Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 January 2012 [1]

Case C-443/09

CCIAA di Cosenza
v
Grillo Star Srl

(Reference for a preliminary ruling from the Tribunale di Cosenza, Sezione fallimentare (Italy))

(Directive 2008/7/EC — Indirect taxes on the raising of capital — Annual duty paid to local chambers of commerce and industry)

I – Introduction

1. The present case gives the Court an opportunity, further to its judgment in *Denkavit*,[2] to clarify its case-law concerning indirect taxes on capital companies, such taxes being prohibited under Directive 2008/7/EC.[3] The subject-matter of the main proceedings is an annual duty which has to be paid to the Italian chambers of commerce and industry by all undertakings registered in the register of undertakings kept by those chambers.

II – Legal context

A – *Union law*

2. Directive 2008/7 is a revision of Directive 69/335/EEC.[4] As the latter had been substantially amended several times in the past, the Council decided to recast it in the interest of clarity. In substance, however, Directive 2008/7 is the same as the earlier directive.

3. Article 5 of Directive 2008/7 is headed 'Transactions not subject to indirect tax' and provides as follows:

'1. 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; ...'

1 — Original language: German.

2 — Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827.

3 — Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11, 'Directive 2008/7' or 'Capital Taxes Directive').

4 — Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ 1969 L 249, p. 25).

4. Article 6 of Directive 2008/7 provides as follows:

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

...

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

B – *National law*

5. The version of the relevant Italian provisions which was applicable to the dispute was as follows:

6. Article 2188(1) of the Italian Civil Code (Codice Civile, CC) introduced a register of undertakings in which all industrial, commercial and financial undertakings are to be registered. Registration is compulsory for sole traders and, pursuant to Article 2200 CC, inter alia, for limited companies. That is the case even if they are not engaged in business activity. Under Article 8 of Law No 580 of 29 December 1993,[5] the register of undertakings is kept by the chambers of commerce and industry.

7. The annual amount which undertakings registered in the undertakings register are required to pay to the chambers of commerce and industry is laid down by a ministerial decree. It appears from Article 3 of the 2009 ministerial decree that the annual duty for undertakings with annual turnover of up to EUR 100 000 is a fixed amount of EUR 200. For undertakings with a higher annual turnover, the duty is laid down as a percentage of the turnover.

III – Facts, main proceedings and procedure before the Court of Justice

8. Insolvency proceedings were opened in respect of the Italian company Grillo Star Srl.[6]

9. The referring court has the task of ascertaining the liabilities of the insolvent company Grillo Star. The Camera di commercio, industria, artigianato e agricoltura Cosenza (Cosenza Chamber of Commerce, Industry, Crafts and Agriculture, CCIAA)[7] filed a claim for EUR 200 in respect of the annual duty for 2009[8] which has to be paid to the chamber of commerce by every undertaking registered in the register of undertakings under Article 2188 CC.

10. The referring court is uncertain whether the annual duty is compatible with Directive 2008/7[9] and has therefore stayed the proceedings in order to refer the following questions to the Court:

‘Are the criteria for determining the annual duty referred to in Article 18[1](b) of Italian Law No 580 of 29 December 1993, as provided for in Article 18(3), (4), (5) and (6) thereof, inconsistent with Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, in so far as the duty cannot be covered by the exceptions provided for in Article 6[1](e) of that directive?

5 — Law on the reorganisation of the chambers of commerce, industry, crafts and agriculture, GURI No 6, 11 January 1994.

6 — ‘Grillo Star’ or ‘Grillo Star in liquidation’.

7 — ‘CCIAA Cosenza’.

8 — Plus interest of EUR 113.39.

9 — The application of the directive to this limited company follows directly from the inclusion of the *società a responsabilità limitata* in No 12 of Annex I to Directive 2008/7.

In particular:

(a) 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?

(b) 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?

(c) 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?

(d) 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 by way of fees or dues?

(e) 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 by way of fees or dues?'

11. By order of 13 September 2010, the referring court requested a ruling on two further questions:

'(1) Does the obligation to pay the company registration fee, where imposed on a capital company which is not — and never has been — engaged in any economic activity and is thus "dormant", conflict with Council Directive 2008/7/EC of 12 February 2008?

(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 the above directive?'

12. In the procedure before the Court, written observations were received from Grillo Star (in liquidation), the CCIAA Cosenza, Austria, Germany, Italy and the European Commission. Grillo Star (in liquidation), the CCIAA Cosenza, Germany, Italy and the European Commission took part in the hearing of 20 October 2011.

IV — Legal assessment

A – *Admissibility of the reference for a preliminary ruling*

13. In its written reply to questions from the Court to the parties to the procedure, the CCIAA Cosenza for the first time claimed that the reference for a preliminary ruling was inadmissible as the referring court had no right to refer a question for a preliminary ruling. It is immaterial that this objection was raised at such a late stage in the procedure because the right to seek a preliminary ruling must be examined by the Court of its own motion.

14. The main proceedings concern the ascertainment of the liabilities of the insolvent company Grillo Star. The CCIAA Cosenza considers that, at this stage of the insolvency procedure, the referring court has only a supervisory and inspection function. No legal dispute is pending as no decision is being made in adversarial proceedings.

15. Under Article 267 TFEU, any court or tribunal of a Member State may request the Court to give a preliminary ruling. The concept of a court must be defined independently for the purposes of European Union law. The Court has developed a number of criteria all of which must be considered for determining whether a body making a reference is a court or tribunal. It must be independent, permanent and established by law, its jurisdiction must be compulsory, its procedure must be *inter partes* and its decision must be of a judicial nature. [10]

16. On the basis of those criteria the Court has rejected references for a preliminary ruling from courts acting as administrative authorities in non-contentious proceedings. In one such case, for example, a decision was sought on an application for confirmation of a company's articles of association for the purpose of registration in the commercial register [11] and, in another, on the judicial appointment of a supplementary liquidator for the remaining assets of a company struck off the register. [12] In such a case, only the court to which an application for review is made may make a reference. [13]

17. In the present context there is no doubt that the referring body satisfies the formal requirements regarding a court or tribunal within the meaning of Article 267 TFEU. However, it is questionable whether the main proceedings involve an *inter partes* procedure and whether the procedure aims at a decision of a judicial nature.

1. *Inter partes* procedure

18. The Court has observed that the requirement for an *inter partes* procedure is not an absolute criterion. [14] In a procedure for reviewing the award of public contracts, the Court found that it was sufficient if the parties had to be heard by the award review body. The many different kinds of procedure in the Member States and their autonomy in relation to procedural matters suggest that the criterion of an *inter partes* procedure must not be understood too formally. Otherwise, depending on the particular form taken by the national procedure, there could be arbitrary consequences regarding the right to make a reference where the circumstances of a dispute are substantively identical.

19. Even if in the main proceedings in the present case there are not two parties confronting each other formally as claimant and defendant, which may be indicated by the heading of the request, the parties — the administrator and the creditor — nevertheless obviously have an opportunity to make their submissions in writing and also at the hearing before the referring court. The CCIAA Cosenza and Grillo Star (in liquidation) could also take part in the reference to the Court of Justice as parties to the main proceedings. Consequently it must be found that the requirement for an *inter partes* procedure is fulfilled.

2. Decision of a judicial nature

20. The question of whether the referring court is acting only as an administrative authority or is making a decision of a judicial nature in a legal dispute is more difficult.

10 — See, as the most recent cases, Case C-118/09 *Koller* [2010] ECR I-13627, paragraph 22, and Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37. In the intervening period the Court had expressly conceded that there was no requirement for an *inter partes* hearing: see Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; and Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 13.

11 — *Job Centre*, cited in footnote 10, paragraph 9

12 — Order in Case C-497/08 *Amiraike Berlin* [2010] ECR I-101, paragraph 19.

13 — Order in *Amiraike Berlin*, cited in footnote 12, paragraph 20.

14 — Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 31.

21. There appears to be no explicit definition of the term 'decision of a judicial nature' in the Court's case-law. The Court has, however, taken into account whether the decision which is made may become final and absolute. [15]

22. At the hearing, the CCIAA Cosenza and Grillo Star expressed differing opinions on the question of the legal force of the impending decision by the referring court. The former claimed that it would not be final and absolute, but Grillo Star contended that it would and described it in any case as 'enforceable'.

23. Irrespective of the technical question of legal force, however, in my opinion the decision is of a judicial nature. According to the undisputed submissions of the CCIAA, the task of the judge in the main proceedings is to establish, by a reasoned decision after hearing the parties orally, the liabilities which are to be admitted to the list of claims. The decision affects all the other creditors because of the dividend. Therefore, as the referring court's decision on the substantive issue between the parties, which is the disputed inclusion of the alleged claim for duty in the list of claims, produces obligatory legal effects, that decision is of a judicial nature.

24. The Commission also points out that Italian commentators differ on the question of the judicial nature of the compilation of the list of claims. Some regard it rather as an administrative activity, other authoritative writers take the view that the ascertainment of liabilities is a genuinely judicial activity. An unclear categorisation of a procedure under national law is also a reason why the Court should, in case of doubt, presume that a national court has a right to make a reference.

25. Finally, I would like to put forward a further pragmatic argument regarding another legal instrument the interpretation of which would be affected if it were found that there is no right to make a reference in the present case. The Insolvency Regulation [16] includes provisions concerning the filing of claims in insolvency proceedings. In order to make those provisions open to interpretation by the Court even at the first stage of the proceedings, the requirements relating to the right to make a reference in connection with the judicial ascertainment of claims for inclusion in the list of liabilities must not be too stringent. After all, considerations of procedural economy would favour allowing a reference to be made at the earliest possible stage, thereby avoiding the need for subsequent proceedings before a reviewing court in order to enable a preliminary reference to be made. [17]

26. The Court therefore has jurisdiction to reply to the questions referred to it.

B – *Replies to the questions referred*

27. The first questions from the referring court related to the issue of whether the annual duty paid to the chambers of commerce and industry constitutes 'duties paid by way of fees or dues' within the meaning of Article 6(1)(e) of Directive 2008/7.

28. First of all, however, it is necessary to clarify whether the annual duty is an indirect tax prohibited by Article 5 of Directive 2008/7. Only if the Italian duty is such an indirect tax will it be necessary to decide whether it is, by way of exception, lawful as a duty paid in the form of fees or dues. Article 6 provides for an exception which is applicable only if the disputed duty is covered by one of the prohibitions of Article 5 as an indirect tax. [18] The two supplementary questions from the referring court also relate to classification as an indirect tax within the meaning of Article 5.

15 — Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 26, and *Dorsch Consult*, cited in footnote 14, paragraph 37.

16 — Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160, p. 1.

17 — Opinion of Advocate General Jacobs in Case C-53/03 *Syfait and Others* [2004] ECR I-4609, paragraph 45, and, in a different connection, my Opinions in Case C-175/06 *Tedesco* [2007] ECR I-7929, point 22, and in Case C-283/09 *Weryński* [2011] ECR I-601, point 16.

18 — Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 20, re the corresponding provision, which had the same wording, of the preceding Directive 69/335/EEC (cited in footnote 4).

1. Indirect tax within the meaning of Article 5(1)(c) of Directive 2008/7

29. The prohibition which could be relevant in the present case is laid down by Article 5(1)(c) of Directive 2008/7, which provides that the Member States are not to impose any form of indirect tax in respect of the 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. Consequently it is now necessary to consider the two criteria of Article 5(1)(c), namely whether the annual duty is an indirect tax in respect of registration or any other formality (a) and is linked to the legal form of the company (b).

a) Tax on registration or any other formality

30. Article 5(1)(c) prohibits indirect taxes in respect of registration or any other formality before the commencement of the company's business. Consequently, first, there must be a registration or some other kind of formality which, secondly, must precede the commencement of business. The second requirement is not to be understood purely as a matter of time, so that it does not depend on whether registration takes place before the company commences business. Rather, this requirement must be understood to mean that registration or any other formality is a precondition for a company to operate or to have capacity to act.

31. The question from the referring court concerns an annual duty which has to be paid to the chambers of commerce and industry by every undertaking in the register of undertakings.

32. The Federal Government has correctly pointed out that it is not clear, at least from the first order for reference, whether the duty at issue is levied *on account of the registration* of the company at all. The order for reference expressly states only that the duty is payable by undertakings registered in the register. It is not clear from that wording whether registration in the register of undertakings is a procedure which is independent of the duty and whether reference is made to the undertakings listed in the register only for determining the entities liable for the duty. It is also possible that the register of undertakings acts at the same time as a commercial register in which capital companies must be registered, with the result that the duty is a prerequisite for the inclusion of a company in the commercial register.

33. However, it seems to appear from the supplementary order for reference that at least the first payment of duty to the chambers of trade and industry is connected with registration in the register of undertakings and that registration is a requirement for a company to obtain legal personality

34. Therefore the Italian duty resembles the Netherlands legislation which was the subject of the *Denkavit Internationaal*[19] case. This concerned a levy which was payable annually on the basis of an undertaking's registration with a chamber of commerce and industry, where such registration served at the same time as registration of the capital company which owned the undertaking. Consequently the register of undertakings was simultaneously a commercial register, which seems to be the case also according to the Italian legislation.

35. In that judgment the Court presumed, without giving detailed reasons, that the Netherlands annual levy was a tax on registration before the commencement of business. The Court did not expressly consider whether the levy was connected with the *maintenance of registration* of the company in the register and, therefore, a condition for its capacity to act.[20] In particular, the Court did not distinguish between the levy for the first registration and the subsequent annual levies. Consequently it would have to be concluded, without further consideration, that the first criterion of Article 5(1)(c) is fulfilled in the present case also.

19 — Cited in footnote 2.

20 — Compare also Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 31. In my opinion, it was also implicitly presumed in that case that the charge in question served to maintain the registration of the company.

36. However, a distinction must be made between the duty in connection with registration for the first time and the duty which is subsequently payable each year. The present case concerns the annual duty only. Therefore, in order for the annual duty to be classified as a tax in respect of registration or other formality required before the commencement of business, it would be necessary to prove that the duty is connected with the *maintenance of the company's registration* and is a prerequisite for its continued capacity to act. In the present case that is not clear.

37. The Commission and the Italian Government pointed out in their observations on the first request for a preliminary ruling that the annual duty paid to the chambers of commerce is not a condition for the maintenance of a company's registration in the register of undertakings. Non-payment of the duty does not lead to removal from the register nor to the loss of legal personality. That would mean that the duty is not a prerequisite for the continuation of the company's activity.

38. However, the supplementary reference for a preliminary ruling could be understood as meaning that the payment of the annual duty is a condition for the continued legal existence of a capital company. If that is correct, the annual duty would be a condition for the company's capacity to act and would fall within the scope of Article 5 of the directive, provided that the duty is paid by reason of the legal form of the company. On that point, Grillo Star observed at the hearing that, if the annual duty were not paid, the respective chambers of commerce would not issue certain certificates which an undertaking needs in order to trade or operate. Those certificates too could be a formality which is a condition for the company to carry on an activity.

39. As no further details are available on that point, a conclusive assessment cannot be made in the present case. It would be for the referring court to resolve the apparent contradiction.

40. If the annual duty were not a condition for the company to carry on an activity, it would, for that reason alone, not be an indirect tax within the meaning of Article 5(1)(c) of the directive. If, on the other hand, it were such a condition, it would be prohibited only if it were charged *by reason of the legal form* of the capital company. That is what I now propose to consider.

b) Subject by reason of its legal form

41. A brief look at the meaning and purpose of the directive will show the meaning of that criterion. The directive aims to promote the free movement of capital.[21] With regard to the prohibition in Article 5 of the directive, the Court has consequently stated that it 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.[22]

i) The *Denkavit Internationaal* judgment

42. With reference to the abovementioned aim of the directive, in *Denkavit*[23] the Court examined the Netherlands commercial register levy which had to be paid annually by reason of the registration of an undertaking with the chamber of trade and industry, such registration serving at the same time as registration of the capital company owning the undertaking. However, the simultaneous registration of the company did not lead to an increase in the levy paid to the chamber of commerce.

21 — See recital 2 in the preamble to Directive 2008/7.

22 — *Denkavit Internationaal*, cited in footnote 2, paragraph 23.

23 — Cited in footnote 2.

43. The Court found that the Netherlands levy was not a prohibited tax within the meaning of the directive. Rather, the decisive factor was that, under Netherlands law, the tax at issue arose not from the registration of the company which owned the undertaking, but from the registration of the undertaking itself.[24] Consequently, the levy was not imposed by reason of the legal form of the company as a capital company. What was involved was a levy which affected, on the basis of their capital, all entities which engaged in economic activity.

44. In order to show that the Netherlands levy was unrelated to the legal form of the company, the Court also pointed out that the levy did not depend on whether the owner of the undertaking was a natural or a legal person, a partnership or a capital company. The fact that partnerships and natural persons were liable for the levy was proof that it was precisely not levied by reason of the legal form of the capital company.

ii) Application of the criteria to the present case

45. On the basis of the abovementioned criteria, it must be presumed that the duty at issue is not charged by reason of the legal form of the capital company.

46. In so far as the rather scanty particulars in the order for reference permit a conclusive finding, the Italian duty has in essence the same characteristics as the Netherlands levy. Undertakings, not companies, are subject to it. If registration or the maintenance of registration in the register of undertakings in the case of companies also fulfils the function of a commercial register, without entailing an increase in the duty, that corresponds to the Netherlands system.

47. All the parties to the proceedings, apart from Grillo Star, point out that under Italian law also the chamber of commerce duty is borne not only by capital companies but also by partnerships. Therefore the point of connection for the duty is not the legal form of the company, but the undertaking.

48. In contrast to *Denkavit*, where the Court could argue that, under Netherlands law, partnerships were also liable to the chamber of commerce duty and therefore capital companies were not charged on the basis of their legal form, that argument would be unlikely to be used under the new version of the directive.

49. Article 2(2) of Directive 2008/7 provides that, for the purposes of the application of the directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. Article 3(2) of the previous Directive 69/335[25] contained the same provision, but added that Member States had the right not to consider them as such. Consequently, partnerships can presumably no longer be used as a comparison.

50. However, that is immaterial in the present case as, under Article 2195 CC, not only companies operating for profit, but also natural persons as individual undertakings must be registered in the Italian register of undertakings and are therefore subject to the annual duty paid to chambers of commerce and industry. That natural persons as individual undertakings are subject to the annual duty may thus be regarded as proof that the annual duty attaches, not to the form of company, but to the undertaking which is owned by the company.

51. In principle, therefore, the duty in question is not a prohibited indirect tax within the meaning of Article 5(1)(c) of the directive.

24 — *Denkavit Internationaal*, cited in footnote 2, paragraph 24.

25 — Cited in footnote 4.

iii) Supplementary question — Obligation of dormant companies to pay the duty

52. The supplementary order for reference draws attention to a further aspect of the Italian legislation. The additional question from the referring court is whether it is compatible with Article 5(1)(c) of the directive to require payment of the annual duty from a company which has never been engaged in any economic activity. The referring court states that Grillo Star has never been engaged in any economic activity.

53. Behind the question is the referring court's opinion that, if a dormant company is taxed, it cannot be said that the point of connection for the duty at issue is the registration of the undertaking and not that of the company, in line with the *Denkavit* judgment. If a company is dormant and therefore no undertaking exists, the point of connection for the duty can only be the company itself and not the undertaking. That, however, is not compatible with the directive. The point of the supplementary question is therefore whether Directive 2008/7 requires dormant companies to be exempted from the annual duty.

54. The referring court appears to base its reasoning on an observation by the Court in *Denkavit* In the course of considering the Netherlands legislation, the Court mentioned that under Netherlands law the obligation to pay the levy did not extend to 'shell companies or, in other words, those which do not have any assets and thus no longer carry on any activity'.[26] So far as that observation is concerned, it is not a leading argument in support of the judgment. Therefore it is not appropriate to apply it to other situations without qualification.

55. The supplementary question concerning the obligation of dormant companies to pay duty could be understood as relating to the treatment of shelf companies, that is to say, companies which have no activity but which, unlike the bare shells mentioned in *Denkavit*, possess assets. Shelf companies are formed without the intention of taking up any activity at first, but doing so only later, after being sold, for example. It is no doubt an interesting question whether shelf companies should be subject to payment of the duty. It would be necessary to determine what meaning should be attached to the Court's statement cited above and, as the case may be, whether the Court's further observation in that judgment that 'any company formation in principle envisages the operation of an undertaking'[27] would justify the conclusion that it is sufficient for a shelf company to intend at some time, for example after being sold, to take up an economic activity.

56. I am not in agreement with the Commission's reasoning, which in the present case related to the fact that dormant companies are frequently used for tax avoidance and money-laundering purposes and therefore do not deserve advantageous treatment. Shelf companies may very well exist for legitimate purposes and in that respect they make it easier precisely to exercise the fundamental freedoms. It may be simpler for a foreign investor or entrepreneur to form a company in another Member State by acquiring a shelf company formed for that purpose, thereby saving time and avoiding possible difficulties in the formation and registration of a company.

57. However, in the present case, as I shall show below, the question of the treatment of dormant companies is hypothetical and consequently no reply is necessary, as Grillo Star is not a dormant company in that sense.

58. In its second supplementary question the referring court referred rather vaguely to Grillo Star never having been engaged in any economic activity. The Commission rightly expressed some doubt as to whether it was conceivable that Grillo Star really had never been economically active. Assuming that the company originally had the necessary initial capital, it is difficult to imagine how it could become insolvent if it was never economically active. I share that doubt.

26 — *Denkavit Internationaal*, cited in footnote 2, paragraph 29.

27 — Ibid.

59. When questioned in the course of the hearing, Grillo Star conceded that the company had been active in a particular form, but its activity was confined to preparatory work for commencing the planned business. The Italian Government then stated that Grillo Star had already acquired premises and goods with a view to opening a hotel business.

60. Therefore the question in the present case is not whether the directive requires dormant companies to be exempted from the annual duty, but whether it requires undertakings which are only making preparations, but have not yet begun their actual planned business activity, to be exempted from the annual duty. Consequently, in relation to companies which are carrying out only preparatory activity in that sense, it is necessary to ascertain whether it can be said that the point of connection for the annual duty is the undertaking and not the company.

61. First of all, in *Denkavit*, as I have already said, the Court pointed out, in connection with the Netherlands legislation, that 'any company formation in principle envisages the operation of an undertaking'. In the Court's view, therefore, the decisive question is not whether the connecting factor for the duty is a company's *actual* economic activity. Rather, the Court proceeds from the presumption that the point of connection for the duty is the undertaking, and not the company itself, even if a company, when it is being formed, *envisages* the operation of an undertaking.

62. According to the submissions of the Commission, the question does not depend, according to the Italian definition of 'undertaking', on the actual economic activity, but on the possibility of becoming economically active. In that case it must be all the more sufficient if a company is already making preparations with a view to business activity and has therefore begun to carry out the intended activity of an undertaking.

63. Secondly, the Court pointed out that the definition of 'undertaking' for the purposes of Article 5 of Directive 2008/7 is a matter of national law.[28] It therefore dismissed the objection that the activity of a holding company which was limited to the management of its subsidiary did not constitute the activity of an undertaking in the true sense.

64. For that reason also it is open to the Italian legislature to regard preparatory activities as the activity of an undertaking with reference to the point of connection for the duty. Practical considerations may also cause the legislature to regard such a company as an undertaking, since it might be difficult to differentiate between preparatory activities and the activity which constitutes the business object, and making such findings could entail a substantial administrative burden.

65. On those grounds, the conclusion must be the same with regard to Grillo Star's argument raised in the course of the hearing, namely that in any case, in view of the insolvency and the resulting cessation of economic activity, the company can no longer be regarded as an undertaking. It is open to the Member States to presume activity by an undertaking even in the case of a company whose business is going badly and which therefore reduces or discontinues its business activity.

66. Therefore, even if a company is carrying out only preparatory activity with a view to taking up the business activity which is really planned, it is conceivable that the point of connection for the duty should be the registration of the undertaking and not the registration of the company.

67. Since, therefore, there is no prohibited tax within the meaning of Article 5(1)(c) in the present case, it is unnecessary to consider whether it takes the form of fees or dues under Article 6.

28 — *Denkavit Internationaal*, cited in footnote 2, paragraph [31], in relation to the previous provision in Directive 69/335, cited in footnote 4.

IV – Conclusion

68. In the light of the foregoing analysis, I propose that the Court should reply to the questions from the Tribunale di Cosenza as follows:

Article 5(1)(c) of Directive 2008/7 does not preclude an annual duty to a chamber of commerce and industry which has to be paid by every undertaking registered in the register of undertakings and which is connected with the registration of the capital company as a condition of the continuation of an activity, if the registration of the undertaking and not the registration of the capital company owning the undertaking is the point of connection for the duty. For those purposes it is open to the Member States to regard companies which carry out only preparatory activities with a view to their actual business activity as undertakings.