OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 November 1990 *

Mr President,
Members of the Court,

1. As in Case C-15/89, the preliminary question submitted by the Bundesfinanzhof in this case requests the Court to interpret Article 4(2)(b) of Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital [1] (hereinafter referred to as 'the Directive').

2. The facts are very simple. Trave Schiffahrts-Gesellschaft mbH & Co. KG (hereinafter referred to as 'Trave'), which was created on 27 June 1975, received from its members loans totalling DM 131 million. As regards the years 1977 to 1983, the loans were granted free of interest. By a notice of 7 December 1984 the Finanzamt (Finance Office) Kiel-Nord subjected the making available of those loans to capital duty amounting to DM 361 335. Trave contested that charge before the competent German courts.

3. The case came before the Bundesfinanzhof which has referred for a preliminary ruling a question essentially seeking to establish whether, firstly, an interest-free loan granted to a heavily over-indebted capital company by one of its members can be charged capital duty and, secondly, how the capital duty is to be calculated.

4. Under Article 4(2)(b) of the Directive, the Member States may subject to capital duty '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'.

5. The Court has consistently held that:

'according to the principles on which harmonized capital duty is based, such duty should be charged only on transactions which constitute in law the raising of capital and only in so far as they contribute to increasing the company's economic potential'. [2]

6. In my view, it is indisputable that the granting of an interest-free loan by a member is a service which contributes to 'increasing the company's economic potential' in so far as it provides it with finance for which it does not have to bear the cost, which, depending on the state of the finance market, may be quite a considerable advantage. However, the Bundesfinanzhof inquires whether this is also the case where a heavily indebted company has a negative asset position. It

* Original language French

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

2 — Judgment in Case 270/81 *Felicitas Rickmers-Linie KG & Co.* v *Finanzamt für Verkehrsteuern* [1982] ECR 2771, see also the judgment in Case 36/86 *Ministeriet for Skatter og Afgifter* v *Investeringsforeningen Dansk Sparinvest* [1988] ECR 409, paragraphs 13 and 14

points out in its order for reference that in previous decisions it has made no distinction in this regard.[3] According to the Bundesfinanzhof, that case-law is, however, criticized by some German academic writers who take the view that Article 4(2)(b) of the Directive allows duty to be charged only on increases in the *net assets* of the company and is inapplicable where the service in question does not render the balance positive since the liabilities far exceed the assets.

7. I do not consider it necessary to follow that school of thought. As I explained in my Opinion in Case C-15/89 *Deltakabel BV*, the reduction of a deficit by the provision of a service, even if only a partial reduction, may increase the value of the company's shares, even where its asset position is markedly negative and continues to be so after the provision of the service, since such a reduction increases the undertaking's ability to become viable again and reduces the additional efforts needed to achieve a financial balance.

8. The view held by some of those German commentators stems from a confusion between the terms *net assets* and *company assets*. As the Court held in its recent judgment in *Siegen*,

'A company's assets include all the property which the shareholders have contributed, together with any increase in its value . . . the assets of a company which incurs losses will decline'.[4]

9. A company's asset position, being the sum of the assets of the company less its liabilities, if any, therefore represents in effect the *value of the company*, which may be a negative value. That concept is not to be confused with the net assets, which represent the *net amount of the assets*, which may be reduced to zero if the amount of the liabilities exceeds the amount of the assets.

10. The grant of an interest-free loan may therefore be subjected to the levying of capital duty.

11. However, the Bundesfinanzhof goes on to inquire as to the way in which the duty is to be calculated. According to Article 5(1)(d) of the Directive, 'in the case of an increase in the assets, as referred to in Article 4(2)(b)', the duty is to be charged 'on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services'. In the specific case of the grant of an interest-free loan, the value of the service is, in my view, the saving of interest made by the company. The rate of interest in force on the corporate finance market at the time when the loan is granted is undoubtedly to be taken into account since it determines the sum which the recipient company would have had to pay if it had been obliged to obtain finance on the market.

3 — Judgment of 12 April 1972, II 37/63, BFHE 106, 123, BStBl. II 1972, 714; judgment of 31 January 1979, II R 46/77, BFHE 127, 227, BStBl. II 1979, 382; judgment of 11 July 1984, II R 87/82, BFHE 141, 569, BStBl. II 1984, 840.

4 — Judgment of 28 March 1990 in Case C-38/88 *Waldrich Siegen Werkzeugmaschinen GmbH* v *Finanzamt Hagen* [1990] ECR I-1447.

12. I therefore propose that the Court should rule:

'(1) Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital allows the Member States to subject to capital duty the grant to a capital company of interest-free loans by its members, even if the grant of such loans does not have the effect of completely clearing the liabilities of the company.

(2) In application of Article 5(1)(d) of the Directive, the amount of capital duty must be calculated on the basis of the amount of interest thus saved at the market rate applicable when the loans were granted, less any expenses borne by the company arising from those loans.'