OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 28 March 1990 *

Mr President,
Members of the Court,

1. None of the parties who submitted written observations in this case failed to point out the similarity of the questions referred to the court to those in Joined Cases 231/87 and 129/88 ([1989] ECR 3233). The answers to be given to them are largely if not entirely conditioned by those which the Court gave in its judgment of 17 October 1989 in those cases.

2. On closer examination, it would even appear that the questions in this case and the grounds for referring them to the Court are in part identical to question 2(a) to (d) in Case 129/88. In fact they have been submitted by the same court. The principal, if not the only, difference is the reference to the concept of 'administrative functions' as defined in regard to the various branches of local authority activity by Presidential Decree No 616 of 24 July 1977, adopted for the purpose of implementing Article 118 of the Italian Constitution.

3. In its first two questions, the commissione tributaria di primo grado di Piacenza wishes essentially to know whether the Italian legislature was required to lay down rules governing the exclusion of local authorities from the status of taxable person in respect of activities engaged in 'as public authorities', within the meaning of the first subparagraph of Article 4(5) of the Sixth VAT Directive [1] by defining them in relation to the said concept of 'administrative functions' (question (a)) and, consequently, not to regard local authorities as taxable persons in respect of activities in which they engage in the context of their 'administrative functions' as defined in national law (question (b)).

4. In short, compared to the earlier cases, the question is whether the concept of 'administrative functions' as defined in the Italian legislation can constitute a valid criterion for determining which activities are engaged in by local authorities 'as public authorities'.

5. In the abovementioned judgment of 17 October 1989, the Court held, in answer to the first question, that:

'It is for each Member State to choose the appropriate legislative technique for transposing into national law the rule of treatment as a non-taxable person laid down in that provision' (first subparagraph of Article 4(5) of the Sixth Directive).

In paragraph 18 of the judgment, the Court had already decided that the Member States

* Original language: French.

1 — 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 (OJ L 145, 13.6.1977, p. 1).

'may, for example, merely incorporate into national law the form of words used in the Sixth Directive or an equivalent expression or they may draw up a list of activities in respect of which bodies governed by public law are not to be regarded as taxable persons'.

6. The legislature may certainly define those activities by means of a concept (or expression) borrowed from national law or by reference to an already existing list, such as the concept or list of local authorities' 'administrative functions', but it is not required to do so (question (a)). However, if it adopts such a method, it must take care not to include in the list of activities so defined, activities which do not come within the definition which the Court has laid down of activities engaged in 'as public authorities'.

7. The concept of activities engaged in 'as public authorities' is a Community law concept and is, moreover, unique to the Sixth Directive. It is from an analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive that the Court concluded that it is the manner in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons (paragraph 15). It follows that its scope does not depend only on classifications or concepts of national law, in particular, as is the case here, when they are borrowed from branches of law other than that at issue.

8. It is thus not merely because a local authority activity is regarded as an 'administrative function' as defined by Presidential Decree No 616 that the authority may automatically be regarded as not being a taxable person in respect of it (question (b)).

9. The Court has certainly decided that the only criterion making it possible to distinguish with certainty activities engaged in by bodies subject to public law 'as public authorities' from those governed by private law is the legal regime applicable *under national law*. However, even though the scope of the tax exemption thus depends on national law, it is not by virtue of the classification of certain activities by that law but solely in so far as national law requires bodies subject to public law to engage in a given activity under particular legal conditions of public law different from those applicable to private traders.

10. At the hearing, brief reference was made to the problem of mixed regimes, that is to say, situations governed in part by public law (for example, a deed of concession) and in part by private law (for example, the contract governing the concession). The local authority of Carpaneto considers that the public law regime must take precedence 'if it is pre-eminent'. The Commission considers that the public law aspect of the activity must take precedence in all cases, in accordance with the principle *accessorium sequitur principale* and that, consequently, the activity in question must be excluded from the scope of VAT.

11. However, having regard to the complexity of that problem, I do not think it is possible to take a position on it in these proceedings. That may be seen in particular from the fact that it has been resolved in different ways by different Member States. To remain with the example of concessions, referred to by the Commission, it would appear that the legislation which deals in the most detailed way is that of the Grand Duchy of Luxembourg. It provides that the hire and concession of the right to occupy

or park on the public highway, concessions of landing and parking rights at airports, concessions of the right to operate a communal aerial and concessions of graves or crypts in cemeteries are not subject to VAT.[2]

12. On the other hand, the French legislation mentions none of those cases, but it provides that advertising billboard concessions are subject to VAT (*Lamy fiscal*, 1988, Vol. 2, No 5019). In French law, there is also an interesting example of a case in which the incidental does not follow the principal:

'Charges giving access to cross-country ski trails and public facilities which may be levied by local authorities in mountain areas are free of VAT. However, if such charges are collected by a departmental, interdepartmental or regional association, the amounts paid to that association in return for collecting the charge are subject to VAT. That is so even if the payment takes the form of a municipal subsidy or is deducted by the association from the amount collected (inst. 10 September 1985, BO 31-17-83)' (*Lamy fiscal*, Vol. 2, No 5018).

13. It thus appears that the question of mixed regimes deserves a more detailed discussion. Moreover, since it was not raised in the questions referred to the Court, I do not think that the Court should give an answer on that subject.

2 — Règlement grand-ducal of 22 October 1979 on the liability of bodies subject to public law to value-added tax, *Mémorial A*, p. 15542.

14. The autonomy of the Italian regions was also raised at the hearing and reference was made to the possibility that one of them might reserve the exercise of certain activities solely to municipal authorities under a public law regime, whereas another region might also permit private traders to exercise the same activity under private law contracts.

15. Like the Commission, I think that in such a case, the national legislature is entitled, in applying the criterion of 'significant distortions of competition', to charge VAT on the activities in question even though they are engaged in in certain parts of the territory 'under the legal regime particular to public bodies' and without there being any distortions of competition at local level.

16. However, what is a court before which such a case is brought to do in the meantime? Here again, I share the Commission's view that the court should regard the activity engaged in by the local authority as subject to VAT if it comes to the conclusion that exemption would lead to significant distortions of competition between traders established in the various regions of the same Member State.

17. However, since that problem was also not raised in the questions referred to the Court, I do not think it is necessary for the Court to deal with it in its answers.

18. Consequently, I propose that the Court should answer the first two questions by repeating the answer given to the first question in Joined Cases 231/87 and 129/88 and adding that

'the Member States are not required to exclude certain activities from the scope of VAT solely on the ground that they are classified in national law as "administrative functions" or something similar'.

19. With regard to question (c), the Court could simply repeat the answer given at point 2 in the operative part of the judgment in Joined Cases 231/87 and 129/88, or modify it slightly to make it correspond more closely to the express scope of the question, which seeks to determine not so much the conditions under which the Member States are required, by way of derogation from the first subparagraph of Article 4(5), to charge tax to local authorities, but under what conditions the latter are entitled, notwithstanding the second subparagraph of that provision, to be treated as non-taxable persons in respect of activities in which they engage 'as public authorities'.

20. It should be recalled that under the second subparagraph, as the Court interpreted it in the abovementioned judgment,

'the Member States are required to ensure that bodies governed by public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which their treatment as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment' (paragraph 24).

21. Moreover, the Court stated further on, in paragraph 32 of the judgment of 17 October 1989, that the fact that the application of that limitation on the exemption involves an assessment of economic circumstances does not deprive Article 4(5) of direct effect, with the result that

'a body governed by public law may rely on [that provision] for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it was engaged as a public authority, which is not listed in Annex D and whose treatment as non-taxable is not liable to give rise to significant distortions of competition' (paragraph 33).

22. It follows from the foregoing that, under the second subparagraph of Article 4(5), the Member States are not merely required to tax bodies subject to public law if their treatment as a non-taxable person under the first subparagraph would lead to significant distortions of competition but must also *exclude* them from VAT if the distortions of competition to which their exclusion is likely to lead are not 'significant', that is to say, they must comply with the rule of non-taxation notwithstanding the fact that distortions of competition are possible if those distortions are not 'significant'.

23. In order to avoid any misunderstanding which might arise from the fact that the question refers to activities engaged in 'optionally' and from the answers proposed by the plaintiff in the main proceedings, which contrasts activities in which local authorities are required to engage with those in which they engage optionally, I

would point out — and the Court might also do so in the statement of the grounds for its judgment — that those are not criteria which determine whether or not the activities of local authorities are engaged in 'as public authorities' or are liable to tax. In particular, it is not only the activities in which local authorities engage 'optionally' which may be covered by the second subparagraph. On the contrary, it is clear from the judgment of 17 October 1989 (paragraph 21) that the activities referred to in the second subparagraph are exactly the same as those referred to in the first subparagraph: regardless of whether they are engaged in on an optional or compulsory basis, tax must be charged in respect of them if failure to do so would result in significant distortions of competition.

24. With regard to question (d), I propose that the Court repeat the answer given at paragraph 3 of the operative part of the judgment in Joined Cases 213/87 and 129/88, adding perhaps, as the Court did in paragraph 27 of that judgment, that it follows from the fact that under the third subparagraph of Article 4(5) of the Sixth Directive the Member States are free to exclude the activities listed in Annex D from taxation in so far as they are carried out on a negligible scale that

'they are also not required to fix a ceiling for treatment as non-taxable persons in respect of the activities at issue'.

25. I would conclude therefore by proposing that the Court should give the following answers to the questions referred to it by the commissione tributaria di primo grado di Piacenza:

'(1) The first subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that activities pursued "as public authorities" within the meaning of that provision are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders. It is for each Member State to choose the appropriate legislative technique for transposing into national law the rule of treatment as a non-taxable person laid down in that provision. *The Member States are not required to exclude certain activities from VAT solely on the ground that they are classified in national law as "administrative functions" or something similar.*

(2) The second subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the Member States are required to ensure that bodies subject to public law are *not* treated as taxable persons in respect of activities in which they engage as public authorities *even* where those activities may also be engaged in, in competition with them, by private individuals, in cases in which their treatment as non-taxable persons is *not* capable of leading to

significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment.

(3) The third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that it does not require the Member States to transpose into their tax legislation the criterion of the non-negligible scale of activities as a condition for treating the activities listed in Annex D as taxable. *Nor are they required to fix a ceiling for treatment as non-taxable persons in respect of the activities at issue.* [3]

3 — The italicized passages are the modifications and additions made to the answers given in Joined Cases 231/87 and 129/88