REPORT FOR THE HEARING
delivered in Case 112/86 *

I — Facts and procedure

1. It can be seen from the order for reference and from the file in the main proceedings annexed thereto that Amro Aandelen Fonds (hereinafter referred to as 'the Fund') is an investment fund maintained for the joint account and risk of third parties who make funds available to the Fund manager, the Amsterdam Rotterdam Bank NV (hereinafter referred to as 'the Manager'), with a view to their investment.

2. According to the conditions under which the Fund is held and managed, its assets consist of funds that are made available for investment either in cash or in another form. In return for those funds, investors receive participations or parts thereof, which are units expressing the extent of their rights in the joint assets of the Fund. The Manager keeps a register in which the name of each participant and the number of his participations are entered. The participant receives a statement of the entry and of each amendment thereof. Participations may be transferred only to the Fund or to the direct relatives of the holder by blood or marriage and such transfers may be made only through the Manager. It is the Manager who has the power to decide on investments, the admission of participants and the exercise of the right to vote attached to securities owned by the Fund. It is required to consult the participants (in writing) only if it ceases to manage the Fund or if the latter is liquidated.

3. In May 1983, the Manager registered the issue of 5 940 participations against receipts totalling HFL 1 459 896 and paid on behalf of the Fund HFL 14 598.96 capital duty on the amount received. The Manager submitted a complaint to the Inspecteur der Registratie en Successie, Amsterdam, seeking repayment of the amount paid. By a decision of 13 June 1984, the Inspecteur refused to grant the repayment. The Manager challenged that decision before the Revenue Chamber of the Gerechtshof on 1 August 1984, seeking its annulment and a complete repayment of the capital duty paid.

4. According to the order for reference, the main proceedings primarily concern the question whether the receiving of monies in return for the issue of participations constitutes the raising of capital in a body within the meaning of Article 32 of the Wet op belastingen van rechtsverkeer (Law on the taxation of legal transactions) of 24 December 1970 (*Staatsblad*, 611) (hereinafter referred to as 'the Law'). If the reply to that question is in the affirmative, the parties also disagree as to whether this is contrary to Article 3 of Council Directive 69/335/EEC.

5. Article 32 of the Law provides as follows:

'(1) A tax called "capital duty" shall be levied on the raising of share capital in bodies established within the European territory of the Netherlands.

* Language of the Case: Dutch.

(2) "Bodies" means associations, other legal persons, companies and funds.

(3) The term "bodies" does not include funds established for the purpose of obtaining advantages for the holders of participations by investing for their joint account or by any other use of capital if, after the establishment of the fund, the allocation of participations to persons other than the holders thereof, their direct relatives by blood or marriage and the transfer of participations to persons other than the fund, the aforementioned holders, or the aforementioned relatives is prohibited or if such allocation or transfer is subject to the agreement of all the holders of participations.'

Article 3 (1) of Directive 69/335 sets out first the companies, firms, associations or legal persons automatically covered by the expression 'capital company' within the meaning of the directive. According to Article 3 (1) (a), that expression means, *inter alia*, companies under Netherlands law known as 'naamloze vennootschap' and 'commanditaire vennootschap op aandelen' and 'personenvennootschappen met beperkte aansprakelijkeid' as well as:

'(b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;

(c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorization and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.'

Article 3 (2), the provision whose interpretation is contested, specifies that:

'For the purposes of the application of this directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

6. The Gerechtshof refers to the documents on the file for a full account of the parties' arguments, which may be summarized as follows.

The plaintiff in the main proceedings considers that the Fund is neither a *maatschap* (a company constituted under civil law) nor a commercial company because there is no *affectio societatis* between the participants, who are not seeking corporative cooperation but are saving for themselves and placing their confidence in the professional skills of the Manager of the Fund in regard to the investment of the funds. The fact that all the holders of participations have an interest in the same property is not sufficient to constitute a *maatschap*. In any event, Amro Aandelen Fonds cannot be classified in one of the legal forms referred to in Article 3 (1) of Directive 69/335, which do not include funds, which are none the less subject to taxation under Article 32 of the Law. It is not possible to assimilate the Fund to the capital companies referred to in Article 3 (2). Even if the Fund may be regarded as a company under Netherlands law, it does not thereby follow that it is one within the meaning of the directive. The purpose of the directive, namely the harmonization of indirect taxes on the raising of capital, requires that funds such as the one in this case should be regarded as companies, firms, associations or legal persons in all the

other Member States of the Community, which is not the case in the national rules cited by the applicant.

The defendant in the main proceedings considers that the Netherlands legislature has made funds such as the one in this case subject to capital duty by availing itself of the freedom left to the Member States by Directive 69/335. On the other hand, that directive contains nothing to suggest the existence of a Community concept of 'company' binding on the national legislatures.

7. In its reference for a preliminary ruling, the Gerechtshof also puts forward its own assessment of the dispute. It points out that if the question is considered solely from the point of view of domestic law, the Fund is required to pay capital duty on the issue of the participations in question. The Gerechtshof considers that the activities of Amro Aandelen Fonds, which consist of receiving sums of money for investment and the administration thereof in an investment fund in exchange for participations as defined in the management conditions, must be regarded as the raising of share capital. The Fund itself is a fund established on the territory of the Kingdom.

The Gerechtshof then considers the compatibility of the Law with Directive 69/335. It points out first that funds are not specifically referred to in Article 3 of the directive. The Fund in this case also may not be classified in one of the forms of company referred to in Article 3 (1) of the directive. With regard to Article 3 (2), which assimilates to a capital company for the purposes of the application of the directive any other company, firm, association or legal person operating for profit, the Gerechtshof considers that the Fund may not be classified as an association or other legal person and that there is nothing to show whether it may be included in the expression 'any other company' used in the directive.

The Gerechtshof considered in that regard that the fact that the concept of a company to be found in Article 32 of the Law also refers to a *maatschap* within the meaning of the Netherlands Civil Code and that the Fund in question may be regarded as a *maatschap* is not of itself decisive. The Gerechtshof takes the view that harmonization of indirect taxes on the raising of capital within the meaning of Directive 69/335 will not be achieved if the concept of 'company', referred to in Article 3 (2) thereof, does not have an independent meaning which is valid in all the Member States and which may be relied upon directly by taxpayers.

8. The Gerechtshof considers that an interpretation of the term 'company' in Article 3 (2) of the directive is necessary in order to give judgment in the case before it. It has therefore stayed proceedings and requested the Court of Justice to give a preliminary ruling on the following question:

'What requirements, besides that of operating for profit, must a group of persons (providers of capital) without legal personality satisfy in order to be regarded as a "company" within the meaning of Article 3 (2) of the directive?'

The Gerechtshof's order for reference was lodged at the Court Registry on 12 May 1986.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 5 August 1986 by the Commission of the European Communities, represented by its Legal Adviser, J. Føns Buhl, of its Legal

Department, and on 18 August 1986 by the Netherlands Government, represented by the Minister for Foreign Affairs, appearing in the person of the Secretary-General of that Ministry, I. Verkade.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry. However, the Court asked for certain information from the Commission which was provided within the prescribed time-limit (see Part III, below).

II — Written observations

1. The Commission considers that Article 3 (2) of Directive 69/335 leaves Member States a certain discretion to specify what other companies, firms, associations or legal persons operating for profit will be assimilated to capital companies for the purposes of implementing the directive other than those compulsorily subject to its provisions under Article 3 (1). However, having regard to the diversity in the legal structure of companies, firms, associations and legal persons which may be assimilated to capital companies, it is necessary to consider in each case whether their legal structure, as determined both by the applicable national provisions and the terms of their statutes, make it possible to assimilate them to capital companies.

The Commission considers that an association of persons may be regarded as a capital company only if there is a certain formal link between the members, normally a contractual agreement in writing. Apart from that basic condition, the expression 'capital company' must be interpreted in accordance with its ordinary meaning. It is for the national courts to determine, on the basis of an assessment of the particular statutes or other act constituting the association, in which cases an association of persons operating for profit may be regarded as a capital company.

In conclusion, the Commission proposes that the Court give the following reply to the question referred to it by the Gerechtshof:

'It is for the national courts to determine, on the basis of an assessment of the particular statutes or other act constituting the association, in which cases an association of persons operating for profit is to be classed as a capital company within the meaning of Article 3 (2) of Directive 69/335, taking account of the criteria laid down in the judgments of the Court of Justice concerning that directive.'

In the written reply to the question put to it by the Court, the Commission also makes observations on the concept of 'capital company' in Community law. Article 3 (2) of the directive is a safeguard clause permitting the Member States to levy capital duty in order to avoid the distortions which could result at national level from a differential taxation of the raising of capital according to the form of company in which it takes place. That function explains the fact that operation for profit is regarded as sufficient in order to assimilate any company, firm, association or legal person to a capital company.

However, in the particular case of investment funds, it could be considered that in general, the common will of the participants to form a company or association is lacking and such funds sometimes are cases of veritable joint ownership.

2. The Netherlands Government considers that in the absence of a precise definition of the term 'company' in Article 3 (2) of the directive, reference must be made to that contained in Article 58 of the EEC Treaty, which provides that 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

However, it points out in that regard, on the one hand, that the Gerechtshof regards the fund in this case as a company constituted under civil law (*maatschap*) and, on the other, that there is no doubt that it is operating for profit.

The Netherlands Government refers to Directive 85/611 of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (Ucits). According to the Netherlands Government, that directive also concerns funds held in joint ownership in which the capital is contributed by the public, which is the case of Amro Aandelen Fonds. In its opinion, it is neither desirable nor in accordance with the general scheme of Community law that forms of cooperation such as the fund in this case, operating for profit and competing directly with other investment companies to which they may be assimilated from the economic point of view, should not be covered by the term 'capital company' in Article 3 (2) of the directive. In conclusion, the Netherlands Government observes that Amro Aandelen Fonds is covered by the expression 'any other company, firm, association or legal person operating for profit' in Article 3 (2) of the directive.

III — Replies to the question put by the Court

The Court called upon the Commission to provide it with information on the following point:

'Are investment funds regarded as capital companies or companies assimilated thereto under the legislation of the various Member States for the purposes of liability to the tax on the raising of capital harmonized by Council Directive 69/335 of 17 July 1969?'

According to the Commission's reply, Belgium, France, Italy, Luxembourg, the Federal Republic of Germany and the United Kingdom do not assimilate investment funds to capital companies. In Denmark, joint investment funds are subject to capital duty only in respect of their securities officially quoted on the stock exchange. Spain, Greece and Portugal have not yet transposed into internal law the Community provisions concerning capital duty.

IV — Oral procedure

At the hearing on 19 May 1987 oral observations were presented by the plaintiff in the main proceedings which had not lodged any written observations. It expounded on the arguments it had put forward before the Gerechtshof stressing in particular the differences between a commercial company and Amro Aandelen Fonds and the fact that it does not have legal personality; it stated that the tax imposed by the Netherlands was discriminatory and contrary to the aim of harmonization which underlies Directive 69/335 in so far as no such taxation exists in the other Member States.

The Commission stated that, having closely examined the statutes of the Amro Aandelen Fonds, it had concluded that there was nothing in Directive 69/335 to preclude a Member State from treating an association such as the Amro Aandelen Fonds as a capital company within the meaning of Article 3 (2) of the directive.

Consequently the Commission considers that it is in accordance with the provisions of the directive for capital duty to be charged on the value of the payments made by the participants to Amro Aandelen Fonds in return for certificates setting out the extent of their rights in the joint property of the Fund.

G. C. Rodríguez Iglesias
Judge-Rapporteur