JUDGMENT OF THE COURT (First Chamber)

24 October 2013 (*)

(Taxation – VAT – Betting and gaming – Legislation of a Member State under which VAT and a special tax are to be levied cumulatively on the operation of low-prize slot machines – Whether permissible – Basis of assessment – Whether the taxable person can pass on the VAT)

In Case C?440/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 21 September 2012, received at the Court on 3 October 2012, in the proceedings

Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt)

v

Finanzamt Hamburg-Bergedorf,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt), by B. Hansen, Rechtsanwalt,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the European Commission, by B.-R. Killmann and A. Cordewener, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(2), 73, 135(1)(i) and 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt) (‘Metropol’) and the Finanzamt Hamburg-

Bergedorf (Hamburg-Bergedorf tax office) (‘the Finanzamt’) concerning the levying of value added tax (‘VAT’) on proceeds from the running of low-prize slot machines (‘gaming machines’).

Legal context

European Union (‘EU’) law

The VAT Directive

3 Article 1(2) of the VAT Directive states:

‘The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

…’

4 Under Article 73 of that directive:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

5 Article 135(1)(i) of the directive provides:

‘Member States shall exempt the following transactions:

…

(i) betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State.’

6 Article 401 of the VAT Directive provides:

‘Without prejudice to other provisions of Community law, 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 or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.’

German law

7 In Paragraph 4 of the Law on turnover tax (Umsatzsteuergesetz), in the version applicable to the case before the referring court (‘the UStG’), entitled ‘Exemptions in respect of supplies of goods and services’, subparagraph 9(b) provides that ‘transactions which come within the scope of the Law on horse-race betting and lotteries’ are to be exempt from VAT.

8 Paragraph 12(2) of the regulation on gaming machines and other games offering the

possibility of winnings (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit – Spielverordnung), in the version applicable to the case before the referring court ('the SpielV'), provides, in essence, that gaming machines must pay out winnings to players so as to ensure that the contents of the cash box of any given machine over time do not increase by more than EUR 33 per hour.

9 Under Article 13 of the SpielV:

'(1) The Physikalisch-Technische Bundesanstalt [(Federal Institute of Physical Technology)] may not authorise the manufacture of a gaming machine … unless it fulfils the following criteria:

1. The minimum gaming period shall be 5 seconds; the stake inserted for that period may not exceed EUR 0.20 and the maximum amount that can be won in that period shall be EUR 2.

…

3. Total hourly losses (total stakes minus total winnings) may not exceed EUR 80.

…'

10 Paragraph 3 of the Law of the *Land* of Hamburg on the licensing of public casinos (Hamburgisches Gesetz über die Zulassung einer öffentlichen Spielbank), as amended, provides:

'1. The trader operating the casino must pay the Free and Hanseatic City of Hamburg a casino tax amounting to 70% of the gross proceeds from gaming. In addition, it must pay a special tax amounting to 20% of the gross proceeds from gaming. …

2. The statutory casino tax referred to in subparagraph 1 shall be reduced by the amount of [VAT] owed and payable under the [UStG] on the basis of the transactions generated in operating the casino …'

11 Paragraph 4(1) of the Law of the *Land* of Schleswig-Holstein on casinos (Spielbankgesetz des Landes Schleswig-Holstein), as amended, provides:

'The casino tax shall amount to 50% of the gross proceeds from gaming. The [VAT] owed and paid under the [UStG] on the basis of the transactions generated in operating the casino shall be offset against the casino tax.'

12 Paragraph 7 of the Law of the *Land* of Mecklenburg-Western Pomerania on casinos (Spielbankgesetz des Landes Mecklenburg?Vorpommern) states:

'(1) The operation of a casino shall be subject to the casino tax.

(2) The casino tax shall amount to:

1. 25% of the gross proceeds from gaming where the total amount of such proceeds for the financial year is less than or equal to EUR 500 000,

…

5. 80% of the gross proceeds from gaming where the total amount of such proceeds for the financial year is greater than EUR 10 000 000.

…

(7) … The [VAT] owed and paid under the [UStG] and generated in operating the casino must be offset against the casino tax.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 During the 2010 financial year, Metropol operated gaming machines in seven gaming halls in the *Länder* of Hamburg, Schleswig-Holstein and Mecklenburg-Western Pomerania. Pursuant to the local legislation of the municipalities concerned in Schleswig?Holstein and Mecklenburg-Western Pomerania and to a Law of the *Land* of Hamburg, the operation of such machines is subject to an entertainment tax which is calculated using rates and bases of assessment which differ from municipality to municipality.

14 The balance of cash box contents for each gaming machine ('the cash receipts') – that is to say, the money inserted by players less the money paid out as winnings, plus withdrawals less replenishment of machines – was noted by Metropol each month using an electronic monitoring device. Besides the cash box, the gaming machines are fitted with a 'hopper', that is to say, a device for holding and dispensing coins. The hopper has one drawer for 20-centime coins and another drawer for 2-euro coins and is filled by the operator whenever the machine is going to be put into operation. All 20-centime and 2-euro coins inserted by players fall into the hopper until it is full and any surplus is then automatically diverted into the cash box. Other coins inserted and any notes always pass directly into the cash box, the contents of which are counted electronically. Any changes in the contents of the hopper are recorded by the monitoring device and are also taken into account when it comes to calculating the cash receipts.

15 The gaming machines have a money counter and a 'points' counter. Any money inserted into the machine creates an initial credit on the money counter. The conversion of money to points is recorded by the machine as a 'stake', while the conversion of points to money is recorded as 'winnings', with one point being equivalent to one centime. Points enable the player to start the game. At any time, the player can convert the number of points awarded and recorded on the points counter into a sum of money recorded on the money counter, which can be paid out at any time.

16 A twofold limitation is placed on any conversion of cash on the money counter to points on the points counter (a 'stake' for the purposes of the SpielV): it cannot exceed 20 centimes every 5 seconds, or EUR 80 every hour, after winnings have been deducted. In the event that the EUR 80 limit is reached during a given hour, no further transfers from the money counter to the points counter may be made for the remainder of that hour ('transfer break'). Changes made to the number of points on the points counter (in layman's terms: stakes, losses or winnings) are unregulated by legislation.

17 The yearly total of monthly cash receipts from all Metropol's gaming machines in the 2010 financial year ('gross cash') amounted to EUR 1 018 041.78. On the basis of the standard German VAT rate of 19%, Metropol used that figure to calculate a taxable amount for VAT of EUR 855 497.29 ('net cash', 100/119 of EUR 1 018 041.78) and turnover on the operation of gaming machines totalling EUR 162 544.49, representing almost the entirety of the VAT owed. The VAT chargeable on all the other taxable transactions carried out by Metropol is EUR 1 790.20. As Metropol had paid input VAT in the amount of EUR 69 355.76, the Finanzamt, by an assessment notice of 29 March 2012, set the amount of VAT still owed at EUR 94 978.93.

18 Metropol has brought an action contesting that notice before the Finanzgericht Hamburg (Finance Court, Hamburg), the referring court, on the view that the methods used to tax gaming machine turnover are contrary to EU law and, in particular, contrary to the principles of

proportionality, pass-through and VAT neutrality. Accordingly, Metropol claims that the Finanzgericht Hamburg should amend the VAT assessment notice for the 2010 financial year by reducing the amount of VAT still owed from EUR 94 978.93 to EUR 1 790.20. The Finanzamt contends that the action should be dismissed.

19 With regard to that action, the Finanzgericht Hamburg points out, first, that, in other fields, a tax which is sufficiently distinct from VAT may be levied alongside VAT.

20 Secondly, the Finanzgericht Hamburg finds that, pursuant to the first sentence of Article 1(2) of the VAT Directive, VAT must be exactly proportional to the price of the services supplied. It is true that, in Case C?38/93 *Glawe* [1994] ECR I?1679, the Court ruled that the taxable amount for the slot machines at issue in that case, which were set in such a way as to pay out as winnings a certain percentage of the stakes inserted, did not include the statutorily prescribed proportion of the total stakes inserted which corresponds to the winnings paid out to the players. On the basis of that case-law, it became common practice in Germany to take as the taxable amount not the total of all stakes inserted but only the contents of the cash box, generally over the period of one calendar month. However, the monthly cash receipts depend on the winnings and losses of the various players, with the result that there is then no correlation between the VAT which can be charged and the stake paid by the individual player.

21 In addition, the Finanzgericht Hamburg states that the minimum win ratio of 60% which was in force in Germany until the end of 2005 was replaced in 2006 by limits on stakes and losses over a given period of time. From a technical point of view, ‘hoppers’, which are a new development in gaming machines, admittedly perform in principle the same function as the old ‘reserve compartments’ did in *Glawe*, but operators are able to access the contents of ‘hoppers’ at any time.

22 Thirdly, the Finanzgericht Hamburg expresses doubts regarding the interpretation of paragraph 24 of the judgment in Joined Cases C?338/97, C?344/97 and C?390/97 *Pelzl and Others* [1999] ECR I?3319 and paragraphs 28, 31, 34 and 37 of the judgment in Case C?475/03 *Banca popolare di Cremona* [2006] ECR I?9373, according to which it is a characteristic of VAT that it can be passed on to the final consumer. It is not clear from those judgments whether the possibility of passing on VAT is simply a typical characteristic of VAT or whether it is a precondition for charging VAT. If prices are subject to restrictions, as in the case before the referring court, a trader cannot increase the price of the supply of services and pass the VAT on to the consumer if, by its calculations, it has already reached the upper end of the maximum price range permitted.

23 Fourthly, the Finanzgericht Hamburg states that, in Germany, betting and gaming are governed by two different legal regimes. Thus, casino operators must possess a licence, and stakes and winnings are in principle unlimited. Under the Laws of the *Länder* of Hamburg, Schleswig-Holstein and Mecklenburg-Western Pomerania on casinos, those operators must pay a special casino tax, set in such a way as to cream off most of their profits. By contrast, the establishment of gaming halls is, in principle, unrestricted, albeit subject to official supervision and legally regulated. As a general rule, gaming hall operators are subject to a special local entertainment tax.

24 As the VAT exemption previously granted to casinos was repealed in 2006, such establishments then became liable to pay VAT, which was offset against the casino tax (since the casino tax was higher than the VAT). According to the Finanzgericht Hamburg, the system of taxation thus provided for could enable the principle of fiscal neutrality to be undermined, as a Member State could introduce, for two comparable groups of taxable persons, a special national tax which cannot be characterised as turnover tax while making provision, applicable to only one

of those groups, for VAT to be offset against that special tax. However, that did not happen in the case currently before it.

25 Lastly, according to the Finanzgericht Hamburg, the legislation at issue in the case before it does not give persons liable for VAT an incentive to ensure that proper invoices are drawn up in respect of transactions from which they derive proceeds, since, if invoices are lacking or contain irregularities, those persons may well be denied the right to deduct the input VAT paid, but as the – then higher – VAT chargeable can be offset against the casino tax, this will have no economic effect as far as they are concerned.

26 In those circumstances, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 401 of [the VAT Directive], read in conjunction with Article 135(1)(i) of that directive, to be interpreted as meaning that [VAT] and a special national tax on games of chance may be levied only as alternatives, and not cumulatively?

2. Only if the answer to Question 1 is in the affirmative:

If, under national provisions, both [VAT] and a special tax are levied on games of chance, does this mean that [VAT] is not levied or that the special tax is not levied, or does the decision as to which of the two taxes may not be levied depend on national law?

3. Are the first sentence of Article 1(2) and Article 73 of [the VAT Directive] to be interpreted as precluding a national provision or practice whereby, in the operation of gaming machines…, the contents of the machine’s cash box (“electronically counted cash box”) serves as the basis of assessment after a set interval?

4. Only if the answer to Question 3 is in the affirmative:

How is the taxable amount otherwise to be determined?

5. Are the first sentence of Article 1(2) and Article 73 of [the VAT Directive] to be interpreted as meaning that the levying of VAT is subject to the condition that the trader can pass the [VAT] on to the recipient of the supply? If so, what is to be understood by the ability to pass on the tax? In particular, is the legal permissibility of a correspondingly higher price for the goods or service an attribute of the ability to pass that tax on?

6. Only if in answer to Question 5 the legal permissibility of a higher price is a precondition:

Are the first sentence of Article 1(2) and Article 73 of [the VAT Directive] to be interpreted as meaning that provisions which limit the consideration for goods or services subject to [VAT] are to be applied in accordance with [EU] law in such a way that [VAT] is understood not to be included in the consideration set but to be in addition to it, even where, according to their wording, the national provisions governing consideration do not expressly so provide?

7. Only if the answer to Question 5 is in the affirmative and the answers to Questions 6 and 3 are in the negative:

In the present case, is no [VAT] to be levied on the total turnover of the gaming machines, or is it to be levied only on the part that cannot be passed on, and how is that part to be determined: for example, on the turnover at which the stake per game could not be increased, or on the turnover at which the contents of the cash box per hour could not be increased?

8. Is Article 1(2) of [the VAT Directive] to be interpreted as precluding a national regulation on an unharmonised tax under which the [VAT] owed is to be set in full against that tax?

9. Only if the answer to Question 8 is in the affirmative:

Does the setting of [VAT] against a national, unharmonised tax in the case of traders liable to pay the latter tax have the effect that [VAT] may not be levied on their competitors who, though not subject to this unharmonised tax, are subject to another special tax and for whom there is no provision for such offsetting?'

Consideration of the questions referred

Question 1

27 By its first question, the referring court seeks to ascertain whether Article 401 of the VAT Directive, read in conjunction with Article 135(1)(i) thereof, is to be interpreted as meaning that VAT and a special national tax on games of chance may be levied only as alternatives, and not cumulatively.

28 In that regard, it should be borne in mind that, under Article 401 of the VAT Directive, '[that] Directive shall not prevent a Member State from maintaining or introducing taxes … on betting and gambling … or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes …'. There is nothing in the wording of that provision, therefore, to preclude Member States from levying, cumulatively on a particular transaction, VAT and a special tax that cannot be characterised as a turnover tax (see, to that effect, Case 73/85 *Kerrutt* [1986] ECR I?2219, paragraph 22).

29 As regards, more specifically, betting and gaming, the Court has ruled that Article 135(1)(i) of the VAT Directive – which provides, inter alia, that forms of gambling may be exempted from VAT 'subject to the conditions and limitations laid down by each Member State' – must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for under that provision allows those States to exempt from that tax only certain forms of betting and gaming (Case C?58/09 *Leo-Libera* [2010] ECR I?5189, paragraph 39).

30 The Court also ruled, in paragraph 38 of the judgment in *Leo-Libera*, that the fact that the amount of an unharmonised tax on betting and gaming, payable by certain organisers and operators of forms of betting and gaming subject to VAT, may be adjusted according to the VAT owed in respect of that activity, is irrelevant in the light of the principle of fiscal neutrality. The Court has thus already confirmed that EU law does not, in principle, preclude VAT and another general tax on games of chance from being levied cumulatively, provided that that general tax cannot be characterised as a tax on turnover.

31 As can be seen from both the order for reference and the observations submitted to the Court, it is common ground that the entertainment taxes at issue in the main proceedings cannot be characterised as taxes on turnover.

32 In the light of the foregoing, the answer to Question 1 is that Article 401 of the VAT Directive, read in conjunction with Article 135(1)(i) thereof, must be interpreted as meaning that VAT and a special national tax on games of chance may be levied cumulatively, provided that the special national tax cannot be characterised as a tax on turnover.

Question 2

33 As the second question was referred only in case the Court answered Question 1 in the affirmative, there is no need to answer it.

Question 3

34 By its third question, the referring court seeks to ascertain whether the first sentence of Article 1(2) and Article 73 of the VAT Directive are to be interpreted as precluding a national provision or practice whereby, in the operation of gaming machines, the cash receipts from those machines is used, after a set interval, as the basis of assessment.

35 First of all, it should be borne in mind in relation to the basis of assessment that, under Article 73 of the VAT Directive, the taxable amount in respect of the supply of goods or services is to include 'everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply'.

36 Moreover, the Court has found that, as can be seen from the first subparagraph of Article 1(2) of the VAT directive, one of the essential characteristics of VAT is that it is proportional to the price of the goods or services concerned (see, to that effect, Case C?200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I?2217, paragraph 11; *Pelzl and Others*, paragraph 25; and Joined Cases C?283/06 and C?312/06 *KÖGÁZ and Others* [2007] ECR I?8463, paragraph 40).

37 In each of the cases giving rise to the judgments referred to in the preceding paragraph, the Court referred to the proportionality of VAT only in order to determine whether a national tax or fiscal levy charged by the Member State involved could be characterised as a tax on turnover, in which case it could not, in consequence, be levied cumulatively with VAT in the European Union. On the other hand, those judgments were not intended to resolve the issue of whether VAT must be proportional to the payments made by various service users in the course of a complex activity which is subject, as such, to VAT, let alone the issue of whether that tax need necessarily be proportional in all circumstances to the payments made by each individual service user.

38 In that regard, the principle that VAT must be proportionate can relate only to the taxable amount. Although that amount usually corresponds to the price payable by the final consumer as consideration for the supply of goods or services, the very wording of Article 73 of the VAT Directive makes it clear that that is not always necessarily the case. Under that provision, the taxable amount is made up of everything which constitutes consideration 'obtained' by the supplier, in return for the supply, from the customer 'or a third party, including subsidies directly linked to the price of the supply'. Accordingly, the taxable amount is determined by what the taxable person actually receives as consideration, and not by what one particular service user pays in a specific case (see, to that effect, inter alia, Case C?149/01 *First Choice Holidays* [2003] ECR I?6289, paragraphs 28 to 31 and the case?law cited).

39 Accordingly, a tax practice, such as that at issue in the main proceedings, of using the monthly cash receipts – the amount of which depends on the winnings and losses of the various players – as the basis of assessment for transactions carried out using gaming machines cannot be said to infringe EU law simply because there is no correlation, in terms of proportionality, between the VAT which may be charged and the specific stakes inserted by individual players.

40 Furthermore, the Court has ruled that, in the case of slot machines which, pursuant to mandatory statutory requirements, are set in such a way that they pay out as winnings on average

at least 60% of the stakes inserted, the consideration actually received by the operator in return for making the machines available consists only of the proportion of the stakes which he can actually take for himself (*Glawe*, paragraph 9). Although, in *Glawe*, the Court was not required to resolve the issue of whether the principle of 'individual taxation' required the calculation of the taxable amount to take account of the individual stake for a game or a series of games, that is to say, the stake inserted by a particular player, it is clear from paragraphs 5 and 14 of the judgment in *Glawe* , read in the light of points 27 to 30 of the Opinion of Advocate General Jacobs in that case, that the Court was of the view that it did not.

41 As the case giving rise to the judgment in *Glawe* was similar, on the facts, to the case before the referring court, the answer given by the Court in that judgment can be applied to the present case. As regards the legislation at issue in the main proceedings, Paragraph 12(2) of the SpielV provides, in essence, that gaming machines must pay out winnings to players so as to ensure that the contents of the cash box of any given machine do not increase over time by more than EUR 33 per hour. Under Paragraph 13 of the SpielV, which provides, inter alia, for other restrictions on players' stakes, winnings and losses, machines must be set in such a way as to ensure that the requirements under the SpielV, introducing a restriction on the takings which may be withdrawn from such machines, are met.

42 In those circumstances, the consideration actually received by an operator in return for making gaming machines available is subject to 'mandatory statutory requirements' and, as a result, consists only of 'the proportion of the stakes which he can actually take for himself' (see *Glawe*, paragraph 9, and Case C?377/11 *International Bingo Technology* [2012] ECR, paragraph 26), that is to say, the cash receipts after a set interval.

43 That conclusion is not affected by the fact that the slot machines at issue in the case which gave rise to the judgment in *Glawe* were fitted with a 'reserve compartment' from which the winnings provided for by law were paid out to players, whereas the gaming machines at issue in the case before the referring court are fitted with a 'hopper', which serves the same purpose. The order for reference states that, although hoppers represent a new technical development in gaming machines, in principle they perform the same function as the old reserve compartments. In that regard, it is also irrelevant that, as the referring court pointed out, the operator is able to access a hopper's contents at any time, since, according to that court, any change in the hopper's contents is recorded by a monitoring device and is also taken into account when calculating the cash receipts. Accordingly, the amount of the cash receipts – which the operator can actually take for himself – can be determined with accuracy.

44 In those circumstances, the answer to Question 3 is that the first sentence of Article 1(2) and Article 73 of the VAT Directive must be interpreted as not precluding a national provision or practice whereby, in the operation of gaming machines, the amount of the cash receipts from those machines is used after a set interval as the basis of assessment.

Question 4

45 As the fourth question was referred only in case the Court answered Question 3 in the affirmative, there is no need to answer it.

Questions 5 to 7

46 By its fifth, sixth and seventh questions, which should be considered together, the referring court seeks to ascertain, in essence, whether the first sentence of Article 1(2) and Article 73 of the VAT Directive are to be interpreted as meaning that the levying of VAT is subject to the condition that the operator is able to pass that tax on to the player and, if so, whether the legal permissibility

of a correspondingly higher price is an attribute of the ability to pass that tax on. If so, the referring court seeks to ascertain whether national legislation which limits an operator's consideration for goods or services subject to VAT is to be applied in such a way that the consideration set does not include VAT. Lastly, the referring court asks the Court of Justice whether, in the event that it is decided that VAT should not be levied, owing to the fact that it cannot be passed on, no VAT is to be levied on any of the turnover obtained from the gaming machines, or whether VAT is to be levied only on the part that cannot be passed on.

47 In order to provide the referring court with a useful answer, it should first of all be noted that, according to settled case-law, the objectives of, in particular, consumer protection and the prevention of incitement to squander money on gambling, as well as the general need to preserve public order represent overriding reasons in the public interest which may be used to justify restrictions on freedom to provide services, and, in the absence of harmonisation at EU level in the field of gaming legislation, it is for each Member State to determine in that area, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected, so long as the restrictive measures imposed satisfy the conditions laid down in the case-law of the Court as regards their proportionality (see, to that effect, Case C?42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I?7633, paragraphs 56, 57 and 59 and the case-law cited).

48 More specifically, the introduction of a 'price regulating' system and/or a statutory limit on gaming machine users' losses, was tacitly approved in principle by the Court in *Glawe*, in particular in view of the measures for levying VAT. In that judgment, the Court based its decision on a statutory winnings rate of 60% and stated that those winnings, which had to be paid out under German law, could not be included in the taxable amount (see *Glawe*, paragraph 9). Accordingly, the introduction, in substance, of a restriction on players' losses in games of chance and, by extension, a restriction on the revenue obtained by operators of those games has already been incorporated into EU law.

49 It follows that, in the field of betting and gaming, Member States have the right, in principle, to place temporary or permanent restrictions on players' stakes, winnings and losses. Where a Member State has in fact taken advantage of that right, as seems to be the case in relation to the main proceedings, there is no question of increasing the revenue obtained by gaming machine operators beyond the limits provided for under the relevant legislation so that those operators can increase the amount passed on to players by way of VAT. In those circumstances, such an increase is simply – and reasonably – prohibited.

50 Next, it should be pointed out that Questions 5, 6 and 7 are predicated on the assumption that national legislation such as the legislation at issue in the main proceedings does not allow gaming machine operators to pass on their VAT in full to the final consumers, that is to say, to the players. Only if that premiss is correct, will it be necessary for the referring court to have an answer to those questions in order to resolve the dispute before it.

51 However, it does not appear that legislation such as that at issue in the main proceedings prevents VAT from being passed on to the final consumers.

52 Indeed, as can be seen from the order for reference, only the net cash receipts – the takings minus the VAT owed – constitute the taxable amount. Pursuant to the legislation at issue in the main proceedings, the taxable amount for the purposes of VAT includes only the revenue actually obtained by the gaming machine operator, while the VAT owed as a result of applying the statutory VAT rate to the taxable amount (net cash) has also actually been paid by the final consumers.

53 In those circumstances, it must be found that national legislation, such as the legislation at

issue in the main proceedings, which imposes restrictions on the operation of gaming machines in relation, inter alia, to players' stakes, winnings and losses over a given period of time, allows operators to pass on in full to the final consumers the VAT owed in respect of that activity.

54 Accordingly, as Questions 5, 6 and 7 are purely hypothetical, there is no need to answer them.

Question 8

55 By its eighth question, the referring court asks, in essence, whether Article 1(2) of the VAT Directive is to be interpreted as precluding a national system regulating an unharmonised tax, under which the VAT owed is to be set in full against that tax.

56 As regards, first, the principle of fiscal neutrality, to which the Finanzgericht Hamburg refers in that context, it should be borne in mind that this principle, which constitutes a fundamental principle of the common system of VAT, is the reflection in the field of VAT of the principle of equal treatment. One of the consequences of this principle is that taxable persons must not be treated differently in respect of similar supplies which are in competition with each other (see, inter alia, Case C?310/11 *Grattan* [2012] ECR, paragraph 28 and the case-law cited).

57 However, as the Commission rightly pointed out, the principle of fiscal neutrality in the field of VAT does not create an obligation to guarantee equal treatment and neutrality outside the framework of that harmonised system. Accordingly, since it is possible for the VAT owed to be offset, pursuant to the legislation at issue in the main proceedings, against an unharmonised tax, and not vice versa, if that legislation were to give rise to any doubts as to observance of the principle of equal treatment, such doubts would relate to that unharmonised tax rather than to VAT. In any event, no such doubts arise in the main proceedings, as the referring court has explained that Metropol did not have to pay the casino tax.

58 Moreover, the Court has found, in response to a line of argument which was essentially identical to that set out in paragraph 56 above, that the fact that the amount of an unharmonised tax on gaming, payable by certain organisers and operators of betting and gaming subject to VAT, may be adjusted according to the VAT owed in respect of that activity, is irrelevant in the light of the principle of fiscal neutrality (see *Leo-Libera*, paragraph 38 and the case-law cited).

59 Secondly, as regards potential practical problems, such as there being no incentive for a person deriving proceeds from a transaction to ensure that a proper invoice is drawn up by the other party, there is no detailed information in either the order for reference or the observations submitted by the parties involved to support the conclusion that such problems have already arisen in Germany or to help assess their impact on the proper functioning of the harmonised VAT system. In the absence of any solid evidence in that regard, there is no need to give a ruling on the potential consequences of the hypothetical situation described by the referring court.

60 In those circumstances, the answer to Question 8 is that Article 1(2) of the VAT Directive must be interpreted as not precluding a national system regulating an unharmonised tax, under which the VAT owed is to be set in full against that tax.

Question 9

61 As the ninth question was referred only in case the Court answered Question 8 in the affirmative, there is no need to answer it.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 135(1)(i) thereof, must be interpreted as meaning that value added tax and a special national tax on games of chance may be levied cumulatively, provided that the special national tax cannot be characterised as a tax on turnover.**

2. **The first sentence of Article 1(2) and Article 73 of Directive 2006/112 must be interpreted as not precluding a national provision or practice whereby, in the operation of gaming machines offering the possibility of winnings, the amount of the cash receipts from those machines is used after a set interval as the basis of assessment.**

3. **Article 1(2) of Directive 2006/112 must be interpreted as not precluding a national system regulating an unharmonised tax, under which the value added tax owed is to be set in full against that tax.**

[Signatures]

** Language of the case: German.