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ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
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EUROPEISKA GEMENSKAPERNAS DOMSTOL
CVRIA
LUXEMBOURG

JUDGMENT OF THE COURT

17 July 1997 *

(Article 177 – Jurisdiction of the Court – National legislation adopting Community provisions – Transposition – Directive 90/434/EEC – Merger by exchange of shares – Tax evasion or avoidance)

In Case C-28/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te Amsterdam for a preliminary ruling in the proceedings pending before that court between

A. Leur-Bloem

and

Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2,

on the interpretation of Articles 2(d) and 11(1)(a) of 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 (OJ 1990 L 225, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray and L. Sevón (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

– Mrs Leur-Bloem, by J.H.W. Lenior, Tax Adviser,

– the Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2,

– the Netherlands Government, by J.G. Lammers, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

– the German Government, by E. Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and B. Kloke, Oberregierungsrat at the same Ministry, acting as Agents,

– the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by A. Fierstra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by B.J. Drijber, at the hearing on 4 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1996,

gives the following

Judgment

1 By order of 26 January 1995, received at the Court on 6 February 1995, the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 2(d) and 11(1)(a) of 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 (OJ 1990 L 225, p. 1, hereinafter ‘the Directive’).

2 The questions have been referred in proceedings between Mrs Leur-Bloem and the Inspecteur of Corporate Taxation, Amsterdam 2 (hereinafter ‘the Inspector’).

3 Mrs Leur-Bloem, who is the sole shareholder and director of two private Dutch companies, is planning to acquire the shares in a third private company, a holding company, payment to be made by exchanging shares in the first two companies.

After the transaction, Mrs Leur-Bloem was to become, no longer directly but only indirectly, the sole shareholder in the two other companies.

4 Mrs Leur-Bloem is subject to the Netherlands Income Tax Law of 1964 (hereinafter 'the Netherlands Law'). In the case of a merger by exchange of shares, Article 14b(1) of the Netherlands Law provides for exclusion from taxation of gains arising on major shareholdings. This facility entails in fact deferment of taxation.

5 Article 14b(2)(a) and (b) of the Netherlands Law provides:

'2. The following situations shall be treated as company mergers:

(a) a company established in the Netherlands acquires, in return for the transfer of a number of its shares together in some cases with an additional payment, possession of a number of shares of another company established in the Netherlands permitting it to exercise more than half the voting rights in the latter company, with a view to combining in a single unit, on a permanent basis from an economic and financial viewpoint, the undertaking of the acquiring company and that of another person.

(b) a company established in a Member State of the European Communities acquires, in return for the transfer of a number of its shares together in some cases with an additional payment, possession of a number of shares of another company established in another Member State of the European Communities permitting it to exercise more than half the voting rights in the latter company, with a view to combining in a single unit, on a permanent basis from an economic and financial viewpoint, the undertaking of the acquiring company and that of another person.'

6 'Undertaking' within the meaning of the Netherlands Law must in substance be understood as the economic activity of a legal person, the term 'company' referring to the legal personality.

7 Mrs Leur-Bloem has asked the Netherlands tax authorities to treat the proposed transaction as a 'merger by exchange of shares' within the meaning of the Netherlands legislation, which would allow her to receive a tax exemption on any gain made on the transfer of shares and to have the possibility of setting off any losses within the tax entity thus created.

8 The Inspector took the view that there was no merger by exchange of shares within the meaning of Article 14(b)(2)(a) of the Netherlands Law and dismissed her application.

9 Mrs Leur-Bloem therefore appealed against that decision to the Gerechtshof te Amsterdam. She takes the view that, in so far as the transaction is designed to achieve closer cooperation between companies, it must be regarded as a merger.

10 The Inspector, on the other hand, contends that the purpose of the proposed transaction is not to combine, on a permanent basis from an economic and financial viewpoint, the undertaking of those companies in a larger single entity. Such an entity already exists, from the economic and financial viewpoint, since both companies already have the same director and sole shareholder.

11 The Gerechtshof came to the view that in order to resolve the dispute a provision of the Netherlands Law inserted when the Directive was transposed into domestic law required interpretation.

12 The Gerechtshof found, first, that according to its preamble, the Directive was designed to eliminate tax provisions which hamper, in particular, mergers and exchanges of shares between companies of different Member States in relation to those effected between companies in one Member State. It then observed that, according to Article 14(b)(2)(a), on the one hand, and Article 14(b)(2)(b) on the other, the Netherlands Law makes no distinction between mergers concerning only companies established in the Netherlands and those concerning companies established in different Member States of the Community.

13 Finally, it states that it is clear from the purposes of the Directive, from the wording of the provision concerned of the Netherlands Law and from the documents preparatory to that Law, in particular its explanatory memorandum, that the Netherlands legislature sought to treat mergers between companies established in the Netherlands in the same way as mergers involving companies established in different Member States.

14 Article 2(d) and (h) of the Directive provides:

‘For the purposes of this Directive:

...

(d) “exchange of shares” shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of nominal value, of the accounting par value of the securities issued in exchange;

...

(h) “acquiring company” shall mean the company which acquires a holding by means of an exchange of securities;

...’.

Title II of the Directive, which comprises Articles 4 to 8, contains rules applicable to the tax treatment of mergers, divisions and exchanges of shares. Article 8 provides in particular that, on an exchange of shares, the allotment of securities representing the capital of the acquiring company to a shareholder of the acquired company in exchange for securities representing the capital of the latter company must not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

Article 11(1)(a) of the Directive provides:

'1. A Member State may refuse to apply or withdraw the benefits of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.'

15 Taking the view that the provisions of the Directive required interpretation in order to decide the proceedings before it, the Gerechtshof te Amsterdam stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. May questions be referred to the Court of Justice concerning the interpretation of the provisions and scope of a directive of the Council of the European Communities even where the directive is not directly applicable to the specific circumstances of the case but it is the national legislature's intention that those circumstances are to be treated in the same manner as a situation to which the directive does apply?

In the event of an affirmative answer:

2. (a) Can there be an exchange of shares within the meaning of Article 2(d) of Council Directive 90/434/EEC of 23 July 1990 if the acquiring company within the meaning of Article 2(h) does not itself carry on a business?

(b) Is an exchange of shares within the meaning of Article 2(d) precluded by the fact that the same natural person who was the sole shareholder in, and director of, the acquired company before the exchange is the director of, and sole shareholder in, the acquiring company after the exchange?

(c) Is there an exchange of shares within the meaning of Article 2(d) only if its effect is to merge the business of the acquiring company and that of another permanently in a single unit from a financial and economic point of view?

(d) Is there an exchange of shares within the meaning of Article 2(d) only if its effect is to merge the businesses of two or more acquired companies permanently in a single unit from a financial and economic point of view?

(e) Is an exchange of shares which is carried out in order to bring about a horizontal setting-off of tax losses between the participant undertakings within a fiscal unit as referred to in Article 15 of the Wet op de Vennootschapsbelasting (Law on Corporation Tax) 1969 a valid commercial reason for the exchange for the purposes of Article 11 of the Directive?'

The first question

16 By its first question the national court asks in effect whether the Court has jurisdiction under Article 177 of the Treaty to interpret Community law where Community law does not directly govern the situation in question but the national legislature has chosen, in transposing provisions of a directive into domestic law, to treat purely internal situations and those governed by the Directive in the same way, so that it has aligned its legislation to Community law.

17 Mrs Leur-Bloem considers that the Court has jurisdiction in view of the purpose of the Directive and the principle of equal treatment. A failure to treat internal mergers and Community mergers in the same way would create distortions of competition between groups of companies having the same structure but where only some have a Community character.

18 The Commission and the Netherlands and German Governments take the view that the Court has no jurisdiction to reply to questions concerning situations not governed by the Directive. This is the case here since, according to Article 1 of the Directive, it applies to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

19 The Commission and the Netherlands Government also refer to the judgment given in Case C-346/93 *Kleinwort Benson* [1995] ECR I-615 in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36, hereinafter 'the Convention'), in which the Court held that it had no jurisdiction. They argue that, given the similarity of procedures, no distinction is to be made between questions referred under the Convention and those referred under Article 177 of the Treaty.

20 The Commission considers that, according to that judgment, the Court has jurisdiction only where the national legislation refers directly and unconditionally to Community law. However, this is not the situation in the present case.

21 The Netherlands Government points out that the judgment to be given by the Court would not be binding on national courts in the sense indicated in *Kleinwort Benson* since the interpretation sought is asked for only in order to enable the court making the reference to apply domestic law. It also states that the reference to Community law made in the explanatory memorandum to the Netherlands Law is not binding but is only a factor in the interpretation of that Law.

22 The German Government points out that, as the Court held in its judgment in Case C 231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, the Court does not have to give a preliminary ruling where, as in the case before the national court, it is clear that the provision of Community law submitted for interpretation by the Court cannot be of application.

23 Under Article 177 of the Treaty the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions.

24 According to settled case-law, the procedure provided for in Article 177 of the Treaty is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see, in particular, the judgments in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 33 and 34, and in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 18 and 19).

25 Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling (see *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 35 and 20 respectively). Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (see *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 36 and 25 respectively).

26 A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of

the case referred to the Court (see, to this effect, *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 40 and 23).

27 Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract (see, as regards the application of Community law by domestic law, *Dzodzi* and *Gmurzynska-Bscher*, cited above; Case 166/84 *Thomasdünger* [1985] ECR 3001; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127 and, as regards the application of Community law by the effect of contractual provisions, Case C-88/91 *Federconsorzi* [1992] ECR I-4035 and Case C-73/89 *Fournier* [1992] ECR I-5621, all those cases being hereinafter referred to as 'the *Dzodzi* line of cases'). In those cases, the provisions of domestic law and the relevant contractual terms, which incorporated Community provisions, clearly did not limit application of the latter.

28 On the other hand, in its judgment in *Kleinwort Benson*, cited above, the Court held that it had no jurisdiction to give a preliminary ruling on the Convention.

29 In *Kleinwort Benson*, the Court observed, in paragraph 19, that, unlike the situation in the *Dzodzi* line of cases, the provisions of the Convention which the Court was asked to interpret had not been rendered applicable as such by the law of the contracting State concerned. In paragraph 16 of its judgment in *Kleinwort Benson* the Court pointed out that the Act of Parliament in question took the Convention only as a model and only partially reproduced its terms. It went on to note, in paragraph 18, that express provision was made in the Act for the authorities of the contracting State concerned to adopt modifications 'designed to produce divergence' between provisions of the Act and the corresponding provisions of the Convention. Furthermore, the Act also made an express distinction between the provisions applicable to Community situations and those applicable to domestic situations. In the first case, in interpreting the relevant provisions of the Act, the national courts were bound by the case-law of the Court on the Convention, whereas in the second case they had only to take account of it, so that they could set it aside.

30 However, this is not the situation in the present case.

31 The national court considers that the concept of 'merger by exchange of shares', taken in its Community context, needs to be interpreted in order to resolve the dispute before it, that this concept is contained in the Directive, that it has been incorporated into the domestic Law transposing it and that it has been extended to similar, purely internal, situations.

32 In those circumstances, where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against its own nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to this effect, the judgment in *Dzodzi*, cited above, paragraph 37).

33 In such a case, and pursuant to the allocation of judicial functions between national courts and the Court of Justice under Article 177, it is for the national court alone to assess the precise scope of that reference to Community law, the jurisdiction of the Court being confined to considering provisions of Community law only (*Dzodzi* and *Federconsorzi*, cited above, paragraphs 41 to 42 and paragraph 10 respectively). Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State (*Dzodzi*, cited above, paragraph 42 and the judgment in Case C-73/89 *Fournier* [1992] ECR I-5621, paragraph 23).

34 It follows from all the foregoing considerations that the answer to the first question must be that the Court of Justice has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law.

The second question

The second question (a) to (d)

35 The Gerechtschof has submitted the second question (a) to (d) having regard to Article 2(d) of the Directive, which defines mergers by exchange of shares. However, the wording of the question shows that it actually relates to the condition of ‘merging the business of two companies permanently in a single unit from a financial and economic point of view’, which is not contained in Article 2(d) of the Directive but which was added by the Netherlands legislature, when transposing the Directive, to the definition in the Directive. It appears from the national file that this condition was inserted in order to prevent, pursuant to Article 11 of the Directive, the tax advantages for which the Directive provides from being granted for operations having for their principal objective tax evasion or tax avoidance. The second question (a) to (d) must therefore be examined with reference not only to Article 2(d) of the Directive but also with reference to

Article 11 which, in such particular cases, allows the Member States a degree of competence.

36 It must be observed first of all that it is clear from Article 2(d) and from the general scheme of the Directive that the common tax rules which it lays down, which cover different tax advantages, apply without distinction to all mergers, divisions, transfer of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations.

37 Consequently, the fact that the acquiring company, within the meaning of Article 2(h) of the Directive, does not itself carry on a business or that the same natural person, who was the sole shareholder and director of the companies acquired, becomes the sole shareholder and director of the acquiring company does not prevent the operation from being treated as an exchange of shares within the meaning of Article 2(d) of the Directive. Similarly, it is not necessary, in order for the operation to be treated as an exchange of shares within the meaning of that provision, for there to be a permanent merger, from a financial and economic point of view, of the business of two companies into a single unit.

38 Secondly, Article 11(1)(a) allows the Member States to refuse to apply or withdraw the benefit of all or any part of the provisions of the Directive, including the tax advantages to which the main proceedings relate, where it appears that the merger, division, transfer of assets or exchange of shares has, in particular, as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

39 As part of that reservation of competence, Article 11(1)(a) provides that where 'one of the operations referred to ... is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation', this may constitute a presumption of tax evasion or tax avoidance.

40 It is therefore clear from Article 2(d) and (h) and from Article 11(1)(a) that the Member States must grant the tax advantages provided for by the Directive in respect of the exchanges of shares referred to in Article 2(d) unless those operations have as their principal objective or as one of their principal objectives tax evasion or tax avoidance. In this regard, the Member States may stipulate that the fact that those operations were not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance.

41 However, in order to determine whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination. According to established case-law, such an examination must be open to judicial review (see, to this effect, the judgment in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 40).

42 That examination may include the factors mentioned by the Gerechtshof in its second question (a) to (d). However, none of those factors may be considered to be decisive on its own. A merger or a restructuring carried out in the form of an exchange of shares involving a newly-created holding company which does not therefore have any business may be regarded as having been carried out for valid commercial reasons. Similarly, such reasons may render necessary the legal restructuring of companies which already form an entity from the economic and financial point of view. Even if this may constitute evidence of tax evasion or tax avoidance, it is nevertheless possible that a merger by exchange of shares with the aim of creating a specific structure for a limited period of time and not on a permanent basis may have valid commercial reasons.

43 In the absence of more detailed Community provisions concerning application of the presumption mentioned in Article 11(1)(a), it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision.

44 However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second question (a) to (d), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or tax avoidance and would undermine the aim pursued by the Directive. This would also be the case if a rule of this kind were to be made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority.

45 Such an interpretation is consistent with the aims both of the Directive and of Article 11 thereof. According to the first recital of its preamble, the aim of the Directive is to introduce tax rules which are neutral from the point of view of competition in order to allow enterprises to adapt themselves to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level. That same recital also states that mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is only when the planned operation has as its objective tax evasion or tax avoidance that, according to Article 11 and the last recital of the preamble to the Directive, the Member States may refuse to apply the Directive.

Question 2(e)

46 By Question 2(e) the national court asks whether horizontal setting-off of tax losses between the companies participating in the operation constitutes a valid commercial reason within the meaning of Article 11 of the Directive.

47 It is clear from the wording and aims of Article 11, as it is from those of the Directive, that 'valid commercial reasons' is a concept involving more than the attainment of a purely fiscal advantage. A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that article.

48 The answer to the second question must therefore be that:

(a) Article 2(d) of the Directive does not require the acquiring company, within the meaning of Article 2(h) of the Directive, to carry on business itself or there to be a permanent merger, from the financial and economic point of view, of the business of two companies into a single unit. Similarly, the fact that the same natural person who was the sole shareholder and director of the companies acquired becomes the sole shareholder and director of the acquiring company does not prevent the operation in question from being treated as a merger by exchange of shares.

(b) Article 11 of the Directive is to be interpreted as meaning that in determining whether the planned operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance, the competent national authorities must carry out a general examination of the operation in each particular case. Such an examination must be open to judicial review. Under Article 11(1)(a) of the Directive, the Member States may stipulate that the fact that the planned operation is not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance. It is for the Member States, observing the principle of proportionality, to determine the internal procedures necessary for this purpose. However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second answer under (a), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or such tax avoidance and would undermine the aim pursued by the Directive.

(c) 'Valid commercial reasons', within the meaning of Article 11 of Directive 90/434, must be interpreted as involving more than the attainment of a purely fiscal advantage such as horizontal off-setting of losses.

Costs

49 The costs incurred by the Netherlands and German Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Gerechtshof te Amsterdam, by order of 26 January 1995, hereby rules:

1. **The Court of Justice has jurisdiction under Article 177 of the EC Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law.**

2. (a) **Article 2(d) of 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, does not require the acquiring company, within the meaning of Article 2(h) of the Directive, to carry on business itself or there to be a permanent merger, from the financial and economic point of view, of the business of two companies into a single unit. Similarly, the fact that the same natural person who was the sole shareholder and director of the companies acquired becomes the sole shareholder and director of the acquiring company does not prevent the operation in question from being treated as a merger by exchange of shares.**

   (b) **Article 11 of Directive 90/434 is to be interpreted as meaning that in determining whether the planned operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance, the competent national authorities must carry out a general examination of the operation in each particular case. Such an examination must be open to judicial review. Under Article 11(1)(a) of Directive 90/434, the Member States may stipulate that the fact that the planned operation is not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance. It is for the Member States, observing the principle of proportionality, to determine the internal procedures necessary for this purpose. However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second answer under (a), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or such tax avoidance and would undermine the aim pursued by Directive 90/434.**

(c) 'Valid commercial reasons', within the meaning of Article 11 of Directive 90/434, must be interpreted as involving more than the attainment of a purely fiscal advantage such as horizontal off-setting of losses.

Rodríguez Iglesias Mancini Moitinho de Almeida

Murray Sevón Kakouris Kapteyn

Gulmann Edward Puissochet

Hirsch Jann Ragnemalm

Delivered in open court in Luxembourg on 17 July 1997.

R. Grass G.C. Rodríguez Iglesias

Registrar President