1. The transfer by a member with unlimited liability for the debts of a capital company of part of his shareholding to a member whose liability in that company is limited cannot be subject to capital duty by virtue of Article 4 of Directive 69/335 concerning indirect taxes on the raising of capital.

2. The transfer by a member with unlimited liability for the debts of a capital company of part of his shareholding to a member whose liability in that company is limited cannot be subject to capital duty by virtue of Article 6 of Directive 69/335 concerning indirect taxes on the raising of capital in the Member States which have elected to exempt contributions subscribed by members with unlimited liability, where the shares transferred have already been subjected to capital tax at the time of their creation.

REPORT FOR THE HEARING
in Case C-280/91 *

I — Facts and procedure

A — *Facts and legislative background*

Viessmann Gmbh & Co. KG (hereinafter 'Viessmann') is a limited partnership under German law. It has one 'limited' partner, who takes no part in the management of the firm and whose liability is limited to the capital contributions he has subscribed. There are also two 'general' partners, who manage the firm and have unlimited liability for its debts.

On 8 July 1983, V., one of the 'general' partners, transferred to his wife and to each of his children a portion of his shareholding in the Viessmann firm; upon receiving those shares, since they took no part in the management of the firm, V's wife and children became 'limited' partners.

The Finanzamt Kassel-Goethestraße (Tax Office, Kassel) (hereinafter 'the Finanzamt') took the view that the transaction must be subjected to capital duty. In its opinion, the shares transferred had undergone a conversion in so far as they had been transferred from a member with unlimited liability to a member whose liability was limited. By virtue of that conversion the shares acquired by V's wife and by his five children were in fact, according to the Finanzamt, new shares. The Finanzamt pointed out that the acquisition of new shares in a capital company must be taxed in accordance with Paragraph 2(1)(i)

* Language of the case: German.

of the German law on the raising of capital (Kapitalverkehrsteuergesetz), according to which capital duty is due

'in the case of the acquisition by a first-time buyer of company shares in a capital company whose registered office is situated on the national territory'.

When the action was brought before it, the Bundesfinanzhof (Federal Finance Court) was uncertain whether the interpretation of German law on which the Finanzamt's decision was based was consistent with Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412, hereinafter 'Directive 69/335/EEC').

The Bundesfinanzhof noted that Article 4(1)(c) of that directive provides that an increase in the capital of a capital company is to be subject to capital duty. According to the Bundesfinanzhof, that provision, if interpreted correctly, may provide a legal basis for the Finanzamt's argument, if it is borne in mind that the capital of a limited partnership consists only of the contributions subscribed by the 'limited' members, to the exclusion of those subscribed by the 'general' members. The Bundesfinanzhof maintains that this means that the capital of the Viessmann company should be deemed to have increased from the moment that the transfer of shares effected in the present case resulted in an increase in the number of 'limited' member shares.

B — *The question referred to the Court*

It was against this background that the Bundesfinanzhof decided to stay proceedings and, by order of 31 July 1991, referred the following question to the Court for a preliminary ruling:

'Does Article 4 of Directive 69/335/EEC allow Member States to subject to capital duty the conversion of part of a general partner share into a limited partner share within a pre-existing Gmbh & Co. KG?'

C — *Procedure before the Court*

The order for reference from the Bundesfinanzhof was received at the Court Registry on 9 September 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 5 February 1992 by the Commission, represented by Henri Étienne, Principal Legal Adviser, acting as Agent.

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 inquiry.

II — Written observations submitted to the Court

The *Commission* points out that the transfer to a 'limited' member of shares held in a capital company by a 'general' member is not included in the list given in Article 4 of Directive 69/335, which specifies the

transactions which Member States must subject to capital duty.

The Commission also maintains that the answer to the question asked by the national court follows from Article 6 — and not from Article 4 — of Directive 69/335.

Article 6(1) provides that:

'Each Member State may exclude from the basis of assessment ... the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company as well as the share of such a member in the company's assets.'

The third indent of Article 6(2) provides that, where a Member State exercises its power under Article 6(1), it must subject to capital duty

'— any transaction as a result of which the liability of a member is limited to his share in the company's capital, in particular when the limitation of liability results from the conversion of a capital company into a different type of capital company'.

The Commission points out in this regard that, by exercising its power under Article 6(1), mentioned above, Germany has decided not to tax the contribution subscribed by a 'general' member to a capital company. Consequently, pursuant to the third indent of Article 6(2), also mentioned above, Germany should subject to capital duty any transaction by which a 'general' member restricts his liability to the amount he has subscribed to the company capital. In the Commission's view, the act whereby a 'general' member transfers a portion of his shareholding in the capital company to a 'limited' member constitutes such a transaction and must therefore be subject to capital duty.

R. Joliet
Judge-Rapporteur