OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 March 1992 *

My Lords,

1. In this case, the Pretura di Milano (Milan Magistrate's Court) asks for a preliminary ruling under Article 177 of the EEC Treaty on the compatibility with Community law of contributions charged by lawyers to their clients which finance certain social benefits for members of the legal profession. It has been argued before the referring court that those contributions are incompatible with the Sixth VAT Directive, Directive 77/388 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).

2. The question which has been referred is in the following terms:

'Is Article 33 of the Sixth Council Directive (No 77/388/EEC of 17 May 1977) to be interpreted as precluding the application in a Member State of a requirement that lawyers pay to the Lawyers' National Provident Fund supplementary contributions based on the consideration payable by clients for their services, having regard to the fact that the consideration is already subject to VAT, the supplementary contribution is to be included separately on every invoice together with the VAT payable by the client and the contributions are used to provide insurance solely on the basis of the principle of solidarity and for all contributing lawyers, but not with regard to the individual contributors since their contributions do not count for pension purposes and cannot be reclaimed in the event that entitlement to a pension is not acquired?'

3. That question has arisen in the course of proceedings instituted by Mr Aldo Bozzi, a member of the Milan Bar, against the Cassa Nazionale di Previdenza e Assistenza a favore degli Avvocati e dei Procuratori legali ('the Fund') for the recovery of LIT 2 280 390 which Mr Bozzi paid to the Fund by way of *contributo integrativo*, or 'supplementary contribution', under Article 11 of Law No 576 of 20 September 1980. Mr Bozzi maintains that that provision is incompatible with Article 33 of the Sixth VAT Directive, which 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 gener-

* Original language: English.

ally, any taxes, duties or charges which cannot be characterized as turnover taxes.'

The case turns on the question whether the supplementary contribution can be characterized as a turnover tax for the purposes of that provision.

4. I note that Article 33 has recently been amended: see Directive 91/680, OJ 1991 L 376, p. 1. The amendments are not, however, material to the question raised in these proceedings.

The Fund

5. The Fund was established by Law No 6 of 8 January 1952 to provide social benefits for lawyers. All lawyers practising in Italy and whose professional income reaches a certain level are required to affiliate to it. Law No 576 of 20 September 1980 is concerned with the benefits payable by the Fund, which include old-age and invalidity pensions, and with the contributions which have to be paid to it by its members. The Fund is financed by two types of contribution. The first type is the 'individual contribution', the amount of which depends on the lawyer's professional fees chargeable to income tax. The basic rate is ten per cent up to a certain ceiling. Thereafter three per cent is payable of professional income which exceeds that ceiling. There is a minimum contribution which is payable by all lawyers affiliated to the Fund. The second type of contribution is the 'supplementary contribution', which is levied at the rate of two per cent on the fees paid by clients. It is the legality of the supplementary contribution which is contested by Mr Bozzi in the main action.

6. The rules relating to the supplementary contribution are laid down in Article 11 of Law No 576 of 1980. By virtue of that provision, anyone whose name appears on the roll of lawyers, including qualified lawyers who are not affiliated to the Fund and trainees who are affiliated to it, must pay to the Fund a certain proportion, currently two per cent, of all fees which contribute to his annual turnover for the purposes of VAT. The amount concerned may be, and usually is, passed on to the client, but remains payable by the lawyer to the Fund whether or not the client has paid it to the lawyer. The supplementary contribution is not subject to income tax or VAT and is not taken into account for the purposes of calculating a lawyer's professional income.

7. According to Article 17 of Law No 576 of 1980, anyone whose name appears on the roll of lawyers, including trainees who are affiliated to the Fund, must inform the Fund each year of his turnover for VAT purposes. The Fund is also authorized to obtain information about lawyers' income and turnover from the tax and VAT authorities. Under Article 21 of the Law, lawyers who withdraw from the Fund before their entitlement to a pension accrues are entitled to a refund of their individual contributions, but not of

their supplementary contributions. It appears that the supplementary contributions are not put to any specific purpose, but simply form part of the income of the Fund.

The concept of turnover taxes

8. The meaning of the expression 'turnover taxes' in Article 33 of the Sixth Directive has been considered by the Court on a number of occasions. In view of the purpose of the directive, it would have been possible to interpret that expression widely as excluding all forms of turnover tax other than the harmonized system of VAT laid down by Community legislation. None the less, the Court's case-law, which was recently subjected to a detailed analysis by Advocate General Tesauro in Case C-200/90 *Dansk Denkavit and Another* v *Skatteministeriet,* has consistently interpreted the expression more narrowly. It would in my view be unwise, having regard to the special need for certainty in the tax field, for the Court now to depart from the general trend of its previous decisions.

9. The Court made it clear in Case 252/86 *Bergandi* v *Directeur-Général des Impôts* [1988] ECR 1343, at paragraph 13, that the notion of a turnover tax for the purposes of Article 33 is a Community concept. In Joined Cases 93/88 and 94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671, at paragraphs 17 and 18, the Court, reiterating its previous case-law, gave a detailed explanation of what that concept embraced. It stated:

'... Article 33 of the Sixth Directive, which leaves the Member States free to maintain or introduce certain indirect taxes, provided 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 principle of the common system of value-added tax 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 the 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.'

10. Thus, only taxes which are levied in a broadly similar way to VAT are to be considered turnover taxes for these purposes. This test was applied by the Court in Case C-109/90 *Giant* [1991] ECR I-1385, where it was held that a tax which was not general in scope, which was imposed at only one stage of the process of production and distribution and which was not charged on the value

added since the previous transaction but on the gross amount of a taxable person's annual receipts did not constitute a turnover tax within the meaning of Article 33 of the Sixth Directive.

11. However, the purpose for which the tax in question is levied is not, according to the case-law, decisive. Thus, the fact that the supplementary contribution may, as the Fund suggests, have more in common with a social security contribution than a tax does not necessarily take it outside the scope of Article 33. As Advocate General Mancini explained in somewhat similar circumstances in Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, at p. 3761, 'it is clear that the social or fiscal purpose which the levies in question are intended to achieve does not constitute a sure and satisfactory criterion for determining whether or not such levies are covered by the Community rule'. That view was borne out by the judgment of the Court, which stated, at paragraph 16, that Article 33 of the Sixth Directive did not 'prohibit the Member States from maintaining or introducing duties or 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 or certain categories of undertakings and calculated on the basis of the total annual turnover without directly affecting the price of goods or services' (emphasis added). It is therefore apparent that such a levy was only regarded as outside the scope of the prohibition laid down in Article 33 because it possessed both the characteristics mentioned. Consequently, the purpose to which the supplementary contribution is put cannot in itself be decisive.

The status of the supplementary contribution

12. The Court's judgment in *Wisselink* makes it clear that, in order to determine whether a charge such as the supplementary contribution constitutes a turnover tax within the meaning of Article 33 of the Sixth Directive, it is necessary to consider whether it is charged on the provision of services in a way comparable to VAT and whether it therefore jeopardizes the functioning of the common system of VAT.

13. As both Mr Bozzi and the Commission point out, the supplementary contribution and VAT undoubtedly have some common features. Thus, the contribution is generally assessed on the same basis as VAT, it is exactly proportional to the cost of the service provided by the lawyer, it has a direct impact on the cost of the service and is in practice nearly always passed on to the client. Where this is the case, it will be shown separately on the lawyer's invoice in the same way as VAT.

14. In my view, however, the supplementary contribution possesses a number of features which show that it is not charged on commercial transactions in a way comparable to VAT. First of all, contrary to the view put forward by the Commission, the supplementary contribution does not appear to be general in scope. It is true that the Court's case-law does not make it entirely clear what is meant by the word 'general' in this context.

It might be taken to mean of general application to all goods and services, apart from certain specified exceptions, like VAT itself. Alternatively, it might have the more limited meaning of applicable generally to all goods or services falling within a particular category. But even on this narrower view, the supplementary contribution cannot in my view be considered general in scope, for Law No 576 of 1980 is concerned only with lawyers. Although it appears that a number of other liberal professions are subject to similar legislation, this is not true of all such professions and it is not suggested that others who provide a service on a commercial basis are required to pay contributions of this nature. Secondly, unlike VAT, the supplementary contribution is a single-stage charge: it is imposed only when the lawyer delivers a bill to his client. Moreover, the lawyer cannot deduct from it tax he has paid on supplies made to him, and his client cannot deduct it from tax for which he may subsequently become liable on supplies made by him.

15. In my view, the Court's case-law makes it clear that those features have the effect of removing the supplementary contribution from the scope of the prohibition laid down in Article 33.

16. That this is the effect of the case-law may be illustrated by comparing the supplementary contribution with the special consumption tax on passenger cars known as the BVB, which was the subject of the Court's ruling in *Wisselink*. There the Court said, at paragraph 20 of the judgment:

'Although the BVB is a consumption tax whose basis of assessment is proportional to the price of passenger cars, it is not a general tax since it is charged only on two categories of specific products, namely passenger cars and motorcycles. Nor is it a tax on the movement of goods and services, or a tax which is charged on commercial transactions in a way comparable to value-added tax, since it is applied once only, at the time of supply by the manufacturer or at the time of importation, and is then passed on in full at the next marketing stage without being levied anew. The BVB paid is not deductible but forms an integral part of the cost price of the car ... Furthermore, the BVB does not jeopardize the functioning of the common system of value-added tax since it is levied alongside that tax and not wholly or partly in place thereof. Finally, the basis for charging the BVB is the list price of the car, net of value-added tax, and where value-added tax is payable, it is calculated on the consideration actually obtained by the supplier, including the BVB.'

The Court concluded that a tax such as the BVB did not constitute a turnover tax within the meaning of Article 33 of the Sixth Directive.

17. The supplementary contribution differs in two respects from the BVB as described by the Court in the passage I have just cited.

First, it is charged on the lawyer's total turnover, whereas the BVB was charged only on specific products. The supplementary contribution may therefore be considered a 'turnover tax' in the broad sense. None the less, as Advocate General Mischo acknowledged in *Wisselink*, at p. 2696, the Court has plainly defined that expression as it is used in Article 33 of the Sixth Directive more restrictively.

18. Secondly, the supplementary contribution is not included in the consideration obtained by the lawyer on which VAT is charged. The Commission argues that the exclusion of the supplementary contribution from the basis of assessment is incompatible with Article 11A(2)(a) of the Sixth Directive, which provides that the taxable amount shall include 'taxes, duties, levies and charges, excluding the value added tax itself'. According to the Commission, the supplementary contribution therefore compromises the functioning of the VAT system and must for that reason be regarded as a turnover tax for the purposes of Article 33.

19. The Commission's view that the exclusion of the supplementary contribution from the basis of assessment is incompatible with Article 11 of the Sixth Directive may well be correct. It seems to me, however, that the answer to the question whether a tax falls within the scope of the prohibition laid down in Article 33 depends on the attributes of the tax itself. The question whether the supplementary contribution should be included in the basis of assessment is in my view a separate one. Although the Court mentioned in *Wisselink* that the BVB was so included, I do not think it was intending to suggest that that factor could in itself have the effect of turning a tax, duty or charge into a turnover tax for the purposes of Article 33.

20. In the light of the Court's case-law, I can therefore find no relevant difference between the supplementary contribution and the BVB, the legality of which the Court upheld in *Wisselink*.

Conclusion

21. I am accordingly of the opinion that the question referred by the Pretura di Milano should be answered as follows:

Article 33 of the Sixth VAT Directive does not preclude the imposition by a Member State of a requirement that lawyers pay to a provident fund a supplementary contribution such as the *contributo integrativo*.