OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 9 November 2004 [1]

1. The questions to which this reference for a preliminary ruling gives rise are precise and also appear well-defined. The Rechtbank (District Court), Rotterdam (bench chamber for administrative matters), asks whether Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [2] (hereinafter 'the Directive') applies to the annual levy which, for the purpose of financing the costs of its supervisory activity, the supervisory body for the securities market charges undertakings in the sector and which it calculates by reference to their gross profit made in the previous financial year

In the event of an affirmative reply, the Rechtbank requests an analysis of whether the disputed charge is prohibited or protected under any of the derogations provided for in the Directive.

1 — Original language: Spanish.

2 — OJ, English Special Edition 1969 (II), p. 412.

I — The legal framework

A — *The Directive*

2. In view of the fact that taxes imposed in the Member States on the raising of capital, particularly stamp duty and the duty chargeable on contributions of capital to companies, were liable to interfere with the free movement of capital within the Community, the Council abolished them in 1969, together with other similar taxes, replacing them with a single harmonised duty in accordance with the provisions of Articles 2 to 9 of the Directive (as stated in the second and ninth recitals in the preamble to the Directive and in Article 1).

3. Article 4(1) lists the transactions which are automatically chargeable events giving rise to capital duty, while Article 4(2) sets out the transactions which the Member States may make subject to the duty. The former include the formation of a capital company, an increase in its capital or an increase in its assets (subparagraphs (a), (c) and (d)), the conversion into a capital company of a company which is not a capital company

(subparagraph (b)), and the transfer of the effective centre of management or the registered office from a non-member country or from another Member State (subparagraphs (e) to (h)).

4. Under Article 4(2), capital duty may be charged on an increase in company capital by capitalisation of profits or of permanent or temporary reserves (subparagraph (a)), an increase in the assets through different channels (subparagraph (b)), and a loan taken up with a third party if the creditor is entitled to a share in the profits or a loan which has the function of an increase in the company's capital (subparagraphs (c) and (d)).[3]

5. Member States may not make the transactions referred to in Article 4 of the Directive, or contributions, loans or the provision of services occurring as part of those transactions, subject to any taxes other than the ones provided for therein; nor are they permitted to impose taxes on registration or any other formality required before commencement of business to which companies operating for profit may be subject by reason of their legal form (Article 10).

6. More specifically, Member States are prohibited from making subject to taxation the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued. Nor may they impose tax on loans, including government bonds, raised by the issue of debentures or other negotiable securities, or any related formalities (Article 11).

7. However, by way of derogation, Member States are entitled to charge: (1) duties on the transfer of securities or other assets and on the creation, registration or discharge of mortgages or other charges on land or other property; (2) value added tax; and (3) duties paid by way of fees or dues (Article 12(1)).

B — *The Netherlands legislation*

8. The Wet toezicht effectenverkeer 1995[4] (hereinafter 'Wet 1995') governs the authority of the State to supervise the securities market, which, in accordance with Article 40

3 — In accordance with Council Directive 85/303/EEC of 19 June 1985 amending Directive 69/335 (OJ 1985 L 156, p. 23), the Member States have the authority to retain the duty on the transactions set out in Article 4(2), provided that they were taxed at the rate of 1% on 1 July 1984.

4 — *Staatsblad* 1995, 574. This law, which was amended on 6 December 2001 (*Staatsblad* 2001, p. 584), transposes into Netherlands law Council Directives 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (OJ 1993 L 141, p. 1) and 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27).

and pursuant to the Overdrachtsbesluit Wet 1995 (Decree on Delegation), [5] the Minister for Finance delegated to the Stichting Autoriteit Financiële Markten (Financial Markets Authority; hereinafter 'FMA'). The law applies to securities intermediaries and to asset managers, categories which are defined in Article 1, first paragraph, points (b) and (c) respectively and grouped together under the heading Securities Institutions (Article 1, first paragraph, point (d)).

9. Under Article 7(1) and (4) of the Wet 1995, a licence must be obtained prior to carrying on such activities.

10. Article 42 provides that costs incurred in the exercise of the supervisory powers may be passed on to securities institutions, in accordance with the criteria laid down in regulations.

11. The Regeling toezichtkosten Wet toezicht effectenverkeer 1995 [6] (Regulation on Supervision Costs under the Wet 1995; hereinafter 'Regeling') authorises the FMA to levy an annual charge on securities institutions established in the Netherlands, which operate under a licence granted pursuant to Article 7 of the law, for the costs incurred in carrying out its tasks and responsibilities. That levy is calculated annually by the Ministry of Finance on the basis of the figures put forward by the FMA, which have been approved by the Ministry and which include a balanced estimate of the expected supervision costs and revenue so that the former are covered by the latter (Articles 2 and 3).

12. The FMA is funded by two types of duty. The first is specific and, in accordance with fixed tariffs, pays for certain services such as the processing of licence applications (Article 4). The second is abstract in nature and is calculated by reference to income earned in the previous financial year by the institutions concerned (Article 5), which is taken to be the gross profit made from the securities-related activities (explanatory memorandum to Article 1).

13. Article 3 of the Vaststellingsregeling bedragen Regeling toezichtkosten Wet toezicht effectenverkeer 1995 [7] (Order setting the levies provided for in the Regeling for 2000) specifies the amounts referred to in Article 5 of the Regeling, which range from NLG 10 000 for companies with gross annual profits of up to NLG 2 500 000, to NLG 2 000 000 for companies whose gross annual profits exceed NLG 1 280 000 000.

5 — *Staatsblad* 1995, 624.

6 — *Staatscourant* 2000, 137, p. 10.

7 — *Staatscourant* 2000, 137, p. 9.

II — The facts of the main proceedings and the question referred for a preliminary ruling

14. Optiver B.V., Robeco Obligatie Dividen-Funds N.V., All Options Internacional BV and the other companies listed by the Rechtbank, Rotterdam, in the heading of the order for reference (hereinafter 'Optiver and others'), which make up 39 companies in total, are securities institutions established in the Netherlands and duly formed in accordance with Article 7 of the Wet 1995.

15. On 15 August 2000, the FMA, at that time called Stichting Toezicht Effectenverkeer, issued every plaintiff with an assessment under Article 5 of the Regeling, which had been calculated on the basis of their gross profits earned from their licensed activities in the previous financial year.

16. On completion of the administrative proceedings, in which they achieved partial success, Optiver and others brought an action before the courts, claiming that the disputed levy is contrary to Article 11 of the Directive.

17. In the light of the nature of the dispute before it, the Rechtbank, Rotterdam, referred the following question to the Court:

'Does Directive 69/335, and in particular the interpretation of Articles 11 and 12, preclude the imposition of a levy as described above on securities institutions in respect of their gross profit from securities-related transactions?'

III — The procedure before the Court

18. Written observations were submitted, within the period laid down in Article 20 of the EC Statute of the Court of Justice, by the plaintiffs in the main proceedings, with the exception of the last 10 companies listed in the order for reference, and by the defendant authority, the Netherlands and United Kingdom Governments, and the Commission.

19. The hearing took place on 30 September 2004 and oral argument was presented by the representatives of those who participated in the written stage, apart from the United Kingdom Government.

IV — Analysis of the question referred for a preliminary ruling

20. As I pointed out in the introduction to this Opinion, the Rechtbank, Rotterdam,

wishes to know whether the Directive permits a levy of the type at issue in these proceedings. It will therefore be necessary to determine the scope of the Directive.

21. Since its initial rulings on the matter, the Court has made it clear that, with a view to encouraging the free movement of capital, the Directive seeks to replace the diverse indirect taxes levied in the Member States on the raising of capital by a single tax which is harmonised with regard both to its structure and to its rates. [8]

22. It is clear from that aim that the harmonisation sought relates only to indirect, rather than direct, taxation. [9] Furthermore, it concerns only indirect taxation for the purposes of which capital-raising transactions are regarded as a chargeable event, in so far as they contribute to strengthening the company's economic potential. [10] However, the definition is not confined to that aspect because it also has a subjective element in that contributions to partnerships do not fall within the scope of the Directive. [11]

23. In other words, a levy on the transactions referred to in Article 4 of the Directive, where those transactions are carried out by capital companies and in so far as they constitute an increase in assets and the strengthening of the company's financial position, is a capital duty within the meaning of the Directive. [12]

24. Therefore, the prohibition in Article 10 of the Directive precludes Member States from charging indirect taxes similar to capital duty, including all taxes which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)), and in respect of registration

8 — The Court ruled to that effect for the first time in Case 161/78 *Conradsen* [1979] ECR 2221, paragraph 11. That approach was followed subsequently in Case 112/86 *Amro Aandelen Fonds* v *Inspecteur der Registratie en Successie* [1987] ECR 4453, paragraph 7, and Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraphs 16 and 17.

9 — In its judgment in Case C-287/94 *Frederiksen* [1996] ECR I-4581, the Court stated that the effects of the Directive are limited to indirect taxes and do not affect direct taxes, such as company income tax, from which it follows that the Directive does not preclude the levying of that tax on a parent company which has granted an interest-free loan to one of its subsidiaries, on the basis of interest fixed after the event (paragraphs 20 to 22). On the same grounds, the Court held that the Directive does not prohibit the levying of a tax on the net assets of capital companies because it is not charged on transfers of capital or assets to such a company or on an effective increase of its capital or assets (judgment in Case C-4/97 *Nonwoven* [1998] ECR I-6469, paragraphs 20, 21 and 25). The latter judgment was confirmed by the Order of the Court in Joined Cases C-279/99, C-293/99, C-296/99, C-330/99 and C-336/99 *Petrolvilla & Bortolotti and Others* [2001] ECR I-2339.

10 — That approach was adopted in Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771 and subsequently upheld in Case C-15/89 *Deltakabel* [1991] ECR I-241, Case C-249/89 *Trave Schiffahrts-Gesellschaft* [1991] ECR I-257, and Case 36/86 *Dansk Sparinvest* [1988] ECR 409. In line with that case-law, the Court ruled that the Directive does not apply to a national tax on any appreciation in the value of immovable property, determined at the time when such property was contributed to a capital company (Case C-42/96 *Immobiliare SIF* [1997] ECR I-7089).

11 — Judgment in Case C-508/99 *Palais am Stadtpark Hotelbetriebsgesellschaft* [2002] ECR I-4455, paragraph 28.

12 — That view is set out in the judgment in Joined Cases C-197/94 and C-252/94 *Bautiaa y Société Française Maritime* [1996] ECR I-505, paragraphs 31 and 32.

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)). [13]

25. That prohibition is justified by the fact that, although 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. [14]

26. That being the situation, it is clear that the disputed levy does not fall within the scope of the Directive and is not, therefore, precluded by the Directive.

27. That assertion is borne out by a number of arguments, because the levy at issue in the main proceedings is not charged on any of the transactions or operations referred to in Article 4 of the Directive, which in legal terms constitute the raising of capital and contribute to the strengthening of the company's economic potential. It is a tax — I use that expression in the broad sense — which companies operating in the securities market are required to pay in order to finance the supervisory body for that market. Accordingly, it cannot be described as a tax on contributions to companies, since, in principle, it is possible for the owners of those companies to be natural persons or, where they are legal persons, partnerships. [15]

28. To the extent that it is paid annually by licensed companies, the levy is similar to a registration charge or to a charge linked to compulsory operating formalities. However, it must be recalled that Article 10(c) of the Directive has been interpreted in Community case-law as extending to the imposition of such levies on capital companies only where they are linked to formalities which are compulsory for the purposes of raising or increasing capital. That is not true of the levy which the FMA collects in order to finance itself, because there is no link to the formalities which the plaintiffs in the main proceedings are required to complete when they raise capital. Unlike the facts of the cases in the so-called 'Portuguese Saga',

13 — The Court ruled to that effect in *Denkavit Internationaal and Others* (paragraph 23), although it had a clear precedent in the judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 29. That approach was upheld and followed in the judgments in Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 21; Case C-347/96 *Solred* [1998] ECR I-937, paragraph 21; Case C-426/98 *Commission* v *Greece* [2002] ECR I-2793, paragraph 24; and Joined Cases C-216/99 and C-222/99 *Prisco and Caser* [2002] ECR I-6761, paragraph 48.

14 — That was the view advanced by Advocate General Jacobs in paragraph 44 of the Opinion in *Denkavit Internationaal and Others* and adopted in full by the Court in the judgment in that case and in the other cases cited in the previous footnote. The approach was also followed in the judgments in Case C-152/97 *AGAS* [1998] ECR I-6553, paragraph 21; Case C-113/99 *P. P. Handelsgesellschaft* [2002] ECR I-471, paragraph 21; and in the 'Portuguese Saga' which comprises the judgments in Case C-56/98 *Modelo I* [1999] ECR I-6427, paragraph 24; Case C-19/99 *Modelo II* [2000] ECR I-7213, paragraph 24; Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 22; and Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 28.

15 — This case is similar to *Denkavit Internationaal and Others*, which concerned a levy unrelated to the formalities to which capital companies may be made subject by reason of their legal form, which could be collected from a natural person or, in the case of legal persons, a partnership (paragraphs 25 and 26).

which concerned charges collected for the drawing up of notarial documents authorising operations included in the scope of the Directive (*Modelo I* and *Modelo II*) or for recording an increase in share capital in a national register (*IGI* and *SONAE*), in these proceedings the disputed levy is not covered by any of the cases laid down in Article 10 (c). [16]

29. Nor is the contention of the plaintiffs in the main proceedings borne out by Article 11, because, in accordance with the scheme of the Directive, the reference to transactions involving shares, debentures or other negotiable securities of the same type must be construed as denoting transactions aimed at raising capital, rather than any other action taken with regard to such securities which, as in the case before the Court, is totally unrelated to that aim. The plaintiffs operate in the securities market but the disputed charge is not imposed on them for dealing in securities with a view to increasing their share capital; instead, it is intended to cover the costs of the public body charged with supervising the financial sector in which they operate. Thus, for example, in *Dansk Sparinvest*, which concerned an action brought by an investment society which had issued certificates representing its assets, the Court held that, as a result of such a transaction, the Member State concerned (Denmark) was not entitled to charge a levy on the contributions, since because they did not strengthen the economic potential of the company, its position was the same before and after the issue.

30. In *FECSA and ACESA*, [17] the Court pointed out that, under Article 11(b) of the Directive, the repayment of debenture loans are subject to taxation 'as overall operations for raising capital' (paragraph 18).

31. Finally, in the recent judgment in *Commission* v *Belgium*, [18] the Court, referring to the considerations set out by Advocate General Tizzano in point 14 of his Opinion, cited the above phrase in order to recall the link which must exist between dealing in securities and the raising of capital (paragraph 32). On those grounds, in paragraph 40, the Court held that, to the extent that it is levied on new securities, 'issued when a company or investment fund is being set up or following an increase in capital or as part of a loan issue', the imposition of tax on stock exchange transactions is prohibited by Article 11(a).

16 — This case is similar to Case C-8/96 *Locamion* [1997] ECR I-7055, in which the Court observed that the Directive does not preclude a levy such as a vehicle registration charge because such a charge does not affect the transfer of vehicles to a capital company but, more specifically, their use on the road (paragraph 31).

17 — Joined Cases C-31/97 and C-32/97 [1998] ECR I-6491.

18 — Case C-415/02 [2004] ECR I-7215.

32. In short, a levy of the kind at issue in the main proceedings falls outside the scope of the Directive **and**, accordingly, the imposition of such a levy does not contravene Community law.

33. The effort made by the plaintiffs in these proceedings for a preliminary ruling to attempt to persuade the Court otherwise is, in my view, to be applauded. However, their tenacity is in vain. Notwithstanding that the levy imposed by the FMA on Optiver and others is indubitably a tax (no one disputes that), the event giving rise to it is not included in any of the cases referred to in Article 11, because, as I have pointed out, such legal transactions are subject to capital duty and, accordingly, cannot be subject to any other duty, because they are a means of raising capital which the Directive aims to make subject to a single harmonised indirect tax.

34. By comparing Article 12 with Articles 10 and 11, it can be seen that the derogations set out in the former, which must be interpreted restrictively, are justified on the grounds that the levies concerned are charged on transactions which do not constitute the raising of capital and which do not contribute to strengthening the economic potential of companies, although they do relate to the achievement of those objectives. That was the view taken by the Court when, in a ruling on Article 12(1)(e) ('duties paid by way of fees or dues'), it held that the provision refers to 'payment collected by way of consideration for transactions required by law in the public interest such as, for example, the registration of capital companies', which 'must be calculated on the basis of the cost' of the service provided (judgment in *Ponente Carni*), without prejudice to the use of flat-rate charges for a specified period, provided that the amount does not exceed the average cost of the service provided (judgment in *Fantask and Others*).

35. That point is illustrated by the judgment in *Immobiliare SIF*, from which it is clear that the specific event giving rise to the duties on transfers of immovable property or businesses provided for in Article 12(1)(b) is not their contribution to a capital company (paragraph 3), but rather the fact that, for that purpose, they are charged on the basis of general and objective criteria (paragraph 34). Thus, in addition to the harmonised levy provided for in the Directive, that provision permits Member States to charge, on the raising of capital, duties in respect of which the operative event is objectively linked to the transfer of businesses or immovable property (paragraph 35).

36. For the same reasons, in *FECSA and ACESA*, the Court held that it was incompatible with the Directive to charge the Spanish duty on documented legal transactions on the repayment of a debenture loan, a transaction which is referred to in Article 11(b) and which is not capable of being caught by Article 12(1)(d) ('duties on the creation, registration or discharge of mortgages or other charges on land or other property'), because it constitutes a discrete financial transaction, which increases the

economic potential of the company and is separate from the discharge of a mortgage registered in order to secure the debentures resulting from the loan (paragraph 24).

37. Securities transactions are subject to the Directive if they are used by a capital company as a means of raising capital, from which it follows that such transactions may only be subject to capital duty. The interpretation advanced by Optiver and others vis-à-vis the other parties who have submitted observations would lead to such transactions being exempt from all forms of tax, both where they are not carried out by a capital company and, where they are, they are totally unrelated to the raising or transfer of funds. The Commission explains very clearly in its written observations that, if the claim of the plaintiffs in the main proceedings — whose sole object, as far as we know, is dealing in securities — were upheld, it would lead to a general exemption which would be incompatible with the more modest desire of the Community legislature to harmonise indirect taxation on the raising of capital, thereby excluding double taxation.

V — Conclusion

38. In the light of the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Rechtbank, Rotterdam, by declaring that:

'Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital does not preclude Member States from imposing on companies licensed to operate in the securities market an annual levy calculated on the gross profit from that activity, the aim of which is to finance the costs of the tasks carried out by the public supervisory body for that market.'