

JUDGMENT OF THE COURT (Sixth Chamber)
5 March 1998 *

In Case C-347/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal Superior de Justicia de Madrid for a preliminary ruling in the proceedings pending before that court between

Solred SA

and

Administración General del Estado

on the interpretation of Articles 4(1)(a), 5(1)(a), 7 and 10(a) 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: H. Ragnemalm (Rapporteur), President of the Chamber, R. Schintgen, G. F. Mancini, P. J. G. Kapteyn and G. Hirsch, Judges,

* Language of the case: Spanish.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Solred SA, by Fernando Lorente Hurtado, of the Madrid Bar,
- the Spanish Government, by Paloma Plaza García, Abogado del Estado, acting as Agent,
- the Commission of the European Communities, by Miguel Díaz-Llanos, Legal Adviser, Hélène Michard and Carlos Gómez de la Cruz, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Solred SA, the Spanish Government and the Commission at the hearing on 16 September 1997,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

Judgment

- 1 By order of 3 July 1996, received at the Court on 21 October 1996, the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid) referred to the

Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 4(1)(a), 5(1)(a), 7 and 10(a) 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 Directive').

- 2 Those questions were raised in proceedings between Solred SA and the Administración General del Estado ('the tax authorities') concerning payment of a charge on the notarial deed recording the subsequent contribution of part of the share capital, which had been fully subscribed when the company was formed.
- 3 The Directive is aimed in particular at achieving harmonisation of the factors involved in the fixing and levying of capital duty in the Community, by means of the elimination of tax obstacles which interfere with the free movement of capital.
- 4 Article 4(1)(a) of the Directive imposes capital duty on *inter alia* 'the formation of a capital company' and Article 4(1)(c) imposes it on 'an increase in the capital of a capital company by contribution of assets of any kind'.
- 5 In accordance with Article 5(1)(a) of the Directive, capital duty is charged, in the case of formation of a capital company or of an increase in its capital, on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution. The provision states that Member States may postpone the charging of capital duty until the contributions have been effected.

6 Article 7(2) provides that Member States may either exempt from capital duty certain transactions referred to in the Directive or charge duty on them at a single rate not exceeding 1%.

7 The Directive also provides, in accordance with the final recital in its preamble, for the abolition of other indirect taxes with the same characteristics as capital duty or stamp duty on securities, the retention of which might frustrate the purpose of the measures provided for in the Directive. Those indirect taxes, collection of which is prohibited, are listed *inter alia* 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) 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 The Spanish legislation applicable to the dispute in the main proceedings is contained in the consolidated version of the Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Law concerning duty on transfers of assets and documented legal transactions), approved by Royal Legislative Decree 3050/1980 of 30 December 1980, the amended version of which now in force was approved by Royal Legislative Decree 1/1993 of 24 September 1993 (*Boletín Oficial del Estado*, 20 October 1993) (‘the Law’).

9 Article 1 of the Law provides as follows:

‘(1) Duty on transfers of assets and documented legal transactions is an indirect tax imposed, subject to the conditions set out in the provisions below, on:

1. transfers of assets for consideration;

2. company transactions;

3. documented legal transactions.

(2) In no circumstances may one and the same act be subject to duty on account of both transfers of assets for consideration and company transactions.’

10 Under the heading ‘Rate of duty’ and in the section relating to duty on ‘documented legal transactions’ in the paragraph ‘Notarial deeds’, Article 31 of the Law provides:

‘(...)

(2) Where original documents and notarial deeds have for their subject-matter a quantity or a thing of value, or contain acts or contracts required to be entered in the Commercial, Mercantile or Industrial Property Register and are not subject to inheritance tax or tax on gifts or the taxes referred to in Article 1(1) and (2) of this

Law, they shall give rise in addition to the payment of duty of 0.5% for such acts or contracts. Copies of notices of protest shall be subject to the same duty at the same rate payable by means of stamped documents.'

- 11 Solred was formed by notarial deed of 21 November 1990, with share capital of PTA 300 000 000. On that date, the sum of PTA 180 000 000, that is to say 60% of the nominal value of the share capital, was contributed. On 28 November 1990 Solred paid the tax authorities the sum of PTA 3 000 000, equivalent to 1% of the nominal value of the share capital.

- 12 By notarial deed of 17 January 1991 the 40% of the capital not yet issued and paid up, that is to say PTA 120 000 000, was contributed to Solred. On 7 February 1991 Solred submitted to the tax authorities the assessment form for the tax payable for that second transaction, stating that it should not give rise to any duty, since 1% duty had already been paid on the whole of the share capital when the company was formed.

- 13 The tax authorities, however, calculated duty at the rate of 0.5% on the sum of PTA 120 000 000. They took the view that the duty on company transactions paid on the formation of the company did not mean that the document recording the paying-up of the part of the capital still to be contributed could not be liable to duty as being a 'documented legal transaction'.

- 14 Solred brought an action against that decision before the Tribunal Económico Administrativo Regional de Madrid (Madrid Regional Court for Economic Administrative Affairs) which was dismissed by decision of 13 December 1993.

Solred appealed to the Tribunal Superior de Justicia de Madrid, which decided to stay proceedings and refer the three following questions to the Court of Justice for a preliminary ruling:

- (1) Properly construed, does Council Directive 69/335/EEC of 17 July 1969 (as amended by Directives 73/79 and 73/80 of 9 April 1973, 74/553 of 7 November 1974 and 85/303 of 10 June 1985), in particular Articles 4(1)(a), 5(1)(a), 7 and 10(a), mean that, if the legislation of a Member State provides for a duty to be charged on the formation of a public limited liability company at the rate of 1%, calculable in all cases on the nominal value of the share capital, even where that capital has not been paid up in full, a duty of 0.5% may not then be levied on the contribution of the part of the capital not previously paid up?
- (2) Is the limitation in Article 10 of Directive 69/335 also applicable even though the second payment of duty does not specifically relate to a capital contribution but falls to be levied on the document recording that contribution, where the recording thereof is a mandatory requirement under domestic company law and the rate of 0.5% specifically relates to the amount of the contribution recorded in the document?
- (3) Does the aforesaid Directive 69/335 (as amended) have direct effect, and does it affect, and possibly prevail over, the provisions of national law in the event that those provisions cannot be interpreted in a manner compatible with the directive?

The first two questions

- 15 By its first two questions, which it is appropriate to consider together, the national court is essentially asking whether the Directive precludes the charging of duty of 0.5% on the notarial deed recording the contribution of part of the share capital

paid up after the formation of a capital company, where duty of 1% has already been charged on the whole of the nominal value of the share capital.

- 16 The Spanish Government observes first of all that the Law provides for an indirect tax imposed on transfers of assets for consideration and on company transactions and on documented legal transactions. Where a transaction formally recorded by notarial deed is subject to the duty under one of the first heads, the deed itself is exempt from the duty.

- 17 In this instance, the formation of the company, as being a company transaction, was subject to duty at the rate of 1% of the capital subscribed. Next, as a result of the decision to contribute the capital not paid up when the company was formed, which is a subsequent and independent transaction, the notarial deed is subject to the duty on documented legal transactions because the transaction formally recorded therein is not liable to any other tax.

- 18 The Spanish Government makes it clear that the charge at issue in the main proceedings is levied on the notarial instrument and not the transaction itself, which is not liable to any taxation.

- 19 The Spanish Government goes on to state that neither the contribution of the capital not paid up at the time the company was formed nor its formal recording by notarial deed is a condition precedent for the company to commence business. The company is formed once the constituent document is registered in the Commercial Register and may then act freely.

- 20 Finally, the Spanish Government claims that this is not a formality to which companies are subject on account of their legal form, but a formality which is

necessary where the share capital has not been paid up in full on the formation of the company. Whether or not there is a second payment depends solely on the wishes of the members.

- 21 Article 10 of the Directive, read in the light of the last recital in the preamble, prohibits in particular indirect taxes with the same characteristics as capital duty. It thus applies, *inter alia*, to taxes in any form which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)), or 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 (Article 10(c)). That latter 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 the Directive (Case C-2/94 *Denkavit Internationaal and Others v Kamer van Koophandel en Fabrieken voor Midden-Gelderland and Others* [1996] ECR I-2827, paragraph 23, and Case C-188/95 *Fantask A/S and Others v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783, paragraph 21).
- 22 Taxes paid on the registration of new public and private limited companies are directly referred to in the prohibition laid down by Article 10(c) of the Directive. A similar conclusion must also be reached where those charges are payable on the registration of increases in the capital of such companies, since they too are imposed on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital does not formally amount to a procedure which is required before a capital company commences business, it is none the less necessary for the carrying on of that business (*Fantask*, cited above, paragraph 22).
- 23 Although the duty on documented legal transactions is a general indirect tax, it is none the less, in circumstances such as those of the dispute in the main proceedings, charged on the notarial deeds necessary for the registration of the payment of

the part of the share capital yet to be contributed and, accordingly, for the paying up in full of the shares. It is therefore a tax imposed on account of an essential formality connected with a company's legal form.

- 24 Furthermore, even if neither the payment of the outstanding part of the share capital nor its recording by notarial deed constitutes a preliminary formality required before a capital company can carry on business, the fact remains that in order for the company to carry on business it is necessary to register the contribution of previously unpaid share capital.
- 25 It follows that although the Member States may, in accordance with Article 5(1)(a) of the Directive, postpone the charging of capital duty until the contributions have been effected, they may not impose taxes on a document recording the subsequent contribution to a capital company of part of the share capital, which has already borne capital duty.
- 26 The answer to the first two questions must therefore be that, properly construed, Article 10 of the Directive precludes the levying of 0.5% duty on the notarial deed recording the contribution of part of the share capital paid up after the formation of a capital company, where duty of 1% has already been charged on the whole of the nominal value of the share capital.

The third question

- 27 By its third question, the national court asks whether the provisions of the Directive give rise to rights upon which individuals may rely before national courts and whether those courts are obliged to leave unapplied provisions of national law incompatible therewith.

- 28 It is settled case-law that where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon in national courts by individuals against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly (see, in particular, *Fantask*, cited above, paragraph 54).
- 29 In this case, it is sufficient to observe that the prohibition laid down in Article 10 of the Directive is expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the Directive.
- 30 The Court has consistently held that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule (Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 21).
- 31 The answer to the third question must therefore be that Article 10 of the Directive gives rise to rights on which individuals may rely before national courts. Those courts are obliged to leave unapplied provisions of national law incompatible therewith.

Costs

- 32 The costs incurred by the Spanish Government and by 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 action 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 questions referred to it by the Tribunal Superior de Justicia de Madrid by order of 3 July 1996, hereby rules:

1. Properly construed, Article 10 of 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, precludes the levying of 0.5% duty on the notarial deed recording the contribution of part of the share capital paid up after the formation of a capital company, where duty of 1% has already been charged on the whole of the nominal value of the share capital.
2. Article 10 of Directive 69/335, as amended, gives rise to rights on which individuals may rely before national courts. Those courts are obliged to leave unapplied provisions of national law incompatible therewith.

Ragnemalm

Schintgen

Mancini

Kapteyn

Hirsch

Delivered in open court in Luxembourg on 5 March 1998.

R. Grass

H. Ragnemalm

Registrar

President of the Sixth Chamber