other kinds of taxes, duties or charges, and in particular stamp duties, which do not have those characteristics.

It follows that the aforesaid provision must be interpreted as meaning that it does not preclude the introduction or maintenance of a national tax such as French stamp duty charged on the acquisition of building land in the event of a breach of the undertaking to build within the time-limit set by the relevant legislation. That duty is not a general tax; it is not applied at the different stages of a production and distribution process since it is charged only when the real estate passes into the ownership of the final consumer; it is not deductible from duty of the same kind paid on subsequent conveyances and the levying of the duty does not take account of the added value but is based on the full value of the property.

REPORT FOR THE HEARING
in Case C-208/91 *

I — Legal background to the dispute in the main proceedings

A — *National legislation*

1. Under French law, VAT is charged on transactions contributing to the production or supply of buildings, pursuant to Article 257(7) of the Code Général des Impôts (General Tax Code, hereinafter 'CGI'), which states:

'1. The following in particular are liable:

sales ... of building land, property assimilated to such land under Article 691 ...'.

2. Under Article 691 of the CGI:

'I. Land registration tax and stamp duty shall not apply to purchases of

1. undeveloped land or land covered by buildings that are to be demolished;

...

where such purchases attract VAT.

...

* Language of the case: French.

II. This exemption is subject to the condition:

1. that the purchase deed contains an undertaking by the purchaser to carry out within four years of the date of the deed the work necessary to erect a building or group of buildings, to complete unfinished buildings or to construct new premises above existing buildings, as the case may be, and that it specifies the number, nature and purpose of the buildings whose construction is planned;

...'.

3. With reference to this article, Article 1840 G ter of the CGI provides as follows:

'If the purchaser fails to produce the proof provided for in Article 691(II)(2), he shall be required to pay, upon the first demand, the tax from which he had been exempted and, in addition, a supplementary duty of 6%. The procedure for the implementation of this article shall be laid down by decree.'

4. Finally, the second paragraph of Article 291 of Annex II to the CGI states:

'However, the VAT paid at the time of the transaction evidenced by the deeds in question shall be eligible for deduction from these taxes up to the limit of their amount unless it has already been deducted at the time of a further conveyance of the same premises.'

B — *The Community legislation*

5. Article 33 of the Sixth Council Directive No 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of VAT: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive') provides as follows:

'Without prejudice to other Community provisions, the provisions of this directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes.'

II — Facts and procedure

6. Mr Beaulande, the applicant in the main proceedings, purchased a house in Nantes in January 1980, undertaking to demolish it and to erect a residential building within four years.

7. Mr Beaulande subsequently applied for and obtained three successive building permits for the said house, all three of which were withdrawn voluntarily. On 11 September 1984 the tax authorities rejected an application for an extension of the building period and on 12 November 1984 issued him with an assessment to tax, which was confirmed on 26 February 1985.

8. On 4 June 1986 an order for payment of the stamp duty due under Article 1840 G ter of the CGI, amounting to FF 221 700, plus an additional duty of 6%, equal to FF 71 091, was served on the applicant.

9. A complaint by Mr Beaulande was rejected by decision of 2 June 1989, notified to him on 13 July 1989.

10. On 14 September 1989 Mr Beaulande brought an action against the Directeur des Services Fiscaux (Director of the Tax Authorities) of Loire Atlantique to have the demand for payment of 4 June 1986 declared void, primarily on the grounds that the stamp duty could be characterized as a turnover tax, so that its imposition alongside VAT on the occasion of the same conveyance was in breach of Article 33 of the Sixth Directive.

11. In their reply, the French tax authorities argued that Article 33 of the Sixth Directive should not be taken out of the general context of that directive. Article 4(3)(b) states that Member States may consider 'the supply of building land' as subject to VAT. In their view, it follows that the French State may set a time-limit for the collection of VAT on building land and make it subject to an undertaking by the purchaser to build within a period of four years, failing which the transactions in real property may be taxed in the normal way at the proportional rates of stamp duty.

12. The dispute came before the Tribunal de Grande Instance (Regional Court), Nantes, which decided by judgment of 7 May 1991 to refer the following question to the Court of Justice for a preliminary ruling:

'Is it not the case that stamp duties which are charged on the acquisition of building land in the event of a breach of the undertaking to build within the four-year period (or such longer period as is allowed) and which are proportional to the value of the property can be characterized as turnover taxes and hence, by virtue of Article 33 of the Sixth Council Directive of 17 May 1977, are incompatible with VAT charged at the time of acquisition?'

13. The order for reference was received at the Court Registry on 2 August 1991.

14. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by R. Beaulande, the applicant in the main proceedings, acting on his own behalf, by the French Government, represented by P. Pouzoulet and G. de Bergues, acting as Agents, and by the Commission of the European Communities, represented by Mr J. F-. Bühl, Legal Adviser, acting as Agent.

III — Summary of the written observations submitted to the Court

1. *Mr Beaulande, the applicant in the main proceedings*, first describes the relevant French legislation and asserts that its

objective is (1) to bring building land within the scope of VAT and (2) to remove it from the scope of VAT retroactively if a building has not been erected on the land within a period of four years. In the latter case, he maintains, the VAT arrangements originally applied are called into question and stamp duty is charged retroactively. In his view, that legislation therefore retroactively cancels the initial tax charged (VAT) and replaces it by stamp duty.

The applicant then considers whether the French legislation is in conformity with the Sixth Directive. He observes first that a strict application of that directive requires an objective definition of building land to be adopted, and not a conditional definition (that laid down in Article 4(3)(b) of the Sixth Directive). In his view, the conditional definition may call into question the VAT regime in force at the date of the chargeable event (Article 10(1) and (2)).

Secondly, the applicant makes a critical examination of the case-law of the Court with regard to the interpretation of Article 33 of the Sixth Directive, and more particularly of the judgments in Joined Cases 93 and 94/88 *Wisselink* v *Staatssecretaris van Financiën* [1989] ECR 2671 and in Case 109/90 *Giant* v *Gemeente Overijse* [1991] ECR I-1385, in which the Court considered that turnover taxes were not prohibited under Article 33 unless they were of a general nature. According to the applicant, this approach runs counter to the objectives of the First, Second and Sixth Directives, so much so, he continues, that when the above directives were implemented in France no fewer than fifteen turnover taxes were abolished, in particular single-stage taxes. In accordance with the aim of these directives, namely to make VAT the sole tax on expenditure, the achievement of this result presupposes the abolition of specific indirect taxes.

In the opinion of the applicant, to consider today that single-stage taxes having the characteristics of turnover taxes are compatible with VAT is to ignore all the work of harmonization pursued by the Community legislature, to disregard the results intended by the directives, to call into question the objective of neutral consumption tax and to allow the reappearance of single-stage taxes.

Thirdly, the applicant observes that the wording of Article 33 raises a fundamental question: does the phrase 'duties and charges which can be characterized as turnover taxes' mean simply VAT, or put another way, is VAT the only turnover tax covered by Article 33?

According to the applicant, as Article 33 refers to turnover taxes in the plural, it must perforce relate to taxes other than VAT. However, the interpretation adopted hitherto by the Court appears to indicate that that interpretation relates only to VAT or any other tax of the same kind as VAT.

The applicant considers that this interpretation empties Article 33 of its substance. Nevertheless, the aim of that article seems clear: freedom of movement and the characteristics of an internal market presuppose that VAT is

the only general consumption tax on goods and services. The applicant therefore maintains that any other additional turnover tax affects the price and creates economic distortions that Article 33 sought to eliminate.

On the assumption that a turnover tax is a tax levied on a transaction and is directly proportional to the price of the transaction, in the case in point the stamp duty charged retroactively to the applicant can, in his opinion, undeniably be characterized as such a tax.

Finally, the applicant considers that retroactively claiming a proportional duty on land that is plainly building land is tantamount to charging a cumulative tax which has the characteristics of a turnover tax and which vitiates the objective of neutrality set by the Sixth Directive.

The applicant points out in this regard that he resold the land under the VAT system, a tax he has already paid to the Treasury. The selling price therefore indirectly included the duties in question. If the purchaser had not built on the land, he would in turn have received a tax assessment of the same kind, less the VAT initially paid. The applicant notes that the cumulative tax which successive directives have endeavoured to eliminate so that the objective of neutrality can be achieved is therefore levied at each stage.

2. According to the *French Government*, it is unequivocally clear from the very wording of Article 33 of the Sixth Directive that the directive does not preclude the levying of national taxation alongside VAT. It points out in this regard that the Court of Justice has expressly acknowledged that Community law, as it now stands, does not preclude the existence of such taxes, even where levying them may result in their imposition together with VAT in respect of one and the same transaction (judgment in Case 73/85 *Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219).

On this point the French Government also notes that the arrangements applicable in France to building land are not intended to create systematic overlapping between stamp duty and VAT, as conveyances of such property are in principle exempt from stamp duty. Only the purchaser's failure to build may in exceptional cases lead to such cumulative taxation, which moreover is neutralized by taking account of VAT paid and not yet deducted.

As in the view of the French Government the principle of cumulative taxation cannot be called into question, the case turns on whether by virtue of its nature the national tax in question can be considered a turnover tax within the meaning of Article 33 of the Sixth Directive.

The French Government notes that in order to determine whether a national charge constitutes a turnover tax within the meaning of Article 33 of the Sixth Directive, the Court pays particular attention to the extent to

which that charge is likely to jeopardize the working of the common system of VAT by taxing the asset in question in a way comparable to VAT.

In this regard, it points out that the disputed stamp duty is not a general tax like VAT. One of its characteristics is that it applies only to legal events precisely and specifically listed by law. Moreover, collection of the duty may be made subject to conditions or, conversely, it may be chargeable only in certain circumstances. The French Government therefore asserts that stamp duty is not intended to apply, nor is it capable of applying, to all economic transactions.

It also considers that stamp duty, unlike VAT, is not a consumption tax. It maintains that while it is logical to charge VAT on the purchase of goods, even real estate, when that transaction forms part of an economic process that is itself subject to the tax, this justification ceases to apply where the conveyance can no longer be considered part of a chain of transactions falling within the scope of the tax.

Stamp duty, by contrast, is levied on the conveyance of land only when the land can no longer be considered as contributing to the production or supply of a building, that is as building land within the meaning of that concept in domestic tax law.

According to the French Government, stamp duty therefore has the following characteristics: it is a tax on capital, which relates to the acquisition of wealth, in contrast to a tax on expenditure, which is levied on the consumption of wealth; it is applied to the total capital value of the goods, irrespective of previous or subsequent conveyances; it is never deductible from the same type of duty paid at the time of subsequent conveyances, and it is ultimately borne by the lawful taxpayer and is therefore not passed on, whether or not the taxpayer is the final consumer, when the goods enter an economic circuit subject to VAT.

The French Government also points out that stamp duty is not a tax exactly proportional to the price. It is paid on the capital value of the goods (Article 666 of the CGI). In its view, this concept — which is much wider than that set out in Article 11 of the Sixth Directive, which refers only to the price, defined as the consideration obtained — therefore indicates the difference in nature that can exist between stamp duty and turnover tax.

Finally, the French Government maintains that stamp duty is charged alongside VAT, and not in place thereof, and without compromising the functioning of the common system of VAT.

Consequently, the French Government considers that the disputed stamp duty is not a turnover tax within the meaning of

Article 33 of the Sixth Directive. That is apparent, moreover, from the judgment of the Court in the *Kerrutt* case, cited above.

In conclusion, the French Government proposes that the Court of Justice reply that Article 33 of the Sixth Directive is to be interpreted as not precluding the maintenance or introduction of national taxes which have the characteristics of stamp duties charged on conveyances of building land.

3. The *Commission* begins by pointing out that the Court of Justice has given several rulings on the interpretation of Article 33 of the Sixth Directive. According to the Commission, the prohibition imposed by Article 33 of the directive on Member States maintaining or introducing their own volition taxes, duties and charges that can be characterized as turnover taxes has been interpreted by the Court as clarifying the general principle proclaimed in Article 5 of the Treaty, whereby it is incumbent upon Member States to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the Community institutions.

The Commission considers that in its interpretation of Article 33 the Court does not use the expression 'turnover tax' in the wider sense, that is to say in the sense that taxation calculated on the basis of the price of goods or services constitutes a 'turnover tax'. Instead, the Court appears to have limited the scope of the prohibition set out in Article 33 of the Sixth Directive to fiscal measures levied on goods and services in a way that is 'comparable to' VAT and as a result compromises the functioning of the Community system of turnover tax (judgment in Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, paragraph 9).

The Commission notes in this regard that although the prohibition set out in Article 33 therefore does not apply to all types of tax based on turnover, the expression 'characterized as' demonstrates clearly that a tax need not necessarily be identical to a Community tax to constitute a turnover tax within the meaning of Article 33. What does matter, according to the Commission, is whether it has the characteristics of the common system of taxation (judgment in the *Rousseau Wilmot* case, cited above, paragraph 15).

On the basis of that case-law, the Commission holds that the concept of 'turnover taxes' within the meaning of Article 33 of the Sixth Directive must be defined in the light of the characteristics of the common system of taxation, as expressed especially in Article 2 of the First Directive, which sets out the common principles of the Community VAT, namely that it must be a general tax and must be exactly proportional to the price of the goods and services, whatever the number of transactions which take place between the producer or provider of services and the consumer.

The Commission then examines the provisions of the Sixth Directive on the supply of a building or building land. After noting that

one of the characteristics of real property is that in a number of Member States it is subject to specific duties on conveyances, the Commission refers to the grounds of the Sixth Directive, which emphasize that the taxation of supplies of new buildings and building land should not however entail an increase in the burden of taxation on these transactions. Consequently, the Member States must avoid, for social reasons, applying stamp duties to some of these transactions (statement of grounds for Article 5).

The Commission considers that the French legislation accords with this philosophy. It provides, subject to the conditions which it lays down, for exemption from the stamp duty normally chargeable upon the sale of a building to be demolished. This transaction then falls within the scope of VAT.

The Commission goes on to maintain that such a tax arrangement is highly advantageous in financial terms, as VAT is deductible, whereas stamp duty is not. First, a non-deductible tax is not retained, and secondly the taxable person can immediately deduct the tax on a transaction (the construction of a building) carried out over a relatively long period of time.

The Commission explains that in order to prevent evasion by declaring an intention to build for the sole purpose of gaining exemption from the duty, the French legislation provides that the purchaser must build within four years and furthermore that a penalty of 6% becomes payable if he fails to do so. In the Commission's view, the cumulation of taxes in those circumstances is not incompatible with the Sixth Directive, since the statement of grounds itself simply suggests avoiding the cumulation of taxes but does not require it.

Finally, the Commission considers whether the French stamp duty has the effect of compromising the functioning of the VAT system by levying a charge on the movement of goods and services and on commercial transactions in a way comparable to VAT.

In this regard, after describing the common system of VAT as interpreted by the Court of Justice in a consistent body of case-law (see most recently the judgment in the *Giant* case, cited above), the Commission notes that stamp duty on purchases of building land in the event of non-fulfilment of the undertaking to build within a period of four years is not a turnover tax, even though it is calculated on the value of the land. According to the Commission, it is not a general consumption tax and is not applied solely to the value added at each stage.

Furthermore, the Commission observes that Article 33 itself expressly states that the provisions of the directive do not prevent the maintenance or introduction of 'stamp duties'.

Finally, the Commission notes that the Court has already ruled favourably on the compatibility with Article 33 of the Sixth Directive of a tax similar to the duty on conveyances complained of in the present case (judgment in the *Kerrutt* case, cited above, paragraph 22).

The Commission therefore proposes that the question referred to the Court should be answered as follows:

'Stamp duties which are charged on purchases of building land in the event of non-fulfilment of the undertaking to build within the four-year period and which are proportional to the value of the building cannot be characterized as turnover taxes and consequently, in the light of Article 33 of the Sixth Council Directive 77/388/EEC of 17 May 1977, are not incompatible with VAT levied at the time of purchase'.

M. Diez de Velasco

Judge-Rapporteur