JUDGMENT OF THE COURT (Sixth Chamber)

29 September 1999 *

In Case C-56/98,

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

Modelo SGPS SA

and

Director-Geral dos Registos e Notariado,

in the presence of:

Ministério Público,

on the interpretation of Articles 4(3), 10 and 12(1)(e) 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),

* Language of the case: Portuguese.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray and H. Ragnemalm (Rapporteur), Judges,

Advocate General: G. Cosmas,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Modelo SGPS SA, by C. Osório de Castro, of the Oporto Bar,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service, Directorate-General for the European Communities, Ministry of Foreign Affairs, and 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 Belgian Government, by J. Devadder, Director of Administration in the Legal Department of the Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent,

— the German Government, by C.-D. Quassowski, Regierungsdirektor in the Federal Ministry of Economic Affairs, and A. Dittrich, Ministerialrat in the Federal Ministry of Justice, acting as Agents,

— the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, 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 for the Hearing,

after hearing the oral observations of Modelo SGPS SA, represented by C. Osório de Castro; the Portuguese Government, represented by L. Fernandes and A. César Machado, Adviser in the Centre for Legal Studies, attached to the office of the Prime Minister, acting as Agent; the Belgian Government, represented by A. Snoecx, Adviser with the Legal Service, Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent; the German Government, represented by A. Dittrich; the Spanish Government, represented by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent; the French Government, represented by S. Seam, Foreign Affairs secretary in the Legal Directorate, Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by A. Alves Vieira and H. Michard, at the hearing on 25 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

Judgment

1 By decision of 21 January 1998, received at the Court on 24 February 1998, 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) four questions on the interpretation of Articles 4(3), 10 and 12(1)(e) 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 Modelo SGPS SA (hereinafter 'Modelo') and the Director-Geral dos Registos e Notariado (Director-General for Registries and the Notariat) concerning the payment of a charge for the notarial certification of public instruments recording an increase in Modelo's share capital and a change in its name and registered office.

Community legislation

3 The aim of the Directive, as is clear from the preamble thereto, is to encourage the free movement of capital, which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of that objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in their place a duty charged only once in the common market and at the same level in all the Member States (Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 13).

4 Article 4(1) of the Directive provides:

'The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

(b) ...

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

...'.

5 Under Article 4(3) of the Directive, formation within the meaning of Article 4(1)(a) does not include 'any alteration of the constituent instrument or regulations of a capital company'.

6 Article 4(2) of the Directive lists the various transactions in respect of which the decision whether or not to charge capital duty rests, subject to certain conditions, with the Member States.

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. The taxes in question, levying of which is prohibited, are set out in Article 10 of the Directive, which reads as follows:

'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(1) of the Directive sets out an exhaustive list of taxes and duties other than capital duty which, by derogation from Article 10, may be levied on capital companies in respect of transactions listed therein (see Case 36/86 *Dansk*

Sparinvest [1988] ECR 409, paragraph 9). Article 12(1)(e) of the Directive mentions 'duties paid by way of fees or dues'.

The relevant national legislation

9 The Portuguese Code governing the notarial profession, enacted by Decree-Law No 47619 of 31 March 1967, provides that certain acts must be recorded in public instruments, that is to say, documents drawn up by a notary. They include acts which 'incorporate commercial companies, change their form, dissolve them or put them into ordinary liquidation... and those which amend any memorandum of association' (Article 89(e) of the Code).

10 Charges for drawing up notarial instruments are set forth in the table of notarial charges (hereinafter 'the Table'), in the version annexed to Decree-Law No 397/83 of 2 November 1983.

11 Article 1(1) of the Table provides that, in general, the value of notarially attested acts is that of the assets to which they relate. Article 1(2) specifies the value to be attributed to each type of notarially attested act. Thus, for an act incorporating a company, amending the memorandum of association or dissolving the company, the value is equal to the company's capital (Article 1(2)(e)); for an increase in capital, whether or not the memorandum of association is amended, it is the amount of the increase (Article 1(2)(f)); and for increases in capital where a partial alteration has been made to clauses other than that directly affected by the increase, it is either the amount of the increase or the resulting amount of share capital, whichever entails a higher charge (Article 1(2)(g)).

12 Article 5 of the Table provides that where the act recorded in a public instrument is of a certain value, variable charges are to be applied in addition to the fixed

charges set out in Article 4 of the Table. These are calculated by reference to the overall value of the act: for every PTE 1 000, the sum of PTE 10 is payable on values up to PTE 200 000; PTE 5 on values between PTE 200 000 and PTE 1 000 000; PTE 4 on values between PTE 1 000 000 and PTE 10 000 000; and PTE 3 on values in excess of PTE 10 000 000.

13 Article 27(1)(c) of the Table provides for a 50% reduction in the charges set out in Article 5 in the case of instruments recording a partial amendment of a company's memorandum of association, or the fact that the period for which the company was constituted has been extended or continued.

The main proceedings

14 Modelo decided to increase its share capital from PTE 7 240 000 000 to PTE 14 000 000 000 and to change its name and registered office. On 31 December 1992 it had public instruments to that effect drawn up in the Sixth Notarial Office, Oporto. On that account, it was called upon to pay a charge of PTE 21 006 000.

15 Modelo contested the calculation of the charge before the Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Oporto, which found against it. Modelo thereupon appealed to the Supremo Tribunal Administrativo on the ground that the contested charge was really a tax, the level of which should therefore be set, not by the Government, but by Parliament, that the amount

demanded was out of all proportion to the services provided and that the levying of that charge was incompatible with the Directive.

16 Uncertain whether the Table was compatible with the Directive, the Supremo Tribunal Administrativo decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it open to an individual to rely on Article 10 of Council Directive 69/335/EEC in his relations with the State even though 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?

(3) Must Articles 10 and 12(1)(e) of Directive 69/335/EEC be interpreted as precluding notarial charges for recording in a public instrument as required by law resolutions to increase capital or to amend articles of association from being varied according to the amount of the capital or the increase therein, rather than according to the cost of the service provided?

(4) If so, is it permissible, in the light of Articles 10 and 12(1)(e) of Directive 69/335/EEC, for the amount of the aforementioned charges manifestly

and unreasonably to exceed the actual cost of the specific service provided?'

The questions referred for a preliminary ruling

17 By those questions, the national court is essentially asking whether notarial charges may be regarded as taxes for the purposes of the Directive and, if so, whether they 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). Lastly, the national court asks whether Article 10 of the Directive creates rights on which individuals may rely in proceedings before the national courts.

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

18 It appears from the Portuguese Government's reply to questions put by the Court that, in Portugal, notaries are employed by the State and have the same rights and duties as other civil servants, their remuneration being made up partly of a fixed amount — determined in accordance with the same criteria as are applied to all other civil servants — and partly of a variable amount representing a share of the monies received in payment.

19 Notaries prepare a monthly statement of the monies received in payment of their charges. From the total amount thus obtained, the percentage amounts payable to the notary and the members of his staff are deducted. The balance 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').

20 According to the Portuguese Government, the Fund is responsible for paying the fixed portion of the salaries payable to notaries and other civil servants; it also meets the cost of training notaries and of acquiring office space and equipment for them; and, subject to authorisation from the Ministry of Justice, it covers other expenditure in the field of legal administration.

21 Thus, a proportion of the charges at issue in the main proceedings, payable pursuant to a rule of law laid down by the State, is paid by a private individual to the State for the financing of its official business.

22 In the light of the objectives pursued by the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, charges collected by public officials for notarising a transaction covered by the Directive, which are in part paid to the State in order to subsidise public expenditure, must be regarded as taxes for the purposes of the Directive.

23 Consequently, the Directive must be interpreted as meaning that charges constitute taxes for the purposes of the Directive where they are collected for drawing up notarially attested acts recording a transaction covered by the Directive, under a system where notaries are employed by the State and the

charges in question are paid in part to that State for the financing of its official business.

The prohibition laid down in Article 10 of the Directive

24 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).

25 That 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 company, it is none the less necessary for the carrying on of that business (*Fantask and Others*, paragraph 22).

26 Since it is compulsory under Portuguese law to register increases in share capital by a notarially attested act, it follows that this 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.

27 Moreover, a tax in the form of a charge collected for drawing up a notarially attested act recording a change in the name and registered office of a capital company must be regarded as having the same characteristics as capital duty in so far as it is calculated by reference to the company's share capital. Otherwise, it would be possible for Member States, while refraining from imposing taxes on the raising of capital as such, to tax that capital whenever the company amended its articles of association. That would enable the objective pursued by the Directive to be circumvented.

28 The answer should therefore be that a charge payable for drawing up a notarially attested act recording an increase in the share capital or a change in the name or registered office of a capital company is, where it amounts 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

29 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 (see Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraphs 41 and 42).

30 Furthermore, charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, constitute duties paid by way of fees or dues within the meaning of the Directive. Even though in some cases the complexity of a registration may be linked to the amount of capital raised, the amount of the charge will generally bear no relation to the costs actually incurred by the administrative body which provided the service (see, to that effect, *Fantask and Others*, paragraph 31).

31 In the present case, even though the charge is levied in accordance with a sliding scale, the amount of tax payable increases in direct proportion to the nominal value of the capital raised. Moreover, given that in the case of values above PTE 10 000 000 the charge is levied at the not inconsiderable rate of 0.3%, and that no upper limit has been set, the amount payable could be substantial.

32 The answer should therefore be that 'fees or dues' within the meaning of Article 12(1)(e) of the Directive do not cover a charge collected for drawing up a notarially attested act recording an increase in the share capital or a change in the name or registered office of a capital company, such as the charge 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

33 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).

34 On that point, the Court has already observed 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 (Case C-347/96 *Solred* [1998] ECR I-937, paragraph 29).

35 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

36 The costs incurred by the Portuguese, Belgian, German, Spanish, French and Austrian Governments and by 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by decision of 21 January 1998, 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 constitute taxes for the purposes of the directive where they are collected for drawing up notarially attested acts recording a transaction covered by the directive, under a system where notaries are employed by the State and the charges in question are paid in part to that State for the financing of its official business.**

2. **A charge payable for drawing up a notarially attested act recording an increase in the share capital or a change in the name or registered office of a**

capital company is, where it amounts to a tax for the purposes of the Directive, in principle prohibited under Article 10(c) thereof.

3. 'Fees or dues' within the meaning of Article 12(1)(e) of the Directive do not cover a charge collected for drawing up a notarially attested act recording an increase in the share capital or a change in the name or registered office of a capital company, such as the charge 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.

Kapteyn Murray Ragnemalm

Delivered in open court in Luxembourg on 29 September 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber