DENKAVIT INTERNATIONAAL AND OTHERS v KAMER VAN KOOPHANDEL EN FABRIEKEN VOOR MIDDEN-GELDERLAND AND OTHERS

OPINION OF ADVOCATE GENERAL JACOBS

delivered on 7 March 1996 *

1. The issue in the present case, which comes to the Court by way of a reference for a preliminary ruling from the Netherlands College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry), is whether a levy imposed by Netherlands Chambers of Trade and Industry on undertakings established within their areas is compatible with the Community directive on capital duty, which prohibits the charging of taxes other than capital duty in respect of the registration of a capital company or any other formality required before such a company commences business.

2. The Netherlands levy is imposed annually by Chambers on undertakings entered on their respective trade registers and is used to finance the Chambers' various activities. The term 'undertaking' is broadly construed as covering all types of business whether trading or carrying on holding and investment activities. The levy is based on the capital employed in the undertaking, defined as its reserves, provisions and long-term debts, and may be as high as HFL 24 400.

3. All companies (with the exception of inactive companies in which no capital is employed) by definition own a registrable undertaking and are subject to the levy. Since the Netherlands legislature has combined the register for undertakings with the companies register, separate registration of the company itself is not required unless the company's registered office is not in the area of the Chamber where its undertaking is established. In the latter case a small additional charge of HFL 61 is made for registration of the company by the Chamber in whose area the company's registered office is situated.

4. The appellant companies in the main proceedings argue that the Chambers are precluded by the directive from imposing upon them a tax such as the levy on undertakings and are merely entitled to charge them HFL 61, representing the cost of company registration.

5. If the levy is unlawful, the further question arises whether the Chambers may rely on the 30-day time-limit laid down by national law for appeals against their decisions in order to resist claims for the refund of fees charged in respect of earlier years.

* Original language: English.

The relevant national rules

6. According to the Wet op de Kamers van Koophandel en Fabrieken (Law on Chambers of Trade and Industry) of 1963 the Chambers have the function of promoting the commercial interests of undertakings within their respective areas. [1] The Chambers provide a variety of services, including the setting up and administration of institutions to serve trade and industry, advertising, subsidizing of institutions promoting commercial interests, authentication of signatures, taking of oaths and collection of information. [2] The Chambers are used by various official bodies as a source of information regarding trade and industry. [3]

7. Article 1 of the Handelsregisterwet (Trade Register Law) of 1918 requires the Chambers to maintain a register of undertakings established in their areas. Article 1(1), (2), (3) and (7) of the Law, as amended, provide:

'1. There shall be a trade register, in which shall be registered 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.

2. The trade register shall be kept by the Chambers of Trade and Industry, each dealing with its own particular area.

3. Registration shall be with each Chamber in whose area the undertaking has

1 — See Article 3 of the Law.
2 — Article 16 of the Law.
3 — Articles 17 and 18 of the Law.

its place of business or has a subsidiary place of business.

...

7. In addition, there shall be registered in the trade register all public limited companies, private limited companies, cooperatives, mutual insurance companies and European economic interest groupings ... with their registered office in the Netherlands. Registration shall be with the Chamber in whose area the registered office is situated.'

8. In the order for reference the national court states that registration of undertakings in the trade register serves a dual purpose. First, it meets the registration requirement for companies under the national provisions implementing Council Directive 68/151/EEC, [4] Article 3(1) of which requires Member States to open a file in a central register, commercial register or companies register for companies covered by the directive. Secondly, it functions as a source of factual information on business and as an inventory of undertakings for which the Chamber was set up and which constitute the group whose interests the Chamber is intended to represent.

9. Article 9(c) of the Trade Register Law prevents dual registration of a legal person whose registered office (statutaire zetel) is located in the same area as an undertaking which it operates. The provision reads as follows:

'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.'

10. It appears that the term 'undertaking' in Article 1(1) covers not only businesses carrying on trading activities but also entities engaging in holding and investment activities. Consequently, in practice registration under Article 1(7) is required only for wholly inactive companies or companies

4 — The First Directive 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.

whose undertaking is in a different area from that of their registered office.

11. Article 22 of the Law deals with registration fees. Article 22(1) to (4) provides:

'1. For the registration of an undertaking with the Chamber of Trade and Industry in whose area the undertaking is established, there shall be payable to the Chamber for each calendar year in which the undertaking is registered or should be registered a fee fixed by the Chamber by order.

2. The Chamber may not, by an order referred to in (1) above, fix for an undertaking a fee which is higher than the fee laid down by regulation for the relevant group of undertakings.

3. For the purposes of (2) above, undertakings shall be divided into groups according to the capital employed in the undertaking less losses. In special cases, undertakings may be divided into groups according to different criteria. For each group of undertakings, a fee shall be laid down with a view to the application of (1) above.

4. The capital employed in the undertaking shall be deemed to comprise:

a. reserves and provisions, with the exception of such reserves and provisions as serve to cover obligations or directly demonstrable risks, provided the amount thereof does not exceed the value of such obligations or risks;

b. debts with a life of a year or more.'

12. More detailed rules on registration and fees were laid down by Royal Decrees of 1 August 1956 and 5 December 1968. Under Article 3 of the latter decree, as amended, the fee varies from HFL 61 for an undertaking in Group I (with a capital of less than HFL 25 000) to HFL 24 400 for an undertaking in Group XVI (with a capital of HFL 500 million or more). Under the Wet op de Bedrijfsorganisatie (Law on Trade Organization) of

1950, as amended, the registration fees are increased slightly by an additional levy in favour of the Netherlands Economic and Social Council.

13. Article 22(6) of the Trade Register Law concerns the registration of legal persons. It provides as follows:

'For the registration of a legal person as referred to in Article 1(7) above, there shall be payable to the relevant chamber a fee laid down by general administrative measure for each calendar year in which the legal person is registered or should be registered. This provision shall 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.'

14. Thus, as I have already explained, a company which owns an undertaking established in the same area as its registered office is not obliged to register separately from its undertaking and does not pay any additional fee. Where a company's registered office and its undertaking are in different areas, it is obliged to pay a separate registration fee to the Chamber concerned. By virtue of Article 8a of the Decree of 5 December 1968 that fee is fixed at HFL 61, which corresponds to the fee for undertakings in the lowest group (Group I). The national court considers that the amount of HFL 61 corresponds to the costs of maintaining the register.

15. Under Article 26 of the Trade Register Law the fee is payable by the owner of the undertaking or the registered legal person. Where a fee is not paid, the Chamber concerned is to issue an order for payment, which is enforceable in accordance with the provisions of the Code of Civil Procedure.

16. Non-compliance with the obligation to register is a criminal offence punishable by imprisonment or a fine or both. [5]

17. An appeal against decisions of the Chambers lies to the Administrative Court for Trade and Industry. [6] An appeal must be lodged within 30 days following the day on which the decision is communicated, issued or dispatched. [7] However, an appeal is not inadmissible where the party concerned can show that no blame can reasonably be

5 — See Articles 1(4c), 2(4) and 6(1)(4c) of the Law of 22 June 1950 laying down rules for the investigation, prosecution and judgment of economic offences.

6 — Article 31 of the Law on Chambers of Trade and Industry.

7 — Article 33 of the Law of 1954 on administrative jurisdiction over trade organizations.

attached to it for non-compliance with the time-limit. [8]

The relevant Community rules

18. By Directive (EEC) 69/335 concerning indirect taxes on the raising of capital, [9] adopted on the basis of Articles 99 and 100 of the Treaty, the Council sought to harmonize the duty charged on contributions of capital to capital companies ('capital duty'). The directive has since been amended several times; [10] however, none of those amendments is relevant to the present case.

19. Article 1 of the directive provides:

'Member States shall charge on contributions of capital to capital companies a duty harmonized in accordance with the provisions of Articles 2 to 9 and hereinafter called "capital duty".'

20. Article 3 of the directive provides in so far as is relevant:

'1. For the purposes of this Directive the expression "capital company" means:

(a) companies under (...) Netherlands law known respectively as:

— (...) naamloze vennootschap;

— (...) commanditaire vennootschap op aandelen;

(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 authorization and

8 — Article 33(3) of the Law.

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

10 — Most recently by Council Directive 85/303/EEC, OJ 1985 L 156, p. 23.

are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.

2. For the purposes of the application of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

21. Article 4 defines the various transactions that are subject, or may be subject, to capital duty. The common characteristic of the transactions is that they involve contributions of capital in various forms to a capital company or the transfer into a State's jurisdiction of the effective centre of management or registered office of such a company in circumstances where capital duty will not already have been charged in another Member State.

22. Article 10 of the directive 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.'

23. Article 11 prohibits certain other taxes connected with the raising of share or loan capital.

24. However, Article 12(1) of the directive adds the following qualification:

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

...

(e) duties paid by way of fees or dues.'

25. The present proceedings appear to have been prompted by the Court's judgment in *Ponente Carni*. [11] There the Court was asked to consider the compatibility with Directive 69/335 of a levy referred to as the 'charge on government licences'. The charge was payable in respect of registration of a company, an increase in its capital, extension of its life, alteration of its objects and the merger of companies. The registration charge, following a number of increases, amounted to LIT 15 million for public limited companies, LIT 3.5 million for private limited companies and LIT 500 000 for other companies. The charge was payable both on first registration and annually. The national court's inquiry concerned the annual charge.

26. The Court observed that Article 10 covered indirect taxes which had the same characteristics as capital duty. It therefore applied to an annual charge such as that in issue payable in respect of the registration of capital companies; that was so even where the proceeds of the charge were used to finance the department responsible for maintaining the register. The charge was therefore prohibited unless it constituted a duty paid by way of fee or due within the meaning of Article 12(1) of the directive.

27. The Court held that Article 12(1) authorized a charge which was the consideration for a transaction required by law for an object of public interest. That applied in particular to a charge required as consideration for a transaction such as the registration of capital companies which was required by national law, in accordance with Community law, in the interests of both third parties and of the companies themselves. [12]

28. The Court noted however that charges were only covered by Article 12 where they

11 — Case C-71/91 [1993] ECR I-1915.

12 — Paragraphs 37 and 38 of the judgment.

were calculated on the basis of the service rendered, adding:

'A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is a consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the directive.

For certain transactions such as, for example, the registration of a company, it may be difficult to determine their cost. In such a case the assessment of the cost can only be on a flat-rate basis and must be fixed 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.' [13]

29. The Court added that Member States were entitled to fix different fees for public and private limited companies, provided that the fees did not exceed the costs of registration for each of those categories of company. [14]

13 — Paragraphs 42 and 43 of the judgment.

14 — Paragraph 44 of the judgment.

The facts and the national court's questions

30. The question therefore arises as to how far the principles established in *Ponente Carni* apply here. In the present case the main proceedings concern a series of appeals against decisions on registration fees adopted by the Chambers of Trade and Industry for Midden-Gelderland, The Hague, Amsterdam and Utrecht by Denkavit International BV, Galveston BV, Heklicht Scheepvaartbelangen BV, C. Roeleveld Beheer BV and two others, R. J. Schippefelt, Sigarenhandel Ben Sterk and J. H. van Werkhoven Holding Maarssen BV. Denkavit challenges the fee decisions for the years 1972 to 1993 inclusive. The other companies' appeals concern the fee decisions for 1992.

31. The appellants, which were all classified in higher fee groups, contest the fees in so far as they exceed the minimum fee of HFL 61 corresponding to the costs of maintaining the trade register. They contend in essence that the registration fee constitutes a tax prohibited by Article 10(c) of Directive 69/335. The national court has made the finding that registration of companies under Article 1(1) of the Trade Register Law constitutes registration within the meaning of Article 3 of Directive 68/151; in *Ponente Carni* the

Court held that Article 10(c) of Directive 69/335 prohibited the levying of taxes in respect of such registration. According to the appellants, the registration levy does not constitute a duty paid by way of fees or dues permitted by Article 12(1)(e) of that directive because it does not merely cover costs of registration but funds practically all the activities of the Chambers.

32. In support of its claim that it is entitled to reimbursement of the levies paid in respect of earlier years, namely the years 1972 to 1992, Denkavit refers to the Court's judgment in *Emmott*, [15] contending that the Chambers may not, in the absence of correct implementation of Directive 69/335, rely on the 30-day time-limit laid down by national law for appeals against their decisions.

33. Those arguments prompted the national court to seek a preliminary ruling from this Court on the following questions:

'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 capital employed in the undertaking, 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?

15 — Case C-208/90 [1991] ECR I-4269.

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 terms of the capital employed in the undertaking?

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?'

Preliminary issue

34. Before turning to the national court's questions I should mention a preliminary point, although it has not been raised in these proceedings. According to the Court's case-law, a directive which has not been implemented can impose obligations only on the State; a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. [16] The levy in issue in the present case is prescribed by the State, but its amount is fixed by, and it is payable to, the Chambers. The question therefore arises whether, independently of their classification under Netherlands law as public or private bodies, the Chambers are to be regarded under Community law as an emanation of the State against which the provisions of a directive can be invoked. The Court has held that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. [17] The attributes of the Chambers, as set out above, suggest that the Chambers satisfy those criteria. In any event, it would be unsatisfactory to hold that, by reason of the form in which a body is set up, a taxpayer cannot rely on the illegality of a tax merely because it is payable to that body rather than

16 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20 of the judgment.

17 — Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, paragraph 20 of the judgment.

to the State. It is true that if the taxpayers' claims were to succeed in the present case, it would be the Chambers, not the State, which would be liable to refund the taxes. However in my view that merely shows that the principle according to which an unimplemented directive can impose obligations only on the State is a principle which has to be understood broadly, if it is not to have arbitrary consequences.

Question 1

35. By this question the national court seeks in substance a ruling on whether an annual levy such as that in issue in the main proceedings falls under Article 10 of Directive 69/335. Part (a) asks whether such a levy is caught even though it is imposed on undertakings in general and is unconnected with an undertaking's legal form. Part (b) asks whether, if the levy is not automatically covered by the directive, it is covered in so far as, in the case of a company, registration of an undertaking also serves as registration of the company (even though the dual function of the registration does not lead to an increased levy).

36. Denkavit, Heklicht and Schippefelt consider that Question 1 must be given an affirmative reply, arguing that Directive 69/335 prohibits all taxes levied by reason of registration, whatever their basis of assessment and structure. Capital companies are automatically liable to register under the Law on the Trade Register; the obligation to register is therefore inseparably linked to a company's legal form. It is immaterial that undertakings not belonging to capital companies must also register; the fact that Member States retain power outside the scope of a harmonizing directive does not mean that they have a corresponding freedom within the scope of the directive.

37. Denkavit points out that its activity is confined to that of a holding company, namely the management and financing of its subsidiaries. It does not itself carry on a business activity and yet it is still obliged to register. It contends that, whatever the view taken with regard to the registration of companies in general, holding companies must by definition be registered purely because of their legal form since they do not carry on a trading activity. Although there are rules to prevent double taxation of groups of companies, those rules are very limited and do not cover every case.

38. The Chambers of Trade and Industry contend that the levy is an annual direct tax levied on undertakings established in the Netherlands and is materially different from

the charge in question in *Ponente Carni*, which was levied in respect of the registration of companies. In the present case the levy is charged on the operation of an undertaking within the area of the Chamber concerned. Its basis of assessment is the economic value of the undertaking rather than the nominal capital contributed by the owner of the undertaking. The Chambers observe that it is important to distinguish the tax from the registration fee of HFL 61, which is intended solely to cover the costs of registration. Where registration covers both an undertaking and the legal person operating it the registration fee is included in the tax. The Netherlands Government expresses broadly similar views to those of the Chambers.

39. The Greek Government and the Commission also propose a negative reply to Question 1. The Greek Government considers that the levy in question is not contrary to Article 10 of Directive 69/335 because the latter merely prohibits indirect taxes whereas the levy is a regional direct tax levied on the basis of the undertaking's ability to pay. The Commission considers that the levy is not caught by Article 10(c) of Directive 69/335 in so far as it exceeds the registration fee of HFL 61 and distinguishes it from the charge in issue in *Ponente Carni* on similar grounds to those mentioned by the Chambers of Trade and Industry. It notes on the other hand that the national court is justified in taking the view that the registration fee of HFL 61 fulfils the conditions of Article 10(c). That fee is directly linked to the existence of the company and has no connection with its economic activities. Since non-compliance is subject to a criminal penalty, registration may be regarded as a requirement that must be met before a company can commence business. However, the fact that the levy may notionally be considered to include the registration fee does not mean that the whole of the levy falls under Article 10(c).

40. The Danish Government takes a somewhat different view. It contends that, in so far as there is no link between the registration requirement and the legal form of the owner of the undertaking, Question 1(a) should be given a negative answer. If, however, registration also serves as the accomplishment of a formality within the meaning of Article 10(c) (the case envisaged in Question 1(b)), the levy falls within that provision and is prohibited even if accomplishment of the formality does not entail any additional payment, unless the levy is merely in the nature of a fee or due within the meaning of Article 12(1)(e). As I shall explain below, however, the Danish Government takes a broad view of what is permitted by the latter provision.

41. As I have already explained, it appears that under the relevant national provisions the concept of undertaking has a broad meaning covering not only entities carrying on a trading activity but also those carrying on holding and investment activities. Although the function of the Chambers is to

promote business interests within their areas, the registration levy is thus less a levy on trading activity than a levy on the capital employed in commercial entities, as represented by their reserves, provisions and long-term debts. The national court's first question is whether such a levy is covered *per se* by Article 10 of the directive, which prohibits its Member States from charging 'with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever ... (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.'

42. In order to reply to that question it is necessary to consider the purpose and scope of the directive. Article 1 of the directive introduces a harmonized duty on 'contributions of capital to capital companies'. The directive also abolishes stamp duties on securities: see Article 11 and also the fifth recital in the preamble. The thinking behind the directive is explained in the second and sixth recitals. The second recital notes that:

'the indirect taxes in force in the Member States at the present time, namely the duty chargeable on contribution of capital to companies and firms and the stamp duty on securities, give rise to discrimination, double taxation and disparities which interfere with the free movement of capital and which, consequently, must be eliminated by harmonization'.

The sixth recital states that:

'it is inherent in the concept of a common market whose characteristics are those of a domestic market that duty on the raising of capital within the common market by a company or firm should be charged only once and that the level of this duty should be the same in all Member States so as not to interfere with the movement of capital.'

43. The prohibitions on other taxes provided for by Articles 10 and 11 follow directly from the directive's dual purpose of harmonizing the duty on the raising of capital and abolishing stamp duties on securities. That is clearly so in the case of the prohibitions in Article 10(a) (transactions subject to the harmonized capital duty under Article 4 of the directive), Article 10(b) (taxes on contributions, loans or the provision of services connected with such transactions) and Article 11 (taxes on the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares and similar securities and taxes

on loans, including government bonds, raised by the issue of debentures or other negotiable securities). Those are the taxes on the raising of capital or transfer of securities which the directive was intended to harmonize or abolish.

44. Although the taxes covered by Article 10(c) are not imposed on contributions of capital or transfers of securities as such, their prohibition is no less essential to the attainment of the aim of the directive. Such taxes are imposed in respect of formalities connected with the company's legal form, that is to say, the vehicle used for raising capital. They therefore fall into a similar category to the other prohibited taxes. The rules harmonizing tax laws in this area would be incomplete without such a prohibition, since the existence of such taxes would frustrate the aims of the directive no less than the continued existence of other taxes on contributions of capital or transfers of securities.

45. It is important to realize, however, that the contribution made by the directive to the free movement of capital is a relatively modest one. The directive must be seen as a single piece of a much larger — far from complete — jigsaw, harmonizing a limited field of tax law. The directive plainly does not seek to remove all the tax obstacles to the integration of capital markets arising from the differences in taxes on the wealth and profits of undertakings. Moreover, the mere fact that a tax is imposed on a company by reason of its legal form is not of itself sufficient to bring it within the scope of the prohibitions in Article 10. The contrary view would call in question the power of Member States to impose on companies any taxes, including those on income and gains, which differ from those applicable to unincorporated businesses; such a conclusion would be inconsistent with the powers which Member States are recognized as retaining in matters of direct taxation and with the existence of other Community initiatives in the sphere of company taxation. [18]

46. The prohibitions in Article 10 are directed more specifically at taxes on transactions connected with the raising of capital by companies or the transfer of securities or more generally at taxes imposed in respect of the *formalities required* where a capital company is used as an investment vehicle. They do not therefore in my view cover a levy such as that in issue in the main proceedings, which is a general levy imposed on commercial entities on the basis of their economic value, i.e. the capital employed in them.

18 — Council Directive 90/434 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States, OJ 1990 L 225, p. 1; Council Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 1990 L 225, p. 6; Proposal for a Council Directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends, OJ 1975 C 253, p. 2.

Such a levy is unrelated to the legal form of an undertaking. Even less is it imposed in respect of formalities connected with the legal form of a capital company.

47. Consequently, Denkavit's argument that holding companies, as non-trading companies, are registered and subject to the levy solely because of their legal form is incorrect. Moreover, in the absence of harmonization of taxes on the wealth of undertakings or the capital employed in them, a Member State retains the right to impose such a tax on whatever entity it wishes, provided that the tax is not applied in such a manner as to constitute an unlawful restriction of one of the freedoms guaranteed by the Treaty; no such argument has been advanced in this case. Subject to the same proviso, it is for national law to provide relief from double taxation in appropriate cases.

48. In view of the foregoing, it is clear that the levy imposed by the Chambers in the present case is plainly distinguishable from that in issue in *Ponente Carni*. The latter was an annual charge imposed specifically in respect of the registration of companies. It therefore fell squarely within the sphere of company taxation which the directive was intended to harmonize.

49. I therefore turn to Question 1(b), which asks whether the levy nevertheless falls within the scope of Article 10(c) because an undertaking's entry on the trade register of a Chamber also serves as company registration for the purpose of Directive 68/151 (even though the dual function of the registration does not lead to an increased levy).

50. The national court states that the levy can be divided into two parts: a fee of HFL 61 intended to cover the costs of registration (being the amount which a Chamber charges a company on account of its registration where the company does not own an undertaking within its area) and the remainder, which varies according to the fee group in which the undertaking is classified and which goes to finance the various activities of the Chambers.

51. It does not seem to me that the dual function of the register alters the situation. The legislature has in effect combined the register for the levy on undertakings with the companies register and has thereby avoided the need to impose separate company registration charges for companies owning an undertaking within the area of a Chamber. It would be paradoxical if that had the consequence that a levy which would otherwise fall outside the scope of Article 10(c) was brought within the scope of that provision.

52. That applies equally to holding companies. Contrary to Denkavit's view, the register also serves a dual function in the case of such companies. Denkavit's holding activity is classed as an undertaking for the purposes of the Trade Register Law and the levy. The scope of the levy is, as already noted, a matter for national law in the absence of Community harmonization of such taxes.

55. Different views were expressed on this issue. Denkavit considers that only the basic registration fee of HFL 61 is covered by Article 12(1)(e). The remainder of the levy is calculated on the basis of an undertaking's ability to pay rather than the costs of maintaining the register; the proceeds from the levy are used to finance not merely the maintenance of the register but the entire activities of the Chambers. Large undertakings are the least likely to need the assistance of the Chambers. Moreover, holding companies do not benefit at all from their services. Denkavit's view is supported by Heklicht.

Question 2

53. By its second question the national court asks whether, if Question 1(a) or (b) is answered in the affirmative, the term 'duties paid by way of fees or dues' in Article 12(1)(e) of the directive includes a duty which is used to finance not only registration in the trade register but also the various tasks and activities which the Chambers perform in the interests of undertakings in their area, the costs of such tasks and activities being spread among the undertakings by reference to their economic importance.

56. The Chambers and the Netherlands Government consider that it does not follow from the judgment in *Ponente Carni* that the only service for which fees or dues may be charged is the maintenance of registers. In this case the levy may be regarded as a fee or due for the various services performed by the Chambers.

54. This question does not arise unless it is considered, contrary to the view which I have taken, that either part of Question 1 must be given an affirmative reply.

57. That view is shared by the Danish and Greek Governments. The Danish Government adds that the *Ponente Carni* judgment does not preclude a Member State from imposing a charge which covers not only direct costs of registration but also certain indirect costs such as the relevant administrative costs of the legislative body, the

performance of other tasks in the interests of the undertaking such as supervision, provision of information, advice, dealing with complaints, and a proportion of the costs of the body responsible for registration, such as rent, salaries, staff training and data processing; the costs in question must however be linked to the service provided.

58. The Commission merely observes that the basic fee of HFL 61 must be regarded as falling within Article 12(1)(e).

59. I do not think the judgment in *Ponente Carni* supports the view that the levy in question in these proceedings constitutes a duty paid by way of a fee or a due within the meaning of Article 12(1)(e). It is true that the Court held that such a duty covered a charge which was the consideration for a transaction required by law in the public interest. The Court also accepted that the assessment of the cost of the service could in some cases only be made on a flat-rate basis. Moreover, I share the view put forward by the Chambers and the Danish Government that Article 12(1)(e) is not exclusively concerned with the services mentioned in Article 10 of the directive.

60. However, the Court's remarks in *Ponente Carni* must be placed in context. The Court was concerned with defining the limits within which a Member State could make a charge for an identifiable service rendered to companies in the public interest, namely registration. In the present case it is impossible to identify precisely the services or benefits received by individual undertakings (other than the service of company registration). Moreover, the possible benefits which an undertaking may receive from the Chambers' various activities and services are not in any way related to the amount of the levy. In so far as it exceeds the cost of registration, the levy is therefore more in the nature of a tax than a fee or due paid for identifiable services. [19]

61. I do not therefore consider it necessary in this case to consider the Danish Government's arguments concerning the extent of the costs which may be taken into account in fixing the amount of a duty for the purposes of Article 12(1)(e).

Question 3

62. By its third question the national court asks whether a time-limit laid down by national law for the exercise of a legal remedy can be relied upon where national provisions contrary to Directive 69/335 have not yet been repealed. This question does not

19 — See further on this point my recent Opinion of 15 February in Case C-191/94 *AGF Belgium* [1996] ECR I-1859.

arise unless the Court, contrary to my view, considers that an affirmative reply must be given to Question 1(a) or (b).

63. The Court has consistently held in a long line of cases starting with *Rewe* and *Comet* in 1976 [20] that, in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

64. That principle applies — and indeed was first applied — to limitation periods laid down by national law. The imposition by a Member State of a reasonable time-limit for taking legal proceedings to challenge a decision cannot be considered to make reliance on Community law virtually impossible or excessively difficult. [21] Such time-limits are an application of the principle of legal certainty protecting both individuals and administrations. [22] The need for legal certainty in matters of taxation is demonstrated particularly clearly by the present case. It is easy to see that, if companies were able to claim reimbursement of the levies paid over the last 20 years, that would entail very serious consequences for the finances of the Chambers of Trade and Industry.

65. The 'virtually impossible' or 'excessively difficult' test was developed further by the Court in its recent judgment in *Peterbroeck*, which did not concern limitation periods for actions but a procedural rule preventing litigants from raising new pleas before the Belgian Cour d'Appel after expiry of a 60-day period from the lodging by the administration of a copy of the contested decision and preventing the Cour d'Appel from raising a point of its own motion. The Court held:

'For the purposes of applying those principles, each case which raises the question whether a national procedural provision

20 — See Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5 of the judgment; Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraph 13; Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-208/90 *Emmott*, cited in note, paragraph 16; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 43; Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paragraph 15; Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 21; Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599, paragraph 12; Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, paragraph 17; Case C-212/94 *FMC* [1996] ECR I-389, paragraph 71.

21 — See *Rewe*, paragraph 5 of the judgment; *Comet*, paragraph 17; *San Giorgio*, paragraph 12.

22 — *Rewe*, paragraph 5 of the judgment.

renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.' [23]

66. The Court concluded that, while such a 60-day period was not objectionable *per se*, the rule was unlawful given the following special features of the procedure in question: the Cour d'Appel was the first court able to seek a reference from the Court of Justice; the rule prevented the Cour d'Appel from raising of its own motion at the hearing the question of the compatibility of the contested measure, since the 60-day period had already elapsed; no other court or tribunal could consider that question; and the rule preventing points being raised by a court of its own motion was not reasonably justifiable by principles such as the requirements of legal certainty or the proper conduct of procedure.

67. It is in the light of the foregoing principles that the 30-day limitation period applicable at the material time in the present case must be considered. In my view that period should not be regarded as making reliance upon Community law virtually impossible or excessively difficult. A key point in the present case is that the contested decisions recur annually; the national court has found that each decision can be challenged individually. Relatively short time-limits for such challenges to routine administrative decisions do not seem objectionable *per se*; they may be justified by the need to prevent the budget of public bodies from being disrupted by belated claims in respect of past or current periods. That is so notwithstanding the fact that there may be a subsequent development, such as a ruling by a court, which an individual could not have anticipated at the time.

68. It may be noted moreover that it was the same 30-day time-limit laid down by Netherlands law that was in issue in *Comet*. [24] In upholding the right of Member States to lay down reasonable time-limits the Court did not suggest that that time-limit was too short. Such a time-limit is in any event no more restrictive than the one-month time-limit laid down by Article 33 of the ECSC Treaty for actions against decisions or recommendations of the Commission.

69. I should add however that I would have taken a different view in this case if the

23 — Paragraph 14 of the judgment. See also paragraph 19 of *Van Schijndel*.

24 — Cited in note 20.

national court had found that Denkavit, by failing to contest an initial decision, was precluded from contesting in the future its recurring liability to pay the leviés in question. The expiry of the time-limit would then have had the effect of precluding claims in respect not only of current or past periods but also of future periods. It is difficult to see how such a result could have been justified on grounds of legal certainty.

70. Although an application of the 'excessively difficult' principle, the *Peterbroeck* judgment is not directly relevant to the present case. In *Peterbroeck* the national court was precluded from considering a Community-law point in proceedings brought within the applicable limitation period. In such cases the principle of legal certainty, which is the primary justification for limitation periods, plays a lesser role. The balance to be struck in *Peterbroeck* was essentially between the effectiveness of Community law and the concern to ensure the proper conduct of proceedings; the Court evidently felt that the latter concern could not justify a rule which precluded a national court, properly seised of a matter, from raising of its own motion a point of Community law arising at the hearing and from seeking, where appropriate, a ruling from this Court. Moreover, in the present case there are no special features comparable to those referred to by the Court in *Peterbroeck*. There is therefore nothing in the *Peterbroeck* judgment to suggest that the present time-limit is unreasonable.

71. The question then arises whether the well-established principles are in any way affected by the judgment in *Emmott*, [25] which is relied upon by Denkavit. In *Emmott*, a case concerning the Equal Treatment Directive, [26] the applicant was not granted equal benefits pursuant to the directive until 28 January 1988, even though the directive took effect on 23 December 1984. Mrs Emmott's claim for equal benefits from 23 December 1984 was resisted by the Irish authorities on the ground that she had failed to make her application within the three-month period from the date when the grounds arose as required by Irish law. The Court held:

'So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.

25 — Cited above, note 15.

26 — Council Directive 79/7, OJ 1979 L 6, p. 24.

Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created.

It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.' [27]

72. The defendants, the four Member States which have submitted observations and the Commission all take the view that the judgment in *Emmott* does not apply. The judgment must be read in the light of the particular circumstances of that case. The present case may, it is argued, be distinguished on a number of grounds: unlike Ireland, the Netherlands has implemented the directive in question in good faith; whereas Mrs Emmott was denied any effective opportunity to rely on the directive for the period in question, the appellants in the present case have had in respect of each decision an opportunity to challenge the levy on the basis of the directive; and the litigants in the present case are large commercial undertakings rather than an individual dependent upon the benefits in question.

73. The Court has had occasion to consider the *Emmott* judgment in *Steenhorst-Neerings* [28] and *Johnson*, [29] which concerned limits on claims for arrears of benefits. The Court held that Community law did not preclude reliance on such limits even where the relevant directive had not been properly implemented in national law. The Court distinguished *Emmott*, observing that the result in that case could be explained by 'the particular circumstances of the case'. The circumstances pointed to by the Court were as follows: Mrs Emmott had sought payment of the benefits in question on the basis of the Court's judgment in *McDermott and Cotter*; [30] the administrative authorities had declined to adjudicate on her claim until the litigation concerning the directive pending before the national courts had been concluded; and the authorities sought to rely on the time-limit notwithstanding the failure correctly to implement the directive. In *Steenhorst-Neerings* and *Johnson* the Court distinguished the rules in issue in those cases on the ground that neither rule constituted a bar to proceedings; they merely limited the period prior to the bringing of the claim in respect of which arrears of benefit were payable.

27 — Paragraphs 21 to 23 of the judgment.

28 — Cited in note 20.

29 — Cited in note 20.

30 — Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney General* [1987] ECR 1453.

74. From the judgments in *Steenhorst-Neerings* and *Johnson* it may be inferred that the mere fact that a directive has not been properly implemented does not, in the absence of other circumstances, preclude a Member State from relying upon a limitation period; if the Court's reasoning in *Emmott* is read without qualification it would apply equally to limits on claims for arrears of benefits. It seems to me that the judgment in *Emmott*, notwithstanding its more general language, must be read as establishing the principle that a Member State may not rely on a limitation period where a Member State is in default both in failing to implement a directive and in obstructing the exercise of a judicial remedy in reliance upon it, or perhaps where the delay in exercising the remedy — and hence the failure to meet the time-limit — is in some other way due to the conduct of the national authorities. A further factor in *Emmott* was that the applicant was in the particularly unprotected position of an individual dependent on social welfare.

75. Seen in those terms the *Emmott* judgment may be regarded as an application of the well-established principle that the exercise of Community rights must not be rendered 'excessively difficult' or — to use the formulation which I suggested in my Opinion in *Van Schijndel* [31] — 'unduly difficult'. That view is consistent with the Court's remark in *Johnson* that the time-bar in *Emmott* 'had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the directive', [32] whereas the application of the rules in *Steenhorst-Neerings* and *Johnson* did not 'make it impossible to exercise rights based on the directive'. [33] It is also consistent with the Court's approach in *Peterbroeck* where the Court, although regarding a 60-day period for raising submissions as unobjectionable *per se*, concluded that the rule made reliance upon Community law excessively difficult given the special features of the procedure.

76. The *Emmott* judgment may nevertheless be seen as a new application of that principle in so far as it demonstrates that a national court may be obliged to set aside a limitation period which is in principle unobjectionable where the special circumstances of the particular case so demand. It seems to me that, in the interests of legal certainty, the obligation to set aside time-limits should be confined to wholly exceptional circumstances such as those in *Emmott*. There do not in any event seem to be any grounds for setting aside the time-limit in the present case.

77. In view of the foregoing I do not think it necessary to qualify the *Emmott* judgment further, for example along the lines suggested in the alternative by the Netherlands and the

31 — Cited at note 20.

32 — Paragraph 26 of the judgment. See also Case C-212/94 *FMC* [1996] ECR I-389, paragraph 64.

33 — Paragraph 35 of the judgment.

United Kingdom. Those Governments suggest that the application of the principle in *Emmott* should be limited to claims based on a grave and manifest infringement of Community law, arguing that a parallel may be drawn between such cases and the conditions for State liability in damages.

78. I am not persuaded by that contention. Admittedly, it has a certain logic in so far as a Member State might be considered to forfeit the right to rely on time-limits in the interests of legal certainty where it has committed an infringement which is both grave and manifest. However, contrary to the view of the Netherlands and United Kingdom Governments, I do not think there is any necessary parallel to be drawn between the conditions for State liability and those for the setting aside of time-limits for ordinary administrative claims. Viewed from the perspective of ensuring effective judicial protection, it would be paradoxical if in administrative proceedings a Member State were able to rely upon a relatively short time-limit where the infringement in question was obscure, but were not able to do so where the infringement was clear and could readily be detected by a diligent plaintiff. The requirement of a manifest infringement as a condition for imposing on the State liability in damages entails no such paradox. The special conditions for State liability are linked to its exceptional character as a remedy which goes beyond ordinary administrative remedies by providing compensation for loss or damage arising from flagrant legislative or administrative misconduct. The suggested parallelism disregards that exceptional and complementary character.

79. Such a view would also lead to considerable uncertainty. In *Emmott* there may have been a total failure to implement a directive, but it would, I think, be arbitrary to restrict the concept of a grave and manifest breach to cases where a Member State took no action at all to implement a directive. A breach might be no less manifest or grave if a Member State implemented only part of a directive or manifestly departed from certain provisions; nor would I necessarily see any reason for distinguishing between infringements of directives and infringements of other provisions of Community law. The result would inevitably be systematic challenges by individuals to past decisions, exposing the Member States to the risk of substantial — and possibly unlimited — retrospective liability. This would be inconsistent with the need for legal certainty, which is of particular importance in the case of challenges to routine administrative decisions arising out of the multitude of everyday transactions between public bodies and individuals.

80. As already noted, a proper balance between the protection of rights under Community law and legal certainty for public authorities may be achieved on the basis of the principles already developed by the Court. Nor do I see any inconsistency between those principles and the developing

remedy against the State in damages. The latter must in my view be of an exceptional and complementary nature and in particular should not be available as a means of circumventing time-limits for other remedies against administrative decisions.

81. If it were necessary to answer the third question, the answer would therefore be that a time-limit such as that in the present case can be relied upon even where the unlawful national provisions on which the levy in question is based have not been repealed.

Conclusion

82. Accordingly, I am of the opinion that the questions referred to the Court by the College van Beroep voor het Bedrijfsleven should be answered as follows:

Article 10 of Council Directive 69/335/EEC is to be interpreted to the effect that a charge such as that imposed annually by Netherlands Chambers of Trade and Industry on undertakings by reason of their registration with a Chamber on the basis of the capital employed in the undertakings does not fall within the scope of the prohibition set out in that article. That is so even where such registration also serves, without any increase in the charge, as the registration required before a company commences business within the meaning of Article 10(c) of the directive.