

JUDGMENT OF THE COURT
20 April 1993

In Joined Cases C-71/91 and C-178/91,

REFERENCES to the Court under Article 177 of the EEC Treaty by the President of the Tribunale di Genova in Case C-71/91 and by the President of the Tribunale di Milano in Case C-178/91 for preliminary rulings in the proceedings pending before those courts between

Ponente Carni SpA

and

Amministrazione delle Finanze dello Stato,

and between

Cispadana Costruzioni SpA

and

Amministrazione delle Finanze dello Stato,

on the interpretation of Articles 10 and 12 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias (President of Chamber), acting for the President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliét, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Ponente Carni, by Giuseppe Conte and Giuseppe Michele Giacomini, of the Genoa Bar,
- Cispadana Costruzioni, by Ernesto Beretta and Aldo Bozzi, of the Milan Bar,
- the Italian Republic, by Professor Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, *Avvocato dello Stato*,
- the United Kingdom, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent,
- the Kingdom of the Netherlands, by B. R. Bot, Secretary General in the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Enrico Traversa, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ponente Carni SpA, Cispadana Costruzioni SpA, the Italian Government, the Netherlands Government and the Commission at the hearing on 8 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1992,

gives the following

Judgment

- 1 By order of 14 January 1991, received at the Court on 21 February 1991, the President of the Tribunale di Genova (District Court, Genoa) referred four questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Articles 10 and 12 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (hereinafter 'the Directive').
- 2 By order of 27 June 1991, received at the Court on 8 July 1991, the President of the Tribunale di Milano (District Court, Milan) referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of the same provisions.
- 3 The two cases were joined by order of the President of the Court of 11 May 1992.
- 4 The questions put by the order of 14 January 1991 in Case C-71/91 were raised in proceedings between Ponente Carni SpA and the Amministrazione delle Finanze dello Stato in relation to the 'tassa di concessione governativa' (administrative charge) for the registration of companies in the register of companies.
- 5 That charge, introduced by Presidential Decree No 641 of 26 October 1972 (GURI No 292 of 11 November 1972, Supplement No 3) applies to the registration in the register of companies of the principal measures concerning the existence of companies. The register is kept by court registrars pending the creation of the register of companies provided for by Article 2188 of the Codice Civile.
- 6 The amount of the administrative charge and the period covered thereby, in so far as it applies to the registration of companies' instruments of incorporation has been repeatedly amended.
- 7 The amount of the charge for registration was increased from LIT 81 000 to LIT 5 000 000 for public limited companies and limited partnerships with a share capital, to LIT 1 000 000 for private limited companies and to LIT 100 000 for other companies by Article 3(18) of Decree-Law No 853 of 19 December 1984 (GURI No 347 of 19 December 1984), converted into Law No 17 of 17 February 1985 (GURI No 41bis of 17 February 1985).
- 8 Decree-Law No 173 of 30 May 1988 (GURI No 125 of 30 May 1988) increased those amounts. Article 1 of Law No 291 of 26 July 1988 (GURI No 175 of 27 July 1988), which converted that decree into a Law, increased the amount of the charge to LIT 2 500 000 for private limited companies and to LIT 500 000 for other companies. For public limited companies and limited partnerships with a share capital the Law set five different charges ranging from LIT 9 000 000 to 120 000 000 according to the amount of the authorized capital.
- 9 Article 36(8) of Decree-Law No 69 of 2 March 1989 (GURI No 51 of 2 March 1989), converted into Law No 154 of 27 April 1989 (GURI No 99 of 29 April 1989), set the amount of the charge at LIT 12 000 000 for public limited companies and limited partnerships, at LIT 3 500 000 for private limited companies and LIT 500 000 for other companies.
- 10 The abovementioned Law No 154 added a paragraph 8bis to Article 36 of the Decree-Law of 2 March 1989, the result of which is that the amount of the charge for 1988 is LIT 15 000 000 for public limited companies and limited partnerships with a share capital, LIT 3 500 000 for private limited companies and LIT 500 000 for other companies. Those provisions replaced the aforesaid provisions of Law No 291 of 26 July 1988.
- 11 As regards the period covered by the charge, the abovementioned Decree-Law No 853 provides that the charge is payable not only when the company's instruments of association are entered on the register but also on 30 June of each subsequent calendar year.
- 12 Ponente Carni considered that the charge was contrary to Articles 10 and 12 of the Directive and applied to the President of the Tribunale di Genova for an order to the Amministrazione delle Finanze to refund the administrative charge which the company had paid for 1988, 1989 and 1990.

- 13 In those circumstances the President of the Tribunale di Genova stayed the proceedings and referred the following four questions to the Court for a preliminary ruling:
- (1) Are "duties paid by way of fees or dues" within the meaning of Article 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 to be construed as meaning solely charges made for optional services performed individually by the public authorities in the specific interests of the person requesting them, or do they cover the broader concept of charges generally imposed for services performed in the public interest?
 - (2) Do the administrative acts performed by the State in order to "maintain the appropriate machinery for making public all documents relating to the conduct of companies" acquire *by virtue of Community law* the nature of a service performed individually and giving rise to a claim for payment of a pecuniary charge in accordance with Article 12(1)(e) of the said Directive and, if so, is Article 12(1)(e) of that Directive compatible with national legislation which makes a company within the meaning of Article 3 thereof liable for the payment of charges which are not quantified on the basis of the cost of the service?
 - (3) Is Article 12(2) of the Directive compatible with certain provisions of national law (Articles 36(8) and 8 bis of Law No 154 of 27 April 1989) which impose on public limited companies (Società per Azioni) falling under Article 3 of the Directive annual charges which are not quantified on the basis of the cost of the service and which are higher than the charges applied within the territory of the State to private limited capital companies (Società di Capitali a Responsabilità Limitata) in respect of like transactions?
 - (4) Should the annual State fee for enrolling a company in the companies' register, imposed by Article 36(8) of Law No 154 of 27 April 1989, be viewed as a tax prohibited under Article 10 of the Directive?
- 14 The question referred to the Court for a preliminary ruling by the order of 27 June 1991 in Case C-178/91 was raised in proceedings between Cispadana Costruzioni and the Amministrazione delle Finanze in relation to the administrative charge, previously described, due for the enrolment of the company's instruments of incorporation in the register.
- 15 In an application for an interim order before the President of the Tribunale di Milano, Cispadana Costruzioni, which also challenged in the main proceedings the validity of the charge, sought suspension of the time-limit for payment of the charge.
- 16 In those circumstances the President of the Tribunale di Milano stayed the proceedings and referred the following three questions to the Court for a preliminary ruling:
1. Are "duties paid by way of fees or dues", referred to in Article 12(1)(e) of Directive 69/335/EEC of 17 July 1969 to be construed as meaning solely the charges made for services (optional or mandatory) performed by the public administration specifically for the person requesting them, or do the said "duties paid by way of fees or dues" include charges made for services performed in the public interest?
 2. Must the pecuniary charge allowed by Article 12(1)(e) of Directive 69/335/EEC of 17 July 1969 — in respect of "duties paid by way of fees or dues" — be proportional to the actual cost of the service provided (as held on several occasions by the Court of Justice, albeit in cases concerning another matter, namely customs, in relation to costs for a service which was not optional but mandatory: see for example the judgment of 12 July 1977 in Case 89/76 *Commission v Netherlands* [1977] ECR 1355, paragraph 16; and subsequent judgments, most recently that of 21 March 1991 in Case C-209/89 *Commission v Italian Republic*) or may the actual cost of the service be completely disregarded?
 3. Must Article 10 and Article 12(1)(e) of Directive 69/335/EEC be interpreted as precluding the introduction and/or maintenance of national legislation — of the type introduced by the Italian legislature in the form of Article 3(19) of Decree Law No 853 of 19 December 1984 (converted into Law No 17 of 17 February 1985) and amended by Article 36(8) of Decree Law No 69 of 2 March 1989, converted into Law No 154 of 27 April 1989 — which required the annual payment of a charge which is not quantified or quantifiable on the basis of the cost of the service provided and, moreover, is of an amount considerably higher than that charged to other capital companies and other undertakings for the same service (for example, for a Società a Responsabilità Limitata (private limited company) the tax is LIT 3.5 million; for other types of companies it is LIT 500 thousand)?

- 17 Reference is made to the Report for the Hearing for a fuller account of the facts of the two cases, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 18 First it is appropriate to state the objects and content of the Directive.
- 19 As the recitals in the preamble indicate, the Directive aims at encouraging the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States.
- 20 For these purposes the Directive provides for charging on the raising of capital a capital duty, which, as stated in the seventh recital, should be harmonized with regard both to its structures and to its rates (Case 161/78 *Conradsen* [1979] ECR 2221, paragraph 11). That capital duty is governed by the provisions of Articles 2 to 9 of the Directive.
- 21 Article 3 defines the capital companies to which the provisions of the Directive apply and they include in particular the *Società per Azioni* (public limited company), the *Società in Accomandita per Azioni* (limited partnership with a share capital) and the *Società a Responsabilità Limitata* (private limited company).
- 22 Article 4, Article 8 as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) and Article 9 list, subject to Article 7, the transactions subject to capital duty and certain transactions which the Member States may exempt. According to Article 4(1)(a) transactions subject to capital duty include the formation of a capital company.
- 23 According to the last recital in the preamble the Directive also provides for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities, the retention of which might frustrate the purposes of the measures provided for. Those indirect taxes, the levying of which is prohibited, are listed in Articles 10 and 11 of the Directive. Article 10 provides:
'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:
(a) in respect of the transactions referred to in Article 4;
(b) ...
(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'
- 24 Article 12(1) of the Directive lays down an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may affect capital companies in connection with the transactions referred to in those latter provisions (see to that effect Case 36/86 *Ministeriet for Skatter og Afgifter v Dansk Sparinves* [1988] ECR 409, paragraph 9). Article 12(1)(e) of the directive concerns in particular 'duties paid by way of fees or dues'. Article 12(2) prohibits certain forms of discrimination concerning the duties and taxes referred to in paragraph 1.

Article 10 of the Directive

- 25 The questions put essentially ask first of all whether an annual charge for the registration of capital companies falls within the scope of the provisions of Article 10 of the Directive.
- 26 It should be emphasized first that in the case referred to by the national court the annual charge is distinct from the capital duty governed by the provisions of Articles 2 to 9 of the Directive and secondly that the registration, the consideration for which the charge is levied, is that provided for by the provisions of Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

- 27 The Italian, Netherlands and United Kingdom Governments claim that an annual charge intended to finance a public service required for keeping the register in which companies are registered is not included in the taxes prohibited by the provisions of Article 10 of the Directive. Those provisions, they contend, concern only charges with the same characteristics as capital duty, which is not the case with the charge referred to by the national courts.
- 28 The Commission, Ponente Carni and Cispadana Costruzioni claim, on the contrary, that such a charge, for which the chargeable event is the registration of the company and the maintenance of that registration, falls within the prohibition laid down in Article 10 of the Directive.
- 29 Indirect taxes which have the same characteristics as capital duty fall within the scope of Article 10 of the Directive. They thus cover, whatever their form, charges which are levied for the formation of a capital company (under (a)) or for registration or any other formality required before the commencement of business to which a company may be subject by reason of its legal form (under (c)).
- 30 It follows that the various charges and duties levied for 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. Contrary to what the Italian, Netherlands and United Kingdom Governments contend, there 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. On 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.
- 31 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. As the Commission and the undertakings which are parties to the main proceedings emphasize, 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.
- 32 Consequently the answer to the question must be that Article 10 of the Directive must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.

The derogating provisions of Article 12 of the Directive and the concept of duties paid by way of fees or dues

- 33 The questions put also ask in substance whether charges levied as consideration for services rendered in the public interest, as, for example, those for the registration of companies, may be regarded as duties paid by way of fees or dues, whether that necessarily depends on the existence of a link between the amount of the charges and the cost of the services provided and finally whether the amount of the charges may, without disregarding the provisions of the Directive and in particular those of Article 12(2), vary according to whether the company liable for the charges is a public limited company or a private limited company.

Charges for services rendered in the public interest

- 34 The Commission, the Italian and United Kingdom Governments and Cispadana Costruzioni maintain that the principles laid down in the Court's case-law for distinguishing charges having an effect equivalent to customs duties, which are prohibited by Articles 9 and 16 of the Treaty, from payment for services actually rendered cannot be transposed in their entirety to define duties paid by way of fees or dues within the meaning of the Directive. In contrast to payment for services rendered, duties paid by way of fees or dues may be the consideration for transactions prescribed by law and carried out in the general interest.

- 35 Ponente Carni on the other hand maintains that duties are paid by way of fees or dues within the meaning of the Directive only if they relate to an optional and well-defined service rendered by the State in the interests of the individual.
- 36 The principles identified by the Court in defining payment for services rendered seek to give full effect to the provisions of the Treaty prohibiting charges having an effect equivalent to customs duties which, by their nature, affect only imported products; such principles consequently seek to allow the levying of various charges and payments when a frontier is crossed only if the amounts so levied constitute consideration for a specific service actually and individually rendered to the trader (see to that effect Case 340/87 *Commission v Italy* [1989] ECR 1483, paragraph 15).
- 37 The object of the Directive is different from that of the provisions of the Treaty relating to charges having an effect equivalent to customs duties. While for the purposes of the application of Article 12 of the Directive the fact that the duties are paid by way of fees or dues implies that, unlike general taxes, they are the consideration for a service to the individual, no provision in Article 12 may be interpreted, in the absence of express requirements to that effect, as excluding from the concept of duty paid by way of fee or due a charge which is the consideration for a transaction required by law for an object of public interest.
- 38 That may be precisely the case with a charge required as consideration for a transaction such as the registration of capital companies which is required by national law, in accordance with Community law, in the interest of both third parties and of the companies themselves.

The link between the amount of the duties paid by way of fees or dues and the cost of the service rendered

- 39 The Commission, Cispadana Costruzioni and Ponente Carni argue, on the basis of the case-law relating to remuneration for services rendered, that a duty paid by way of fee or due must be proportionate to the cost of the service rendered. A flatrate assessment of such costs may however be allowed provided that there is a link between such cost and the amount of the duty.
- 40 The Italian Government contends that the levying of duties paid by way of fees or dues in the circumstances provided for by the Directive must be accepted even if it is impossible to calculate the cost of the service rendered, as in the case of the keeping of the register of companies.
- 41 The distinction between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter cover only payments collected on registration or annually, the amount of which is calculated on the basis of the cost of the service rendered.
- 42 A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is a consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the directive.
- 43 For certain transactions such as, for example, the registration of a company, it may be difficult to determine their cost. In such a case the assessment of the cost can only be on a flat-rate basis and must be fixed in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction.

Duties of amounts varying according to the legal form of the company

- 44 Member States are not prohibited by any provision of the Directive, in particular Article 12(2), which merely prohibits certain forms of discrimination affecting all capital companies, from fixing different amounts for the registration of public limited companies and that of private limited companies, subject nevertheless, as the Commission, Cispadana and Ponente Carni emphasize, to ensuring that none of the amounts required for any of the companies exceeds the cost of the transaction of registration.
- 45 The answer to the question put must therefore be that Article 12 of the Directive must be interpreted as meaning that duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for operations required by law in the public interest such as, for example, the

registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.

Costs

- 46 The costs incurred by the Italian, Netherlands and United Kingdom Governments and the Commission of the European Communities, 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 actions pending before the national courts, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the President of the Tribunale di Genova by order of 14 January 1991 and by the President of the Tribunale di Milano by order of 17 June 1991, hereby rules:

1. **Article 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.**
2. **Article 12 of the Directive must be interpreted as meaning that duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for transactions required by law in the public interest such as, for example, the registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.**