OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 26 May 2005 [1]

I — Introduction

1. The lawfulness of a duty charged in respect of a transaction under company law which can be described as a 'reverse' merger of two companies limited by shares is in dispute before the Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy). In a merger of that kind, a parent company which holds 100% of the shares in its subsidiary is integrated into the subsidiary. By its reference for a preliminary ruling, the Corte Suprema di Cassazione is seeking to ascertain whether such circumstances fall within the scope of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [2] (hereinafter: 'Directive 69/335'). If they do, the transaction is subject only to the capital duty harmonised by the directive. If, on the other hand, the directive does not apply to reverse mergers, Member States are at liberty to tax such a transaction in some other way.

II — Relevant legislation

A — *Community law*

2. Under Article 1 of Directive 69/335, Member States are to charge a harmonised duty, namely 'capital duty', on contributions of capital to capital companies.

3. Article 4 of Directive 69/335 defines the various chargeable transactions as follows:

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

...

1 — Original language: German.

2 — OJ, English Special Edition 1969 (II), p. 412; most recently amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded — Annex II: List referred to in Article 20 of the Act of Accession, OJ 2003 L 236, p. 555.

(c) an increase in the capital of a capital company by contribution of assets of any kind;

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

...

2. The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:

...

(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares;

...'

4. Under Article 7 of Directive 69/335 [as amended], Member States are to exempt from capital duty transactions which were, as at 1 July 1984, exempted or taxed at a reduced rate of 0.5% under the conditions applicable on that date.[3] The exemption thus applies to the contribution of at least 75% of the shares of one capital company to another capital company which is in the process of being formed or is already in existence, the consideration for those shares essentially consisting in the allocation of shares (of the parent company).

5. Finally, Article 10 of Directive 69/335 provides:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms,

3 — The transactions exempted are defined accordingly in Article 7 (1) as amended by Directives 73/79/EEC (OJ 1973 L 103, p. 13) and 73/80/EEC (OJ 1973 L 103, p. 15), under which:
'(bb) the rate of capital duty may be reduced by 50% or more where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75% of the issued share capital of another capital company ...
This reduction shall be subject to the condition that:
— the consideration for the shares acquired shall consist exclusively of the allocation of shares in the acquiring company, ...'

associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to in Article 4;

(b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

B — *Italian law*

6. According to the information provided by the referring court, Article 4(1)(b) of Part I of the Tariff annexed to Presidential Decree No 131 of 26 April 1986, prior to its amendment by Article 10 of Decree-Law No 323 of 20 June 1996 (which became Law No 425 of 8 August 1996), applies ratione temporis to the case in the main proceedings.

7. Under that provision, mergers between companies of any kind were subject to capital duty at 1% of the assets of the company merged or integrated. The basis of assessment for that charge is determined — as are the civil law rules governing company mergers — in Article 2501 et seq. of the Codice Civile (Civil Code); however, the detailed content of those provisions is of no particular relevance to these proceedings.

III — Facts, proceedings and question referred for a preliminary ruling

8. Aro Tubi Trafilerie SpA, the claimant in the main proceedings, (hereinafter: 'Aro Tubi') is a company limited by shares and incorporated under Italian law. Aro Tubi was a wholly-owned subsidiary of Fratelli Gaggini SpA (hereinafter: 'Fratelli Gaggini'). Moreover, Aro Tubi held a 100% share in Aro Tubi Estrusi e Profilati SpA. By notarial act of 19 December 1995, Aro Tubi acquired by merger its parent company, Fratelli Gaggini, and its own subsidiary, Aro Tubi Estrusi e Profilati SpA. Upon acquisition of Fratelli Gaggini, the shares in that company were called in; in return, its shareholders received the shares in the acquiring company Aro Tubi that had previously been held by its parent company, Fratelli Gaggini. Thus, the natural persons who had originally held only an indirect share in Aro Tubi through Fratelli Gaggini had now acquired a direct

share in Aro Tubi in the wake of the 'reverse' merger because the intermediary company had been dissolved.

9. When the merger concerned was entered in the public register, Aro Tubi was charged registration duty at 1% of the assets of the companies acquired, namely of Aro Tubi Estrusi e Profilati SpA and Fratelli Gaggini.

10. Following payment of that duty, Aro Tubi submitted a claim for its repayment on the ground that the charge was contrary to Directive 69/335. The Commissione Tributaria Provinciale di Milano (Provincial Tax Court, Milan) allowed its appeal against the tacit rejection of that claim, only for its decision subsequently to be overturned by the Commissione Tributaria Regionale della Lombardia (Regional Tax Court, Lombardy) on appeal by the State Tax Authority.

11. By order of 6 November 2003, the Corte Suprema di Cassazione, hearing the appeal in cassation against the appeal decision, referred a question to the Court of Justice for a preliminary ruling, by which it effectively[4] sought to ascertain whether the charging of registration duty at 1% of the assets of the company acquired, prompted by the merger by acquisition of one company by another company whose entire share capital was previously held by the company acquired, is compatible with Directive 69/335.

12. The claimant in the main proceedings, the Italian Government and the Commission have submitted observations in the proceedings before the Court of Justice.

IV — Arguments of the parties

13. The Italian Government relies essentially on the judgment in Case C-152/97[5] ('*Agas*'). It is apparent, it claims, from that judgment that the merger of two companies does not fall within the scope of Directive 69/335 if, in that transaction, a subsidiary company whose shares are all held by its parent company is integrated into the parent company (known as a 'non-proper' merger).

14. The 'reverse' merger at issue here — a merger in which the parent company is integrated into the subsidiary — was not to be treated any differently from a 'non-proper' merger and likewise fell outside the scope of

4 — The order for reference does not contain a question worded specifically in that way.

5 — Case C-152/97 *Abruzzi Gas* (Agas) [1998] ECR I-6553 ('*Agas*').

the directive. Moreover, the economic potential of the [acquiring] company was not strengthened, generally speaking, as a result of the acquisition, a factor that the Court of Justice regarded as essential for the transaction concerned to fall within the scope of Directive 69/335.

15. In contrast, Aro Tubi considers that the charging of registration duty in this case is contrary to Directive 69/335. The findings in *Agas*[6] could not be transposed to the circumstances of this case since 'reverse' mergers and 'non-proper' mergers had to be treated differently in view of their economic and legal differences.

16. The economic potential of the subsidiary company is strengthened as a result of a 'reverse' merger because the subsidiary acquires the assets of the parent company. Therefore, Directive 69/335 is applicable and the acquiring subsidiary, Aro Tubi, was entitled to the tax exemption provided for in Article 7 of Directive 69/335.

17. Lastly, the Commission adopts an intermediate position. In its view, a 'reverse' merger can be treated in the same way as a 'non-proper' merger and falls outside the scope of Directive 69/335 only if it does not lead to any strengthening of the economic potential of the acquiring company. That situation would arise only if the company acquired had no further shareholdings apart from its share in the acquiring company, as was the case in the main proceedings.

18. On the other hand, if the company acquired does in fact have shareholdings in other companies, the economic potential of the acquiring company is, it maintains, increased as a result of the acquisition, and the circumstances constituting the derogation which are cited in the case-law established in *Agas*[7] — case-law which is in any case open to criticism — do not arise. In such circumstances, it concludes, Directive 69/335 is therefore applicable.

V — Legal assessment

19. The referring court seeks in essence to establish whether Directive 69/335 precludes the charging of registration duty in the case of a 'reverse' merger, that is to say where the company acquired holds all the shares in the acquiring company.

6 — Cited in footnote 5.

7 — Judgment in *Agas* (cited in footnote 5).

A — *Conditions for the application of Directive 69/335*

20. In its previous case-law, the Court of Justice gave clear indications as to the conditions that have to be met for Directive 69/335 to apply. In that regard it held in *Bautiaa and Société Française Maritime*: [8]

'In order to classify the duty at issue for the purposes of Directive 69/335, and to assess its compatibility with that directive as regards, in particular, the rates applicable, it is necessary, first of all, to determine whether transactions such as those which gave rise to the levying of capital duty in the two disputes in the main proceedings fall within the scope of Directive 69/335, and to classify them in the light of that directive ...'.

21. The Court similarly held in *Agas*: [9]

'Consequently, if the transaction in question is to fall within the scope of the Directive, it must be possible to bring it within one of the cases described in Article 4 thereof to which Article 10(a) and (b) of the Directive refer ...'.

22. Thus, the application of Directive 69/335 hinges on the following sequence of measures of assessment. The point of departure is the prohibition in Article 10 of the charging of any taxes other than the harmonised capital duty. However, that prohibition applies, pursuant to Article 10 (a) and (b), only to taxes in respect of the transactions listed in Article 4 of the directive.

23. Thus, it is necessary first of all to determine whether a transaction can be considered to come under one of the situations defined in Article 4 and, by extension, whether the directive and, specifically, the prohibition laid down in Article 10 apply to it. Only then — once the transaction has been categorised in that way — is it possible to establish, on the basis of the other provisions of the directive, whether the transaction might perhaps be exempted from the harmonised capital duty. [10]

24. Contrary to what the claimant in the main proceedings is evidently maintaining, it cannot be inferred from the mere fact that the criteria for exemption from capital duty under Article 7(1)(b) of Directive 69/335 are met that no taxes whatsoever may be charged in respect of a transaction such as the 'reverse' merger at issue in this case. On the contrary, it is first necessary for the directive actually to apply, which can be verified only by reference to Article 10 in

8 — Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 31.

9 — Cited in footnote 5, at paragraph 21.

10 — On that sequence of measures of assessment, see also the Opinion of Advocate General Cosmas in the *Agas* case, cited in footnote 5, at point 43.

conjunction with Article 4. If a transaction does not come under the directive, the directive cannot preclude the charging of other, non-harmonised taxes in respect of that transaction. In that case, the exemption under Article 7 cannot apply either.

B — *Scope of Directive 69/335*

25. If the prohibition as defined in Article 10 (a) and (b) is to apply, the transaction at issue here must first come under one of the situations defined in Article 4.

1. Article 4(1)(c) of Directive 69/335

26. The facts underlying the main action could, first of all, be considered to come under Article 4(1)(c) of Directive 69/335.

(a) Whether there is an increase in capital

27. For that provision to apply, the 'reverse' merger would have to lead to an increase in the capital of the acquiring company by contribution of assets. An increase in subscribed capital usually requires either the issue of new shares or an increase in the nominal value of the shares already issued. [11] However, paragraph 1(c) of the merger contract submitted by Aro Tubi expressly states that the merger in question does not involve an increase in the capital of the acquiring company (Aro Tubi) as defined above. The parties to the main proceedings do not dispute that point.

28. In view of the express wording of the provision concerned, it is not possible to take no account of the requirement of an increase in capital, as Aro Tubi suggests. The facts at issue in this case could still be considered to come under Article 4(1)(c) of Directive 69/335, subject to a broad interpretation of the terms 'increase in capital'. In this case, the shareholdings in Fratelli Gaggini were converted into shareholdings in Aro Tubi. The Aro Tubi shares, which had previously been held by Fratelli Gaggini, were transferred to the members of Fratelli Gaggini. It is uncertain, however, whether that transfer of Aro Tubi shares can be treated as the issue of new shares and can thus be classified as an increase in capital in the broad sense.

11 — In that regard, see, in particular, Académie des sciences commerciales (Ed.), *Dictionnaire commercial*, 1987, under the entries for 'capital' and 'capital social'; *Gabler Wirtschafts-Lexikon*, 12th Edition, 1988, under the entries for 'Kapital' and 'Kapitalerhöhung'.

29. That broad interpretation of the increase in capital must be rejected. According to the Court's case-law, the Community law interpretation of the defining criteria listed in Article 4 of Directive 69/335 must be carried out independently, that is to say, objectively, with uniform application to all Member States and without regard to any specific aspects of their individual domestic legislation or tax systems. [12] However, that independent interpretation under Community law of the increase in capital cannot entirely rule out the natural meaning of those terms.

30. The terms 'capital of a capital company' and 'increase in capital' are not just (Community) law terms; they are also economic terms which, in business economics, are ascribed a specific meaning applying irrespective of national borders and languages. In that context, the (equity) capital of a capital company corresponds to the total nominal value of the company's shares, and for there to be an increase in capital — of whatever type — either the nominal value or the number of shares must therefore have increased. [13] It would be surprising if, in drafting the directive, the legislature had intended to attribute to the terms 'increase in capital' used in the directive a meaning other than that corresponding with the established definition in economic terminology.

31. Thus, in view of the interpretation of that term, 'increase in capital' cannot include the mere conversion of an indirect shareholding into a direct shareholding through acquisition of the intermediary (Fratelli Gaggini). After all, in this case the shares are merely transferred, without any alteration to their number or nominal value, from the intermediate company to its members.

32. It may be left open whether the shares in Aro Tubi originally held by Fratelli Gaggini first reverted to Aro Tubi and then were issued to the previous shareholders of Fratelli Gaggini or whether the shares were transferred directly without interim acquisition by Aro Tubi. In neither case is there a change in the number or value of the shares.

33. The fact that the Court regarded the merger of two capital companies in its previous case-law as an increase in capital for the purposes of Article 4(1)(c) of Directive 69/335 [14] does not preclude the interpretation of the terms 'increase in capital' put forward in this Opinion. The case in which the Court was adjudicating in that instance was in fact characterised specifically by an increase in the nominal

12 — *Bautiaa and Société Française Maritime* (cited in footnote 8), at paragraph 32; *Agas* (cited in footnote 5), at paragraph 21; cf. also Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 14.

13 — See the references cited in footnote [11].

14 — *Bautiaa and Société Française Maritime* (cited in footnote 8), at paragraph 38.

capital of the acquiring company through the issue of *new* shares, [15] which is not the case here.

(b) Whether the economic potential has been strengthened

34. Even if, contrary to the above considerations, the mere transfer of the Aro Tubi shares is treated as an increase in capital for the purposes of Article 4(1)(c) of Directive 69/335, Aro Tubi's economic potential would still have had to be strengthened as a result of that transaction. As the Court has consistently held, [16] that factor is the decisive criterion for enabling a transaction to be regarded as the raising of capital and therefore to be subject to capital duty.

35. The Court infers [17] the unwritten prerequisite of increased economic potential from the second recital in the preamble to Directive 74/553/EEC [18] which states that the principles on which the harmonised capital duty is based 'aim at introducing a system whereby capital duty is to be charged only on transactions legally constituting a raising of capital and only in so far as such transactions contribute towards strengthening the economic potential of the company.'

36. The requirement of strengthened economic potential is, moreover, consistent with the objective of Directive 69/335 of promoting the free movement of capital between Member States by harmonising the different national charges on transactions constituting the raising of capital. The transactions which the directive is intended to cover must therefore comprise a movement of capital which, for the benefiting company, results in a growth in capital.

37. However, facilitating the straightforward restructuring or regrouping of capital companies already in existence, that is to say of existing accumulations of capital, is not the objective of Directive 69/335. [19] This is apparent, for example, from the fact that Article 4(3)(a) expressly excludes mere alterations to the type of a capital company from the scope of the directive. Even though it may be in the interest of economic operators for alterations to capital companies affiliated through shareholdings to be

15 — See point 1 of the Opinion of Advocate General Cosmas in *Bautiaa and Société Française Maritime* (judgment cited in footnote 8).

16 — See, inter alia, *Felicitas Rickmers-Linie* (cited in footnote 12), at paragraph 16, and Case C-249/89 *Trave Schiffahrtsgesellschaft* [1991] ECR I-257, paragraph 13, Case C-15/89 *Deltakabel* [1991] ECR 241, paragraph 13 et seq., and *Bautiaa and Société Française Maritime* (cited in footnote 8), at paragraph 36.

17 — In the *Deltakabel* judgment (cited in footnote 16), at paragraph 13.

18 — Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335/EEC concerning indirect taxes on the raising of capital, OJ 1974 L 303, p. 9.

19 — The right to establish subsidiary companies and perhaps even to reintegrate them into the parent company could, of course, be guaranteed by freedom of establishment within the meaning of Article 43 EC. Along with a prohibition under national law against discrimination against that country's own nationals, this guarantee might also be relevant to the facts in this case. In its order for reference, however, the referring court confined itself to requesting an interpretation of Directive 69/335.

subjected to as few restrictions as possible, such transactions in fact come under the Community rules on harmonised capital duty only if they do not entail a mere redeployment of the capital already accumulated but are also accompanied by a (further) raising of capital.

38. In this case of a 'reverse' merger, it might initially be considered that Aro Tubi's economic potential has been strengthened. After all, the assets of acquiring company Aro Tubi absorbed the assets of the company acquired, Fratelli Gaggini, the latter's assets having previously constituted a legally separate body of assets. However, that approach, which focuses exclusively on the assets of the acquiring company, is too limited.

39. In *Agas*[20] the Court held that Directive 69/335 did not apply to the case of a 'non-proper' merger because a transaction of that kind did not come under any of the situations defined in Article 4 of the directive. As the Commission and the Italian Government rightly maintain, that finding can be understood only as meaning that the decisive test to establish whether the economic potential has been strengthened involves an analysis of the *overall* situation of the companies concerned, both before and after the transaction.

40. Only in that way can it be determined whether the relevant situation is a transaction involving the raising of capital and therefore a transaction protected by Directive 69/335. To affirm that Aro Tubi's economic potential had been strengthened on the sole ground that the assets of its former parent company had been incorporated into it would effectively be to disregard the special features of a 'reverse' merger in this case.

41. On the contrary, it must be borne in mind that the assets — taken as a whole — of Aro Tubi and Fratelli Gaggini, companies which were previously affiliated by virtue of a 100% shareholding, were unaffected by the act of merging, the only change being that they are now expressly allocated to one legal person instead of being divided between two legally separate companies. Indeed, these circumstances are, as regards the aspects that are relevant here, the same as those involving a 'non-proper' merger, which formed the basis of the *Agas* case.

42. That becomes particularly clear on looking at the situation of the shareholders, who are in fact the real providers of the capital behind the companies. From their perspective, the 'reverse' merger did not lead to a strengthening of the companies' economic potential or, more generally, to a raising of capital: prior to the merger they were shareholders in Fratelli Gaggini. However, their shares represented more than just the value of that company; they also represented the value of Aro Tubi which, as a wholly-owned subsidiary of Fratelli

20 — Cited in footnote 5.

Gaggini, of course was part of that company's assets. After the merger, the shareholders received shares in Aro Tubi in place of the Fratelli Gaggini shares which were no longer valid. Nevertheless, as far as the shareholders were concerned, the Aro Tubi shares were no different from the 'old' shares inasmuch as they simply represented the value of the aggregate assets of the two companies. In spite of the fact that the shares formally pertain to another company after the transaction, they still confirm title to the same economic potential as the securities previously held by the shareholders.

43. Even though it may well be — as the claimant in the main action argues — that the merger transaction is not a purely formal act, simply to satisfy registration requirements, but may have a particular economic significance, it is none the less clear that the economic potential of the companies involved has not been strengthened as a result of a raising of capital in this case. Thus, the criterion defined in Article 4(1)(c) of Directive 69/335 is not met in the case of a 'reverse' merger either.

2. Article 4(1)(d) of Directive 69/335

44. The application of Article 4(1)(d) of Directive 69/335 must also be considered. Under that provision, an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of other rights, such as voting rights or a share in the profits, falls within the scope of the directive. The 'assets of a company' in that context does not refer — distinct from Article 4(1)(c) — to the subscribed capital but to 'all the property which the shareholders have contributed [to the company], together with any increase in its value.' [21]

45. However, the reverse merger transaction cannot come under Article 4(1)(d) precisely because the situation defined in that provision must be coupled with strengthened economic potential, an unwritten criterion which, as already shown, is not met in these circumstances.

46. Irrespective of that point, however, the defining criteria expressly referred to in Article 4(1)(d) are not met either. It seems perfectly reasonable to consider Aro Tubi's assets as having increased through acquisition of Fratelli Gaggini's assets. Indeed, it is apparent from the documents before the Court that, prior to its integration into Aro Tubi, Fratelli Gaggini appeared to have, in addition to the shareholdings in Aro Tubi,

21 — Case C-38/88 *Siegen Werkzeugmaschinen* [1990] ECR I-1447, paragraph 12.

other assets of not insignificant value, such as rights over immovable and movable property. Before the two companies merged, those assets had belonged to Fratelli Gaggini alone. Aro Tubi did not acquire power of disposal legally and economically over those assets until after it had acquired its parent company, hence the suggestions that the transfer of those assets upon the merger might be regarded as an increase in Aro Tubi's assets.

47. However, an increase in the assets of a company is not in itself sufficient to meet the criteria under Article 4(1)(d); the provision additionally requires members' rights — not those comprising shares in the capital or assets of the company — to be granted in consideration of the contributions leading to the increase in assets.

48. The shares held in Fratelli Gaggini could be regarded as a contribution of assets in the broadest sense. Fratelli Gaggini's shareholders received shares in Aro Tubi in return for surrendering their original shareholdings. Shares, however, are the principal form of corporate rights, embodying a share in the capital of the company. Shares are not, by contrast, 'rights of members' for the purposes of Article 4(1)(d). Such rights typically do not embody any share in the capital of the company; they merely involve individual rights of members, for example, rights to dividends, [22] which merely confer on members a right to share in the profits of an undertaking. If shares are allocated in return for a contribution of assets, Article 4 (1)(d) cannot apply. Such circumstances fall within the scope of Article 4(1)(c) alone.

3. Article 4(2)(b) of Directive 69/335

49. Lastly, it is possible that the circumstances of this case come under Article 4(2) (b) of Directive 69/335. According to the criteria expressly defined in that provision, the prerequisite for that is, first, an increase in the assets of the company not at the same time entailing an increase in its capital, which can definitely be considered to be the case in the present circumstances in the light of my earlier observations. [23]

50. Next, the company's assets must have been increased through the provision of services by a member. The decision by Fratelli Gaggini's shareholders to relinquish their shareholdings in that company to the benefit of Aro Tubi could be regarded as a provision of services of that kind. However, at the time of the merger of the two companies, Fratelli Gaggini's shareholders

22 — See Case C-138/00 *Solida and Tech* [2002] ECR I-8905, paragraph 28.

23 — See point 45 above.

were not shareholders in the beneficiary Aro Tubi; on the contrary, they were shareholders in its parent company.

51. The criteria laid down in Article 4(2)(b) would therefore be met only on a broad interpretation of the terms 'provision of services by a member', that is to say if services provided by an indirect shareholder — a member of a member — were included.

52. Such a broad interpretation of those terms appears to be perfectly conceivable. The Court has already held in its case-law in similar cases that, in order to determine whether or not a transaction comes under Article 4(2)(b), it is necessary to adopt an economic approach, and not a formal one based solely on the source of the contributions. [24]

53. Nevertheless, even if it were concluded on the basis of such an economic interpretation of the criteria defining the provision of services by a member that Fratelli Gaggini's acquisition by Aro Tubi was to be regarded as a service provided by a member for the benefit of Aro Tubi, that would still be insufficient grounds for the transaction in question to be covered by Article 4(2)(b). That provision additionally requires that the provision of services by the member must result in variation in the rights in the company or may increase the value of the company's shares.

54. The first of those alternatives, that is to say, variation in the rights in the company, clearly does not arise in this case since the Aro Tubi shares did not alter in number or nominal value.

55. There was, likewise, no increase in the value of the company's shares as defined in the second alternative. It could be argued, however, that Aro Tubi additionally obtained the assets of Fratelli Gaggini upon its acquisition of that company and that the (real) value of Aro Tubi shares increased as a result of those acquired assets.

56. Nevertheless, that approach would be inconsistent with the abovementioned economic interpretation of the material scope of Article 4(2)(b). If it is sufficient for the service to be provided by an indirect member, it can be concluded from the synallagmatic arrangement of the rule that an increase in the value of the company's shares must likewise occur in the specific case of that indirect member.

57. Thus, the objects for comparison are not the (real) values of the Aro Tubi shares before and after the merger; on the contrary, the comparison should be between the (real) value of the shares held by Fratelli Gaggini's

24 — Case C-49/91 *Weber Haus* [1992] ECR I-5207, paragraph 11, and Case C-339/99 *ESTAG* [2002] ECR I-8837, paragraph 37.

shareholders prior to that company's acquisition and the value of the Aro Tubi shares which were allocated to them after acquisition. However, those values did not differ in any way, since the aggregate value of the undertakings Aro Tubi and Fratelli Gaggini prior to acquisition, represented in its entirety by the Fratelli Gaggini shares, is the same as the value of the 'new' Aro Tubi, represented by its shares. Ultimately, there was no variation in the value of the shareholders' portfolio as a result of the transaction.

58. Therefore, even on an economics-based reading of the terms 'provision of services by a member', the criteria under Article 4(2)(b) are not met. Nor are those criteria met, a fortiori, in the light of the requirement — albeit unwritten — that the companies' economic potential must have increased.

59. The other types of transaction defined in Article 4 of Directive 69/335 are irrelevant. Furthermore, it is not possible for the circumstances of the main action to be brought within the scope of Article 10(c) of Directive 69/335.

60. There is, therefore, no provision under which Directive 69/335 would apply to the circumstances of this case. The directive thus does not prohibit a Member State from charging registration duty in the case of a 'reverse' merger as in the main proceedings.

VI — Conclusion

61. In the light of the foregoing considerations, I propose that the question referred by the Corte Suprema di Cassazione should be answered as follows:

'Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital does not preclude the charging of registration duty at 1% of the assets of the company acquired, that duty being charged, in the circumstances of the main proceedings, upon the acquisition of a company by another company whose entire share capital was previously held by the company acquired (reverse merger).'