

ORDER OF THE COURT (Sixth Chamber)

21 March 2002

(Article 104(3) of the Rules of Procedure - Raising of capital - Directive 69/335/EEC - Charges for the drawing up of a notarially attested act recording the formation of a capital company)

In Case C-264/00,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Müllheim/Baden (Germany) for a preliminary ruling in the proceedings pending before that court between

**Gründerzentrum-Betriebs-GmbH**

and

**Land Baden-Württemberg,**

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, R. Schintgen (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order pursuant to Article 104(3) of its Rules of Procedure,

the persons referred to in Article 20 of the EC Statute of the Court of Justice having been invited to submit any observations they may have on that proposal,

after hearing the Opinion of the Advocate General,

makes the following

**Order**

1. By order of 20 June 2000, received at the Court of Justice on 29 June 2000, the Amtsgericht (Local Court) Müllheim/Baden referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23, hereinafter 'Directive 69/335).

2. That question arose in proceedings between Gründerzentrum-Betriebs-GmbH (hereinafter ‘Gründerzentrum’) and Land Baden-Württemberg (hereinafter ‘the Land’) concerning the payment of charges for the drawing up of a notarially attested act recording the formation of a capital company.

### **Legal background**

#### *Community legislation*

3. As is clear from the first recital in its preamble, the aim of Directive 69/335 is to promote 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.
4. According to the sixth recital in the preamble to Directive 69/335, the pursuit of that objective presupposes, as far as concerns taxes on the raising of capital, the abolition of indirect taxes then in force in the Member States, and imposing in their place a duty charged only once in the common market and at the same level in all the Member States.
5. Under Article 4 of Directive 69/335:
  1. The following transactions shall be subject to capital duty:
    - (a) the formation of a capital company;
    - ...
    - (c) an increase in the capital of a capital company by contribution of assets of any kind;
    - ...
  3. Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:
    - (a) the conversion of a capital company into a different type of capital company;
    - (b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;
    - (c) a change in the objects of a capital company;
    - (d) the extension of the period of existence of a capital company.’
6. Article 7(1) and (2) of Directive 69/335 provide:

1. Member States shall exempt from capital duty transactions ... which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

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

... .

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.’
7. In accordance with the final recital in its preamble, Directive 69/335 also provides for the abolition of other indirect taxes having the same characteristics as capital duty. The taxes in question, levying of which is prohibited, are set out in Article 10 of Directive 69/335, which provides as follows:
  - (a) in respect of the transactions referred to in Article 4;
  - (b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;
  - (c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.’
8. Article 12(1)(e) of Directive 69/335 provides:

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

...

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

#### *German legislation*

9. The first sentence of Paragraph 2(1) of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Law on private limited companies) of 20 April 1892 (RGBI. 1898, p. 846), as amended by the Gesetz zur Neuregelung des Kaufmanns- und Firmenrechts und zur Änderung anderer handels- und gesellschaftsrechtlicher Vorschriften (Law reorganising commercial and business law and amending various provisions of commercial and company law) of 22 June 1998 (BGBl. 1998 I, p. 1474), provides that contracts establishing a company with limited liability must be in the form of a notarially attested act.

10. In accordance with the Beurkundungsgesetz (Law on the official recording of documents) of 28 August 1969 (BGBl. 1969 I, p. 1513), as amended by the Drittes Gesetz zur Änderung der Bundesnotarordnung und anderer Gesetze (Third Law amending the Federal Code on Notaries and other laws) of 31 August 1998 (BGBl. 1998 I, p. 2585, hereinafter 'the BeurkG'), a notarially attested act must, among other things, be read in the presence of the notary to the contracting parties, who must give their consent to and sign the document at the same time as the notary.
11. Under Paragraph 17(1) of the BeurkG the notary must ascertain the wishes of the parties, establish the facts, inform the parties of the legal effect of the transaction and set out their declarations in clear and unequivocal terms in the act. He must satisfy himself that there are no misunderstandings and that inexperienced parties are not disadvantaged. Paragraph 17(2) of the BeurkG provides that if there is any doubt about the legality of the transaction or the true wishes of the parties to the contract, the notary must discuss it with them.
12. Paragraph 115 of the Bundesnotarordnung (Federal Code on notaries) of 24 February 1961 (BGBl. 1961 I, p. 98), as amended by the Gesetz zur Änderung des Einführungsgesetzes zur Insolvenzordnung und anderer Gesetze (Law amending the Law implementing the Insolvency Rules and other laws) of 19 December 1998 (BGBl. 1998 I, p. 3836, hereinafter 'the BNotO'), provides that that code does not apply in the district of the Oberlandesgericht (Higher Regional Court) Karlsruhe (Germany). It is replaced there by the Landesgesetz über die freiwillige Gerichtsbarkeit (Regional Law on non-contentious jurisdiction) of 12 February 1975 (GBl. für Baden-Württemberg 1975, p. 116), as amended by the Rechtsbereinigungsgesetz (Consolidating Law) of 18 December 1995 (GBl. für Baden-Württemberg, p. 29), under which only notaries employed by the Land as civil servants are permitted to act in the district of the Oberlandesgericht Karlsruhe. In the rest of the Land, corresponding to the district of the Oberlandesgericht Stuttgart (Germany), both notaries who are civil servants of the Land and notaries practising independently are permitted to act.
13. However, it follows from Paragraph 20 of the BNotO that the drawing up of an official act may be requested of any notary acting in Germany, whether civil servant or self-employed, and an act thus drawn up must be recognised throughout Germany.
14. The amounts of the charges which can be levied by notaries are laid down by the Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit (Kostenordnung) (Federal Law on the taxation of matters of non-contentious jurisdiction) of 26 July 1957 (BGBl. 1957 I, p. 960), as amended by the Drittes Gesetz zur Änderung der Bundesnotarordnung und anderer Gesetze of 31 August 1998 (BGBl. 1998 I, p. 2585, hereinafter 'the KostO'). Those amounts apply uniformly throughout Germany for both self-employed notaries and those who are civil servants.
15. Under the KostO the charges for the drawing up of a notarially attested act are calculated by taking account of three different factors.
16. The first of those factors is the value of the transaction. Under Paragraph 39(1) of the KostO that value depends on the amount of the capital to which the authentication relates. Paragraph 39(4) of the KostO states however that, for the recording of documents concerning contracts, statutes and articles of association of companies, such

as a contract for the formation of a company, the value of the transaction is subject to a maximum of DEM 10 million.

17. The second factor consists of the table of fixed charges laid down by Paragraph 32 of the KostO. That charge is DEM 20 for transactions whose value is less than DEM 2 000. It increases by DEM 15 for each additional DEM 2 000 between DEM 2 000 and 10 000, by DEM 10 for each additional DEM 5 000 between DEM 10 000 and 100 000, by DEM 30 for each additional DEM 20 000 between DEM 100 000 and 10 million, by DEM 33 for each additional DEM 50 000 between DEM 10 million and 50 million, by DEM 20 for each additional DEM 100 000 between DEM 50 million and 100 000 million, by DEM 15 for each additional DEM 500 000 between DEM 100 million and 500 million and by DEM 15 for each additional DEM 1 million up to DEM 500 million. Since the value of the transaction for the recording of documents concerning company contracts is subject to a maximum of DEM 10 million, the charges which may be levied for that type of document, under that provision, may not exceed DEM 15 110.
18. The third factor which is taken into consideration in calculating the amount of the charges is the scale of charges. Under Paragraph 36(2) of the KostO, twice the fixed charge is levied for the authentication of company contracts. That factor is deemed to take account of the complexity of the relevant transaction, and the amount of work it represents. The charges payable for the drawing up of a notarially attested act recording the formation of a capital company may not therefore exceed the sum of DEM 30 220.
19. It is apparent from the documents before the Court that notaries who are civil servants employed by the Land are not directly entitled to the charges for the drawing up of a notarially attested act. Those charges are paid directly to the Land and accrue to its general budget. Notaries who are civil servants are entitled to a fixed salary calculated in accordance with the same rules as apply to other civil servants of the Land, to which is added a variable sum, corresponding to a fraction of the charges which they levy. From its budget the Land pays for, among other things, the costs of training notaries, their social insurance, the acquisition and equipment of offices; notaries who are civil servants have no power of decision as to the allocation of those resources. Apart from cases of serious negligence or intention, notaries who are civil servants are not personally liable for faults committed in the exercise of their functions, the Land undertaking that liability.

### **The main proceedings**

20. Gründerzentrum is a company with limited liability, the statutes of which were the subject of an official act drawn up on 27 October 1999 by the Notarial Office No 1 of Müllheim. Since the issued capital of Gründerzentrum was EUR 285 000, the charges payable for the drawing up of that notarially attested act were fixed at DEM 1 900. To those charges were added copying fees of DEM 60 as well as value added tax amounting to DEM 313.60. In total, Gründerzentrum was therefore charged a sum of DEM 2 273.60.
21. On 15 November 1999, Gründerzentrum brought an action in the Amtsgericht (Local Court) Müllheim/Baden contesting the notice of assessment of the charges payable for the drawing up of the notarial act. Referring to the Court's judgment in Case C-56/98 *Modelo* [1999] ECR I-6427, Gründerzentrum claimed more particularly that those

charges were really a tax, that their amount was disproportionate to the service rendered and that their imposition was contrary to Directive 69/335.

22. Before the national court, the Bezirksrevisor II beim Landgericht Freiburg (Germany), representing the public purse, maintained, among other things, that:
- having regard to the extensive obligations to which the notary is subject under Paragraph 17(1) of the BeurkG, the notary's function is not a formality within the meaning of Article 10(c) of Directive 69/335 and, therefore, the charges levied cannot be considered to be a tax within the meaning of the latter provision;
  - the national legal system in issue in *Modelo*, cited above, is clearly distinguishable from that in force in Germany since the latter recognises, apart from notaries who are civil servants, two other types of notary, practising their profession as self-employed persons. Since individuals can use such self-employed notaries, the charges payable for the drawing up of notarially attested acts are not necessarily collected by the State and, therefore, do not constitute a tax within the meaning of Directive 69/335;
  - the amount of the charges levied under the KostO for the drawing up of notarially attested acts recording transactions within the field of application of Directive 69/335 is both subject to a ceiling and considerably lower than the sum involved in *Modelo*, cited above;
  - the charges are linked to the costs of the service provided and are therefore not contrary to Directive 69/335.
23. Since it agreed with the analysis of Gründerzentrum and, therefore, doubted that, in a system such as that in force in the district of the Oberlandesgericht Karlsruhe, the KostO was compatible with Community law, the Amtsgericht Müllheim/Baden decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:
- ‘ In the case of operations to which Article 4(3) of Directive 69/335/EEC refers, are charges for the recording and certification of documents by notaries in the civil service of the Land Baden-Württemberg in the District of the Oberlandesgericht Karlsruhe caught by the prohibition under Article 10 of that directive, so that they may be charged only in accordance with the actual costs incurred by the notaries for the service in question?’

#### **The national court's question**

24. In order to reply to that question properly, it is appropriate to consider, first, whether the imposition of charges for the drawing up by a notary, who is a civil servant, of an official act recording the formation of a capital company can be considered to be a tax within the meaning of Directive 69/335. If such is the case, it is necessary to ascertain whether those charges are prohibited by Article 10(c) of Directive 69/335. Finally, it must be determined whether the fact that charges, the amount of which increases directly in proportion to the value of the issued capital subscribed, cannot exceed a

maximum limit, may affect their classification as duties paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335.

25. Since it considered that the replies to those three aspects of the question referred could be clearly deduced from its case-law, the Court, in accordance with Article 104(3) of its Rules of Procedure, informed the referring court that it proposed to give its decision by reasoned order and invited the persons referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they might have on that proposal.
26. *Gründerzentrum*, the Spanish Government and the Commission raised no objection to the Court's intention to give its decision by reasoned order, but the Land and the German Government objected.
27. So far as concerns the first aspect of the question, the Court of Justice has already held, in paragraph 23 of its judgment in *Modelo*, that Directive 69/335 must be interpreted as meaning that charges constitute taxes for the purposes of that directive where they are collected for drawing up notarially attested acts recording a transaction covered by the directive, under a system where notaries are employed by the State and the charges in question are paid in part to that State for the financing of its official business.
28. The same applies to a system such as that in force in the district of the *Oberlandesgericht Karlsruhe*, which is also characterised by the fact that the notaries are civil servants and that the charges levied for the drawing up of a notarial act recording a transaction covered by Directive 69/335 are paid in part to the State which employs them and used to finance its official business.
29. In relation to the second aspect of the question, the Court held, in paragraph 26 of its judgment in *Modelo*, that since it is compulsory under Portuguese law to register increases in share capital by a notarially attested act, that act constitutes an essential formality connected with the legal form of the company, which is necessary if the company is to carry on business. The Court concluded from that, in paragraph 28 of the same judgment, that a charge payable for drawing up a notarially attested act recording an increase in the share capital or a change in the name or registered office of a capital company is, where it amounts to a tax for the purposes of Directive 69/335, in principle prohibited under Article 10(c) thereof.
30. That reasoning also applies to a case such as that in the main proceedings since Directive 69/335 requires the same treatment for the formation of a capital company and an increase of its capital and, in the same way as the transactions in issue in *Modelo*, the formation of a capital company must, under German law, be carried out by notarially attested act.
31. As regards the third aspect of the question, according to the Court's consistent case-law, the distinction drawn between taxes prohibited by Article 10 of Directive 69/335 and duties paid by way of fees or dues, which can lawfully be imposed, implies that the latter comprise only remuneration the amount of which is calculated on the basis of the cost of the service rendered. Where the amount payable is wholly unrelated to the cost of the service in question or is calculated, not by reference to the costs of the transaction for which it constitutes the consideration, but to all the operational and capital costs incurred by the office responsible for that transaction, it must be regarded as a tax falling

exclusively within the prohibition laid down in Article 10 of Directive 69/335 (see, among other cases, Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraphs 41 and 42, *Modelo*, paragraph 29, and Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 32).

32. Secondly, the Court has repeatedly held that charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, constitute duties paid by way of fees or dues within the meaning of Directive 69/335. Even though in some cases the complexity of a registration may be linked to the amount of capital raised, the amount of the charge will generally bear no relation to the costs actually incurred by the administrative body which provided the service (see, among other cases, *Modelo*, paragraph 30).
33. Finally, the Court made clear, at paragraph 36 of its judgment in *SONAE*, cited above, that although the absence of an upper limit certainly indicates that a charge calculated by reference to the value of the act registered is not a duty paid by way of fees or dues within the meaning of Directive 69/335, the existence of such a limit, which is neither prescribed nor prohibited by that directive, is not sufficient to render the charge a duty paid by way of fees or dues. The Court added, at paragraph 37 of that judgment, that an upper limit which cannot be regarded as reasonable in relation to the cost of the transaction in point, cannot alter the nature of the charge if it is not in fact a duty paid by way of fees or dues levied on that transaction.
34. In those circumstances, the national court's question must be answered as follows:
  - Directive 69/335 must be interpreted as meaning that charges constitute taxes for the purposes of that directive where they are payable for the drawing up of a notarially attested act recording a transaction covered by Directive 69/335, under a system where the notaries are civil servants and the charges are paid in part to the public authority which employs them, and used for the financing of its official business, such as the system in force in the district of the Oberlandesgericht Karlsruhe.
  - Where they amount to a tax for the purposes of Directive 69/335, charges payable for the drawing up of a notarially attested act recording the formation of a capital company are, in principle, prohibited by Article 10(c) thereof.
  - The fact that charges payable for the drawing up of a notarially attested act recording the formation of a capital company, which increase directly in proportion to the nominal value of the capital raised, cannot exceed a certain maximum, is not sufficient, by itself, to render them duties paid by way of fees or dues within the meaning of Directive 69/335, where the amount of that maximum bears no relation to the costs of the service for which the charges constitute the consideration.

### **Costs**

35. The costs incurred by the Spanish and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these

proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Amtsgericht Müllheim/Baden by order of 20 June 2000, hereby rules:

**Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as meaning that charges constitute taxes for the purposes of that directive where they are payable for the drawing up of a notarially attested act recording a transaction covered by Directive 69/335, as amended, under a system where the notaries are civil servants and the charges are paid in part to the public authority which employs them, and used for the financing of its official business, such as the system in force in the district of the Oberlandesgericht Karlsruhe.**

**Where they amount to a tax for the purposes of Directive 69/335, as amended, charges payable for the drawing up of a notarially attested act recording the formation of a capital company are, in principle, prohibited by Article 10(c) thereof.**

**The fact that charges payable for the drawing up of a notarially attested act recording the formation of a capital company, which increase directly in proportion to the nominal value of the capital raised, cannot exceed a certain maximum, is not sufficient, by itself, to render them duties paid by way of fees or dues within the meaning of Directive 69/335, as amended, where the amount of that maximum bears no relation to the costs of the service for which the charges constitute the consideration.**