OPINION OF ADVOCATE GENERAL TESAURO
delivered on 23 October 1997 *

1. The three questions referred for a preliminary ruling by the Tribunal Superior de Justicia, Madrid, Division for Contentious Administrative Proceedings, relate to the interpretation of Articles 4, 5, 7 and 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [1] (hereafter 'the Directive'), as amended and supplemented. [2]

More particularly, the question was raised, in a dispute between Solred SA, a capital company, and the Administración General del Estado whether a duty imposed on the notarial deed recording the deferred contribution of a part of the share capital which had been fully subscribed at the formation of the company was consistent with the Directive.

The relevant legislation

2. In order to answer the questions referred by the national court, it is necessary to recall the provisions of national and Community law which are relevant to the case.

Community legislation

3. Article 1 of the Directive provides that Member States are to charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9. Article 4 makes subject to capital duty *inter alia* 'the formation of a capital company' (Article 4(1)(a)) and 'an increase in the capital of a capital company by contribution of assets of any kind' (Article 4(1)(c)).

Pursuant to Article 5(1)(a), the duty is to be charged, in the case of formation of a capital company, on the actual value of assets of

* Original language: Italian.

1 — OJ, English Special Edition 1969 (II), p. 412.

2 — Directives 73/79/EEC and 73/80/EEC, both of 9 April 1973 (OJ 1973 L 103, p. 13 and p. 15 respectively); Directive 74/553/EEC of 7 November 1974 (OJ 1974 L 303, p. 9); Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

any kind contributed or to be contributed by the members, after deduction of liabilities assumed and expenses borne by the company as a result of each contribution. The last sentence of this provision permits Member States to postpone the charging of capital duty until the contributions have been effected. [3]

4. 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) 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.'

In derogation from these provisions, however, Member States may charge 'duties paid by way of fees or dues' (Article 12(1)(e)).

Lastly, it should be remembered that the eighth and last recital in the preamble to the Directive states that 'the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this Directive and those taxes should therefore be abolished'.

National legislation

5. The provisions of national legislation which the Spanish authorities deemed applicable in this case are laid down in the amended text of the Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Law concerning duty on transfers of assets and on documented legal

3 — Article 7(1) provides that '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' (first paragraph), and that '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' (second paragraph). The same article provides that '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%' (paragraph 2).

transactions) approved by Royal Legislative Decree 3050 of 30 December 1980. [4]

Article 1(1) of that law provides that duty on transfers of assets and on documented legal transactions is an indirect tax imposed, subject to the conditions set out in the subsequent clauses, on transfers of assets for consideration, on company transactions and on documented legal transactions. Article 1(2) provides however, that a single transaction shall in no case be taxed both as a transfer of assets for consideration and simultaneously as a company transaction. I would add that the duties relevant to the present proceedings are the duty on company transactions and that on documented legal transactions.

6. Lastly, pursuant to Article 31 of the Law, under Section III concerning documented legal transactions, 'minutes and copies of notarial deeds and documents as well as affidavits shall in all cases be drawn up on paper stamped at either PTA 50 per double page or PTA 25 per single page, as the public official may choose. Simple copies are not subject to duty' (paragraph (1)). It is further stipulated that 'where notarial deeds and documents concern a quantity or object that can be valued, contain deeds or contracts which may be registered in property, trade or property rights registers without being liable to inheritance or donation tax or to the taxes provided for under paragraphs 1 and 2 of Article 1 of the present Law, the first copies of the deeds and documents shall further be subject to payment of a duty of 0.5% on said deeds and contracts. Copies of deeds of protest are subject to the same duty at the same rate, by way of revenue stamp' (paragraph 2).

4 — The version currently in force is published in the *Boletín Oficial del Estado* of 20 October 1993.

The facts and the questions referred

7. By notarial deed executed on 21 November 1990, Solred was formed as a limited liability company with a registered share capital of PTA 300 million. Only 60% of the registered share capital (PTA 180 million) was paid up on this date. On the following 28 November, Solred paid the sum of PTA 3 million, being 1% of the registered share capital, to the tax authorities by way of duty on transfers of assets and documented legal transactions — as a 'company transaction'. By notarial deed of 17 January 1991, the 40% balance (PTA 120 million) of the registered share capital which had not previously been issued and paid up was formally contributed to the company.

On 7 February 1991, the appellant company in the main proceedings filed the self-assessment form relative to the duty on the second transaction with the tax authorities, indicating that it was not subject to tax since the 1% duty had been paid on the full

amount of the registered share capital when the company was formed.

8. The tax authorities, however, assessed duty at the rate of 0.5% on PTA 120 million. In their view, the fact that the duty in respect of company transactions (1% of the company's share capital) had been paid at the time the company was formed did not preclude charging the duty in respect of 'documented legal transactions' at a rate of 0.5% on the notarial deed recording the contribution of the unissued balance of share capital. Solred did not agree, and brought an action before the Tribunal Económico Administrativo Regional, Madrid which was dismissed by decision of 13 December 1993.

9. Solred filed an appeal against this decision before the Tribunal Superior de Justicia, Madrid, Sala de lo Contencioso Administrativo, Sección Primera, which decided to refer the following three questions to the Court for a preliminary ruling:

'(1) Properly construed, does Council Directive 69/335 of 17 July 1969 (as amended by Directives 73/79 and 73/80 of 9 April 1973, 74/553 of 7 November 1974 and 85/303 of 10 June 1985), in particular Articles 4(1)(a), 5(1)(a), 7 and 10(a), mean that, if the legislation of a Member State provides for a duty to be charged on the formation of a public limited liability company at the rate of 1%, calculable in all cases on the nominal value of the share capital, even where that capital has not been paid up in full, a tax of 0.5% may not then be levied on the contribution of the part of the capital not previously paid up?

(2) Is the limitation in Article 10 of Directive 69/335 also applicable even though the second payment of tax does not specifically relate to a capital contribution but falls to be levied on the document recording that contribution, where the recording thereof is a mandatory requirement under domestic company law and the rate of 0.5% specifically relates to the amount of the contribution recorded in the document?

(3) Does the aforesaid Directive 69/335 (as amended) have direct effect and does it affect, and possibly prevail over, the provisions of national law in the event that those provisions cannot be interpreted in a manner compatible with the Directive?'

The first and second questions

10. The first two questions asked by the national court seek to clarify whether the aforesaid provisions of the Directive preclude the charging of a 0.5% duty on the balance of share capital paid up after the formation of a capital company if 1% tax was already levied on the entire registered share capital, including therefore also on that portion not previously paid up.

11. The Court has already had occasion to define the purpose and content of the Directive. In particular, in *Ponente Carni* [5] the Court pointed out that, as indicated in the recitals in the preamble, the Directive seeks to promote the free movement of capital, which is deemed essential to the creation of an economic union whose characteristics are similar to those of a domestic market. In the view of the Court, the pursuit of such an objective presupposes, in so far as taxes on the raising of capital are concerned, the abolition of indirect taxes in force up to then in the Member States and the application in their stead of a duty charged only once within the common market and at a single rate in all the Member States.

12. The purpose and content of the Directive, as construed in the Court's case-law, provide a first element of particular importance in deciding the questions referred: the provisions of the Directive, and particularly those imposing obligations on the Member States, must be interpreted as broadly as possible. However, the derogating provisions (Article 12) must be interpreted strictly. Therefore, to give the Directive due effect, all direct and indirect taxes on transactions falling within the scope of the Directive must be considered in the light of the provisions thereof.

13. As I said, Article 10 of the Directive is of decisive importance. This article prohibits Member States from charging on contributions any additional tax whatsoever apart from capital duty. This applies to three categories of transaction: first, the transactions referred to in Article 4 (including company formations); secondly, contributions, loans or the provision of services occurring 'as part' of the transactions referred to in Article 4; lastly, 'registration' or any other formality required before the commencement of business to which a company, firm, association

5 — Joined Cases C-71/91 and C-178/91 [1993] ECR I-1915; also Case 161/78 *Conradsen* [1979] ECR 2221 and Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827.

or legal person operating for profit may be subject by reason of its legal form.

14. The combined effect of those provisions is to prevent several concurrent taxes, levied on the same basis of assessment, from raising the fiscal charge to a level exceeding the 1% maximum rate laid down in Article 7 of the Directive. Otherwise, the harmonisation of duties chargeable on capital contribution transactions would be imperiled by the maintenance by Member States of indirect taxes on the same operative event.

15. It is indisputable that the imposition of a duty on the notarial deed (the purpose of which is to record the contribution of capital) means that the contribution of the part of the share capital paid up subsequently to the formation of the company will *de facto* be taxed at a rate of 1.5%. It cannot be argued, as the Spanish Government endeavours to, that the duty is not charged on the contribution as a company transaction, but on the document recording the contribution. The terms of the Directive seek precisely, as I said, to ensure that the general prohibition laid down in Article 10 cannot be circumvented simply by giving a duty that has the same characteristics a different classification.

16. There can be no doubt that, although the duty at issue is formally charged on the legal instrument recording the contribution of a part of the share capital, *de facto* it is charged *in occasione* and by reason of the contribution required to complete the paid-up share capital. It is therefore an indirect tax which has the same characteristics as capital duty. [6] For that reason, the duty falls in principle within the scope of Article 10 of the Directive.

17. It is true, as the Spanish Government points out, that the duty at issue in the main action is not intended to apply exclusively to legal instruments recording capital contributions but applies to all deeds and documents which are required to comply with the formalities laid down by national law. However, as the Commission stated, that in itself is not sufficient to exclude the duty at issue from the scope of the Directive, since payment of it is mandatory under Spanish law for all deeds and documents, including those recording capital contributions. It is in fact clear that the duty would not have been charged in this case had there not been a capital contribution (even though it was deferred).

18. If that is so, then it is already clear that the duty at issue is unlawful in several respects. I think it is difficult, in fact, to argue that a duty on capital contributions is

6 — See *Ponente Carni* (cited in footnote 5), paragraph 29.

unlawful when charged at company formation but lawful when charged subsequently. [7]

19. Finally, the duty at issue is imposed on capital contributions to capital companies. Any other conclusion would make it too easy for Member States to evade the obligations imposed on them by the Directive. Moreover, it is settled case-law of the Court that the nature of a tax must be determined not on the basis of its classification under national law but according to the objective characteristics ascertained from the reference for a preliminary ruling and from the case-file. [8]

20. It must therefore be determined whether the duty at issue in the main proceedings falls into one of the categories listed in Article 10. That issue was examined in depth by Solred and by the Spanish Government, while the Commission simply indicated that the duty was generally incompatible with Article 10. I shall say straightaway that the answer is far from self-evident; however, a useful guide is to apply the interpretation of the Directive which guarantees it full effect.

21. The appellant company in the main action argues primarily that charging the duty on registered legal documents is in principle incompatible with Article 10(c). In its view, the criteria for application of the provision are met. Firstly, the duty at issue is charged in respect of a formality required before the commencement of business: failing execution of the deed recording the contribution of the unpaid balance of share capital, the company could not, under Spanish law, undertake certain normal company activities, such as a further increase in capital. Secondly, it is imposed on the company by reason of its legal form, in so far as it is mandatory under Spanish law for capital contributions effected after registration of share capital to be recorded by notarial deed.

22. The Spanish Government contends that neither of the two conditions for application of Article 10(c) is met. In its view the contribution of the unpaid balance on the shares not previously issued in full is not a formality required before the commencement of

7 — The circumstances in this case are not very different from those which led the Court to rule, in *Ponente Carni* (cited in footnote 5), that the yearly registration charge due under Italian law was unlawful. See paragraph 31 of the judgment, in which the Court observed that 'the fact that the charge is due not only on registration of the company but also in each subsequent year cannot of itself free the charge from the prohibition laid down by Article 10. ... any other interpretation would deprive the provisions of Article 10 of any practical effect'. The only difference with respect to this case is that here the duty is charged only as a result of a specific choice made by the capital company, namely, to defer the contribution of a part of its share capital. However, neither the content nor the aims of the Directive provide sufficient grounds for penalising that choice in the manner claimed by the Spanish Government.

8 — Joined Cases C-197/94 and C-252/94 *Bautiaa* [1996] ECR I-505.

business because under Spanish legislation, [9] in implementation of Article 9 of Council Directive 77/91/EEC of 13 December 1976, [10] limited liability companies may be formed, provided that their share capital is subscribed in full, even when only one quarter thereof is issued and paid up. However, the Spanish Government itself concedes that although a company is duly formed upon fulfilment of the minimum requirements laid down by the law, including precisely the paying-up and issue of one quarter of its share capital, the company is none the less required to pay up the unissued balance of its share capital subsequently. The Spanish Government also denies that these are formalities to which the company is subject 'by reason of its legal form'.

23. The rule laid down in Article 10(c) is clearly formulated, in fact, in more general and comprehensive terms than the Spanish Government concedes. The provision refers to the formalities required not before company formation but before 'the commencement of business'. Article 10 therefore prohibits the charging of any tax, apart from harmonised capital duty, in respect of formalities required for the full exercise of the normal activities of capital companies. In that context it is of no consequence whether the duty coincides in time with the formation of the company or whether it is charged subsequently. What matters is that it is charged in respect of a formality indispensable to the full exercise of the company's business.

24. While it must be repeated that, although the duty on documented legal transactions is formally charged on the notarial deed, it in effect taxes the contribution of the unpaid balance of Solred's share capital, I do not believe that in this case the paying-up and issue in full of the share capital, which is the result of the subsequent contribution, can be deemed to be a formality required before commencement of the company's business. The term 'commencement of business' as used in Article 10(c) of the Directive clearly refers to the exercise of the company's activities, understood in the sense of the pursuit of the company's objects. Consequently, the fact that the failure to fully issue and pay up its share capital prevents the company from undertaking certain normal company transactions, such as capital increases, is something which falls outside the scope of Article 10(c).

25. The duty at issue is, on the other hand, certainly incompatible with Article 10 in another respect. It may be recalled that paragraphs (a) and (b) of that article prohibit Member States from charging any taxes other than the harmonised capital duty, both in respect of the 'transactions referred to in

9 — Ley de Sociedades Anónimas (Law on public limited liability companies), as amended, Article 12 (BOE 310 of 27 December 1989).

10 — OJ 1976 L 26, p. 1.

Article 4', which include company formation, and in respect of 'contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4'.

26. The contribution of the balance of share capital not paid up at company formation is not in this case a requirement for completing formation because, as stated above, a capital company is effectively duly formed when one quarter (at least) of its share capital is issued and paid up. In my view therefore, the duty at issue cannot be regarded as a tax prohibited by Article 10(a). However, I consider it possible to reach a different conclusion with respect to paragraph (b) of the same article. Although the contribution of subscribed but previously unissued share capital is not strictly speaking essential to the 'formation of a capital company', such a contribution may be assumed to occur *as part* of such a transaction.

27. The last assumption clearly covers a larger group of transactions than those purely required for the purposes of company formation. It can consequently also cover transactions, such as the subsequent contribution of part of the initially subscribed share capital, which certainly occur 'as part' of the 'formation of a capital company' in so far as, by finalising the latter, they reflect the initial intent of the members and are technically necessary to permit the capital company to carry out its normal activities. In other words, whilst it may not be *necessary* for the formation of a company that its share capital be fully issued and paid up, that does not mean that such a transaction is *alien* to the formation of the company. The issue in full of all shares, which is the consequence of the share capital having been fully paid up, definitely occurs as part of the 'formation of a capital company'.

28. The wording of Article 5 of the Directive supports that interpretation. It will be recalled that Article 5 concerns the conditions for charging the duty. Paragraph 1(a), which applies to contributions made, *inter alia*, for the *formation* of a company, provides that Member States may postpone the charging of the duty until contributions are effected (the Spanish Government did not elect to do so). It is clear that that provision was intended to cover possible subsequent contributions occurring 'as part', precisely, of the company formation. I need hardly repeat that it is of no consequence that the duty at issue is charged on the instrument recording the contribution and not on the contribution as such. I have already said that the general terms of the introductory sentence of Article 10, prohibiting Member States from charging any taxes 'whatsoever', eliminate all doubt in that respect.

29. In the light of the foregoing, it is my view that Article 10 of the Directive must be interpreted as prohibiting the charging, in respect of documented legal transactions, of a duty corresponding to 0.5% of the capital contributed after formation of the company in cases where a 1% duty on capital contributions was already charged on the entire registered share capital at the time the company was formed.

30. Furthermore, even though the order of the referring judge does not raise the issue, I would add that the disputed duty can in no case be justified on the basis of the exemptions listed in Article 12 of the Directive. Only the Commission submitted argument in that regard; it ruled out the application of Article 12 in the present case. Suffice it to say that the duty charged as a percentage of subsequent partial capital contributions is a tax of a general nature and that it has no counterpart in any services rendered by the authorities. [11] The stamp duty charged in respect of the same transaction, however, clearly does.

11 — See *Ponente Carni* (cited in footnote 5), paragraph 33 et seq. In Case 36/88 *Sparinvest* [1988] ECR 409, the Court ruled that the exemptions to the rule prohibiting any taxes other than capital duty listed in Article 12 of the Directive must be deemed exhaustive.

The third question

31. In the third question, the referring court asks whether it is possible to construe the disputed provision of national law in a manner compatible with the Directive. In the proceedings before the Court, both the Commission and Solred proposed an interpretation of Articles 1 and 31 of the Spanish Law which would make it compatible with the Directive. Solred also stated that in fact it was precisely the interpretation of national law adopted by the Spanish tax authorities which was incompatible with the Directive.

32. Those arguments rely on the wording of Article 31 of the Law on transfers of assets and documented legal transactions. Pursuant to that provision, the duty on documented legal transactions is to be charged only in respect of deeds or contracts which have not already been subject to the taxes, including company transactions, listed in paragraphs 1 and 2 of Article 1 of the Law. Under the Spanish Law, deeds and documents which have been taxed as company transactions cannot be subjected to the duty on documented legal transactions. Therefore, it would appear that national legislation itself prohibits the cumulation of the duty on capital contributions (as a company transaction) and the duty chargeable pursuant to Article 31(2) on the registration of the notarial deed recording the contribution of the unpaid balance of share capital. The Commission, albeit more cautiously, envisages the same conclusion when it observes

that it may be deduced from a simple reading of the two texts that contributions of share capital effected to a company under formation cannot be subject to a further fiscal charge over and above that levied in respect of the company transaction, even if subsequent contributions are recorded by notarial deed.

33. It is not for the Court to decide on the interpretation of national law. It is settled case-law that the national court is bound to interpret provisions of domestic law in the light of the wording and purpose of the relevant provisions of Community law. [12] Once the meaning of Article 10(c) of the Directive has been clarified and what the provision prohibits has been been determined, it is for the national court to ascertain whether the provisions of national law may be interpreted in a manner consistent therewith or whether in order to give full effect to the provisions of community law it is necessary to aside conflicting national provisions in the specific case.

34. Finally, the referring court asked the Court to clarify whether the Directive has direct effect, what the effects of that might be and whether it takes precedence over provisions of national legislation conflicting therewith. That question can be answered very briefly. The provisions of the Directive which impose obligations on the Member States have direct effect in relations between individuals and the public authorities. [13] In that respect, it is my view that Article 10 fulfils the conditions (clarity, precision, unconditionality) required by the Court for a provision of Community law to be relied on by individuals directly before a national court. The obligation not to impose any taxes apart from capital duty has its counterpart in the citizen's right to rely on the relevant provision before a national court in order to challenge fiscal charges in conflict therewith.

35. With regard to the precedence of Community law over conflicting national legislation, I would simply quote the 'classical' passage of the *Simmenthal* judgment in which the Court ruled: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.' [14]

12 — Case C-106/89 *Marleasing* [1990] ECR I-4135.

13 — Case C-38/88 *Siegen* [1990] ECR I-1447.

14 — Case 106/77 [1978] ECR 629.

Conclusion

36. In the light of the foregoing, I propose that the Court reply to the questions referred by the Tribunal Superior de Justicia, Madrid as follows:

(1) Article 10 of Council Directive 69/335/EEC of 17 July 1969 must be interpreted as prohibiting the imposition of a duty of 0.5% on the contribution of a residual part of the share capital where capital duty was already charged, at the maximum rate permitted by the Directive, in respect of the entire share capital at the time the company was formed.

(2) Article 10 of Directive 69/335/EEC is sufficiently clear, precise and unconditional to be relied upon by individuals against the national authorities and to be applied by the court in place of national provisions which conflict therewith.