That concept presupposes the existence of a direct link between the service provided and the consideration received, and no such link exists where the functions of that body relate to the common interests of the growers, and the individual growers, from whom the charges are recoverable regardless of whether or not a given service confers a benefit on them, receive only indirectly the benefits accruing generally to the industry as a whole.

REPORT FOR THE HEARING (Sixth Chamber) delivered in Case 102/86 *

I — Facts and written procedure

The Apple and Pear Development Council (hereinafter referred to as 'the Development Council') was established in 1966 by the Minister for Agriculture, Fisheries and Food under the Industrial Organization and Development Act 1947 at the instance of commercial growers of apples and pears. The founding instrument was the Apple and Pear Development Council Order 1966 (SI 1966, No 1579), now superseded by an Order of 1980 (SI 1980, No 623). The Development Council is a body of 14 persons appointed by the minister, the majority being representatives of growers. A grower is defined as a person who carries on business 'in the industry' namely the 'growing of apples and pears in England and Wales for sale by way of trade or business', and occupies not less than two hectares of land planted with not less than 50 apple or pear trees. It is mandatory for a grower, as defined, to register with the Development Council.

The functions of the Development Council are set out in 12 paragraphs of the first schedule to the Order. They cover all manner of research and promotional activities which are likely to be of use to commercial growers of apples and pears, including the dissemination of information obtained by the Development Council and the rendering of advice on matters with which it is concerned in the exercise of its functions. The Development Council is required to exercise its functions in such manner as appears to it to be likely to increase efficiency and productivity in the industry.

Under Article 9 of the Order, the Development Council is authorized, with the approval of the minister, to impose on growers an annual charge at a rate not exceeding a specified amount per hectare for the purpose of enabling it to meet administrative and other expenses incurred or to be incurred in the exercise of its functions. This charge is expressed to be

* Language of the Case: English.

recoverable as a debt due to the Development Council. These functions are referred to below as the 'general activities' of the Development Council, and the annual charges so imposed on growers are referred to as the 'mandatory charges'.

By an amendment Order (SI 1980, No 2001) which came into operation in December 1980 the Development Council may, with the approval of the minister, for the purpose of enabling it to meet administrative and other expenses incurred or to be incurred in connection with any scheme for promoting the production and marketing of standard products, impose on a person participating in any such scheme an additional charge by reference to the weight of such standard products marketed by him.

The Development Council is largely self-financing and operates on a commercial basis in the sense that its administrative costs are kept to a low percentage of total revenue in order to allow maximum expenditure on publicity and market research. The Development Council decides each year what rate of annual charge to impose, taking into account crop prospects, the state of the market and the Development Council's estimated expenditure.

In October 1980 the Development Council launched a concurrent and voluntary scheme known as the Kingdom Scheme designed to promote the sale of standard top-quality apples. This was a scheme which growers were entitled to join if they wished. Financed initially by a government grant, the scheme was later run by means of an additional charge imposed under the authority of the supplemental Order of 1980 on those who chose to join the scheme.

A considerable part of the Development Council's expenditure consists of advertising and similar publicity. A very small part of its receipts comes from the sale by it of promotional items.

In 1973 the Development Council raised with the Commissioners of Customs and Excise (hereinafter referred to as 'the Commissioners') the question of its position under the value-added tax legislation. The advice it was given by the Surveyor of Customs and Excise on behalf of the Commissioners was that: (a) the annual charge imposed under the Order of 1966 was considered to be outside the scope of value-added tax, and (b) the activities of the Development Council which were in pursuance of the aim of promoting and furthering the sales of apples and pears were regarded as 'business activities' and tax incurred on purchases and the like for these purposes was input tax which might be deducted (or repaid) subject to the normal rules. Interest on the Development Council's deposit account would be treated as an 'exempt' supply upon which, therefore, it was not liable to account for tax.

When the Kingdom Scheme started, it was not in dispute that the Development Council was liable to account for output tax (that is, tax on taxable supplies made by a person) in respect of the charges imposed by it on those who voluntarily joined the scheme, and that it was entitled to invoice members for tax accordingly.

The Development Council was in the position of being able to reclaim all the input tax (that is, tax on taxable supplies made to a person) which it paid on supplies to itself, but was liable to charge and account for output tax only on a part of its

receipts, namely the voluntary charges collected from the members of the Kingdom Scheme and the small receipts from sales of promotional items.

In 1981, the Commissioners reviewed the position. By a letter dated 2 December 1981, the Commissioners ruled that the Development Council's general activities (that is to say those funded by the compulsory charges) did not constitute a 'business' for value-added tax purposes, with the result that it could not take credit for input tax on supplies to it relating to such activities; only the Kingdom scheme and the sales of promotional items were a business.

The Commissioners claimed that the Development Council was engaged in both business and non-business activities, so that an apportionment was appropriate under section 3 (4) of the Finance Act 1972 which, as amended by the Finance Act 1977, contains the rules relating to the incidence and operation of value-added tax in the United Kingdom. Under section 3 (4), where goods or services supplied to a taxable person, or goods imported by him, are used or to be used partly for the purposes of a business carried on or to be carried on by him and partly for other purposes, tax on supplies and importations is apportioned so that only so much as is referable to his business purposes is counted as his input tax.

The Development Council appealed to a value-added tax tribunal, which allowed the appeal. The Commissioners successfully appealed to a Divisional Court. The Development Council appealed to the Court of Appeal which rejected its submissions whereupon it appealed to the House of Lords.

The House of Lords referred to Article 2 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977 L 145, p.1) (hereinafter referred to as 'the Sixth Directive'). Article 2, which defines the scope of value-added tax, provides:

'The following shall be subject to value-added tax:

(1) the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

(2) the importation of goods'.

The House of Lords considered that it was essential to determine whether the payment of the charges imposed compulsorily on growers by the Development Council amounted to consideration for the services rendered by the Development Council in pursuance of its general activities. The House of Lords noted that although the word 'consideration' was defined in Article 8 and Annex A, paragraph 13 of the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16) (hereinafter referred to as 'the Second Directive'), that definition was not repeated in the Sixth Directive.

By order of 20 March 1986, the House of Lords stayed the proceedings until such time as the Court of Justice should have given a preliminary ruling pursuant to Article 177 of the EEC Treaty on the following question:

'Does the exercise by the Apple and Pear Development Council of their functions pursuant to Article 3 of the Apple and Pear Development Council Order 1980, SI No 623 (as amended by the Apple and Pear Development Council (Amendment) Order 1980, SI No 2001), and the imposition on growers pursuant to Article 9 (1), of an annual charge for the purposes of enabling the Council to meet administrative and other expenses incurred or to be incurred in the exercise of such functions, constitute "the supply of ... services effected for consideration" within the meaning of Article 2 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes?'

The order of the House of Lords was received at the Court Registry on 28 April 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Development Council, represented by Andrew Park, QC, and Gerald Barling, Barrister, instructed by the Buss Murton Partnership, Solicitors; the United Kingdom, represented by H. R. L. Purse of the Treasury Solicitor's Department; the Government of the Federal Republic of Germany, represented by Martin Seidel, and the Commission of the European Communities, represented by its legal adviser Johannes Føns Buhl.

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.

On 25 February 1987 the Court assigned the case to the Sixth Chamber, pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Observations submitted to the Court

The Development Council refers to its functions as set out in schedule 1 to the 1980 Order, and notes that there is a heavy emphasis on functions of a promotional nature. The performance by the Development Council of its functions constitutes the provision of services by it to the growers. The growers pay for these services by means of the compulsory charges.

The question referred by the House of Lords serves to determine whether or not the Development Council can claim a deduction or refund of the value-added tax imposed on it as regards payments made by it to third parties (input tax). If the charges to the growers are themselves subject to value-added tax, it seems likely that the Development Council will be able to obtain credit for its input tax. The imposition of value-added tax on the compulsory charges will not be to the disadvantage of the growers since they will be able to deduct it as input tax of their own. However, the growers would be disadvantaged if the charges were not subject to value-added tax, because the level of the charges would have to be increased to recover the unrefundable value-added tax suffered by the Development Council on its expenses.

If the charges to the growers are outside the scope of value-added tax, there is a significant distortion of competition which places United Kingdom growers at a disadvantage as against importers or exporters of apples and pears from other countries into the United Kingdom. Thus, an importer based in the United Kingdom pays value-added tax on expenses (for example, for advertising) but may reclaim this tax. An exporter based outside the United Kingdom who incurs the same expenditure is not charged value-added tax at all, since the supply of services to such a person is zero rated. In both cases, the effective cost of the services is not altered by value-added tax. Likewise, if the Development Council's submissions were accepted and the charges to growers were regarded as 'consideration', there would be no increase in the effective cost of such services, as the growers, the Development Council and the provider of services to the Development Council would all receive repayment of the value-added tax they paid. Thus, in all those instances, the effect of value-added tax is neutral, and the effective cost of the services remains unchanged.

The position is different if the Commissioners' position is upheld. In that case, the Development Council's payment for provision of services by, for example, an advertising agency is subject to value-added tax, on which the Development Council cannot claim a repayment. Thus, the effective cost of the services is increased by the cost of paying the value-added tax. The increased cost of the services is borne by the growers. Because the effective cost to the growers is higher, they are thereby disadvantaged in comparison with importers or exporters, hence the distortion of competition.

The Development Council then discusses the relevant Community legislation. It submits that Article 2 of the Sixth Directive, and in particular the word 'consideration' used in it, should be interpreted consistently with the similar wording of Article 11 (A) (1) (a) of that directive.

Although the word 'consideration' is used in both those provisions, the text of the Sixth Directive in other languages does not always use the identical word. However, whether the same word is used or not, the concepts are identical. The Development Council also refers to Paragraph 13 of Annex A to the Second Directive.

The Development Council refers to the case-law of the Court concerning the meaning of 'consideration' in the Second Directive. In Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats GA* [1981] ECR 445, the Court held that the expression 'consideration' in the Second Directive 'is part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope; it follows that the interpretation, in general terms, of the expression may not be left to the discretion of each Member State.' In Case 89/81 (*Staatssecretaris van Financiën* v *Hong-Kong Trade Development Council* [1982] ECR 1277), the Court held that services provided free of charge are different in character from taxable transactions which, within the framework of the value-added tax system, presuppose the stipulation of a price or consideration. The Development Council also refers to Case 222/81 (*BAZ Bausystem AG* v *Finanzamt München für Körperschaften* [1982] ECR 2527).

The Development Council submits that the word 'consideration' in Articles 2 and 11 (A) (1) (a) of the Sixth Directive bears a general Community law meaning, and does not bear the specialised meaning which it carries under the English law of contract. A payment is consideration for services if it is made in order to pay for the services provided. The clear purpose of the 1980 Order is to lay down a scheme whereby the payments by growers to the Development Council will be commensurate with the benefits received by them from the Development Council. Thus the 1980 Order provides that the larger the grower's production, the greater the increase in the amount which he pays to the Development Council.

The Development Council also refers to other provisions of the Sixth Directive which assume that a body, like the Development Council, established under public law may be a taxable person, and that payments made under some form of statutory scheme (rather than under a negotiated contract or other consensual agreement governed by private law) are capable, in appropriate circumstances, of being consideration for goods or services. In particular, it refers to the second paragraph of Article 4 (5) of the Sixth Directive which provides that when States, regional and local government authorities and other bodies governed by public law engage in activities or transactions as public authorities they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition. As the Development Council maintains that there would be a distortion of competition if it was not treated as a taxable person, the second paragraph of Article 4 (5) requires that it be treated as a taxable person. It follows from the correlation explained in Case 89/81 (the *Hong-Kong Trade Development Council* case, *supra*) between the status of a taxable person and consideration, that the charges must be regarded as consideration for the services which the Development Council provides.

The Development Council further refers to the third paragraph of Article 4 (5) and Annex D to the Sixth Directive which require that bodies governed by public law are to be considered as taxable persons in relation to the activities listed in Annex D. Some of those activities would be likely to be paid for by payments under some form of statutory obligation. In particular, point 10 in Annex D refers to 'the activities of commercial publicity bodies'. Since the Development Council is a body governed by public law and acts as a commercial publicity body, it follows that this provision also requires it to be treated as a taxable person and of necessity, the charges which it receives must be regarded as consideration. The Development Council also refers to the third indent of Article 6(1), Article 11 (A) (1) (a) and Article 13 of the Sixth Directive.

The Development Council proposes that the Court should reply to the question of the House of Lords in the affirmative.

The United Kingdom observes that there will only be supply for a consideration when there is a direct causal link between the two constituent elements, supply and consideration. This means that there must be a transaction entered into between the supplier, on the one hand, and the purchaser or customer, on the other, so that the supply of services is given in exchange for the consideration, and is particularly directed at and provided to the customer in question.

The Sixth and Second Directives have the same fundamental purpose. The term 'consideration', which is defined in the Second Directive, cannot have different

meanings as between the two directives, so that the definition in the Second Directive is of assistance in interpreting the Sixth. The absence of any definition in the Sixth Directive is not significant, as is clear from the common legislative purpose of the directives and from the case-law of the Court.

The United Kingdom accepts that the notion of 'supplies effected for a consideration' cannot have a construction which varies according to the national laws of the Member States. Like the Development Council, it refers to the Court's interpretation of 'consideration' in Cases 154/80, 89/81 and 222/81. It also refers to Case 15/81 (*Gaston Schul Douane Expediteur BV* v *Inspecteur der Invoerrechten en accijnzen, Roosendaal*, [1982] ECR 1409).

It follows from Case 89/81 (the *Hong Kong Trade Development Council* case, *supra*) that the person or body at the end of the production and distribution chain for turnover tax purposes may be a person or body who provides services to others, if such services are provided for no direct consideration.

As regards the activities of the Development Council (apart from those relating to the Kingdom Scheme which are recognized as constituting the supply of services for consideration), its general functions are entirely unrelated to any particular grower or growers and there is no relationship between the functions of the Development Council and the benefits which any particular grower may derive from them. The Development Council is obliged by law to carry out its functions, irrespective of the extent to which it recovers levies from the growers, or the amount of such levies. Likewise, the growers are obliged to pay the levy, irrespective of their opinion of the usefulness of the Development Council's activities, or whether they derive any benefit from such activities. The levies therefore do not represent a commercial return to the Development Council for the activities which it performs.

The United Kingdom submits that the concept of 'supply of . . . services effected for consideration' within the meaning of Article 2 (1) of the Sixth Directive involves the existence of a direct causal link between the supply, on the one hand, and the consideration, on the other. This is supported not only by the reference to 'direct link' in the case-law but by the use of the concept 'transaction' in the Sixth Directive. This suggests a degree of particularity in what is done by the supplier, so that it is directed to and provided for the party who provides consideration.

The essence of the concept of supply of services effected for consideration is that the obligation to supply and the obligation to give consideration are inter-dependent, which is to be contrasted with a situation in which the obligation upon one party to provide services in the interests of an industry at large and the obligation upon another to pay money are quite independent of each other.

There is nothing in the terms of Article 4 (5) and Annex D to the Sixth Directive to suggest that a body such as the Development Council supplies services for consideration. But whether or not the Development Council is a 'commercial publicity body' within the meaning of Annex D, and the United Kingdom submits that, on the facts, it is not, the effect of that measure cannot be that activities which would not otherwise constitute the making of supplies for a consideration are to be treated as such. Thus, Article 4 (5) and

Annex D — given their purposes — cannot be regarded as widening the scope of the concept of the supply of services effected for consideration.

The United Kingdom submits that the question should be answered in the negative.

The *Government of the Federal Republic of Germany submits that,* in respect of supplies of goods and services, consideration is the value of the reciprocal benefit which, under Article 11 (A) (1) (a) of the Sixth Directive is also the 'taxable amount'. Whether there is a reciprocal benefit, and hence consideration within the meaning of the Sixth Directive, depends on whether there is a direct link between the benefit provided, supply of goods or services, and the benefit obtained. Referring to Case 154/80, the German Government submits that provided that there is reciprocity and interdependence, the existence of a benefit constituting consideration is substantiated.

In the present case, the annual charges imposed on growers constitute a reciprocal benefit, and hence 'consideration' within the meaning of Article 2 of the Sixth Directive, only if there is a direct link between the general activities of the Development Council and the mandatory charges levied on producers. The fact that the Development Council was founded pursuant to an Order which also required the payment of mandatory charges does not conflict with the supposition of the existence of a benefit constituting consideration for the purposes of Article 2.

It is unimportant whether the Development Council is an association organized on corporate lines or not. In both cases, the same criteria negate the thesis of an exchange of benefits between it and the growers. However, assuming the Development Council to be an association organized on corporate lines with a membership structure, as long as the association serves the common interests of its members, it affords its members no benefits constituting consideration, even though its activities benefit all the members, and hence each member individually. If, on the other hand, an association provides benefits by serving the individual interests of the members and imposes charges for those benefits in accordance with the actual or presumed requirements of its activities, there arises an exchange of benefits between the association and its members which is subject to value-added tax. In the present case, the mandatory charges on growers represent remuneration for looking after the common interests of the members and hence benefits are not provided to the latter for consideration.

This view is not upset by the fact that the mandatory charge is calculated according to the number of hectares planted, since it cannot be inferred from that fact alone that the charge in question corresponds to the actual or presumed requirements of the Development Council's activities. In addition, it is in keeping with the majority view of the Advisory Committee on Value-Added Tax which has held that subscriptions charged by motoring organizations must be taxed where they represent the consideration for individual services offered to their members.

Even if the Development Council were not a growers' association organized on corporate lines it would still be necessary to reject the thesis of an exchange of benefits constituting consideration between the Development Council and the growers, on the ground that the Development Council operates in order to discharge the tasks assigned to it by statutory order, and not to obtain reciprocal benefits in the form of mandatory charges paid by the growers.

Conversely, the mandatory charges paid by the growers are intended to enable the Development Council to discharge the tasks assigned to it. They are not paid in order to obtain services from it.

If the Development Council, which was founded by a statutory order, constitutes a body governed by public law within the meaning of Article 4 (5) of the Sixth Directive, its activities which are compensated by the mandatory charges would not, by virtue of Article 2 of the directive, be subject to value-added tax in the first place, on the ground that they are not carried out by a taxable person.

The German Government also refers to the terminology of the Sixth Directive. British law clearly uses a different terminology, inasmuch as the 'scope of tax' under section 2 (1) of the Finance Act 1972 as amended extends only to transactions effected in the United Kingdom, where they are 'taxable'. Thus 'exempt' transactions do not come within that scope. According to the scheme and terminology of the Sixth Council Directive, however, a distinction must be drawn between transactions which are subject to value-added tax, exempt transactions, and taxable transactions. It follows from Article 2 of the Sixth Directive that the transactions falling within the scope of value-added tax — that is to say, those which are subject to the tax (supplies of goods or services) — comprise exempt transactions (for example, under Articles 13 to 16 of the directive), and taxable transactions (see for example Article 12 (1) of the directive).

The German Government is of the opinion that the question should be answered in the negative.

The Commission of the European Communities (hereinafter referred to as 'the Commission') observes that it follows from Case 89/81 (the *Hong-Kong Trade Development Council* case, *supra*) that a person who habitually provides services, in all cases free of charge, cannot be regarded as a taxable person, in the sense of this term as used in the value-added tax directives.

The Development Council predominantly makes supplies of services which, if provided by a usual commercial body, would be subject to value-added tax. The interest which apple and pear growers have in the functions performed by the Development Council is demonstrated by the fact that it was established at the request of the growers, a request which was confirmed on three occasions after it started its functions.

It is clear from the case-law of the Court that a provision of services is taxable for value-added tax when the service is provided against payment. The basis of assessment is everything which makes up the consideration for the service. It follows from Case 154/80 that there must be a direct link between the service provided and the consideration received.

The services provided by the Development Council in return for the levy paid under the Kingdom Scheme do not differ in style from those provided in return for the compulsory charges. The question is therefore whether the fact that the Kingdom Scheme payment is of a contractual nature and the compulsory payment of a fiscal nature affects the taxable position of the two kinds of levies.

Article 4 of the Sixth Directive does not exclude the levying of value-added tax on

certain contributions of a fiscal nature, where a body governed by public law engages in activities or transactions where treatment as non-taxable persons would lead to distortion of competition.

The term 'bodies governed by public law' was examined by the Council of Ministers during the passage of the Sixth Directive in relation to Article 13 (A) (1) (b) and on that occasion the United Kingdom representative pointed out that the term had no meaning in British law. The Council minutes state that the United Kingdom is to interpret the term as in Member States where the same term has a meaning. The Commission assumes that a body, such as the Development Council, which is set up by a specific statutory instrument can be regarded as a body governed by public law.

If the fruit growers had not sought the establishment of the Development Council, which has functions amounting to those of a marketing agency, but had instead set up their own marketing cooperative, the latter organization would undoubtedly have been a taxable person whose services would have been taxed under the provisions of the Sixth Directive. If the fruit growers' payments for these services were invoiced annually on a flat-rate basis, this would not have affected the position as to liability to value-added tax on payments made for its services. The Commission recalls that other Member States have similar agricultural marketing organizations paid for by means of parafiscal charges. The functions of these private marketing organisations are, in fact, often identical with the functions performed by the Development Council in the United Kingdom. Charges paid by agricultural producers to these organizations are normally related to quantity or value of produce delivered, and they invariably form part of the taxable amount for the transaction concerned.

If the Development Council is treated as if it were exempt from value-added tax, so that value-added tax cannot be recovered on inputs associated with its taxable outputs, the cost is borne by the fruit growers who must pass it on in the price of their goods. Given that a specific exemption is necessary to exempt the activities of the non-profit-making bodies referred to in Article 13 (A) (1) (f) of the Sixth Directive, it seems certain that the directive's intention is normally to levy value-added tax on the activities and transactions carried out by bodies governed by public law, such as the activities and transactions performed by the Development Council.

The Court's judgment in Case 154/80 rules out the creation, for fiscal purposes, of a fictitious consideration where a taxable person has made a commercial decision to make no charge for its services. If, as in that case, the Development Council found that in a given year it need not raise a levy to cover its costs, the United Kingdom would not be able to invent a fictitious consideration. In the present case, however, there is an exact payment for the services rendered to each grower. The compulsory charges represent the division of the cost to the Development Council of providing its taxable services in the course of one year. There is therefore a direct link between the services provided and the consideration received. It is immaterial that the charges are on a flat-rate basis, as many businesses invoice on such a basis. Likewise, it is irrelevant that the charges are compulsory, since the Sixth Directive does not deal with

this aspect other than to make it plain that all taxes on goods or services other than the value-added tax itself are part of the consideration and must form part of the basis of assessment.

The Commission proposes that the Court should reply to the question in the following manner:

'Where a body governed by public law and being a taxable person provides taxable services to producers against contributions from these, such services constitute "supply of services effected for consideration" in the sense of Article 2 of the Sixth Council Directive on the harmonization of the laws of Member States relating to turnover taxes.'

T. F. O'Higgins
Judge Rapporteur