OPINION OF ADVOCATE GENERAL COSMAS

delivered on 20 May 1999 *

I — Introduction

1. In the present case, the Tax Litigation Section of the Supremo Tribunal Administrativo (Supreme Administrative Court), Portugal, requests the Court of Justice to interpret certain provisions of Council Directive 69/335/EEC of 17 July 1969, concerning indirect taxes on the raising of capital [1] (hereinafter 'the Directive').

2. The national court essentially asks whether the Directive covers notarial charges for the drawing up — as required under national law — of public instruments recording amendments to memoranda and articles of association or increases in share capital; and, if so, whether those charges may nevertheless be regarded as permissible by virtue of the derogation provided for in Article 12(1)(e) of the Directive, under which Member States may collect 'fees or dues.'

II — The Community legal framework

3. The aim of Directive 69/335 is to encourage the free movement of capital, with a view to creating an economic union whose characteristics are similar to those of a domestic market. [2] That objective is pursued through the harmonisation of indirect taxes levied on contribution of capital to companies, stamp duty on securities and other indirect taxes having the same characteristics as capital duty or stamp duty on securities. According to the eighth recital in the preamble to the Directive, 'the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this Directive and those taxes should therefore be abolished'.

4. As provided by Article 1 of the Directive, 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9 and hereinafter called "capital duty"'.

* Original language: Greek.

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

2 — See the first recital in the preamble to the Directive.

5. Articles 4, 8 (as amended by Council Directive 85/303/EEC [3]) and 9 list — without prejudice to the provisions of Article 7 — both the transactions subject to capital duty and those which Member States may exempt. [4]

6. Under Article 4(1) of the Directive, capital duty is payable, *inter alia*, on the formation of a capital company (Article 4(1)(a)) and on an increase in the capital of a capital company by contribution of assets of any kind (Article 4(1)(c)).

7. Article 4(3) of the Directive provides:

'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'.

8. Article 5 [5] sets out the method of calculating the tax which in general terms is based upon the actual or nominal value, as appropriate, of the assets contributed.

9. In addition, Article 7 initially established variable rates within which Member States could freely establish the rates in their respective territories and provided for

3 — Directive 85/303 of 10 June 1985 amending Directive 69/335 (OJ 1985 L 156 p. 23).

4 — Articles 5 and 6 of Directive 69/335 concern the basic taxable amount.

5 — As amended by Council Directive 74/553/EEC of 7 November 1974 (OJ 1974 L 303 p. 9).

the obligatory or optional application of reduced rates, depending on the type of taxable transaction.

10. Specifically, in respect of transactions such as those mentioned above, Article 7(1)(a) of the Directive initially provided that the rate of capital duty could vary between 1% and 2%. This rate was later reduced to 1% as from 1 January 1976.[6]

11. Finally, Article 7, as amended by Article 1(2) of Directive 85/303, provides:

'1. Member States shall exempt from capital duty those transactions, save for those mentioned in Article 9, which, as at 1 July 1984, would have been exempt or would have been taxed at a rate of 0.5 % or less.

...

2. Member States may exempt from capital duty all transactions save for those referred to in paragraph (1) or submit them to a single rate which shall not exceed 1%.

3. ...'

12. 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) 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

6 — Article 1 of Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty.

company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

13. Article 12(1) of the Directive sets out an exhaustive list of taxes and duties other than capital duty which, by derogation from Articles 10 and 11, may be levied on capital companies in respect of transactions listed therein. [7]

14. More specifically, Article 12 of the Directive — in particular Article 12(1) thereof — provides that, by way of derogation from Articles 10 and 11, Member States may charge duties paid by way of fees or dues.

III — The national legal framework

A — *The calculation of notarial charges*

15. It appears from the observations submitted by the appellant in the main proceedings and by the Portuguese Government that 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.

16. Under Article 89(e) of the Code, these acts 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'.

17. 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.

18. Article 1 of the Table defines the value of notarially attested acts. Under Article 1(2)(e), the legal value of a notarially attested act in respect of the amendment of the memorandum and articles of association of a company is equal to the entire share capital. Under Article 1(2)(f), for an increase of capital, the value is equal to the amount of the increase. Finally, Article 1(2)(g) provides that, that, for increases in capital where a partial alteration has

7 — See, on that point, Case 2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 21, and Case C-38/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 9.

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.

19. Article 4 of the Table provides that the notarial charge payable is to depend on the type of act; Article 5 provides that the charge payable is to be a fraction of the legal value of the notarially attested act. Those provisions have cumulative effect.

20. More specifically, Article 5 of the Table provides that where the act recorded in a public instrument is of a certain value, the charges payable are to comprise a fixed charge and a variable charge, to be applied in accordance with a sliding scale. In concrete terms, where the act in question 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: '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'.

21. Under Article 27, the charges set out in Article 5 are halved in the case of instruments recording the fact that the period for which the company was constituted has been extended or continued or recording a partial amendment of a company's memorandum and articles of association.

B — *Notarial charges under Portuguese law*

22. In reply to a written question from the Court, the Portuguese Government explained the rules relating to notarially attested acts under Portuguese law.

23. Portuguese notaries carry out their duties as part of the public service; they are employed by the State, with the same rights and duties as other civil servants. [8] They are personally liable, however, in respect of the instruments which they draw up and can be compelled to pay damages to persons harmed as a result.

24. The remuneration of notaries is made up partly of a fixed amount and partly of a variable amount. The fixed amount is determined in accordance with the same criteria as are applied to all other civil

8 — Under Article 4 of Decree No 55/80 of 8 October 1980, which regulates the keeping of public records and the provision of notarial services, notaries are attached to the Ministry of Justice, under the supervision of the Director General for Public Records and Notarial Services.

servants. The variable amount represents a share of the monies received in payment. Notaries prepare a monthly statement of the monies collected, from which the sums due to the notary himself and to his staff are deducted.

25. The sums to be paid to the notary and his staff are calculated as percentages of the overall monthly receipts.

26. The balance — that is to say, the difference between the monies collected and the amount paid to the notaries and their staff — is paid to an organisation called the 'Cofre dos Conservadores, Notários e Funcionários de Justiça' (Fund for Registrars, Notaries and Officers of the Ministry of Justice; hereinafter 'the Fund'). The Fund uses this to pay the following expenses: (a) the salaries of notaries and other staff; (b) all expenses relating to the professional training of notaries; (c) the purchase of office equipment; and (d) the acquisition of office space for notaries, building works and the payment of rents.

27. In other words, the charges collected are used to pay the salaries of notaries and their staff and the cost of acquiring and maintaining their offices and equipment.

C — The existence under Portuguese legislation of other taxes relating to increases in share capital

28. In reply to a written question from the Court, the Portuguese Government stated that Portuguese law provides for other taxes in the event of an increase in the share capital of a company. Increases in share capital must be registered in the Commercial Registry, a charge of PTE 3 000 being payable on each occasion. To this must be added, under Article 1(3) of the relevant Table, in cases where the value of the increase of capital exceeds PTE 100 000, the following charges for every PTE 1 000 or a fraction thereof: PTE 10 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.

29. An increase in the share capital of a company also attracts a charge of 0.5% of the value of the increase, payable to a public entity called the 'Registo Nacional de Pessoas Colectivas' (National Register of Bodies Corporate).

30. The charges for entry in the commercial register and the national register of

bodies corporate are treated as receipts of the Fund.

IV — Facts

31. The Portuguese company Modelo SGPS SA (hereinafter '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.

32. 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. In accordance with Article 1(2)(g) of the Table, that charge was calculated by reference to the new share capital resulting from the increase.

33. Modelo contested the calculation of the charge before the Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Oporto, which found against it.

34. Modelo then appealed to the Supremo Tribunal Administrativo for the judgment at first instance to be set aside, claiming that the charge should be revoked and the monies reimbursed. It maintained 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.

V — The questions referred for a preliminary ruling

35. In order to reach a decision in the dispute before it, the Supremo Tribunal Administrativo referred the following questions to the Court of Justice 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?'

VI — Admissibility

36. Before examining the substance, a few preliminary remarks must be made concerning the admissibility of the questions.

37. To my mind, the order for reference clearly fails to provide sufficient information concerning the factual and legal context in which the questions arose; nor does it give sufficient details of the facts on which the questions are based. [9]

38. To be more precise, the national court merely rehearses the arguments put forward by Modelo, without sufficiently describing the event giving rise to the notarial charge, the rules governing the notarial profession in Portugal, the method by which the Sixth Notarial Office, Oporto, calculated the charge in this case or the nature of the change made to Modelo's memorandum and articles of association. Neither does it indicate whether other charges were levied in relation to the instrument recording the increase in Modelo's capital.

39. Those elements are essential if the Court is to be able to decide whether the charge at issue falls within the scope of the Directive. Should it be found that the charge is indeed covered by the Directive,

9 — The Commission has drawn attention to the shortcomings of the order for reference in terms of the information provided on the national legal background as it relates to taxation on the raising of capital by capital companies; the Commission nevertheless maintains that, despite the somewhat laconic nature of the order for reference, no problem of admissibility arises.

it will be necessary to know the amount of the increase in capital in order to determine the rate of capital duty and thus to determine whether or not the charge is compatible with Article 7(2) of the Directive, as amended by Directive 85/303.

40. As the Court of Justice has repeatedly emphasised, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the latter define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [10]

41. In the words of the Court, 'it is moreover essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and on the link it establishes between those provisions and the national legislation applicable to the dispute'. [11] Such information [12] serves not only 'to enable the Court to give helpful answers' but also to enable the Governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the EC Statute of the Court, [13] bearing in mind that, by virtue of that provision, only the decisions making references are notified to the interested parties. [14]

42. Naturally, it is open to the Court to seek the necessary information in the order for reference or in the case-file forwarded by the national court. The information thus gleaned may then be supplemented by the replies given by the parties to the questions put by the Court, either in writing or during the oral hearing.

43. Indeed, one of the aims of Article 177 of the EC Treaty (now Article 234 EC) is to encourage judicial co-operation, and dialogue between the Court of Justice and the national courts. In my view, therefore, the Court can give a useful reply to the national court, even where the order for reference fails to provide all the requisite information.

10 — See Joined Cases C-320/90 and C-321/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6; Case C-316/93 *Vaneetveld* [1993] ECR I-763, paragraph 13; Case C-83/91 *Meilicke* [1993] ECR I-4871, paragraph 26; Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4; Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, paragraph 6; Case C-191/96 *Modesti* [1996] ECR I-3937, paragraph 4; Case C-196/96 *Lahlou* [1996] ECR I-3945, paragraph 4; Case C-326/95 *Banco de Fomento e Exterior* [1996] ECR I-1385, paragraph 6; Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 8; and Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 12.

11 — See *Grau Gomis and Others*, cited in footnote 10 above, paragraph 9.

12 — That is to say, information of the kind referred to above.

13 — See, for example, *Modesti*, *Lahlou* and *Grau Gomis and Others*, cited in footnote 10 above, paragraphs 5, 5 and 10 respectively.

14 — See Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; see also *Modesti*, *Lahlou* and *Banco de Fomento e Exterior*, cited in footnote 10 above, paragraphs 5, 5 and 7 respectively.

44. In other words, where the case-files forwarded by the national court and the written observations submitted by the parties to the main proceedings 'have given the Court enough information to enable it to interpret the rules of Community law in respect of the situation which is the subject of the main proceedings', [15] the Court will be able to give the national court a useful reply.

45. Moreover, that requirement is less pressing where the questions relate to specific technical points and enable the Court to give a useful reply even where the national court has not given an exhaustive description of the legal and factual situation. [16]

46. In my view, the facts and the national legislative framework in this case can be inferred with sufficient clarity from the written observations and from the written replies given by the Portuguese Government to the questions put by the Court. It will therefore be possible for the Court to give a useful reply to the questions referred.

47. Accordingly, I conclude that the questions referred by the Supremo Tribunal Administrativo are admissible, and I shall now proceed to examine the issues raised.

VII — Substance

48. For reasons relating to the structure of this Opinion, I shall begin by analysing the second question. It is necessary first to determine whether the notarial charges paid in accordance with Portuguese law fall within the scope of the Directive and whether they are caught by the prohibition laid down in Article 10.

49. By its second question, the national court essentially asks whether the transactions referred to in Article 4(3) of the Directive are covered by the prohibition laid down in Article 10 thereof, so that not only would the charging of capital duty be prohibited but also the charging of any other tax, in whatever form.

50. It should be recalled that the notarial charges at issue here were occasioned by the fact that Modelo *increased* its share capital and *changed* its company *name* and *registered office*.

15 — See *Vaneetveld*, cited in footnote 10 above, paragraph 14, and *Telemarsicabruzzo and Others*, cited in footnote 10 above, paragraph 9; see also the Opinion of Advocate General Jacobs in *Vaneetveld*, points 6 and 9.

16 — See *Vaneetveld* and *Banco de Fomento e Exterior*, cited in footnote 10 above, paragraphs 13 and 8 respectively.

51. The legal characterisation of those charges must be identified. That is to say, it must be determined to what extent the imposition of such charges by reason of an increase in share capital or a change in the name or registered office of a capital company falls within the scope of Article 4, and, consequently, whether it is caught by the prohibition laid down in Article 10 of the Directive.

52. The points to be addressed are: the rules governing the notarial profession in the various Member States; the substantive legal content of the concept of tax; the body of rules laid down by the Directive; and, lastly, the question to what extent the notarial charges constitute a tax or duty prohibited under Article 10 of the Directive.

(a) *Comparative overview of the notarial profession*

53. Although the notarial profession is a feature of most legal systems of the Member States, the rules governing that profession vary from country to country. It is possible to discern three categories: (a) in certain systems, notaries are regarded as members of one of the liberal professions whose business is carried on independently, [17] even they may be civil servants or public officials; (b) under Portuguese law, as noted above, notaries are employed by the State, with the same rights and duties as other civil servants and answerable to the Ministry of Justice; (c) lastly, in some legal systems, [18] the notarial profession does not exist in any properly defined form [19] or is virtually unknown. [20]

54. In almost all the Member States, [21] the charges payable in respect of acts which, by law, must be drawn up or authenticated by a notary, are set out in a table established by law, decree or ministerial order, or even by decision of a professional association or organisation. [22]

17 — That is the position in Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands and Spain.

18 — Those of Denmark, Finland, Sweden and the United Kingdom.

19 — As regards the United Kingdom, it should be noted that the notarial profession is not recognised under either English or Scots law in the same way as in the preceding two categories. Notarial tasks are carried out either by solicitors or notaries public, who are usually not civil servants and are ordinarily regarded as members of the liberal professions.

20 — That is the position in Scandinavia. To be more precise, in Denmark the profession of notary does not exist and those acts classifiable as 'notarised' acts are performed by the courts. In Finland, notaries serve the administrative authorities and their principal task is the authentication of certain acts. In Sweden, the profession of *notarius publicus* exists and is regarded as one of the liberal professions. Apart from the fact that they are appointed by the prefectures, the *notarii publici*, whose role is limited, have no connection with the administrative authorities.

21 — Including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

22 — Only Swedish law provides for fixed fees, but they are fixed by the *notarius publicus* himself.

55. In the legal systems considered above, notarial charges are collected either by the notaries or — where the notarial profession is not recognised as such — by the persons or authorities which undertake notarial tasks.

56. Under Danish and Finnish law, the charges collected are paid to the State. In Portugal, they are paid to the Fund, which is a State body. In all the other legal systems, the charges — net of registration fees and stamp duty — pass to the notary. By contrast once again with Danish and Finnish law, under which the notarial profession is not recognised, Portuguese law also provides, as described above, that part of the monies collected are to be retained by the notary.

(b) *The concept of tax*

57. According to academic commentators, 'tax' [23] is 'the payment made, compulsorily and without specific consideration, by an individual to the State for the financing of official business'. [24] That definition comprises several elements: (a) payment made by an individual to the State; (b) the compulsory nature of that payment, given that the payment of tax is not voluntary; (c) the lack of any specific consideration; and (d) the fact that the purpose of taxation is to enable the State to accomplish its business, that is to say, to discharge the responsibilities inherent in the role of the State, [25] one of which — manifestly — is the operation of various public services.

58. In return for payment of tax, the State does not provide the taxpayer with any specific consideration. Consideration arises, if ever, in the case of fees or licences. These are paid in exchange for specific services provided by the State and generally serve to cover specific expenditure incurred by the State in so doing.

(c) *The body of rules laid down by the Directive*

59. One point must be made clear at the outset. The question whether a particular charge, levied by a Member State on the raising of capital, constitutes a tax within the meaning of the Directive is a matter for

23 — According to academic theory, the concept of tax comprises three essential elements: (a) a legal element; (b) a financial element (the tax's impact on the national economy through its effects on public finances); and (c) a social element (the tax's influence on the composition of various social groups); see M. Stasinopoulos *Μαθήματα Δημοσιονομικού Δικαίου* (Course in Public Finance Law), Athens, 3rd Edition, 1966, paragraph 60. As regards the various aspects of the concept of tax (political, economic and legal), see also L. Trotabas and J.-M. Cotteret, *Droit Fiscal*, Paris, Dalloz, 8th Edition, 1997, paragraph 2 et seq.

24 — See, by way of illustration, M. Stasinopoulos, op.cit., p. 256. Thus taxation involves the exercise of a State prerogative as against the taxpayer in order to satisfy the needs of the community at large.

25 — The delimitation of that role depends on political considerations as well as on economic and social factors, varying from State to State and from era to era.

the Court, whatever its classification under national law. Accordingly, I do not consider it appropriate to attempt an analysis of Community law concepts, such as 'capital duty', on the basis of theories and conceptual distinctions proper to national law. That follows naturally from the principle that Community law takes precedence over national law. Otherwise, it would be possible, by founding on distinctions and precepts of national law, to re-fashion the scope of Community legislation along lines quite alien to the intentions of the Community legislature.

60. The Court has held that the fact that a particular national charge is classified as direct or indirect is not decisive. In *Bautiaa* v *Société Française Maritime*,[26] the Court held that 'the nature of a tax, duty or charge must be determined by the Court, under Community law, according to its objective characteristics and irrespective of its classification under national law'. It also stated that: '[t]he term "duties paid by way of fees" appears in a provision of Community law which does not refer to the law of the Member States in order to determine the term's meaning and scope; [f]urthermore, the objectives of the Directive would be undermined if the Member States were entirely free to retain taxes with the same characteristics as capital duty, by categorising them as duties paid by way of fees or dues; [i]t follows that the interpretation of the term at issue, considered in its entirety, cannot be left to the discretion of each Member State'.[27] Those concepts are quite distinct from those used in national law. This means that they have their own content, which cannot be determined — in the case of each of the fifteen Member States — by reference to analyses, distinctions and theories proper to national law.

61. One of the indirect charges levied by the State is the duty charged on contributions of capital to capital companies, namely the capital duty provided for in the Directive.[28]

62. Article 1 of the Directive introduces a harmonised tax on 'contributions of capital to capital companies'. As the Court has pointed out,[29] 'the Directive is aimed in particular at achieving harmonisation of the factors involved in the fixing and levying of capital duty in the Community,

26 — See Joined Cases C-197/94 and C-252/94 [1996] ECR I-505, paragraph 39. See also Case C-4/97 *Nonwoven* [1998] ECR I-6469, paragraph 19.

27 — See Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 26, and Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 14.

28 — Direct taxation is based directly on the taxpayer's ability to pay (as a factor of income, wealth and so on), whereas indirect taxation is occasioned by certain events which indicate ability to pay, such as consumption of goods or the transfer thereof. See M. Stasinopoulos, op. cit., p. 265 et seq.

29 — Case C-347/96 *Solred* [1998] ECR I-937, paragraph 3. In addition, the Court held that, as Community law stood at that time, indirect taxation did not as such fall within the purview of Community law; see also Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, and Case C-287/94 *Frederiksen* [1996] ECR I-4581, paragraphs 20 and 21, concerning income tax which, being direct tax, falls outside the scope of the Directive.

by means of the elimination of tax obstacles which interfere with the free movement of capital'. [30]

63. According to the second recital in the preamble to the Directive, 'the indirect taxes on the raising of capital 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 harmonisation'.

64. The sixth recital in the preamble 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'.

65. The transactions on which capital duty is payable (listed in Article 4(1) of the Directive) are all transactions by which capital or assets are transferred to capital companies within the taxing State, either through the formation of a capital company (Article 4(1)(a) and (b)), or through an increase in the capital of a capital company by contribution of assets (Article 4(1)(c)). [31]

66. The fact that the transfer of capital or assets constitutes the primary characteristic of transactions subject to capital duty is confirmed by Article 4(3). [32] In order to avoid double taxation, Article 4(3) excludes from the concept of 'formation' (of a capital company) certain transactions which, albeit important for the existence in law of the capital company, do not entail any transfer of capital.

67. Furthermore, the prohibition of other taxes, laid down in Articles 10 and 11, is a direct consequence of the Directive's twofold objective, namely harmonisation of taxes on the raising of capital and the abolition of stamp duty on securities. This is clear from the fact that Article 10(a) and (b) respectively prohibit taxes in respect of the transactions referred to in Article 4 and in respect of contributions, loans or the

30 — See also Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 19.

31 — Either through an increase by contribution of assets of any kind, in consideration of rights of the same kind as those of members (Article 4(1)(d)); or through the transfer of the effective centre of management of a company whose registered office is in a third country or, in certain circumstances, through its transfer from one Member State to another (Article 4(1)(e), (f) and (g)).

32 — Similarly, the transactions listed in Article 4(2), which the Member States may make subject to capital duty, all entail an increase in the company's share capital or assets.

provision of services occcurring as part of such transactions. [33] These are the taxes [34] which the Directive was intended either to harmonise or to abolish.

68. Although the taxes referred to Article 10(c) are not levied on capital contributions as such or the transfer of securities as such, they must be prohibited if the aim of the Directive is to be attained. The taxes in questions are levied in respect of certain formalities connected with the legal form of the company, that is to say, they are related to the means used to raise capital. They fall, therefore, in a category similar to that of the other prohibited taxes. If such charges were not prohibited, there would be a lacuna in the rules harmonising tax laws in this area, since the existence of such charges would frustrate the aims of the Directive as effectively as the retention of other charges on the raising of capital or the transfer of securities. [35]

69. In *Ponente Carni and Cispadana Costruzioni*, [36] the Court emphasised that indirect taxes with the same characteristics as capital duty fall within the scope of Article 10 of the Directive. It also held that 'the various charges and duties levied on the registration of a capital company fall within the scope of the aforementioned provisions and are, in principle, prohibited, subject to the derogating provisions of Article 12' (paragraph 30). Rejecting the argument put forward by various Governments in their written observations, the Court held that '[t]here is no reason based on the wording of the provision or on its objectives which makes it possible to refrain automatically from applying Article 10 in cases where the product of the charge contributes to the financing of the department responsible for keeping the register in which companies are registered; [o]n the contrary, by enabling Member States to impose a charge, other than capital duty, on capital companies in respect of one of the essential formalities for their formation, the amount of which moreover would not be restricted by the provisions of Community law, the interpretation proposed by the abovementioned Governments would run counter to the objectives of the Directive'. [37]

33 — It is also clear from the prohibition in Article 11 (of taxes on the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or on loans, including government bonds, raised by the issue of debentures or other negotiable securities).

34 — Taxes on the raising of capital or the transfer of securities.

35 — This was emphasised by Advocate General Jacobs in point 44 of his Opinion in *Denkavit Internationaal and Others* (cited in footnote 7), his views being espoused by the Court in its judgment (paragraph 23). See also *Fantask and Others*, cited in footnote 27 above, paragraph 21, and *Solred*, cited in footnote 29 above, paragraph 21.

36 — Cited in footnote 30 above, paragraph 29.

37 — In order to prevent the provisions of the Directive from being frustrated, the Court ruled in *Ponente Carni and Cispadana Costruzioni* that: 'The fact that the charge is due not only on registration of the company but also in each subsequent year, cannot of itself free the charge from the prohibition laid down by Article 10; [a]s the Commission and the undertakings which are parties to the main proceedings emphasise, any other interpretation would deprive the provisions of Article 10 of any practical effect since it would enable Member States to burden capital companies with an annual fiscal charge the chargeable event for which would be merely the maintenance of the company in the register'.

(d) *Notarial charges as capital duty*

70. That said, in order to classify notarial charges under Portuguese law in the light of the Directive, it is necessary to identify their objective characteristics.

71. In my view, if regard is had to those characteristics, the notarial charge levied under Portuguese law in connection with an increase in share capital or a change in the name or registered office of a capital company cannot be considered to be an indirect tax on the raising of capital for the purposes of the Directive. That view is based on an analysis of those objective characteristics, that is to say, the body of factors and criteria which enable us to classify the charges at issue in the light of the Directive. It is important, therefore, to determine the extent to which those charges possess the characteristics of a tax, the latter concept being extrapolated from an analysis of Community law.

72. To my mind, the notarial charges at issue cannot be regarded as taxes, even though they display some of the features characteristic of taxes.

73. First, the notarial charges are levied on the basis of legislation enacted by the Portuguese Republic. [38] However, that factor alone is not enough to justify their classification as taxes.

74. Secondly, the chargeable event is essentially the notary's provision of services to the client [39] (consisting in the drawing up of a public instrument recording an increase in capital and a change in the name and registered office of the capital company), not the transaction itself. In other words, the chargeable event is not the same as that giving rise to capital duty, as authorised by the Directive (in the case of an increase in capital).

75. Thirdly, the basis on which notarial charges are calculated is the share capital following the increase. However, the fact that the amount of the charge depends on the amount of share capital subscribed is not sufficient to bring the charge at issue within the scope of the Directive. That would be the position only if there were other evidence to indicate that the notarial

38 — Namely, under Article 5 of the Table of Notarial Charges, in the version set out in Decree-Law No 397/83.

39 — According to the written observations of the Portuguese Government, under Portuguese law notaries act both in the interests of a person providing services (but also of employees and creditors) and in the public interest. That is to say, the notary checks that there is nothing untoward in statements made before him; he makes sure that the parties are aware of the significance of the documents; and, more generally, he checks that the transactions in respect of which, as required by law, he draws up public instruments, are indeed lawful.

charges at issue, whatever their formal designation, constitute a tax on the raising of capital.

76. In other words, the chargeable event here — namely, the provision of services by a notary — is not the same as the event giving rise to capital duty as provided for by the Directive, namely, an increase in share capital (Article 4(1)(c)),[40] even if the taxable amount corresponds (or may correspond) to that contemplated by the Directive.[41]

77. In the fourth place, the charges paid to a notary for drawing up a public instrument are compulsory in nature, since that formality is not a matter of choice.[42] However that is not sufficient in itself to characterise the notarial charges as a tax.

78. Fifthly, the 'charges' at issue constitute a payment made by an individual to the State, given that in Portuguese law the notary is employed and paid by the State, being a civil servant answerable to the Ministry of Justice, with the same rights and obligations as other civil servants.

79. In the sixth place, and most important of all, the notarial charges levied are not intended for the financing of State business, namely for the discharge of responsibilities inherent in the role of the State, one of which, clearly is the operation of various public services.

80. To my mind, although part of the remuneration received by Portuguese notaries is fixed, the fact that they also receive a percentage of the charges proportional to the monies collected reflects the ethos of the liberal professions; it indicates that the notarial profession seeks financial gain, and this distinguishes the notary from the civil servant proper. It is for the national court to assess whether it is open to notaries to try to increase the percentages retained by attracting new clients; if so, it would be all the more apparent that the notarial profession as it operates in the Portuguese legal system is not substantially different from the notarial profession in other Member States, where it is recognised as one of the liberal professions.

40 — It is clear from the cases contemplated in Article 4(3) that changes in the name or registered office of a capital company are not equated with the formation of a capital company and, accordingly, are not subject to capital duty.

41 — Such as when — pursuant to Article 1(2)(f) of the Table in the case of an increase in capital, where the legal value corresponds to the amount of the increase, and pursuant to Article 1(2)(g) in the case of further amendments to the memorandum and articles of association — the value of the capital following the increase is taken into account in calculating the charges.

42 — It should be recalled that, under the national legislation at issue here, it is compulsory to engage the services of a notary and to have a public instrument drawn up. The Portuguese Code governing the notarial profession, approved by Decree-Law No 47619, provides that a notarially attested instrument is indispensable for certain transactions. Pursuant to Article 89(e) of the Code, these include the formation of commercial companies, changes made thereto, and amendments made to memoranda and articles of association.

81. Nor, it seems to me, is there any real difference between the amounts retained by Portuguese notaries from monies collected by way of notarial charges and fees paid to notaries elsewhere who practise a liberal profession from which they derive the income to sustain their livelihood.

82. Furthermore, even though the charges are intended to enable the Fund — which is a body governed by public law [43] — to finance its activities, that does not mean that they are used to subsidise State business; to my mind, this reflects rather the corporatist logic which generally informs the rules governing the liberal professions. Further support for that view lies in the fact that under Portuguese law the charges collected are used, on the one hand, to enable the Fund to pay the salaries of notaries, who are civil servants, and their staff, and, on the other hand, to defray the expenses incurred by notaries in setting up and maintaining offices, although they may also be used to cover other public expenditure which the Minister of Justice may, in exceptional cases, decide should be met out of the Fund's income. [44]

83. Lastly, it should not be forgotten that Portuguese notaries practise their business at their own risk, being personally liable in respect thereof so that they they may be compelled to pay damages to persons harmed as a consequence.

84. By way of conclusion, it is clear from the foregoing that, even though the body of rules governing notaries under Portuguese law constitutes a special regime, [45] the charges collected by notaries for the provision of their services [46] do not constitute charges which fall within the scope of the Directive. There is no need, therefore, to address the other questions referred.

43 — To my mind, of course, the fact that the Fund is not a public service but a legal person — a public body — is not decisive evidence that the notarial charges at issue do not constitute a tax.
The Court has held, on the subject of taxation for the purposes of Articles 9, 12 and 95 of the EC Treaty (now, after amendment, Articles 23 EC, 25 EC and 90 EC), that a pecuniary charge need not necessarily be levied for the benefit of the State. Accordingly, any pecuniary charge which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier is prohibited under Articles 9 and 12, even if it is not imposed for the benefit of the State (the charge at issue in the case then before the Court being a contribution which importers of uncut diamonds had to pay to a social fund for diamond workers; see Joined Cases 2/69 and 3/69 *Diamantarbeiders* [1969] ECR 211, paragraph 18). The Court has also held that, since Article 95 of the Treaty refers to internal taxation of any kind, the fact that a tax or levy is collected by a body governed by public law other than the State or is collected for its benefit cannot prevent it from falling within the scope of Article 95 of the Treaty (at issue in that case was the payment of a levy to a body governed by public law, the Ente Nazionale per la Cellulosa e per la Carta; see Case 74/76 *Iannelli* [1977] ECR 557, paragraph 19).

44 — In concrete terms, as Modelo pointed out at the hearing, the amounts paid may also be allocated to other public objectives (such as the financing of a university; investments made by the Ministry of Justice; the construction of prisons; the transportation of case-files; various police and judicial expenses; the running of prisons; and so on). Verification of such points is, of course, a matter for the national courts. Although the Portuguese Government emphasised at the hearing that the Fund's income is not public revenue, entered in the State budget, the Ministry of Justice may in exceptional cases authorise the use of some of the Fund's income for other purposes.

45 — In any event, it is for the national court to check facts pertaining to national law.

46 — The drawing up of a public instrument recording the increase in share capital and the change in the name and registered office.

VIII — Conclusion

Having regard to the foregoing, I consider that the following answer should be given to the questions referred by the Supremo Tribunal Administrativo:

The charges payable to notaries for the drawing up, as required by Portuguese law, of public instruments recording amendments to the memoranda and articles of association of capital companies, or an increase in their share capital, do not fall within the scope of Council Directive 69/333/EEC of 17 July 1969 concerning indirect taxes on the raising of capital.