# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 15 February 2007 [1]

## I — Introduction

1. In the present action for failure to fulfil obligations the Commission alleges that the Hellenic Republic has failed to transpose Directive 69/335/EEC concerning indirect taxes on the raising of capital [2] ('capital duty') properly.

2. First, the Commission claims that the Greek provisions concerning taxation on the transfer to Greece of the registered office or effective centre of management of capital companies infringe the requirements of the directive.

3. Second, the Commission considers that the Greek provisions which exempt from capital duty agricultural cooperative organisations and associations and consortia thereof, and co-ownership of vessels, shipping consortia and any form of shipping company, are incompatible with Directive 69/335.

## II — Legal framework

### A — *Directive 69/335*

4. The original purpose of the directive is identified by the second recital in its preamble:

'... the indirect taxes on the raising of capital, in force in the Member States at the present time, namely the duty chargeable on contribution of capital to companies and firms and the stamp duty on securities, give rise to discrimination, double taxation and disparities which interfere with the free movement

1 — Original language: German.

2 — Council Directive of 17 July 1969 (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital (OJ 1985 L 156, p. 23) ('Directive 69/335').

of capital and which, consequently, must be eliminated by harmonisation'.

5. The directive's extended purpose and its background are stated by the second and third recitals in the preamble to the amending Directive 85/303: [3]

'... the economic effects of capital duty are detrimental to the regrouping and development of undertakings; ... 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;

... the best solution for attaining these objectives would be to abolish capital duty ...'.

6. The fifth recital in the preamble to the amending Directive 85/303 deals with Greece's situation following its accession to the European Union:

'... on 1 July 1984 no capital duty existed in Greece; ... for this reason, provision should be made for the possibility of introducing such duty in Greece and of exempting certain transactions from it'.

Accordingly, the directive lays down some special provisions for Greece.

7. Article 1 of Directive 69/335 lays down the basis for the manner in which capital duty is to be imposed as follows:

'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9 and hereinafter called "capital duty".'

8. Article 3(1) identifies which companies are taxable:

'For the purposes of this Directive the expression "capital company" means:

(a) ...

3 — Cited in footnote 2.

(b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;

(c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.'

9. Article 3(2) extends the directive's field of application by means of a legal fiction to certain companies which are not capital companies, but permits the Member States to apply a different tax treatment to such companies:

'For the purposes of the application of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

10. Article 4 specifies the transactions which Member States may make subject to capital duty:

'1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

...

(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.

2. ...

However, the Hellenic Republic shall determine which of the transactions listed above it will subject to capital duty.

3. Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:

...

(b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;

...'

11. Article 7(1) and (2) provide:

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

...

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

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%.'

12. In addition, Article 8 permits types of capital company to be exempted from capital duty:

'Subject to Article 7(1), Member States may exempt from capital duty the transactions referred to in Article 4(1) and (2) concerning:

— capital companies which supply public services, such as public transport undertakings, port authorities or undertakings supplying water, gas or electricity, in

cases where the State or regional or local authorities own at least half of the company's capital;

— capital companies which, in accordance with their regulations and in fact, pursue exclusively and directly cultural, charitable, relief or educational objectives.'

13. Article 9 lays down as follows the conditions on which the Member States may otherwise depart from the prescribed manner of charging capital duty:

'Certain types of transactions or of capital companies may be the subject of exemptions, reductions or increases in rates in order to achieve fairness in taxation, or for social considerations, or to enable a Member State to deal with special situations. The Member State which proposes to take such a measure shall refer the matter to the Commission in good time, having regard to the application of Article 102 of the Treaty.'

B — *National law*

14. In Greece, Law No 1676/86 is intended to transpose Directive 69/335. Under Article 17 of the Greek Law, commercial companies, business consortia and cooperative organisations of whatever level, and every other company or firm, legal person, or association operating for profit, are subject to capital duty.

15. Article 18 identifies which transactions are taxable, for example formation of a capital company, conversion into a capital company, and increases in company assets. Article 18(2)(c) and (d) provide for the transfer from another Member State to Greece of the effective centre of management of a legal person within the meaning of Article 17 to be treated in the same way, in so far as that legal person is not subject to duty in its Member State of origin. The same applies to the transfer from another Member State to Greece of the registered office of a legal person whose effective centre of management is in a third country.

16. On the other hand, Article 18(4) makes it clear that the transfer of the effective centre of management or the registered office of a legal person within the meaning of Article 17 is not the raising of capital, and therefore does not constitute a taxable transaction, if the legal person is subject to duty in its Member State of origin.

17. Article 22(1)(a) of the Greek Law exempts from capital duty agricultural coop-

erative organisations of whatever level including associations and consortia thereof, and Article 22(1)(b) exempts co-ownership of vessels, shipping consortia and any form of shipping company.

18. Agricultural cooperative organisations are the subject of Law No 2810/2000, which governs inter alia their formation, structure and organisation.

## III — Procedure and forms of order sought

19. The pre-litigation procedure having been duly carried out, on 19 April 2005 the Commission brought the present action, in which it claims that the Court should:

— declare that, as a result of its legislative provisions concerning the imposition of duty on the transfer of registered offices and the transfer of effective centres of management and concerning the exemption from that duty of all agricultural cooperative organisations of whatever level, of associations and consortia thereof of any kind, of co-ownership of vessels, of shipping consortia and of any form of shipping company, the Hellenic Republic has failed to fulfil its obligations under Directive 69/335;

— order the Hellenic Republic to pay the costs.

20. The Hellenic Republic contends that the Court should:

— dismiss the action.

21. The Kingdom of Spain, which was granted leave to intervene in the proceedings by order of 19 September 2005, contends that the Court should:

— dismiss the action and order the Commission to pay the costs;

— in the alternative, in so far as the Court holds that the Hellenic Republic has failed to fulfil its obligations, limit the temporal effects of the judgment to the future.

## IV — Analysis

### A — *Admissibility*

22. Greece has not made any express submission that the action is inadmissible. However, doubts as to its admissibility might be aroused by the Greek Government's objection that Law No 1676/86, which is designed to transpose the directive — including the provisions disputed in the present case — into national law, was notified to the Commission in the form of a proposal as early as September 1986. Thus, almost 18 years passed between notification of the legislative proposal and the Commission's letter of formal notice dated 1 April 2004. Until the pre-litigation procedure forming the basis for this action was initiated, the Commission had not at any time suggested to the Greek Government that there was a potential infringement of its obligations under the directive.

23. However, Article 226 EC does not lay down any time-limit for bringing proceedings. According to the case-law of the Court, the admissibility of an action for failure to fulfil obligations does not depend on whether the Commission has acted within a specified period in initiating the preliminary procedure or in bringing the action; instead, it has a discretion and it is not for the Court to review the exercise of that discretion. [4]

24. A different result is possible only if the excessive duration of the pre-litigation procedure makes it more difficult for the Member State concerned to refute the Commission's arguments and thus infringes that Member State's rights of defence. [5] It is unnecessary to consider whether the same must apply where the pre-litigation procedure itself does not last a long time, but the infringement procedure is initiated a very long time after the enactment of the disputed measure. This is because the Member State must in any event prove any negative effects on its rights of defence. [6] In the present case, however, the Greek Government has not submitted that the late initiation of the infringement procedure affected how it conducted its defence.

4 — See, inter alia, Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 18, where the action was brought more than six years after the disputed provisions came into force; Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 15; and Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 4.

5 — *Commission* v *Netherlands* (cited in footnote 4), paragraph 16.

6 — See *Commission* v *Netherlands* (cited in footnote 4), paragraphs 14 to 16; Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraphs 24 and 25; and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 76.

25. In addition, the Greek Government has submitted that the Commission's failure to react to the notification of the disputed provisions meant that it did not initiate the procedure laid down by Article 9 of Directive 69/335, but it has not submitted that this renders the action inadmissible.

26. Article 9 of the directive provides that, where certain conditions are satisfied, exceptions from charging capital duty may be laid down. For this, the Member State must notify the Commission in good time *ex proprio motu*. However, the fact that a failure to act by the Commission gives a Member State the impression that action under Article 9 is not necessary cannot render Treaty infringement proceedings inadmissible. This is because Treaty infringement proceedings are not a means of enforcing rights vested in the Commission which it might forfeit by preventing a Member State from relying on an exception. On the contrary, Treaty infringement proceedings are directed at an objective finding as to whether there has been an infringement of Community law.[7] Apart from that, both during and after Treaty infringement proceedings a Member State may still obtain an exception pursuant to the procedure laid down by Article 9 of the directive in cooperation with the Commission.

27. Accordingly, the action is admissible.

7 — See, inter alia, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 67.

B — *Substance*

28. The Commission's view is that the Greek provisions infringe Directive 69/335 in three ways. First, there is the question as to the basis for taxing the transfer of the registered office or effective centre of management (section 1 below), and second, there is the exemption from capital duty conferred on particular undertakings, namely agricultural cooperative organisations (section 2(a) below) and co-ownership of vessels, shipping consortia and shipping companies (section 2(b) below).

1. Basis for taxation in the event of transfer of the registered office or effective centre of management

29. The Commission is of the view that the Hellenic Republic has not transposed Article 4(1)(g) and (h) and (3)(b) of Directive 69/335 properly. These provisions lay down the conditions for charging capital duty on a transfer of the registered office or effective centre of management ('transfer of seat') from one Member State to another Member State.

30. According to the Commission, Directive 69/335 provides that the decisive criterion for the question of whether a transfer of seat

is subject to tax is whether the company is classified in its Member State of origin as a capital company. By contrast, the Greek provision makes charging capital duty on a transfer of seat depend on whether capital duty has been charged on the company in question in its State of origin (in that event the transfer of seat is not taxed) or no capital duty has been charged (in that case the transfer of seat is taxed).

31. In its defence, the Greek Government criticised the Commission's interpretation of the Greek provision, and emphasised that Greek law does not apply the criterion of whether capital duty has been *charged* in the State of origin but whether the company is in principle *subject to capital duty* in its State of origin. [8] If a company is not subject to capital duty in its State of origin, the transfer of its seat to Greece is taxed, but if on the other hand it is subject to capital duty there, the transfer of its seat is not taxed. The Greek Government is of the view that this criterion complies with the directive's requirements. However, the Commission is of the view that the criterion of being *subject to capital duty* is in any event also incompatible with the directive.

8 — The fact that the Greek Government first relied on this distinction in its defence is irrelevant, because a Member State is not precluded from raising material arguments only after receipt of the reasoned opinion: see Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585, paragraph 19.

32. Thus, it must now be examined whether the criterion laid down in the Greek provision, namely being subject to tax, constitutes proper transposition of Directive 69/335. For this purpose it is necessary to interpret Article 4 of the directive.

33. Article 4(1)(g) provides that 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 host State, for the purposes of charging capital duty, to be a capital company, but is not so considered in the State of origin, is subject to capital duty. Article 4(1)(h) is a parallel provision for 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.

34. Article 4(3)(b) of Directive 69/335 provides that inter alia the following transaction is not to be regarded as the formation of a capital company that is subject to capital duty: the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, to be a capital company.

35. It must first be observed that the criterion applied in Greek law of being *subject to duty* does not correspond to the wording of Directive 69/335. However, the Greek Government submits that this criterion leads to results identical to those reached using the directive's criterion. To assess this defence it is thus necessary to consider the circumstances in which the directive provides that a transfer of seat is subject to capital duty. In a second stage it must then be considered whether the criterion applied by Greek law leads to an identical result in all cases.

36. On the wording of Article 4(1)(g) and (h), a transfer of seat is subject to capital duty if the company in question *is considered* in the host State, *for the purposes of charging capital duty, to be a capital company*, but by contrast is *not* considered in the Member State of origin to be a capital company. Accordingly, the precondition for the application of this provision is a divergence in classification as a capital company. Article 4 thereby refers to Article 3(2) of the directive, and also repeats its terminology. The first sentence of Article 3(2) provides that, for the purposes of the application of the directive, any other company, firm, association or legal person operating for profit is to be deemed to be a capital company. The second sentence of Article 3(2) permits the Member State not to *regard it as a capital company for the purpose of charging capital duty.* Since a divergence in classification as a capital company may arise in the case of these deemed companies, Article 4(1) makes provision for transfers of their seats.

37. In the case of companies which fall within Article 3(1) of Directive 69/335, it is in principle not possible for there to be any divergence in their classification as a capital company. This is because Article 3(1) contains a comprehensive and binding definition of capital companies for all Member States. In part, they are expressly listed; in part, conditions are specified which, if satisfied, mean that a company is a capital company for the purposes of the directive. Accordingly, it is not possible for such companies not *to be considered to be capital companies* in a Member State for the purposes of charging capital duty. In accordance with Article 4(3)(b), a transfer of seat by companies falling within Article 3(1) is therefore never a taxable transaction, because it is mandatory under the directive for them to be considered to be capital companies in both the State of origin and in the host State.

38. One must grant the Greek Government that the directive's criterion and the criterion applied in Greek law of being 'subject to duty' can lead to the same result in some situations. If a company is not considered in its State of origin to be a capital company, the transfer of its seat is subject to capital duty under Article 4(1)(g) and (h). Since a

company which is not regarded in its State of origin as a capital company will also not be subject to capital duty there, in these circumstances the Greek criterion does not lead to any different result.

39. However, the situation is different if, pursuant to Article 7(2) of Directive 69/335, the State of origin has exempted all transactions from capital duty, thereby abolishing capital duty.

40. The question whether, in these circumstances, taxation on a transfer of seat is governed by Article 4(1)(g) and (h) (with the consequence that the transfer is subject to capital duty) or by Article 4(3)(b) (with the consequence that it is not subject to capital duty) is likewise determined according to whether a company is 'considered ..., for the purposes of charging capital duty, as a capital company' in the State of origin. [9]

41. On the one hand, it may be argued that, in a country which has abolished capital duty, a company is also no longer considered, for the purposes of charging capital duty, to be a capital company, precisely because capital duty is no longer charged. On this approach, Article 4(1) would apply, with the consequence that the transfer of seat is subject to tax.

42. However, I am not persuaded by this solution. It proceeds on the footing that classification as a capital company depends on classification according to national law. This is not correct. The directive itself lays down definitively in Article 3 which companies are to be considered, for the purposes of charging capital duty, to be capital companies. Classification under national law is relevant only in the context of the exercise of the option to except certain companies, which are *not* capital companies, from the general requirement under Article 3(2) that they be deemed to be capital companies. Even if a Member State has abolished capital duty pursuant to Article 7(2), the question as to which companies are to be considered to be capital companies is, on the other hand, determined exclusively on the basis of Article 3 of the directive. On the interpretation adopted here, taxation on a transfer of seat is accordingly determined in principle in accordance with Article 4(3), that is to say the transfer is not subject to capital duty.

43. The view adopted here is also confirmed by the judgment of the Court in *Senior Engineering*. [10] In that judgment the Court

9 — The provisions regarding transfers of seat were not amended when Article 7(2) was inserted by the amending Directive 85/303 (cited in footnote 2).

10 — Case C-494/03 [2006] ECR I-525, paragraph 43.

had regard, for the purpose of determining the State entitled to charge duty, solely to whether a taxable transaction, within the meaning of the directive, was carried out in that State. On the other hand, the fact that the State in question has abolished capital duty pursuant to Article 7(2) is irrelevant. The Court got to the heart of the matter when it stated that Directive 69/335 cannot be interpreted as enabling a Member State to benefit, so as to increase its tax revenue, from the fiscal moderation of another Member State. [11]

44. Accordingly, in the circumstances under examination here too, all that matters is whether, under Article 3 of the directive, a company is to be considered to be a capital company which is liable to capital duty. This classification is unaffected by the fact that a Member State no longer charges capital duty.

45. This interpretation of Directive 69/335 also corresponds with its goal, which, since its amendment, has been the abolition of capital duty. [12] If a Member State responds to this goal and abolishes capital duty, the provisions on the transfer of seat cannot be interpreted in such a way that this decision is reversed by taxation in the host State. Moreover, this interpretation achieves the best possible realisation of the fundamental freedoms, in this case freedom of establishment, because it facilitates transfers of seat to a different Member State.

46. In summary, it is to be held that the abolition by the State of origin of capital duty pursuant to Article 7(2) does not mean that the transfer of the seat of a company falling within the directive's definition of a capital company is subject to capital duty.

47. On the other hand, if the criterion under Greek law — that of the company in question being subject to tax in its State of origin — is applied, a different result is reached in the scenario under consideration. If, under the law of its State of origin, a capital company is no longer liable to capital duty in respect of any transaction, then for the purposes of Greek law — as the Greek Government has itself conceded in the proceedings before the Court — it is *not subject to capital duty*. In this scenario, therefore, on application of the criterion used in Greek law, in contrast to application of the criterion of classification as a capital company, a transfer of seat would always be subject to capital duty.

11 — *Senior Engineering* (cited in footnote 10), paragraph 43.

12 — See the third recital in the preamble to the amending Directive 85/303 (cited in footnote 2). Originally, Directive 69/335 sought to abolish discrimination and double taxation (see the second and sixth recitals in its preamble).

48. It follows that, contrary to the submissions of the Greek Government, the criterion used in Greek law does not in all cases lead to the same result as the criterion laid down by the directive, namely classification as a capital company. Thus, by choosing the criterion of being *subject to duty* the Hellenic Republic has failed to transpose the directive properly.

49. The Kingdom of Spain, which is participating in the present proceedings as an intervener, refers to its own provisions, which are similar to Greek law. In its submission, the arrangements chosen by Spanish and Greek law are necessary to prevent fraud and tax avoidance.

50. The Court has consistently recognised that Community law cannot be relied upon for abusive or fraudulent ends. This means that the application of a provision of Community law cannot be extended to cover abusive practices by economic operators, that is to say transactions which do not take place in the context of normal commercial operations but have the sole purpose of wrongfully obtaining advantages provided for by Community legislation. [13] However, making use of a possibility created by Community law cannot in itself justify a suspicion of abuse. [14]

51. Article 4 of Directive 69/335 enables a capital company whose State of origin does not subject it to capital duty to transfer its seat to another Member State without the transfer of seat being subject to capital duty. A Member State cannot generally abolish this advantage which the directive confers on companies.

52. It is only if there are specific circumstances which render reliance on this Community provision abusive that a Member State could refuse to allow reliance on the provision. However, the Greek provisions are not restricted to preventing abuse in particular cases, but generally impose capital duty on a transfer of seat by companies which are lawfully not subject to capital duty in their State of origin. Thus, they in any event go beyond what is necessary to prevent tax avoidance. Accordingly, even taking into

13 — See Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24, with further references; Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraph 20; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 69; and Case C-196/04 *Cadbury Schweppes* [2007] ECR I-7995, paragraph 35; see also my Opinion in Case C-321/05 *Kofoed*, pending before the Court, point 57 et seq.

14 — To that effect, see *Centros* (cited in footnote 13), paragraph 27, and *Cadbury Schweppes* (cited in footnote 13), paragraph 36 et seq.

account the prevention of tax avoidance, the Greek provisions do not properly transpose Directive 69/335.

2. Exemption from capital duty for particular kinds of companies

(a) Exemption for agricultural cooperative organisations

53. Under Greek law, agricultural cooperative organisations of whatever level and associations and consortia thereof are exempt from capital duty. The Commission's view is that this exemption is not compatible with Directive 69/335.

54. Article 1 of Directive 69/335 provides that Member States are to charge capital companies a capital duty harmonised in accordance with the directive. Accordingly, it is necessary to consider below whether agricultural cooperative organisations established under Greek law are capital companies with the consequence that in principle they are to be charged capital duty. If agricultural cooperative organisations are capital companies for the purposes of the directive, it must then be considered in a second stage whether and to what extent the directive permits exceptions from the charging of capital duty.

55. Article 3(1)(a) lists as capital companies certain forms of company recognised by the laws of the Member States, whereas Article 3(1)(b) and (c) identifies characteristics which likewise make a company, firm, association or legal person a capital company for the purposes of the directive. Agricultural cooperative organisations under Greek law are not mentioned in the list in Article 3(1)(a); nor do they exhibit the characteristics identified in Article 3(1)(b) and (c) as preconditions for classification as a capital company.

56. Article 3(1)(b) provides that a company the shares in whose capital or assets can be dealt in on a stock exchange is a capital company. As the Commission has itself submitted, shares in agricultural cooperative organisations cannot be dealt in on a stock exchange.

57. Article 3(1)(c) provides that any company, firm, association or legal person operating for profit whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares is a capital company for the purposes of the directive. The Commission has stated that under Greek law shares in an agricultural cooperative organisation can be disposed of only if the statutes of the particular cooperative organisation so provide and if the board of the cooperative organisation consents to the

disposal. Thus, the shares of an agricultural cooperative organisation under Greek law cannot be disposed of to third parties without prior authorisation. It is unnecessary to consider whether agricultural cooperative organisations satisfy the second criterion specified in Article 3(1)(c), namely that members are only responsible for the debts of the company to the extent of their shares, because in order to be a capital company under Article 3(1)(c) a company has to satisfy both the criteria identified there. Given that agricultural cooperative organisations under Greek law do not satisfy the first criterion, they are not capital companies as referred to in Article 3(1)(c).

58. However, Article 3(2) provides that, for the purposes of the application of Directive 69/335, any other company, firm, association or legal person operating for profit is to be deemed to be a capital company. The Court has held that the object of that provision is to prevent the choice of a particular legal form from leading to a different fiscal treatment of activities which, from the economic point of view, are equivalent. [15]

59. Therefore, agricultural cooperative organisations under Greek law would have to operate for profit if they are to be capital companies under Article 3(2).

60. The Commission rightly points out that the criterion of operating for profit must be interpreted broadly. It is not only if the purpose of its economic activities is to make an investment return that a company operates for profit within the meaning of the first sentence of Article 3(2) of the directive. It also operates for profit if, as in the case of an agricultural cooperative organisation, the economic results of its activity directly benefit its members and economically strengthen the company as a joint enterprise, even though this does not lead to payment of a direct return on investment. Moreover, the Greek Government too accepts that agricultural cooperative organisations of at least one kind, namely 'farming cooperatives', [16] operate for profit within the meaning of the directive and are accordingly deemed capital companies.

61. However, the second sentence of Article 3(2) of Directive 69/335 allows Member States not to regard companies, firms, associations or legal persons deemed by the first sentence to be capital companies as capital companies for the purpose of charging capital duty. It must therefore now be considered whether the exemption granted to agricultural cooperative organisations is covered by this exception.

15 — Case 112/86 *Amro Aandelen Fonds* [1987] ECR 4453, paragraph 10.

16 — In Greek, 'γεωργικοί συνεταιρισμοί'.

62. It is necessary for this purpose to define what is meant by 'shall have the right not to consider it as such for the purpose of charging capital duty'.

63. On the basis of the wording, a number of interpretations are possible.

64. First, it might be understood that the second sentence allows Members States to disapply the deeming provision only in its entirety, that is they can either exempt all forms of association deemed to be capital companies or none of them. However, this interpretation would not correspond to the spirit and purpose of Directive 69/335. Since the amending Directive 85/303, [17] one of its purposes is the abolition of capital duty. If Article 3(2) permitted exemption only either of all or of none of the companies, firms, associations and legal persons deemed to be capital companies, this would be a very large obstacle to the abolition of capital duty. By contrast, the abolition of capital duty would be facilitated if it could be done in stages. Accordingly, Article 3(2) is not to be interpreted as meaning that only all deemed capital companies together may be exempted from capital duty. [18]

65. Second, the second sentence of Article 3(2) might also be interpreted as meaning that the Member States are entirely free to exempt individual companies or groups of companies from the deeming provision. However, the purpose of the directive is to put all capital companies, and forms of association deemed to be capital companies, in principle in the same position as regards capital duty. The directive permits sectoral exemptions under Article 8 for particular areas only. It would not correspond to the scheme of the directive if Member States could introduce further sectoral exemptions pursuant to Article 3(2). Besides, the possibility of exempting individual branches of production from capital duty would risk contradicting the prohibition in Article 87 EC on State aid. Thus, the second sentence of Article 3(2) is not to be interpreted as meaning that individual companies or branches of the economy can be exempted from capital duty without restriction.

17 — See footnote 2 for the citation.

18 — This interpretation is clearer from the French language version, which [like the English language version] uses the singular in relation to companies which may be exempted: 'Toutefois, un État membre peut ne pas la considérer comme telle pour la perception du droit d'apport.' By contrast, the Greek language version, like the German language version, uses the plural: 'Εν τούτοις, ένα Κράτος μέλος δύναται να μη τις θεωρεί ως κεφαλαιουχικές εταιρίες για την είσπραξη του φόρου εισφοράς.'

66. The exception permitted by the second sentence of Article 3(2) is instead to be interpreted as meaning that a Member State may exempt individual *forms of company* deemed to be capital companies as defined in Article 3(1), that is to say autonomous legal forms, from the application of the directive.

67. This is also supported by the judgment in *Amro Aandelen Fonds*, in which the Court stated that Article 3(2) permits 'the raising of certain capital' to be exempted from the charge to capital duty. [19] This interpretation of the provision promotes in particular the directive's objective of abolishing capital duty, because the Member States may proceed in stages and thus by manageable steps.

68. Under Greek law not all cooperative organisations are exempt from capital duty, but only agricultural cooperative organisations. Prima facie, it appears that a sector of the economy has hereby been exempted from capital duty. However, under Greek law agricultural cooperative organisations are governed by a separate law, which provides comprehensively for their establishment, structure and organisation.

69. The Commission has itself accepted that agricultural cooperative organisations are subject to a special statutory regime. It follows that they are an autonomous form of association, which the second sentence of Article 3(2) permits to be exempted from capital duty. In the present case it so happens that an autonomous form of association relates to a single sector of the economy. In that regard, it need only be made clear that a Member State should not, with a view to circumventing the prohibition on sectoral exemptions, create autonomous forms of association for particular sectors of the economy so as then validly to exempt those forms of association from capital duty. However, in the present proceedings the Commission has not adduced any evidence of this type of abusive arrangement in Greek law.

70. If the exemption from capital duty is valid for agricultural cooperative organisations, it must also be valid for associations and consortia of agricultural cooperative organisations.

71. It follows that the Hellenic Republic was able, by Article 22(1)(a) of Greek Law No 1676/86, to exempt agricultural cooperative organisations and associations and consortia thereof from being deemed capital companies, and thus to exempt them from capital duty. This does not constitute an infringement of Directive 69/335.

19 — *Amro Aandelen Fonds* (cited in footnote 15), paragraph 12.

(b) Exemption for shipping companies

72. Finally it must be considered whether the exemption from capital duty of co-ownership of vessels, shipping consortia and any form of shipping company is compatible with Directive 69/335.

73. Under Directive 69/335, all capital companies (pursuant to Article 3(1)) and deemed capital companies, that is companies, firms, associations and legal persons operating for profit (pursuant to Article 3(2)), are in principle subject to capital duty. Co-ownership of vessels, shipping consortia and any form of shipping company constitute either capital companies within the meaning of Article 3(1) or, in any event, given that they operate for profit, deemed capital companies under Article 3(2), with the consequence that in principle they are subject to capital duty.

74. Capital companies within the meaning of Article 3(1) of Directive 69/335 may be exempted from capital duty only on the strict conditions laid down by Articles 8 and 9 of the directive. However, their requirements are not satisfied in the present case. First, shipping is not one of the sectors of the economy which Article 8 permits to be the subject of a sectoral exemption. Second, the requirements for exemption under Article 9 are not satisfied. If a Member State is considering enacting a measure pursuant to Article 9, it must refer the matter to the Commission in good time, having regard to the application of Article 97 EC. However, Greece did not initiate this procedure in relation to the exemptions at issue here. Given that Greece did not initiate the procedure provided for in Article 9, it is unnecessary to consider whether Article 9 can apply at all to sectoral exemptions.

75. Nor can the exemption for co-ownership of vessels, shipping consortia and any form of shipping company be justified by reference to Article 7(1) and Article 4(2) of Directive 69/335, given that, simply on the basis of their wording, those provisions provide merely the possibility for Greece to exempt specific *transactions* from capital duty. However, in the present case the Greek provisions do not exempt only specific transactions from capital duty, but companies in a specific sector of the economy.

76. In addition, the fact that, as the Greek Government submits, shipping companies have always been exempt from capital duty likewise does not constitute justification for an exemption from capital duty. Directive 69/335 does not provide for the possibility of such an exemption.

77. The only other possibility which Directive 69/335 envisages for exemption from capital duty concerns deemed capital companies under Article 3(2).

78. Since this provision constitutes an exception, a Member State which relies on it bears the burden of proving that its conditions are satisfied. Thus, it was for Greece to submit that the co-ownership of vessels, shipping consortia and shipping companies exempted from capital duty do not constitute capital companies within the meaning of Article 3(1), but instead merely deemed capital companies falling within Article 3(2), with the consequence that a further possibility for exempting them is available. If the exempted companies were deemed capital companies, they could, as explained above, be exempted from capital duty if they amounted to an autonomous form of company. However, since the Greek Government has not demonstrated this, it is also not possible here for the exemption from capital duty to be justified under the second sentence of Article 3(2).

79. Accordingly, the tax exemption conferred by Greek law on co-ownership of vessels, shipping consortia and shipping companies breaches Directive 69/335.

80. This result also does not contradict Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport. [20] It is true that in this communication the Commission describes fiscal advantages conferred by individual Member States as measures which can constitute a means of improving the competitiveness of the Community fleet vis-à-vis ships registered in third countries. [21]

81. However, no statement as to the lawfulness of tax exemptions within the framework of Directive 69/335 can be inferred from this Commission communication. First, it pursues a different legislative purpose: it is intended only to set the parameters within which State aid to maritime transport will be approved, pursuant to Community State aid rules and procedures, by the Commission under Article 87(3)(c) and/or Article 86(2) EC. [22] Second, it is merely a communication, therefore ranking below Directive 69/335 in the hierarchy of norms, and accordingly cannot determine the directive's field of application and content.

82. Nor does a different result follow from Article 80(2) EC, to which the Greek Government refers. Article 80(2) EC constitutes an independent legal basis for provi-

20 — OJ 2004 C 13, p. 3.

21 — Commission communication (cited in footnote 20), p. 6.

22 — Commission communication (cited in footnote 20), p. 5.

sions relating to maritime transport. The Greek Government submits that Directive 69/335 therefore does not apply to maritime transport and instead this sector requires separate legislation adopted under Article 80(2). However, this line of argument is not convincing. It cannot be inferred from Article 80(2) EC that in overlapping areas separate rules should be adopted in each case for maritime transport.

*C — Limitation on the temporal effects of the judgment*

83. In its statement in intervention the Kingdom of Spain applied for the temporal effects of the judgment to be limited. The reasons it gave were, first, the fact that 18 years elapsed between notification of the disputed Greek Law to the Commission and initiation of the infringement procedure, and that Greece acted in good faith throughout that period. Second, claims for tax repayments to which the judgment might give rise would entail serious economic detriment for Greece. In its observations on the statement in intervention, the Greek Government adopted, in the alternative, the submissions of the Kingdom of Spain as regards limiting the effects of the judgment.

84. Limitation of the temporal effects of a judgment is expressly provided for only in respect of actions for annulment, in the second paragraph of Article 231 EC. In addition, the Court has in exceptional cases, on the basis of the general principle of legal certainty, limited the temporal effects of a judgment on a reference for a preliminary ruling. It has also considered limiting the temporal effects of judgments in actions for failure to fulfil obligations. [23] In so far as, because of the interpretation of Community law which it contains, a judgment in an action for failure to fulfil obligations has effects beyond the simple finding of an infringement of the Treaty, there may in certain circumstances be cause to limit the temporal effects of the judgment.

85. However, in the present case the general conditions for such a limitation are not met. According to the case-law of the Court, such a limitation is possible only by way of exception, where two conditions are fulfilled: [24] first, there must be a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force, and second, both individuals and national autho-

23 — See Case C-426/98 *Commission* v *Greece* [2002] ECR I-2793, paragraph 40 et seq.; Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 49 et seq.; and, considering only hypothetically the possibility of restricting the effect of a judgment in an action for failure to fulfil obligations, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 92.

24 — In addition to the cases cited in footnote 23, see Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 69, and Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 53.

rities must have been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed.

86. In the present case the first condition is in any event not satisfied. The Hellenic Republic has not put forward specific submissions as to what serious economic repercussions a judgment upholding the action might have for it. In this regard it has merely adopted the submissions of the Spanish Government. The Spanish Government, however, has merely referred generally to serious economic detriment for Greece. Nor has the Spanish Government referred to any economic detriment that it might suffer itself.

## V — Costs

87. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic is unsuccessful in relation to two of the three parts of its complaint, each part being of substantially the same importance, the Hellenic Republic should be ordered to pay two thirds of the costs. Since the Hellenic Republic has not applied for costs, the parties are, as to the remainder, to bear their own costs, pursuant to Article 69(5) of the Rules of Procedure.

88. Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Spain shall pay the costs it has incurred by reason of its intervention.

## VI — Conclusion

89. Accordingly, I propose that the Court should:

(1) declare that, as a result of its legislative provisions concerning the imposition of duty on the transfer of registered offices and the transfer of effective centres of

management and concerning the exemption from capital duty of co-ownership of vessels, shipping consortia and any form of shipping company, the Hellenic Republic has failed to fulfil its obligations under Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital;

(2) dismiss the action as to the remainder;

(3) order the Hellenic Republic to pay two thirds of the costs and, as to the remainder, order the parties to bear their own costs;

(4) order the Kingdom of Spain to bear its own costs.