OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 May 1999 *

1. The questions referred by the Verwaltungsgerichtshof (Administrative Court), Austria, concern the meaning and scope of Article 73b of the EC Treaty (now Article 56 EC) et seq. and of certain provisions of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (hereinafter 'Directive 88/361' or 'the Directive'). [1] It is seeking to ascertain thereby whether a national law which in essence enables the national tax authority to charge stamp duty equivalent to 0.8% of the value of a loan taken out by a resident borrower from a non-resident lender is compatible with the abovementioned Community provisions.

Law

The relevant Community provisions

2. Article 73b et seq., which entered into force on 1 January 1994, introduced the liberalisation of capital between Member States and between Member States and third countries.

3. Article 73b(1) of the Treaty provides:

'1. Within the framework of the provisions set out in [Chapter 4 of the Treaty entitled "Capital and payments"], all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

4. Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC), however, states:

'1. The provisions of Article 73b shall be without prejudice to the right of Member States:

...

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of admin-

* Original language: French.

1 — OJ 1988 L 178, p. 5.

istrative or statistical information, or to take measures which are justified on grounds of public policy or public security.'

5. However, Article 73d(3) provides that those measures and procedures 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital ... as defined in Article 73b'.

6. The Court held in its judgment in *Sanz de Lera and Others* that: 'Article 73b(1), in conjunction with Article ... 73d(1)(b) of the Treaty, may be relied on before national courts and may render inapplicable national rules inconsistent therewith'. [2]

7. The Directive, on which the Treaty provisions are largely based, is also designed to bring about complete liberalisation of capital movements between Member States, and Article 1 of the Directive requires Member States to abolish restrictions on movements of capital taking place between persons resident in Member States.

8. Article 4 of the Directive provides, however, that Member States may 'take all requisite measures to prevent infringements of their laws and regulations, *inter alia* in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information' (first paragraph) and also that 'application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law' (second paragraph).

9. Loans and credit granted by residents to non-residents are regarded as capital movements according to Heading VIII of Annex I to the Directive.

The relevant Austrian provisions

10. The Austrian law on stamp duties (the Gebührengesetz, hereinafter 'the GebG') [3] provides that legal transactions are to be subject to 'stamp duty only if they are recorded in a written instrument, unless otherwise provided for herein' (Article 15(1) of the GebG).

2 — Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821, paragraph 2 of the operative part.

3 — BGBl. 1957, No 267, in the version published in the BGBl. of 1957, as amended by BGBl. 818/1993.

11. Article 16 of the GebG distinguishes between the case where the instrument is drawn up abroad and the case where it is drawn up in Austria.

12. Under Article 16(1) of the GebG, if the instrument is drawn up in Austria, the duty is payable either when it is signed by the contracting parties or when it is issued or sent by one of the signatories.

13. However, if the instrument is drawn up abroad, the requirement to pay the duty concerned is dependent on certain conditions being met ensuring that a particular connection exists with Austria. If the contracting parties are Austrian residents and the subject-matter of the contract has some connection with Austria [4] the requirement to pay the duty arises at the time when the written agreement is concluded abroad (point (1) of Article 16(2) of the GebG). If one or both of the parties [5] are non-residents, the duty is payable when the instrument concerned enters Austria (point (2) of Article 16(2) of the GebG). In short, if the instrument is drawn up abroad, the duty is payable only if certain conditions are met.

4 — Where, for example, a loan is intended to provide funding for an operation which will take place in Austria or if the borrower is resident in Austria.

5 — This is clear from the Austrian Government's explanations at the hearing.

14. Point (1) of Article 28(1) and Article 28(6) of the GebG provide that, in the case of legal transactions binding on both parties, the signatories to the instrument are jointly liable to pay the duty.

15. Article 30 of the GebG, however, states that all parties to a legal transaction are responsible for payment of such duties.

16. The rates of duty are laid down in Article 33 of the GebG and vary according to the type of transaction concerned.

17. Under the first subparagraph of Paragraph 33 Tarifpost ('TP') 8 of the GebG, loan agreements are subject to stamp duty at the rate of 0.8% of the value of the loan.

18. The first sentence of the fourth subparagraph of Paragraph 33 TP 8 of the GebG states that: 'Where a loan granted by a member of a company to that company or a loan granted by a lender who neither resides in Austria nor maintains his habitual abode, his head office or his seat there is not recorded in an instrument in the prescribed form giving rise to liability to pay stamp duty, the books and records which the debtor is required to maintain within Austria in accordance with the national fiscal rules and in which the loan

is recorded shall be deemed to constitute the relevant document.'

Facts and procedure

19. On 20 January 1995, Sandoz GmbH, established in Vienna, Austria (hereinafter 'Sandoz' or 'the appellant in the main proceedings'), took out a loan of ATS 220 million from Sandoz Management Services Brüssel SA, whose registered office is in Brussels, Belgium. No instrument recording the loan was drawn up although Sandoz recorded it in its books.

20. On 18 December 1995, Sandoz was required to pay stamp duty equivalent to 0.8% of that amount on the basis of what is known as 'equivalent' documentation (Ersatzbeurkundung), under the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG.

21. The appellant in the main proceedings brought an appeal against that decision, which was dismissed. It then referred the matter to the Verwaltungsgerichtshof, claiming *inter alia* that it had suffered an infringement of its rights under the relevant Community law, in particular its right to expect that 'duties and charges contrary to Directive 88/361/EEC and/or Article 73b(1) of the Treaty shall not be fixed'.

22. Sandoz considers that the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, as applied by the national tax authority, is likely to discourage a resident borrower from approaching a lender who is not resident in Austria, normally a foreigner, in order to take out a loan which the parties agree will not be recorded in a written instrument. In cases where a loan is agreed but is not recorded in an instrument, a borrower approaching a lender established in Austria is not required to pay the duty provided for in the first subparagraph of Article 33 TP 8 of the GebG. The first sentence of the fourth subparagraph of that provision therefore constitutes an obstacle to the free movement of capital between a non-resident lender and a borrower resident in Austria.

23. The Federal Finance Ministry (representing the tax authority against which the appeal was brought) claims that the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG comes within the scope of the derogations stated in Article 73d(1). It is of the opinion that the national provision concerned does not result in discrimination against foreign lenders but in the prevention of offences which might be committed by Austrian residents. It considers that the national measure thus enables the Austrian authority to resolve the difficulties it encounters in proving that a loan has been recorded in a written instrument when the transaction has taken place abroad. Thus, the concept of an equivalent document was introduced

by the GebG solely in the interests of equality of tax treatment for Austrian residents.

24. The court making the reference states [6] that the Austrian legislature justified the adoption of the contested national provision as follows:

'In the interests of equal fiscal treatment, provision is additionally made, in relation to stamp duty on loan and credit agreements, for the following further changes:

...

— the entry in the books and records which the debtor is required to keep in Austria should be treated as an equivalent document not only in respect of loans and credits granted by members of a company to that company but also in relation to loans and credit granted by lenders who neither reside in Austria nor maintain their habitual abode, their head office or their seat there' (point 77).

6 — Order for reference, English translation, p. 8.

25. It infers from this that where a resident borrower takes out a loan from a resident lender which is not recorded in a written instrument within the meaning of Article 15(1) of the GebG, although reference is made to it in the debtor's books, no liability to stamp duty arises. However, under the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, a similar transaction will give rise to liability to stamp duty if the lender neither resides in Austria nor maintains his habitual abode, his head office or his seat in that country. [7]

26. Pointing out that a borrower cannot be accused of an offence under Austrian tax law (Abgabenrecht) if the loan agreement is not recorded in a written instrument within the meaning of Article 15(1) of the GebG, the court making the reference concludes that the rule at issue, namely that laid down in the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, does not appear to be justified according to Article 73d(1)(b). [8]

27. It also states [9] that certain Austrian academic legal writers have expressed the view that the national provision at issue represents a restriction on the free movement of capital and discrimination against lending by foreigners to Austrian bor-

7 — *Ibidem*, p. 8.
8 — *Ibidem*, p. 9.
9 — *Ibidem*, p. 9.

rowers, which cannot be justified by the principle of fiscal cohesion developed in the judgments of the Court of Justice in Case C-204/90 *Bachmann* [10] and Case C-300/90 *Commission* v *Belgium*. [11]

28. The Verwaltungsgerichtshof, being unsure as to the merits of the legal arguments put forward by the Austrian legislature and considering that the outcome of the case depends on the interpretation of certain provisions of the Treaty and of the Directive, has therefore decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 73b in conjunction with Article 73d (in particular, Article 73d(3)) of the EC Treaty and Article 1(1) in conjunction with Article 4 of Directive 88/361/EEC concerning the movement of capital preclude the maintenance in force of the first sentence of the fourth subparagraph of Article 33 TP 8 of the 1957 Gebührengesetz (Law on Stamp Duties, in the version published in BGBl. 818/1993), which provides that, where a loan is granted by a lender not domiciled or ordinarily resident or not having its headquarters or seat in Austria without any written instrument being drawn up in a form attracting duty, the books and records of account which are to be kept in Austria by the debtor in accordance with the relevant national tax legislation and in which the loan is entered are to be deemed to constitute a written instrument?

(2) Does the taxation of loans (in so far as they result in a flow of capital from one Member State to another) under the first subparagraph of Article 33 TP 8 of the Gebührengesetz constitute arbitrary discrimination or a concealed restriction on the free movement of capital within the meaning of Article 73b(1) of the Treaty?'

Answers to the questions

29. By its first question, the court making the reference seeks to ascertain whether Article 73b et seq. of the EC Treaty, together with the provisions of the Directive, preclude the maintenance in force of a national provision which charges to duty cross-frontier loans on the basis of what is known as an equivalent document, where the same loan would not have been subject to duty if the borrower and the lender had both been Austrian residents. The second question is a general question whether it is compatible with those same provisions of the Treaty to impose duties on cross-frontier loan agreements in the same way as on loan agreements between Austrian residents. As this question constitutes a preliminary to the first question, I shall consider it first.

10 — [1992] ECR I-249.
11 — [1992] ECR I-305.

Second question

30. The court making the reference asks whether Articles 73b(1) and 73d(1)(b) and (3) are to be interpreted as precluding a national law which makes cross-frontier loans recorded in a written instrument and loans recorded in the same form in Austria subject to payment of the same duties.

31. It should be pointed out that the national law at issue does not prevent Austrian residents from taking out a loan from a foreign lender nor does it impose on them stricter conditions than if they were borrowing from an Austrian lender. However, it does deprive them of the opportunity of being exempt from duty, which would be available to them if they took the loan out abroad.

32. In order to reply to this question it is necessary to ascertain whether a national rule like the one at issue does actually come within the scope of Article 73b(1), which provides that '... all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. If the answer to this first question is in the affirmative I shall go on to consider whether the measure concerned comes within the scope of the derogations to the principle of the free movement of capital contained in Article 73d(1). Finally, if the answer to that question is in the affirmative it will be necessary to ensure that, albeit justified, such a measure does not constitute arbitrary discrimination or a disguised restriction within the meaning of Article 73d(3).

33. The Treaty does not give any definition of the term *capital movements*. However, the Court has provided some clarification, in particular in its judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone*. [12] The Court was asked to rule in particular whether the physical transfer of currency in order to pay for various transactions [13] should be regarded as a capital movement within the meaning of the EEC Treaty. It gave the following negative ruling: 'The general scheme of the Treaty shows that current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst *movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service*'. [14]

34. The Court has also ruled, in particular in the judgment in Case C-222/97 *Trummer and Mayer*, [15] that 'inasmuch as Article 73b of the EC Treaty substantially reproduces the contents of Article 1 of Directive 88/361, and even though that

12 — [1984] ECR 377.

13 — That particular case concerned ensuring the current payment of allowances granted in connection with travel for purposes of study, business, leisure or medical treatment.

14 — *Luisi and Carbone* judgment, cited above, paragraph 21, emphasis added.

15 — [1999] ECR I-1661, paragraph 21.

directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive'. [16]

35. A loan is a financial transaction which enables funds to be obtained generally for investment purposes. [17] Moreover, it is clear from Heading B of Annex I (VIII) to Directive 88/361 that loans and credit granted by residents to non-residents constitute capital movements.

36. Loans between residents and non-residents and the capital movements relating to such transactions are thus liberalised.

37. I shall now investigate whether the measure, which imposes stamp duty on loan agreements entered into abroad when they are brought into Austria or where one of the contracting parties is Austrian, constitutes a restriction on the free movement of capital within the meaning of Article 73b(1).

38. The Court has been called upon to provide a definition of the term '*restriction*' of capital movements.

39. In the judgment in *Bordessa and Others*, [18] the Court ruled that the fact that a Member State makes the export of currency to other Member States conditional on prior approval by the authorities constitutes a restriction on the free movement of capital.

40. The Court gave a similar ruling with regard to the declaration which is required prior to the transfer of currencies. In paragraph 27 of the *Bordessa* judgment, cited above, by taking Article 73d(1)(b) as its basis and inferring from it that 'a prior declaration ... may be one of the requisite measures which Member States are permitted to take ...', the Court conceded implicitly that such a measure constitutes a restriction within the meaning of Article 73b(1).

It seems to me moreover that the actual wording of Article 73d(1)(b), which authorises Member States 'to lay down procedures for the *declaration of capital movements* for purposes of administrative

16 — The Court had already given a similar ruling in the judgment in *Sanz de Lera and Others*, cited above, paragraph 34, and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 7.

17 — In this respect, the order for reference does not state the purpose of the loan or the destination of the capital obtained therefrom.

18 — Joined Cases C-358/93 and C-416/93 [1995] ECR I-361.

or statistical information',[19] supports this view.

41. Similarly, in *Svensson and Gustavsson*, cited above, the Court was asked to rule whether national legislation such as the Luxembourg law which restricted the grant of interest rate subsidies on loans intended to finance the construction, acquisition or improvement of housing to cases in which the loan is raised with a credit institution approved in Luxembourg constituted a restriction on capital movements within the meaning of Article 67 of the EEC Treaty (which following amendment became Article 67 EC and was repealed by the Treaty of Amsterdam).[20] Advocate General Elmer proposed that the Court should rule that a measure could not be deemed to be a restriction on the free movement of capital where it did not 'in itself imply that cross-frontier transactions with the capital paid over as a result of the raising of the loan *are prevented or made more difficult*'.[21] He considered that the national legislation at issue did not preclude Luxembourg borrowers from taking out loans abroad nor did it require them to comply with conditions which were not imposed in respect of loans taken out in Luxembourg. He merely observed that 'The essential point with regard to the national subsidy system ... [was] ... *that the system ma[de] it economically less attractive to raise* the loan in a financial institution which [was] not established in the Member State in question and so to undertake a cross-frontier performance of services in the form of a housing loan'. He therefore concluded that the measure at issue did not constitute a restriction on free movement of capital.[22]

42. Contrary to that Opinion, the Court ruled that any measure '*liable to dissuade those concerned* from approaching [businesses] established in another ... State ... constitute[s] an obstacle to movements of capital such as bank loans'.[23]

43. Again more recently the Court gave a similar ruling in the *Trummer and Mayer* case, cited above, in which it held that 'the effect of national rules such as those at issue in the main proceedings is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments ...'.[24]

19 — Emphasis added.

20 — Paragraph 1 of that article read: 'During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.'

21 — Point 8, emphasis added.

22 — *Ibidem*.

23 — Paragraph 10, emphasis added.

24 — Paragraph 26.

44. The national rules at issue did not preclude the denomination of a debt in a foreign currency nor the possibility of securing such a debt, even by a mortgage, they only precluded the mortgage securing such a claim being denominated in a foreign currency.

45. It is therefore clear from the Court's case-law that any restrictive measure, or even simply a minor interference, is liable to constitute a restriction within the meaning of Article 73b(1).

46. In my view, the Austrian law at issue does constitute a restriction on capital movements within the meaning of Article 73b(1).

47. The principle of the free movement of capital was introduced *inter alia* in order to enable Community nationals to enjoy the most favourable conditions for investing their capital available to them in any of the States which make up the Community.

48. It is clear that the national law at issue does not prevent Austrian residents from taking out a loan from a foreign lender nor does it impose on them stricter conditions than if they were borrowing from an Austrian lender. However, it does deprive them of the opportunity of being exempt from duties, which would be available to them if they took the loan out abroad. A measure which involves a Member State offering persons taking out a loan exemption from duty is likely to persuade an individual or a company to take out a loan from an institution located in a State which offers this type of tax advantage or exemption.

49. This is why, by laying down rules which result in depriving Austrian residents of favourable conditions which are offered to other Community nationals, the Austrian law is likely to reduce substantially the attractiveness of such a transaction and hence is likely to dissuade those concerned from proceeding with it. Hence, such a law does in fact constitute a restriction on the free movement of capital within the meaning of Article 73b(1).

50. I shall now consider whether that measure, which is likely to restrict capital movements within the Community, comes within the scope of the derogations from the principle laid down in Article 73b(1). It is therefore necessary to see whether, according to Article 73d(1)(b), that measure is essential in order to prevent infringements of Austrian laws and regulations, in particular in the field of taxation, or whether it is justified on grounds of public policy or public security.

51. The Treaty does not explain what those terms mean.

52. However, the Court has on several occasions been asked to rule whether national measures constituting restrictions on the free movement of capital were justified.

53. In Case C-148/91 *Veronica Omroep Organisatie* [25] the Court was asked to rule whether the provisions of the Treaty relating to the free movement of capital precluded legislation of a Member State which prohibited among others a broadcasting organisation established in its territory from investing in a broadcasting company established or to be established in another Member State and from providing a bank guarantee to a television company to be set up in that other Member State. The Netherlands Government justified those measures by pointing out that the law at issue was designed to establish a pluralist and non-commercial radio and television broadcasting system, and thus formed part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands. [26] The Court accepted that such measures were in the public interest and justified the restrictions on the free movement of capital introduced by Article 67 of the EEC Treaty. [27]

54. Similarly, in the *Bordessa* judgment, cited above, the Court was asked whether a national law which made the transfer to other Member States of large sums of liquid cash subject to a prior declaration or even prior administrative authorisation was compatible with Article 73b. As regards the prior declaration, the Court ruled that 'A prior declaration ... may be one of the requisite measures which Member States are permitted to take since, unlike prior authorisation, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringement of their laws and regulations'. [28]

55. As regards prior authorisation, the Spanish Government claimed that those measures did meet the requirements of Article 73d(1)(b) since they were designed to combat crimes which are often linked to that type of transfer, such as money laundering, drug trafficking, tax fraud and terrorism. As a consequence of the introduction of those measures the competent Spanish authorities were able to identify people who were making major transfers of currency abroad (and thereby prevent such operations taking place under cover of anonymity) and possibly conduct further investigations in order to establish whether there were any links between the operations concerned and certain offences. The Spanish Government claimed that it was only under a system of prior authorisation that it was possible to ascertain whether the person making the transfer was involved in a criminal offence, and consequently that the system concerned had the advantage of effectively imposing criminal penalties on

25 — [1993] ECR I-487, paragraph 8.

26 — *Ibidem*, paragraph 9.

27 — *Ibidem*, paragraph 14.

28 — Paragraph 27.

the offender, such as confiscation of the capital sums involved in the crime. Such measures therefore pursued public policy objectives.

56. The Court ruled, however, that the Spanish Government had failed to provide sufficient proof 'that it is impossible to attach criminal penalties to the failure to make a prior declaration'. [29]

57. In *Bachmann* and *Commission* v *Belgium*, cited above, the Court was asked to rule whether Article 48 of the EEC Treaty (which became Article 48 of the EC Treaty and which, following amendment, became Article 39 EC), Article 59 of the EEC Treaty (which became Article 59 of the EC treaty and, following amendment, became Article 49 EC), Article 67 of the EEC Treaty and Article 106 of the EEC Treaty (which became Article 73h of the EC Treaty, and was repealed by the Treaty of Amsterdam) preclude the legislation of a Member State making the deductibility of sickness and invalidity insurance contributions and pensions and life assurance contributions conditional on those contributions being paid in that State.

58. Replying to those questions in the affirmative the Court added, however, that such measures were justified. Indeed, it held that within the tax system at issue there existed a connection between the deductibility of contributions and the liability to tax of sums payable by insurers pursuant to pension or life assurance contracts. Owing to the connection thus established, it held that contributions and taxes could no longer be offset if the payments resulting from the exempt contributions were made by a foreign insurer abroad where the payment of tax was uncertain.

59. The Court therefore held that the need to preserve the cohesion of the applicable tax system may justify rules which are likely to restrict the exercise of fundamental freedoms guaranteed by the Treaty, such as the free movement of capital.

60. In the present case, the Austrian Government maintains that the purpose of the national law is to introduce an indirect domestic tax which, in the current state of partial harmonisation of tax law, falls within the jurisdiction of the Member States. Consequently, the factual criterion giving rise to the obligation, that is to say the liability to pay the duty, is to be found in the existence of a loan recorded in a written instrument or in any other equivalent document within Austria. The Austrian Government adds that the charges of duty on a loan recorded in a written instrument and taken out by an Austrian abroad is justified in order to comply with the principle of equality for tax treatment for residents. The measure is therefore essential in order to prevent infringements of national laws and regulations in the field of taxation within the meaning of Article 73d(1)(b).

29 — Paragraph 30.

61. The Commission considers that neither Article 73b(1) nor any other provision of Community law precludes the charging by Member States of 'stamp duty' on that type of transaction, provided that Member States comply with the principles of Community law and in particular that they do not engage in overt or disguised discrimination on grounds of the nationality of the persons concerned [30] and do not infringe the principle of proportionality.

62. First of all, it is necessary to determine whether the measure at issue constitutes a customs duty which is imposed on certain financial transactions due to the fact that they take place across frontiers, or a domestic tax to which all products are subject irrespective whether they cross frontiers. This question is important because, as the Court has consistently held, [31] 'customs duties are prohibited, independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom'. [32] In the second subparagraph of paragraph 9 of its judgment in *Commission* v *Italy*, cited above, the Court held that 'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product'. Even if capital cannot be regarded as 'goods', [33] it is entitled to move freely within the Community. To impose customs duties on cross-frontier capital movements would be contrary to that principle, which is of direct effect according to Article 73b(1). [34] However, charges, within the meaning of Community law, that is to say, direct or indirect domestic taxes levied on products irrespective of whether they cross frontiers, are not prohibited as such.

63. As I mentioned above, [35] the Austrian law provides, in Article 15(1) in conjunction with Article 16(1) and the first subparagraph of Article 33 TP 8 of the GebG, that a loan taken out in Austria and recorded in a written instrument gives rise to liability to stamp duty at the rate of 0.8% of the value of the loan. Moreover, according to Article 15(1), in conjunction with Article 16(2) and the first subparagraph of Article 33 TP 8 of the GebG, that duty is payable on all loan agreements entered into abroad between non-residents and residents, provided that they have some connection with Austria. [36]

30 — The Portuguese Government also makes this observation.

31 — See the judgment in Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 7.

32 — Judgment in Joined Cases C-485/93 and C-486/93 *Simitzi* [1995] ECR I-2655, paragraph 14.

33 — See the judgments in Case 7/78 *Thompson and Others* [1978] ECR 2247; Case 7/68 *Commission* v *Italy* [1968] ECR 617, and *Bordessa and Others*, cited above, paragraph 12.

34 — See the judgment in *Sanz de Lera and Others*, cited above, paragraph 2 of the operative part.

35 — See points 10 to 17 of this Opinion.

36 — *Ibidem*, paragraph 13.

64. A national measure introducing a duty which applies, irrespective of the nationality of the parties or the place where the loan agreement is concluded, to all Austrian residents who take out such a loan, must be regarded as indirect domestic taxation. The precise result of such a measure is, moreover, to prevent persons liable to pay the tax, through exercising the freedom provided for in Article 73b(1), from unlawfully avoiding their obligations under domestic tax laws that come within the powers of the Member State, which has extensive powers in this field.

65. It is quite clear that the EC Treaty does not contain, in respect of either direct or indirect taxation, provisions similar to those of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).[37] The EC Treaty, apart from Article 220 of the EC Treaty (now Article 293 EC),[38] is in fact silent on this matter.

66. The subject of taxation is also excluded from the scope of Article 100a of the EC Treaty (now, after amendment, Article 95 EC), which permits harmonisation measures when adopted by qualified majority. However, under Article 99 of the EC Treaty (now Article 93 EC), harmonisation in the field of indirect taxation must be agreed unanimously by Member States where it is necessary in order to ensure the establishment and operation of the internal market within the time-limit laid down in Article 7a of the EC Treaty (now, after amendment, Article 14 EC), that is to say within a period expiring on 31 December 1992.

67. There has, however, been only partial harmonisation in this field (this is also the case as regards value added tax[39] and indirect taxes on capital[40]). I must therefore conclude that the right to determine taxes, in particular the right to charge 'stamp duty' on loan agreements, comes within the powers of the Member States.

68. These powers are restricted by the need to comply with Community law and its general and fundamental principles. The Court has already ruled that 'the powers retained by the Member States must nevertheless be exercised consistently with Community law'.[41]

69. It is therefore necessary to determine whether, in the context of the broad powers

37 — Which provides that no Member State may impose 'directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

38 — Which requires Member States to abolish double taxation within the Community.

39 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

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

41 — Judgments in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12; Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, and Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19.

conferred on it, the Member State concerned complied with its obligations under Community law.

70. Sandoz asserts that the first subparagraph of Article 33 TP 8 of the GebG infringes Article 73b(1), without being justified on one of the grounds specified in Article 73d(1). Pointing out that a written instrument within the meaning of the GebG is in principle drawn up for reasons of legal certainty, it infers from this that the duty to be paid 'is regarded as corresponding to the greater legal certainty provided by having a written instrument'. [42] The objective of the Austrian provision at issue is therefore to ensure the legal certainty of a transaction.

71. Sandoz claims that the measure adopted by the Austrian Government, which imposes stamp duty on any loan agreement, whether it is drawn up abroad or in Austria, does not meet the stipulations of the Court's case-law regarding compliance with the principle of proportionality. It observes that the general practice followed in Austria is no longer to draw up a written instrument for this type of transaction (loan) or to substitute for such an instrument another document which is not subject to payment of a duty. Since that measure is no longer appropriate to requirements, it is therefore no longer necessary. It also points out that legal certainty, although in itself worthy of protection, does not constitute a necessary or proportionate ground which the public authorities can claim for purposes of meeting their own financial requirements, which is what the improper objective of the first subparagraph of Article 33 TP 8 of the GebG in fact amounts to. The measure does not therefore achieve the purported objective, namely to ensure the legal certainty of the transaction and the principle of proportionality is thereby infringed.

72. It is apparent from the Court's settled case-law that the principle of proportionality requires that measures adopted in rules as regulations must not exceed the limits of what is appropriate and necessary in order to attain the objectives lawfully sought by the rules as regulations concerned, provided that where there is a choice between several appropriate means the competent legislature must select the means which are least restrictive and the inconvenience caused must not be excessive in relation to the objectives sought. [43]

73. The first subparagraph of Article 33 TP 8 of the GebG must be viewed as a measure introducing an indirect tax on loans taken out in Austria or loans which, although taken out abroad, have some particular connection with Austria. The main objective pursued by that measure is therefore, quite specifically, to ensure equality of tax treatment for Austrian residents and not, as

42 — Observations of the appellant in the main proceedings, p. 13, third paragraph. It also justifies its comments by quoting various authors: Gaier: *Gebührengesetz*, Article 1 of the GebO, subparagraph 14; Doralt, P.: *FS-Kastner zum 90 Geburtstag*, p. 106.

43 — See, for example, the judgment in Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraphs 49 and 50, or in Case C-161/96 *Südzucker* [1998] ECR I-281, paragraph 31.

Sandoz claims, to ensure the legal certainty of the transaction.

74. The national measure at issue has the effect of forcing all Austrian residents, irrespective of their nationality or the place where the loan agreement is concluded, to pay a tax equivalent to a certain percentage of the value of the loan. It is therefore well suited to the purpose assigned to it.

75. Moreover, it does not follow from the fact that the Austrian legislation does not require the parties to record this type of agreement in a written instrument that there is no need for the measure at issue. I would have concluded otherwise if Sandoz had provided evidence that the Austrian legislation exempted from payment of the duty some residents who, in similar circumstances, record a loan in a written instrument.

76. In the light of the details of this case, it must be concluded that the principle of proportionality has not been infringed.

77. It is apparent therefore that a national measure such as the first subparagraph of Article 33 TP 8 of the GebG constitutes a restriction on the free movement of capital which is justified under Article 73d(1)(b).

78. It remains to be assessed whether that national provision constitutes a means of arbitrary discrimination within the meaning of Article 73d(3).

79. As the Court has consistently held,[44] 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations'.[45]

80. From the documents in the case it does not appear that the Austrian legislation relating to the charging of the duty introduced under the first subparagraph of Article 33 TP 8 of the GebG applies in a different and unfavourable way to non-Austrian resident borrowers, but it applies irrespective of nationality or the place where the loan is concluded, to all resident borrowers. All the interveners in the case, including the applicant, accept this.

81. It is apparent therefore that a national measure such as that provided for in the first subparagraph of Article 33 TP 8 of the GebG constitutes a restriction on the free movement of capital between Member States within the meaning of Article 73b(1) which is justified by the need to ensure equal tax treatment for Austrian residents. It must therefore be regarded as a measure which is essential in order to prevent [infringements of] national tax laws. It

44 — Judgment in Case 283/83 *Racke* [1984] ECR 3791.
45 — *Schumacker* judgment, cited above, paragraph 30.

follows that the abovementioned national measure comes within the scope of the derogations from Article 73b(1) provided for in Article 73d(1)(b). Moreover, such a measure is not disproportionate and does not constitute arbitrary discrimination within the meaning of Article 73d(3).

[measures to prevent infringements of the laws and regulations of the Member States, *inter alia* in the field of taxation] may not have the effect of impeding capital movements carried out in accordance with Community law'.

First question

82. By this question the national court asks whether Article 73b(1), Article 73d(3) and Article 1(1) and Article 4 of the Directive are to be interpreted as precluding a national provision such as that contained in the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, which provides that loans recorded in what is known as an 'equivalent' document are subject to payment of the duty provided for in the first subparagraph of Article 33 TP 8 of the GebG where the loan is 'granted by a lender who neither resides in Austria nor maintains his habitual abode, his head office or his seat there ...'.

84. I shall therefore consider the first question referred by the national court from the point of view of whether the national provision is compatible merely with Article 73b(1) and Article 73d(1) and (3), in conjunction with the second paragraph of Article 4 of the Directive. It is necessary therefore to ascertain firstly whether the national provision at issue constitutes a restriction on the free movement of capital.

83. Article 1(1) and the first paragraph of Article 4 of the Directive are reproduced in substance in the provisions now contained in Article 73b(1) and Article 73d(1)(b). However, the second paragraph of Article 4 of the Directive contains a special provision which was not expressly reproduced in the Treaty. It provides that 'Application of

85. The first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG states in substance, may I reiterate, that where a loan taken out abroad by an Austrian resident which is not recorded in a written instrument but its existence is recorded in the debtor's books and records, the stamp duty provided for in the first subparagraph of that provision is applicable.

86. I have already shown when considering the second question that a national measure such as the first subparagraph of Article 33 TP 8 of the GebG constitutes a restriction on the free movement of capital. [46] This conclusion is all the more applicable in the case of a provision such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, under which the duty levied on loans taken out by Austrian residents, both in Austria and abroad and recorded in a written instrument, is applied also to loans taken out by Austrian residents abroad and recorded in an 'equivalent' document. Such a measure is undoubtedly likely to dissuade resident borrowers from taking out a loan recorded in this form abroad since they can only enjoy exemption from payment of the duty if they take the loan out in Austria.

87. The answer to the first question again calls for consideration as to whether this restriction on the free movement of capital is essential in order to prevent infringements of national laws and regulations, in particular in the field of taxation, as is permitted under Article 73d(1)(b). If this is the case, it will be necessary to check that it does not constitute arbitrary discrimination, prohibited under Article 73d(3).

88. As was apparent from my consideration of the second question, the Treaty does not define the terms used in Article 73d(1)(b). The Court's case-law shows, moreover, that the Court determines the meaning of those terms on the basis of the facts of the case. [47]

89. Thus, in *Trummer and Mayer*, cited above, the ground put forward in order to justify regulations prohibiting the denomination in a foreign currency of a mortgage securing a debt was the concern to ensure the foreseeability and transparency of the mortgage system. It was claimed that such a ground constituted an overriding factor serving the public interest. [48]

90. The Court did not accept this argument because, as it observed in particular, the national law at issue allowed the value of the mortgage to be expressed by reference to the price of fine gold, which is also subject to fluctuations in the same way as the value of a foreign currency. It concluded, therefore, that 'national rules such as those at issue in the main proceedings contain an element of uncertainty which may compromise the attainment of the objective described above'. [49]

46 — See in particular points 35, 36 and 45 to 49 of this Opinion.

47 — *Ibidem*, points 51 to 59.

48 — Paragraph 29.

49 — Paragraph 32.

91. As regards the national measure at issue contained in the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, I do not consider that that measure either is appropriate for attaining the lawful objectives stated by the national legislature.

92. The Austrian Government claims that the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG comes within the scope of the derogations contained in Article 73d(1) and seeks to attain two lawful objectives. Firstly, the aim of the measure is to prevent Austrian borrowers from committing infringements by concealing the existence of a loan recorded in a written instrument; the fact that the competent national authority has difficulty in establishing whether or not an instrument has been drawn up abroad makes it easier to commit such infringements. The contested measure is therefore justified on grounds of public policy or public safety. Secondly, it seeks to ensure equality of tax treatment for Austrian residents irrespective of their nationality and the place where the loan is taken out. It therefore seeks to prevent infringements of its laws and regulations, in particular in the field of taxation.

93. As regards the last objective, it is clear both that the Austrian law permits borrowers to take out a loan without recording it in a written instrument and that this type of loan must be recorded in the debtor's books. The Austrian law also provides that when this type of loan is taken out in Austria it is exempt from the stamp duty provided for in the first subparagraph of Article 33 TP 8 of the GebG.[50] So, by introducing a rule whereby a resident borrower who takes out such a loan abroad must pay the contested duty, the principle of equality of tax treatment for residents is in fact infringed, since the tax system applying to Austrian residents who are in a similar situation differs depending on where the loan agreement is concluded. The national measure at issue may therefore compromise the attainment of the objective described.

50 — See, in particular, points 25 and 26 of this Opinion. This was confirmed by the Austrian Government's representative when the oral pleadings were presented.

94. As regards the risk of infringements, which the measure is designed to combat, it should be made clear that it will exist whether the loan is taken out in Austria or abroad. I do not know whether the Austrian legislature has introduced measures to combat such infringements by Austrian residents taking out loans in Austria and if so what the provisions of such measures are. I shall consider both hypotheses. If the Austrian law does not contain measures to combat the risk of infringements by Austrian residents as a result of this type of transaction, it must be inferred from this that it is prepared to tolerate that risk. However, if such measures exist, they are not the same as the measures contained in the national provision at issue. The Austrian Government has not, however, provided evidence that the measures thus adopted cannot be applied to circumstances in which infringements are committed by resident borrowers who enter into agreements abroad. In both cases it must be concluded that the contested measure is inappropriate to attain the objective described.

95. The arguments put forward by the Austrian Government are therefore insufficient to justify the restriction on capital movements imposed by the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG.

96. Moreover, the national measure at issue appears to me to conflict with the Directive, in particular the second paragraph of Article 4 thereof, which applies to the extent that it still has the same indicative value for the purposes of defining the Treaty provisions on the free movement of capital. [51] The second paragraph of Article 4 of the Directive reads: 'Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law'.

97. In its judgment in *Bordessa and Others*, cited above, the Court ruled that a Spanish provision which made all transfers of capital conditional upon prior authorisation being obtained from the competent national authority caused exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory. [52] The Court therefore held that the measure concerned might 'have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive'. [53]

51 — By analogy, point 21 of the *Trummer and Mayer* judgment, cited above.

52 — Paragraph 25.

53 — *Ibidem*.

98. The first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG, may I point out, systematically requires all resident borrowers who take out a loan abroad without recording it in a written instrument to pay the contested duty, in order to prevent infringements by some of them. In so doing it deprives residents who have no fraudulent intent from enjoying the tax exemption available solely to borrowers who take out loans in Austria. This provision therefore has the effect of dissuading residents borrowers who have no fraudulent intent from taking out a loan abroad.

99. Consequently, such a provision is likely to impede capital movements carried out in accordance with the provisions of Community law and is therefore contrary to the second paragraph of Article 4 of the Directive.

100. It follows, therefore, that a national provision such as the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG infringes the second paragraph of Article 4 of the Directive.

101. Since I am of the opinion that the restriction on the free movement of capital imposed by the contested national measure does not comply with Article 73d(1), there is no call for a reply to the question as to whether the contested national measure [54] is discriminatory within the meaning of Article 73d(3).

102. It follows therefore that a national provision such as that contained in the first sentence of the fourth subparagraph of Article 33 TP 8 of the GebG constitutes a restriction on the free movement of capital within the meaning of Article 73b(1) which does not come within the scope of the derogation from the above principle contained in Article 73d(1)(b).

54 — Moreover, Article 73d(3) also precludes such a provision. This is the view of all the intervening parties, including the Austrian Government. Indeed, at the pleadings the Commission announced, and was not contradicted by the Austrian Government's representative, that the contested national law was going to be amended so that all resident borrowers, wherever a loan recorded in an 'equivalent' document is taken out, will be liable to pay the contested duty.

Conclusion

103. I therefore propose that the Court give the following answer to the question submitted by the Verwaltungsgerichtshof:

(1) A national law which imposes a duty equivalent to a specific percentage of the value of loans recorded in a written instrument contracted by resident borrowers with non-resident lenders must be regarded as a restriction on the free movement of capital within the meaning of Article 73b(1) of the EC Treaty (now Article 56(1) EC) which:

— is covered by the derogations contained in Article 73d(1)(b) of the EC Treaty (now Article 58), which authorises Member States to take all requisite measures to prevent infringements of their national laws and regulations, in particular in the field of taxation, where it seeks to ensure the cohesion of a national tax system coming within the powers retained by the Member States;

— does not infringe the principle of proportionality;

— does not constitute a means of arbitrary discrimination within the meaning of Article 73d(3) since the tax system at issue does not in any way discriminate between resident borrowers according to their nationality or that of the persons with whom they are entering into agreement or to the place where the agreement is concluded.

(2) Article 73b(1), Article 73d(1)(b) and the second paragraph of Article 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty must be interpreted as precluding a national law which requires resident borrowers who take out a loan from a non-resident lender that is recorded in a document which is the equivalent of a written instrument to pay duty equivalent to a certain percentage of the value of the loan, when resident borrowers who take out similar loans from resident lenders are not liable to pay such a duty.

There is therefore no call for a reply to the question as to whether such a law is compatible with Article 73d(3).