JUDGMENT OF THE COURT (Second Chamber)

21 June 2001 *

In Case C-206/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Tributário de Primeira Instância do Porto (Portugal) for a preliminary ruling in the proceedings pending before that court between

SONAE — Tecnologia de Informação SA

and

Direcção-Geral dos Registos e Notariado,

on the interpretation of Articles 10 and 12 of Council Directive 69/355/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 (Second Chamber),

composed of: V. Skouris, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: D. Ruíz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— SONAE — Tecnologia de Informação SA, by C. Osório de Castro, advogado,

— the Portuguese Government, by L. Fernandes, Â. Seiça Neves and R. Barreira, acting as Agents,

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

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 February 2001,

gives the following

Judgment

1 By order of 16 April 1999, received at the Court on 31 May 1999, the Tribunal Tributário de Primeira Instância do Porto (Fiscal Court of First Instance, Porto) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation of Articles 10 and 12 of Council Directive 69/355/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 'Directive 69/335').

2 Those questions arose in proceedings between SONAE — Tecnologia de Informação SA ('SONAE') and the Direcção-Geral dos Registos e Notariado concerning the payment of charges for the recording in the Registo Comercial (Commercial Register) of a demerger-merger together with an increase in SONAE's share capital.

Legal framework

Community regulations

3 As stated in the first recital of the preamble thereto, Directive 69/335 is intended to encourage the free movement of capital, which is regarded as essential to the creation of an economic union whose characteristics are similar to those of a domestic market.

4 According to the sixth recital of the preamble to Directive 69/335, such an objective requires, as regards duty on raising capital, the abolition of the indirect charges hitherto in force in the Member States and the application, instead, of a duty charged only once in the common market and at the same level in all Member States.

5 Article 4 of Directive 69/335 provides as follows:

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

(a) the formation of a capital company;

...

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

...

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

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

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

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

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

6 Article 7(1) and (2) of Directive 69/335 provides:

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

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

...

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

7 Directive 69/335 also provides, in accordance with the last recital of the preamble thereto, for the abolition of other indirect taxes with the same characteristics as capital duty. The proscribed taxes are listed in Article 10 of Directive 69/335, which provides 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)(e) of Directive 69/335 provides:

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

...

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

National legislation

9 The Código do Registo Comercial (Portuguese Code of the Commercial Register), enacted by Decreto-Lei (Decree-Law) No 403/86 of 3 December 1986, provides in Article 3(q) that certain company instruments, such as the merger, demerger, transformation and dissolution of a company and an increase, reduction or reconstitution of the share capital of a capital company, must be recorded in the Commercial Register.

10 Article 13 of the Code on the Commercial Register provides:

'1. Acts which are subject to registration may be relied on as between the parties themselves or those entitled under them even if they have not been registered.

2. The above provision shall not apply to documents relating to the formation of companies and any amendments thereto to which the Code of Commercial Companies applies.'

11 Article 14(1) of the Code of the Commercial Register provides:

'Acts subject to registration shall take effect as against third parties only after the date of registration.'

12 Pursuant to Article 6 of Decree-Law No 403/86 of 3 December 1986, the fees for registration of the various company acts in the Commercial Register are paid to the Cofre dos Conservadores, Notários e Funcionários de Justiça (Fund for Registrars, Notaries and Legal Officials, 'the Fund'), which bears, *inter alia*, the costs of setting up and operating the Commercial Register.

13 The fees payable for the recording of those acts in the Commercial Register are laid down in the Schedule of Charges.

14 Under Article 1(1) and (2) of the Schedule, in the version amended by Order No 883/89 of 13 October 1989 (*Diário da República* I No 236 of 13 October 1989), duties of a fixed amount are payable when the acts are recorded.

15 Under paragraph 3 of that article, if the value determined for the act to be registered exceeds PTE 100 000, the fixed fee provided for in paragraphs 1 and 2 of that article is to be increased by a variable fee which depends on the total value of the act: thus for each PTE 1 000 or part thereof PTE 10 will be added up to PTE 200 000, PTE 5 between PTE 200 000 and PTE 1 000 000, PTE 4 between PTE 1 000 000 and PTE 10 000 000 and PTE 3 over PTE 10 000 000.

16 Order No 996/98 of 25 November 1998 (*Diário da República* I, Series B, No 273 of 25 November 1998) introduced maximum limits on the fees payable under the Schedule. Article 23(c) of the Schedule, in the version amended by that order, provides that the fees payable for the registration of a company act such as an increase in share capital are not to exceed PTE 15 000 000.

The main proceedings

17 On 30 September 1997, SONAE drew up a number of public instruments attesting to an amendment of its articles of association, a demerger-merger and an increase in its share capital. Under Articles 1(3) and 14 of the Schedule, in the version amended by Order No 883/89, the office of the Commercial Register fixed the duties payable for entering those amendments at PTE 7 662 000.

18 SONAE challenged the calculation of those duties before the Tribunal Tributário de Primeira Instância do Porto and claimed that in reality they constituted a tax on capital and were therefore incompatible with Directive 69/335.

19 The Tribunal Tributário de Primeira Instância do Porto was uncertain as to the interpretation of Directive 69/335 for the purposes of determining the compatibility therewith of Article 1(3) of the Schedule, and decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'Whereas in certain cases (for example, increases of capital, mergers and demergers of companies) the execution of a public instrument is compulsory, together with recording thereof in the Commercial Register and in the National Register of Legal Persons;

Whereas such services are provided by public departments of the Portuguese State;

Whereas, following the contested assessment, the Portuguese State passed a law, which does not have retroactive effect, setting an upper limit on the amount payable for such action;

Having regard to Articles 10 and 12 of Directive 69/355/EEC,

1. May the fees paid for such services be calculated and collected by reference to the value of the act?

   (a) May that value be unlimited?

   (b) May that value be calculated in the manner described in Question 1 if there is an upper limit?

2. In compliance with ... Directive [69/335], must the court of the Member State reduce the amount payable in accordance with the upper limit laid down in national legislation after the transaction was completed?

3. Must the fees paid for such services be calculated in the light of the costs involved in providing the service?

4. Are such costs those incurred in completing the transaction and in maintaining the facilities necessary for doing so?

5. May the criterion of the economic benefit which the user obtains from the transaction be applied in calculating the amount payable in respect of it?'

First, third, fourth and fifth questions

20 It should be stated at the outset that it is apparent from the case-file that the charges the payment of which is in dispute before the national court were calculated solely on the basis of the amount of the increase in share capital recorded in the Commercial Register and that no charge was imposed for the registration of the acts of demerger and merger.

21 In those circumstances, the first, third, fourth and fifth questions, which should be examined together, must be taken as seeking in substance to know whether Article 12(1)(e) of Directive 69/335 is to be interpreted as meaning that the charges for recording an increase in the share capital of a capital company and calculated in proportion to the value of the act recorded, such as those at issue in the main proceedings, are paid by way of fees or dues or whether in order to qualify as such those charges must be calculated in accordance with other criteria, such as the cost of the service provided, the operating costs of the office responsible for making the entry or the economic or legal advantages derived by the company at whose request the registration is effected.

22 In order to provide a useful answer to those questions, it is necessary, first of all, to determine whether charges such as those at issue in the main proceedings constitute taxation within the meaning of Directive 69/335 or whether, as the Portuguese Government maintains, they fall outside the scope of that directive.

23 In that regard, it is clear that under the Portuguese legislation capital companies are required to have increases in their share capital recorded in the Commercial Register and when that record is made to pay registration duties, the proceeds of which go to the Fund. The Fund bears not only the costs of setting up and operating the Commercial Register but also the operating costs of the National Register of Legal Persons, the payment of the fixed portion of the salaries payable to notaries and other legal officials, and, following authorisation from the Ministry of Justice, it covers other expenditure arising from the conduct of legal business (see Case C-56/98 *Modelo* [1999] ECR I-6427, paragraph 20).

24 It follows that the charges at issue in the main proceedings, payable pursuant to a rule of law laid down by the State, are paid by a private individual to the State for the financing of its official business (see *Modelo*, paragraph 21).

25 In the light of the aims of the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, registration duties collected by the State for an operation covered by the Directive, which are paid to the State in order to subsidise public expenditure, must be regarded as taxes for the purposes of the Directive (see *Modelo*, paragraph 22).

26 It follows that charges such as those at issue in the main proceedings, levied when an increase in a company's share capital is recorded in a commercial register, constitute a tax within the meaning of Directive 69/335.

27 It is therefore also necessary to determine whether such charges are covered by the prohibition in Article 10 of Directive 69/335 or whether they constitute duties paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335.

28 As regards, first, Article 10 of Directive 69/335, subparagraph (c) of that article prohibits the charging, apart from capital duty, of 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 International and Others* [1996] ECR I-2827, paragraph 23, and *Modelo*, paragraph 24).

29 It is thus settled law that that prohibition covers not only charges paid for the registration of new companies, but also those payable by companies for the registration of increases in capital since these, too, are levied on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital is not, strictly speaking, a formality required before the commencement of business by a capital company, it is none the less necessary for the carrying on of that business (see, in particular, Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 23).

30 Since under the legal rules at issue in the main proceedings it is compulsory to record any increase in a capital company's share capital in the Commercial Register, the recording of that increase constitutes an essential formality connected with the legal form of the company and it is necessary for the carrying on of the company's business.

31 It follows that where they constitute a tax within the meaning of Directive 69/335 charges for recording an increase in the share capital of a company in a commercial register, such as those in issue in the main proceedings, are in principle prohibited by Article 10(c) of that directive.

32 As regards, next, Article 12(1)(e) of Directive 69/335, the distinction drawn between taxes prohibited by Article 10 of that directive and duties paid by way of fees or dues, which can lawfully be imposed, 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 office responsible for that transaction, it must be regarded as a tax falling exclusively within the prohibition laid down in Article 10 of Directive 69/335 (Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraphs 41 and 42).

33 Furthermore, although it may be difficult to determine the cost of certain transactions, for example the registration of a company, so that the cost can only be assessed on a flat-rate basis, it must be determined in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction (see, in particular, *IGI*, paragraph 27).

34 Moreover, in accordance with the case-law of the Court, charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, amount to duties paid by way of fees or dues within the meaning of the Directive. Even if there may be a link in some cases between the complexity of a registration and the amount of capital raised, the amount of such charges will generally bear no relation to the costs actually incurred by the administration for registration formalities (Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 31, and *IGI*, paragraph 31).

35 It follows that, in so far as they have no upper limit and increase directly in proportion to the value of the act to be registered, charges for recording an increase in a company's share capital in the Commercial Register, such as those at issue in the main proceedings, do not constitute duties paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335.

36 Furthermore, although the absence of an upper limit certainly indicates that a charge calculated by reference to the value of the act registered is not a duty paid by way of fees or dues within the meaning of Directive 69/335, the existence of such a limit, which is neither prescribed nor prohibited by that directive, is not sufficient to make the charge a duty paid by way of fees or dues.

37 Since, as stated in paragraphs 32 and 33 above, the amount of a charge in respect of a specific transaction must always be calculated by reference to the cost of that transaction if it is to be classified as a duty paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335, whether that cost is capable of precise calculation or whether a flat-rate evaluation is necessary, an upper limit which cannot be regarded as reasonable in relation to that cost cannot alter the nature of the charge if it is not in fact a duty paid by way of fees or dues.

38 Furthermore, the fact that the charge is calculated on the basis of the cost of the service rendered, which the Court has held to be the only acceptable way of calculating a duty paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335, allows a Member State, as follows from paragraph 30 of *Fantask*, to take account not only of the material and salary costs which are directly related to completion of the registration in respect of which they are incurred, but also of the proportion of the overheads of the competent authority which can be attributed to such registration.

39 It follows that, in so far as neither the economic advantage nor the legal advantage deriving from the recording of an act relating to a capital company in the Commercial Register constitutes a cost related to the service rendered, those advantages cannot be taken into consideration in calculating the amount of a duty payable by way of fees or dues.

40 Last, although the Court held in paragraph 28 of *Fantask* that a Member State may impose charges only for major transactions and pass on in those charges the costs of minor services performed without charge, it follows from that paragraph that the Court based its decision exclusively on the significance of the various types of operations which can be carried out and not on the significance, in particular as regards their capital or their economic capacity, of the capital companies at whose request a specific operation is carried out.

41 It follows that, contrary to what the Portuguese Government maintains, the case-law of the Court does not authorise a Member State to introduce, in the scale of charges payable for a service rendered, an element of solidarity between large and small companies by introducing, for one and the same service, a higher charge for companies with a higher share capital than for those with a lower share capital where that difference in the amount of the charges bears no relation whatsoever to the cost of the service.

42 That conclusion is also consistent with the interpretation of Directive 69/335 adopted by the Court in *Ponente Carni and Cispadana Costruzioni*. It follows from paragraph 44 of that judgment that, although the charge for a service rendered may differ according to the legal form of the company, the amount may not exceed the cost of the service in question.

43 In the light of all the foregoing considerations, the answer to the first, third, fourth and fifth questions must be that Article 12(1)(e) of directive 69/335 is to be interpreted as meaning that charges for recording an increase in the share capital of a capital company in a commercial register, which increase without upper limit in direct proportion to the nominal capital subscribed and are not calculated on the basis of the cost of the service rendered, such as those at issue in the main proceedings, are not duties paid by way of fees or dues. The existence of a maximum which those charges cannot exceed is not sufficient to make them duties paid by way of fees or dues if that maximum is not established reasonably by reference to the cost of the service in respect of which the charges are levied. Furthermore, a Member State cannot, without making the charges in question cease to be duties paid by way of fees or dues, introduce into the scale of charges payable for a service rendered an element of solidarity between large and small companies, by establishing, for one and the same service, a higher charge for capital companies with significant share capital than for those with less share capital, where that difference in the charge bears no relation to the cost of the service.

Second question

44 As regards the second question, it must be stated that, even if Directive 69/335 requires the retroactive application of Decree No 996/98, the national court

cannot reduce the charges at issue in the main proceedings, since the maximum hitherto provided for in Article 23(c) of the Schedule, in the version amended by Decree No 996/98, namely PTE 15 000 000, is in any event higher than the charges payable by SONAE in the present case.

45 Consequently, whatever the answer to the second question may be, it is manifestly without impact on the outcome of the main proceedings.

46 In accordance with settled case-law, it must be held that the question referred to the Court for a preliminary ruling does not involve an interpretation of Community law objectively required for the decision to be taken by the national court (see, in particular, Case C-375/96 *Zaninotto* [1998] ECR I-6629, paragraph 79).

47 Accordingly, there is no need to answer the second question.

Costs

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

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Tribunal Tributário de Primeira Instância do Porto by order of 16 April 1999, hereby rules:

Article 12(1)(e) of 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, is to interpreted as meaning that charges for recording an increase in the share capital of a capital company in a commercial register, which increase without upper limit in direct proportion to the nominal capital subscribed and are not calculated on the basis of the cost of the service rendered, such as those at issue in the main proceedings, are not duties paid by way of fees or dues.

The existence of a maximum which those charges cannot exceed is not sufficient to make them duties paid by way of fees or dues if that maximum is not established reasonably by reference to the cost of the service in respect of which the charges are levied.

Furthermore, a Member State cannot, without making the charges in question cease to be duties paid by way of fees or dues, introduce into the scale of charges

payable for a service rendered an element of solidarity between large and small companies, by establishing, for one and the same service, a higher charge for capital companies with significant share capital than for those with less share capital, where that difference in the charge bears no relation to the cost of the service.

Skouris Schintgen Colneric

Delivered in open court in Luxembourg on 21 June 2001.

R. Grass V. Skouris

Registrar President of the Second Chamber