

JUDGMENT OF THE COURT (Third Chamber)

19 April 2012

(Directive 2008/7/EC — Indirect taxes on the raising of capital — Articles 5(1)(c) and 6(1)(e)  
— Scope — Annual duty paid to local chambers of commerce, industry, crafts and  
agriculture)

**In Case C-443/09,**

REFERENCE for a preliminary ruling under Articles 234 EC and 267 TFEU from the Tribunale di Cosenza (Italy), made by decisions of 5 November 2009 and 13 September 2010, received at the Court on 13 November 2009 and 20 September 2010, in the proceedings

**Camera di Commercio, Industria, Artigianato e Agricoltura (CCIAA) di Cosenza**

v

**Grillo Star Srl, in liquidation,**

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2011,

after considering the observations submitted on behalf of:

- Camera di Commercio, Industria, Artigianato e Agricoltura (CCIAA) di Cosenza, by O. Morcavallo and F. Sciaudone, avvocati,
- Grillo Star Srl, by R. Mastroianni, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,
- the German Government, by N. Graf Vitzthum, acting as Agent,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the European Commission, by A. Aresu and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 5(1)(c) and 6(1)(e) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11).
- 2 The reference has been made in proceedings for the determination of the liabilities of Grillo Star Srl ('Grillo Star'), a company in liquidation, by the judge for insolvency cases at the Tribunale di Cosenza (District Court, Cosenza) hearing the application by the Camera di Commercio, Industria, Artigianato e Agricoltura di Cosenza ('CCIAA di Cosenza') for a claim relating to the failure of Grillo Star to pay, for 2009, the annual duty payable by every undertaking registered or noted in the register of undertakings ('the annual duty') to be included in the liabilities.

### **Legal context**

#### *European Union law*

- 3 Article 2, 'Capital company', of Directive 2008/7 states:
  1. For the purposes of this Directive "capital company" means:
    - (a) any company which takes one of the forms listed in Annex I;
    - (b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;
    - (c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.
  2. For the purposes of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company.'
- 4 Article 5(1) of the directive provides:

'Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:

...

  - (c) registration or any other formality required before the commencement of business to which a capital company may be subject by reason of its legal form;

...'

5 Article 6(1) of the directive reads as follows:

‘Notwithstanding Article 5, Member States may charge the following duties and taxes:

...

(e) duties in the form of fees or dues;

...’

#### *National legislation*

6 In the version before they were recast by Article 1(19) of Legislative Decree No 23 on the reform of the organisation of chambers of commerce, industry, crafts and agriculture pursuant to Article 53 of Law No 99 of 23 July 2009 (Decreto legislativo n. 23 — Riforma dell’ordinamento relative alle camere di commercio, industria, artigianato e agricoltura, in attuazione dell’articolo 53 della legge 23 luglio 2009, n. 99) of 15 February 2010 (GURI No 46, 25 February 2010, p. 1), which entered into force on 12 March 2010, the national provisions applicable to the main proceedings are as follows.

#### The Civil Code

7 Article 2188(1) of the Italian Civil Code (Codice civile) established the register of undertakings, in which, under Article 2195 of the code, all industrial, commercial and financial undertakings, whether sole traders or associations of persons, and more particularly, under Article 2200 of the code, companies and cooperatives, including those not engaged in commercial activity, are obliged to be registered.

#### Law No 580/1993 and its implementing provisions

8 Article 8(1) and (2) of Law No 580 on the reorganisation of chambers of commerce, industry, crafts and agriculture (Legge n. 580 — Recante riordinamento delle camere di commercio, industria, artigianato e agricoltura) of 29 December 1993 (ordinary supplement to GURI No 7, 11 January 1994; ‘Law No 580/1993’) provide that the register of undertakings is to be kept by the chambers of commerce, industry, crafts and agriculture.

9 Article 18(3) to (5) of Law No 580/1993 determines the method of calculating the annual duty.

10 The Decree of the Minister for Economic Development on the determination of the amount of the annual duty payable by undertakings to chambers of commerce for 2009 (Decreto del ministro dello Sviluppo economico — Determinazione delle misure del diritto annuale dovuto per l’anno 2009, dalle imprese alle camere di commercio) of 30 April 2009 (GURI No 114, 19 May 2009, p. 37) sets the amount of the annual duty for the year at issue in the main proceedings. That duty is a flat rate of EUR 200 for undertakings with a turnover of less than EUR 100 000, and above that figure it is calculated, in bands, as a percentage of the turnover of the undertaking concerned.

## **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 11 By judgment of 29 April 2009, the insolvency section of the Tribunale di Cosenza declared Grillo Star insolvent and opened the procedure for creditors to prove their debts in accordance with Article 93 of the Law on bankruptcies.
- 12 In that procedure the CCIAA di Cosenza applied on 4 June 2009 for a debt of EUR 200, plus EUR 113.39, in respect of the annual duty payable for 2009, to be included in the liabilities of Grillo Star.
- 13 The insolvency judge of the Tribunale di Cosenza, who is hearing the application for the debt to be included in the liabilities of Grillo Star, is unsure whether the Italian legislation on the determination of the annual duty is compatible with Directive 2008/7.
- 14 He refers in this respect to the Court's case-law, in particular Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, Case C-188/95 *Fantask and Others* [1997] ECR I-6783, and Joined Cases C-216/99 and C-222/99 *Prisco and CASER* [2002] ECR I-6761, defining the duties paid by way of fees or dues which the Member States are allowed to charge pursuant to the exception in Article 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), which was reproduced in substance in Article 6(1)(e) of Directive 2008/7. It appears to the judge that the annual duty is not such a duty, in that it is not calculated on the basis of the cost of the service provided to undertakings for maintaining their registration in the register kept by the chambers of commerce, industry, crafts and agriculture.
- 15 In those circumstances, the insolvency judge of the Tribunale di Cosenza decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
  - ‘1. Are the criteria for determining the annual duty referred to in Article 18[1](b) of [Law No 580/1993], as provided for in Article 18(3), (4), (5) and (6) thereof, inconsistent with [Directive 2008/7], in so far as the duty cannot be covered by the exceptions provided for in Article 6[1](e) of that directive?
  2. In particular:
    - Does the annual duty, which is to be determined by reference to “the budgetary resources needed in order for the chambers of commerce system to be able to carry out the services which it is under a duty to provide throughout the national territory”, constitute a duty paid by way of fees or dues?
    - Does the provision for a “balancing fund”, which is intended to harmonise throughout the national territory the performance of all the “administrative functions” entrusted by law to the chambers of commerce, preclude the possibility that the annual duty is a duty paid by way of fees or dues?

- Is the power conferred on the individual chambers of commerce to increase the amount of the annual duty by up to 20% for the purposes of cofinancing initiatives aimed at increasing production and improving the economic conditions of the territorial unit under their responsibility consistent with that annual duty being a duty paid by way of fees or dues?
  - Does the fact that no methods have been specified for determining the total budgetary requirements for the maintaining and the updating by the chambers of commerce of registrations and notes in the register of companies mean that the annual duty cannot be a duty paid by way of fees or dues?
  - Is the fact that the annual duty is determined on a flat-rate basis, with no provision for checking at “regular intervals” that it appropriately reflects the average cost of the service, consistent with the annual duty being a duty paid by way of fees or dues?
- 16 As regards the applicability of Article 5(1)(c) of Directive 2008/7 to the annual duty, the insolvency judge of the Tribunale di Cosenza supplemented his order for reference of 5 November 2009 by adding the following questions:
- ‘1. Does the obligation to pay the [annual duty], where imposed on a capital company which is not — and never has been — engaged in any economic activity and is thus “dormant”, conflict with [Directive 2008/7]?’
  2. Does the fact that registration in the register of companies constitutes an event which, for the Italian legal system, is necessarily linked to the acquisition of legal personality by capital companies — and hence the payment of the related “annual duty” — conflict with [Directive 2008/7]?’
- 17 Following the supplementary reference for a preliminary ruling, the written procedure was reopened by order of the President of the Court of 20 October 2010.

### **Jurisdiction of the Court**

- 18 The CCIAA di Cosenza submits essentially that the Court lacks jurisdiction to reply to these references for a preliminary ruling, as the insolvency judge of the Tribunale di Cosenza cannot be regarded as a ‘court or tribunal’ within the meaning of Article 267 TFEU. It submits that the procedure before that judge does not lead to a decision of a judicial nature. It observes that the judge essentially supervises and monitors the correctness of the procedure for establishing the liabilities by accepting in whole or in part or rejecting or declaring inadmissible any application for a debt to be included. It also argues that the procedure before such a judge fails in many ways to observe the *inter partes* principle.
- 19 Grillo Star submits, on the other hand, that the procedure conducted by the insolvency judge is of a judicial nature, since the Italian legislation confers on him the task of taking reasoned decisions on all applications for debts to be included in the liabilities and those decisions, if no appeal is brought, are final and binding on the parties. It also observes that the insolvency judge’s decision is made following a hearing to which the parties are summoned and in which they are entitled to take part.

- 20 On this point, it must be noted that, according to settled case-law of the Court, in order to determine whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37 and the case-law cited).
- 21 In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (order of 24 March 2011 in Case C-344/09 *Bengtsson*, paragraph 18 and the case-law cited).
- 22 Thus, when it makes an administrative decision without being required to decide a legal dispute within the meaning of the Court’s case-law, the referring body cannot be regarded as exercising a judicial function (order in *Bengtsson*, paragraph 19 and the case-law cited).
- 23 In the present case, the information provided by the CCIAA di Cosenza and confirmed by Grillo Star shows that the function of the insolvency judge is, on the basis of a draft statement of liabilities drawn up by the administrator of the bankrupt company, to determine, on application by the creditors, which debts are to be included in the liabilities. It is also apparent from the Law on bankruptcies that both the administrator and the other interested parties can challenge, before the insolvency judge, an application by a creditor for a debt to be included in the liabilities. Finally, it should be noted that, in the absence of a challenge, a decision of the insolvency judge refusing to include a debt in the liabilities has binding legal effects.
- 24 Moreover, as the Advocate General observes in point 19 of her Opinion, the administrator and the creditors can submit written and oral observations to the insolvency judge.
- 25 Having regard to all the above elements, it cannot validly be argued that the insolvency judge of the Tribunale di Cosenza is not called upon to give a decision of a judicial nature, within the meaning of European Union law, in order to decide a dispute in *inter partes* proceedings.
- 26 In those circumstances, the Court has jurisdiction to answer the referring court’s questions.

### **Consideration of the questions referred**

- 27 By its questions, which should be considered together, the referring court asks essentially whether Directive 2008/7, in particular Articles 5(1)(c) and 6(1)(e), must be understood as precluding the charging of an annual duty such as that at issue in the main proceedings, paid to chambers of commerce, industry, crafts and agriculture by all undertakings registered or noted in the register kept by those chambers.

- 28 It should be recalled that the Court has already had occasion to rule that Article 12 of Directive 69/335, the wording of which is substantially the same as that of Article 6 of Directive 2008/7, is an exception to the prohibition in principle of taxes with the same characteristics as capital duty in Article 10 of Directive 69/335, itself substantially reproduced in Article 5(1) of Directive 2008/7 (see, to that effect, inter alia, *Fantask and Others*, paragraph 20).
- 29 It must first be examined, therefore, whether an annual duty such as that at issue in the main proceedings is one of the taxes prohibited by Article 5(1) of Directive 2008/7.
- 30 That article prohibits in particular, in paragraph 1(c), indirect taxes of any form whatsoever that are payable in respect of registration or any other formality required before the commencement of business to which a capital company may be subject by reason of its legal form.
- 31 That prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of Directive 2008/7 (see, to that effect, Case C-466/03 *Albert Reiss Beteiligungsgesellschaft* [2007] ECR I-5357, paragraph 50 and the case-law cited).
- 32 Article 5(1)(c) of Directive 2008/7 must in principle be interpreted broadly as including not only procedures which are formally required before a capital company commences business but also the formalities which are necessary for carrying on the business of the company (see, to that effect, *Albert Reiss Beteiligungsgesellschaft*, paragraph 51 and the case-law cited).
- 33 However, the Court's case-law shows that that article does not prohibit a tax which is payable annually on account of the registration of an undertaking with a chamber of commerce and industry, in so far as the event which gives rise to that tax is not the registration of the company or the legal person which owns an undertaking but the registration of the undertaking itself, the tax is unrelated to the legal form of the entity which owns the undertaking, and it is not therefore linked to formalities to which capital companies may be subject by reason of their legal form (see, to that effect, Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraphs 24 to 26).
- 34 It is common ground that the event which gives rise to an annual duty such as that at issue in the main proceedings consists, in accordance with the national legislation applicable, not in the registration of the company or the legal person which owns the undertaking but in the registration of the undertaking itself. It is a duty which affects, on the basis of their turnover, all entities operating for profit.
- 35 Such a duty, as Grillo Star confirmed at the hearing, is unrelated to the legal form of the entity which owns the undertaking, as it affects both undertakings which take the form of capital companies within the meaning of Article 2 of Directive 2008/7 and undertakings which take another legal form, in particular those owned or operated individually by natural persons (see, by analogy, *Denkavit Internationaal and Others*, paragraph 25).

- 36 Moreover, as the Italian Government and the European Commission rightly point out, the fact that the annual duty is a proportion of the undertaking's turnover means that the payment of the duty cannot be a more burdensome formality for an undertaking which has adopted the legal form of a capital company than for one which takes a different legal form.
- 37 It is thus apparent that an annual duty such as that at issue in the main proceedings is not linked to formalities to which capital companies may be subject by reason of their legal form.
- 38 The circumstance mentioned by the referring court that registration of capital companies in the register of undertakings has constituent effect for capital companies as defined in the national law concerned, unlike other undertakings, cannot call into question the conclusion in the preceding paragraph. Even if registration in that register, and consequently the payment of the annual duty relating to registration, is a condition of the legal existence of a capital company, that factor cannot in itself alter the event giving rise to the annual duty, as identified in paragraph 34 above, by transforming it into a duty payable by virtue of the registration of the capital company which owns the undertaking (see, by analogy, *Denkavit Internationaal and Others*, paragraph 28). Furthermore, it is common ground that the failure of a capital company to pay that duty does not bring about its deletion from the register of undertakings.
- 39 Also immaterial is the fact, relied on by the CCIAA di Cosenza, that an annual duty such as that at issue in the main proceedings has to be paid by a capital company, such as Grillo Star, even for the period during which it does not carry on any actual economic activity. In accordance with the national law at issue in the main proceedings, the obligation for capital companies to pay the annual duty is justified by the presumption that every capital company in principle owns an undertaking. The Court has accepted, first, that the definition of an undertaking in a field such as that covered by Directive 2008/7 is within the competence of the national legislature (see, to that effect, *Denkavit Internationaal and Others*, paragraph 31) and, secondly, that that presumption does not affect the finding that the event which gives rise to a charge such as the annual duty consists, as stated in paragraph 34 above, in the registration of the undertaking itself, regardless of its legal form (see, to that effect, *Denkavit Internationaal and Others*, paragraph 29).
- 40 Moreover, according to the documents before the Court, a company such as Grillo Star, which at least carried out operations preparatory to conducting a hotel business, in particular by acquiring land, cannot in any event be equated to a 'shell' company as described in paragraph 29 of *Denkavit Internationaal and Others*, that is, a company with no assets and thus no longer carrying on any activity.
- 41 In those circumstances, the conclusion must be that an annual duty such as that at issue in the main proceedings is not a prohibited tax within the meaning of Article 5(1)(c) of Directive 2008/7.
- 42 There is therefore no need to consider whether such a duty is covered by the exception to that article in Article 6(1)(e) of Directive 2008/7.

- 43 Consequently, the answer to the questions referred is that Article 5(1)(c) of Directive 2008/7 must be interpreted as not precluding a duty, such as that at issue in the main proceedings, payable annually by all undertakings on account of their registration in the register of undertakings, even if that registration has constituent effect for capital companies and even if the duty is also payable by those companies for the period during which they only carry on activities preparatory to operating a business.

### **Costs**

- 44 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 5(1)(c) of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital must be interpreted as not precluding a duty, such as that at issue in the main proceedings, payable annually by all undertakings on account of their registration in the register of undertakings, even if that registration has constituent effect for capital companies and even if the duty is also payable by those companies for the period during which they only carry on activities preparatory to operating a business.**