REPORT FOR THE HEARING
in Case C-249/89 *

I — Facts and procedure

A — *Facts, legal background and the question referred*

By an instrument of 27 June 1975 a company, Trave Schiffahrts-Gesellschaft mbH & Co. KG (hereinafter referred to as 'Trave') was set up under German law in order to cover the risks assumed by one of its limited partners as a result of a large construction project. Whilst the company assumed the liabilities arising from the construction project, its members undertook to make loans to it. From 1977 to 1983, Trave received interest-free loans from its partners amounting to DM 131 million.

During that period, the company incurred heavy losses.

On 31 December 1983, the proportions of the losses to be borne by the members were set off against their claims against the company. At the same time, it was decided to wind up the company.

By a notice of 7 December 1984, the Finanzamt (Finance Office) Kiel-Nord imposed capital duty of DM 361 335 on the transaction consisting in the granting by a member of an interest-free loan to the member's company. The Finanzamt considers that the transaction is covered by Paragraph 2, subparagraph 1(4)(c), of the Kapitalverkehrsteuergesetz (Capital Transfer Tax Law), which provides that capital duty is to be imposed on:

'...

(4) the following voluntary services provided by a member to a German capital company:

...

(c) the transfer of assets to the company in return for consideration less than their value,

...

provided that the services may increase the value of the company's shares.'

The company is challenging the Finanzamt's decision before the German courts. The action before the lower court was unsuccessful and Trave appealed to the Bundesfinanzhof. That court considered that its decision depended on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the

* Language of the case: German.

raising of capital (OJ, English Special Edition 1969 (II), p. 412, hereinafter referred to as 'the Directive') and, by an order of 28 June 1989, decided to stay the proceedings and to refer the following preliminary question to the Court of Justice pursuant to Article 177 of the Treaty:

'Does Article 4(2)(b) of Directive 69/335/EEC permit the Member States to impose 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 (saved expenditure on interest)?'

In Article 4(2)(b), the Directive authorizes the Member States to impose capital duty 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'.

Article 4(2)(c) and (d) provide that capital duty may also be imposed on:

'a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company',

and

'a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital'.

Article 5(1)(d) of the Directive then provides that, in the case of an increase in the assets, as referred to in Article 4(2)(b), the duty is to be charged 'on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services'.

In the view of the Bundesfinanzhof, the preliminary question should be answered in the affirmative for the following reasons:

The term 'service' used in Article 4(2)(b) of the Directive should be given a wide meaning; it covers not only concealed contributions of assets by a member but also contributions to the success of the undertaking ('Erfolgsbeiträge'), for example by making something available for the use of the company;

The increase in the assets arises from the saving of interest by the company; contrary to what certain German academic writers claim, the increase in the assets does not require an increase in the net assets of the company; furthermore, the fact that the increase in the assets occurs only at the time when the loan is used and not at the time of transfer of assets, as is the case with a contribution of capital, does not preclude the application of the Directive, which makes no distinction in this regard;

From Article 4(2)(c) and (d) of the Directive, which concern special loan cases, no converse inference that an interest-free loan granted by a member to its company is not covered by Article 4(2)(b) may be drawn; the fields of application of Article 4(2)(c) and (d), on the one hand, and of Article 4(2)(b) on the other, are independent and mutually exclusive; moreover, the basis of taxation is different: in the cases covered by Article 4(2)(c) and (d), capital duty is charged on the total amount of the loan whereas in the case covered by Article 4(2)(b) only its utility value must be taken into consideration.

B — *Procedure before the Court*

The order of the Bundesfinanzhof was received at the Court Registry on 7 August 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 2 November 1989 by the Government of the Netherlands, represented by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, and on 30 October 1989 by the Commission, represented by H. Étienne, 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. However, it decided to put a question to the Netherlands Government, which was answered within the time allowed.

By order of 10 May 1990, the Court decided pursuant to Article 95(1) and (2) of the Rules of Procedure to assign the case to the Fifth Chamber of the Court.

II — Written observations submitted to the Court

In the view of the *Netherlands Government*, there are several reasons in favour of levying capital duty where a member grants an interest-free loan to his company. Besides allowing a saving of interest and providing a corresponding increase in the overall assets of the company, the grant of the loan increases the company's assets by an amount equivalent to the cash payment arising from the loan less the market value of the repayment obligation without interest on the repayment date. Finally, it increases the economic potential of the company, which, according to the preamble to the Directive, is decisive for its application.

The *Commission* observes first of all that the granting of interest-free loans to a company by its members is not covered by either Article 4(2)(c) or Article 4(2)(d) of the Directive. Both those provisions concern different cases in which the creditor granting the loan to the company receives consideration consisting in either participation in profits or in a capital share. The basis of assessment for capital duty is then the nominal amount of the loan, in accordance with Article 5(1)(e) of the Directive.

However, the Commission takes the view that the transaction in question in this case

meets the criteria laid down in Article 4(2)(b) and is therefore covered by that provision. The interest-free loans are to be regarded as 'services provided by a member' and the resulting saving of interest for the company creates an increase in its assets. From the judgment in Case 161/78 *P. Conradsen A/S* v *Ministeriet for Skatter og Afgifter* [1979] ECR 2221, it is clear that an increase in company assets is an operation distinct from an increase in share capital, which must be defined as an objective and material operation not depending on the way in which it appears in the balance sheet. Finally, the granting of interest-free loans entails an alteration in members' rights, if only in the form of participation in the proceeds from the winding-up of the company. At any rate, the operation is such as to increase the value of the company's shares.

Once it is accepted that the granting by a member of interest-free loans to the company must be subject to capital duty, it is necessary to determine the basis on which the duty must be levied. In the Commission's view, for the purposes of Article 5(1)(d) of the Directive, the 'actual value of the services provided' must be taken to mean the interest thus saved by the company, the granting of the loan not entailing any immediate charge or liability. Indeed, such an interpretation would constitute an application of the decision in the *Conradsen* case, cited above, to the present case; according to that judgment, in the event of a contribution of assets to a company, it is the actual value of those assets and not their book value which must be used as the taxable amount for the purposes of capital duty.

The Commission also observes that the saving of interest arises as and when payments of the sum lent are actually made.

For the reasons set out, the Commission proposes that the answer to the preliminary question should be that 'Article 4(2)(b) of Directive 69/335 allows the Member States to subject to capital duty an interest-free loan granted to a heavily over-indebted capital company by one of its members on the basis of its utility value (corresponding to the interest saved)'.

III — Answer to the question put by the Court

In its observations, the Netherlands Government stated:

'Here there comes to mind a difference in the charging of capital duty in the case of an interest-free loan granted by a shareholder to his company and in the case of a loan granted by a shareholder to his company on the condition that the right of use thereof ('recht van vruchtgebruik') is conferred on the company.'

The Court requested the Netherlands Government to explain the meaning of that remark.

The Netherlands Government gave the following reply:

'If the Court were not to hold capital duty to be chargeable upon the granting of an interest-free loan by the parent company to its subsidiary, this would create a difference with regard to the economically similar situation of a loan being granted subject to the right of user.

A parent company may grant a loan to its subsidiary on condition that the right of user attaching to the loan accrues to the

subsidiary. Under Netherlands law, a right of user is a right *in rem* enabling a person to enjoy the natural or civil fruits of another person's property. The right of user attaching to a loan entails that the interest from the loan belongs to the usufructuary.

In such a case, the levying of capital duty is allowed since the parent company confers a certain asset on the subsidiary. From the economic point of view, however, that situation is no different from that in which the parent company grants an interest-free loan to its subsidiary.

The point made by the Netherlands Government was intended to draw the Court's attention to the odd result which would arise from a negative decision for the Finanzamt Kiel-Nord so that the Court can take this into account in its reasoning. In the view of the Netherlands Government, a difference in the levying of capital duty in economically similar cases, based on a difference of legal form, is hardly compatible with a tax such as capital duty as provided for in Directive 69/335/EEC.'

R. Joliet
Judge-Rapporteur