trade register for their respective areas.

4 Article 1(1) of the Law provides for the registration in that register of all undertakings which:

(a) are established in the Netherlands, or

(b) have a secondary establishment in the Netherlands (...), or

(c) are represented in the Netherlands by an authorized agent.

Registration is to be on the register kept by the Chamber in whose area the undertaking in question has its main place of business or a subsidiary place of business.

5 In addition, Article 1(7) of the Law provides that all public limited companies, private limited companies, cooperatives, mutual insurance companies and European Economic Interest Groupings within the meaning of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1) which have their registered office in the Netherlands are to be registered.

6 Under Article 9(c) of the Law, 'Where a legal person covered by Article 1(7) is the owner of an undertaking which is registered with the Chamber of Trade and Industry in whose area the legal person has its registered office, registration of the said undertaking with the Chamber shall be deemed to constitute registration of the said legal person'.

7 Since there is no separate register for companies, the Netherlands trade register has a dual purpose. First, as a register of companies, it is deemed to satisfy the publicity and registration requirements for the legal acts of companies laid down by the 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; hereinafter 'Directive 68/151'). Secondly, as a register of undertakings, it constitutes a directory and source of economic information on undertakings established within the geographical area of each Chamber of Trade and Industry.

8 Article 22 of the Law provides that the Chambers of Trade and Industry are to levy an annual registration fee on undertakings, the rate of which is to be fixed by the Chamber in question. The undertakings are divided into groups according to the capital employed, less losses. The Chamber may not fix an amount which is higher than that laid down by general administrative measure for the relevant group of undertakings, although it may classify an undertaking in a group for which a higher amount is payable than for the group of which the undertaking in

question claims to be a member, if the Chamber considers that the undertaking falls within the former group or its size so warrants.

9 Under Article 22(6) of the Law, an amount fixed by general administrative measure — currently HFL 61 — is payable to the relevant Chamber for the registration of a legal person as referred to in Article 1(7) for each calendar year in which such person is or should be registered. That provision does not apply where the registration of the legal person's undertaking is deemed under Article 9(c) to be the registration of the legal person.

10 Article 26 of the Law provides that the levy is payable by the owner of the undertaking or, in the case of the registration of a legal person as referred to in Article 1(7), by that person. If the undertaking is owned by a number of persons, they are jointly and severally liable for the levy.

11 The applicants in the main proceedings, none of whom are taxed at the flat-rate amount of HFL 61, brought actions before the national court following rejection by the Chambers of Trade and Industry of their complaints against decisions assessing them for payment of the registration levy.

12 The national court is uncertain, first, as to whether the registration levy is compatible with Directive 69/335, having regard in particular to the judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* v *Amministrazione delle Finanze dello Stato* [1993] ECR I-1915 (hereinafter 'the judgment in *Ponente Carni*').

13 It also wishes to know, should the Court of Justice interpret Directive 69/335 as precluding the imposition of a registration levy of the type in dispute, whether in the light of the Court's case-law, and in particular its judgment in Case C-208/90 *Emmott* v *Minister for Social Welfare and the Attorney General* [1991] ECR I-4269, Chambers may rely on a 30-day time-limit, such as the time-limit for bringing administrative complaints and legal actions set by the Law on Administrative Actions concerning the Organization of the Economy, in order to resist claims by a company for the refund of fees it considers to have been unlawfully levied. The order for reference shows that that period had expired when Denkavit, in particular, lodged its complaint.

14 The College van Beroep voor het Bedrijfsleven therefore stayed the proceedings pursuant to Article 177 of the EC Treaty and referred the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Must Article 10 of Council Directive 69/335/EEC be interpreted as meaning that, in addition to a tax on the registration of companies, associations and legal persons as specified in the said article, a fee such as is payable annually by virtue of the — compulsory — registration of an undertaking with a Chamber of Trade and Industry and in respect of which the criterion is the economic importance of the undertakings as expressed — primarily — in terms of the undertaking's working capital, falls automatically within the scope of the prohibition set out in the said article, even where there is no connection between the compulsory nature of the registration of the undertaking and the legal form of those to whom the undertaking belongs?

(b) If the answer to that question is in the negative:

Where a registration as referred to in 1(a) above with respect to the owner of the undertaking complies with the formality described in Article 10(c) of Council Directive 69/335/EEC, should the levy imposed on the owner by virtue of the registration of the undertaking be regarded as a tax within

the meaning of the abovementioned article, even where it is not coupled with an increase in the levy referred to under 1(a) above?

2. If (one of) the above question(s) is(are) answered in the affirmative:

Can the concept of "duties paid by way of fees or dues" used in Article 12(e) of Council Directive 69/335/EEC also include a duty such as the levy imposed by a Chamber of Trade and Industry which, apart from covering the costs incurred by the Chamber in making the registrations in its trade register, is also used to finance tasks and activities which the Chamber performs in the interests of all undertakings in its area, the costs of such tasks and activities being spread among the undertakings by reference to the economic importance of the undertakings as expressed — primarily — in the undertaking's working capital?

3. If it must be assumed that a levy such as that referred to in the above questions is unlawful, can failure to comply with the time-limit prescribed by national law for the exercise of a legal remedy not be raised, so long as the provisions of national legislation on which the levy is based and which are incompatible with Directive 69/335/EEC have not been repealed, as a defence to a claim by an individual who in a dispute brought before a national court pleads that illegality by reference to that directive?'

15 The Court must first recall the purpose and content of Directive 69/335, as described in the judgment in *Ponente Carni*.

16 As its preamble shows, Directive 69/335 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. As regards taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes already in force in Member States and their replacement by a tax levied only once throughout the common market and at the same rate in all Member States.

17 Directive 69/335 therefore provides for capital which has been raised to be subject to a capital duty, which, as stated in the sixth and seventh recitals in the preamble to the directive, should be harmonized with regard both to its structures and to its rates, so as not to interfere with the movement of capital (Case 161/78 *Conradsen* v *Ministeriet for Skatter og Afgifter* [1979] ECR 2221, paragraph 11). That capital duty is governed by Articles 2 to 9 of the directive.

18 Article 3 determines the capital companies to which the directive is to apply, which include the 'naamloze vennootschap' (public limited liability company), the 'commanditaire vennootschap op aandelen' (limited partnership with a share capital) and the 'personenvennootschap met beperkte aansprakelijkheid' (private limited liability company).

19 Article 4 of the directive, Article 8, as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23), and Article 9 set out, subject to the provisions of Article 7, the transactions which are subject to capital duty and certain transactions which may be exempted by Member States. Under Article 4(1)(a), the formation of a capital company is one of the transactions subject to capital duty.

20 Directive 69/335 also provides, in accordance with the final recital in its preamble, for the abolition of other indirect taxes with the same characteristics as capital duty

or stamp duty on securities, the retention of which might frustrate the objectives pursued. Those indirect taxes, collection of which is prohibited, are listed in Articles 10 and 11 of the directive. Article 10 provides:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

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

(b) (...)

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

21 Article 12(1) of Directive 69/335 sets out an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may affect capital companies in connection with the transactions referred to in Articles 10 and 11 (see Case 36/86 *Ministeriet for Skatter og Afgifter* v *Dansk Sparinvest* [1988] ECR 409, paragraph 9). Article 12 refers in particular, in paragraph (1)(e), to 'duties paid by way of fees or dues'. Article 12(2) prohibits certain forms of discrimination concerning the taxes and duties referred to in Article 12(1).

## Question 1

22 In its first question, the national court asks, essentially, whether a tax such as the Netherlands trade register levy, inasmuch as it is payable annually by virtue of the registration of an undertaking with a Chamber of Trade and Industry, and inasmuch as that operation also serves, where the undertaking is owned by a capital company, as registration of that company, but without that latter formality being accompanied by an increase in the levy in question, falls within the scope of Article 10(c) of Directive 69/335.

23 It should be recalled at the outset that Article 10 of Directive 69/335, read in the light of the last recital in the preamble to the directive, prohibits in particular indirect taxes with the same characteristics as the capital duty. It thus envisages, *inter alia*, taxes in any form which are payable in respect of the formation of a capital company or an increase in its capital [Article 10(a)], or in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form [Article 10(c)] . As the Advocate General has pointed out in paragraph 44 of his Opinion, that latter prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the directive.

24 In this case, as the national court points out, the event which gives rise to the tax at issue consists, in Netherlands law, not in the registration of the company or the legal person which owns an undertaking but in the registration of the undertaking itself. What is concerned is a levy which affects, on the basis of their capital employed, all entities which, outside certain sectors, engage in trading and pursue as one of their objects the making of profits.

25 Such a levy is unrelated to the legal form of the entity which owns the undertaking in respect of which the levy is due. It may just as well be a natural person as a legal person, or a partnership as a capital company. Conversely, a company which does not own any undertaking is not subject to the levy, and a company which does not own an undertaking within the geographical area of the Chamber of Trade and Industry in which it has its registered office is not required to make payment to that Chamber.

26 The levy in question cannot therefore be linked to formalities to which capital companies may be made subject by reason of their legal form. Thus, an undertaking whose owner adopts the form of a capital company in the course of a year is not required to pay it a second time. Moreover, if in the following year that new legal person does not pay the levy, it does not thereby lose the benefit of its registration as a company.

27 That being so, the Netherlands levy at issue differs from the Italian administrative charge at issue in the *Ponente Carni* judgment. That charge was levied specifically on the registration of companies in the register of commercial companies and levied annually thereafter merely for retaining their registration.

28 That interpretation is not called into question by the fact that, under the Netherlands legislation, the registration of an undertaking with a Chamber of Trade and Industry also serves as registration of the legal person which owns the undertaking, whenever the registered office of that legal person is situated within the geographical area of the same Chamber. That provision, which was, moreover, introduced merely in order to implement Directive 68/151, cannot in itself alter the event giving rise to the tax in question and transform it into one due by virtue of the registration of the legal person which owns the undertaking, especially since it is not accompanied by any increase in the levy.

29 Nor is that conclusion affected by the fact, cited by the applicants in the main proceedings and not denied by the Netherlands Government, that every capital company is presumed to own an undertaking for the purposes of the relevant Netherlands legislation. In the first place, that presumption does not extend to 'shell' companies, or, in other words, those which do not have any assets and thus no longer carry on any activity. Secondly, the applicants in the main proceedings do not deny that any company formation in principle envisages the operation of an undertaking but deduce from the correspondence between, on the one hand, the formation of a company and, on the other, the operation of an undertaking, that the levy at issue must be regarded as being due by virtue of the company registration itself. The fact that every capital company in principle owns an undertaking cannot alter the event giving rise to the tax, which, on that hypothesis also, consists in the registration of the undertaking itself.

30 Denkavit nevertheless argues in the alternative that its activities, as a holding company, are limited to the management and financing of its subsidiaries. It is therefore subject to the levy as a holding company inasmuch as it is established that holding companies do not carry on the activities of an undertaking in the material sense of the term. At the hearing, Denkavit referred in particular to the judgments in Case C-60/90 *Polysar Investments Netherlands* v *Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1991] ECR I-3111 and Case C-333/91 *Sofitam* v *Ministre Chargé du Budget* [1993] ECR I-3513.

31 In those two judgments, the Court held that a mere financial holding in other undertakings did not constitute an economic activity within the meaning of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; hereinafter 'the Sixth Directive'). It added, however, that that did not apply where such a holding was accompanied by direct or indirect involvement in the management of the companies in question, without prejudice to the holder's rights in his capacity as a shareholder or a member of the company. In any event, the interpretation adopted by

the Court concerns only the Sixth Directive. It cannot, in particular, bind the Member States in an area in which Community law does not contain any specific provision intended to exclude or limit their competence. As the defendants in the main proceedings and the Commission pointed out at the hearing, the definition of an 'undertaking' for the purposes of the legislation at issue is a matter for the Netherlands legislature.

32 The answer to Question 1 must therefore be that Article 10(c) of Directive 69/335 must be interpreted as not prohibiting a levy which is payable annually by virtue of the registration of an undertaking with a Chamber of Trade and Industry, even if that operation also serves, where the undertaking is owned by a capital company, as registration of that company, without that latter formality being accompanied by an increase in the levy in question.

## Questions 2 and 3

33 In the light of the answer to Question 1, there is no need to answer Questions 2 and 3.

## Costs

34 The costs incurred by the Netherlands, Danish and Greek Governments, the United Kingdom and the Commission of the European Communities, 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,

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by order of 23 November 1993, hereby rules:

**Article 10(c) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as not prohibiting a levy which is payable annually by virtue of the registration of an undertaking with a Chamber of Trade and Industry, even if that operation also serves, where the undertaking is owned by a capital company, as registration of that company, without that latter formality being accompanied by an increase in the levy in question.**

Rodríguez Iglesias Kakouris Edward Puissochet

Hirsch Mancini Schockweiler Moitinho de Almeida

Gulmann Murray Jann Ragnemalm Sevón

Delivered in open court in Luxembourg on 11 June 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President