OPINION OF ADVOCATE GENERAL COSMAS

delivered on 20 February 1997 *

I — Introduction

1. In this case the Tribunal de Grande Instance (Regional Court), Tours, has referred to the Court, pursuant to Article 177 of the EC Treaty, two questions relating to the interpretation of Articles 4, 7, 10 and 12 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [1] ('Directive 69/335').

2. Those questions have arisen in the course of proceedings between SA Locamion and the Directeur des Services Fiscaux d'Indre et Loire (Head of the Indre et Loire Tax Office) concerning the compatibility with Directive 69/335 of certain provisions of the French General Tax Code relating to collection of the charge for the issue of registration certificates in respect of motor vehicles when the vehicles in question have been contributed as assets in the course of a company merger where one capital company is acquired by another.

* Original language: Greek.

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

II — The legal context

A — *National legislation*

3. The order for reference does not discuss the national provisions in question.

As the Commission mentions in its written observations, under Articles R-110 to R-119-1 of the French Highway Code, the owner of a motor vehicle must, when the vehicle is used for the first time, lodge a declaration with the prefecture of the *département* where he resides. The authorities issue a vehicle registration certificate, known as the 'log book', which shows the registration number of the vehicle. If the ownership of the vehicle is transferred, the new owner must, within fifteen days of the date of transfer, obtain a new registration certificate in his own name if he wishes to continue to use the vehicle (Article R-113 of the Highway Code).

4. The issue of the log book gives rise to, firstly, a 'registration charge', governed by Articles 1599(n) to (r) of the General Tax

Code and, secondly, a 'parafiscal tax' governed by Articles 339 to 341 of Annex II to that Code.

5. It appears from the written observations of the parties to the main action that Part III, entitled 'Stamp duties', of the General Tax Code contains the following provisions under the heading 'II — Charge on vehicle registration certificates':

'Article 1599(n)

A charge shall be payable for the benefit of the Regions on vehicle registration certificates issued within their respective territorial areas, which may be a *pro rata* or a flat-rate charge, according to the provisions laid down by Articles 1599(o) to 1599(r).

The basis of assessment for the said charge and the manner in which it is collected shall be the same as for stamp duty.

Article 1599(o)

I.1 Registration certificates for automobiles and all other motor vehicles shall give rise to the payment of a proportional charge, of which the rate per unit of horsepower, laid down by the Region concerned, shall be determined each year by resolution of the Regional Council.

2. The unit rate provided for in paragraph 1 shall be reduced by one-half for:

1° commercial vehicles with a total authorized weight when loaded exceeding 3.5 tonnes,

2° non-agricultural tractors,

3° motorcycles.

3. The unit rates provided for in paragraphs 1 and 2 shall be reduced by one-half for vehicles more than ten years old.

...

Article 1599(q)

1. The issue of:

1° all duplicate certificates;

2° original certificates issued in the event of changes in civil status or a change in the business name, without the formation of a new legal entity, of the natural or legal person owning the vehicle, shall be subject to the payment of a fixed charge.

2. The amount of the fixed charge provided for in paragraph 1 shall be equal to:

a) one-quarter of the unit rate referred to by Article 1599(o)I, 1, for lightweight motorcycles and motorcycles with a cubic capacity not exceeding 125 cm^3;

b) the said unit rate for all other vehicles.

3. No charge shall be payable where the issue of the registration certificate is due to a change in marital status or a change of address.'

6. Secondly, with regard to the 'parafiscal charge', Article 339 of Annex II to the General Tax Code provides that, in addition to the charge laid down by Article 1599(n) of the same Code, on the issue of registration certificates for goods vehicles, articulated tractors and vehicles for the collective transport of passengers a charge is payable in favour of third parties, in this case the 'association for the development of the occupational training of transport [workers]'.

This charge is not payable, *inter alia*, for the issue of the certificates referred to by Article 1599(q) of the abovementioned Code.

Finally, under Article 341 of the same Annex, the parafiscal charge is to be collected in accordance with the same rules and on the same conditions as the charge provided for by Article 1599(n) of the General Tax Code.

B — *The relevant Community provisions*

7. The provisions of Directive 69/335, as construed by the Court in its judgments of

20 April 1993 *Ponente Carni*, [2] 13 February 1996 *Bautiaa* [3] and 11 June 1996 *Denkavit and Others*, [4] give rise to the following observations.

8. As its preamble shows, the aim of Directive 69/335 was to promote the free movement of capital, regarded as essential for the creation of an economic union with characteristics similar to those of a domestic market. As regards taxes on the raising of capital, the pursuit of such an objective presupposed the abolition of indirect taxes already in force in the Member States and their replacement by a capital duty levied only once throughout the Common Market and at the same rate in all Member States.

9. Directive 69/335 provides, *inter alia*, for capital which has been raised to be subject to capital duty which, as stated in the sixth and seventh recitals in the preamble to the Directive, should be harmonized with regard both to its structure and rates within the Common Market, so as not to interfere with the movement of capital. This capital duty is governed by Articles 2 to 9 of the directive.

10. Article 3 specifies the capital companies to which the directive is to apply. They include the type of company under French law known as 'société anonyme'.

11. Article 4 of the directive, Article 8, as amended by Council Directive 85/303 of 10 June 1985 amending Directive 69/335, [5] and Article 9 set out, subject to Article 7, the transactions which are subject to capital duty and certain transactions which may be exempted from such duty by Member States.

12. In particular, Article 4 provides as follows:

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

(a) ...

(b) ...

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

2 — Joined Cases C-71/91 and C-178/91 [1993] ECR I-1915, paragraph 19 et seq.

3 — Joined Cases C-197/94 and C-252/94 [1996] ECR I-1505, paragraph 6 et seq.

4 — Case C-2/94 [1996] ECR I-2827, paragraph 16 et seq.

5 — OJ 1985 L 156, p. 23.

(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;

13. Article 5, as amended by Council Directive 74/553/EEC of 7 November 1974, [7] lays down the method of charging capital duty which, broadly speaking, is to be charged on the basis of the actual or the nominal value, as the case may be, of the assets contributed.

2. The following transactions may be subject to capital duty: [6]

14. In addition, Article 7 of Directive 69/335 originally set a range of rates within which the Member States were free to determine those applying in their territory and provided for mandatory or optional reduced rates, depending on the nature of the chargeable transaction.

(a) ...

(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;

15. That provision was amended by Council Directives 73/79/EEC (OJ 1973 L 103, p. 13), 73/80/EEC (OJ 1973 L 103, p. 15) and 85/303/EEC, which is cited above.

... .'

16. As the Court held when construing Article 7 in relation to a registration duty of 1.20% on movable assets in connection with

6 — The beginning of paragraph 2 was replaced, pursuant to Directive 85/303/EEC, by the following wording:
'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: .'

7 — OJ 1974 L 303, p. 9.

company mergers (Articles 810-1 and 816 of the French General Tax Code):

'Since the registration duty at issue applies to capital contribution transactions falling within the scope of Directive 69/335, it constitutes a capital duty within the meaning of that directive. ...

In the light of the successive amendments made to that provision, it appears that, from 1 January 1976 to 31 December 1985, the maintenance by a Member State of a capital duty of the type in issue was incompatible with Article 7(1)(b) of Directive 69/335, as amended by Directive 73/80, which provided that the reduced rates referred to in Article 7(1)(b) were not to exceed 0.50%.' [8]

17. Directive 69/335 also provides, according to the last recital in its preamble, for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities, the retention of which might frustrate the purpose of the directive. These indirect taxes, which are not to be charged, are listed in Articles 10 and 11 of the directive.

8 — See the judgment in *Bautiaa*, cited above, paragraphs 40 and 41.

18. Article 10 provides as follows:

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

19. Article 12(1) of the directive gives an exhaustive list of the duties and taxes other than capital duty which, by way of exception to Articles 10 and 11, may be imposed on capital companies by reason of the transactions specified in those articles. Article 12(1)(a) and (b) refers, *inter alia*, to certain

transfer duties, and Article 12(1)(e) to duties paid by way of fees or dues. Article 12(2) prohibits certain forms of discrimination relating to the duties and taxes mentioned in Article 12(1).

III — The facts

20. According to the order for reference, by a writ served on 22 April 1994, Locamion, a company, summoned the Directeur des Services Fiscaux d'Indre et Loire to appear before the Tribunal de Grande Instance, Tours, on the following grounds:

— by resolution of the extraordinary general meeting of 30 June 1992, Locamion carried out a merger by acquisition of the company France Location;

— this transaction entailed the transfer to Locamion of all the assets and liabilities of France Location, including its fleet of 1 698 vehicles;

— on 28 August 1992 Locamion, as the purchaser of the vehicles, sent to the prefect of the *département* in which its Tours establishment is located, an application for the registration in its own name of the 1 698 vehicles which it had just acquired as a result of the aforementioned transaction.

The registration certificates, which were drawn up in the period from September to December 1992, resulted in the payment, in respect of each vehicle acquired, of the charge for vehicle registration certificates provided for by Article 1599(q) (or, to be more precise, (o)) of the General Tax Code, and of the parafiscal charge introduced by Article 339 of Annex II to that Code.

The total number of log books dealt with in this way was 1 698, which means that the cost of re-registering the vehicles amounted to FF 2 391 761.

21. By a complaint dated 15 June 1993, Locamion sought the reimbursement of that sum on the ground that payment of a charge for registration certificates and of a parafiscal charge on a merger by acquisition was contrary to Directive 69/335.

22. The Directeur des Services Fiscaux d'Indre et Loire rejected the complaint by decision dated 26 January 1994.

23. Locamion brought an action before the national court, seeking a ruling that the abovementioned decision was unfounded on the ground that the levying, on the occasion of a merger, of the charge for registration certificates and the parafiscal charge was contrary to Directive 69/335.

In support of its application, Locamion argued, firstly, that mergers by acquisition come within the scope of Directive 69/335 and, secondly, that, since the charges levied for registration certificates are indirect taxes, levying such charges on the occasion of a merger by acquisition is contrary to Article 10 of the directive, which prohibits any tax charge whatsoever, apart from capital duty.

24. With regard to the nature of the charge for registration certificates and the parafiscal charge, Locamion contended that under French law the former is linked to stamp duty by the position of the provisions dealing with that charge in the General Tax Code and by the actual wording of the second subparagraph of Article 1599(n), which provides that 'the basis of assessment for the said charge and the manner in which it is collected shall be the same as for stamp duty'.

Locamion also argued that the rules governing the parafiscal charge were modelled on those governing the charge for registration certificates pursuant to Article 339 of Annex II to the General Tax Code.

Consequently Locamion concluded that, having regard to the general principles for the application of Community law, the charge, which is levied on a transaction and not on income, comes within the very wide category of indirect taxes which also encompasses registration and stamp duty.

25. In seeking the dismissal of the action, the Directeur des Services Fiscaux d'Indre et Loire contended before the national court that the charge for vehicle registration certificates was payable, subject to the exceptions laid down by law, whenever a log book was issued by the competent administrative service, irrespective of the nature of the transaction underlying the issue of the log book (transfer for consideration, transfer without consideration, partition, company merger) and irrespective of the owner of the vehicle (legal person or individual), with the result that such charges, which have nothing

whatever to do with capital duty, did not fall within the scope of the Community directive in question.

26. Locamion objected that in certain cases, such as a change of company name, the Treasury levies only a fixed charge by way of a fee or dues within the meaning of Article 12 of the directive and that therefore it is not the issue of the log book which gives rise to the proportional charge, but the change in ownership resulting from the merger.

27. In view of the foregoing, the national court found that, in so far as mergers by acquisition fall within the scope of Directive 69/335, the question was whether the directive prohibited duties charged on certain assets, not by reason of a merger by acquisition, but by reason of a change of ownership, the merger by acquisition being only the occasion for the change of ownership.

For the national court, that question called for the interpretation, not only of Article 10 of Directive 69/335, which prohibits any tax other than capital duty, but also Article 12, which lays down certain exceptions to such prohibition, particularly in relation to transfer duties.

IV — The questions referred

28. Accordingly the national court considered it necessary to refer the following questions to the Court:

1. Must Articles 4 and 7 of Council Directive 69/335/EEC of 17 July 1969 be interpreted as meaning that the directive applies to the merger/take-over transactions defined by Articles 371 to 372-2 of Law No 66.537 of 24 July 1966 on commercial companies?

2. Is the levying by the French State of a proportional charge on the drawing-up of registration certificates following a merger/take-over transaction compatible with the prohibition laid down by Article 10 of the directive and, if not, is it covered by the provisions of Article 12?

V — The questions

A — *First question*

29. In its first question, the national court asks whether a company merger by acquisition, such as that in issue in the main action, and which is governed by Articles 371 to 372-2 of the French law on commercial companies, falls within the ambit of Articles 4 and 7 of Directive 69/335.

30. In its written observations, the plaintiff in the main action, referring to the *Bautiaa* judgment cited above, [9] maintains that the merger in question is covered by Article 4(1)(c) of the directive. This view is shared by the Commission, which adds that, under Article 7(1), as amended, transactions such as those mentioned above are exempt from capital duty. Finally, the French Government takes the view that the transactions in question are undoubtedly covered by the directive.

31. I am not sure that the information which can be gleaned from the order for reference and, generally, from the documents in the case enables a reply to be given to the first question, and whether such reply would be helpful for determining the issue before the national court.

32. First of all, the national court should be reminded that, in order to obtain an interpretation of Community law which is of use to it, it must give an account of the factual and legal context of its questions or, at least, explain the factual situations on which they are based. Furthermore, the information supplied and the questions referred in orders for reference must not only enable the Court to give appropriate answers, but must also enable the Governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. [10]

33. In the present case, the national court has merely repeated the submissions of the parties to the main action and has not mentioned any of the specific facts of the merger between France Location and Locamion. Moreover, no details are given of the provisions of the French law on limited compa-

9 — See paragraph 3 above.

10 — See, *inter alia*, the orders of 2 February 1996 in Case C-257/95 *Bresle* [1996] ECR I-233, paragraphs 16 and 19 respectively, and of 21 December 1995 in Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraphs 6 and 7 respectively.

nies referred to by the first question, [11] which would have enabled the Court, even if indirectly, to ascertain the type of merger in question or, in other words, to ascertain its conditions and effects.

34. However this may be, Locamion's written submissions to the Court include, as an annex, the minutes of the extraordinary general meeting of the company, which were mentioned in the complaint giving rise to the decision referred to the national court. [12]

The minutes show that the meeting passed resolutions concerning, *inter alia*, the merger by acquisition of, firstly, France Location, which appears to be a public company, and secondly, of two subsidiaries of the latter, SLECO and Garage Michel SA. Regarding the first merger, with which the present case is concerned, the minutes state that Locamion had owned all the shares in France Location since 1991 as the result of an asset contribution. Consequently, as the minutes state, the contribution of all the assets, rights and obligation of France Location, which 'finalized' the acquisition of that company, did not entail an increase in Locamion's capital. According to the minutes, the merger dates back to 1 January 1992, but they contain no mention of any consideration for the contribution of the assets, rights and obligations of France Location. [13]

35. The fragmentary nature of these details makes it difficult to bring the merger by acquisition of France Location within one of the situations referred to by Article 4 of the directive.

36. In particular, as the transfer of France Location's assets (including the fleet of vehicles, according to the order for reference) did not lead to an increase in Locamion's capital, as expressly stated in the minutes of the general meeting, it is difficult to see how this transaction could come within Article 4(1)(c) of the directive, which refers to an increase in the capital of a capital company by contribution of assets of any kind.

11 — In its written observations, the Commission cites the following extracts from Article 371 of the French Commercial Code (Law No 88.17 of 5 January 1988): 'One or more companies may, by way of merger, transfer their assets and liabilities to an existing company or to a new company formed by them.' I assume that this is a provision of the Law of 24 July 1966 which, as amended in 1988, was incorporated in the Commercial Code. However, even if this was the case, it cannot be concluded that the Court is aware of the legal context of the first question because the other three articles to which it refers are missing in any event.

12 — The file in the case which was sent to the Court does not include the minutes in question. Therefore the Court does not know whether the national court was aware of this document.

13 — In contrast, the minutes expressly state that the merger with the subsidiaries Sleco and Garage Michel SA (which became subsidiaries of Locamion as a result of the first merger) entailed an increase in Locamion's share capital and an issue of new shares to be allotted to the other shareholders of the two subsidiaries in consideration of the contribution.

Furthermore, points (c) and (d), when construed in conjunction with one another, show that contributions which entail an increase in capital must be in consideration of shares in the capital, which is not clearly apparent in this case. [14]

37. In addition, as the transfer of France Location's property, particularly the vehicle fleet in question, increased Locamion's *assets*, [15] it is just as difficult to bring the situation within Article 4(1)(d) of the directive. This provision formally requires contributions to be in consideration of rights of the same kind as those of members (and not of shares in the capital or assets of the company), although it is not clear whether these were granted in the present case.

38. It would be even more questionable to try to bring the situation in the present case within Article 4(2) of the directive. The increase in the company assets referred to by that provision is not in principle subject to capital duty, but it may be if the transaction was taxed at the rate of 1% as at 1 July 1984, [16] although it assumes, firstly, a contribution from a person who is already a member of the company and, secondly, the existence of consideration in return for the contribution.

39. Relying on paragraphs 34 to 36 of the *Bautiaa* judgment, cited above, Locamion contends, as I have already said, that the question whether company mergers are covered by Article 4(1)(c) of the directive has been settled. This is also the view taken by the French Government and the Commission.

40. In those cases, the question was whether capital duty, laid down by the French General Tax Code, on a company merger was compatible with Community law. Both the legal context and the factual situation in the main proceedings were sufficiently clear to enable the Court to find that transactions of the type at issue in the main proceedings fell within the scope of Directive 69/335 and had to be examined in the light of Article 4(1)(c) thereof (increase of capital by contribution of assets of any kind), with the ensuing consequences as regards the application of the rate of capital duty payable under Article 7(1)(b) (paragraph 38). Furthermore, in paragraph 36 of the same judgment, the Court observed that 'the term "merger", as used in the national provision, clearly refers to a capital-raising transaction consisting in an increase in the capital of a company ... by the contribution to it of the whole of the assets of another company ...; second, the purpose

14 — See paragraph 22 and footnote 16 of my Opinion in the *Bautiaa* case, cited above.

15 — The assets must be distinguished from the capital and are subject to fluctuations which may, but need not necessarily, entail an increase in the share capital.

16 — See footnote 6 above.

of the capital raising is to strengthen another company already in existence, namely the acquiring company, the capital of which is increased by the contribution made by the shareholders of the company acquired.'

41. In my opinion, it cannot be concluded from this that, according to the *Bautiaa* judgment, any kind of merger or any kind of contribution of assets by one company to another in connection with a merger simply falls within Article 4(1)(c) of the directive. If the merger is to fall within the scope of that provision, the contribution of capital must be in consideration of shares in the company.

42. Of course, I do not mean to say that the merger referred to in the first question does not fall within the scope of Article 4 of the directive. I merely wish to point out that not enough of the factual or legal background is known to enable the merger to be brought beyond all doubt within one of the situations specified by Article 4 of the directive.

43. It might be possible to take the view that the contribution of assets referred to by the resolution of the plaintiff's general meeting was only a step [17] in the entire procedure involving the acquisition and merger of France Location with Locamion, which had been initiated by the 'contribution' of the former's shares to the latter in the previous year (1991), and that this merger by acquisition was being carried out with a view to increasing Locamion's capital, i. e. a capital-raising transaction, and strengthening the economic potential of the acquiring company within the meaning of the directive. In this situation, it would be possible to reply to the first question that such a merger may come within the scope of Article 4(1)(c) of the directive, with the ensuing consequences regarding the rate applicable under Article 7(1)(b).

44. However, I consider that such a reply is not necessary for a decision in the case before the national court. The dispute does not arise from a charge to capital duty on a contribution transaction or on a merger by acquisition, which would raise the question whether the merger is covered by Article 4. Still less is it connected with the question of determining the rate of capital duty applicable, pursuant to Article 7 of the directive. [18] The dispute arises from a different charge relating to the issue of registration certificates for vehicles which presumably formed part of the assets of a company taken over by the plaintiff company, and relates to the question whether the charge on that

17 — See the judgment in *Bautiaa*, cited above, paragraph 37.

18 — There is nothing to show whether the merger is subject to, or exempt from, capital duty.

transaction falls within the scope of the directive. As I shall show below, since the charge for vehicle registration certificates has no connection at all with capital duty, it is not covered by the directive and certainly not by Article 10 thereof, whether or not the merger in the course of which the vehicles were transferred comes within the scope of Article 4 of the directive.

45. Since, in any event, the connection between the merger by acquisition and Article 4 of the directive is a factual presumption, I shall treat it as such for the purpose of replying to the second question.

B — *Second question*

46. In the first limb of this question, the national court asks in essence whether a vehicle registration charge, such as that imposed in the present case, is compatible with Article 10 of the directive, assuming that the vehicles have been contributed as assets to a company in connection with a merger by acquisition covered by Article 4 of the directive.

In the second limb, the national court asks whether, if the answer to the first limb is in the negative, such a charge is justified on the basis of Article 12 of the directive.

47. The first point to note is that, in summarizing the facts of the case, the order for reference mentions only incidentally that, *inter alia*, a 'parafiscal' charge was also imposed. In addition, the second question is formally confined to whether the proportional charge is compatible with the directive. Therefore, in so far as the written observations of Locamion and the Commission relate also to the question whether the 'parafiscal' charge is compatible with Community law, they cannot be taken into account because they unduly widen the subject-matter of the question. [19] Undoubtedly this must be the conclusion here, particularly as in the present case one of the parties has requested the Court to examine a question which was raised in the proceedings before the national

19 — See the judgments in Case 44/65 *Hessische Knappschaft* [1965] ECR 965; Case 5/72 *Grassi* [1972] ECR 443, paragraph 4; Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 9; Case 311/84 *CBEM* [1985] ECR 3261, paragraph 10; Case 299/84 *Neumann* [1985] ECR 3663, paragraphs 11 and 12; Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 7 and 8; Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 20; Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647, paragraph 23; Case C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias* [1992] ECR I-2111, paragraphs 18 and 19; joined Cases C-134/91 and C-135/91 *Kerafina — Keramische und Finanz-Holding and Vioktimatiki* [1992] ECR I-5699, paragraph 16; and Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraphs 18 and 19. See also the judgment in Case 97/85 *Deutsche Lebensmittelwerke* v *Commission* [1987] ECR 2265, paragraph 12.

court, but on which the latter refused by implication to seek a ruling from the Court of Justice. [20]

Second question, first limb

48. To answer the first limb of the second question, it will be necessary to determine whether the charge at issue falls within the scope of Article 10 of the directive. For this purpose, that article must first be interpreted and the charge then characterized in the light of the directive.

49. It must be observed at the outset that, according to the Court, 'Article 10 of Directive 69/335, read in the light of the last recital in the preamble to the directive, prohibits in particular indirect taxes with the same characteristics as capital duty.' [21]

It therefore covers, firstly, taxes in any form which are payable in respect of the transactions referred to in Article 4 of the directive (Article 10(a)), that is to say, *inter alia*, 'the formation of a capital company or an increase in its capital'. [22]

Secondly, it covers taxes payable in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4 (Article 10(b)), that is to say, as must be accepted, transactions which *aid* the formation of a company or an increase in its capital and so on or which are essential for the *realization* or *completion* of the transactions referred to in Article 4.

Thirdly, it covers taxes in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form (Article 10(c)). As the Court stated in the *Denkavit* judgment, referring to paragraph 44 of the Opinion of Advocate General Jacobs in that case, 'the latter prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the directive.' [23]

20 — See the judgments in *Alsatel* (paragraph 8) and in *AC-ATEL Electronics Vertriebs* (paragraph 19), cited in the previous footnote.

21 — See the judgment in *Denkavit*, cited in footnote 4, paragraph 23.

22 — Ibid.

23 — Ibid.

50. It may be inferred from the foregoing that the last-mentioned prohibition does not apply to every kind of registration or formality necessary for the company to carry on business. The directive, and particularly Article 10 thereof, did not have the aim of exempting companies from indirect taxes generally on the ground that they were raising capital. In the situation covered by Article 10, it is also expressly stated that the registration or formality in question must be required of the company by reason of its legal form, that is to say, as a capital company.

51. Registration and related formalities necessarily include disclosure and, in particular, compulsory registration in the company registers which record fundamental changes (monitored, on the basis of those registers, by the public authorities) in the company, for example, constitution, increases in share capital, alterations in the articles of association and soon, such formalities being required in the public interest, the interest of third parties with whom the company contracts and, furthermore, of the shareholders themselves. In addition, since Council Directive 68/151/EEC of 9 March 1968 [24] (see Articles 1 and 2 thereof), Community law has also required registers of this kind to be kept and similar disclosure formalities to be observed.

52. To ascertain whether the vehicle registration charge provided for by Article 1599(n) et seq. of the French General Tax Code falls within Article 10 of the directive, it is necessary to establish whether the chargeable event, namely registration of the vehicle, either originally or later, is covered by one of the situations referred to by Article 10 of the directive.

53. In the *Ponente Carni* judgment, the Court, referring to the prohibition of indirect taxes, other than capital duty, on the raising of capital (last recital in the preamble to Directive 69/335), stated that 'those indirect taxes, the levying of which is prohibited, are listed in Articles 10 and 11 of the directive'. [25] Those articles, particularly the former, with which we are concerned here, determine the fundamental characteristics of the prohibited taxes, that is to say, the chargeable transactions and the taxpayers affected by such taxes. The list must therefore be regarded as exhaustive and not as being for guidance only. Articles 10 and 11 reflect in detail the last recital in the preamble to the directive. It follows that a tax which does not have the characteristics of the taxes referred to by Articles 10 and 11 does not come within the scope of the directive (and would therefore be authorized), without there being any need to consider whether it has other characteristics similar to those of capital duty and stamp duty, that is to say, whether it may fall within the scope of the directive, regard being had to the last recital in its preamble.

24 — OJ, English Special Edition 1968 (I), p. 41. See the Opinion of Advocate General Jacobs in *Ponente Carni*, cited above, paragraph 10 et seq.

25 — Paragraph 23.

54. It is regrettable that neither the order for reference nor the written observations submitted to the Court give more details of Articles R-110 to R-119-1 of the French Highway Code which, according to the Commission, govern the registration of vehicles, the matter at issue in the present case. The available information supports the following inferences: all motor vehicles must be registered in a special register when they are first used or put back into use by a new owner. For this purpose, the former or the new owner submits a declaration to the authorities, which then issue a registration certificate, and this gives rise to the payment of the contested proportional charge, which takes the form of stamp duty. The statement lodged by the Directorate-General of Taxes in the main proceedings before the national court contains in an annex one of the registration certificates issued to Locamion. The certificate shows the name of the new owner, the number of the vehicle and the date when it was first used, as well as its technical characteristics, such as the type of vehicle, make, model, engine number, chassis number, weight, horsepower and so on. Finally, the certificate has a grid section for recording technical inspections of the vehicle and the date of the next inspection.

55. It is clear from the foregoing that the aim of motor vehicle registration is not only to monitor changes of owner, but also to monitor regularly the technical condition of the vehicle by means of technical inspections, for obvious reasons in the public interest such as the safety of users and of the public. It is also logical to assume that registration and periodic checks of the particulars identifying the vehicle aim to record any change in those particulars during the period when the vehicle is in use or in connection with a change of owner.

56. That being so, it seems clear to me that in the present case the registration of a vehicle entailing the imposition of the proportional charge at issue does not fall within the scope of the first, second or even third situation referred to by Article 10 of the directive. None of the conditions relating to the last-mentioned provision is satisfied in the present case. Registration or any other formality to which Article 10 refers pursue the aforesaid aims (paragraph 45), which differ completely from the aims of registration in the present case. The formalities referred to by the directive are those to which *only* legal persons operating for profit are subject, whereas in the present case, as the French Government correctly points out in its written observations, any vehicle owner, whether a natural or legal person and whether or not operating for profit, must obtain a vehicle registration certificate. Registration and the other formalities referred to by Article 10(c) of the directive relate to changes resulting from the contribution of assets of any kind, whereas in the present case registration relates only to vehicles. Finally, in the situation covered by the directive, registration and/or any other formality must be carried out by a legal person only by reason of its

legal form, whereas this factor is of no relevance whatever with regard to the registration of a vehicle.

57. It is clear from the foregoing that two of the fundamental characteristics of taxes in general, that is to say, the aim of the tax at issue and the chargeable event, differ from those of the taxes prohibited under Article 10 of the directive. As the French Government rightly contends, that is sufficient to remove the charge at issue from the scope of that provision.

58. Let me add, for the sake of completeness, that according to national legislation, the proportional charge is calculated on the basis of the vehicle's horsepower, whereas capital duty (and taxes treated in the same way under Article 10, as must be accepted) are calculated according to the actual or nominal value of the assets contributed (see Article 5 of the directive, paragraph 13 above).

Furthermore, according to the abovementioned provisions of the General Tax Code, the rate of the proportional charge at issue is reduced in several cases (in particular by reason of the age, type and weight of the vehicle, and so on), which proves that the charge covers only motor vehicles and not assets contributed on a merger by acquisition or, generally, on a capital-raising transaction. Therefore, in view of its form and structure, the contested charge has no connection with the taxes referred to by the directive.

59. The arguments to the contrary advanced by Locamion and the Commission are not persuasive. Let me consider them briefly.

60. The argument that the charge at issue is covered by Article 10 of the directive, which prohibits all indirect taxes except capital duty, is based on a mistaken assumption. As I have already shown, the prohibition laid down by the article in question *is confined* to indirect taxes which have the same characteristics as capital duty and which relate to the transactions listed in Article 10(a) to (c). However, those requirements are not satisfied in the present case.

61. The Commission's argument that the charge at issue is a 'financial burden' on the company because it becomes payable on the raising of capital is untenable for the same reason. The directive aims only to eliminate fiscal and financial burdens in general which have the same characteristics as capital duty, and not to exempt the assets contributed from any other fiscal burden.

62. Finally, it has been argued that, under Article 1599(q) of the General Tax Code, the issue of a log book as a result of a change in marital or civil status (in the case of natural persons) or merely a change of name (in the case of legal persons) gave rise to the payment of a fixed charge, not a proportional charge. It has tentatively been inferred from this that the proportional charge was payable by reason of a change of ownership (of the vehicle, in this case) and thus fell within the scope of the directive.

Those arguments cannot be upheld. First of all, the contested charge is payable by reason of the vehicle being used for the first time by the owner himself or being used once again by the new owner, and not only on the sale or transfer of the vehicle. In any event, however, a change of ownership is not relevant in itself for the purpose of bringing the contested charge within the scope of the directive. It is self-evident that any contribution entails a change of ownership. However, the directive does not apply to every kind of transfer of ownership, in other words, it does not aim to harmonize transfer duties. It applies to one particular transfer of ownership, that is to say, the contribution of capital and other asset in order to promote the raising of capital by capital companies. This aim differs from those of a transfer of vehicles (sale, gift, succession, and so on).

It follows that capital duty (and duties treated as such) within the meaning of the directive, and the vehicle registration charge, when considered by reference to their objective characteristics and not to incidental factors, [26] are different in nature and not linked to one another in any way.

In addition, as the registration charge at issue does not, because of its objective characteristics, come within the scope of the directive but within the remit of the national legislature, the fact that the latter lays down more favourable tax rules for certain special cases of vehicle registration (for example, as a result of a change in the civil or marital status of natural persons or in the name of a legal person) is not sufficient on its own to alter the nature of that charge or to bring it within the scope of the directive.

Second question, second limb

63. The Court has taken the view that 'Article 12(1) of Directive 69/335 sets out an exhaustive list of taxes and duties other than

26 — See the judgment in *Bautiaa*, cited above, paragraph 39.

capital duty which, in derogation from Articles 10 and 11, may affect capital companies in connection with the transactions referred to in Articles 10 and 11'. [27] Therefore Article 12 authorizes taxes which are in principle prohibited, that is to say, taxes which fall in principle within the ambit of Articles 10 and 11.

64. As the charge at issue does not fall within the scope of Article 10 and has no connection with the subject-matter of Article 11, [28] it is not contrary to the directive. Consequently it is unnecessary to consider whether or not the charge falls within the scope of Article 12 or to answer the second limb of this question.

VI — Conclusion

In the light of the foregoing considerations, I suggest that the Court reply as follows to the first limb of the second question:

Article 10 of Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as not prohibiting the imposition in the name of a capital company, of a proportional charge for the registration of motor vehicles, of the kind at issue in the main proceedings, even where such vehicles previously formed part of the assets of another capital company which was acquired by the first company as a result of the transfer of all the assets and liabilities of the second company.

27 — See the judgment in *Denkavit*, cited in footnote 3 above, paragraph 21. See also the judgment in Case 36/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 9.

28 — The prohibition of taxes on stocks, shares, loans or other negotiable securities of the same type.