JUDGMENT OF THE COURT (Fifth Chamber)

26 September 2000 *

In Case C-134/99,

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

IGI — Investimentos Imobiliários SA

and

Fazenda Pública,

in the presence of:

Ministério Público,

on the interpretation of Articles 4, 10 and 12(1) 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

* Language of the case: Portuguese.

of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P. Jann, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— IGI — Investimentos Imobiliários SA, by C. Osório de Castro, of the Oporto Bar,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for the European Communities of the Ministry of Foreign Affairs, Â. Seiça Neves, of the same Service, and R. Barreira, Adviser in the Centre for Legal Studies attached to the office of the Prime Minister, acting as Agents,

— the Spanish Government, by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent,

— the Commission of the European Communities, by A.M. Alves Vieira and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2000,

gives the following

Judgment

1 By decision of 17 March 1999, received at the Court on 19 April 1999, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Articles 4, 10 and 12(1) 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 'the Directive').

2 Those questions arose in proceedings between IGI — Investimentos Imobiliários SA (hereinafter 'IGI') and the Fazenda Pública (Public Exchequer) concerning the payment of charges for entering an increase in the share capital of that company in the Registo Nacional de Pessoas Colectivas (National Register of Legal Persons).

Community legislation

3 The aim of the Directive, as is clear from the first recital in its preamble, is to encourage the free movement of capital, which is regarded as essential for the creation of an economic union with characteristics similar to those of a domestic market.

4 According to the sixth recital in the preamble, it is inherent in the pursuit of such an objective, so far as concerns taxation on the raising of capital, that the indirect taxes hitherto in force in the Member States should be abolished and replaced by a tax which is charged once in the common market and is at the same level in all the Member States.

5 Article 4 of the Directive provides:

'1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

...

(c) an increase in the capital of a capital company by contribution of assets of any kind;

...

3. Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:

(a) the conversion of a capital company into a different type of capital company;

(b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;

(c) a change in the objects of a capital company;

(d) the extension of the period of existence of a capital company.'

6 Article 7 states:

'1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less.

...

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

...'

7 In accordance with the final recital in its preamble, the Directive also provides for the abolition of other indirect taxes having the same characteristics as capital duty. Taxes which may not be charged are set out in particular in Article 10, which 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) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;

(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.'

8 Article 12 states:

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

...

(e) duties paid by way of fees or dues;

...'.

National legislation

9 Article 24 of Decree-Law No 144/83 of 31 March 1983 (*Diário da República* I, Series A, No 75, of 31 March 1983) provides:

'Legal persons must enter in the National Register of Legal Persons the following documents and events:

(a) the constitution;

...

(d) a change in the objects or capital;

...'.

10 Article 73 of Decree-Law No 144/83 states that charges set by order of the Ministry of Justice are payable for entries in the National Register of Legal Persons and for the issue of certificates attesting that firm and business names are permitted. The revenue from those charges is paid to the Cofre dos Conservadores, Notários e Funcionários de Justiça (Fund for Registrars, Notaries and Officers of the Ministry of Justice; hereinafter 'the Fund'), which bears the capital and operational costs of the National Register of Legal Persons.

11 Article 3(1) of the Schedule of Charges for the National Register of Legal Persons, approved by Order No 366/89 of 22 May 1989 (*Diário da República* I, Series A, No 117, of 22 May 1989) provides for a charge of PTE 1 500 in respect of every entry made pursuant to Article 36 et seq. of Decree-Law No 42/89 (*Diário da República* I, Series A, No 29, of 3 February 1989). In accordance with Article 3(4) of that order, where an entry records an increase in the capital of a legal person, a sum equivalent to 0.5% of the increase is added to the charge. Under Article 3(5) of the order, the amount laid down in Article 3(4) is raised further for entries recording increases in the capital of certain undertakings.

12 Article 57(1) of Law No 10-B/96 of 23 March 1996 (*Diário da República* I, Series A, No 71, of 23 March 1996) provides that the statutory charges payable on account of increases in the share capital of companies effected in the course of 1996 are halved in certain cases.

The main proceedings and the questions referred for a preliminary ruling

13 On 27 June 1996 IGI entered an increase in its share capital in the National Register of Legal Persons. On 8 July 1996 the Oporto Commercial Registry determined that the registration charges amounted to PTE 12 501 500, a sum which IGI paid.

14 However, IGI contested the calculation of those charges before the Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Oporto, which found against it. Thereupon it appealed to the Supremo Tribunal Administrativo, submitting that the levying of the charges was incompatible with the Constitution of the Portuguese Republic and the Directive. It contended that the judgment

subject to appeal should be set aside and the sums paid reimbursed together with statutory interest.

15 Since the Supremo Tribunal Administrativo was uncertain whether Article 3 of the Schedule of Fees for the National Register of Legal Persons was consistent with the Directive, it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is it open to an individual to rely on Articles 10 and 12 of Council Directive 69/335/EEC in his relations with the State where the latter has not transposed that directive into its national legal system?

(2) Must the transactions referred to in Article 4(3) of Directive 69/335/EEC be regarded as covered by the prohibition laid down in Article 10 of the same Community measure, in such a way as to preclude the collection, with respect to those transactions, not only of capital duty but also of any other levy, of whatever kind, in particular one that is a charge rather than a tax?

(3) Must Articles 10 and 12(1)(e) of the same directive be interpreted as meaning that the charges payable for entry (prescribed by law) on the National Register of Legal Persons of increases of capital may not vary according to the amount of such increases?

(4) May such variables also be regarded as a function of the cost of the service provided?

(5) Does that cost include the salary of officials, agents or other public employees, expenses incurred in respect of minor operations carried out free of charge, and a portion of overheads (rent of premises, data-processing and communications equipment, electricity, water and the like) attributable to registration operations?

(6) Is it permitted, having regard to the abovementioned articles of the said directive, to regard those variables deriving from increases of capital as a manifestation of standardised charges and, as such, authorised charges?

(7) Is it permitted, having regard to the same provisions of the directive, for any charge in excess of the cost of the service to be made? And if so, to what extent? If the excess were to be manifest and unreasonable, could the amount of the charges be reduced on an equitable basis?'

Consideration of the questions referred for a preliminary ruling

16 The questions submitted by the national court in the present case are to a large extent identical to those asked by the same court in Case C-56/98 *Modelo* v *Director-Geral dos Registos e Notariado* [1999] ECR I-6427 (hereinafter '*Modelo I*') and Case C-19/99 *Modelo Continente* v *Fazenda Pública* [2000] ECR I-7213, which relate to the levying of charges for drawing up a notarially attested act recording an increase in the share capital of a capital company.

17 By its questions, the national court is essentially asking whether charges for entering an increase in the share capital of a capital company in a national register of legal persons may be regarded as a tax for the purposes of the Directive and, if so, whether such registration charges are caught by the prohibition laid

down in Article 10 thereof or whether they are fees or dues within the meaning of Article 12(1)(e). In this connection, the national court asks the Court in particular to provide it with criteria for defining fees or dues. Lastly, it wishes to know whether Article 10 of the Directive, read in conjunction with Article 12(1)(e), creates rights on which individuals may rely in proceedings before the national courts.

The meaning of 'tax' for the purposes of the Directive

18 Under the national legislation, legal persons are required to enter changes to their share capital in the National Register of Legal Persons and to pay charges when they are entered. The revenue from the charges is paid to the Fund, which bears the operating costs of the National Register of Legal Persons, pays the fixed portion of the salaries of notaries and other civil servants and, subject to authorisation from the Ministry of Justice, meets other expenditure in the field of legal administration (see *Modelo I*, paragraph 20).

19 Thus, the charges at issue in the main proceedings, payable pursuant to a rule of law laid down by the State, are paid by a private person to the State for the financing of its official business (see *Modelo I*, paragraph 21).

20 In the light of the objectives pursued by the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, registration charges levied by the State for a transaction covered by the Directive and paid to

it in order to subsidise public expenditure must be regarded as a tax for the purposes of the Directive (see *Modelo I*, paragraph 22).

21 Consequently, the Directive must be interpreted as meaning that charges, such as those at issue in the main proceedings, which are levied for entering an increase in the share capital of a capital company in a national register of legal persons constitute a tax for the purposes of the Directive.

The prohibition laid down in Article 10 of the Directive

22 Article 10(c) of the Directive prohibits, in addition to capital duty, taxes 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. That prohibition is justified by the fact that even though the taxes in question are not levied on capital contributions as such, they are nevertheless levied on account of formalities connected with the company's legal form, that is to say, on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23, and *Modelo I*, paragraph 24).

23 The prohibition covers not only charges paid for the registration of new companies, but also duties payable by companies for the registration of increases in capital since these, too, are levied on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital is not, strictly speaking, a formality required before the commencement of business by a capital company, it is none the less necessary for the carrying on of that business (Case C-188/95 *Fantask and Others* v *Industriministeriet* [1997] ECR I-6783, paragraph 22, and *Modelo I*, paragraph 25).

24 Since it is compulsory under Portuguese law to enter increases in the share capital of a capital company in the national register of legal persons, it follows that such registration constitutes an essential formality connected with the legal form of the company and that it is necessary if the company is to carry on business.

25 The answer should therefore be that charges payable for entering an increase in the share capital of a capital company in a national register of legal persons are, where they amount to a tax for the purposes of the Directive, in principle prohibited under Article 10(c) thereof.

The derogation provided for in Article 12(1)(e) of the Directive

26 The distinction drawn between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter comprise only remuneration the amount of which is calculated on the basis of the cost of the service rendered. Where the amount payable is wholly unrelated to the cost of the service in question or is calculated, not by reference to the costs of the transaction for which it constitutes the consideration, but to all the operational and capital costs incurred by the department responsible for that transaction, it would have to be regarded as a tax falling exclusively within the prohibition laid down in Article 10 of the Directive (Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraphs 41 and 42, and *Modelo I*, paragraph 29).

27 It may be difficult to determine the cost of certain transactions, for example the registration of a company. In such a case the cost can only be assessed on a flat-

rate basis and must be determined in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction (*Ponente Carni and Cispadana Costruzioni*, paragraph 43).

28 In that regard, as the Court held at paragraph 30 of the judgment in *Fantask and Others*, cited above, when calculating the amount of duties paid by way of fees or dues, the Member States are entitled to take account not only of the material and salary costs which are directly related to the effecting of the registrations in respect of which they are incurred, but also, in the circumstances indicated by the Advocate General at paragraph 43 of his Opinion in the same case, of the proportion of the overheads of the competent authority which can be attributed to those registrations.

29 The Court has also held that a Member State may impose charges for major transactions only and pass on in those charges the costs of minor services performed without charge (*Fantask and Others*, paragraph 28).

30 The amount of duties paid by way of fees or dues does not necessarily have to vary in accordance with the costs actually incurred by the authority in effecting each registration and a Member State is entitled to prescribe in advance, on the basis of the projected average registration costs, standard charges for carrying out registration formalities in relation to capital companies. Furthermore, there is nothing to prevent those charges from being set for an indefinite period, provided that the Member State checks at regular intervals, for example once a year, that they continue not to exceed the registration costs (*Fantask and Others*, paragraph 32).

31 However, charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, amount to duties

paid by way of fees or dues within the meaning of the Directive. Even if there may be a link in some cases between the complexity of a registration and the amount of capital raised, the amount of such charges will generally bear no relation to the costs actually incurred by the authority on the registration formalities (*Fantask and Others*, paragraph 31).

32 In the main proceedings, the registration charges increase directly in proportion to the nominal value of the capital raised. Furthermore, even though the charges are reduced by half in certain cases, they are levied at the not inconsiderable rate of 0.5% and no upper limit is set, so the amount payable could be substantial. In those circumstances, such charges cannot be regarded as fees or dues within the meaning of Article 12(1)(e) of the Directive.

33 Also, once the national court finds that the charges levied have to be regarded as caught by the prohibition laid down in Article 10 of the Directive, it is in principle required to order repayment of the sums collected in breach of that provision.

34 It is settled case-law that entitlement to the recovery of sums levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions as interpreted by the Court. The Member State is therefore in principle required to repay charges levied in breach of Community law. In the absence of Community rules governing the matter, it is for the domestic legal system of the Member State to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (*Fantask and Others*, cited above, paragraphs 38 and 47).

35 The answer should therefore be that 'fees or dues' within the meaning of Article 12(1)(e) of the Directive do not cover charges levied for entering an increase in the share capital of a capital company in a national register of legal persons, such as the charges at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit.

The direct effect of Article 10 of the Directive

36 The Court has consistently held that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by an individual against the State in proceedings before the national courts where the State has failed to transpose the directive into national law by the end of the period prescribed or has failed to do so correctly (see, *inter alia*, Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and Others* [1994] ECR I-483, paragraph 8, Case C-347/96 *Solred* v *Administración General del Estado* [1998] ECR I-937, paragraph 28, and *Modelo I*, paragraph 33).

37 On this point, it need only be noted that the prohibition laid down in Article 10 of the Directive is expressed in sufficiently precise and unconditional terms to be relied upon by individuals in the national courts in order to contest a provision of national law which is contrary to the Directive (*Solred*, paragraph 29, and *Modelo I*, paragraph 34).

38 It must therefore be stated that Article 10 of the Directive creates rights on which individuals may rely in proceedings before the national courts.

Costs

39 The costs incurred by the Portuguese and Spanish Governments and 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by decision of 17 March 1999, hereby rules:

1. **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, must be interpreted as meaning that charges, such as those at issue in the main proceedings, which are levied for entering an increase in the share capital of a capital company in a national register of legal persons constitute a tax for the purposes of the directive.**

2. **Charges payable for entering an increase in the share capital of a capital company in a national register of legal persons are, where they amount to a**

tax for the purposes of Directive 69/335, as amended by Directive 85/303, in principle prohibited under Article 10(c) thereof.

3. 'Fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335, as amended by Directive 85/303, do not cover charges levied for entering an increase in the share capital of a capital company in a national register of legal persons, such as the charges at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit.

4. Article 10 of Directive 69/335, as amended by Directive 85/303, creates rights on which individuals may rely in proceedings before the national courts.

Edward Sevón Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 26 September 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber