OPINION OF ADVOCATE GENERAL COSMAS

delivered on 26 June 1997 *

I — Introduction

1. The Tribunale Civile e Penale, Venice, has submitted a reference to the Court for a preliminary ruling on the interpretation of Articles 4, 7 and 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [1] ('the Directive').

The questions were raised in a dispute between Immobiliare SIF SpA ('SIF') and the Ufficio di Registro (Registry Office), Padua, on the issue whether certain fiscal charges applied in the event of an increase in the company's capital by the contribution of immovable property by its members were compatible with the Directive.

According to the order for reference, those charges are: (a) a registration charge (imposta di registro); (b) a mortgage registration fee (imposta ipotecaria); (c) a Land Register fee (imposta catastale); and (d) a municipal tax on the increase in the value of immovable property (imposta communale sull'incremento di valore dei beni immobili, 'the Invim').

II — The national provisions

2. The order for reference does not contain any information as to the content of the national provisions which have been applied or the nature of the national charges at issue.

In its written observations, which were not contested on this point at the hearing, the Commission describes the charges in question as follows:

3. The *registration charge* (imposta di registro) is governed by the '*Uniform Provisions*

* Original language: Greek.

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

on the Registration Charge' [2] and consists in a charge on '*transactions subject to registration and transactions registered on a voluntary basis*' (Article 1). Included among the transactions which it is compulsory to register (Article 2) are '*corporate transactions of any kind*' (Article 4 of the tariff annexed to the Uniform Provisions). Article 4 provides in particular that the charge applies to '*the constitution or increase in company capital or assets*' (Article 4(a)) through: '*(1) the transfer of ownership of immovable property or of a right in rem over such property; (2) the transfer of ownership of or of a right in rem over buildings specifically intended for commercial use and not capable of serving for other purposes without being radically transformed ...*'.

As regards the various rates of the charge, Article 4(a)(1) (contribution of ordinary immovable property) refers to Article 1 of the said tariff, which provides generally for a registration charge to be levied on '*transactions by which the ownership of immovable property is transferred*'. Article 1 of the tariff provides for four rates, according to the type of immovable property transferred, which are determined according to the value of the immovable property as follows: (1) immovable property generally: 8%; (2) agricultural land, if the purchaser has no agricultural holding: 15%; (3) immovable property which has a historical, artistic or archaeological value: 4%; (4) houses or flats, other than luxury houses or flats, if the building is situated within the district in which the purchaser resides and he does not own any other building which could be lived in: 4% (Article 50 of the Uniform Provisions '*Chargeable basis*').

Article 4(a)(2) of the tariff provides, on the other hand, that the contribution of immovable property '*specifically intended for commercial use*' is subject to a uniform rate of 4%.

4. The *mortgage registration fee* ('imposta ipotecaria') [3] is governed by the '*Uniform Provisions relating to charges for transcription and entry in the Land Register*'. [4] That fee is payable on 'transcription, registration, renewal and annotation of deeds in the Register' (Article 1 of the Uniform Provisions), and the chargeable basis (Article 2) is the value of the immovable property as determined for the purposes of payment of the registration charge. The rate of the fee for the '*transcription of transactions and judicial decisions involving the transfer of ownership of immovable property in the Land Register*' is determined in Article 1 of the tariff annexed to the Uniform Provisions, and has recently been increased from 1.6% to 2% [5] of the value of the immovable property transferred or, as in the present case, contributed to a company.

2 — Presidential Decree No 131 of 26 April 1986 (Ordinary Supplement to GURI No 99 of 30 April 1986).

3 — That fee applies not solely to the '*transcription*' of certain transactions but also to the registration of mortgage documents in the Land Register (Article 3 of the Uniform Provisions).

4 — Legislative Decree No 347 of 31 October 1990 (Ordinary Supplement No 75 to GURI No 277 of 27 November 1990).

5 — Article 133 of Law No 549 of 28 December 1995 (Ordinary Supplement No 153 to GURI No 302 of 29 December 1995).

5. The *Land Register fee* ('imposta catastale') is also governed by the Uniform Provisions (Article 10) and applies to *'alterations'*, namely a change in the name of the owner of or holder of a right *in rem* over immovable property entered in the Land Register. That fee is proportional to the value of the property, as calculated for the purpose of payment of the registration charge. The rate of the Land Register fee was, at the time relevant to this case, 0.4%. [6]

6. The *Invim* was introduced by Presidential Decree No 643 of 26 October 1972. [7] It is charged on *'the increase in the value of immovable property situated on Italian territory'* (Article 1) and calculated either when immovable property *'is transferred for consideration'* (Article 2 of Presidential Decree No 643/1972, cited above) or, in the case of immovable property owned by companies, *'at the end of each 10-year period elapsing from the date of purchase'* (Article 3). Under the provisions of the said Law, immovable property contributed to *'companies or firms of any kind whatsoever'* is regarded as being *'transferred for consideration'* (Article 2(2)).

The basis of assessment for the Invim is the difference between the value of the immovable property at the time of transfer of ownership and its value at the time of purchase, plus any expenditure which has increased the value. For the purposes of calculating the difference in value of immovable property in the second case where Invim is charged (at the end of each 10-year period), the difference in the value of the immovable property is calculated by taking its value at the end of the 10-year period as the final value, and its value at the time of purchase, or its value as calculated for the purposes of the previous charge, as the initial value (Article 6).

The rate of the tax is determined according to the scale of the appreciation in value calculated on the basis of the criteria set out in Article 15 and ranges between 3% and 30%, depending on the degree of appreciation (falling between a minimum of 20% and a maximum of more than 200% of the reference value).

The Invim was abolished with effect from 1 January 1993 by Article 17 of Legislative Decree No 504 of 30 December 1992. [8] However, according to that Article, *'The tax shall be payable at the maximum rates — the product of the tax shall be wholly incorporated in the State budget — where the conditions under which the tax is payable are met for the period from 1 January 1993 to 1 January 2003 on the basis of the appreciation in value by 31 December 1992'* (paragraph 7).

According to the order for reference, the Invim was charged to the members of the company who had contributed the immovable property.

6 — That rate was increased to 1% by Article 132 of the above-cited Law No 549/95.

7 — Ordinary Supplement No 3 to GURI No 292 of 11 November 1972.

8 — Ordinary Supplement to GURI No 137 of 1992.

III — Facts

7. It appears from the order for reference, that on the occasion of SIF's extraordinary general meeting of 11 December 1992 the members transformed the company from a limited liability company into a joint-stock company and increased the company's share capital from LIT 290 000 000 to LIT 4 290 000 000 by the contribution of immovable property of a total value of LIT 8 712 600 000, by reason of which 40 000 new shares were issued.

8. By a decision of 26 April 1993, in view of the contribution of immovable property that had taken place, the Padua Registry Office issued an assessment to the three charges referred to above and to Invim, totalling LIT 859 354 000.

9. After it had paid that amount, by an application made on 9 July 1993, SIF claimed that if the common rate provided for in Article 7(2) of the Directive was applied, in the version in force, the amount due would be LIT 87 126 000, and it asked for the additional amount it had paid to be reimbursed.

10. That application was rejected by the competent authorities, whereupon SIF brought an action on 19 January 1994 in the Tribunale Civile e Penale, Venice. It claimed that the assessment in respect of the contribution in question was contrary to Articles 4, 7 and 10 of the Directive and asked that the fiscal authorities be ordered to reimburse to it the sum which had been unduly paid.

11. Since the national court entertained doubts as to whether the charges in question were permitted under the Directive and as to the level of the rate applicable, it referred to the Court of Justice for a preliminary ruling the following questions:

'(1) Are Articles 4, 7 and 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 73/80/EEC of 9 April 1973, applicable in the circumstances set out by the plaintiff?

(2) Does the application of those provisions preclude the charging of any other taxation, in particular the taxes imposed by the Italian Registry Office, including the Invim (Imposta communale sull'incremento di valore dei beni immobili — Municipal tax on the

increase in value of immovable property) and, if so, is the applicable rate 2% or the reduced rate?'

It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties. [10]

IV — My views on the case

Preliminary observations

12. It is appropriate to remind the national court, first, that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the latter define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which the questions referred to the Court of Justice are based.

Moreover, the information which it provides and the questions which it raises in the order for reference must not only enable the Court to give helpful answers, but must also give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court. [9]

In this case the order for reference, as stated above, contains no information in respect of the national legal background. Although that background emerges from the Commission's observations which have not been contested, and accordingly it is possible for the Court to accept jurisdiction, [11] nevertheless it should be emphasized that that substantive deficiency in the order for reference could have prevented the Governments of the Member States other than Italy and Greece from submitting observations, the subject of which appears, from its nature, of more general interest.

13. Moreover, it should be pointed out that in order to give a useful reply to the questions referred for a preliminary ruling, an interpretation of Article 12 of the Directive is also essential. The Court is not precluded from providing such an interpretation despite the fact that it was not expressly asked to do so by the national court (see Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17).

9 — See *inter alia* Case C-257/95 *Bresle* [1996] ECR I-233, paragraphs 16 and 19; Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraphs 6 and 7, and Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

10 — See *Max Mara*, cited in the previous footnote, paragraph 8; Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 13; and Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 10.

11 — See Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 14.

Substance

14. In Question 1 and the first part of Question 2, the national court is asking, essentially, whether charges such as those at issue fall within the scope of application of the Directive and whether their application is allowed or prohibited by the Directive.

In order to decide whether the charges at issue are compatible with the Directive, the latter's objective and content should be examined and subsequently the charges must be classified from the point of view of the Directive.

Interpretation of the Directive

15. According to settled case-law, [12] as its preamble indicates, the Directive is aimed at encouraging the free movement of capital, which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As regards taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes already in force in Member States and their replacement by a tax levied only once throughout the common market and at the same rate in all Member States.

16. Directive 69/335 provides, in consequence, for the levying of capital duty on the raising of capital, which, in accordance with the sixth and seventh recitals in the preamble to the Directive, must be harmonized within the Community, with regard both to its structures and to its rates, so as not to interfere with the movement of capital. The capital duty in question is governed by Articles 2 to 9 of the Directive.

17. Article 3 defines the capital companies to which the Directive applies, among which are listed Italian public limited liability companies (Società per azioni) such as that in the main proceedings.

18. Article 4, Article 8, as amended by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC (OJ 1985 L 156, p. 23), and Article 9 list, subject to the provisions of Article 7, the transactions subject to capital duty and certain transactions which the Member States may exempt from capital duty.

12 — See, in particular, Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 16 et seq.; Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 19 et seq.; Case 161/78 *Conradsen* [1979] 2221, paragraph 11.

In accordance with Article 4(1)(c), an increase in the capital of a capital company by contribution of assets of any kind is included among the transactions subject to capital duty.

19. As regards the charging of the duty in the above case, Article 5(1)(a) of the Directive provides that the duty is to be charged: '... on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution. ...' [13]

20. In respect of transactions for the raising of capital such as the above, Article 7(1)(a) of the Directive originally provided that the rate of capital duty was to be between 1% and 2%.

That rate was subsequently reduced to 1% from 1 January 1976 (Article 1(2) of Council Directive 73/80/EEC (OJ 1973 L 103, p. 15)).

Lastly, the same Article 7 of the Directive, as amended by Article 1(2) of Directive 85/303, provides:

'1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less.

...

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

3. ...'

13 — Subject to the proviso that '... [t]he amount on which duty is charged shall in no circumstances be less than the nominal amount of the shares in the company allotted or belonging to each member' (Article 5(2) of the Directive, as amended by Article 1 of Directive 74/553/EEC (OJ 1974 L 303, p. 9).

21. Directive 69/335 also provides, in accordance with the final 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, retention of which might frustrate the objectives pursued. Those indirect taxes, the charging of which is prohibited, are listed in Articles 10 and 11 of the Directive.

Article 10 provides:

'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) ...

(c) ...'

22. Article 12(1) of the Directive sets out an exhaustive list of taxes and duties other than 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. [14]

Specifically, Article 12(1)(b) of the Directive refers *inter alia* to: '(b) transfer duties, including land registration taxes, on the transfer, to a company, firm, association or legal person operating for profit, of businesses or immovable property situated within their territory'.

Moreover Article 12(2) prohibits certain forms of discrimination as regards the duties and taxes referred to in paragraph 1, providing, inter alia, that 'these duties and taxes [may not] exceed those which are applicable to like transactions in the Member State charging them'.

23. It is not contested in the present case that the increase in the company capital by way of a contribution of immovable property falls under Article 4(1)(c) of the Directive. Accordingly the charges in issue must be classified from the point of view of the Directive.

14 — *Denkavit Internationaal and Others*, cited in footnote 12, paragraph 21, and Case 36/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 9.

24. As is clear from their content, as set out above (see points 3 to 5), on the one hand the first three charges are related, and on the other they differ from the Invim. Accordingly, they must be examined separately.

The first three charges

25. In its written observations, SIF, the plaintiff in the main proceedings, points out that since the contribution of immovable property at issue falls under Article 4(1)(c) of the Directive, the charges at issue necessarily constitute capital duty which is, in addition, 'multiple', to which the single rate of 1% provided for in Article 7(2) should be applied. That is because Italy did not comply with the Directive within the prescribed period and did not adopt, either within the time-limit laid down in Article 13 (1 January 1972) or subsequently, capital duty in accordance with the Directive. Furthermore, according to the plaintiff, the exception of Article 12(1)(b) is not applicable in this case because the contribution in question should be regarded as aimed essentially at increasing the assets of SIF. In view of those factors, the plaintiff concludes that the taxation of the contribution of immovable property at issue is contrary to Articles 4, 7 and 10 of the Directive, which have direct effect, inasmuch as the rate applied exceeds the single rate of 1%.

26. The Italian Government maintains that the charges at issue are imposed on all transfers of ownership of immovable property and that the rate applied is the same regardless whether an ordinary transfer or a contribution to a company is involved. Accordingly, it is permissible to make such charges on the basis of the derogations in Article 12(1) of the Directive. If the contrary were the case, tax evasion would be facilitated (by means of cost-free transfer of immovable property to capital companies) and the fiscal income of the State would be substantially reduced.

27. The Commission states that although the operative event for the charges at issue is any transfer of assets in general, in view of their effects they must be likened to capital duty. Consequently they fall in principle under the scope of Article 10, but the charges are permissible on the basis of the exemption in Article 12(1)(b) of the Directive. In particular, as regards the registration fee, the Commission observes that it appears to be of a twofold nature, namely it constitutes on the one hand 'capital duty' and on the other hand 'transfer duty'. However in view of the fact that the rate of the charges in question is the same in all cases of transfer of immovable

property in general, the Commission concludes that it is not contrary to Article 12(1)(b) of the Directive. [15]

28. The claims of the plaintiff in the main proceedings cannot be accepted.

29. It must be pointed out, first of all, that contributions of immovable property such as that in question fall, as is not contested, under Article 4(1)(c) of the Directive and consequently are subject to capital duty at the appropriate rates and under the conditions of Article 7.

30. Since such a contribution falls under Article 4, the imposition of any other indirect tax with the same characteristics as capital duty is in principle prohibited pursuant to Article 10(a), subject to the provisions in Article 12. [16]

31. In fact Article 12(1) permits, notwithstanding Articles 10 and 11, the charging, apart from capital duty, in other words *in addition* to capital duty, [17] of the taxes and duties listed exhaustively therein.

32. Consequently, as regards the contribution of immovable property, such as that in issue in the main proceedings, the Member State in question may charge, on the one hand, harmonized capital duty in accordance with Articles 4 to 7 and, on the other hand, a duty on the transfer of immovable property including land registration taxes, in accordance with the express provision of Article 12(1)(b).

From that point of view, the question whether or not the Italian Republic adopted harmonized capital duty within the period prescribed is irrelevant to the present case, contrary to what the plaintiff mistakenly maintains, in view of the fact that at all events Article 12(1)(b) permits the charging of transfer duties on immovable property in addition to any existing capital duty.

33. Nevertheless, it would be contrary to the objectives of the Directives were the Member States to adopt taxes or duties, in the

15 — It is not clear from that line of argument whether the Commission considers that the nature of the registration fee as a 'transfer duty' outweighs its character as 'capital duty', with the result that the fee should fall within the derogating provision of Article 12(1)(b) or whether, on the contrary, it considers that the fee in question should be analysed essentially as two duties, that is to say, capital duty at a rate of 1% and transfer duty at a rate of 3% (in other words the difference between the rate of 4% applicable in this case less 1%) and that the latter rate is not contrary to Article 12(2) of the Directive on the ground that it does not exceed the proper rate for 'similar transactions'.

16 — See *Ponente Carne*, cited in footnote 12, paragraphs 29 and 30.

17 — See *Dansk Sparinvest*, cited in footnote 14, paragraph 9, and also *Denkavit Internationaal*, cited in footnote 12, paragraph 21.

guise of those listed in Article 12(1), which would affect mainly, or more severely, transactions for the raising of capital. Accordingly, the levying of those taxes or duties is subject to certain requirements.

34. The first requirement is laid down expressly in Article 12(2), to the effect that those duties and taxes may not exceed those which are applicable to like transactions in the Member State charging them. Indeed, in that situation, transactions for the raising of capital would end up essentially being taxed twice, which is directly contrary to the Directive.

35. The second requirement is easily discernible from the formulation of Articles 10 and 12 in conjunction with the objective of the Directive. It requires that the national taxes involved should in fact be covered by Article 12(1), otherwise they constitute duties or taxes prohibited on the basis of Article 10 of the Directive.

36. Determination of the duties and taxes permitted on the basis of Article 12(1) is a question of Community law for the Court to decide, [18] as is moreover the classification generally of a national duty or tax for the purposes of the application of Community law. To that end, it is settled case-law that the Court examines the objective characteristics of the tax, duty or charge involved as revealed in the order for reference and the file on the case, and is not bound by its classification under national law. [19]

37. Consequently, in this case too it is necessary to examine whether the charges at issue constitute duties on transfers of immovable property within the meaning of Article 12(1)(b) of the Directive and are not subject to a rate which exceeds that laid down in Article 12(2), in which case their levying is permissible, or whether they do not fulfil the above conditions, in which case they are prohibited, in whole or in part, according to the circumstances, pursuant to Article 10 of the Directive.

Accordingly, the plaintiff's argument that the charges in question should be regarded as capital duty, for the sole reason that they affect contribution transactions falling under Article 4 of the Directive must be rejected,

18 — See *Ponente Carne*, cited in footnote 12, paragraph 41, in which the Court defined 'duties paid by way of fees or dues' referred to in Article 12(1)(e) of the Directive, and paragraph 42 of that judgment, in which a national charge which did not correspond to the above definition was held to fall under the prohibition of Article 10 of the Directive.

19 — See, for example, Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 39.

on the one hand because it circumvents the question of the classification of the charges at issue on the basis of their objective characteristics and on the other because, in any case, Article 12(1)(b) of the Directive refers expressly to transfer duties on the transfer to capital companies of immovable property.

38. In my opinion, charges which, on the basis of general and objective criteria are applied to all or most transactions by which immovable property and/or rights *in rem* over such property are transferred, and not in particular or principally to transactions contributing immovable property to capital companies for the purpose of increasing their capital, should be regarded as 'transfer duties on the transfer of immovable property' under Article 12(1)(b). Furthermore, special charges made on the occasion of registration formalities which are necessary to complete and validate such transfer transactions as against third parties should be regarded as land registration taxes.

39. In this case, as is clear from the written observations of the Italian Government and the Commission, the registration charge (imposta di registro) [20] is made generally on all transfers of immovable property for consideration, including (in the sense, obviously, that they are not excluded) transactions by which immovable property is transferred to capital companies. Moreover, the same observations show that the rates of the charge are the same, whether the contribution of immovable property or other transfers are involved. Accordingly the charge in question indisputably, in my view, falls under Article 12(1)(b) and is not contrary to Article 12(2).

40. The other two charges, as the Commission rightly points out, are clearly 'registration taxes' on transactions by which immovable property is transferred generally, within the meaning of the same provision; moreover, there does not appear to be any differentiation in the rates to the detriment of transactions by which immovable property is contributed to capital companies. Accordingly, for the same reasons, the charges in question must be regarded as permissible on the basis of Article 12 of the Directive.

The Invim

41. Classification of this tax from the point of view of the Directive presents rather more problems.

42. The plaintiff in the main proceedings maintains that the Invim should be regarded as a 'capital duty' within the meaning of the

20 — *Supra*, points 1 and 3.

Directive and that it does not fall within any of the categories listed in Article 12 and, in particular, it does not constitute a transfer duty. The Italian Constitutional Court (Judgments 126/79 and 239/83) have classified it as a duty on the increase in capital on the occasion of a transfer of property.

43. The Italian Government observes that the operative event for the Invim is the increase in the value of the immovable property and consequently the increase in the wealth of the owner of that property. Moreover, the subject of the charge is the transferor rather than the transferee. Accordingly, the Invim falls outside the scope of the Directive. If the Invim fell to be treated as a transfer duty it would affect the fiscal powers of the Member States, it would reduce their public receipts and would facilitate tax evasion.

44. The Greek Government and the Commission share the view of the Italian Government and add that the Invim constitutes a direct tax and accordingly falls outside the scope of the Directive. Consequently, there is no question of the application of either Article 7 or, *a fortiori*, Article 12 of the Directive.

45. I agree with the view of the Italian and Greek Governments and the Commission.

46. As is clear from the observations of the parties, the Invim appears to be of an intermediate character, between a capital tax and income tax, without being identical to either. In fact, the Invim does not affect the owner of capital, but its automatic appreciation for external reasons (such as, for example, the execution of structural work or improvements by the State in the area surrounding the property), whilst it does not appear to be income tax in the narrow sense, in other words, charged annually on the source of income arising. [21]

47. In order to classify that tax from the point of view of the Directive, account must be taken, first, of the fact that the operative event is not the transaction transferring the immovable property, or *a fortiori* the transaction contributing the immovable property, as the plaintiff in the main proceedings wrongly maintains, but the *fact* of an increase in the value of the immovable property over a certain period, in other words between the time when it was acquired and the time when it was transferred or, in the case of the immovable property of companies, over a period of ten years. Accordingly, as has been held by the Italian Constitutional Court, the transfer of the immovable property constitutes merely the 'occasion', in other words the causal event on the occasion of which the increase in the value of the immovable property is ascertained. Accordingly, the operative event for the Invim is not

21 — For the question of the nature of taxes on the appreciation of capital, including tax on the appreciation in value of immovable property, see Lucien Mehl and Pierre Beltrame: *Science et technique fiscales*, P. U. F., 1984, p. 408 et seq.; Guy Gest and Gilbert Tixier: *Manuel de droit fiscal*, Paris, L. G. D. J., 1986, p. 88 et seq. and p. 94 et seq.

identical to the operative event for capital duty purposes, which is the transfer of immovable property to a capital company for the purpose of increasing its capital.

48. Secondly, the basis of the tax is not the actual value of the immovable property at the time of transfer, as it is for harmonized capital duty (Article 5 of the Directive), but, as set out above, the difference between the value on acquisition and the value on transfer. That difference, inasmuch as it exists, necessarily corresponds to part of the actual value of the immovable property. Since the difference may be nil (where there is no increase) or negative (as, for instance, in a case where immovable property has fallen in value either for general reasons or for reasons relating to the area in which the property is located), then, logically, it is not possible to levy a tax on appreciation.

49. Thirdly, as is clear from the order for reference, on transfers for consideration the Invim is charged to the transferor (in this case the members) and not on the capital company. That is a characteristic of direct taxes rather than indirect taxes, which are passed on as a rule to third parties, and among which is included, by definition, capital duty.

50. Fourthly, from the observations of the Italian Government, according to which the Invim is charged on the 'increase in wealth' arising for the owner of the immovable property on the ground of the appreciation in its value, but also from the structure of the tax as a whole, it follows that the appreciation in the immovable property is regarded as a benefit which the owner has obtained from the immovable property and consequently as 'income', in the broad sense, from the immovable property, which is a characteristic reinforcing the classification of the Invim as a direct tax.

51. Fifthly, that interpretation is also supported by the periodic nature of the Invim in certain cases (that is to say the ten-yearly taxation of the appreciation in the value of the immovable property of companies), which is a characteristic of direct taxes.

52. In view of the foregoing, I conclude that the Invim is different from the capital duty which the Directive seeks to harmonize. It appears to be a direct tax and as such falls outside the scope of the Directive, as the Court held in connection with income tax. [22] Consequently, there is no need to review the Invim from the point of view of Article 10 and Article 12 of the Directive, or reply to the last part of Question 2.

22 — Case C-287/94 *Frederiksen* [1996] ECR I-4581, paragraphs 20 and 21. See also Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, according to which, as Community law stands at present, direct taxation does not as such fall within the purview of the Community. It is worth pointing out that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1), includes taxes on capital appreciation under direct taxes and in particular under taxes on income and on capital (Article 1(2)).

V — Conclusion

53. I would accordingly suggest that the questions referred to the Court should be answered as follows:

(1) Article 12(1)(b) of Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital should be interpreted as meaning that, in the event of an increase in the capital of a capital company by the contribution of immovable property, the levying of a registration charge, a mortgage registration fee and a Land Register fee such as those at issue in the main proceedings is permissible, subject to the provisions of Article 12(2).

(2) A tax on the appreciation in value of immovable property such as the Municipal tax on the increase in the value of immovable property (Invim) at issue in the main proceedings, levied in the event of such a contribution of immovable property, does not fall within the scope of Directive 69/335.