In Case 90/79

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Manfred Beschel, a member of the Legal Department of the Commission, acting as Agent, assisted by Robert Collin, Advocate at the Cour de Paris, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

v

FRENCH REPUBLIC, in the person of the Minister for Foreign Affairs, represented by Noel Museux, acting as Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

defendant,

APPLICATION for a declaration that the French Republic has failed to fulfil its obligations under Articles 12 und 113 of the EEC Treaty and under the Common Customs Tariff as laid down by Regulation No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275) and by the regulations making subsequent amendments thereto,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, A. Touffait and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGEMENT

Facts and Issues

The facts and the arguments advanced by the parties during the written procedure may ber summarized as follows:

I — Facts and written procedure

Paragraph I (b) of Article 22 of the French Loi de Finances [Finance Law] for 1976, No 75-1278 of 30 December 1975 (Journal Officiel de la République Française of 31 December 1975, p. 13564), institutes a "levy on the use of reprography", the yield from which, less an amount representing 5% of the levy which goes to the customs authorities, is allocated to the Centre National des Lettres [National Centre for Literature] which subsidizes literature in France, particularly in the scientific field. According to details furnished by the French authorities, the revenue is used in particular to finance the purchase of journals and new books and the translation of foreign works.

By paragraph II (b) of the same provision, the levy is payable on sales and appropriations for their own use, otherwise than for export, of reprographic machines by undertaking which have manufactured them, or have had them manufactured in France as well as on imports of such machines by undertakings which import them.

By the same paragraph, the levy, the rate of which is 3%, is assessed, paid and collected in the same way as value-added tax. The detailed methods for collecting it were laid down by Decree No 76-514 of 11 June 1976 (Journal Officiel de la République Française of 13 June 1976, p. 3572) and an Order of 12 July 1976 (Journal Officiel de la République Française of 17 July 1976, p. 4279).

Article 22 of Law No 75-1278 also institutes a levy of 0.20% on the publication of certain written works which is payable by publishers according to the sales, other than export sales, of works published by them.

The Commission took the view that the levy imposed on imports of the equipment in question constituted a charge which has an effect equivalent to a customs duty prohibited by Article 9 *et seq.* of the EEC Treaty in so far as it applies to imports from other Member States and which is incompatible with Article 113 of the Treaty and with the Common Customs Tariff in so far as it applies to imports from non-member countries and by a letter of 1 August 1977 notified the Government of the French Republic of its viewpoint and gave it an opportunity to submit its observations.

After pointing out that the dual purpose of the levy in issue is to assist intellectual creativity in written form and to strengthen the entire protective scope of copyright law, which is seriously threatened by the extension of reprography which is replacing the traditional

distribution of books, the French Government submitted in its reply of 22 November 1977 that the levy in issue, which is borne by domestic and imported products alike, cannot be regarded as a charge having an effect equivalent to a customs duty. The fact that, as regards imported equipment, the customs authorities are made responsible for its collection is in this respect immaterial.

The Commission maintained its point of view and sent to the French Republic a reasoned opinion dated 28 July 1978 in which it stated that "by charging levies on reprographic equipment the French Government has failed to fulfil its obligations under Article 12 of the EEC Treaty, under Regulation No 950/68 of 28 June 1968 on the Common Customs Tariff and under Article 113 of the EEC Treaty" and invited it to take the necessary measures to comply with that opinion within a period of two months. It contended in substance that as there was no significant manufacture of reprographic equipment in France the levy was borne "almost entirely by imported products" and that secondly, owing to its specific character, the levy could not be regarded as forming part of a general system of internal taxation.

The Government of the French Republic also maintained its point of view, which it set out again in a letter of 28 September 1978. The French Government drew attention to the need to protect copyright rights endangered by the spread of reprography, pointing out that the Commission had itself made proposals to introduce at Community level a measure similar to the one which it was criticizing, and submitted that the levy in issue was borne equally by domestic and imported products alike, that domestic production was far from being insignificant and that 8% of the revenue from the tax in issue came from equipment manufactured in France.

By an application dated 5 June 1979 the Commission thereupon brought the matter before the Court pursuant to Article 169 of the Treaty in order to obtain a declaration that the alleged failure had occurred.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry being necessary. However, the Court requested the parties to furnish, by agreement if possible, statistical details on French manufacture and importation of the reprographic equipment in question.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare that by charging levies on the importation of reprographic equipment the French Republic has failed to fulfil its obligations under Article 12 of the EEC Treaty, under Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff as subsequently amended, and under Article 113 of the EEC Treaty;

2. Order the French Republic to pay the costs.

The *defendant* claims that the Court should:

1. Dismiss the application;

2. Order the Commission to pay the costs.

III — Arguments of the parties

A — Application

The *Commission* observes that under the case-law of the Court of Justice any pecuniary charge, however small and whatever may be its designation, mode of application, objective, or the use to which the sums raised by it are put, borne by imported goods when or by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12 and 13 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect, and if the product on which the charge is imposed is not in competition with any domestic product.

The position is different only if the charge:

— firstly, appears to be payment for a service actually rendered to importers and whose amount is proportionate to the value of the service in question as well as to its cost (judgment of 11 October 1973, Case 39/73 *REWE* [1973] ECR 1039);

— secondly, relates to a general system of internal dues applied systematically in accordance with the same criteria to imported products and similar or comparable domestic products (judgment of 14 December 1972, Case 29/72 *Marimex* [1972] ECR 1309).

Nevertheless, even a duty falling within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria may constitute a charge having an effect equivalent to a customs duty on imports if it appears to be intended exclusively to support activities which specifically benefit domestic products alone so that as regards those products the charge is offset. Such a duty has only the appearance of being a system of internal taxation (judgment of the Court of Justice of 19 June 1973, Case 77/72 *Capolongo* [1973] ECR 611; judgment of 18 June 1973, Case 94/74 *IGAV* [1975] ECR 699; judgment of 25 May 1977, Case 77/76 *Cucchi* [1977] ECR 987).

It is the Commission's view that, in the case of reprographic equipment which has not been manufactured in France, it is the importation of such equipment which, under Article 22 of the Finance Law, makes the levy chargeable whereas there is nothing to suggest that the levy is payment for a service rendered. The first two conditions required by the case-law cited above are accordingly fulfilled.

As to whether the levy does not constitute internal taxation within the meaning of Article 95 of the EEC Treaty, the Commission admits that from a theoretical and strictly legal point of view the levy has all the appearance of an internal tax which applies systematically and in the same manner to domestic and imported products alike. In reality the situation is however different. The Commission says that the production of reprographic equipment in France is negligible. According to official statistics on imports and official industrial statistics on production in

France, the *value* of reprographic equipment produced in France represents only 1 to 1.5% of all equipment marketed in France. Moreover, if those statistics are adjusted — which according to the Commission is necessary owing to the fact that the import figures are based on the value declared for customs purposes whilst the national production figures are based on selling prices to buyers (wholesalers or ultimate consumers) — the proportion of national production falls to 0.33%. From that it follows that owing to its economic effect the levy in issue constitutes in practice a tax on imports and not a means of collecting an internal tax within the meaning of Article 95 of the Treaty.

It is undoubtedly necessary to bear in mind that even in the absence of similar domestic products a charge borne by such products must be regarded as an internal tax within the meaning of Article 95 if it is part "of a general system of internal taxation" (judgment of the Court of Justice of 1 July 1969 in Case 24/68 *Commission* v *Italian Republic* [1969] ECR 193).

That requirement is not however fulfilled in this case because the levy in issue was introduced outside the general taxation system for the purpose of financing a specific project of cultural policy. In practice the charging of that levy results in making imports alone bear the cost of financing a measure which must necessarily benefit essentially national businesses. It thus appears that whilst the levy in question appears to be internal taxation from a technical point of view, it in fact has the same effect as a charge on imports. It is that effect which is the test for determining whether a domestic charge comes under Article 12 or Article 95 of the Treaty.

In arriving at that assessment the Commission observes that according to an established body of case-law the objective pursued by a charge having an equivalent effect cannot remove it from the scope of the prohibition contained in Article 12 or alter the designation which it is appropriate to give to it.

Even if it were possible to take account of the objective pursued, which the Commission denies, that factor would not be enough, according to the Commission, to alter the designation of the levy in issue or to justify it. Contrary to what is stated by the French Government, the measure in question does not come under the law of literary property because it is not concerned with the lawfulness of copies under copyright law and does nothing to resolve the problem of authors' copyrights. On the contrary, as appears from the studies and reports prior to the enactment of the Law, the measure is aimed at securing the funds needed to finance a cultural project, namely the promotion of books, without resort to revenue from general taxation.

The Commission concluded that by introducing the levy in issue the French Republic has infringed Articles 12 and 113 of the Treaty and the provisions of the Common Customs Tariff.

B — Defence

The *French Republic* considers it appropriate to recall at the outset the features of the system under criticism and to

clarify the legal argument underlying the complaints which have been made.

(a) The sums raised by the levy in issue are allocated entirely to the Centre National des Lettres whose work in promoting the reading of books by the public at large supplements that of the Ministry of Culture. The Centre National des Lettres was created by the Law of 11 October 1946, which was amended by the Decree of 30 January 1976, and its objects are to promote writing and the dissemination of books, mainly by subsidizing orders for published works, both foreign and French, placed by libraries and cultural bodies, and by providing direct aid for authors consisting mainly of grants, which represents about 10% of its work. The Law did not place any requirement on the Ministry of Culture or on the Centre National des Lettres as to the use of the revenue from the levy.

In the light of the expansion of reprography, which represents a danger to the writing and publishing professions, it seemed justified that the reprographic industry should contribute to the financing of cultural action in this sector. In accordance with the Berne Convention on Copyright, the Law of 11 March 1957 on copyright exempts from the payment of royalties only copies made for private use. However, in many areas reprography is replacing the traditional dissemination of books and periodicals thus seriously prejudicing the rights of authors and publishers.

On the basis of those factors the French Government stresses that the levy on the use of reprography is collected by the State in the same way as all other taxation and forms part of the national budget. It was only because of the particular nature of the French administrative structure in the cultural field that a "special Treasury account" had to be opened to enable funds to be allocated. The levy is therefore not allocated to any particular use and is simply added to the other income of the Centre National des Lettres in order to finance the whole of its expenditure.

The French Government points out that all machines bearing the levy are marketed in France, whatever their origin, and that the levy in question is collected in exactly the same way as value-added tax except that, in accordance with the provisions of Decree No 76-514 of 11 June 1976, it is levied only at the stage at which the equipment is first marketed in France.

(b) As regards the legal assessment of the tax on reprography in the light of Community law, the French Government first of all criticizes the Commission's approach in listing a number of complaints which do not add up to a coherent argument free of obscurity and contradiction. It particularly challenges the statement that the factor which determines whether a charge should be described as one having equivalent effect is the fact that "importation gives rise to the collection of the levy" and that there is accordingly a causal link between the crossing of the frontier and the collection of the charge. That alleged

causal link is not relevant because the essential issue is whether the tax is borne equally by domestic and imported products alike, in which case it comes under Article 95. The Court of Justice made it plain in its judgment of 22 March 1977 in Case 74/76 *Iannelli* [1977] ECR 557 that the time when the duty is charged is immaterial; the test is whether it is because of the crossing of frontiers *alone* that the duty is charged, in which case there can be no identical taxation of the domestic product.

On the other hand, having acknowledged that from a theoretical point of view the levy in issue appears to be an internal tax the Commission goes on to suggest two factors which contradict that appearance; namely the fact that French production is negligible, and the use to which the revenue raised by the levy is put. The Commission does however concede that under the case-law of the Court the first argument is not conclusive whilst by criticizing the allocation of the revenue to a cultural purpose rather than to a system of compensation for loss of royalties the Commission is entering upon political ground and departing from pure legal assessment.

After considering the case-law of the Court the French Government believes that it may be summarized in the following propositions:

(1) Under the scheme of the Treaty the same tax may not simultaneously belong to the category of charges having an effect equivalent to a customs duty and to the category of internal taxation within the meaning of Article 95 since those in the first category are purely and simply prohibited whilst in the case of the second Article 95 merely prohibits discrimination between domestic products and those imported from other Member States which is adverse to the latter (judgment of 22 March 1977 in Case 78/76 *Steinike & Weinlig* [1977] ECR 595).

(2) The criterion for distinguishing between the two categories follows quite logically from that duality of the system and the Court put it in these terms in the judgment of 25 January 1977 in Case 46/76 *Bauhuis* [1977] ECR 5: "Any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State. The position would be different only if the charge in question is the consideration for a benefit provided in fact for the exporter representing an amount proportionate to the said benefit or if it is related to a general system of internal dues applied systematically in accordance with the same criteria to domestic products and imported products alike". As the Court stated in its judgment in Case 78/76 *Steinike & Weinlig*, cited above, the fact that a tax is imposed on a product solely by reason of its crossing a frontier precludes the existence of an identical tax on domestic products.

(3) A charge coming under Article 95 may nevertheless come within the category of charges having equivalent effect if, although applying to domestic and imported products according to the same criteria, it "has the sole purpose of financing activities for the specific advantage of the taxed domestic product" (judgment of 25 May 1977 in Case 77/76 *Cucchi*, cited above).

(4) Finally, it follows from the judgment of the Court of 22 March 1977 in Case 74/76 *Iannelli* [1977] ECR 557 that a tax applying systematically, according to the same criteria, to domestic and imported or exported products alike, and as such coming under Article 95, must satisfy only the requirement of non-discrimination imposed by that provision. The fact that a tax or levy is collected by a body governed by public law other than the State or is collected for its benefit and is a special tax or one allocated to a specific purpose cannot prevent its falling within the field of application of Article 95 (paragraph 19). On the other hand there is an infringement of Article 95 not only if the rate of the tax on domestic and imported products is different but also if the difference affects the mode of assessment and collection of that tax.

Applying those criteria the French Government makes the following observations concerning the levy in issue:

(1) The levy fulfils all the necessary requirements to come under a general system of internal taxation. It applies to domestic and imported products according to the same criteria because the tax of 3% applies uniformly and the mode of assessment of the tax, for both imported and domestic products, is that used for value-added tax.

By reference to the provisions relating to VAT, the event giving rise to the tax and the stage of marketing at which it is levied are the same. So, in principle, the levy in issue meets the conditions required to come under Article 95 of the Treaty and does not infringe the provisions of that article.

(2) It then remains, according to the French Government, to consider whether the two sets of circumstances relied on by the Commission are such as to prevent the levy in question falling within the ambit of Article 95 and to bring it back within that of Articles 9 and 12.

(a) The absence of domestic production of reprographic equipment

On a point of fact the French Government observes that some reprographic equipment is actually produced in France. Evaluating the extent of that production in terms of "significant" or "insignificant" would be arbitrary since it is impossible to determine the level below which domestic production should be regarded as "non-existent".

The total amount of the tax on reprography recovered by the customs authorities in 1978 stood at FF 21 625 000 as against FF 1 901 082 collected by the Direction Générale des Impôts [Directorate-General for Taxes] which makes the relative share held by domestic products 8% and not the insignificant figure of 0.33% suggested by the Commission.

Furthermore, the list of reprographic equipment on which the tax is levied comprises all kinds of such equipment whereas only certain kinds of reprographic equipment are manufactured in France. In order to ascertain whether or not there is any domestic production it is necessary to take products which, if not interchangeable, are at any rate in competition.

From a legal point of view the question to be resolved is whether a Member State may tax products imported from the Community when the same products are not manufactured in the State. Provided certain conditions are fulfilled

the case-law of the Court expressly admits of such a possibility from the moment the tax in question comes under a general system of internal dues (judgment of 4 April 1968 in Case 7/67 *Wöhrmann* [1968] ECR 177 and Case 13/67 *Becher* [1968] ECR 187; judgment of 1 July 1969 in Case 24/68 *Commission* v *Italy* [1969] ECR 193; judgment of 1 July 1969 in Joined Cases 2 and 3/69 *Diamantarbeiders* [1969] ECR 211). Contrary to what the Commission contends, taxes of this kind are not rare and do not only come under the heading of traditional taxes; the defendant cites various examples taken from the practice of Member States.

The defendant further stresses that where fiscal levies on consumption are concerned it is justifiable for the basis of assessment of those levies to extend to all products consumed on the territory in question.

The characteristics of the levy in issue do make it a general internal tax. It is a fiscal tax which is incorporated in the budget of the State on the same conditions as other fiscal revenue; it is charged on all reprographic equipment released on the national market and it is applied or is capable of being applied in the same way to national and imported products.

(b) The use to which the levy is put

The French Government observes that there is an established body of case-law of the Court to the effect that a fiscal charge having all the appearance of an internal tax might nevertheless still constitute a charge having equivalent effect if such a charge is limited to particular products and has the sole purpose of financing acitivites for the specific advantage of the taxed domestic products so as to affect, wholly or in part, the fiscal charge imposed upon them (judgment of the Court of 18 June 1975 in Case 94/74 *IGAV* [1975] ECR 711 and of 22 March 1977 in Case 78/76 *Steinike & Weinlig* [1977] ECR 595). However, the circumstances in which that case-law may be applied do not exist as far as the levy in question is concerned and the French Government points out that the Commission does not contend that this case-law should apply. There is in fact no relationship between the domestic products subject to the levy and the allocation of the tax to the Centre National des Lettres. The charge bourne by those domestic products is not offset in any way whatsoever, either wholly or in part. On the contrary, the existence of the levy tends in practice to inhibit the development of the French industry owing to the strength of foreign undertakings in the market.

Moreover, the levy is not allocated to a particular project but is part of the entire revenue of the public institution. It finances a public administrative department performing a traditional public service and the existence of an original administrative structure does not change that legal situation.

The Centre National des Lettres supplies funds to libraries which enjoy full independence in the use to which the funds are put and the Commission does not in any event contend that those libraries discriminate in their purchase of books.

Although the French Government decided not to allocate the sums raised by the tax to pay royalties due to copyright holders it so decided for general policy reasons. However, that fact is immaterial in so far as the position

of the levy in regard to Article 95 is concerned. The test under that provision is not whether the levy gives authors a direct or indirect, or even unascertained advantage, but whether it is a discriminatory measure which takes the levy in issue outside the ambit of Article 95. That is not the case.

C — Reply

1. The Commission makes two preliminary remarks. It says that the French Government does not contest the accuracy of the statistical data submitted by the Commission as regards the respective shares of domestic and imported products and that it has admitted that the levy in question does not form part of the scheme of French legislation on copyright.

The object of the levy is not to remunerate authors for the reproduction of protected works but to finance specific functions conferred on the Centre National des Lettres. The Commission does not dispute that the increasing use of reprographic machines presents serious problems from the point of view of copyright but the matter is so complex that studies made for several years at world level have not agreed in their conclusions.

It was on the basis of those considerations and in the context of copyright alone that in its Communication to the Council of 22 November 1977, to which reference is made elswhere, the Commission suggested that, as part of a comprhensive solution to the general problem of copyright, "a sum ought to be included in the selling price of equipment (photocopiers, tape-recorders, video-recorders) and the material they use (photocopying papers, tapes)" so that "users could pay a fixed fee which would cover subsequent utilization coming under the heading of copyright".

However, in Community law, the only relevant question is whether the levy in issue is part of the system of copyright rules because the question whether that levy is or is not part of a system of internal taxation depends on the answer to that question alone. However, that is clearly not the case.

2. The Commission then goes on to consider the pleas advanced by the French Government in its defence and contends first of all that it is impossible to resolve the dispute between the two parties to the action without raising the question whether there is or is not in fact any domestic production. A unilaterally imposed tax which is basically aimed at imports alone and is borne by foreign goods by reason of their crossing a frontier constitutes a charge having an effect equivalent to a customs duty.

The Commission considers it necessary to analyse the concept of internal taxation within the meaning of Article 95 of the EEC Treaty in order to refute the French Government's argument that it is immaterial whether or not there is any domestic production.

(a) Although there is no exhaustive definition of that concept it has been clarified by the Court by means of the expression "general system of domestic charges" (judgment of the Court of 25 January 1977 in Case 46/76 *Bauhuis*

[1977] ECR 5) or general internal system of fiscal charges (judgment of 22 March 1977 in Case 74/76 *Iannelli* [1977] ECR 557) so that the tax applies "without distinction to all categories of products, whether domestic or imported", like the turnover tax which was the subject-matter of the judgment of the Court of Justice of 4 April 1968 in Case 31/67 *Stier* [1968] ECR 235. Although Article 95 allows a general internal system to be extended to products imported from other Member States, it does so in order to provide a balance between imported and domestic products. In its judgment of 4 April 1968 (*Stier*) the Court was careful to state that "in fact such a tax, when charged on importation, even on products not competing with domestic products, is intended to place in a comparable fiscal situation all categories of products, whatever their origin".

(b) In its *Bauhuis* judgment the Court admittedly held that there is "internal taxation" when domestic and imported products are taxed systematically according to the same criteria but where domestic production is non-existent that condition is not automatically fulfilled by the mere fact that a national fiscal rule provides for equal treatment of imports and domestic products.

The use of such a fiscal arrangement is in reality a circumvention of the prohibition on charges having equivalent effect which the Court has specifically condemned (judgment of 1 July 1969 in Joined Cases 2 and 3/69 *Diamantarbeiders*, cited above).

(c) Those observations likewise apply if domestic production is so insignificant that in real economic terms it should be regarded as negligible. If that were not so a Member State could, by introducing "internal taxes" in the sectors in which there is no significant domestic production, cause the principle of the free movement of goods to be undermined. The problem of applying the criterion "negligible" or "insignificant" to domestic production is therefore fundamental in evaluating the tax in issue.

(d) The French Government's argument as to the allegedly arbitrary nature of the concept of negligible production is especially surprising in view of the fact that it was used by its representative to justify the introduction of the tax (sitting of the Senate of 22 November 1975). It is apparent from the debates on the tax that it was calculated mainly on the basis of imports and was in fact aimed at them only. That fact reveals the true intention of the French legislature.

It is further apparent from those debates that instead of considering the internal tax and particularly the rate thereof and then extending it to imports, the French Government proceeded in precisely the reverse order. Having studied on the one hand the volume of imports of reprographic equipment and on the other hand the revenue which it required, it first established the rate of tax needed to bring in the pre-determined amount of revenue and only then applied that tax, at the same rate, to French products in the knowledge that they were almost non-existent.

(e) The criterion of "negligible" or "insignificant" domestic production is not at all abritrary. It can be quantified according to a given situation and it is moreover applied in other areas of Community law, particularly in the field of competition. Although application of the criterion may prove difficult that is certainly not the case here and furthermore the criterion is always subject to judicial review. When applied to the facts of this case it necessarily leads to the conclusion that the levy in issue cannot be regarded as an internal tax.

3. As a final argument the Commission seeks to show that, even without taking account of whether or not there is any domestic production, the levy in question cannot be defined as internal taxation.

In this respect it cannot but conclude, especially in the light of the statements made during the parliamentary debates, that it is *prima facie* a special tax on imports and that there is no factor to prove that the levy is an internal tax. This case is moreover clearly distinguishable from that of the classical parafiscal charges with which the Court had to deal in Case 105/76 *Interzuccheri* [1977] ECR 1029 (judgment of 25 May 1977). In the present case examination of the use to which the revenue is put is relevant not to whether an internal tax recognized as such is, by way of exception, to be regarded as a charge having equivalent effect but, on the contrary, to whether there are grounds for accepting that a charge, borne mainly by imports and which for that reason should *prima facie* be regarded as a charge having an effect equivalent to a customs duty, may be regarded as an internal tax owing to the particular legislative system which introduced it.

As to the examples quoted by the French Government, particularly concerning the taxation of motor cars in Member States which do not make them and the taxation of petroleum products, the Commission observes that they are classical systems of internal taxation which are recognized as such not only in all the Member States of the Community but also in the majority of industrialized countries with a market economy.

Differences existing from one Member State to another in the method of charging and collecting taxes as well as in the allocation of the revenue from them do not alter their nature. The situation is exactly the same when taxes of that nature form an integral part of a general system which has been in force for a long time.

The Commission is aware that such differences are likely to affect intra-Community trade and it has submitted proposals to the Council for directives founded on Article 99 of the EEC Treaty with a view to harmonizing that kind of tax but it observes that it is not possible to harmonize provisions which are contrary to the Treaty. They should be abolished.

D — Rejoinder

1. The facts

(a) The French Government first criticizes the Commission's statement that the French Government has not

contested the facts put forward by the Commission. It claims that the Commission's officials have misinterpreted the statistics on the actual position of the reprographic industry in France. The most direct and accurate sources of information available to assess the actual share of French products in relation to imports of foreign equipment are the vouchers for the revenue from the levy on reprographic equipment which are held by the Centre National des Lettres.

It appears from those that in 1978 for example the levy on reprography yielded FF 21 652 146.53 from the customs authorities and FF 1 900 931.66 remitted by the tax authorities. The percentage of French products was consequently 8.07% of the total. The statistics for the first half of 1979 show an increase in the share of domestic products, which moved up to 8.79%.

(b) The French Government believes that those statistics are perfectly consistent and accurate. The difference in the figures obtained from them and the lower ones submitted by the Fédération des Industries Électriques et Électroniques on which the Commission relies stems from the fact that French subsidiaries of foreign manufacturers of reprographic equipment were omitted from that Fédération's list although, as checks which have been carried out have shown, as French undertakings they paid the tax to the tax authorities.

(c) As regards the deliberate intention of the French legislature to tax imported equipment only, the statements made by the Ministre de l'Économie et des Finances [Minister for Economic Affairs and Finance] before the Senate on 22 November 1975 should be placed in their context. Not only is it questionable to found an argument on statements made in the context of an internal debate, in which any responsible politician is necessarily concerned to present the measures which he is advocating in a light as favourable as possible to the interests of his country, but the Commission should have referred to the entire debate which opened with a long report from the President of the Senate Commission for Cultural Affairs setting out the need for and the importance of a tax on reprography at a time of rapid development in photocopying.

It was after some opposition which was fiscal in its nature that the Minister gave a comprehensive report mentioning the large volume of imports and agreeing to reduce the tax from 5% to 3%.

(d) The French Government lays stress on the fact that the system instituted in France is similar to the one which the Commission itself favoured when it proposed the idea of a tax on reprography in its Communication to the Council of 22 November 1977. The conditions under which the tax on reprography is charged on equipment are entirely the same as those for value-added tax and the tax is consequently included in the final price which the user pays.

(e) As regards the arguments of the Commission based on the conditions governing the use to which the tax is put, the French Government observes that the Commission's opinion that "in Community law, the only relevant

question is whether the levy in issue is part of the system of copyright rules because the question whether that levy is or is not part of a system of internal taxation depends on the answer to that question alone" is not acceptable in any respect because cultural policy remains the prerogative of national authorities. The Commission's Communication of 22 November 1977 did no more than set out very broad objectives and cannot be invoked in order to restrict that prerogative.

Moreover, the Centre National des Lettres, the institution which receives the sums yielded by the tax, is clearly an instrument for assisting authors and publishers and the aid given by that Centre is intended to subsidize the purchase of books by libraries which, having a free choice, buy foreign as well as French books.

2. The legal aspects

The French Government whishes to supplement its defence on two specific points: the criterion of "negligible" or "insignificant" domestic production, and the concept of a parafiscal charge.

As to the criterion of "negligible" or "insignificant" domestic production, it submits that neither the letter nor the spirit of the Treaty of Rome makes any appeal to that concept and it questions the references by the Commission to competition law.

The Treaty does not seek to impose a division of labour. On the contrary, many of its provisions, such as Article 85 (3), are intended to give every opportunity to new manufactures and even to allow marginal industries to survive.

The criterion of "negligible" or "insignificant" domestic production can be only arbitrary and a source of conflict. If it is quantitative it does no more than take a snapshot of production at a given moment, ignoring the possibility of development. If it is qualitative it would have to include an indefinite number of factors and it would penalize small States by prejudging any relatively modest level of production.

The French Government also criticizes the distinction made by the Commission between classical taxes and new taxes which is capable of many, easily alterable interpretations and is based on a static view of economic life which recognizes established situations and denies factors of change.

As to the concept of a parafiscal charge, it refers to the judgment of 22 March 1977 in Case 78/76 *Steinike & Weinlig* which clearly distinguished between charges having an effect equivalent to a customs duty and internal taxation.

In view of the definition of a charge having equivalent effect given by the Court in that judgment the French Government points out that the tax on reprography is not borne solely by imported products but is charged on both domestic and imported products on identical terms. The tax on no account benefits taxed domestic products but is rather the financial instrument of a comprehensive policy on the dissemination of books.

After the exchange of the written pleadings the parties were invited by the Court to furnish in writing, by joint agreement if possible, detailed statistical data on the size of domestic production of the equipment which is subject to the levy on the use of reprography compared to the level of imports of such equipment, distinguishing between imports from Member States and non-member countries. They complied with that request by registered letters sent to the Court Registry on 30 September 1980.

It appears from the figures produced, which related, according to the year, to 90 to 83% of all sales of reprographic equipment in France, that imports from non-member countries represent about 25% of the total of those sales, and imports from Member States of the EEC about 75%.

The value of French production was
FF 11 768 000 (1.2% of the total) in 1977,
FF 8 982 000 (0.9%) in 1978, and
FF 13 427 000 (1.0%) in 1979.

IV — Oral procedure

At the sitting held on 28 October 1980, the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, acting as Agent, assisted by Robert Collin, of the Paris Bar, and the French Government, represented by Gilbert Guillaume, Maître des Requêtes au Conseil d'État and Director of the Legal Affairs Department at the Ministry for Foreign Affairs, presented oral argument.

The Advocate General delivered his opinion at the sitting on 4 December 1980.

Decision

1 By application lodged at the Court Registry on 5 June 1979 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by charging levies on the importation of reprographic equipment, the French Republic has failed to fulfil its obligations under Articles 12 and 113 of the Treaty and under the provisions of Regulation No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (Official Journal, English Special Edition 1968 (I), p. 275) as subsequently amended and in force on the date of the reasoned opinion sent to the French Republic.

2 Article 22 of the French Finance Law for 1976, No 75-1278 of 30 December 1975 (Journal Officiel de la République Française of 31 December 1975, p. 13564), introduced a tax called a levy on the use of reprography which is charged at the rate of 3% on sales and appropriations for their own use,

otherwise than for export, of reprographic machines by undertakings which have manufactured them or have had them manufactured in France and on imports of such machines. A Decree of 12 July 1976 (Journal Officiel de la République Française of 17 July 1976, p. 4279) listed the types of machines subject to the levy. The list includes certain offset printing machines, hectographs and stencil duplicating machines, special photographic equipment for the copying of documents, microfiche scanners linked to copying equipment, optical photocopying equipment, thermo-copying equipment and certain contact-photocopying equipment.

3 Article 22 of Law No 75-1278 further provides for the introduction of a levy on the publication of books which is charged at the rate of 0.20% and is payable by publishers on their sales, other than export sales, of any kind of works published by them.

4 Under the same provision the sums raised by both those levies are allocated entirely to the Centre National des Lettres and remitted to a special account called the "Fonds National du Livre" [National Book Fund]. Those levies are added to the other resources of the Fund — particularly subsidies — which are available to the Centre National des Lettres which uses them amongst other things to subsidize the publication of quality works and the purchase of both French and foreign books by libraries and the translation of foreign works into French. Finally, it is apparent from paragraph II of Article 22 of the said Law that those levies are assessed, paid and collected in the same manner as value-added tax.

5 It is not disputed that the widespread use of reprography for the reproduction of printed works results in the loss not only by authors but also by publishers of the monetary gain which national copyright laws guarantee them. As it stated in its Communication to the Council of 22 November 1977 concerning Community Action in the Cultural Sector (Bulletin of the European Communities, Supplement 6/77, p. 13), the Commission believes that "a sum ought to be included in the selling price of equipment (photocopiers, tape-recorders, video-recorders) and the material they use ...

to guarantee the remuneration which authors, publishers and performers are entitled to expect . . .".

6 It is also not disputed that the levies in issue do not confer any direct and individual benefit on the authors and publishers whose works are reproduced in this way. The French Government maintains however that the allocation of the sums raised by those levies to purposes such as the dissemination of books, which is promoted by the Centre National des Lettres, amounts to a kind of collective compensation which helps to make good, if only to a partial extent, the loss of earnings suffered by authors and publishers owing to the increasingly frequent use of reprography.

7 The Commission came to the conclusion that French production of reprographic equipment, taken as a whole, was extremely small compared to all imports of such equipment and it concluded from that fact that the levy in issue was borne in practice by imported products alone and that it accordingly contravened Article 12 of the Treaty, so far as it applies to equipment from other Member States, and Article 113 of the Treaty and the provisions of the Common Customs Tariff so far as it applies to equipment originating in non-member countries.

8 The Government of the French Republic submits on the contrary that the levy in issue does not constitute a charge having an effect equivalent to a customs duty referred to in Articles 9, 12 and 13 but is an internal tax as referred to in Article 95 of the Treaty and that it satisfies the requirements of the last-mentioned provision regarding the prohibition of discrimination against products imported from other Member States.

9 Investigations undertaken jointly by the parties at the request of the Court and on the results of which both parties are agreed show that domestic production of all the different kinds of reprographic machine is only a small percentage, amounting in value to about 1% in 1977, 1978 and 1979, of the value of the total number of products, both domestic and imported, put on to the French market.

10 As regards the facts which form the basis for the Commission's case, it should be observed that the percentage mentioned above relates to the entire French production of reprographic machines. The Decree of 12 July 1976 however lists eight different kinds of machines so that, the parties not having been able to provide accurate details on this point, it is not inconceivable that the percentage in question might be higher in the case of certain categories of machines.

11 The fact that French production is extremely limited compared to imports, which actually appears to be the case even if the reservation expressed above is taken into account, does not by itself justify the conclusions which the Commission draws from it regarding a failure by the French Republic to fulfil its obligations.

12 Well-established case-law of the Court is to the effect that the prohibition laid down by Articles 9, 12 and 13 of the Treaty in regard to charges having equivalent effect covers any charge exacted at the time of or on account of importation which, being borne specifically by an imported product to the exclusion of the similar domestic product, has the result of altering the cost price of the imported product thereby producing the same restrictive effect on the free movement of goods as a customs duty.

13 The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products.

14 The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.

15 Those considerations demonstrate that even if it were necessary in some cases, for the purpose of classifying a charge borne by imported products, to equate extremely low domestic production with its non-existence, that would not mean that the levy in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty. In particular, that will not be so if the levy is part of a general system on internal dues applying systematically to categories of products according to the criteria indicated above.

16 The Court is of the opinion that the particular features of the levy in issue lead to its being accepted as forming part of such a general system of internal dues. That follows first from its inclusion in taxation arrangements which have their origin in the breach made in legal systems for the protection of copyright by the increase in the use of reprography and which are designed to subject, if only indirectly, the users of those processes to a charge which compensates for that which they would normally have to bear.

17 That conclusion follows in the second place from the fact that the levy in issue forms a single entity with the levy imposed on book publishers by the same internal legislation and from the fact, too, that it is borne by a range of very different machines which are moreover classified under various customs headings but which have in common the fact that they are all intended to be used for reprographic purposes in addition to more specific uses.

18 It follows from those considerations that the alleged failure to fulfil obligations has not been proved and that the action should be dismissed.

Costs

19 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs if the other party has asked for them. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the applicant to pay the costs.**

Mertens de Wilmars Pescatore Mackenzie Stuart

Koopmans O'Keeffe Touffait Due

Delivered in open court in Luxembourg on 3 February 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 4 DECEMBER 1980

My Lords,

This is an action brought by the Commission against the French Republic under Article 169 of the EEC Treaty. The Commission contends that, in introducing by its "Loi de Finances" for 1976 a "levy on the use of reprography" ("redevance sur l'emploi de la reprographie"), the French Republic has failed to fulfil its obligations under:

(i) Article 12 of the Treaty, which requires Member States to refrain