Opinion of Advocate General Kokott, 5 March 2009

Case C-397/07
Commission of the European Communities v Kingdom of Spain

I – Introduction

1. In the present action for failure to fulfil obligations, the Commission alleges that the Kingdom of Spain has failed to fulfil its obligations under Directive 69/335/EEC concerning indirect taxes on the raising of capital.2

2. The case concerns, first, provisions of Spanish law which make tax exemptions that are mandatory under the directive dependent on opting for a specific tax regime. At issue, secondly, are provisions concerning the taxation of the transfer of a company’s registered office to Spain from another Member State. Thirdly, the Commission objects to Spanish provisions under which tax is charged on capital used to carry out the business activity of foreign companies in Spain.

II – Legal framework

A – Directive 69/335

3. According to the first and second recitals in its preamble, Directive 69/335 is designed to promote the free movement of capital. For that purpose, as the sixth to eighth recitals in the preamble indicate, the directive provides for the harmonisation of the duties on contributions of capital to companies, by introducing a uniform tax on the raising of capital (‘capital duty’). That duty is to be charged once only within the common market.

4. Article 2 of the directive provides:

'1. Transactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place.

3. When the registered office and the effective centre of management of a capital company are situated in a third country, the supply-ing of fixed or working capital to a branch situated in a Member State may be taxed in the Member State in whose territory the branch is situated.'

5. Article 3 of the directive specifies the companies that are to be considered as capital companies within the meaning of the directive.

6. Article 4 of the directive lists the transactions which are subject to capital duty. These include both the formation of a capital company and the increase of its capital, and:

'g. the transfer from a Member State to another Member State of the effective centre of management of a company, firm, association or legal person which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State;

h. the transfer from a Member State to another Member State of the registered office of a company, firm, association or legal person, whose effective centre of management is in a third country and which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State.'

7. As regards the rate of capital duty, the original version of Article 7 of Directive 69/335 provided as follows:

'1. Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph (2):

a. the rate of capital duty may not exceed 2% or be less than 1%;

b. this rate shall be reduced by 50% or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in exist-ence.

... .

8. Directive 73/80/EEC3 reduced to between 0% and 0.5% the rate of capital duty laid down in the original version of Article 7(1)(b) of the directive.

1 Original language: German.
extended the field of application of the reduced rate of capital duty. It added to Article 7(1) a 
subparagraph (bb) which covers further restructuring measures. According to that subparagraph, the rate of capital duty may also be 
reduced where 

’a capital company which is in the process of being formed or is already in existence acquires shares representing at least 75% of the 
issued share capital of another capital company. Where the said percentage is reached by means of two or more transactions, the 
reduced rate shall apply only to the transaction whereby this percentage is reached and to subsequent transactions.’

10. Directive 85/303 
introduced further amendments. It broadened the aim of the directive, as is apparent from the second and third recit-
als in its preamble: 

‘Whereas the economic effects of capital duty are detrimental to the regrouping and development of undertakings; whereas such effects 
are particularly harmful in the present economic situation in which there is a paramount need for priority to be given to stimulating 
investment; 

Whereas the best solution for attaining these objectives would be to abolish capital duty. ….’

11. As amended by Directive 85/303, Article 7 now reads as follows: 

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. 

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%.’

B – National law

12. Article 19(1)(1) of the Spanish law on capital transfers and documented legal transactions (Ley del Impuesto sobre Transmisiones Patri-
moniales y Actos Jurídicos Documentados) (‘the tax law’), enacted by Royal Decree (Real Decreto Legislativo) No 1/1993, stipulates which 
transactions are subject to capital duty. Included among these transactions are the formation of a company, increasing or reducing a com-
pany’s capital, mergers and demergers, and the winding up of companies.

13. Article 45, Part I(b)(10), and Article 21 of the tax law, in conjunction with the second additional provision of the consolidated version of 
the Spanish Law on corporation tax (Ley del Impuesto sobre Sociedades) (‘the law on corporation tax’) provides that transactions involving 
merger, demerger, the transfer of parts of undertakings and the exchange of shares, defined in Title 7 of Chapter 8 of the law on corporation 
tax, which establishes a special regime in this connection, are exempt from the duty, provided that this regime is in each case applicable to 
the transaction concerned.

14. Article 96 of the law on corporation tax, entitled ‘Applicability of the tax regime’, sets out the conditions governing the applicability of 
this special regime. It provides: 

1. In order for the regime established in this Chapter to be applicable, there must have been an election to opt for the regime and the 
following conditions must have been satisfied: 

a. in cases of merger and of demerger, that option must have been included within the proposal and the agreements for merger or 
demerger of the transferor and transferee undertakings, which are domiciled for tax purposes in Spain. 

b. with regard to contributions in kind, the option must be exercised by the transferee undertaking in the resolution approving 
the takeover or merger, which failing, in the authentic instrument by which the transaction or contract in question is constituted. 

c. in cases involving a share exchange, the option must be exercised by the transferee undertaking in the resolution approving 
the takeover or merger, which failing, in the authentic instrument by which the transaction or contract in question is constituted. 

In every case, the exercise of the option must be notified to the Ministry of Finance in the form and within the period laid down by 
the applicable provisions.

The regime laid down by this Chapter shall not apply where the principal object of the transaction entered into is tax avoidance or 
tax evasion. In particular, the regime shall not apply where the transaction is entered into otherwise than for valid economic reasons, 
such as the restructuring or rationalisation of the activities of the undertakings involved in the transaction, but solely in order to obtain 
a tax advantage.


5 Cited in footnote 2.


15. Article 19(3) of the tax law provides that liability to the tax is to arise in cases involving:

‘The transfer of the place of the centre of effective management or the registered office of a company to Spain, where neither of these was previously located in a Member State of the European Economic Community or where the undertaking was not subject, in a Member State, to a tax equivalent to the duty provided for in this Title.’

16. Article 20 of the tax law provides:

‘Undertakings which carry out, through branches or permanent establishments, commercial transactions in Spain and whose registered office and centre of effective management is located in a country which does not belong to the European Economic Community or is located in such a country without the undertaking being subject to a tax equivalent to the duty provided for in this Title, shall be taxed in the same way and under the same conditions as Spanish undertakings as regards the amount of their capital which is allocated to those transactions.’

III – Procedure and forms of order sought

17. The pre-litigation procedure having been duly carried out, the Commission has brought the present action, in which it claims that the Court should (a) declare that:

– by subjecting the application of the obligatory exemptions from capital duty to certain conditions;

– by imposing an indirect tax on the transfer of the effective centre of management or the registered office of a company to Spain, for those companies which have not been subject to a similar tax in their country of origin; and

– by subjecting to an indirect tax capital used to carry out business transactions through a subsidiary or fixed place of business of companies established in another Member State which does not apply a tax similar to the Spanish tax, the Kingdom of Spain has failed to fulfil its obligations under Directive 69/335; and (b):

– order the Kingdom of Spain to pay the costs.

18. The Kingdom of Spain contends that the Court should dismiss the action and order the Commission to pay the costs.

19. The Hellenic Republic was granted leave to intervene by decision of 11 February 2008, but took part in neither the written nor the oral procedure.

20. On completion of the written procedure, the parties made oral submissions at the hearing before the Court on 15 January 2009.

IV – Legal assessment

A – First plea

21. By its first plea, the Commission alleges that the Spanish legislation makes subject to an inadmissible condition the tax exemption for certain transactions in relation to which the directive stipulates that such tax exemption is mandatory.

1. The different requirements for exemption from duty for transactions under Article 7(1)(b) and (bb)

22. One can only assess whether it is contrary to the directive to introduce conditions for the grant of tax exemptions, if it is first established whether the directive actually provides for mandatory exemption from tax for the transactions at issue. That question cannot, for instance, be left open simply because the parties tacitly answer it in the affirmative. It is, in fact, a point of law which is material to the resolution of the dispute in the main proceedings and which the Court must examine of its own motion.

23. Pursuant to Article 7(1) of the directive, as amended by Directive 85/303, it is mandatory to exempt from capital duty those transactions which were, as at 1 July 1984, exempted or taxed at a rate 0.50% or less.

24. In that connection, it should be borne in mind that Spain did not become a member of the European Communities until 1 January 1986. However, the Court has already held that the date of 1 July 1984, which Article 7(1) of Directive 69/335 sets as the reference date, applies also to Member States which acceded to the Community after that date.8

25. In its application, the Commission refers - without entering into further detail - to transactions which it is mandatory to exempt. However, the grounds of the application indicate that the Commission is referring here to those company restructuring transactions which are identified in Article 7(1)(b) or (bb) of the earlier version of the directive.

26. For the purposes of my further analysis, it is necessary - as the Commission also correctly maintains - to distinguish between the restructuring transactions that are covered by Article 7(1)(b) and those that are covered by Article 7(1)(bb).

27. In the case of transactions subject to Article 7(1)(b), it is in fact irrelevant, as I shall explain below, whether and at what rate they were actually taxed in Spain on 1 July 1984.

28. The original version of Article 7(1)(b) provided for a rate of tax of 1%, which was reduced to between 0% and 0.5% by Directive 73/80. It follows that all of the Member States were under an obligation to tax transactions subject to Article 7(1)(b) at a maximum rate of 0.5% or less. Since Directive 85/303 stipulated that it was mandatory to exempt all transactions that were subject to a rate of capital duty of 0.5% or less, there was an automatic requirement to exempt transactions subject to Article 7(1)(b), as a result of the earlier reduction in the rate of tax.

29. That being so, Spain cannot object that it did not accede to the European Community until 1 January 1986 and that, consequently, the versions of Directives 73/80 which reduced the rate of tax on transactions subject to Article 7(1)(b) as at 1 January 1976 to 0.5% were not directly applicable to Spain. The legislative effect of Directive 85/303 is the same in relation to Spain as to the existing Member States. At the time of Spain's accession, the rate of tax, which had been reduced by the amendments to Directive 69/335, formed part of the acquis communautaire whose implementation Spain had to ensure, and, on the basis of the acquis, the directive gives rise to mandatory tax exemptions for transactions subject to Article 7(1)(b).

30. As regards transactions subject to Article 7(1)(b), any other interpretation would result, contrary to the aim of the directive, in capital duty being inconsistently applied in the existing and new Member States. The existing Member States were required to apply a reduced rate of tax to transactions covered by Article 7(b) on 1 July 1984, with the result that it was mandatory to exempt such transactions from capital duty by virtue of Directive 85/303. If, in relation to Member States which acceded later, the point of reference for transactions covered by Article 7(b) was their actual taxation as at 1 July 1984 and not, hypothetically, the taxation obtaining under the acquis communautaire at that date, the effect would be to undermine the directive's declared aim of achieving harmonisation.

31. Consequently, it is obligatory for restructuring measures under Article 7(1)(b) of the directive to be exempted from the tax in Spain.

32. With regard to transactions under Article 7(1)(bb), however, the principle continues to apply that it is mandatory to exempt them from the tax only if, as at 1 July 1984, they were actually exempted from the tax or were subject to a maximum rate of tax of 0.5%. In its original version, the directive in fact provided for only an optional and not a compulsory tax reduction in relation to such transactions.27

33. It follows that, unlike transactions under Article 7(1)(b), transactions under Article 7(1)(bb) were not uniformly and mandatorily subject, as at 1 July 1984, to a rate of tax which resulted in it being mandatory to exempt them from tax on the basis of Directive 85/303.

2. Factual basis of the application as regards transactions covered by Article 7(1)(bb)

34. For the application to be conclusive, the Commission would, therefore, have needed to argue, in relation to transactions subject to Article 7(1)(bb), that such transactions were exempted from the duty in Spain as at 1 July 1984. Only in that event would it be mandatory to exempt the transactions from the duty under the directive.

35. It is questionable whether the Commission has succeeded in satisfying the burden of proof imposed on it in that respect.

36. At the hearing, the Spanish Government indicated that, in 1984, the transactions at issue were taxed at a rate of 1%. It follows that it is not mandatory to exempt them from the tax. In response to the Commission's objection that Spain had failed to make that submission at the proper time, the latter stated that, in pointing this out, it had not been its intention to contradict the Commission's position. When questioned by the Court, the parties agreed that, on that issue, the statements in the written observations should be taken as the point of reference.

37. In its application, the Commission made no mention of the taxation of transactions subject to Article 7(1)(bb) as at 1 July 1984 in Spain. In its defence,28 the Spanish Government stated that Spain had not elected to apply a reduced rate of tax to transactions covered by Article 7(1)(bb). That being so, the Commission ought to have argued, in its reply at the latest, and to have provided facts to support this, that the disputed transactions were none the less subject, in Spain, to a rate of tax of 0.5% or less. But the Commission stated nothing of the kind. It therefore remains unclear whether transactions subject to Article 7(1)(bb) were taxed as at 1 July 1984 at a maximum rate of 0.5% or were subject to a higher rate of capital duty. Consequently, for the purposes of deciding the present case, it cannot be assumed that it was mandatory to exempt transactions covered by Article 7(1)(bb) from the duty in Spain. In that respect, the Commission's application must be dismissed on the ground that it is inconclusive.

38. The only question that might arise is whether a Member State must also grant exemption from duty, without attaching conditions to such an exemption, for transactions that it is not mandatory to exempt from the tax. The Commission appears to suggest this in its application, when it states that Article 7(2) of Directive 69/335 authorises the Member States either to exempt from capital duty all transactions, other than those listed in Article 7(1), or to tax them at a uniform rate not exceeding 1%.

39. This might be taken to imply that the directive leaves the Member States precisely three options: retention of the tax, if levied in 1984, complete tax exemption or charging a reduced rate of tax. The directive would, consequently, preclude exemption to which a condition attaches. That interpretation of the directive would best take into account, in particular, the need for legal certainty. However, the opposite
view could also be taken. Since its amendment by Directive 85/303, the aim and object of Directive 69/335 has been to reduce capital duty. It could therefore be argued that – before a Member State takes up the option of retaining the tax – it would have to be consistent with the aim and object of the directive to allow that Member State to exempt the transaction from the duty subject to a condition.

40. In the present case, there is no need to take a final decision on that point, since, in its application, the Commission has simply complained that Spain sets a condition for the exemption from capital duty of transactions that it is mandatory to exempt from it. It would be contrary to the principle that the Court must not rule ultra petita, were the Court additionally to express a view on transactions that it is not mandatory to exempt.

41. Since the Commission’s argument in relation to transactions within the meaning of Article 7(1)(bb) is not based on factual allegations that are adequately substantiated, the analysis that follows must be confined to transactions subject to Article 7(1)(b).

3. Taxation of transactions subject to Article 7(1)(b)

42. In the Commission’s view, in the case of transactions which it is mandatory to exempt from capital duty, it is incompatible with the directive to make exemption from the duty dependent on fulfilling a condition.

43. Article 7(1) of the directive, which lays down the mandatory exemption, makes no provision for exception to or restriction on the tax exemption. Consequently, to restrict the tax exemption or to confine it to certain cases infringes the directive. In principle, a rule which attaches a further condition to a tax exemption also constitutes an obstacle to the tax exemption.

44. The Spanish legislation makes exemption from the duty dependent on the undertaking in question having previously opted for a special tax regime.

45. The Spanish Government defends that provision by claiming, first, that this requirement is merely a formality which does not, therefore, stand in the way of the exemption from duty.

46. That claim cannot, however, be accepted.

47. It should first be stated that the directive does not provide that exemption from capital duty may be made subject to any kind of condition, even a formal one. Moreover, the Spanish provision at issue is more than a pure formality. That follows, first, from the fact that it lays down a deadline by which time the decision to opt for the special tax regime must be notified to the authorities and, in addition, imposes formal requirements. Secondly, opting for the special regime also has, as the Commission maintains, an effect on the amount of corporate tax and income tax which is payable.

48. As further justification for its legislation, Spain contends that it is needed in order to prevent tax avoidance and tax evasion.

49. It must first be pointed out, in that connection, that Directive 69/335 contains no provision authorising the Member States to adopt measures to combat tax avoidance and tax evasion. However, the application of Community legislation cannot be extended, in such a case, to permit abusive practices by commercial operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.12 A Member State may therefore adopt measures in that connection to prevent abusive practices. Such measures must, however, be proportionate.

50. However, the Spanish Government has failed to put forward evidence to support its contention that it is necessary to make all transactions subject to the requirement to opt for a specific tax regime in order to prevent tax avoidance and tax evasion. The Commission has, moreover, pointed out that, as well as notifying the exercising of the option, the companies concerned are required to notify the restructuring measures to the financial authorities. Spain has not explained why it necessary, for the purposes of preventing tax avoidance and tax evasion, to require companies to exercise the option, as well as to provide that information. It must, therefore, be assumed that there are less constritive ways of preventing tax evasion in individual cases, without generally requiring all those concerned to opt for a specific tax regime. The Spanish legislation is accordingly not justified.

51. Finally, in its rejoinder, the Spanish Government referred in its challenge to the first plea to Directive 2008/7,13 amending and revising Directive 69/335.

52. It should first be pointed out that in determining whether an action for failure to fulfil obligations is well founded, the legal position at the time of the reasoned opinion is the critical factor. At that time, only the earlier version of the directive was in force.

53. Spain submits that, by virtue of Articles 4 and 5(1) of Directive 2008/7, certain company restructuring measures are specifically exempted from capital duty. The Spanish Government seeks to infer from this that, under the earlier versions of the directive, it could not have been mandatory to exempt all restructuring transactions from tax.

54. That elicits the objection that, to a large extent, Directive 2008/7 merely clarifies and revises the earlier version of the directive. Consequently, not every tax exemption provided for in Directive 2008/7 constitutes a newly-introduced tax exemption. As stated above, it was previously mandatory to exempt restructuring transactions under Article 7(1)(b) of the original version of Directive 69/335 from capital duty.


55. It follows that the Spanish Government’s reference to Directive 2008/7 cannot affect the conclusion previously reached.

56. It must therefore be held as an interim conclusion that the Commission’s first plea is justified in so far as it relates to transactions under Article 7(1)(b) of the directive in its original version. The first plea must be rejected as to the remainder.

B – Second plea

57. By its second plea, the Commission objects that an indirect tax is charged on the transfer to Spain of a company’s effective centre of management or registered office, where this was not subject, in the company’s State of origin, to a tax comparable to the Spanish tax.

58. Article 4 of Directive 69/335 contains an exhaustive list of transactions which are subject to capital duty.

59. According to Article 4(g) and (h), the transfer of the effective centre of management or registered office of a company, firm, association or legal person from one Member State to another Member State is to be subject to capital duty, if, for the purpose of charging capital duty, that body is considered as a capital company in the State of transfer but is not considered as a capital company in the State of origin.

60. On that basis, a transfer of a company’s registered office may not be taxed if the company is considered, in both the Member States concerned, as a capital company for the purpose of charging capital duty.

61. As the Court has already held, the question of whether the company is regarded as a capital company in the State of origin and not on whether capital duty was actually charged in the State of origin. The determining factor cannot, therefore, consist in the criterion of being subject to capital duty in the State of origin but, exclusively, in the criterion of classification as a capital company.

62. Article 3(1) of the directive identifies, in a mandatory and uniform fashion, for all Member States, those companies which are to be regarded as capital companies within the meaning of the directive.

63. Consequently, if, pursuant to Article 7(2) of Directive 69/335, a Member State refrains from charging capital duty on a company which is to be regarded as a capital company within the meaning of the directive, this may not result, where the registered office is transferred from that Member State to another Member State, in the latter State taxing that transfer.

64. The criterion of ‘taxation in the State of origin’ employed in the Spanish legislation on transfer of a registered office does not therefore correspond to the criterion of ‘classification as a capital company’ laid down in the directive. The former criterion may in fact result in a company, which is a capital company within the meaning of the directive, being taxed where its registered office is transferred to Spain, because its State of origin decided not to charge capital duty. The Spanish provisions must therefore be regarded as having failed properly to transpose Article 4(g) and (h) of Directive 69/335.

65. Nor is that finding invalidated by the argument put forward by the Spanish Government in its defence, when it claims that the legislation is needed to prevent tax avoidance and tax evasion. According to Spain, there is a risk of companies being set up in a Member State which does not charge capital duty, and then to transfer their registered office to Spain, in order to avoid Spanish capital duty.

66. As I have already mentioned, Directive 69/335 contains no specific provision that would empower the Member States to adopt general measures to prevent tax avoidance. Consequently, the Member States can prevent the application of Community law only in specific circumstances entailing abusive or fraudulent practice.

67. The Court has held that the application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.

68. However, the fact that a company is set up in a particular Member State to enable it to benefit from more favourable legislative provisions is not of itself sufficient to support the finding that an abuse of Community legislation has occurred. Only the formation of a company in a Member State under wholly artificial arrangements which do not reflect economic reality, with the aim of avoiding the tax normally payable, goes beyond the protection which Directive 69/335 must afford to the companies to which it applies.

69. The rule at issue is not, however, confined to preventing abuse in specific cases, but provides for a general taxation of transactions which should be exempt from tax under the directive. Consequently, the Spanish legislation fails to meet the requirements of Community law.

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14 That interpretation is confirmed by Article 4(3)(b) of the directive, according to which such transfers also cannot be subject to capital duty charged on the formation of a company under Article 4(1)(a).


18 Commission v Hellenic Republic, cited in footnote 15, paragraph 32, and ING. AUER, cited in footnote 12, paragraph 41.

19 See Commission v Hellenic Republic, cited in footnote 15, paragraph 32, and Halifax, cited in foot-

20 See Commissioners Hellenic Republic; cited in footnote 15, paragraph 32, and ING. AUER, cited in footnote 12, paragraph 43 et seq.
70. In submissions in defence in relation to that plea, the Spanish Government also refers, in its rejoinder, to Directive 2008/7 which amended and revised Directive 69/335.

71. Applying a form of inverted logic, the Spanish Government seeks to infer from the fact that, under the new directive, the duty charged on the transfer of a registered office under Article 4(g) and (h) has been abolished, it should follow that, under the earlier version of the directive, the transfer of a registered office could be taxed without restriction.

72. But that is patently not the case. Under Article 4(g) and (h), the transfer of a registered office could be taxed only subject to the strict condition that the company concerned was not considered as a capital company, within the meaning of the directive, in its State of origin. And even before the amendments introduced by Directive 2008/7, it was not permissible, as I have explained above, to make the taxation of the transfer of a registered office dependent on whether the company concerned had already been subject to capital duty in the State of origin, as provided for by the Spanish legislation.

73. My interim conclusion must be that the Commission’s second plea is well founded.

C – Third plea

74. By its third plea, the Commission alleges that the Spanish legislation taxes capital used to carry out the business transactions of branches or permanent establishments of companies in Spain which have their registered office or effective centre of management in a different Member State, if the latter Member State does not apply a tax similar to the Spanish tax. In the Commission’s view, the Spanish legislation is in breach of Article 2(1) of Directive 69/335.

75. According to Article 21 of the Protocol on the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure, in any application made under Article 226 EC, the Commission must indicate the specific complaints on which the Court is called upon to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based, to allow the Court to rule on the application.22

76. In this case, the application fails to meet those requirements in relation to the third plea.

77. In the section of the application containing the legal assessment, the Commission merely alleges a breach of Article 2(1) of the directive. Article 2(1) provides that transactions subject to capital duty are to be taxable only in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place.

78. However, the Commission’s application fails to identify the facts and circumstances that are supposed to have resulted in a breach of Article 2(1).

79. It is true that Article 2(1) of the directive contains a rule on how the power to tax is to be allocated as between the Member States, conferring the right to tax on the Member State in which the effective centre of management of a company is located. However, as is clear from its wording, the rule under Article 2(1) applies only to transactions which are subject to capital duty.

80. Article 4 of the directive determines which transactions are subject to capital duty. Those transactions include, among others, the formation of a capital company and an increase in the capital of a capital company.

81. The Commission has failed to specify which transactions are actually taxed under Spanish law. The Commission refers only to the taxation of capital used by permanent establishments and subsidiaries to carry out business transactions. Consequently, it is not clear, for example, whether the tax is charged only once or on a regular basis.

82. Consequently, it is not possible to link that taxation procedure unequivocally to one of the transactions covered by Article 4 of Directive 69/335.

83. If the transaction that has been taxed cannot be brought within the transactions to which Article 4 of Directive 69/335 refers, then, contrary to what the Commission alleges, the breach of Article 2(1) of the directive which the Commission alleges could not have taken place, as the legislation would not be covered by Directive 69/335. It is conceivable that the Spanish rules might be in breach of the principles of the freedom of establishment or the free movement of capital. However, the Commission has not alleged that the fundamental freedoms have been infringed.

84. Since the exposition of the plea on which the Commission relies in its action for failure to fulfil obligations is insufficiently clear, the requirements laid down by Article 21 of the Protocol on the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure have not been satisfied.

85. The third plea must therefore be rejected as inadmissible.

21. See, to that effect, Commission v Hellenic Republic, cited in footnote 15, paragraph 32.

V – Costs

86. Under Article 69(3) of the Court’s Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the parties must bear their own costs. Spain has failed in relation to the second plea, and the Commission in relation to the third plea; the Commission has succeeded in part only in relation to the first plea. Since the parties have succeeded and failed to the same extent in relation to the pleas to which equal significance must be attached, each party must bear its own costs.

87. Pursuant to Article 69(4) of the Rules of Procedure, the Hellenic Republic must itself bear the costs which it has incurred as a result of its intervention.

VI – Conclusion

88. Accordingly, I propose that the Court should:

   - by attaching an additional condition to the exemption from duty for transactions subject to Article 7(1)(b) of Directive 69/335/EEC in its original version, and
   - by making subject to the duty the transfer from another Member State to Spain of a company’s registered office or effective centre of management, if a tax similar to the Spanish tax has not been levied in the State of origin.
2. Dismiss the action as to the remainder.
3. Order that the Kingdom of Spain and the Commission should each bear their own costs.
4. Order the Hellenic Republic to bear its own costs.