OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 7 July 1987 *

Mr President,
Members of the Court,

A — Facts

1. The respondent in the proceedings pending before the Danish Supreme Court, which have given rise to the request for a preliminary ruling which we are to consider today, is a Danish investment society with four sections, which are apparently managed independently (even from the book-keeping point of view) and, as we are assured, according to Danish law are regarded as independent societies with their own assets. Section C of the respondent (the main proceedings arose out of transactions effected within it) is an accumulating fund, that is to say, the net profits realized by means of the securities belonging to the section are not distributed but are automatically added to assets (which are moreover measured by the quoted value of the securities and the amount of liquid assets). Every holder of a certificate which is made out for a nominal amount has a share in those assets and the value of that share (which determines the quoted value of the certificates) is calculated by dividing the total assets by the number of certificates (for all this, see the statutes of the society and in particular Articles 15, 18 and 19).

2. In December 1979 the quoted value of the certificates of the respondent's Section C was apparently about 200. Since, according to what the respondent has said in the proceedings, the form of the certificates was no longer in accordance with the law and therefore new certificates had to be issued, the opportunity was also taken to reduce the value of the certificates, which is of importance for prospective buyers. For that purpose the old certificates were withdrawn and, without the payment of any sum whatever, a new issue was made of twice the number of certificates with the same nominal value, which led to the value falling to about 100.

3. In the eyes of the Danish revenue authorities this procedure, which was reminiscent of a bonus issue by a public limited company, constituted an event giving rise to capital duty pursuant to Article 4 (3) of the Danish Law on Capital Duties of 23 May 1973 according to which capital duty becomes payable on an increase in the share or nominal capital by capitalization of profits or of permanent or temporary reserves. Accordingly, capital duty was demanded of the respondent and this was paid in June 1980 (a deduction was made of duties paid in previous years on the issue of certificates on the basis of their quoted value at the time).

4. Since the respondent is of the opinion that in no event can there be said to be in its case a capitalization of profits or of permanent or temporary reserves and that there was no increase in the share capital (since the share capital is the same at any given time as the assets of Section C) it

* Translated from the German.

brought proceedings to recover the capital duty it had paid and its claim was upheld by a judgment of the Østre Landsret (Eastern Division of the High Court) of 28 March 1983.

5. The Danish Ministry of Fiscal Affairs thereupon appealed to the Højesteret (Supreme Court). Since the abovementioned Danish law was adopted to implement the Council directive of 17 July 1969 concerning indirect taxes on the raising of capital [1] and since it is to be assumed that the abovementioned provision of that law has the same scope as Article 4 (2) of the directive (which speaks of an increase in the capital of a capital company by capitalization of profits or of permanent or temporary reserves) the Højesteret considered it appropriate, in order to enable it to give final judgment in the case, to obtain an interpretation of the directive. By order of 28 January 1986 it therefore stayed the proceedings pending before it and pursuant to Article 177 of the EEC Treaty requested the Court to answer the following questions:

'(1) Are Articles 10 and 11 of the Council Directive of 17 July 1969 concerning indirect taxes on the raising of capital to be interpreted as meaning that, in respect of the transactions mentioned in Articles 10 and 11 it is not permissible for a Member State to subject capital companies, within the meaning of Article 3 of the directive, to taxes or duties other than capital duty and the duties mentioned in Article 12?

(2) Is Article 4 (2) of the directive to be interpreted as meaning that an increase in company capital effected by a transfer to it of the assets mentioned in that provision is a precondition for the charging of capital duty within the meaning of the said provision or is a Member State entitled to charge capital duty solely on the basis of an increase in nominal capital?'

6. Observations on those questions have been submitted in writing (and to some extent orally) by the parties to the main proceedings (the abovementioned Ministry speaking at the same time for the Danish Government), the Netherlands Government and the Commission of the European Communities. As far as the content of those observations is concerned let me for the time being refer to the Report for the Hearing.

B — Opinion

In my opinion the problems raised should be considered in the following way.

7. *1.* To begin with, it has to be recognized that there is no dispute between the parties that the respondent's Section C is to be regarded as a capital company within the meaning of Article 3 of Directive 69/335 and that therefore the question is how the taxable events for the purposes of the directive are to be interpreted in relation to a transaction such as the one at issue in the main proceedings. In any event the Højesteret has not asked whether the directive (Article 3 (1) (b) of which refers to any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange) also covers legally independent sections of a company and there is therefore no need to consider any further that aspect of the case which was touched on only towards the end of the hearing.

1 — Official Journal, English Special Edition 1969 (II), p. 412, in the version contained in the Act concerning the conditions of Accession and the Adjustments to the Treaties (Official Journal L 73, Special Edition, 27 March 1972).

8. *2.* All the parties have proposed an answer in the affirmative to the first question concerning the unlawfulness of taxes other than those expressly mentioned in it and with that answer one can only agree, bearing in mind the wording of the three provisions referred to, considered in the context of the directive's general structure and recitals.

9. Thus, it is significant that Article 10 requires the Member State to charge only the capital duty as defined in the directive and that for that purpose the factors set out in Article 4 of the directive apply. It is also to be noted that according to Article 11 (a) (which might be brought to mind in the present case) Member States are not to subject to any form of taxation whatsoever the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued. On the other hand, it may be observed that by virtue of Article 12 Member States may charge duties, notwithstanding Articles 10 and 11. But it at once becomes apparent that none of these cases, which are obviously intended to be exhaustive, is of the slightest relevance to the main proceedings. Finally, reference may be made to the last recital in the preamble from which it clearly emerges that Member States may not retain other indirect taxes with the same characteristics as capital duty or stamp duty on securities but must abolish them, since otherwise they might frustrate the purpose of the measures provided for in the directive.

10. *3.* The Højesteret's second question is concerned with the interpretation of Article 4 of the directive, paragraph (1) of which defines, as we know, the transactions which must be subject to capital duty while paragraph (2) sets out those which Member States, if they consider it appropriate, may subject to capital duty. It falls to be determined how Article 4 (2) (a) (which speaks of an increase in the capital of a capital company by capitalization of profits or of permanent or temporary reserves) is to be construed and whether it is sufficient for that purpsoe that there be an increase in the nominal capital (which is said to have occurred in the respondent's case, although there was no change in the structure of its assets) or whether the decisive criterion is the contribution of the assets referred to in Article 4 (2) (a), which no doubt means a contribution by a special act of an organ of the company in the sense of a transfer of certain parts of the assets to liable capital.

11. The latter interpretation was espoused not only, albeit primarily, by the respondent in the main proceedings but also, essentially, by the Commission, although in a rather more qualified way. The appellant, on the other hand, proposes that the question be answered along the lines of the first-mentioned alternative and is supported in this by the Netherlands Government which takes the view that in the Netherlands such transactions (that is, the capitalization of profits, reserves and permanent reserves on which duty has not yet been paid) would certainly attract capital duty.

12. *(a)* In my opinion a basic observation of considerable assistance in resolving this problem is that Article 4 of the Council directive, in which the transactions giving rise to capital duty are listed, is to be interpreted restrictively and that this applies in particular to paragraph (2) which allows the Member States to apply a different treatment, thereby in any event making the achievement of the aim of encouraging the

free movement of capital by similar taxation more difficult.

13. It may be thought that that conclusion is justified in the first place in the light of certain observations of the Community institutions which took part in the adoption of the directive, namely the Economic and Social Committee and the Parliament. Thus, it is significant that in the opinion of the Economic and Social Committee it was stressed that it should be possible to abolish indirect taxes on the raising of capital, the yield from which was low, and which no longer had any place in a rational taxation system, and it was also regretted that it was not possible to abolish capital duty as well, since there was scarcely any justification from an economic point of view for taxing the raising of capital.[2] Similarly, it is significant that in a resolution of the Parliament it was stated that the complete abolition of capital duties would be the best solution; as regards the proposed solution it was noted that it represented an essential step towards that objective.[3]

14. Secondly, for the view which I consider to be correct as a matter of principle is to be found the preamble to the Council directive of 10 June 1985, amending Directive 69/335, where it is stated that the economic effects of capital duty are detrimental to the regrouping and development of undertakings and that the best solution for stimulating investment would be to abolish capital duty.[4] From that it may at once be inferred that as early as the adoption of Directive 69/335 the Community legislature had adopted an attitude which in principle the two other Community institutions I have mentioned took as well.

15. *(b)* On the basis of that position of principle and the wording of Article (2) (a) (which is of particular importance in such a case), the conclusion which forcibly suggests itself is that when it refers to an increase of capital by capitalization of profits and so forth Article 4 (2) (a) has in mind only cases where a company has two separate blocks of capital (which are the subject of special entries in the accounts and, as the case may be, are entered in public registers) and where as a result of a special transaction there is a transfer between the blocks of capital, which also has an effect in company law *vis-à-vis* the outside world (so that shareholders can no longer have at their disposal the capital contributed in this way and therefore as far as the capital position is concerned there may be said to be an increase in 'a comapny's economic potential', as referred to in the judgment in Case 270/81[5]).

16. On the other hand, after what has just been said it is scarcely possible to have in mind transactions such as those falling for consideration in the main proceedings, in other words the case where a company has only a single body of assets which, as was established at the outset, progressively increases as a result of profits and the like and where a change occurs only in the nominal capital, that is to say in the ratio of distribution for determining the amount of the individual shares without there being any direct effects in company law because the shares of the various shareholders remain as a whole unchanged. Even if in such a case the total nominal value of all the shares is in fact shown separately in the accounts (which, if I understand the position correctly, was disputed with regard

2 — *Journal Officiel* 1965, 133, p. 2232. It should be noted in passsing that the Economic and Social Committee even made a proposal for an amendment, which was however rejected, that the optional cases of taxation in Article 4 (2) should be removed.

3 — *Journal Officiel* 1965, 119, p. 2057.

4 — Official Journal 1985, L 156, p. 23.

5 — Case 270/81 *Felicitas Richmers-Linie KG & Co.* v *Finanzamt für Verkehrssteuern, Hamburg* [1982] ECR 2771.

to the respondent in the main proceedings) and if a resolution of the general meeting is required for the certificates to be altered, that does not in itself justify speaking of an increase in capital within the meaning of the directive. On the contrary, if it comes to the taxation of such a transaction, it is Article 11 of the directive which should be brought to mind, which prohibits the taxation of the creation, issue and making available on the market or dealing in securities.

17. *(c)* It may yet be added that it certainly seems perfectly conceivable for increases in assets such as those which occur in an accumulating fund also to be made subject to capital duty. That would however clearly require special provisions. Since the directive does not contain them and the computation provision in Article 5 of the directive is obviously not adapted to such a case, one can only feel even more compelled to conclude that transactions such as those falling for consideration in the main proceedings are not covered by the directive.

18. In the case of an accumulating fund numerous transactions throughout the year result in increases in capital. Since certainly not each of them can be regarded as giving rise to a taxable event, the point in time to be taken into consideration in the case of such a company ought therefore to have been specified. There is, however, nothing on this point in the directive.

19. On the other hand, there would seem to be very little sense in referring solely to an alteration in the nominal value of the certificates issued. Companies which might fall to be taxed could simply refrain from making an alteration and would thus easily escape taxation. They would be able (the respondent has shown how by means of certain examples annexed to its written observations) to influence the assessment to tax according to the quotation which they sought and that certainly does not seem acceptable.

20. *(d)* On the other hand, nothing decisive emerges — let me go on to demonstrate — from certain arguments put forward by the appellant in support of its view.

21. That is true in the first place as regards its reference to the fact that Directive 69/335 (as Article 3 (1) (b), which has already been mentioned, shows) covers all possible capital companies (which is why, according to the appellant, nothing decisive turns on whether, according to the accounting provisions, different bodies of assets should be distinguished) and as regards its reference to Article 5 (1) (c) according to which the nominal amount of an increase in capital is the determining factor.

22. It cannot be simply concluded from the fact that as regards the companies concerned the directive has a wide scope that transactions such as those described by means of very precise criteria in Article 4 (2) (a) of the directive can equally be envisaged in every company of that type, irrespective of its structure.

23. So far as Article 5 (1) (c) is concerned, it seems on the other hand fundamentally wrong to seek to obtain from a provision on the computation of the duty the criteria for the interpretation of a provision which defines the events giving rise to it.

Furthermore, it is clear that that provision (which seeks to prevent the quoted value of the securities issued on an increasing capital from being taken as a basis) is not so particularly well adapted to cover transactions such as those with which we are now concerned.

24. The same conclusion is called for as regards the recitals in the preamble to the directive (where in one passage it is stated that the harmonization of taxes on the raising of capital must be arranged in such a way as to minimize the budgetary repercussions for Member States) and as regards the fact that capital duty in Denmark (as is apparent from the declaration made by the Minister to the Parliament) has *inter alia* replaced stamp duty (which plainly applied to transactions such as those with which we are now concerned).

25. The abovementioned passage in the recitals certainly cannot in itself justify an extension of the taxable events provided for, if only because — quite apart from the necessity for a restrictive interpretation, as became clear at the start — the recitals also show that it is of course not possible in every case to retain the *status quo ante*, and this is obviously so in a process of harmonization.

26. Although, on the other hand, it has to be accepted that an exchange of certificates such as that on which the national court is called to give judgment would have been relevant for the purposes of the earlier stamp duty law, that can provide no substantial assistance in interpreting the Community directive, because the directive is not based on the issue of securities [6] and because, according to it, to facilitate the movement of capital separate national taxable events must be eliminated by harmonization.

27. Finally, it is likewise irrelevant to refer to the fact that the object pursued by the respondent could also be pursued by a company limited by shares or that companies such as the respondent, as is apparent from the evolution of legislation, have from the tax point of view been approximated to companies limited by shares or limited liability companies.

28. The essential point is precisely that the respondent does not have the form of company limited by shares but is structured in a substantially different manner (namely in such a way that there are no different blocks of capital subject to different rules). Moreover, were the abovementioned evolution of legislation in fact to be observed in Denmark (it is significant that only an approximation of taxes was mentioned) that of course would not justify the assumption that such an approximation or assimilation was also regarded as appropriate at the Community level, precisely in the case of capital duty.

C — Conclusion

In view of those considerations I can only propose the following answers to the questions put by the Højesteret:

6 — See Article 11.

29. '*(a)* Articles 10 and 11 of Directive 69/335 are to be interpreted as meaning that Member States are not empowered to impose on capital companies within the meaning of Article 3 of the directive taxes or duties in respect of the transactions mentioned in Articles 10 and 11 other than capital duty and the duties mentioned in Article 12.

30. *(b)* Article 4 (2) of the directive is to be understood as meaning that capital duty is chargeable only if there has been an increase in the company's capital specially shown in the accounts as a result of an express contribution of the assets referred to in the provision; mere increase in the nominal capital in the form of a nominal increase in the number of certificates is not sufficient.'