

JUDGMENT OF THE COURT (Fourth Chamber)

21 September 2000

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Charge for drawing up a notarially attested act recording an increase in the share capital of a capital company and an amendment to its statutes)

**In Case C-19/99,**

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Supremo Tribunal Administrativo, Portugal, for a preliminary ruling in the proceedings pending before that court between

**Modelo Continente SGPS SA**

and

**Fazenda Pública,**

in the presence of:

**Ministério Público,**

on the interpretation of Articles 4(3), 10 and 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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: G. Cosmas,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Modelo Continente SGPS SA, by C. Osório de Castro, of the Oporto Bar,
- the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for the European Communities of the Ministry of Foreign Affairs, Â. Seïça Neves, of the same Service, and R. Barreira, Adviser in the Centre for Legal Studies attached to the office of the Prime Minister, acting as Agents,
- the German Government, by W.-D. Plessing and C.-D. Quassowski, respectively Ministerialrat and Regierungsdirektor in the Federal Ministry of Finance, acting as Agents,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in the same Directorate, acting as Agents,
- the Commission of the European Communities, by A.M. Alves Vieira and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2000,

gives the following

### **Judgment**

1. By decision of 9 December 1998, received at the Court on 28 January 1999, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Articles 4(3), 10 and 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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) (hereinafter 'the Directive').
2. Those questions arose in proceedings between Modelo Continente SGPS SA (hereinafter 'Modelo Continente') and the Fazenda Pública (Public Exchequer) concerning payment of charges for the notarial certification of public instruments recording an increase in Modelo Continente's share capital and other amendments to its statutes.

#### **Community legislation**

3. The aim of the Directive is to encourage the free movement of capital, which is regarded as essential for the creation of an economic union with characteristics similar to those of a domestic market.
4. Article 4 of the Directive provides:
  - '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.’

5. Article 7 states:

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

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

...

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

...’

6. 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) 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.’

7. Article 12(1) states:

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

. ..

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

### **National legislation**

8. The code governing the Portuguese notarial profession, enacted by Decree-Law No 47619 of 31 March 1967, provides that certain acts must be recorded in public instruments, that is to say, documents drawn up by a notary. They include acts which 'incorporate commercial companies, change their form, dissolve them or put them into ordinary liquidation ... and those which amend any company statutes' (Article 89(e) of the code).
9. 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.
10. Article 1(1) of the Table provides that, in general, the value of notarially attested acts is that of the assets to which they relate. Article 1(2) specifies the value to be attributed to each type of notarially attested act. Thus, for an act incorporating a company, amending the statutes or dissolving the company, the value is equal to the company's capital (Article 1(2)(e)); for an increase in capital, whether or not the statutes are amended, it is the amount of the increase (Article 1(2)(f)); and for increases in capital where a partial alteration is made to clauses other than the clause 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 (Article 1(2)(g)).
11. Article 5 of the Table provides that where the act recorded in a public instrument 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. These are calculated by reference to the overall value of the act: for every PTE 1,000, 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.
12. Article 27(1)(c) of the Table provides for a 50% reduction in the charges set out in Article 5 in the case of instruments recording a partial amendment of a company's statutes, or the fact that the period for which the company was constituted has been extended or continued.

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

13. On 31 October 1992 Modelo Continente had public instruments drawn up recording an increase in its share capital and other amendments to its statutes. On that account, it was called on to pay a sum of PTE 16 842 000.
14. Modelo Continente contested the calculation of that charge before the Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Oporto, which found against it. Thereupon it appealed to the Supremo Tribunal Administrativo on the ground that the charge was really a tax, the level of which therefore had to be set not by the Government but by Parliament, that the amount demanded was out of proportion to the services provided and that the levying of the charge was incompatible with the Directive.

15. Since the Supremo Tribunal Administrativo was uncertain whether Article 5 of the Table was compatible with the Directive, it decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Is it open to an individual to rely on Articles 10 and 12 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, in particular one that is a charge rather than a tax?
- (3) Must Articles 10 and 12(1)(e) of the same directive be interpreted as meaning that notarial charges for recording in a public instrument as required by law resolutions to increase the capital or to amend the statutes of a company may not vary according to the amount of the increase and the amount of the capital respectively?
- (4) May those charges - see Article 5 of the Table of Notarial Charges - be regarded as reflecting the cost of the service provided?
- (5) What must such cost be construed as comprising? Does it include the remuneration of notaries and of the staff in their office, premises and office equipment and the like?
- (6) Is it permitted and, consequently, lawful, having regard to Articles 10 and 12(1)(e) of the said directive, for any charge in excess of that cost to be made? And if so, to what extent?'

### **Consideration of the questions referred for a preliminary ruling**

16. The questions submitted by the national court in the present case are to a large extent identical to those asked by the same court in Case C-56/98 *Modelo v Director-Geral dos Registos e Notariado* [1999] ECR I-6427 (hereinafter '*Modelo I*').
17. By its questions, the national court is essentially asking whether notarial charges may be regarded as taxes for the purposes of the Directive and, if so, whether they are caught by the prohibition laid down in Article 10 thereof or whether they are fees or dues within the meaning of Article 12(1)(e). In this connection, the national court asks the Court in particular to provide it with criteria for defining fees or dues. Lastly, it wishes to know whether Article 10 of the Directive, read in conjunction with Article 12(1)(e), creates rights on which individuals may rely in proceedings before the national courts.

#### *The meaning of 'tax' for the purposes of the Directive*

18. It is clear from paragraph 18 of the judgment in *Modelo I* that in Portugal notaries are employed by the State and have the same rights and duties as other civil servants, their remuneration being made up partly of a fixed amount - determined in accordance with

the same criteria as are applied to all other civil servants - and partly of a variable amount representing a share of the monies received in payment.

19. Notaries prepare a monthly statement of the monies received in payment of their charges. From the total amount thus obtained, the percentage amounts payable to the notary and the members of his staff are deducted. The balance is paid to the Cofre dos Conservadores, Notários e Funcionários de Justiça (Fund for Registrars, Notaries and Officers of the Ministry of Justice; hereinafter 'the Fund') (*Modelo I*, paragraph 19).
20. The Fund is responsible for paying the fixed portion of the salaries payable to notaries and other civil servants; it also meets the cost of training notaries and of acquiring office space and equipment for them; and, subject to authorisation from the Ministry of Justice, it covers other expenditure in the field of legal administration (*Modelo I*, paragraph 20).
21. Thus, a proportion of the charges at issue in the main proceedings, payable pursuant to a rule of law laid down by the State, is paid by a private person to the State for the financing of its official business (*Modelo I*, paragraph 21).
22. In the light of the objectives pursued by the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, charges collected by public officials for notarising a transaction covered by the Directive, which are in part paid to the State in order to subsidise public expenditure, must be regarded as taxes for the purposes of the Directive (*Modelo I*, paragraph 22).
23. Consequently, the Directive must be interpreted as meaning that charges constitute taxes for the purposes of the 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.

*The prohibition laid down in Article 10 of the Directive*

24. Article 10(c) of the Directive prohibits, in addition to capital duty, taxes in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form. That prohibition is justified by the fact that even though the taxes in question are not levied on capital contributions as such, they are nevertheless levied on account of formalities connected with the company's legal form, that is to say, on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23).
25. The prohibition covers not only charges paid for the registration of new companies, but also duties payable by companies for the registration of increases in capital since these, too, are levied on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital is not, strictly speaking, a formality required before the commencement of business by a company, it is none the less necessary for the carrying on of that business (Case C-188/95 *Fantask and Others v Industriministeriet* [1997] ECR I-6783, paragraph 22).

26. Since it is compulsory under Portuguese law to register increases in share capital by a notarially attested act, it follows that this constitutes an essential formality connected with the legal form of the company and that it is necessary if the company is to carry on business (*Modelo I*, paragraph 26).
27. Moreover, a tax in the form of a charge collected for drawing up a notarially attested act recording an amendment to the statutes of a capital company must be regarded as having the same characteristics as capital duty in so far as it is calculated by reference to the company's share capital. Otherwise, it would be possible for Member States, while refraining from imposing taxes on the raising of capital as such, to tax that capital whenever the company amended its statutes. That would enable the objective pursued by the Directive to be circumvented (see *Modelo I*, paragraph 27).
28. The answer should therefore be that a charge payable for drawing up a notarially attested act recording an increase in the share capital or an amendment to the statutes of a capital company is, where it amounts to a tax for the purposes of the Directive, in principle prohibited under Article 10(c) thereof.

*The derogation provided for in Article 12(1)(e) of the Directive*

29. The distinction drawn between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues 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 department responsible for that transaction, it would have to be regarded as a tax falling exclusively within the prohibition laid down in Article 10 of the Directive (Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraphs 41 and 42).
30. It may be difficult to determine the cost of certain transactions, for example the registration of a company. In such a case the cost can only be assessed on a flat-rate basis and must be determined in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction (*Ponente Carni and Cispadana Costruzioni*, paragraph 43).
31. In that regard, as the Court held at paragraph 30 of the judgment in *Fantask and Others*, cited above, when calculating the amount of duties paid by way of fees or dues, the Member States are entitled to take account not only of the material and salary costs which are directly related to the effecting of the registrations in respect of which they are incurred, but also, in the circumstances indicated by the Advocate General at paragraph 43 of his Opinion in the same case, of the proportion of the overheads of the competent authority which can be attributed to those registrations.
32. The amount of duties paid by way of fees or dues does not necessarily have to vary in accordance with the costs actually incurred by the authority in effecting each registration and a Member State is entitled to prescribe in advance, on the basis of the projected average registration costs, standard charges for carrying out registration formalities in relation to capital companies. Furthermore, there is nothing to prevent those charges

from being set for an indefinite period, provided that the Member State checks at regular intervals, for example once a year, that they continue not to exceed the registration costs (*Fantask and Others*, paragraph 32).

33. It should also be noted 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 the Directive. 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 authority which provided the service (*Modelo I*, paragraph 30).
34. In the present case, even though the charge is levied in accordance with a sliding scale, the amount of tax payable increases in direct proportion to the nominal value of the capital raised. Moreover, given that in the case of values above PTE 10 000 000 the charge is levied at the not inconsiderable rate of 0.3%, and that no upper limit has been set, the amount payable could be substantial (*Modelo I*, paragraph 31).
35. The answer should therefore be that 'fees or dues' within the meaning of Article 12(1)(e) of the Directive do not cover a charge collected for drawing up a notarially attested act recording an increase in the share capital or an amendment to the statutes of a capital company, such as the charge at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit.

#### *The direct effect of Article 10 of the Directive*

36. The Court has consistently held that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by an individual against the State in proceedings before the national courts where the State has failed to transpose the directive into national law by the end of the period prescribed or has failed to do so correctly (see, *inter alia*, Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and Others* [1994] ECR I-483, paragraph 8, and Case C-347/96 *Solred v Administración General del Estado* [1998] ECR I-937, paragraph 28).
37. On this point, it need only be noted that the prohibition laid down in Article 10 of the Directive is expressed in sufficiently precise and unconditional terms to be relied upon by individuals in the national courts in order to contest a provision of national law which is contrary to the Directive (*Solred*, paragraph 29, and *Modelo I*, paragraph 34).
38. It must therefore be stated that Article 10 of the Directive creates rights on which individuals may rely in proceedings before the national courts.

#### **Costs**

39. The costs incurred by the Portuguese, German and French Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by decision of 9 December 1998, hereby rules:

- 1. 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 the 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.**
- 2. A charge payable for drawing up a notarially attested act recording an increase in the share capital or an amendment to the statutes of a capital company is, where it amounts to a tax for the purposes of Directive 69/335, as amended by Directive 85/303, in principle prohibited under Article 10(c) thereof.**
- 3. 'Fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335, as amended by Directive 85/303, do not cover a charge collected for drawing up a notarially attested act recording an increase in the share capital or an amendment to the statutes of a capital company, such as the charge at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit.**
- 4. Article 10 of Directive 69/335, as amended by Directive 85/303, creates rights on which individuals may rely in proceedings before the national courts.**