# OPINION OF ADVOCATE GENERAL JACOBS
delivered on 14 May 1992 *

*Mr President,*
*Members of the Court,*

1. In this case, the Bundesfinanzhof has requested a preliminary ruling on the interpretation of Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412; hereafter 'the directive'). The directive has since been amended by Council Directive 73/79/EEC of 9 April 1973 (OJ 1973 L 103, p. 13); by Council Directive 73/80/EEC of 9 April 1973 (OJ 1973 L 103, p. 15); by Council Directive 74/553/EEC of 7 November 1974 (OJ 1974 L 303, p. 9); and by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23), although those amendments have no direct relevance to this case.

2. The directive has the aim, in particular, of harmonizing the taxation payable on the contribution of capital to companies and firms ('capital duty'). Article 3 specifies the companies and firms in respect of which capital duty is payable, and Article 4 specifies the transactions which attract the duty. Article 7(1)(a) of the directive provides that the standard rate of capital duty must be at least 1% and not more than 2%, and Article 7(1)(b) provides for the rate to be reduced by at least 50% in certain circumstances. Directive 73/80/EEC fixes the standard rate at 1%, and the reduced rate at any rate between 0% and 0.50%, with effect in each case from 1 January 1976.

3. The reduced rate provided for in Article 7(1)(b) applies, under certain conditions, to contributions of capital in which:

'one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence'.

The Bundesfinanzhof seeks guidance on the interpretation, in that provision, of the expression 'one or more parts of their business'.

4. In the main proceedings, the question at issue is the amount of capital duty payable on a contribution of capital made by one of the five founder shareholders in Commerz-Credit-Bank AG — Europartner (hereafter 'Europartner'), namely Commerzbank AG of Düsseldorf (hereafter 'Commerzbank'). Also among the founder shareholders was Crédit Lyonnais SA of Lyon ('Lyonnais'). Europartner was formed on 4 April 1974, and its articles of association provided that Commerzbank and Lyonnais would each make contributions of capital consisting of certain of their branches in Saarland. Commerzbank would contribute to Europartner

* Original language: English.

all the branches it operated in Saarland, and Lyonnais would contribute a branch it operated in Saarbrücken.

5. It appears from the Order for Reference that the directive is implemented in Germany by the Kapitalverkehrsteuergesetz 1972 ('the Tax Law'), and in particular that Paragraph 9(2)(3) of the Tax Law is intended to implement Article 7(1)(b) of the directive. The Finanzamt Saarbrücken (hereafter 'the Finanzamt') refused to allow, in respect of the contribution made by Commerzbank, the reduced rate of tax provided by Paragraph 9(2)(3), on the ground that the branches contributed by Commerzbank were not a 'part' of that bank's business for the purposes of Paragraph 9(2)(3). The plaintiff appealed against that decision, ultimately to the Bundesfinanzhof, which has accordingly referred the following questions to the Court:

'1. Does the expression "one or more parts of their business" in Article 7(1)(b) of Directive 69/335/EEC presuppose the existence of a part of an undertaking, in the sense of a part of a larger undertaking which has a certain autonomy, is capable of existing independently, and whose business assets, taken together, serve an activity which of its very nature is clearly distinct from the rest of the undertaking?

2. If the first question is answered in the negative:

(a) What are the essential characteristics of a "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?

(b) Is a branch within the meaning of Paragraph 13 of the Commercial Code "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?'

I shall consider those two questions in turn.

**Question 1**

6. As the Bundesfinanzhof explains in the Order for Reference, the purpose of the first question is to enable it to decide whether the concept of 'part of a business' in Article 7(1)(b) of the directive is the same as the concept of 'Teilbetrieb' employed by German tax legislation, and used in particular in Paragraph 9(2)(3) of the Tax Law. The expression used for 'part of their business' in the German version of the directive is not 'Teilbetrieb', but rather 'Zweig ihrer Tätigkeit'. It appears that the German courts have tended to give a narrow construction to the expression 'Teilbetrieb', and that, on the approach adopted by the German courts, the individual branches of a bank would not normally be regarded as 'parts' of the bank's business. It appears, in particular, that for a branch to constitute a 'Teilbetrieb' for the purposes of German law, there must be no activities essential to its operation which are

dealt with centrally from head office. As the Bundesfinanzhof points out, the branches of a bank will rarely satisfy that condition, since such activities as refinancing and the purchase of securities are usually dealt with centrally.

7. As the Court has recently emphasized, a national court is obliged when interpreting national legislation to take account, to the fullest extent possible, of the text and aims of any relevant Community directive: see Case C-106/89 *Marleasing* [1990] ECR I-4135, at paragraph 8 of the judgment. There is accordingly no doubt that the notion of 'Teilbetrieb' in Paragraph 9(2)(3) of the Tax Law is to be interpreted in the sense of 'Zweig ihrer Tätigkeit' or 'parts of their business' in Article 7(1)(b) of the Directive.

8. The concept of 'part of a business' in Article 7(1)(b) was recently considered by the Court in Case C-164/90 *Muwi Bouwgroep* v *Staatssecretaris van Financiën* [1991] ECR I-6049. In paragraph 22 of its judgment, the Court stated that the situation intended by that provision is where a company contributes to another company assets which form an entity capable of functioning independently. The precise degree of independence necessary before such an ensemble of assets can amount to a 'part' of a business was not however at issue in the *Muwi Bouwgroep* case.

9. As the Commission suggests in its written observations, and emphasized at the hearing, the reduced rate of capital duty provided for in Article 7(1)(b) of the directive is intended to avoid the cumulative effects on liability to tax of certain company reconstruction operations: see the third recital to Council Directive 73/80/EEC. Furthermore, the second recital to Council Directive 85/303/EEC observes that the economic effects of capital duty can be detrimental to the regrouping and development of undertakings, and the reduced rate of duty originally provided for in Article 7(1)(b) of Directive 69/335/EEC was accordingly replaced, as from 1 January 1986, by a total exemption from capital duty: see Article 1(2) of Directive 85/303/EEC.

10. It seems to me that the Commission is right in suggesting that, for those reasons, the notion of a 'part of a business' in Article 7(1)(b) of the Directive is to be given an interpretation broad enough to include, in principle, all relevant kinds of company reconstruction operations. There is, in particular, no reason to exclude from the benefit of Article 7(1)(b) transfers of branches of an undertaking which, as regards some of their activities, are dependent upon the parent organization; for the transfer of such branches to other undertakings may well promote the more efficient operation of the organizations concerned. Nor does it seem necessary that the part of the business transferred should constitute a wholly distinct area of the transferor's business activity. In my view, therefore, the first question referred by the Bundesfinanzhof is to be answered in the negative, and it will accordingly be necessary to answer the other question which has been referred.

**Question 2**

11. By its second question, the Bundesfinanzhof seeks guidance on the characteristics required for assets to constitute a 'part of a business' for the purposes of Article 7(1)(b), and asks in particular whether such criteria would be satisfied by a 'branch' ('Zweigniederlassung') within the meaning of Paragraph 13 of the German Commercial Code. In response to a written question put by the Court, the Finanzamt explained that, in order to be a 'branch' within the meaning of Paragraph 13 of the Code, the establishment in question must, *inter alia*, have some degree of functional independence from the parent organization, without however requiring to be completely independent.

12. As we have seen, the objective of Article 7(1)(b) is to eliminate fiscal obstacles to company regrouping and reconstruction operations. The Commission suggests therefore that the provision is to be interpreted as covering all transfers of a business activity which are calculated to promote the regrouping and development of the undertakings concerned. It is apparent from the wording of Article 7(1)(b) that, where all the assets and liabilities of a capital company are transferred to a new company, the transfer automatically qualifies for the reduced rate of duty under that provision. Where, however, only part of the assets are transferred, a further requirement is laid down. It is not sufficient that one or more assets be transferred; the assets must in addition form part of a business ('branche de leur activité', 'Zweig ihrer Tätigkeit'). The essential requirement therefore seems to be that the assets must be transferred as a trading entity. As is apparent from the Court's judgment in *Muwi Bouwgroep*, cited above at paragraph 8, the assets transferred must form a whole capable of some degree of independent functioning: they must be more than a mere collection of individual assets. It could also be expected that the transfer of assets might, depending on the circumstances, be accompanied by the transfer of some of the transferor's liabilities, certain intangible assets such as intellectual property rights required to exploit the assets, lists of customers and even some of the staff employed in the part of the business transferred, although no single factor is necessarily decisive. As stated above, however, it does not seem necessary that the part of the business transferred should be an entirely distinct type of business activity. The abovementioned objective of Article 7(1)(b) must be regarded as extending to the dividing up and re-grouping of existing businesses on the basis of, for example, separate geographical areas. Nor does the fact that the part of the business transferred shares certain central services with other parts necessarily prevent it from being a 'part of a business' for the purposes of Article 7(1)(b). In my view, such an interpretation would clearly be too restrictive, since few branches of large organizations are likely to be entirely independent. Provided that any services essential to the continued exploitation of the assets transferred can be provided by the new company, a degree of reliance upon central services does not prevent the assets from forming part of a business.

13. The application of those criteria may be illustrated by two examples falling very clearly on either side of the line. On the one hand, the simple transfer to a new banking company of surplus computer hardware for use in a different area of banking activity would not of itself constitute the transfer of 'part of a business': the transfer would merely comprise a collection of assets. If, on the other hand, all the branches of a bank in a specific geographical area, including premises and equipment, were transferred, together with many of the customer accounts and staff, to a new company which continued to use the branches for substantially the same activity, the branch assets would clearly be transferred as part of a business. It is however for the national court to apply the criteria to the facts of the case.

14. Since it does not fall to the Court to construe Paragraph 13 of the German Commercial Code, it would not in my view be appropriate for the Court to give a separate answer to part (b) of the question. Since however, as we have seen, a 'branch' for the purposes of Paragraph 13 of the Code is, according to the Finanzamt, an entity which enjoys at least partial independence from the parent organization, the answer which has been suggested to part (a) of question should provide the Bundesfinanzhof with all the elements it needs in order to answer part (b).

## Conclusion

15. I am accordingly of the opinion that the questions referred by the Bundesfinanzhof should be answered as follows:

(1) For the purposes of Article 7(1)(b) of Council Directive 69/335/EEC, it is not necessary that the parts of a business transferred from one company to another should be capable of existing entirely independently or that they should consist of assets exclusively used to carry on activities which are distinct from the activities of the rest of the undertaking.

(2) The transfer of 'part of a business' for the purposes of Article 7(1)(b) is the transfer of an entity capable of some degree of independent business activity. In order to decide whether such an entity has been transferred, it is necessary to consider all the circumstances of the transaction, in particular the nature of the assets transferred, the purposes for which they are used before and after the transfer, and whether the transfer is accompanied by a transfer of liabilities, customers, staff, or other elements of the business.