OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 30 January 1992 *

Mr President,
Members of the Court,

1. The national court has submitted four questions for a preliminary ruling on the interpretation of Article 33 of the Sixth Council Directive on value added tax, [1] and on Article 9 et seq. and Article 95 of the EEC Treaty.

Those questions were raised in proceedings brought by two Danish companies for the reimbursement of the tax introduced by the Kingdom of Denmark by Law No 840 of 18 December 1987.

2. The tax in question, known as the 'employment market contribution' (hereinafter referred to as 'the employment levy'), was introduced in order to offset the decrease in State revenue as a result of the adoption of measures to pay for social expenditure out of tax with a view to strengthening the competitiveness — especially abroad — of Danish undertakings.

As is apparent from the order for reference the employment levy exhibits the following characteristics:

It applies to the supply of goods and the provision of services subject to value added tax and to various transactions that are exempt from value added tax (including, in particular, banking and insurance services).

In the case of undertakings subject to value added tax, the basis of assessment for the levy is calculated in accordance with the same rules as those laid down for the calculation of value added tax. Accordingly, the principle of the deduction of input tax is applied.

In the case of undertakings exempt from value added tax, the basis of assessment is, where possible, the value of sales less the value of purchases; otherwise, it is fixed on a flat-rate basis, namely the undertaking's total wages bill with a supplement of 90%.

The rate of the employment levy is fixed at 2.5% of the basis of assessment.

In contrast to value added tax, the levy is not paid on importation, but on subsequent marketing by the importing undertakings. Since imports are not subject to the levy, no deduction is made when the imported goods are marketed for the first time.

The employment levy is not invoiced separately.

* Original language: Italian.

1 — Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

3. The first question submitted by the national court turns on the compatibility of the tax in question with Article 33 of the Sixth Directive. I would point out, in passing, that an action for failure to fulfil its obligations, dealing with the same matter, has been brought by the Commission against Denmark and is currently pending before the Court (Case C-234/91).

4. Article 33 of the Sixth Directive, which forms part of Title XVIII ('Miscellaneous'), provides as follows:

'Without prejudice to other Community provisions, the provisions of this directive shall not prevent a 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.'

5. It follows from the wording of that provision that although Article 33 permits the Member States, in the exercise of their sovereignty in tax matters, to charge value added tax concurrently with other taxes, duties or charges (see the Court's judgment of July 1986 in Case 73/85 *Kerrut* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219), it expressly prohibits the introduction of duties which can be 'characterized as turnover taxes'.

The scope of that prohibition, as the Court has consistently held (see the judgments of 27 November 1985 in Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, and of 13 July 1989 in Joined Cases 93/88 and 94/88 *Wisselink* v *Staatssecretaris van Financien* [1989] ECR 2671), must be determined in the light of the role of Article 33 in the harmonized system of turnover tax, which takes the form of a common system of value added tax.

As is already apparent from the First Directive on value added tax,[2] harmonization in that sector must result in the abolition of cumulative multi-stage taxes and in the adoption by all Member States of a common system of value added tax (see the fourth recital in the preamble). A harmonized system of that kind is designed, in particular, to ensure that a single commercial transaction is subject to uniform tax provisions, so far as turnover tax is concerned, regardless of the Member State in which the transaction takes place (see the Court's judgment of 3 March 1988 in Case 252/86 *Bergandi* v *Directeur Général des Impôts* [1988] ECR 1343).

In order to achieve that objective the First and Second Directives on value added tax[3] provide that the Member States are to replace their system of turnover tax by the common system of value added tax.

Viewed in that context, Article 33 is in fact designed to ensure the proper functioning of the common system by expressly prohibiting the Member States, whose power to introduce charges *other than value added tax* is simultaneously recognized, from unilaterally introducing or maintaining in force taxes which exhibit the basic characteristics of value added tax and therefore overlap with the latter jeopardizing the unity of the system.

2 — First Council Directive of 11 April 1967 (67/227/EEC) on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

3 — Second Council Directive of 11 April 1967 (67/228/EEC) on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16).

That is the rationale behind Article 33, as is clear from the case-law of the Court. In its aforesaid judgment in *Rousseau Wilmot*, the Court points out that the provision in question, in leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on the condition that they are not taxes which can be 'characterized as turnover taxes', 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 Court has expressed itself in similar terms in *Bergandi*, stating that Article 33 must be interpreted as meaning that, as from the introduction of the common system of value added tax, the Member States are no longer entitled to impose on the supply of goods, the provision of services or imports liable to value added tax, taxes, duties or charges which can be characterized as turnover taxes.

6. Turning to the scope of Article 33, let me point out first of all that this provision does not define the concept of charges which can be 'characterized as turnover taxes'.

It is self-evident that — as the Court pointed out in *Bergandi* — it is a Community concept in so far as it is relied upon with a view to the attainment of the objective pursued by Article 33, which is to ensure that the common system of value added tax is fully effective.

The principle underlying that system consists, by virtue of Article 2 of the First Directive, in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which tax is charged. However, value added tax is chargeable on each transaction only after deduction of the amount of value added tax borne directly by the costs of the various price components; the procedure for deduction is so arranged by Article 17(2) of the Sixth Directive that taxable persons are authorized to deduct from the value added tax for which they are liable the value added tax which the goods have already borne (see the judgments in *Rousseau Wilmot*, *Bergandi* and *Wisselink* and, most recently, the Court's judgment of 19 March 1991 in Case C-109/90, *Giant* v *Gemeente Overijse* [1991] ECR I-1394).

In the light of that legislation, the Court has so far taken the view that the concept of charges which can be 'characterized as turnover taxes' must be defined essentially by reference to three factors (see the judgment in *Giant*):

— the tax is of general application, that is to say it applies in principle to all transactions involving the supply of goods and the provision of services;

— the tax collected at each stage in the production and distribution process;

— it is charged only on the added value as a result of the deduction of input tax.

Thirdly, it is also clear that the levy is charged only on the value added at the stage of each transaction since the tax payable on each transaction is in principle calculated after deduction of input tax.

7. The contested levy exhibits all the distinctive features outlined in the case-law. In the first place, it is a tax of general application levied on the supply of goods and the provision of services. Its field of application in fact is even wider than that of value added tax itself, inasmuch as it extends to sectors which are exempt from value added tax. The fact that imports are not subject to tax is immaterial in that regard, since imported goods are in any event subject to tax at each subsequent marketing stage.

Secondly, the levy constitutes, as the Danish Government itself acknowledges, a 'cascade' tax on turnover which is collected at each stage of the marketing chain and whose basis of assessment, as in the case of value added tax, is determined by reference to the revenue earned by the undertakings concerned. As for the fact that in some cases the tax is determined on a flat-rate basis (that is to say, on the basis of the total wages bill increased by a given percentage), it should be pointed out that the purpose of that criterion is to reconstruct the amount of revenue purportedly earned by the undertakings in question and that, as the Court has confirmed in its case-law, in particular in *Bergandi*, a flat-rate tax may be regarded as a turnover tax for the purposes of Article 33 where — as is precisely the case here — the amount thereof is fixed on the basis of an objective evaluation of the undertaking's foreseeable receipts.

In the light of those considerations, it seems to me that the contested levy must be classified as a turnover tax for the purposes of Article 33 of the Sixth Directive.

8. That conclusion — in my view — is not invalidated by the Danish Government's objections.

The first of those objections concerns the interpretation of Article 33. According to the Danish Government, that provision prohibits only taxes which distort competition or which compromise the common system of value added tax, either because they replace value added tax wholly or in part or because they affect the manner in which the system operates. On the other hand, Article 33 does not prohibit the mere introduction of 'cascade' turnover taxes which exhibit characteristics similar to those of the system of value added tax.

That objection must be rejected inasmuch as it is based on a misinterpretation of Article 33.

The scope of the prohibition laid down by that provision is not limited solely to taxes that distort or replace value added tax, which, moreover, would in any event be incompatible with the common system even in the absence of Article 33. On the

contrary, as is clear from the case-law referred to earlier — and in particular from the judgments in *Rousseau Wilmot* and *Bergandi* — Article 33 lays down an absolute prohibition on the charging of value added tax concurrently with national taxes which, like the contested levy, are charged 'on the movement of goods and services and on commercial transactions in a way comparable to value added tax'.

In that regard, it should also be pointed out that the role of a provision against concurrent taxation, which Article 33 assumes in the context of the common system, is, if viewed in perspective, one of growing importance. With the gradual attainment of harmonized rates of value added tax, the continued existence of national taxes essentially identical to value added tax would entail the application of a distinct rate in addition to the common rates, thereby enabling the harmonized system to be circumvented.

It must also be emphasized, moreover, that the employment levy, though charged on transactions in a manner comparable to value added tax, is governed exclusively by national rules which do not coincide with those of the common system as regards, for instance, the range of activities that are exempted. Those possible difference between the systems governing the two taxes, one being a Community tax and the other a national tax, which, however, exhibit the same characteristics and are intended to be charged in the same manner on the same transactions, demonstrate that the overlap between value added tax and similar national taxes has a far from negligible effect on the uniform functioning of the common system.

Secondly, the Danish Government denies that the contested levy displays characteristics which are similar to those of value added tax, regard being had to the aforementioned differences between the systems governing the two taxes.

That objection has already been met in paragraph 8 of this Opinion. At this juncture, I shall confine myself to the following points:

— the Danish Government acknowledges that, instead of introducing the employment levy, it would have been possible simply to increase the rate of value added tax; moreover, the day before the hearing the Danish Government submitted a draft law replacing the levy with an increase in value added tax, and the interchangeability of those two measures confirms the similarity between them;

— only economic considerations (primarily the supposedly lesser impact on prices of a tax which is not invoiced separately) were at the time behind the Danish Government's preference for introducing the levy, instead of increasing value added tax; however, it is clear, and confirmation is to be found in the Court's case-law, that 'the reasons for the introduction of a national tax into internal law and the circumstances surrounding its introduction cannot affect its nature with regard to Community law' (see the judgment in *Wisselink*);

— the fact that the levy is not invoiced separately from the price reflects a

choice of accounting method which cannot affect the nature of the tax since, as stated earlier, the levy constitutes a cascade tax which is charged only on the added value and which is ultimately borne by the final consumer (in practical terms the introduction of the levy did not lead to a corresponding increase in prices only because, at the same time as it was introduced, the Danish Government reduced the social expenditure borne by undertakings and, consequently, the costs of production).

9. In the light of those considerations, I consider that Article 33 of the Sixth Directive must be interpreted as precluding the introduction and maintenance in force of a tax such as the 'employment market contribution' which forms the subject-matter of the dispute in the main proceedings.

10. The second question concerns the direct effect of Article 33. That provision, as stated earlier, lays down an absolute prohibition on introducing and maintaining in force taxes similar to value added tax. It therefore imposes a negative obligation, which is precise and unconditional, and therefore has direct effect in legal relations between States and individuals.

Moreover, the same view has been expressed by Mr Advocate-General Mancini in his Opinion in *Bergandi*, and it seems to me that the Court adopted that suggestion in its entirety, stating in its judgment that 'Article 33 of the Sixth Directive must be interpreted as meaning that as from the introduction of the common system of value added tax the Member States are no longer entitled to impose on the supply of goods, the provision of services or imports liable to value added tax, taxes, duties or charges which can be characterized as turnover taxes'.

11. The interpretation of Article 33 of the Sixth Directive which is advocated here renders consideration of the third and fourth questions submitted by the national court on the application of Article 9 et seq. and Article 95 of the Treaty devoid of purpose. However, in the event that the Court should opt for a different reading of Article 33, I shall confine myself to the following observations:

As the Court has consistently held, Article 9 et seq. and Article 95 do not apply concurrently (see, for a representative decision, the judgment of 22 March 1977 in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595). The essential characteristic which distinguishes a charge having an effect equivalent to a customs duty from discriminatory internal taxation is that the first is imposed exclusively on imported products, whilst the second is imposed on both imported and domestic products (see *Steinike und Weinlig*).

The employment levy is borne — as has repeatedly been emphasized — by domestic products and imported products. It must therefore be assessed exclusively in the light of the provisions of Article 95 of the Treaty.

In that regard, that plaintiffs in the main proceedings maintain that the contested levy has discriminatory effects in relation to imported products inasmuch as, in the case of the latter, the basis of assessment of the levy is calculated in accordance with rules which differ to some extent from those laid down for domestic products.

The Court has already held that Article 95 is infringed 'where the taxation on the imported products and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product' (see the judgment of 17 February 1976 in Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181).

It follows that a tax system may be considered compatible with Article 95 only if it is established that its structure is such as to preclude discrimination against imported products in any circumstances whatsoever. Furthermore, the Court has held, in relation to tax systems which provide for the application of different criteria to domestic products and to imported products, that where the detailed rules of application are not transparent, it is for the State which established the system to demonstrate that it does not have discriminatory effect in any circumstances (see the judgment of 26 June 1991 in Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3160). A rebuttable presumption of that kind arises, in my view, even in national proceedings involving the application of Article 95.

In practice, it is for the national court to ascertain in the light of those principles whether the rules governing the contested levy are such as to preclude discrimination against imported products in all cases. Such an appraisal must be carried out by reference to the fiscal impact both of the levy as such and of other charges, in particular value added tax, whose impact may vary owing to the existence of the levy.

12. There is a final point which has not been raised in the order for reference.

The Danish Government asks the Court to limit the temporal effects of its judgment in the event of a declaration that the contested levy is incompatible with Community law.

In that regard let me recall the view I expressed in my Opinion in Joined Cases C-19/90 and C-20/91 (*Karella* v *Minister for Industry, Energy and Technology* [1991] ECR I-2704) to the effect that, according to the case-law of the Court, the interpretation of a provision of Community law, given in the exercise of the jurisdiction conferred on the Court by Article 177 of the EEC Treaty, clarifies and defines where necessary the meaning and scope of that provision as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the provision as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that provision to be brought before the courts having jurisdiction are satisfied (see the judgments of 27 March 1980 in Case 61/79 *Amministrazione delle*

Finanze dello Stato v *Denkavit Italiana* [1980] ECR 1205, and of 27 March 1980 in Joined Cases 66, 127 and 128/79 *Amministrazione delle Finanze dello Stato* v *Salumi* [1980] ECR 1237).

In the light of those principles, it is only exceptionally that the Court may be moved to restrict the effects of a ruling on interpretation (see the aforesaid judgments in *Denkavit Italiana* and *Salumi*). The Court has had recourse to that possibility in very specific circumstances, that is to say where there was a risk of serious economic repercussions resulting in particular from the large number of legal relationships established in good faith on the basis of a provision considered to be validly in force, and having regard to the consideration that individuals and national authorities had been induced to behave in a manner inconsistent with Community legislation by reason of an objective and significant uncertainty relating to the scope of that legislation, to which the same behaviour on the part of other Member States or the Commission may have contributed (see the judgments of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR 1889; 2 February 1988 in Case 24/86 *Blaizot* v *University of Liège* [1988] ECR 379; and 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455).

Having said that, I consider that in this case the imposition of a restriction on the effects of the judgment should be categorically excluded.

The interpretation of Article 33 is quite clear and is supported by a wide and unambiguous body of case-law. Accordingly, there cannot have been any objective uncertainty with regard to the fact that the employment levy was prohibited in the light of that provision.

Moreover, the Commission informed the Danish Government that it considered the contested levy to be incompatible with Article 33 only a few days after its introduction, and subsequently instituted proceedings against Denmark under Article 169 for failing to fulfil its obligations.

As for the financial consequences for the Danish Government of a declaration that the employment levy is unlawful, it must be pointed out that this factor in itself certainly does not justify restricting the effects of the Court's ruling. If it were otherwise, there would be a risk of according more favourable treatment precisely for the more serious infringements since it is those infringements which may have financial implications of greater significance for the Member States: an aberrant and clearly unacceptable solution.

Furthermore, cases concerned with the legality of national charges under Community law may frequently have serious financial implications for the recovery of charges unduly levied. Accordingly, to restrict the effects of the judgment solely on account of the magnitude of those implications would not only run counter to the

previous case-law of the Court (see, for example, the judgment of 25 May 1989 in Case 15/88 *Maxi-Di* v *Ufficio del Registro di Bolzano* [1989] ECR 1391 concerning a charge whose financial importance was far from negligible) but would also constitute a dangerous precedent inasmuch as it could lead to a substantial reduction in the judicial protection accorded to the rights of taxpayers under Community tax law.

13. To conclude, therefore, I propose that the questions submitted by the national court be answered as follows:

'1. Article 33 of the Sixth Directive precludes the introduction and maintenance in force of a national tax such as the "employment market contribution" introduced by Danish Law No 840 of 18 December 1987.

2. In prohibiting the introduction and maintenance in force of charges which can be characterized as turnover taxes, Article 33 of the Sixth Directive confers on individuals rights which may be relied upon before the national courts.

3. A national charge such as the contested levy, which is borne by both domestic products and imported products, does not fall within the scope of Article 9 et seq. of the Treaty.

4. A national tax system may be considered compatible with Article 95 of the Treaty only if it is established that its structure is such as to preclude discrimination against imported products in any circumstances whatsoever. It is for the national court to ascertain whether the rules governing the contested levy are such as to preclude discrimination against imported products in all cases.'