OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 12 December 1989 *

Mr President,
Members of the Court,

1. The Finanzgericht Münster has asked this Court to give a preliminary ruling on two questions concerning the basis of assessment of the indirect tax levied on the raising of capital, as harmonized by Council Directive 69/335/EEC of 17 July 1969 [1] (hereinafter referred to as 'the directive').

2. The facts may be summarized as follows. In 1971, Ingersoll Maschinen und Werkzeuge GmbH (hereinafter 'Ingersoll') concluded an integration agreement entailing the transfer of profits and losses (Organschafts- und Ergebnisabführungsvertrag) with its subsidiary, Waldrich Siegen Werkzeugmaschinen GmbH (hereinafter 'Siegen'), of which it is the sole shareholder. The agreement provides that Ingersoll undertakes to take over the results — whether profit or loss — shown in the accounts of its subsidiary. In the financial years 1975 to 1978, the subsidiary realized profits which were transferred to the parent company. However, from the financial year 1979/80 [2] onwards, Siegen incurred losses which were absorbed by Ingersoll. The Finanzamt (Finance Office) Hagen (hereinafter 'the Finanzamt') levied capital duty of 1% on the transfers of losses, pursuant to Paragraph 2 of the German Law on the taxation of capital transactions, the Kapitalverkehrsteuergesetz (hereinafter 'the German Law'). Paragraph 2 treats the absorption of a company's losses by its parent company pursuant to a profit and loss transfer agreement as a contribution subject to capital duty. After bringing an action against the Finanzamt's decision before the Finanzgericht (Finance Court) Münster, Siegen asserted in the proceedings before that Court that Paragraph 2 of the German Law was contrary to Article 4(2)(b) of the directive. That article allows capital duty to be levied on '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, [3] but which do result in variation in the rights in the company or which may increase the value of the company's shares'.

3. The Finanzgericht Münster therefore referred to this Court two questions which seek in essence to establish, first, whether Article 4 of the directive has 'direct effect' and, secondly, whether or not the absorption of a company's losses by its shareholder pursuant to a profit and loss transfer agreement is subject to capital duty.

4. This is not the first occasion on which a national court has questioned this Court about the 'direct effect' of Article 4 of the directive, [4] but for various reasons the Court has not yet had an opportunity of ruling on this point. Nevertheless, in the *Dansk*

* Original language: French.

1 — Directive concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412).

2 — According to the order of the Finanzgericht the financial year runs from 1 December to 30 November of the following year

3 — Provision is made in Article 4(2)(a) of the directive for the taxation of increases in the capital of a company

4 — Judgment of 15 July 1982 in Case 270/81 *Felicitas* v *Finanzamt für Verkehrsteuern* [1982] ECR 2771, see also the judgment of 25 May 1989 in Case 15/88 *SpA Maxi Di* v *Officio del Registro di Bolzano* [1989] ECR 1391.

Sparinvest judgment, the Court held that Articles 10 and 11 of the directive

'must be interpreted as meaning that, in respect of the transactions mentioned in those articles, it is not permissible for a Member State to subject capital companies . . . to taxes or duties other than capital duty and the duties mentioned in Article 12'.[5]

Accordingly, the list in Article 4 of the directive showing the transactions which may be subject to capital duty is an exhaustive one. Consequently, the obligation on Member States to refrain from introducing any indirect taxes on the raising of capital other than those for which the directive provides is an unconditional one.

5. Moreover, the provisions of Article 4 — as is immediately clear from its wording — are perfectly precise.

6. Indeed, in his Opinion in Case 15/88, Mr Advocate General Lenz concluded that the prohibition in Article 11 of the directive was unambiguous and sufficiently precise to enable economic agents to rely on it on the expiry of the period allowed for its implementation.[6]

7. Accordingly, I propose that the reply to the first question should be to the effect that, since 1 January 1972, it has been possible for a taxable person to rely directly on Article 4 of the directive in proceedings before a national court against a Member State.

8. With regard to the second question, the Court has already ruled 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'.[7]

9. The peculiar feature of a profit and loss transfer agreement is that it replaces the risks inherent in economic life with a degree of certainty, since the subsidiary company — and its creditors — may be sure that, irrespective of the results of its business activities, the company will never show either profits or losses. As the Commission notes in its written observations,[8] the difficulty is not whether the profit and loss transfer agreement has, in itself, the effect of increasing the company's assets — what indeed is the value of certainty in the functioning of an undertaking? — but whether or not the absorption of losses pursuant to that agreement is to be regarded as a transaction subject to capital duty.

10. I think that a criterion which focuses on whether the economic potential of the company is thereby enhanced should serve as a guideline and point to a distinction. A company which, having suffered losses, secures *ex post facto* an agreement for the transfer of profits and losses necessarily has its losses absorbed by its shareholder, and thus, even if subsequent profits accrue to the shareholder rather than the company itself, its economic potential at that stage is enhanced. Such a transaction may be subject

5 — Operative part of the judgment of 2 February 1988 in Case 36/86 *Ministeriet for Skatter og Afgifter* v *Dansk Sparinvest* [1988] ECR 409.

6 — Opinion delivered on 15 February 1989, paragraph 7.

7 — Case 270/81, cited above, paragraph 16; see also Case 36/86, cited above, paragraph 14.

8 — Paragraph 5.3 on p. 7 of the French text.

to capital duty on account of the increase in the company's assets which it brings about. On the other hand, if the losses are determined, not before the conclusion of the contract for the transfer of the negative results but after that contract comes into force, they do not in any way alter the economic potential of the company, since it was certain from the outset that neither losses nor profits would ultimately have any effect on the company itself. A transfer of losses of that kind cannot therefore attract capital duty. National laws which provided that transfers of losses are subject to such duty in all cases would not be compatible with Article 4 of the directive. I propose that the Court should answer the second question accordingly.

11. My conclusion, therefore, is that the Court should rule as follows:

'(1) Since 1 January 1972, it has been possible for a taxable person to rely directly on Article 4 of Council Directive 69/337/EEC of 17 July 1969 concerning indirect taxes on the raising of capital in proceedings before a national court against a Member State.

(2) Article 4(2)(b) of the directive must be interpreted as prohibiting national laws which require capital duty to be levied on transfers of losses from a capital company to a member pursuant to a profit and loss transfer agreement where those losses were incurred after the conclusion of the contract.'