OPINION OF ADVOCATE GENERAL LENZ

delivered on 16 September 1997 *

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* Original language: German.

A — Introduction

1. In this reference for a preliminary ruling, the Queen's Bench Division of the High Court of Justice has referred questions to the Court concerning the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1997 on the harmonisation of the rules of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (the 'Sixth Directive'). [1] The questions are concerned with the taxation of foreign exchange transactions and with whether the London branch of The First National Bank of Chicago is entitled to deduct input tax.

I. Background to the main proceedings

2. According to the information provided by the national court, the dispute presents itself as follows: the Bank, which is registered for value added tax and partly exempt therefrom, agreed with the Commissioners of Customs and Excise a special partial exemption method. The recoverable portion of input tax allocated by the agreed method to the Bank, which includes the department carrying out the foreign exchange transactions, is determined on the basis of the number of transactions carried out by that department during the period in question in the ratio of the fraction in which the numerator is the number of transactions with counterparties outside the European Union and the denominator is the total number of transactions.

3. In its value added tax return for the period 1 May 1994 to 31 July 1994, which included its annual adjustment for the period April 1993 to April 1994, the Bank took into account the foreign exchange transactions entered into by it in the period April 1993 to July 1994. It calculated that the input tax credit to which it was entitled over that extended period of 15 months attributable to foreign exchange transactions with counterparties belonging in countries outside the European Union amounted to UKL 251 454.90.

4. By decision of the Commissioners of Customs and Excise of 26 September 1994, the input tax credit claimed was readjusted by disallowing that part reflecting foreign

1 — OJ 1997 L 145, p. 1.

exchange transactions conducted with counterparties from outside the Community. According to that decision, the tax authority took the view that the whole amount of input tax had diminished.

5. The Bank appealed to the Value Added Tax Tribunal, which considered the case on the agreed limited issue of whether or not the relevant foreign exchange transactions constituted supplies of goods or services for value added tax purposes. The Value Added Tax Tribunal allowed the appeal, whereupon the Commissioners of Customs and Excise appealed on a point of law to the High Court of Justice. That court takes the view that it is material to this case to determine whether the foreign exchange transactions constitute a supply of goods or services effected for consideration within the meaning of the Sixth Directive.

II. Questions referred by the High Court of Justice

6. Accordingly, the High Court of Justice has referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty:

On the proper interpretation of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover tax (the Sixth VAT Directive) and in relation to transactions of foreign exchange as defined by the British Bankers' Association (as set out at paragraph 1 of the Findings of Fact):

1. Do such foreign exchange transactions constitute the supply of goods or services effected for consideration?

2. If there has been a supply of goods or services effected for consideration, what is the nature of the consideration in relation to such transaction?

III. The Bank's foreign exchange transactions

7. The expression 'foreign exchange transactions' has been defined as follows by the British Bankers' Association:

'transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date'.

8. The London branch of The First National Bank of Chicago, a national banking association organised with limited liability under federal laws of the United States of America, carries on a wide range of banking activities including foreign exchange dealing. At the time of the order for reference, it employed approximately 440 staff, of whom about 40 were employed in its foreign exchange trading department, with further staff in the back office providing support.

9. The Bank is a 'market-maker'. It is willing at all times to provide and receive those currencies in which it specialises. It provides and receives currencies in transactions which are commonly described as those of purchase and sale. In common with other market-makers, the Bank will quote prices at which it is willing to trade as 'bid' or 'offer' prices. The Bank's bid rate is the exchange rate at which the Bank is willing to buy a currency. The Bank at any one specific time will bid, that is to say offer to buy, at one price expressed as a rate of exchange and at the same time will offer, that is to say offer to sell, the currency in the same denomination and the same amount at a slightly higher price. The difference between the two rates is known as the 'spread'.

10. The Bank's customers for its foreign exchange transactions fall into three categories. The first includes corporate customers seeking to manage their foreign currency risks and needs through spot and forward contracts and hedging. The second category covers fund managers, such as pension funds. Customers in this group are typically organisations which manage other people's money. The third category includes other financial institutions.

11. All three categories of customer enter into essentially the same types of foreign exchange transaction with confirmatory documentation including similar information. These foreign exchange transactions include 'spot' and 'forward' transactions. 65% of customer transactions entered into by the Bank are spot transactions, the remaining 35% being forward transactions.

12. A spot transaction is the purchase of one currency against the sale of another currency, with the delivery and sale normally being completed on the second following business day, which is known as the settlement date or value date. Following agreement for a spot transaction, the Bank will supply the other party to the transaction with documentary confirmation of the terms of the

transaction and how it is to be effected. The confirmation will include statements of:

— the name and address of the customer;

— the production date of the confirmation, which will be typically the date on which the deal was agreed;

— the deal date, being the date on which the transaction was agreed;

— the currency and amount agreed to be purchased by the Bank from the customer;

— the value date for settlement of the transaction;

— the rate of exchange applicable to the transaction;

— the foreign currency and amount agreed to be sold by the Bank to the customer;

— the Bank account to which the customer will transfer the currency to be delivered by it to the Bank; and

— the Bank account to which the Bank will transfer the currency to be delivered by it to the customer.

The confirmation will show the one agreed rate of exchange for the particular transaction. It will not show the two rates of bid and offer. However, the bid and offer rates will generally be known to the customer, since he will commonly ask the Bank to quote them.

13. A customer for a spot transaction may, for example, be a manufacturer in the United States who has shipped a product manufactured there to a customer in Germany and receives Deutsche Mark abroad as payment. As a rule, the customer will wish to exchange the Deutsche Mark for US dollars. He will then telephone the Bank and ask for a price to sell Deutsche Mark for US dollars for spot.

14. In contrast a 'forward' transaction is the purchase of one currency against the sale of another currency, with delivery and sale being completed on a future value date. The amounts are fixed by reference to the rate of exchange agreed on the deal date. Following agreement for a forward transaction, the Bank will supply the other party with similar documentary confirmation including the same information as that included in a confirmation for a spot transaction. The essential difference from a spot transaction is that the value date confirmed will be a future date more than two business days after the deal date.

15. In the foreign exchange transactions entered into by the Bank, no money is delivered physically in the form of coin, bank notes or other chattels. What is 'delivered' is the availability of drawing on a credit opened with the Bank in the currency 'delivered'.

16. These spot and forward transactions may be effected in a number of ways. On the one hand, a computerised system is used, whereby the prices for the currency amounts to be exchanged are agreed by the dealers for both parties by telephone and subsequently confirmed in writing. The confirmation takes the form of a computer-printed note. The details required are keyed into the computer at the time the transaction is agreed. Confirmation is given by pressing a single designated button on the keyboard. In the case of transactions with corporate customers worldwide, a system is employed whereby the dealers receive or provide their details and confirmations by telex. The Bank also provides currency to private customers. In this case the currency is obtained from a bank using the telex system. Confirmation is then given by post.

17. No transaction fee or commission is charged for or invoiced by the Bank for any foreign exchange transaction. Like any other market-maker, the Bank looks to make a profit out of its foreign exchange dealings at least in part as a result of the spread between its bid and offer quotes. Generally speaking, the greater the number of foreign exchange transactions the Bank can make for the purchase and sale of currencies at its bid and offer prices, the greater will be the possibility of profit on its foreign exchange transactions. Each of its traders will have his or her own book of particular currencies and will be expected to make a profit over appropriate periods. This profit is the result of all his or her dealings over the period. Each transaction is entered into in the belief that it has value to the Bank, but it is not the Bank's practice to value each transaction individually.

18. In any foreign exchange transaction, and in particular a forward contract, the Bank will run at least two risks. The first risk is that of default by the other party. A more significant risk is the risk that the market

rates will move against any position taken by the Bank. The bid and offer rates quoted by the Bank are liable to change rapidly in the course of a business day. Thus, for example, where the Bank has contracted to pay Deutsche Mark in a forward exchange contract against settlement by the Bank in dollars and the Deutsche Mark depreciates against the dollar, the Bank runs the risk of a loss expressed in dollars. The Bank will therefore seek to limit its potential risk by seeking counterparties at relevant rates, value dates and amounts. A significant proportion of these transactions will be initiated by other financial institutions seeking the same protection for themselves.

19. In order to maintain and increase the Bank's goodwill in the foreign exchange market, it publishes circulars and information sheets which it circulates to its approved customers free of charge. For similar reasons, it offers free advice to its corporate and fund manager customers.

IV. Relevant provisions of the Sixth Directive

20. Article 13 of the Sixth Directive provides as follows as regards foreign exchange transactions under the heading B. *Other exemptions*:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) the following transactions:

...

4. transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items; ...

...'.

21. However, it is provided under heading C. *Options* that Member States may allow taxpayers a right of option or taxation in the case of the transactions covered by Article 13 B(d). [2] Member States may restrict the scope of this right of option and are to fix the details of its use.

22. Accordingly, by virtue of Article 17(1) of the Sixth Directive, no deduction of input tax is possible with regard to foreign exchange transactions, since that provision provides that the right to deduct shall arise 'when the deductible tax becomes chargeable'. One of the exceptions provided for in Article 17(3) allows input tax to be deducted 'in so far as the goods and services are used for the purposes of:

...

(c) any of the transactions exempted under Articles 13 B a and d, paragraphs 1 to 5, when the customer is established outside the Community ...'.

2 — Article 13 C(b).

23. According to Article 6(1), 'supply of services' means 'any transaction which does not constitute a supply of goods within the meaning of Article 5'. Under Article 5(1) of the Sixth Directive, 'supply of goods' means 'the transfer of the right to dispose of tangible property as owner'.

B — Opinion

I. Question 1

24. The wording of this question refers to Article 2 of the Sixth Directive, which prescribes what activities are subject to value added tax. According to Article 2(1), the activities in question are supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such. The national court's first question seeks to ascertain whether the aforementioned foreign exchange transactions of the Bank fall within the scope of the directive.

1. Tax exemptions under the Sixth Directive

25. As has already been mentioned, such foreign exchange transactions normally have no bearing on taxation, since, under Article 13 B(d)(4) of the Sixth Directive, they are exempt from value added tax. However, under Article 17(3)(c), input tax may be deducted in connection with such foreign exchange transactions where the customer is resident outside the Community. The First National Bank is seeking the benefit of such deduction of input tax in this case. In order for it to be able to do so, it is first necessary, of course, that the Bank's foreign exchange transactions should come within the scope of value added tax and hence of the Sixth Directive.

26. In my view, this is clear already from the fact that, under Article 13 B(d)(4), transactions concerning currency are expressly exempted from value added tax. Such exemption would be necessary and make sense only if it were indeed possible to tax such transactions, that is to say if they fell within the scope of value added tax. This is further supported by the fact that, under Article 13 C(b), the Member States may allow taxable persons a right of option in respect of the taxation of such transactions. The upshot is that, in certain circumstances, such foreign exchange transactions are in fact subject to value added tax. Lastly it would be completely incomprehensible if Article 17(3)(c) were to grant the right to deduct input tax in respect of transactions which did not fall within the scope of value added tax. Accordingly, The First National Bank and the Commission point out that the provisions in question would be completely superfluous and meaningless if the foreign exchange transactions — as the United Kingdom argues — fell completely outwith the scope of the Sixth Directive.

2. Concept of consideration

27. In the United Kingdom's view, the relevant provisions of Articles 13 and 17 of the directive do not apply to the transactions at issue on the ground that no consideration is paid for the Bank's service. As has already been described, the Bank does not charge a fee for exchanging foreign currency, but obtains a profit at least partly as a result of its fixing different bid and offer prices. The difference between the two prices, that is to say the spread, does not, the United Kingdom maintains, constitute consideration within the meaning of the Sixth Directive. For their part, the Bank, the French Government and the Commission take a different view.

2.1 Comparison between commission and spread

28. In the United Kingdom's view, the Bank would be working for consideration only if it charged a commission for exchanging foreign currency. In other words, where a bank made a charge of, say, 2% for exchanging money, it would, in the United Kingdom's

opinion, without doubt be supplying a service for consideration within the meaning of the directive. At the hearing, the United Kingdom explained this using the example of a bureau de change. There is no difference in principle between a bureau de change and the Bank, except that in the latter case the foreign exchange transactions are bigger and more complex.

29. The United Kingdom contends that if the bureau de change or the Bank makes no charge but seeks to make a profit by buying and selling foreign exchange at different rates, it does not receive any consideration within the meaning of the directive. It does not follow from the fact that over a given period the Bank makes a profit from various foreign exchange transactions that it supplies a service for consideration in the case of each individual foreign exchange transaction.

30. The United Kingdom further argued at the hearing, again using the example of a bureau de change, that, even if the bureau de change were to make a charge for exchanging the money, it could effectuate that exchange only if it were to offer to purchase foreign currencies at particular rates and to sell them at other rates, in order thus to obtain the corresponding currencies. The selling price is invariably higher than the purchase price and, as a result, a profit is made over a certain period of time. The bureau de change is trading. It carries out foreign exchange transactions in the normal course of its economic activities. This corresponds — on a small scale — to the activities of the Bank.

31. The United Kingdom goes on to argue that if that bureau de change were now to decide no longer to charge commission, it would receive no consideration for exchanging currencies and hence would not be supplying a service within the meaning of the directive.

32. In such a case, the United Kingdom argues, the bureau de change — and also the Bank in this case — would be working free of charge. In the Commission's contention, this is very improbable. The United Kingdom itself points out that the Bank and the bureau de change are seeking to make a profit even from these general foreign exchange transactions.

33. If we now consider the two cases described by the United Kingdom — the general foreign exchange transactions of the Bank or of the bureau de change, on the one hand, and the additional charge of commission as consideration for the exchange of foreign currencies, on the other — it proves that those cases do not differ as fundamentally as the United Kingdom maintains they do. In its example of a bureau de change which charges 2% commission for exchanging foreign currencies, the United Kingdom has already affirmed that changing amounts of money into another currency constitutes a

service within the meaning of the Sixth Directive and hence not a supply of goods.

34. Nothing changes where no commission is charged for this operation. It remains the case that the customer goes to the Bank or the bureau de change and asks for means of payment to be made available to him or her in a particular currency in return for means of payment in another currency. Even in the event that the Bank charges no commission, it operates for the customer and 'supplies' him with the means of payment by enabling him or her to have recourse to a credit opened at a bank in the currency 'supplied'. Consequently the Bank again supplies a service. Even if — as the United Kingdom argues — there is no consideration for that service, it nevertheless remains a service. It may possibly no longer fall within the scope of the Sixth Directive. In any event, the Bank tries to sell the means of payment at a somewhat higher rate or price than the one at which it purchases it.

35. As the United Kingdom itself concedes, the Bank pays less than it hopes to obtain when it sells on the currency. However, this means simply that it 'supplies' commensurately less money in the foreign currency and hence makes a profit. So, also in this case, the customer pays for the Bank's service. In the course of this currency transaction, which, as has just been shown, still constitutes a service for the customer, the Bank is endeavouring to make a profit; this means that it is seeking to recover the costs of the service and more besides. The costs of large-scale foreign exchange transactions as carried out by the Bank are very much higher than the costs incurred by a small bureau de change. As has already been mentioned, the use of computers and technology on an extensive scale is necessary.

36. In any event, the fact remains that the Bank has to set its rates in such a way that it receives payment for its service. This means that also where the Bank seeks to make a profit only through the purchase and sale of foreign currencies, it does not work free of charge — contrary to the United Kingdom's contention — but makes the customer pay for its service and that payment takes the form of a smaller amount of consideration being paid for currencies purchased and a higher amount of consideration for currencies sold.

2.2 Case-law of the Court

37. The fact that income is actually received for an operation does not mean in every case that that operation is effected for consideration within the meaning of the Sixth Directive. [3] Where the requirement for consider-

3 — See my Opinion in Case C-16/93 *Tolsma* [1994] ECR I-743, at I-745, point 13.

ation is satisfied can be ascertained from the case-law of the Court, which has had to pronounce on this question on several occasions. Thus, in the judgment in *Tolsma* [4] the Court held, referring to its judgments in *Coöperatieve Aardappelenbewaarplaats* [5] and *Naturally Yours Cosmetics*, [6] that a provision of services is taxable only if there is a direct link between the service provided and the consideration received. [7]

38. The Court concluded from this that 'a supply of services is effected "for consideration" within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. [8]

39. The Commission and The First National Bank rightly argue that all those criteria are fulfilled in this case.

40. There is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. It appears from the information provided by the national court that, in the course of negotiations on a given exchange, the customer and the Bank agree that the customer should place a specific amount of money in a particular currency in a precisely specified account, whilst the Bank commits itself for its part to deposit a certain sum of money in another currency in an account specified by the customer. Consequently, the customer and the Bank commit themselves to reciprocal performance.

41. The question here is whether the remuneration received from the supplier of the service, here the Bank, constitutes the actual value given in return for the service supplied to the recipient.

42. In *Tolsma* it was held that this was not the case. The question there was whether the receipts of a musician who played a musical instrument on the public highway could be regarded as consideration for the service provided by him of playing music. The Court considered that there was no agreement in that case between the parties, since the passers-by voluntarily made a donation, whose amount they determined as they wished. In addition, the Court found that there was no necessary link between the musical service and the payments to which it gave rise, since the passers-by did not request music to be played for them. Moreover, they paid sums which depended not on

4 — Case C-16/93 *Tolsma* [1994] ECR I-743.

5 — Case 154/80 *Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12.

6 — Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11.

7 — *Tolsma*, cited in footnote 4, paragraph 13; see also Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12.

8 — *Tolsma*, cited in footnote 4, paragraph 14.

the musical service but on subjective motives which might bring feelings of sympathy into play. [9]

43. In the instant case the situation is different. It is the customer who approaches the Bank and asks for a service, namely the exchange of a foreign currency. According to the Bank, the customer is aware that that service will not be performed free of charge. This, moreover, is contested only by the United Kingdom, which considers that the spread between the bid and offer price does not constitute consideration for the service. On the other hand, the United Kingdom also states that customers generally enquire at the Bank about the two rates, that is to say also about the spread. Customers therefore know by how much the selling price of foreign currencies exceeds the purchase price. Consequently, customers know that they are paying for the service and are aware of how much they are paying.

44. It is also absolutely clear to the Bank itself, which constitutes the other party to the reciprocal relationship, that its payment for the service of exchanging currencies results from its spread. This means that there is no doubt as between the supplier and the recipient of the service that the service is effected for consideration and that the consideration relates to the transaction in question.

9 — *Tolsma*, cited in footnote 4, paragraph 17.

45. It remains to be noted therefore that, in the case of the rates at which the Bank is prepared to purchase currencies from customers and to sell currencies to customers, the spread resulting from the difference in rates constitutes the payment for the service supplied by the Bank. The Bank fixes the rates with that aim in mind. The United Kingdom itself confirmed at the hearing that where a charge is 'concealed' in the difference between the bid and the offer rate, but is capable of being identified, a service is effected for consideration. In this case the charge is 'concealed' in the spread in so far as it constitutes the payment for the service and, to that extent, constitutes a charge. Accordingly, the charge is also capable of being identified.

46. For this reason, it is possible, as the Commission suggests, to divide the amount which the customer pays in a given currency to the Bank into

— the amount corresponding to the other currency supplied by the Bank and

— the consideration for the service, that is to say the spread.

47. In the United Kingdom's view, however, it is impossible to determine a countervalue for the amount paid by the Bank on the ground that there is no corresponding market price which can be used to make such a determination. There is just the bid and offer prices set by the Bank.

48. The Commission disagrees. It takes the view that there is a market price whose value is between the bid and the offer price.

49. To my mind, it is certainly conceivable that there are other possibilities for determining the value of a given amount of money in terms of a countervalue in another currency apart from the bid and offer prices fixed by the Bank for its customers. I would point out in this connection simply that the individual currencies are also traded on the stock exchange and that prices are fixed there. To what extent it is actually feasible to determine a countervalue in another currency is a matter for the national court.

50. Even if it should not be feasible to determine an exact countervalue on the basis of a market price, this would not alter the fact that the Bank's service is paid for through the spread. As has been made clear above, the Bank calculates its prices in such a manner that its service is paid for in the case of each transaction. This is because the spread is calculated for each exchange, which means that on each transaction the customer receives less back from the Bank than he pays. The First National Bank stated at the hearing that the customer paid a higher price for a foreign currency than he would obtain were he to sell that currency back to the Bank immediately.

51. Consequently, the customer pays for the Bank's service in respect of each individual exchange via the spread fixed between the bid and the offer price, with the result that whenever the customer makes an exchange transaction he receives less back from the Bank than he gave the Bank. It is irrelevant in this connection whether he may make ultimately a profit on a transaction as a result of currency fluctuations occurring in the meantime. I shall explain this further below. [10]

2.3 Necessity for a second transaction in order to obtain consideration

52. The United Kingdom goes on, however, to name other reasons why, in its view, the Bank's receipts derived from the spread cannot be regarded as consideration for the individual exchange. It argues first that the profit from the different purchase and selling prices is invariably not realised until the next trans-

10 — See point 73, below.

action, that is to say when the Bank sells on the money purchased from the customer to another customer.

53. As has already been made clear, however, in the case of every transaction the Bank purchases a particular currency. In so doing it 'supplies' less to the customer than it receives from him. The Bank and the Commission also agree that for each transaction the customer does not receive the full countervalue of the sum exchanged by him on account of the spread. The Commission cites in this connection the Value Added Tax Tribunal, which also assumed that the rate at which the Bank sells the currency to the customer includes the costs of the exchange, that is to say the service.

2.4 Direct link between the service provided and the consideration received (individual valuation)

54. The United Kingdom submits, as an additional argument in support of its view that the spread cannot constitute the consideration for the service consisting of the exchange, that consideration within the meaning of the Sixth Directive must be capable of being determined for each individual transaction. It refers in this connection to the case-law of the Court, which has held that in order for a service to be taxable, there must be a direct link between the service provided and the consideration received. [11]

55. It is clear from the parties' submissions and from the order for reference that each of the Bank's transactions is conducted in the belief that it will yield an advantage for the Bank. In addition, however, it emerges that it is not the Bank's practice to value each transaction individually. In other words, the Bank calculates its profit over a particular period. The United Kingdom argues that this is too imprecise to ground the assumption that the Bank's service is effected for consideration in the case of each individual transaction. It refers in this connection, *inter alia*, to the Opinion in *Glawe*. [12] The Advocate General stated in that case that gaming transactions are ill-suited to value added taxation. [13] Elsewhere in the Opinion the Advocate General expressed the view that there may be some theoretical difficulty in viewing, for example, a bookmaker's net winnings as the consideration for services. [14] In the United Kingdom's view, those difficulties and the lack of suitability to value added taxation apply *a fortiori* in the present case of foreign exchange transactions, since here it is not only a question of consideration being difficult to determine, but of no consideration at all.

11 — *Naturally Yours Cosmetics*, cited in footnote 6, paragraph 11, and *Coöperatieve Aardappelenbewaarplaats*, cited in footnote 5, paragraph 12.

12 — Opinion in Case C-38/93 *Glawe* [1994] ECR I-1679, at I-1681.

13 — Opinion in *Glawe*, cited in footnote 12, point 16.

14 — Opinion in *Glawe*, cited in footnote 12, point 22.

56. As has already been shown, it cannot be considered here that there is no consideration for the service performed by the Bank in relation to foreign exchange transactions. Nevertheless, it cannot be denied that it is not entirely an easy matter to determine the consideration. As the United Kingdom rightly submits, the Bank's receipts are the outcome of its involvement in a series of transactions, all of which are concluded at different rates and under different market conditions. Even if foreign exchange transactions are ill-suited to value added taxation, this is perhaps the reason why they are exempt from tax under the Sixth Directive. However, even after the Opinion in *Glawe*, those difficulties in determining the consideration do not lead to the conclusion that there is no consideration within the meaning of the directive and that foreign exchange transactions consequently do not come within the scope of value added tax. It is worth emphasising here once again that the Bank fixes a spread for each exchange. The spread is the difference between the rate agreed for the transaction and the offer price (or, if one exists, the market price). However, the Bank does not value each transaction individually and hence also does not value every spread. The United Kingdom takes the view that this is too imprecise, since the customer is not charged the spread. It further considers that in principle the Bank's profit cannot be regarded as consideration for the purposes of the Sixth Directive.

57. As to this, I would first say that it cannot be concluded simply from the fact that the Bank does not value each individual transaction that it is impossible to effect such an individual valuation. Perhaps the Bank does not carry out an individual valuation because — and this is beyond doubt — it would be very complicated and is unnecessary for the Bank. It is so complicated because, in order to determine how much profit the Bank has ultimately made, it is not sufficient to determine when which sum of money was exchanged at which rate, the market situation at the relevant time must also be taken into account and — in the case of forward transactions — regard has to be paid to the subsequent development of the market. For this reason, an individual valuation would only be possible after the event, if at all. The Court does not have sufficient information in order to judge whether it would be possible for the Bank to carry out such an individual valuation. It should be left to the national court to assess this if necessary.

2.5 Need for individual valuation (judgment in *Glawe* and the *Fischer* case)

58. It must be considered, however, in the light of the judgment of the Court of Justice in the *Glawe* case [15] whether such an individual valuation is necessary for the purposes of charging value added tax.

59. The *Glawe* case was concerned with charging value added tax in respect of gaming machines in bars and restaurants. The operation of such machines was regulated by law. They incorporated a reserve compartment holding a stock of coins from which winnings were paid out, and a cash box

15 — Case C-38/93 *Glawe* [1994] ECR I-1679.

compartment. If, following the payment of winnings, the reserve was no longer full, the coins inserted by the players did not fall into the cash box but entered the reserve. The machines were required to be set in such a way that they paid out as winnings at least 60% of coins inserted by players (the stakes), with the remainder, some 40%, being retained in the cash box.

60. The Court followed the proposal of the Advocate General and regarded the stakes as being divided into two parts: one served to replenish the reserve, and thus to pay out winnings, and the remainder entered the cash box. [16]

61. In his Opinion, the Advocate General defined that remainder somewhat more precisely. He considered that that remaining portion was the price paid for the services provided by the operator. He further expressed the view that, over a given period, the two components would correspond to the amounts collected respectively by the cash box and the reserve of the machine. [17]

62. The Court held that the proportion of the stakes which was paid out as winnings could not be regarded as forming part of the consideration for the provision of the machine to the players, nor as the price for any other service provided to the players, since it was mandatorily fixed in advance. [18] Consequently, the taxable amount was the takings of the operator of the gaming machine, that is to say the coins contained in the cash box. Consequently, in that case, too, each individual game was not evaluated in accordance with whether the gaming machine or the player had won, but the takings of the operator, calculated over a period of time, were regarded as the taxable amount.

63. These issues have also been raised in a case at present before the Court which is concerned with the taxation of a game amounting to the game of roulette. [19] Similarly, players purchased chips which they could place on a table resembling a roulette table. Here too, it was possible for a player to win several times his stake, the winnings being paid out in chips after every game. Players wishing to discontinue the game could exchange their remaining chips for cash.

64. In this case too, the Advocate General considered that each chip placed on the table comprised, as a matter of legal analysis, two components: (a) the wager and (b) the

16 — Judgment in *Glawe*, cited in footnote 15, paragraph 11.

17 — Opinion in *Glawe*, cited in footnote 12, point 29.

18 — Judgment in *Glawe*, cited in footnote 15, paragraph 12.

19 — Opinion of 20 March 1997 in Case C-283/95 *Fischer* [1998] ECR I-3369.

consideration for the organiser's service, i. e. the price paid by players for the right to participate in the game and obtain the chance of winning. That price, consisting in the advantage which the house reserved to itself by virtue of the odds being in its favour, could be calculated precisely and was a standard percentage varying according to the version of roulette played. It was paid by each player each time he placed a chip on the table. It would be perfectly possible for an organiser to separate the two components by eliminating the advantage for the house and replacing it with a separate charge to cover his costs and provide him with a profit. [20]

65. The Advocate General ultimately reached the conclusion that in practice individual calculations based on each chip placed on the table were unnecessary. The total of the amounts received by way of consideration for individual transactions corresponded to the organiser's net takings (after payment of winnings) during a given period. Over a period the organiser's net takings necessarily corresponded to the advantage which he reserved to himself. The Advocate General further stated that the fact that there was in practice an easier method of determining the taxable amount did not however mean that tax was not levied on individual transactions. [21]

66. What of the present case? Here too it is possible to divide what the customer pays the Bank into two components. As we have already seen, one component is the countervalue of the amount of money provided by the Bank, whilst the second component is the consideration, that is, the price, for the service of making the exchange. In the cases of *Glawe* and *Fischer*, that component was determined, respectively, by the statutory percentage of winnings or by the odds determined by the house. In the present case, the corresponding component is the spread. As in the case of *Fischer*, that component — the spread — could also have taken the form of a charge. It can therefore be considered, on the same lines as in *Glawe* and *Fischer*, that, in the case of each individual transaction, part of what the customer pays may also be regarded as the consideration for a service, and that that portion can be precisely determined.

67. It must be considered, however, whether that price component is as precisely determined in this case as it was in the cases of *Glawe* and *Fischer*. In the case of *Glawe*, for instance, it was clear from the outset that the operator of the gaming machines would receive, in terms of his net takings, a given percentage of the amounts inserted in the machines. It was in that case impossible to reconstruct after a given period how much money had been inserted in the machines. Yet it was clear that the amount in the cash box after a certain period of players winning and losing corresponded to a certain percentage of the stakes. In other words, the percentage was fixed from the outset, but the exact amount could only be determined after a certain period of time.

20 — Opinion in *Fischer*, cited in footnote 19, point 47.

21 — Opinion in *Fischer*, cited in footnote 19, point 49.

68. In the instant case, the consideration is determined by the spread. At the time of the transaction the spread is determinate, since it consists of the difference between the individual rates. However, its exact amount may possibly not be realised until later, as, for example in the case of forward transactions. In my view, it is irrelevant that the spread may vary from one transaction to another, provided that it may be clearly determined for each transaction. This was also the view reached by the Advocate General in his Opinion in *Glawe* when he found that in the case of a bookmaker, for example, the 'price' which he receives for that service varies and depends partly on chance and partly on his skill in setting the odds. [22] This does not mean, however, that that service has to be excluded from the scope of the directive.

69. It should therefore be considered that the price component in the instant case is no less precisely predetermined than it was in the cases of *Glawe* and *Fischer*. This means that it can be assumed, as in those cases, that individual transactions are being taxed in this case. At the same time, I can see no reason why it should not be possible to effect the calculation over a period of time, as was necessary in the cases of *Glawe* and *Fischer* and as in fact is the Bank's practice in this case. It should therefore be considered that in this case individual transactions are being taxed and that the Bank's calculation is sufficient for the purposes of the taxation. Accordingly, it is clear that, in carrying out foreign exchange transactions, the Bank effects a service for consideration within the meaning of the Sixth Directive.

2.6 Comparison with typical cases of value added taxation

70. Consequently, it is clear that in this case — contrary to the opinion of the United Kingdom — the Bank's profit can be regarded as consideration for a service. As the Advocate General explained in *Fischer*, this approach produces results most closely resembling typical cases of value added taxation. [23] If, for example, a manufacturer sells a product for a given price plus value added tax, the amount remaining after deduction of value added tax constitutes the amount covering his profit-margin, his material costs and all other overheads. The tax is precisely proportional to the price, since the ratio between the price, i. e. the aggregate takings, and the value added tax correspond to the statutory rate of value added tax. In the instant case, the Bank's profit, that is to say its takings, constitute the amount covering the profit-margin, the costs of carrying out the transaction and the costs of operating the Bank and the foreign exchange department. It should be noted in this connection that it is not the Bank's pure profit which is to be taken into account here, but everything which it receives by way of spread.

22 — Opinion in *Glawe*, cited in footnote 12, point 22.

23 — Opinion in *Fischer*, cited in footnote 19, point 45.

71. I would further point out that, also in typical service transactions, what is taxed is what the supplier obtains as consideration for his service. As the Commission states, it is also compatible with the case — hardly conceivable in practice — in which the Bank makes a loss over a given period and then has to pay no tax.

72. In a case in which a bank made both a charge and purchased and sold foreign currencies at different rates, the consideration for the Bank's service would consist, not only of the charge, but also of the spread, as the Commission rightly suggests.

2.7 Exchange of means of payment distinguished

73. Neither can the United Kingdom's submission that a foreign exchange transaction is nothing more than the exchange of one means of payment for another alter the fact that the spread is to be regarded as the Bank's consideration. Exchanging dollars for Deutsche Mark, for example, is more than exchanging a banknote for coins of the same currency. In exchanging different currencies, an exchange rate must be fixed. Even if in the case of a fixed exchange rate the exchange of currencies ceases to differ from the transaction of exchanging a banknote for coins, it must be borne in mind in this connection that in the case of the Bank's foreign exchange transactions the exchange rate must first be agreed, taking into account the situation on the foreign exchange market, and that the exchange rate is then confirmed electronically. The United Kingdom itself refers to buying and selling in connection with foreign exchange transactions, which points to the fact that more is being done than merely exchanging means of payment.

2.8 Consideration in the event of losses on the part of the Bank

74. The outcome is not altered either by the fact that the Bank may make losses on individual transactions. Also in the case of games of chance, the house may incur very heavy losses. Yet this does not alter the fact that — as mentioned above — one component of each individual stake represents the payment for the house. This can be illustrated for the purposes of the present case by the fact that even if the Bank made losses on transactions, the losses would be even higher if the Bank had not calculated a spread but instead had paid the full countervalue. If the Bank has charged a spread, it does not take the full countervalue as the basis for determining its losses.

2.9 Simple games of chance distinguished

75. Lastly, I would consider a further argument put forward by the United Kingdom, which once again refers to the Opinion in *Glawe*. In that case, the Advocate General stated that gambling for money in its simplest form does not give rise to consumption of goods or services, even though it does entail expenditure by gamblers. This would be the case with a private bet, where both gamblers place their stakes on the table. The placing of the bets, although it involves the outlay of money, does not constitute, the Advocate General considered, the consumption of goods or services which is the taxable event under the VAT system. [24] Referring to that passage of the Opinion, the United Kingdom submits that also in this case there is only a movement of money from the Bank to the customer and from the customer to the Bank. It cannot be concluded from this that there is a consumption of services within the meaning of the value added tax system.

76. The Advocate General further considered that commercial gambling is different in so far as the person organising the gambling arranges matters in such a way that on average his winnings are sufficient to meet his costs in organising the gambling and to provide him with a reasonable profit. He gave as an example a bookmaker who sets the odds for bets on horse-racing at a level intended to ensure that he makes an overall profit on bets placed. To that extent the person organising the gambling may perhaps be regarded as not only taking part in the gambling himself but as also providing a service to the other gamblers consisting in organising the gambling. [25] The position is no different in this case. The Bank will fix the rates for its foreign exchange transactions in such a way as to ensure that it obtains a profit from the transactions which it concludes, taken as a whole. The United Kingdom does not contest this. On this ground, it should be considered that the Bank's activities in connection with foreign exchange transactions cannot be compared to gambling in a simple form, which does not involve any consumption of services within the meaning of the value added tax system. Moreover, The First National Bank takes this view.

77. It must therefore be considered that, in engaging in foreign exchange transactions, the Bank effects services for consideration within the meaning of the Sixth Directive. Consequently, those services come within the scope of the directive and may — even if they are exempt from tax — entitle the Bank to deduct input tax in accordance with Article 17(3)(c) in connection with transactions with counterparties resident outside the Community. The consideration therefore may be precisely determined and imputed to individual transactions, even if it is not calculated for each individual transaction.

24 — Opinion in *Glawe*, cited in footnote 12, point 20.

25 — Opinion in *Glawe*, cited in footnote 12, point 21.

II. Question 2

1. Need to answer the question

78. Given that in the course of answering the first question referred for a preliminary ruling it was already necessary precisely to determine the consideration, the second question has already been answered. However it was not unnecessary to answer the second question — as The First National Bank suggested —, since, in my view, it cannot be proved that there is consideration within the meaning of the Sixth Directive without precisely defining that consideration.

2. Consideration of the counter-arguments

79. Since my answer to the second question does not accord with the approach proposed by The First National Bank, I would now briefly consider the counter-arguments put forward by the Bank. In the Bank's view the total amount of foreign currency paid by the customer should be taxed as the consideration. Its grounds for arguing this are that value added tax is a tax on turnover and not a tax on profit. It refers in this connection to Article 11 A(1)(a) of the Sixth Directive, which provides that the taxable amount in respect of supplies of services is everything which constitutes the value of the consideration which the provider of services receives for the transaction from the recipient of the services. The Bank infers from this that the taxable amount is everything which the Bank receives from the customer.

2.1 Wording of Article 11 A(1)(b)

80. As the Commission and the United Kingdom rightly submit, Article 11 does not support this argument. It provides merely that the taxable amount is everything obtained by way of *consideration*. That cannot be equated with 'everything which the provider of services receives'. Consequently, the amount of the consideration still has to be determined.

2.2 Value added tax as turnover tax

81. As far as concerns the submission that value added tax as a turnover tax may not be charged on a taxable amount consisting of the Bank's profit, The First National Bank itself refers to the judgment in *Glawe* and concludes that the approach taken there, that is to say that the takings of the operator of the gambling machines constitute the taxable amount, may be regarded as correct. As I have already mentioned, it appears from the Opinion in *Fischer* that the approach taken in *Glawe* is the one which most closely approximates to the normal case of value added taxation. [26]

26 — Opinion in *Fischer*, cited in footnote 19, point 45.

2.3 Practical effects of the Bank's approach

82. This becomes clear if the approach advocated by the Bank is taken a stage further. If the Bank had to tax everything which it received from the customer — that is to say the total amount of foreign currency — it would have to pay disproportionately high tax in relation to its earnings — which are constituted only by the spread. As I have already shown above, in the case of value added tax the price of a service, that is to say that which the provider receives, is taxed. The Bank's approach would therefore distort the value added tax system and, in this case, would result in the Bank being able to claim a disproportionately high amount of input tax. [27]

2.4 Examples proving the opposite

83. The United Kingdom rightly points out that if the service consisting of the exchange were to be paid for by a charge, it is clear that only that charge would be taxed and not the charge together with the amount of foreign currency exchanged by the customer. The Commission takes a similar view, constructing an example in which in the context of one currency — i. e. notes to coin — a charge was also levied. In this case too, there would be no reason for taxing the amount of money to be exchanged in addition to the charge. At the hearing, the Commission gave another example relating to the taxation of a service in general. The example was cleaning a coat for a given price. In this case, too, it is clear that only the price of the cleaning and not the value of the coat plus the price of cleaning is taxed.

2.5 Proposal for a Nineteenth VAT Directive

84. Lastly, the Commission refers to its proposal for a Nineteenth Directive containing provisions on foreign exchange transactions, in which an approach was chosen whereby only the charge or the costs demanded by the purchaser as payment for the service were to be regarded as consideration, came to nought, not because of this approach but for other reasons.

85. Consequently, it only remains to confirm that the consideration for the exchange of foreign currencies is the spread.

27 — Whether that would be the actual consequence in this case is questionable since — as The First National Bank states — under the special method of partial exemption agreed with the Commissioners of Customs and Excise, not turnover, but only the number of foreign transactions are used in order to calculate value added tax and the input tax deducted.

2.6 Foreign exchange transactions as exchange transactions?

86. I do not intend to consider further the submission made by the First National Bank that foreign exchange transactions should be regarded as exchange transactions. Admittedly, a currency is exchanged against another, yet not by the Bank handing over to the customer money physically in the form of coins or banknotes and at the same time receiving coins or banknotes from the customer. Instead, the Bank enables the customer to use a credit opened at a bank in the currency sought by the customer. Here, the Bank's interest lies principally in the amount of the margin and less in the type of currency supplied by the customer. The Bank itself points out that the exchange is paid for by the spread. It can be seen from this that the transaction is not an exchange but a provision of services, namely the changing of foreign currencies.

C — Conclusion

87. I therefore propose that the questions referred for a preliminary ruling be answered as follows:

(1) In relation to foreign exchange transactions as defined by the British Bankers' Association, [28] the Bank effects a service for consideration within the meaning of the Sixth Directive where that service is not paid for by a charge but by the spread between the bid and offer rates.

(2) The consideration for the service is what the Bank receives by way of spread between the bid and offer rates.

28 — See point 7, above.