OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 15 December 1987 *

Mr President,
Members of the Court,

1. In connection with a dispute as to whether a tax on the operation of automatic entertainment machines can be classified as a turnover tax, the Tribunal de grande instance (Regional Court), Coutances, has asked this Court to interpret Article 33 of the Sixth Council Directive (77/388/EEC) on the harmonization of laws on turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p.1) and two Articles (95 and 30) of the EEC Treaty.

It is appropriate to point out that the French courts have pending before them innumerable cases (several hundred according to some sources) on the same question. At least three Regional Courts — Argentan, Verdun and Nîmes — have submitted to the Court questions similar or even identical to those with which we are concerned today; two courts — Tarbes and Foix — appear to have submitted questions, but they have not yet reached the Registry here; and we know that 16 — Avranches, Rennes, Thionville, Poitiers, Quimper, Laval, Metz, Agen, Bernay, Clermont-Ferrand, Charlesville-Mézières, Toulouse, Limoges, Saint Malo, Vesoul and Chartres — have stayed proceedings before them until this Court has given its judgment on the matter.

Five courts, on the other hand, have already resolved the problem, but of those only one — the Tribunal de grande instance, Cusset, by judgment of 21 May 1987 — has classified the tax at issue as a turnover tax. The other courts have decided that it is not a turnover tax, albeit on the basis of different reasoning, namely: Montbeliard on 23 July 1986, because a tax described as an indirect tax by the Code général des impôts (the 'CGI') does not constitute a tax on turnover; Sens on 3 July 1986, because the provisions of a directive cannot be relied upon by private individuals to support an action in a tax matter (that being the well-known position of the Conseil d'État, expressed in Judgment No 51811 of 1 July 1985, RJF, 10/85, p. 1286); Auch on 26 November 1986, because the definition of a tax as a turnover tax is a matter of domestic rather than Community law; and Nevers on 27 November 1987, because the charge in question is annual whereas the plaintiff had asked for relief in respect of a period of six months.

In France therefore the question referred to the Court is highly problematical and the judgment resolving it is awaited with great expectation.

2. On 2 July 1985 the Centre des impôts, Saint-Lô, sent to Gabriel Bergandi, a trader and operator of automatic entertainment machines, a tax assessment for FF 111 000

* Translated from the Italian.

in respect of the annual tax on those machines. Pointing out that they had been subject to VAT since 1 July 1985, Mr Bergandi applied for relief from the portion of the tax relating to the second half of 1985; and when his application was rejected (31 December 1985) he instituted proceedings against the Directeur des services fiscaux of the département of la Manche before the Tribunal de grande instance, Coutances, which has jurisdiction in matters relating to taxes classified as turnover and similar taxes. At the same time he requested that the tax authorities should be ordered to grant him relief in respect of a principal sum of FF 38 000 and exemption from penalties and should be ordered to reimburse to him the amounts already paid; in that regard, he submitted that the levying of the State tax on the games machines for the period from 1 July to 31 December was contrary to Article 33 of the Sixth Directive and Articles 95 and 30 of the Treaty.

By judgment of 18 September 1986 the national court stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling under Article 177:

'(1) Must Article 33 of Directive 77/388/EEC be interpreted as prohibiting Member States from continuing to levy turnover taxes on the supply of goods or the provision of services once such activities become liable to value-added tax?

(2) Must the concept of turnover taxes or any taxes, duties or charges which may be characterized as turnover taxes referred to in Article 33 of the Sixth VAT Directive be interpreted as applying to taxes levied on operating receipts, regardless of whether tax is charged on the basis of actual revenue or on an approximate basis where it is difficult to arrive at an exact determination of actual revenue?

(3) More particularly, does the concept of turnover taxes or any taxes, duties or charges which may be characterized as turnover taxes referred to in Article 33 of the Sixth VAT Directive include an annual, flat-rate fiscal charge which: (a) is levied on all automatic machines installed in public places and providing visual or aural entertainment, a game or an amusement; (b) is introduced for the purpose of replacing a tax on the turnover of the operator of the machine; and (c) is broadly adjusted to take account of the profitability of each type of machine and, indirectly, of the operator's receipts?

(4) If the replies to Questions 1 and 3 are in the affirmative, does the prohibition of the cumulative levying of value-added tax and other turnover taxes on the same revenue or turnover mean that where value-added tax is applied for the first time at the beginning of the second half of a year and when the turnover taxes levied in addition to value-added tax must be paid in a single instalment at the beginning of the calendar year (unless deferred payment has been permitted), one half of the sums due in respect of the taxes in the nature of turnover taxes for the year in which value-added tax was first applied must, in consequence of the introduction of VAT, be reimbursed or not demanded.

(5) Must Article 95 of the EEC Treaty be interpreted as prohibiting the levying on operating receipts of tax at a rate three times higher on products that are principally of foreign origin than on similar products that are principally of domestic manufacture? Must that discrimination be regarded as even more serious when the operating receipts concerned are liable both to value-added tax and to indirect taxation of another kind?

(6) Must Article 30 of the EEC Treaty be interpreted as meaning that it is an infringement thereof to make revenue from the operation of certain products liable to value-added tax pursuant to Community legislation without abolishing existing taxes on such revenue even though certain of the products operated are no longer manufactured in the Member State levying the various taxes concerned and where, in any event, the cumulative levying of such taxes may result in a reduction in the imports of such products from the rest of the Community?'

3. At the material time, automatic entertainment machines were subject to entertainment tax, VAT and the so-called 'State tax'. The first is not relevant here. The second, which came into force on 1 July 1985, was introduced by Article 16 of the Finance Law for 1985 (Law No 84-1208, JORF 1984, p. 4060). That provision repealed Article 261-E-3 of the CGI which exempted from VAT receipts from the operation of all automatic machines subject to entertainment tax; and an incentive for its adoption was provided by the action under Article 169 of the Treaty which the Commission — considering that that exemption was incompatible with Article 13 B (f) of the Sixth Directive — brought against the French Republic on 23 December 1983 (that case, Case 287/83, was removed from the register by order of 16 January 1985, not published).

Finally, there is the State tax. It was introduced by Article 33 of the Finance Law for 1982 (Law No 81-1160, JORF 1981, p. 3539) on the ground that automatic games machines 'ne supportent actuellement aucun impôt sur le chiffre d'affaires' (JORF, Débats, Ass. Nat. 1981, p. 3056). According to the government bill, the tax was to be a fixed annual sum of FF 1 500 on each machine; but an amendment passed at the sitting on 27 November 1981 set different amounts for different types of machine. The Minister for the Budget, Laurent Fabius, considered the resultant system satisfactory. It distinguished 'entre les appareils qui ont une tres faible rentabilité, et pour lesquels le taux de prélèvement sera bas, les appareils intermédiaires qui seront soumis à un double taux, un taux moyen pour les communes urbaines et un taux assex faible pour les appareils mis en service depuis plus de trois ans qu'on trouve souvent dans les petits cafés des communes rurales, . . . et, enfin, les appareils qualifiés de jackpot, concernant les jeux d'argent et de hasard dont la taxation . . . peut être supérieure'. In other words, concluded the Minister, the amendment took account 'des exigences des finances publiques, de rendement des appareils et de la distinction entre les communes rurales et urbaines par le biais de l'ancienneté des appareils' (JORF, Débats, Senat 1981, p. 3253).

In particular, Article 33 introduced Article 564 *septies* and Article 564 *octies*. The first provides that the tax is to apply to automatic entertainment machines providing

visual or aural entertainment, a game or an amusement, installed in public places. It is an annual tax and the amount differs according to the type of machine. More particularly:

(1) The tax is FF 500 on:

(a) machines offering games of skill with devices, consisting of dispensers of balls and score recorders, which are purely mechanical (table football machines);

(b) small-scale vehicles or animals on which children can sit; and

(c) coin-operated record-players (juke-boxes).

(2) A tax of FF 5 000 is payable on machines on which games of chance are played, even where a player requires skill in order to win, and which give prizes of game tokens or a number of free matches (slot machines, pin-ball, Roll-a-top, 'Astoria', 'Rotamint', etc.). However, the manufacture, possession, installation and operation of such machines were prohibited by the Law of 12 July 1983 (Law No 83-628, JORF 1983, p. 2154);

(3) All other machines (such as video games, the various types of billiards, mini-bowling, and so on) are subject to a tax of FF 1 500, which is reduced to FF 1 000 if the machines were brought into service more than three years earlier. It is also provided that machines put into service during the second half of the year are liable to tax at half rate.

Pursuant to Article 564 *octies*, the tax becomes due from the person operating the machine at the time of the annual return indicating that it has been brought into service. The payment must be made within the six months following the return and no later than 31 December in the year to which the return relates (see also the Instruction of 24 February 1982, BODGI 2 I-2-82). The tax is collected according to the rules, under the conditions and subject to the safeguards and penalties laid down for indirect taxes.

Finally, I would mention that, after the period during which the dispute arose, Articles 564 *septies* and 564 *octies* were repealed by Article 35 I of the Finance Law for 1987 (Law No 86-1317, JORF 1986, p. 15820). In the report annexed to the government bill, it is stated that the tax was introduced 'dans l'attente de l'application de la taxe sur la valeur ajoutée'and that, once the latter tax had come into force, 'il convient de revenir au droit commun en supprimant la taxe d'État'.

4. Let us first examine the question concerning the interpretation of Article 33 of the Sixth Directive. The wording of the provision is well known: 'Without prejudice to other Community provisions, the provisions of this directive shall not prevent another Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes'. Among the parties to the proceedings before this Court, the Commission of the European Communities, the French Government and the German Government have taken the

view that collection of the contested tax is compatible with Article 33. Let me say straight away that the opinion — *inter alia* expressed on behalf of the Community executive by Lord Cockfield in the reply which he gave to Written Question No 2054/84 submitted by the Member of the European Parliament Mr Vernier (Official Journal 1986, C 277, p.) — is not in my view convincing. On the other hand, I find the arguments put forward by Mr Bergandi in support of the opposing view persuasive.

But let us take things in their proper order, directing our attention first to the nature of the tax. In that regard it is appropriate to note that, with the exception of the German Government, the parties before this Court have referred to the judgment of 27 November 1985 (Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759) and, in particular, paragraph 16 thereof. It states that Article 33 of the Sixth Directive 'seeks to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax'. The provision does not therefore preclude the retention or introduction by Member States of 'charges which are not fiscal but have been introduced specifically in order to finance social funds and which are based on the activity of undertakings without directly affecting the price of the goods or services'.

According to the Commission and the French Government, this passage contains the criteria for identification of the features of a charge which indicate that it is a tax on turnover. In the first place, it is necessary to analyse the impact of the charge, for which the chargeable event is the transfer of goods or the provision of a service, on the final price; that impact must be direct even though it is not essential, unlike the case of VAT, that the person bearing it should be the purchaser or the recipient of the service. The second requirement is that the turnover obtained from the use of the goods or the provision of the service must be subjected to a charge on a real or flat-rate basis. To those criteria the Commission adds a third: there must be a relationship between the subjection of goods or services to the charge and the movement thereof within the Community.

The Federal Republic of Germany, however, relies upon Article 33 of the directive and takes the view that it is inappropriate to seek an 'exhaustive' definition of taxes which can be characterized as turnover taxes since they may *appear* to be different by reason of the name given to them without in fact being different as far as their purpose or nature is concerned. Turnover taxes and Community VAT are characterized by the fact that they cover all possible categories of products and for that very reason are general taxes on consumption. The fact that a tax is stated to relate to turnover is not therefore sufficient reason to characterize it as a turnover tax. The latter relates both to imports of goods and to transfers of goods and the provision of services for consideration by a taxable person; on the contrary, often displaying the features of proceeds from business, the consideration received by the transferor or provider of services does not constitute the target of the tax but is merely the basis of assessment for it.

The Commission also observes that, for the purpose of classifying a tax, the aim pursued is all-important; and similarly the German

Government states that the legislature's intention to introduce a charge replacing the tax on turnover is of no importance as far as Article 33 is concerned, the essential point being that the tax should display the requisite objective features. It follows — concludes the Commission — that, as regards the tax with which the Coutances court's question is concerned, the chargeable event is not the transfer of goods or the provision of a service but, on the contrary, is closely related to the basis of assessment. The tax is in fact levied on the use of a machine and does not vary according to the location where the machine is installed; quite apart from that fact, since it cannot be deducted as Community VAT under Article 17 of the Sixth Directive, it is not in the nature of a turnover tax.

For its part, the French Government notes that the tax at issue is unrelated to the purchase price of the machines; moreover, it is not intended to represent a deduction from receipts but rather, as is apparent from the fact that it becomes due when the annual return is made in respect of the machine, it relates to the installation of the machine. The annual nature of the tax also makes it utterly impossible for the administration to grant relief in respect of half-years. France adds that the tax at issue clearly cannot be regarded as being in the nature of a turnover tax if only because Mr Bergandi brought his action before an ordinary court; as is well known, such courts have jurisdiction only for proceedings concerning indirect taxes.

In the opinion of the German Government, finally, the tax cannot be characterized as a turnover tax because it does not satisfy the requirement of generality.

5. Personally, contrary to the view expressed by Germany, I consider that the answer to the question submitted by the Coutances court depends on the definition of a tax which can be characterized as a turnover tax within the meaning of Article 33 of the Sixth Directive. Moreover, the German Government itself, which in any event regards any endeavour in that direction as superfluous, succeeds only in identifying the tax under review here by reference to Community VAT.

I would point out in the first place that the concept of a tax which can be characterized as a turnover tax is a Community concept. That follows ineluctably from the wording of Article 33 and the purposes of the system of which that article forms part. As the legislature made clear, the prohibition of overlapping does not apply to 'any taxes, duties or charges' which cannot be characterized as turnover taxes; and it is clear that the very plurality of the terms used — namely 'taxes', 'duties' and 'charges' — renders impossible any classification which is dependent upon the names used or criteria adopted at national level. The reason for this is clear and is to be found, as I have pointed out, in the objectives of the system: VAT is a tax whose characteristics have been harmonized at Community level and a percentage of the revenue accruing from it goes towards financing the Community.

But that is not all. If no Community definition of the tax were accepted, the Member States would be able to evade the

prohibition of overlapping laid down in Article 33 by recourse to criteria and concepts peculiar to their own national systems of taxation or by choosing one name rather than another (for example by avoiding the term 'turnover tax'). However, the fact that that situation exists is to be inferred even from the case-law of this Court. In its judgment of 8 July 1986 (Case 73/85 *Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219), the Court ruled that a tax on transfers and transactions such as the German 'Grunderwerbsteuer' is not caught by that prohibition; and thereby — it seems to me — the Court recognized by implication the existence of a Community concept defining a charge which can be characterized as a turnover tax.

6. I too am of the opinion that the proper basis for the concept of a charge which can be characterized as a turnover tax is to be found in the *Rousseau-Wilmot* judgment, notwithstanding that it concerns a charge which, unlike the one at issue here, was not of a fiscal character. As Mr Bergandi points out, in paragraph 16 of the decision the Court lays down two criteria which are relevant to the definition of that concept, but it did not give details in general and abstract terms. It placed emphasis above all on the 'common system of VAT', identifying in Article 33 the will to prevent its being compromised by national fiscal measures; it then stressed that, to meet that requirement, national measures must neither be levied on the movement of goods and services nor be charged on commercial transactions 'in a way comparable' to value-added tax.

The conclusion thus reached provides support for the arguments to the effect that the tax at issue here is not such a tax, which rely on the fact that it is described in France as an 'indirect tax' or on the fact that the matter was brought before an ordinary court (when it is well known that disputes concerning turnover taxes are a matter for the administrative courts). With respect to the latter point, moreover, Mr Bergandi informed us at the hearing that he merely took the advice given to him by the French tax authorities. At the foot of the document in which the Directeur des services fiscaux de la Manche rejected his complaint it is in fact stated that 'si vous souhaitez contester ce rejet, vous pouvez dans les deux mois assigner le Directeur des services fiscaux devant le Tribunal de grande instance de Coutances'.

A first comment: the use of the word 'comparable' seems to me to imply that the features of a tax which can be characterized as a turnover tax and those of VAT do not necessarily have to coincide completely. Comparability does not mean identicality. In the same way, the Court's reference to the 'common system of VAT' does not relate exclusively to the definition of VAT in Article 2 of the First Council Directive (67/227) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p. 14). The terms used by the Court refer rather to the system as a whole which, if not entirely uniform, is at least 'common' (see the Opinion of Advocate General Rozès in Case 15/81, *Schul* v *Inspecteur der Invoerrechten*

en Accijnzen [1982] ECR 1437, at p. 1441). The characteristics which a turnover tax must have can be inferred from the rules laid down on VAT in the Sixth Directive, particularly as regards the chargeable event, the method of assessment of the tax and its impact on the consumer.

Let us consider the chargeable event first. As will be recalled, the Commission and France have expressed the view that there is a close relationship between that event and the basis of assessment, in so far as the tax at issue here is payable in respect of the availability for use of the machines and is unrelated to their turnover. For my part, I consider that:

(a) the Sixth Directive indicates an intention to distinguish between the two factors by the very fact that they are dealt with in separate provisions (Articles 10 and 11);

(b) Article 10 allows for the possibility of derogations, whilst stating that the tax becomes chargeable when the goods are delivered or the service is performed;

(c) Article 10 (3) provides that, as regards imported goods, the chargeable event occurs 'when the goods enter the territory of the country'.

Thus, in the case of VAT — which is *par excellence* a turnover tax — no direct and individual relationship between the chargeable event and the basis of assessment appears to be identifiable.

Nor can it be said — although the German Government does so — that the Sixth Directive endows VAT with the feature of generality. Certainly, generality is a particular feature which distinguishes that tax from the other types of indirect taxation (see my Opinion in *Rousseau Wilmot*, part 4). But particular does not mean exclusive; so much so that as a result of the options and exemptions provided for by that directive the tax does not apply to all economic transactions.

Let us now examine the argument developed with particular vigour by the French Government that the contested charge is not proportional to receipts and for that very reason is not intended to apply a real or flat-rate deduction to the turnover achieved by the machines. That argument contains an element of truth. VAT is in fact calculated as a rule on the basis of the turnover declared and of the separate transactions represented by transfers of goods or the provision of services. But it is also true that there are important exceptions to that rule, as in the case, for example, of the flat-rate system involving the possibility of exemptions and non-deduction available for small undertakings, farmers and travel agencies (Articles 24 to 26 of the Sixth Directive). It follows that, if the basis of assessment does not take account of the totality of the turnover declared, the tax, although created on a flat-rate basis, remains *ad valorem*.

An even clearer result is arrived at if the impact of the tax is considered. It will be remembered that in the *Rousseau Wilmot* judgment the Court stated that the tax can be characterized as a turnover tax only if commercial transactions are affected in a way comparable to that of VAT. But, as the Commission itself concedes, the ways in which VAT is passed on to the final

consumer of the goods or the recipient of the service differ considerably. The transfer is sometimes direct (as where the amount of the tax is separate from the price of the goods or service) and sometimes indirect (where, on the contrary, the tax forms part of the price) and at least in one case (that of the flat-rate system) entirely non-existent. As is obvious, the same principles apply to taxes which can be characterized as turnover taxes.

Finally, a few words concerning the criterion — postulated only by the Commission — whereby there must be a relationship between the subjection of goods or services to the tax and their movement within the Community. As Mr Bergandi points out, that view relies upon interpreting Article 33 as prohibiting overlapping only where the tax affects trade between Member States and not also where its effects are felt within one country. But that reading is unduly reductive; no-one can in fact fail to see that it is incompatible with a system such as the VAT system which requires equality of conditions of competition 'whether at national or Community level' (third recital in the preamble to the First Directive).

7. Having thus determined the distinguishing features of a 'tax which may be characterized as a turnover tax', it is now necessary to establish whether the tax here displays those features.

It is clear from a review of the rules (point 3, *supra*) that (a) the tax is paid by the operator and not by the possessor of the machine; it is not therefore a tax on ownership or possession like for example the road tax for motor vehicles; (b) the amount varies according to the type of machine, takes account of the period for which it has been in use and takes obsolescence into consideration. Machines intended for the entertainment of children bear a lesser burden than those providing recreation for adults; moreover, a reduction of half is available for machines brought into service in the second half of the year and, in the case of machines brought into service more than three years earlier, the tax is reduced by one third. As the Commission itself conceded, we are dealing with the taxation of an activity according to its profitability or receipts. The latter — as is proved by the graduation of the tax — is calculated on a flat-rate — and therefore approximate — basis but, as we have just seen, it is also based on apparent, specific and almost unvarying factors. There is, in short, no doubt that the operators include the tax in the price charged and hence pass it on to the user of the service.

The result to which this analysis leads seems to me to be clear: the contested tax — which is charged on operating receipts, however the tax basis is defined (that is to say according to the actual proceeds or, if they are not ascertainable, on a flat-rate basis), is in the nature of a tax on turnover and cannot therefore coexist with VAT. Furthermore, that conclusion is corroborated by the *travaux preparatoires* for the Finance Law for 1982. They make it clear that the legislature was moved by two intentions: on the one hand to overcome the difficulties of applying VAT in an area in

which the Commission was taking action to secure the removal of the general tax created by Article 261-E of the CGI; and, on the other, to subject the receipts of machines to a tax whose amount reflected their presumed profitability.

With regard to the first purpose, in addition to the statement of Mr Fabius quoted earlier (in part 3 hereof) reference may be made to the observations of Christian Pierret, the Rapporteur General of the Finance Committee of the National Assembly, to the effect that 'le contrôle de la recette est très difficile et je ne m'étendrai pas sur les pratiques abusives auxquelles la perception de cette recette sous forme de pièces de monnaie donne parfois lieu. L'assujettissement à la TVA serait donc impossible dans la mesure où la recette declarée ne correspondrait pas forcément à la réalité. Le Gouvernement ne pouvait donc s'orienter que vers une taxe forfaitaire' (JORF, Débats, Ass. Nat., 4 November 1981, p. 3058). The second purpose is highlighted by the remarks of the Deputy Charles Josselin. He expressed pleasure at the 'modulation de la taxe par type d'appareils, car on tient compte ainsi des revenus plus ou moins importants qu'ils procurent' and he considered 'que l'on ait pris en consideration l'âge des appareils et que l'on ait retenu le principe de son paiement semestriel . . . car cela permettra d'eviter que les appareils qui fonctionnent seulement une partie de l'année — je pense notamment à la periode estivale — soient frappés d'une taxe annuelle' (JORF, Débats, Ass. Nat., 17 December 1981, p. 5063, and see also remarks by the member of the Senate, Francis Palmero, JORF, Débats, Senat 27 November 1981, p. 3252).

8. I have already said that the classification of a charge as one which can be characterized as a turnover tax gives rise, pursuant to Article 33 of the Sixth Directive, to the prohibition of overlapping with VAT, that is to say with a burden which is itself also levied on the receipts obtained from use of the machine. On that point the French Government maintains that the prohibition should not operate where the tax is annual and the law does not allow the grant of relief for periods of less than one year in the year in which VAT was first applied.

That view, which was subscribed to in the judgment of the Tribunal de grande instance, Nevers, mentioned earlier, is without foundation. Article 33 satisfies the conditions consistently laid down by the Court for the provisions of a directive to be recognized as having direct effect. It follows that, once a Member State imposes VAT on an activity already covered by a charge like the one at issue here, the prohibition against overlapping may be relied upon to prevent the collection of the latter charge and the tax authorities are obliged to reimburse or not require payment of the sums in respect of that part of the year during which VAT was applied for the first time.

9. The solution which I have proposed renders devoid of purpose the questions as to the compatibility of the contested tax with Articles 95 and 30 of the EEC Treaty; I need not therefore give details of and examine all the arguments which have been expounded in that connection. For the sake of completeness I shall merely make the following observations:

(a) as regards Article 95, the tax is not levied on goods but on the profitability of the service provided and, in the absence of proof of the non-existence of nationally manufactured automatic machines, it is impossible to identify discriminatory intent against the

machines manufactured in other Member States;

(b) as regards Article 30, according to the decisions of this Court, obstacles of a fiscal nature to imports are not covered by that provision and in any event do not provide grounds for applying it in conjunction with Article 95 (judgments of 22 March 1977 in Case 84/86 *Ianelli e Volpi SpA* v *Paolo Meroni* [1977] ECR 557, and of 7 May 1985 in Case 18/84 *Commission* v *French Republic* [1985] ECR 1339).

10. For all the reasons which I have given, I propose that the Court should give the following answer to the questions submitted to it by the Tribunal de grande instance, Coutances, by judgment of 18 December 1986 in the proceedings between Gabriel Bergandi and the Directeur des Services Fiscaux du Département de la Manche:

'The concept of a charge which can be characterized as a turnover tax, within the meaning of Article 33 of the Sixth Council Directive (77/338/EEC) of 17 May 1977, is to be interpreted as including a tax which is determined annually, is due from the operator of an automatic entertainment machine and is paid on the basis of criteria which take account, even though on a flat-rate basis, of the presumed profitability of the machine.

Article 33 of the Sixth Directive prohibits the imposition upon transfers of goods or the provision of services of any charges, duties or taxes which can be characterized as turnover taxes as from the time at which VAT is applied for the first time, regardless of the detailed arrangements laid down for the payment of the tax.'