AGAS v AMMINISTRAZIONE TRIBUTARIA DI MILANO

OPINION OF ADVOCATE GENERAL COSMAS

delivered on 25 June 1998 *

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* Original language: Greek.

I — Preliminary remarks

1. In the present proceedings, the Commissione Tributaria Provinciale (Provincial Tax Court), Milan, asks the Court to interpret the provisions of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital. [1]

2. The questions raised are aimed essentially at ascertaining whether the merger by acquisition of one company by another company which already holds 100% of the capital of the former falls within the scope of this Directive and the consequences that ensue with regard to the application of national legislation — in this instance Italian legislation — which provides for registration duty to be levied in such a case.

II — Legal background

A — *Community law*

3. Under Article 1 of Directive 69/335, 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9 and hereinafter called "capital duty"'.

4. Article 3 of Directive 69/335 specifies the capital companies to which the provisions of the directive apply; these include joint stock companies (società per azioni) and limited liability companies (società a responsabilità limitata) under Italian law.

5. Article 4, Article 8 as amended by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335 [2] and Article 9 list, subject to the provisions of Article 7, the transactions on which capital duty is payable and certain transactions which Member States may exempt from that duty. [3]

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

2 — OJ 1985 L 156, p. 23.

3 — Articles 5 and 6 of Directive 69/335 lay down the basis of assessment of the duty in question.

6. In particular, pursuant to Article 4(1)(c) and (d), the following transactions are subject to capital duty:

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

(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'.

7. By virtue of Article 4(2)(b), capital duty may be charged *inter alia* [4] 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, but which do result in variation in the rights in the company or which may increase the value of the company's shares'.

8. Article 5 [5] defines the amount on which duty is payable, which is generally either the actual or the nominal value of the contribution.

9. In addition, Article 7 of Directive 69/335 originally laid down a range of rates within which Member States were free to set the rates applying on their territory, and provided for the mandatory or optional application of preferential rates depending on the type of transaction being taxed.

10. In concrete terms, for capital-raising transactions such as those described above, Article 7(1)(a) of Directive 69/335 originally provided that the rate of capital duty could be between 1% and 2%. This rate was subsequently reduced to 1% with effect from 1 January 1976. [6]

4 — Directive 85/303 (cited above) replaced the introductory phrase of Article 4(2) with the following:
'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:'.

5 — As amended by Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive No 69/335 (OJ 1974 L 303, p. 9).

6 — Article 1 of Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15).

11. Finally, Article 7 of Directive 69/335, as amended by Article 1(2) of Directive 85/303, now provides as follows:

'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. ...'

12. However, as I emphasised in my Opinion in *Bautiaa and Société Française Maritime*, [7] the special provision — Article 7(1)(b), as it now applies as amended by Directive 85/303 — subsumes the previous version in Directive 69/335, especially as regards the conditions governing exemption from the duty.

13. Specifically, Article 7(1) of Directive 69/335 provided as follows in relation to capital duty:

'1. Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph 2:

(a) ...

(b) this rate shall be reduced by 50% or more when 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

7 — Point 31 of my Opinion in Joined Cases C-197/94 and C-252/94 [1996] ECR I-505.

in the process of being formed or which are already in existence.

This reduction shall be subject to the condition that:

— the *consideration* for the contributions shall *consist exclusively of the allocation of shares in the company or companies*, although Member States shall have the right to extend application of the reduction to cases in which the consideration for contributions consists of the allocation of shares in the company or companies together with a payment in cash not exceeding 10% of the nominal value of the shares;

— the companies taking part in the transaction have their effective centre of management or their registered office within the territory of a Member State;

(c) ...' (my italics).

14. In accordance with its final recital, Directive 69/335 also provides for the abolition of other indirect taxes with the same characteristics as capital duty or stamp duty on securities, the retention of which might frustrate the objectives pursued by the directive. These indirect taxes, the charging of which is prohibited, are listed in Articles 10 and 11 of Directive 69/335.

15. Article 10 of Directive 69/335 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;

...'

16. Article 12(1) of Directive 69/335 sets out an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may be levied on capital

companies in connection with the transactions referred to in those Articles. [8]

17. Specifically, Article 12(1)(c) of the directive mentions, *inter alia*, 'transfer duties on assets of any kind transferred to a company, firm, association or legal person operating for profit, in so far as such property is transferred for a consideration other than shares in the company'.

18. Lastly, pursuant to Article 13, the measures necessary for implementation of the Directive had to be adopted by 1 January 1972 at the latest.

B — *National legislation*

19. It appears from the application initiating proceedings before the national court, which is annexed to the order for reference, that Article 7 of the enabling law in respect of tax reform (Law No 825 of 9 October 1971, entitled 'legge delega per la riforma tributaria'), which transposed Directive 69/335 into national law, provided that 'the rules on the levying of registration duty ... shall be reviewed and brought into line with the Directive of the Council of Ministers of the European Community of 17 July 1969 concerning indirect taxes on the raising of capital'.

20. Article 4 of the Tariff contained in Annex A of Presidential Decree No 634/72 on registration duty, previously in force, made merger transactions subject to the rates applicable to capital increases, reduced by 50%, differentiating them on the basis of the type of assets involved.

21. By Law No 904 of 16 December 1977, the Italian legislature, once again with the purpose of bringing Italian legislation into line with Directive 69/335, provided for the application of a 'single rate of 1% of the net value of the companies involved in the merger, as shown in their balance sheets drawn up in accordance with Article 2502 of the Civil Code'.

22. At the time of the facts in the present case, the applicable provisions of national law were set out in Presidential Decree No 131 of 26 April 1986 approving the consolidated provisions on registration duty [9] (hereinafter 'Presidential Decree No 131/86').

8 — See in this regard Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 21, and Case 36/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 9.

9 — Approval of the consolidated text of the provisions on registration duty [*Supplemento ordinario alla Gazzetta ufficiale della Repubblica italiana (GURI)* of 30 April 1986, No 99].

23. Article 1 of Presidential Decree No 131/86, entitled 'Attachment of registration duty', provided as follows:

'1. Registration duty shall be payable, in accordance with the Tariff appended to this consolidated law, on deeds subject to compulsory registration and on those voluntarily submitted for registration.'

24. Under Article 2 of Presidential Decree No 131/86, entitled 'Deeds subject to registration', any deed listed in the Tariff, if concluded in writing on the territory of the (Italian) State, was subject to registration in accordance with the subsequent provisions of that Decree, (*inter alia*, subparagraph (a)).

25. Article 4 of the Tariff annexed to Presidential Decree No 131/86 (Part I, entitled 'Deeds subject to registration within a fixed period') provided that registration duty was payable on, *inter alia*:

'I. Deeds of companies of any type and purpose, whether ...:

...

(b) mergers between companies, divisions of companies and similar transactions effected by bodies other than companies: 1%.

...'

26. The rate of duty set by Article 4(b) of the Tariff, Part I, set out in Presidential Decree No 131/86, which was in force at the time of registration of the deed at issue, was therefore the same as that laid down in Law No 904/77, which had applied previously.

27. However, the legislature itself stated, in Explanatory Note No IV concerning Article 4 of the Tariff, Part I, set out in Presidential Decree No 131/86, that 'if the company receiving the capital contribution or the company resulting from the merger or the acquisition ... has its registered office or administrative headquarters in another Member State of the European Economic Community', tax will be payable at a flat rate.

28. The basis of assessment of the duty in question is set, specifically for merger transactions, by Article 50(4) of Presidential Decree No 131/86, which provides:

'In the case of mergers between companies of whatever type, the basis of assessment shall consist of the amount, shown in the balance

sheets referred to in Article 2502 of the Civil Code, of the capital and reserves of the merged companies or, if the merger is effected by acquisition, of the acquired companies.' [10]

III — Facts

29. Abruzzi Gas AGAS SpA (hereinafter 'Agas') is a joint stock company ('società per azioni') incorporated under Italian law, and primarily engaged in the production and distribution of methane gas.

30. Agas held the entire capital of Briangas SpA (hereinafter 'Briangas'), also a joint stock company, and Italgasdotti Serio Srl, a limited liability company (hereinafter 'Italgasdotti').

31. During the oral procedure the Commission stated that Agas was the parent company and that Briangas and Italgasdotti were its subsidiaries.

32. The general meetings of shareholders and members of these companies decided on their merger: Agas would absorb Briangas and Italgasdotti.

33. During the oral procedure, the Italian Government stated that prior to the merger Agas had acquired all stocks and shares in Briangas and Italgasdotti, but had not thereby strengthened its own economic potential, since its balance sheet shows a disbursement equivalent to the purchase price. As the Italian Government explained, Agas thus purchased the stocks and shares in Briangas and Italgas-

10 — Article 50(4) (cited above) of Presidential Decree No 131/86 was repealed by Decree-Law No 323 of 20 June 1996 (GURI No 143 of 20 June 1996), which was ratified by Law No 425 of 8 August 1996 (GURI No 191 of 16 August 1996) [see Article 5(b) of the Decree-Law]. Article 4(c) of Decree-Law No 323 replaced the previous proportional duty of 1% with a flat-rate duty of LIT 250 000 with effect from 20 June 1996. It is for this reason that disputes involving registration duty charged on mergers relate only to deeds drawn up before that date, as in the present case.
It is interesting to read the statement of the reasons for Decree-Law No 323/96, which the Commission cites in its written observations. The report relating to this Decree-Law was published in *Atti Parlamentari — Senato della Repubblica — XIII Legislatura*, No 757, pp. 10 and 11.
'As regards paragraph 5(b) and (c), Community Directive 335 of 1969, as amended by Directive 303 of 1985, provides that the proportional duty on contributions of capital, which in our legal system takes the form of registration duty, shall not be applicable to company deeds relating to the transfer by one or more companies of all their assets and liabilities in existence or in the course of being formed, in order to prevent the duty from also being applied to contributions that have previously been subject to duty on transfers in respect of transactions which, in our legal system, take the form of mergers, divisions or transfers of businesses entailing only a regrouping or reorganisation of productive entities in order to rationalise corporate structures (termed "cascade" taxation).
The Member States of the European Union have brought their legislation into line with these Community rules; in particular, France recently introduced a flat-rate duty of 1 220 francs for such transactions in place of the proportional duty of 1.20% (the Court of Justice of the European Communities having ruled in the judgment delivered on 13 February 1996 in Joined Cases C-197/94 and C-252/94 that the latter was incompatible with the Community directives).
The Italian State, by contrast, has not yet come into line with these directives, since the proportional rate of 1% is still applicable to such transactions; it has therefore deprived the legal order of an instrument of fundamental importance for the rationalisation of productive structures, in contravention of Community rules which, on account of their binding nature, are considered to be directly applicable in the Member States and which, as such, have permitted the tax courts to consider the exemption applicable in some cases, despite the fact that it has not been incorporated into national legislation.
The abovementioned provisions, which are contained in paragraph 5(b) and (c), are intended to close these gaps by laying down that the abovementioned transactions are to be subject to the flat-rate registration duty in place of the proportional duty in the case of deeds drawn up after the date on which this Decree enters into force.'

dotti by paying the corresponding amounts, and subsequently absorbed both companies.

34. The merger contract was concluded on 20 December 1994 and registered on 28 December 1994 at the Ufficio del Registro Atti Pubblici (Public Documents Registration Office; hereinafter the 'Ufficio del Registro'), Milan.

35. The merger did not entail any increase in the capital of Agas but its shares in Briangas and Italgasdotti — companies which it already owned — were cancelled.

36. As a result of the merger, Briangas and Italgasdotti transferred assets to Agas with a net value of LIT 1 439 682 051 and LIT 22 105 502 520 respectively.

37. The Ufficio del Registro, to which the official merger document was submitted for registration, charged the sum of LIT 236 052 000 by way of registration duty at a rate of 1% of the net assets of the merged companies as shown in their balance sheets prepared for the purposes of the merger.

38. On 11 July 1996 Agas applied to the Ufficio del Registro for reimbursement of the registration duty paid, together with interest. It maintained that the national provision [11] on the basis of which this duty had been charged was contrary to Articles 4 and 7 of Directive 69/335, as amended, which make provisions for tax concessions — entailing the charging of registration duty at the flat rate — in respect of certain capital transactions such as mergers by acquisition. [12]

39. The Ufficio del Registro did not respond. Surmising that its request had been rejected, Agas brought an action on 13 November 1996 before the Commissione Tributaria Provinciale di Milano.

IV — Question referred for a preliminary ruling

40. The Commissione Tributaria Provinciale di Milano, considering that the interpretation of the applicable Community provisions needed to be clarified in order to resolve the

11 — Article 4(b) of the Tariff, Part I, annexed to Presidential Decree No 131/86.

12 — As the Italian Republic explains in its written observations, Agas requested reimbursement of the sum of LIT 220 863 000, corresponding to the difference between the duty paid (LIT 221 013 000) and the flat-rate duty payable (LIT 250 000); it is obviously an oversight that the Italian Republic speaks of a fixed duty of LIT 150 000, whereas Presidential Decree No 323/86 indicates that the duty amounts to LIT 250 000.

case pending before it, stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Do the provisions on the harmonisation of indirect taxes on contributions of capital to capital companies in the Union also relate to merger by acquisition of one company by another company which already owns 100% of the capital of the former?'

V — Reply to the question referred for a preliminary ruling

41. It must first be pointed out that the national court, in its succinct order for reference, does not specify which provisions of Community law it is asking the Court to interpret. Nevertheless, from the facts in the present dispute and the legal points raised, it can be deduced that in essence the national court seeks an interpretation of Articles 4(1)(c) and 7(1)(b) of Directive 69/335, as amended by Directive 85/303.

42. It should next be observed that both Agas and Briangas are joint stock companies (società per azioni) incorporated under Italian law. Italgasdotti is a limited liability company (società a responsabilità limitata). Consequently, all three companies fall within the scope *ratione personae* of Directive 69/335.

43. As regards the question asked by the national court — whether the provisions of Directive 69/335, as amended, apply to the merger by acquisition of one company by another company which already owns 100% of the capital of the former and, consequently, whether national legislation (in the present case, Italian legislation) is compatible with Directive 69/335 — I believe that the following method of analysis should be adopted. [13] First, it is necessary to determine whether Directive 69/335 covers a transaction such as the one to which the dispute in the main proceedings relates and which gave rise to the charging of registration duty, and to classify this transaction in the light of the directive (A). If we conclude that such a transaction does indeed fall within the scope of the directive, as defined more specifically in Article 4, we shall then examine whether, under Community law, it qualifies for the preferential treatment provided for in Article 7(1) of Directive 69/335, as amended (B). Finally, we shall ascertain whether the rate of duty laid down in the disputed provision of Italian law is compatible with Directive 69/335, as amended (C).

13 — With regard to the method of analysis to be followed, we can refer to the guidance provided by the Court in *Bautiaa and Société Française Maritime* (cited in footnote 7 above, at paragraph 31).

A — *Whether Directive 69/335 covers the merger by acquisition of one company by another company which already owns the entire capital of the former*

44. According to the Italian Government, the acquisition of an undertaking which is 100% controlled by the acquiring company cannot qualify for exemption from duty under Article 7(1)(b) of Directive 69/335, as amended, because consideration for the transfer does not consist exclusively of the allocation of shares. However, at the end of its analysis, the Italian Government states that, since the aim of Directive 69/335 is to harmonise indirect taxation on the raising of capital, cases in which no increase in capital occurs, such as the present one, do not fall within its scope.

45. The Commission, by contrast, maintains that a merger by acquisition of this kind is covered by Article 4(1)(c) of Directive 69/335 and that, moreover, it must be exempted from capital duty, as provided for under Article 7(1)(b) of Directive 69/335, as amended, even if consideration does not consist exclusively of the issue of shares to the shareholders of the companies acquired.

46. First of all, it will be recalled that in paragraph 31 of its judgment in *Bautiaa and Société Française Maritime*, the Court ruled on this point that 'it is apparent from Article 1 of the Directive, read in conjunction with Article 4, that the duty levied on contributions to capital companies constitutes a "capital duty" within the meaning of the Directive where it applies to transactions covered by that Directive'. It went on to state, in paragraph 32, that 'the transactions which are or may be rendered subject to the harmonised capital duty by the Member States are defined objectively, and with uniform application to all Member States, in Article 4 of the Directive, without reference to any specific aspects of their individual domestic legislation or to the way in which national tax systems are organised'.

47. Consequently, it is necessary to determine whether, in the case of a merger by acquisition such as that at issue, it is possible to apply Article 4(1)(c) of Directive 69/335, which provides that an increase in the capital of a capital company by contribution of assets of any kind is subject to capital duty.

48. As for the problem of applying Directive 69/335 to mergers between companies, the Court held in *Bautiaa and Société Française Maritime* that although company mergers [14] are not expressly mentioned among the 'transactions ... subject to capital duty' listed in Article 4, they none the less fall within the scope of that provision. The Court stated

14 — The order for reference uses the term 'merger'.

(paragraph 34): 'Such a transaction constitutes an increase in the capital of a capital company by contribution of assets of any kind, within the meaning of Article 4(1)(c) of Directive 69/335, in the particular circumstances referred to in Article 7(1)(b), that is to say, the transfer by one or more capital companies of all of their assets and liabilities to one or more capital companies which are in the process of being formed or which are already in existence.'

49. Thus in *Bautiaa and Société Française Maritime* [15] the Court used the term 'merger' in a broad sense, encompassing among the various forms of merger both those where an increase in capital is effected 'by contribution of assets of any kind' (referred to in Article 4(1)(c) of Directive 69/335) and those where a joint stock company transfers all its assets and liabilities to another joint stock company, the latter type of transaction being covered by the special exemption provided for in Article 7(1) of the directive.

50. In paragraph 36 of its judgment in *Bautiaa and Société Française Maritime*, the Court also stated: '[f]irst, 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 (the "acquiring company") by the contribution to it of the whole of the assets of another company (the "company acquired"); second, the purpose 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; [a]s regards the latter point, the Court noted, in paragraph 14 of its judgment in Case C-15/89 *Deltakabel* [1991] ECR I-241, that the decisive test to be satisfied in order for a capital-raising transaction to attract capital duty is the strengthening of the economic potential of the company benefiting from it.'

51. Furthermore, in paragraph 37 of the judgment in *Bautiaa and Société Française Maritime* the Court held that '[i]t follows that, in the two disputes in the main proceedings, the transaction whereby the company acquired capitalised its reserves merely constituted a capital-raising transaction which was not completed, for the purposes of the application of the directive, until the *acquiring company's capital was increased by the contribution* to it of the assets of the company acquired; [i]t is only when the amalgamation of the two companies is finally completed that the *criterion of the strengthening of economic potential* is fulfilled and the levying of capital duty, at the rate fixed by Article 7(1)(b) of Directive 69/335, is justified' (my italics).

15 — At paragraph 34. See also Case C-8/96 *Locamion* v *Directeur des Services Fiscaux d'Indre-et-Loire* [1997] ECR I-7055, paragraph 20. In *Bautiaa and Société Française Maritime*, the company acquired (SNMTP) had transferred to the acquiring company (Bautiaa) under the merger its entire assets in consideration for the allocation of 142 new shares in Bautiaa.

52. In paragraph 38 the Court reached the following conclusion: '[i]t would appear, therefore, that transactions of the type at issue in the main proceedings fall within the scope of Directive 69/335, and that they must be examined in the light of Article 4(1)(c) of that directive (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), as amended by Directive 85/303'.

53. Consequently, for the purposes of Article 4, the Court has consistently held [16] that 'the *decisive test* to be satisfied in order for a *capital-raising transaction* to attract capital duty is the *strengthening of the economic potential* of the company benefiting from it' (my italics).

54. In the present case, where the transaction in issue is a merger by acquisition, [17] it is necessary to determine whether capital was raised and Agas's capital increased, and whether the economic potential of the acquiring company was strengthened.

55. The first point to note is that at the time of the merger Agas already held 100% of the capital of Briangas and Italgasdotti — the acquired companies — and that their shareholders did not receive shares in consideration; instead, the acquiring company's holdings (shares) in these companies were cancelled. The acquisition of majority holdings, prior to the merger transaction, by means of the acquisition of shares, did not, as the Italian Government confirmed during the oral procedure, entail any loss of legal personality on the part of the two companies acquired, which, according to the Commission, were subsidiaries of the acquiring company. They lost their legal personality as a result of the merger transaction. [18]

56. Clearly, the merger effected by means of the acquisition of Briangas and Italgasdotti by Agas did not entail *any increase* in the latter's capital, as required by Article 4(1)(c) of Directive 69/335. [19]

16 — See, for example, *Bautiaa and Société Française Maritime* (cited in footnote 7 above, paragraph 36) and Case 270/81 *Felicitas* [1982] ECR 2771, paragraph 16, and the later judgments in *Dansk Sparinvest* (cited in footnote 8 above, paragraphs 13 and 14) and *Deltakabel* (cited above, paragraph 14).

17 — According to French legal writings and case-law, a merger has three characteristics: (a) it leads to the complete transfer of both the assets and the liabilities of the company acquired to the acquiring company; (b) it entails the dissolution of at least one of the companies involved; (c) it entails the allocation of new shares as consideration for the injections of capital; see, for example, J.-P. Bertrel and M. Jeantin, *Acquisitions et fusions des sociétés commerciales*, Paris, Litec, 2nd ed., 1991, pp. 331—341, paragraphs 776—797.

18 — See, for example, J. Hémard, F. Terré and P. Mabilat, *Sociétés Commerciales*, Vol. 3, Paris, Dalloz, 1978, paragraph 780, p. 596.

19 — See *Locamion*, cited in footnote 15 above, paragraph 21.

57. However, it must not be overlooked that the contribution of the net assets of Briangas and Italgasdotti [20] to Agas, albeit not entailing any increase in the share capital of the acquiring company, nevertheless led to an 'increase in its assets' and, in any event, strengthened its economic potential, given that the merger transaction is 'likely to increase the value of the company's shares' as a result of the contribution of the assets of the companies acquired. [21]

58. More specifically, even though Agas already held 100% of the shares of the two companies acquired, it was not legally the owner of their assets or, generally speaking, of their overall assets and liabilities, as the Commission maintained during the oral procedure. It was only after the merger that it acquired full rights over the assets of the two companies [22] and that, by reason of that fact, its economic potential was undeniably strengthened.

59. Clearly, the case-law shows that the increase in the economic potential of a company is an essential precondition for applying the provisions of Directive 69/335. However, on the basis of a particular provision of that directive, [23] the Court has held that certain transactions are subject to capital duty, even if they do not entail any increase in the company's share capital (see *Siegen*, [24] *Deltakabel*, [25] *Trave Schiffahrts-gesellschaft* [26] and *Frederiksen* [27]).

60. On the evidence submitted to the Court by the parties, the accuracy of which it is obviously for the national court to verify, the merger by acquisition in December 1994 cannot be seen as the culmination of a strategy to increase the capital of Agas, accomplished earlier through its purchase of the entire share capital of Briangas and Italgasdotti, 'so that the two transactions can be viewed together as a single transaction carried out in two

20 — This contribution amounted to approximately LIT 23.6 billion.

21 — See Case C-287/94 *Frederiksen* v *Skatteministeriet* [1996] ECR I-4581, paragraph 13.

22 — By way of example, the Commission refers to the land, buildings, plant, stocks, patents, claims and bank accounts of the companies acquired.

23 — This was permitted by Article 4(2)(b) (cited above) of Directive 69/335.

24 — Case C-38/88 [1990] ECR I-1447, paragraph 13; in that case, the Court held, *inter alia*, that when a company has incurred losses which one of its shareholders agrees to absorb, that shareholder thereby increases the company's assets within the meaning of Article 4(2)(b) of Directive 69/335.

25 — A judgment (cited above in paragraph 50) in which the Court found that where a parent company waives all or part of its claim against a subsidiary and thereby relieves it of a liability, capital duty may be levied under Article 4(2)(b) of Directive 69/335.

26 — In this judgment (Case C-249/89 [1991] ECR I-257) the Court ruled that Article 4(2)(b) of Directive 69/335 allows Member States to charge capital duty on an interest-free loan granted by a member of a heavily over-indebted capital company to that company on the basis of the loan's utility value, that is to say, the amount of interest saved, which is to be determined by the national court.

27 — In this judgment (cited in footnote 21 above), the Court ruled that where a subsidiary benefits from an interest-free loan from its parent company, Article 4(2)(b) of Directive 69/335 is applicable to the amount of interest saved.

stages', falling within the scope of the directive. [28]

61. It should be recalled that during the oral procedure, the Italian Government stated that at a stage prior to the merger Agas had purchased all the shares in Briangas and Italgasdotti and that its balance sheet showed a disbursement equivalent to the purchase price. Agas therefore acquired the shares in Briangas and Italgasdotti, the companies which it subsequently absorbed, by paying a sum equivalent to the value of those shares.

62. On the facts, therefore, Agas's capital was not increased by assets of any kind, whether before or during the merger/take-over procedure. Thus, the condition laid down in Article 4(1)(c) of Directive 69/335, fulfilment of which would have made this transaction subject to capital duty, was not satisfied.

63. Furthermore, as can be deduced from Article 4(1)(c) and Article 4(1)(d) of Directive 69/335, read together, consideration for contributions of assets which lead to an increase in capital must consist in the allocation of shares in the capital which clearly was not the case here. [29]

64. Moreover, if the contribution of the assets of Briangas and Italgasdotti is deemed to have increased the *assets* [30] of Agas, Article 4(1)(d) of Directive 69/335 cannot apply to the case at issue, since it expressly requires that the consideration for contributions in kind be rights of the same kind as those of members (not shares in the capital or assets of the company), which was manifestly not the case here.

65. Nor is it possible to apply Article 4(2)(b) of Directive 69/335, because an increase in assets, which this provision establishes is in principle not subject to capital duty, may be so if it was taxed at the rate of 1% as at 1 July 1984, but this provision presupposes first a contribution from a person who is already a shareholder in the company and secondly a counterpart to that contribution.

28 — In contrast to the Court's finding on the facts of *Locamion* (cited in footnote 15 above, paragraph 23).

29 — See point 36 of my Opinion in *Locamion* (cited in footnote 15 above) and point 22 and footnote 16 of my Opinion in *Bautiaa and Société Française Maritime* (cited in footnote 7 above).

30 — It should be remembered that company assets, as distinct from company capital, are subject to fluctuations which may possibly, but not necessarily, lead to an increase in capital; see, for example, G. Vuillermet, 'Droit des sociétés commerciales', 3rd ed. of the work by G. Hureau, in the collection *Sciences économiques commerciales*, Vol. 1, Paris, Dunod, 1969, pp. 35-37.

66. To my mind, it cannot be deduced from the foregoing that, in accordance with *Bautiaa and Société Française Maritime*, Article 4(1)(c) of Directive 69/335 automatically applies to any merger or contribution of assets by one company to another as part of a merger. For a merger to be subject to the latter provision, it is necessary, *inter alia*, that there be an increase in capital and that the consideration for the contribution of capital be shares representing the capital.

67. As a consequence, given the facts stated by the Italian Government during the oral procedure, I come to the conclusion that the provisions of Directive 69/335 do not apply to the merger by acquisition of one company by another company which already owns all the capital of the former. Accordingly, in such a case they do not prohibit the charging of registration duty such as the Italian duty at issue.

B — *The application of Article 7(1)(b) of Directive 69/335, as amended by Directive 85/303*

68. As a secondary consideration, and solely for the sake of completeness, I shall now examine whether it is possible to apply Article 7(1)(b) of Directive 69/335, as amended by Directive 85/303, to the merger by acquisition of one company by another company which already owns the entire capital of the former.

(a) Non-application of Article 7(1)(b) to the merger by acquisition of one company by another company which already owns the entire capital of the former

69. The present case is distinguished [31] by the fact that it relates to companies (Briangas and Italgasdotti) entering into a merger by acquisition with another (Agas), which already owns 100% of their capital.

70. The Italian Government maintains that Community law, and in particular Directive 69/335, does not prevent the application of a national measure providing for the payment of duty in such a case. More precisely, it begins by observing that the merger entailed no increase in the capital of Agas and asserts that Article 7 of Directive 69/335, as amended by Directive 85/303, is not applicable, since an essential condition has not been satisfied, namely that shares be allocated in consideration of the contribution of capital. In the view of the Italian Government, it was there-

31 — Cf. *Bautiaa and Société Française Maritime* (cited in footnote 7 above), which came before the Court earlier.

fore correct to charge the proportional duty provided for in national legislation.

71. Clearly, the doubts of the national court and the objections of the Italian Government stem from the fact that the second paragraph of Article 7(1) of Directive 69/335, as amended by Directive 85/303, provides that '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'; in other words the exemption is subject to these conditions. It will be recalled that the first of these conditions is the one stated in the first indent of Article 7(1)(b) of Directive 69/335, which requires that '*the consideration* for the contributions *shall consist exclusively of the allocation of shares*' (my italics).

72. In the present case, however, the consideration for the acquisition of Briangas and Italgasdotti by Agas did not consist in the allocation of shares, since the merger entailed no increase in the capital of the acquiring company but only the cancellation of its shareholdings in the companies acquired, which already appeared on the assets side of its balance sheet.

73. The specific nature of the overall procedure followed by Agas led the national court to ask the Court of Justice whether the exemption from capital duty provided for by Article 7(1) of the Directive applies equally in cases where, by reason of the absolute control exercised by the acquiring company over the companies acquired, no shares are issued or — obviously — allocated by the acquiring company. [32]

74. According to settled case-law, [33] as the recitals in the preamble indicate, Directive 69/335 aims 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 far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States and their replacement by a charge levied once only in the common market and at the same level in all the Member States.

75. Directive 69/335 therefore provides for capital which has been raised to be subject to

32 — In *Bautiaa and Société Française Maritime* (cited in footnote 7 above), no mention is made of the second indent of Article 7(1)(b) of Directive 69/335, since it was not material to the dispute pending before the national court. It should be remembered that in *Bautiaa and Société Française Maritime* the company acquired (SNMTP) had transferred its entire assets to the acquiring company (Bautiaa) under the terms of the merger and that the consideration for the contribution had been the allocation of 142 new shares in Bautiaa with a nominal value of FF 142 each. Consideration for the transfer to Bautiaa had therefore been made by allocating shares.

33 — See especially *Denkavit Internationaal and Others* (cited in footnote 8 above, paragraph 16 et seq.) and Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* v *Amministrazione delle Finanze dello Stato* [1993] ECR I-1915, paragraph 19 et seq. and Case 161/78 *Conradsen* v *Ministeriet for Skatter og Afgifter* [1979] ECR 2221, paragraph 11.

a capital duty, which, as stated in the sixth and seventh recitals in the preamble, should be harmonised within the Community with regard both to its structure and its rates, so as not to interfere with the movement of capital. [34] That capital duty is governed by Articles 2 to 9 of the Directive.

76. Article 7(1) of Directive 69/335 states that the rate of capital duty is to be reduced by 50% or more when 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 same provision also states that the reduction in the rate of duty — or, after the amendment introduced by Directive 85/303, the exemption from capital duty — is to be subject to the condition that the *consideration for the contributions shall consist exclusively of the allocation of shares* in the company or companies, although Member States shall have the right to extend application of the reduction (or exemption) to cases in which the consideration for contributions consists of the allocation of shares in the company or companies together with a payment in cash not exceeding 10% of the nominal value of the shares.

77. Article 7(1)(a) therefore sets the rate of capital duty and Article 7(1)(b) expressly governs when the rate is to be reduced by way of exception, or, after the amendment introduced by Directive 85/303, when certain transactions are to be exempted from capital duty, in the strictly limited cases to which I have referred above. The very fact that an exception is involved means that the text must be narrowly construed. [35]

78. From the abovementioned provisions, interpreted in conjunction with one another, it emerges that the Community legislature did not wish to apply this more favourable system of exemptions to the acquisition of one capital company by another and hence to cases in which the consideration for a capital contribution is the allocation of shares together with payment in cash of more than 10% of their nominal value.

34 — See, for example, *Denkavit Internationaal and Others* (cited in footnote 8 above, paragraph 17), *Ponente Carni and Cispadana Costruzioni* (cited in footnote 33 above, paragraph 20) and *Conradsen* (cited in footnote 33 above, paragraph 11).

35 — The need for provisions derogating from a general principle to be interpreted strictly is also evident from the case-law of the Court on cases interpreting legislation on the taxation and exemption of certain transactions. For example, the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), provides that a *specific list* of activities shall, by way of exception, be exempted from VAT (Article 13). As they constitute exemptions to a general principle, a strict interpretation is adopted because, as the Court has ruled (Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraphs 13 and 14), any interpretation which broadens the scope of Article 13(A) would be incompatible with the objective of that provision. As the Court has further stated (see Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 17, and Case 348/87, cited above, paragraph 12), 'Article 13 of the Sixth Directive does not provide exemption for every activity performed in the public interest, but only for those which are listed and described in great detail'. The Court refused to give a broad interpretation of the exemptions provided for by the Directive in cases where it had not been demonstrated that factors existed permitting the exemption to be extended beyond the scope provided for in the provisions in question, and specifically by Article 13 (see Case 107/84, cited above, paragraph 20, and point 16 of the Opinion of Advocate General Darmon in Case C-63/92 *Lubbock Fine* v *Commissioners of Customs and Excise* [1993] ECR I-6665).

79. In my opinion, those provisions also demonstrate *a fortiori* that the Community legislature did not wish this more favourable system of exemptions to apply to cases in which no shares at all are allocated in consideration for capital contributions for the reason that, at the time of a merger by acquisition, the acquiring company owns all the shares of the companies acquired, having purchased them prior to the merger. The application of this regime to cases of that kind would be contrary to the purpose of the provision in question, which is to promote the free movement of capital by facilitating the regrouping and development of undertakings.

80. The Italian Government points out that Article 12(1)(c) of Directive 69/335 expressly provides for Member States to levy the duty by way of derogation from Articles 10 and 11 thereof.

81. *By derogation from* Articles 10 and 11, Article 12(1)(c) of Directive 69/335 — which is even more specific — permits Member States to charge not only capital duty but also transfer duties on assets of any kind transferred to a company in so far as such property is transferred for a consideration other than shares in the company.

82. As the Court has held, 'Article 12(1) of Directive 69/335 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'. [36] Consequently, Article 12 authorises the charging of duties which in principle are prohibited, that is to say, which in principle fall within the scope of Articles 10 and 11.

83. Since the registration duty at issue does not fall within the scope of Directive 69/335, [37] such taxation is not incompatible with that Directive. It is unnecessary, therefore, to determine whether or not the charge falls within the scope of Article 12. [38]

84. Simply in order to complete this analysis, I shall now examine whether it can be proved that factors exist which make it possible, as the Commission maintains, to extend the exemption provided under Article 7(1)(b) to the present case.

36 — See *Denkavit Internationaal and Others*, paragraph 21, and *Dansk Sparinvest*, paragraph 9, both cited in footnote 8 above.

37 — It therefore falls outside the scope of Articles 1, 7(1)(b) and 10 and has nothing to do with the purpose of Article 11, which prohibits the taxing of stocks, shares, bonds or other negotiable securities of the same type.

38 — I reached a similar conclusion in points 63 and 64 of my Opinion in *Locamion* (cited in footnote 15 above), which turned on whether Article 10 of Directive 69/335 prohibited the levying of a tax such as the regional charge on vehicle registration certificates for which French law provided. The Court ruled (at paragraph 36) that since the levying of the charge was not prohibited under Article 10, there was no need to consider whether or not it fell within the scope of Article 12.

(b) Council Directives 78/855/EEC and 90/434/EEC

85. In my Opinion in *Bautiaa and Société Française Maritime*, I pointed out [39] that the term which the national courts used to describe the taxed transactions ('merger transactions') did not appear at all in Directive 69/335. I considered, however, that this was of no importance. Indeed, what was important in that case was that the transactions at issue had the same essential characteristics as those covered by Article 7(1)(b) of the Directive in its original version.

86. However, subsequent directives concerning mergers between companies define this concept in terms of criteria (the transfer of all of the assets and liabilities of company A to company B in exchange for the issue of shares in company B to the shareholders of company A) which are also referred to in Article 7(1)(b) of Directive 69/335.

87. In fact, the legislature has intervened on two subsequent occasions to regulate matters relating to mergers between companies. The legislation in question is Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, [40] and Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. [41]

88. On the basis of the interpretation of these two directives, the Commission concludes that, in listing the transactions exempted from capital duty, the Community legislature omitted to include the merger by acquisition of one company by another company which already owns all of the capital of the former, because such cases were not sufficiently frequent when Directive 69/335 was adopted.

89. Furthermore, the Commission considers that the condition laid down in Article 7(1)(b) of Directive 69/335, namely that 'the consideration for the contributions shall consist exclusively of the allocation of shares in the company or companies', is not applicable to the merger by acquisition of a company of which the capital is already wholly owned by the acquiring company. According to the Commission, it would be absurd, logically and legally, to require in such a case that, as the sole consideration, shares be allocated to the sole shareholder of the acquired company, which is the acquiring company itself. It

39 — See footnote 16 in my Opinion.

40 — OJ 1978 L 295, p. 36.

41 — OJ 1990 L 225, p. 1.

concludes that, since such an allocation is objectively impossible, Article 7(1)(b) does not prevent the exemption from the harmonised capital duty from being applied in a case such as that in the present proceedings.

90. First of all, it should be pointed out that Chapter IV of Directive 78/855, which establishes rules applicable to mergers between companies, lays down specific provisions relating to the 'acquisition of one company by another which holds 90% or more of its shares'; to my mind, therefore, it also applies to cases where the acquiring company holds 100% of the capital of the companies acquired.

91. More specifically, Article 24 of Directive 78/855 provides as follows:

'The Member States shall make provision, in respect of companies governed by their laws, for the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings. Such operations shall be regulated by the provisions of Chapter II, with the exception of Articles 5(2)(b), (c) and (d), 9, 10, 11(1)(d) and (e), 19(1)(b), 20 and 21.'

92. In the case of Agas, Briangas and Italgasdotti, in theory neither Article 5(2)(b), (c) or (d) nor Article 19(1)(b) could apply. [42]

93. In practical terms, under Articles 5(1) and (2)(b), (c) and (d) of Directive 78/855:

'1. The administrative or management bodies of the merging companies shall draw up draft terms of merger in writing.

42 — However, the other provisions mentioned in Article 24 could not apply either to the extent that they either relate to share exchanges occurring in the context of mergers or govern the civil liability of certain persons involved in the merger procedure, and consequently they presuppose that at the time of the merger the acquiring company does not own all the capital of the company acquired. In concrete terms, Article 9 of Directive 78/855 concerns the detailed written report on the proposed merger, in particular the share exchange ratio. Article 10 relates to the examination of proposed mergers by independent experts who must, among other responsibilities, state whether the share exchange ratio is fair and reasonable. Article 11(1)(d) concerns the reports mentioned in Article 9, and Article 11(1)(e) the reports by the independent experts mentioned in Article 10. Under Article 20, '[t]he laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the merger'. Finally, under Article 21, 'the laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the experts responsible for drawing up on behalf of that company the report referred to in Article 10(1) in respect of misconduct on the part of those experts in the performance of their duties'.

2. Draft terms of merger shall specify at least:

(a) ...

(b) the share exchange ratio and the amount of any cash payment;

(c) the terms relating to the allotment of shares in the acquiring company;

(d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;

...'

94. Moreover, Article 19(1)(b) of Directive 78/855 provides that:

'1. A merger shall have the following consequences *ipso jure* and simultaneously:

(a) ...

(b) the shareholders of the company being acquired become shareholders of the acquiring company;

...'

95. It can be seen from the abovementioned provisions of Directive 78/855 that when the acquiring company is the sole shareholder of the company or companies acquired, the allocation of shares in the former to the shareholders in the latter is by definition impossible. Indeed, since such an allocation is intended as consideration to the shareholders of the company acquired for the assets they have transferred to the acquiring company, it would be absurd for the latter to remunerate itself for the contribution made by a company which it owned in its entirety and from which it (the acquiring company) benefited.

96. On the other hand, I am not opposed in theory to the Commission's assertion that an examination of Community legislation (Directive 78/855 as well as Directive 69/335) leads us to conclude that the absence of express provisions governing the merger of one company with another which owns it entirely is perhaps due to the fact that in practice such cases were not sufficiently frequent to warrant express action by the legislature or a special chapter in Directive 78/855. Obviously, as its title indicates, Chapter IV of Directive 78/855 contains provisions relating to the acquisition of companies in which the acquiring company already holds 100% of the shares [43] and provisions relating to the acquisition of companies in which the acquiring company does not hold all the capital. [44]

97. Directive 90/434 gives specific and special treatment to the acquisition of a company which is 100% controlled by another. This is significant, given that Directive 90/434 concerns the tax system applicable, *inter alia*, to mergers and in accordance with Article 4(1) is intended to exempt from taxation capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

98. A provision which, in my opinion, deserves special attention is Article 2(a), which contains definitions of the three types of merger to which Directive 90/434 applies. The first and third types, which interest us most because they concern merger by acquisition, [45] are defined as follows:

'[f]or the purposes of this Directive:

(a) "merger" shall mean an operation whereby:

— one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company, and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities,

— ...

43 — Articles 24, 25 and 26 of Directive 78/855: Article 24 concerns the operation whereby one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which is the holder of all their shares and other securities conferring the right to vote at general meetings.

44 — Articles 27, 28 and 29 of Directive 78/855: Article 27 relates to cases of merger where one or more companies are acquired by another company which holds 90% or more, but not all, of the shares and other securities of each of those companies the holding of which confers the right to vote at general meetings.

45 — The second type relates to cases in which two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form.

— a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital'.

99. In the case in point, I observe that there is a clear similarity between the first indent of the second subparagraph of Article 7(1)(b) of Directive 69/335 and the first indent of Article 2(a) of Directive 90/434.

100. In both cases, the Community legislature provided that in consideration for the transfer of all the assets and liabilities of the companies acquired the shareholders of the former companies would be allocated shares in the acquiring companies and, where applicable, a payment in cash not exceeding 10% of the nominal value of the shares. However, this provision applies only to cases in which the acquiring company does not hold all, in other words 100%, of the capital of the companies acquired.

101. Similarly, where the acquiring company holds all the capital of the company acquired, Directive 90/434 provides a specific definition which, as the Commission rightly points out, differs from the first definition in one fundamental respect: the elements characterising this type of merger *do not include the allocation of shares* by the acquiring company to the shareholders of the company acquired. This explicitly confirms one conclusion that can be drawn only indirectly from Article 24 of Directive 78/855: the merger by acquisition of a company whose capital is 100% owned by the acquiring company does not give rise to a distribution of shares to the sole shareholder of the company acquired, which is the acquiring company itself.

102. However, I do not see any need to qualify the conclusion which I have reached with regard to the interpretation of Article 7(1)(b) of Directive 69/335, in its original version, even in the light of the provisions and definitions (of the merger by acquisition of one company by another) in Directives 78/855 and 90/434, which are more recent and more detailed. I do not believe that the method whereby the legal concepts contained in one text are interpreted in the light of another, and in particular whereby the concepts set out in one directive (69/335) are transposed into another (90/434), [46] is sufficient in the present case to affect my findings.

46 — The judgment in Case C-164/90 *Muwi Bouwgroep* v *Staatssecretaris van Financiën* [1991] ECR I-6049 concerned the definition of a 'part of a business' transferred by one company to another in the context of Article 7(1)(b) of Directive 69/335. In paragraphs 16 and 17 of his Opinion, Advocate General Jacobs interpreted this concept from Directive 69/335 in the light of the definition given in Article 2(a) of Directive 90/434. Without referring expressly to the latter provision, the Court replied to this question by analysing the provision of Directive 69/335 as a whole (paragraph 20 of the judgment; see also paragraphs 21 and 22).

103. In my view, given that Directive 78/855 and, above all, Directive 90/434 have a specifically determined scope, it follows from the above analysis that there are no interpretative factors which would make it possible to apply Article 7(1)(b) of Directive 69/335 — which is express and must be strictly construed — also to the case of a merger by acquisition of one company by another which already holds all the capital of the former, because in such a case the conditions laid down by this directive, as amended by Directive 85/303, for exemption from capital duty are not satisfied.

104. The Commission maintains that the exemption for which Article 7(1) provides should be extended to the case under examination here, because such an extension is compatible with the objective of facilitating the reorganisation of undertakings, in particular the grouping within one undertaking of various entities carrying on identical or complementary activities.

105. As regards the grounds for exemption from capital duty under Article 7(1)(b) of Directive 69/335, the Court has ruled [47] that 'it is apparent from the preambles to those directives [48] that the purpose of the fiscal derogation is to avoid transfers of assets between companies being impeded by tax obstacles, in order to facilitate the reorganisation of undertakings, in particular the grouping within one undertaking of various entities carrying on identical or complementary activities'.

106. However, having regard to the aforegoing analysis and the abovementioned case-law of the Court, I consider that for the exemption provided for in Article 7(1)(b) of Directive 69/335 to apply to the acquisition of two companies by a third which receives the assets of the acquired companies by way of capital contribution, [49] all the conditions set out in that provision must be satisfied; as we have seen, that is not the case here. For that reason, it is not possible to endorse the arguments developed by the Commission in favour of the opposite view.

107. In the light of the foregoing considerations, I am led to conclude that, even if the Court were to rule that the merger by acquisition of one company by another company which already holds all the capital of the former falls within the scope of Directive 69/335, and more specifically within that of Article 4(1)(c), this transaction could not be exempt from capital duty because it does not satisfy the conditions laid down in Article 7(1)(b) of that Directive. A different solution would open the door to possible deviations from the underlying objective,

47 — See the judgment in Case C-50/91 *Commerz-Credit-Bank v Finanzamt Saarbrücken* [1992] ECR I-5225, paragraph 11.

48 — Directive 69/335 and Directives 73/80 and 85/303 amending it.

49 — Regardless of whether such a transaction consists in 'the grouping within one undertaking of various entities carrying on identical or complementary activities'.

which was to make only certain capital contributions subject to the more favourable treatment available under Article 7(1)(b), provided that the conditions set out therein were fulfilled.

C — *Whether the Italian registration duty levied in the event of a merger is compatible with Article 7(1)(b) of Directive 69/335, as amended*

108. I have already reached the conclusion that the merger by acquisition of one company by another which already holds 100% of the capital of the former does not fall within the scope of Directive 69/335. However, solely for the purposes of complementing the foregoing analysis, I shall determine the quantum, in other words the rate at which registration of a merger may be taxed. I shall therefore examine the compatibility of the contested Italian provision with Article 7(1)(b) of Directive 69/335, as amended, from the point of view of the rate of duty levied. [50]

109. As the Commission rightly points out in paragraph 12 of its written observations, there is a close analogy between the Italian registration charge of 1% and the French registration charge of 1.20%, [51] which was at issue in *Bautiaa and Société Française Maritime*.

110. In concrete terms, the Court ruled in *Bautiaa and Société Française Maritime* that '[w]ith effect from 1 January 1986, the maintenance of such a duty remained incompatible with the directive, Article 7(1) having been amended by Directive 85/303, which clearly provides for the mandatory exemption from all capital duties on increases of capital effected by means of the contribution by one company of the whole of its assets to another' (paragraph 42). It added that 'Article 7(1) of Directive 69/335, as amended, with effect from 1 January 1976, by Directive 73/80 and subsequently, with effect from 1 January 1986, by Directive 85/303, precludes the application of national laws maintaining at 1.20% the rate of registration charge on contributions of movable property made in the context of a merger' (paragraph 43).

111. Consequently, if the Court were to consider it appropriate to rule on whether the exemption from all capital duty provided for in Article 7(1)(b) of Directive 69/335, as amended, is applicable to mergers between companies, I would say that the reply can only be in the affirmative, with all the ensuing consequences as regards the contested Italian registration duty. [52]

50 — See *Bautiaa and Société Française Maritime*, paragraph 40.

51 — This duty was provided for under Article 816 of the French General Tax Code.

52 — It is significant that subsequent to the *Bautiaa and Société Française Maritime* judgment the Italian Government amended Article 4(b) of the table annexed to Presidential Decree No 131/86 by adopting Presidential Decree No 323/96 and replaced the proportional registration duty with a flat-rate duty of LIT 250 000.

VI — Conclusion

112. In the light of the foregoing, I propose that the Court reply as follows to the question referred by the Commissione Tributaria Provinciale di Milano:

Articles 4(1)(c) and 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, mean that it is not prohibited to levy registration duty in the event of the merger by acquisition of one company by another company which already holds 100% of the capital of the former.