REPORT FOR THE HEARING
delivered in Case 235/85 *

I — Facts

1. The Law of 28 June 1968 on turnover tax (*Staatsblad* [Official Gazette], p. 329), as amended *inter alia* by the Law of 28 December 1978 (*Staatsblad*, p. 677) adjusting it to conform to the Sixth Directive on VAT, provides in Article 1 (a) that a tax to be known as 'turnover tax' is to be levied on the provision of services within the Kingdom of the Netherlands by traders acting in the course of their business. Under Article 7 (1), a 'trader' is considered to mean any person who carries on a business independently. For the purposes of the law, the term 'business' is, according to paragraph 2 (a), to include the exercise of a profession. Article 7 (3) provides that the Minister may determine that a body governed by public law which provides, otherwise than as a trader, services which by their nature may also be provided by a trader, is to be regarded as a trader as far as those services are concerned.

2. In the Netherlands the profession of notary is governed by the Wet op het Notarisambt [Law on notaries] (*Staatsblad* 1842, p. 20) and that of bailiff by the Deurwaardersreglement [Regulation on bailiffs] (*Staatsblad* 1960, p. 562). Those instruments determine the number of posts available, the conditions for appointment and dismissal, territorial and substantive jurisdiction, rules for the exercise of the profession, scales of charges, accountancy rules and rules concerning disciplinary supervision. On the one hand, notaries and bailiffs exercise functions which are assigned and reserved to them by statute. These are known as 'official functions' ['ambtelijke werkzaamheden'] and, in the case of notaries, essentially consist in the drawing up of notarial deeds, and, in the case of bailiffs, in the serving of writs and the enforcement of judicial decisions; on the other hand, they perform what are regarded as private functions which include, in the case of notaries, their activities *qua* tax experts, trustees, and executors of wills, and, in the case of bailiffs, their appearance as attorneys before certain courts.

3. When exercising official functions, notaries and bailiffs are not regarded as traders within the meaning of Article 7 of the 1968 Law and are thus not subject to VAT. That exemption, already contained in earlier legislation and upheld by judgments of the courts, was confirmed by various ministerial directives adopted pursuant to the 1968 Law (namely: Resolution No 27.955 I of 3 November 1980, regarding auctions at which the notary acts as a public official; Resolution No 283-7242 of 17 July 1984, concerning the drawing up of notarial deeds; and Resolution No 281-18.950 of 15 December 1981, on the services performed by bailiffs). Those resolutions constitute instructions from the Secretary of State for Finance to the inspectors of taxes, but may be relied on in legal proceedings by the taxpayer.

4. The Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member

* Language of the Case: Dutch.

States relating to turnover taxes — Common system of bailiff: uniform basis of assessment (Official Journal 1977, L 145, p. 1) defines in Article 2 the scope of VAT, which applies *inter alia* to the supply of services effected for consideration within the territory of the country by a taxable person acting as such.

Article 4 (1) defines 'taxable person' as meaning any person who independently carries out in any place any economic activity specified in paragraph (2).

Paragraph (2) treats as 'economic activities', *inter alia,* the activities of the professions.

Article 4 (4) defines the term 'independently' used in paragraph (1) as excluding employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee.

According to the first subparagraph of Article 4 (5), bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. The third subparagraph of Article 4 (5) expressly provides that such bodies are to be considered taxable persons in relation to the activities listed in Annex D. The last subparagraph authorizes Member States to consider activities of the bodies mentioned in the third subparagraph which are exempt under Articles 13 or 28 as activities in which they engage as public authorities.

Article 13 sets out *inter alia* exemptions for certain activities in the public interest.

Article 28 (3) (b) provides that Member States may, during the transitional period, continue to exempt certain activities set out in Annex F under conditions existing in the Member State concerned.

Article 6 (1) defines 'supply of services' as meaning any transaction which does not constitute a supply of goods.

5. In its formal notification of 25 October 1983 the Commission took the view that notaries and bailiffs independently engaged in economic activities consisting in the provision of services should be subject to VAT and it called upon the Netherlands Government to submit its observations within one month.

6. In a letter from the Permanent Representative of the Netherlands dated 18 January 1984 the government of the Kingdom of the Netherlands stated that the provision of services by bailiffs and notaries did not amount to an economic activity and that, in any case, they should be covered by the exemption laid down in Article 4 (5) of the Sixth Directive.

7. In its reasoned opinion of 13 December 1984 the Commission claimed that, by introducing and maintaining a VAT exemption for notaries and bailiffs, the Kingdom of the Netherlands had failed to adopt the laws, regulations and administrative provisions needed to comply with the Sixth Directive and called upon the Kingdom of the Netherlands to comply with the opinion within two months. No reply to the reasoned opinion was received.

II — Written procedure and conclusions of the parties

1. By an application lodged at the Court Registry on 30 July 1985 the Commission brought the matter of the alleged failure of the Kingdom of the Netherlands to observe its Treaty obligations before the Court.

2. 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.

3. The *Commission* claims that the Court should:

(1) Declare that by not subjecting to the system of value-added tax the official services performed by notaries and bailiffs and remunerated by those instructing them, the Kingdom of the Netherlands has failed to fulfil its obligations under Community legislation, in particular under Article 2 and Article 4 (1), (2) and (4) of the Sixth Council Directive (77/388/EEC) of 17 May 1977;

(2) Order the Kingdom of the Netherlands to pay the costs.

4. The *Kingdom of the Netherlands,* the defendant, contends that the Court should

(1) dismiss the Commission's application and

(2) order the Commission to pay the costs.

III — Submissions and arguments of the parties

A — *The term 'economic activity'*

1. According to the *Commission* the services provided by notaries and bailiffs indisputably constitute an 'economic activity' within the meaning of Article 4 (2) of the directive. The article does not require the activity to be profit-making or one governed by market forces, but requires it to have a permanent character and to be performed for consideration. That autonomous, specific definition given by the VAT directive must take precedence over the definitions given in other branches of Community law.

The activities of notaries and bailiffs cannot escape VAT on the ground that they involve acts of a public authority, any more than it is possible to exempt acts of that type carried out by a lawyer or a doctor.

Notaries and bailiffs may not be treated like court clerks, passport-issuing officers, tax bailiffs or municipal bailiffs, because these are all officials or agents of the State or of other public bodies, providing services in a subordinate capacity on behalf of and for the benefit of their employer. Notaries and bailiffs, on the other hand, carry out their activities on their own behalf, quite independently and on their own responsibility in law, and they receive fees for their own account. Even if they are supervised by some body or other, like other classes of taxable person, notaries and bailiffs are not subordinated to an employer, as would be the case if they performed their functions as a public body.

The Commission's definition of the term 'economic activity' in Article 4 of the directive is in keeping with the definition given by the Court in its judgment of 1

April 1982 in Case 89/81 *Hong Kong Trade Development Council* v *Staatssecretaris van Financien* [1982] ECR 1277 and of 5 May 1982 in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

2. The *Kingdom of the Netherlands* explains the special, independent status of the offices of notary and bailiff, the origins of which go back to a period when the role of a legal person governed by public law had hardly developed. An analysis of the functions of notaries and bailiffs and of the statutory organization of their professions shows that their activities consist of official acts carried out by a public body in the public interest. The public character of their activities resides, in the case of notaries, in the authenticity conferred on their documents, and, in the case of bailiffs, in the exercise of coercive powers of a public nature over individuals. It is indisputable that the function of notaries and bailiffs is to protect the public interest.

In the absence of a precise definition of 'economic activity' in the Sixth Directive, recourse must be had to criteria in other branches of Community law, especially since tax harmonization constitutes a step towards the creation of a common market. The only valid criterion is that of the nature of the goods or services supplied and not the manner in which the activities are organized, which varies from one State to another. Without there being any need to give a comprehensive definition of 'economic activity', it may at any rate be supposed that the concept excludes activities such as those of notaries and bailiffs, to which the normal laws of economics do not apply, which constitute activities of public bodies involving the exercise of public authority, which are remunerated in accordance with statutory provisions, which do not entail the provision of a true service for individuals and to which individuals are required to resort for reasons of public policy. Similarly, the fact that the activities in question are not covered by the rules relating to freedom of establishment and the freedom to provide services means that they cannot be described as 'economic activities'.

The supposedly economic character of their activities cannot be based on the extrinsic characteristic that the officials in question perform their tasks independently or that they do so without being subordinated to others. The fact that the notaries and bailiffs have not been integrated into the apparatus of the State has a historical explanation, but has no influence on the nature of the activities carried out. Other public officials, in particular members of the judiciary, are not, when exercising their functions, subordinated within a hierarchy.

B — *The concept of a 'body governed by public law'*

1. The *Commission* maintains that the concept of 'transactions in which public authorities engage', within the meaning of Article 4 (5) of the Sixth Directive, is a concept of Community law which must be construed independently. Even if it refers to the public authorities existing in the Member States, those States may not define it in whatever way they wish, by reference to national traditions and peculiarities. The purpose of Article 4 (5) is not to exempt from VAT all acts relating to the exercise of public authority but only those acts related to the fundamental powers and functions of the States and of other collective bodies

governed by public law in the fields of government, administration of justice, security and national defence.

Activities which may by their nature be carried out for profit-making purposes by independent traders or by members of the liberal professions, remunerated by those instructing them, may not be treated as activities carried out in the exercise of public powers, nor are individuals pursuing that type of activity covered by the concept of a 'body governed by public law'.

Wherever fundamental public powers are vested in independent natural persons, for example lawyers deputizing for judges, those persons when acting in such a capacity are closely attached to the hierarchy of public administration and are remunerated by the State.

The very principle of VAT as a comprehensive and general tax on consumption calls for a restrictive interpretation of the concept of transactions engaged in by public authorities. Thus notaries and bailiffs cannot, as far as all the functions attaching to their office are concerned, be included in the category of bodies governed by public law on the grounds that they are appointed by royal decree, that their conditions of work and remuneration are laid down by law, that their services are mandatory, that the value of their official activities lies in their formal aspects, or that individuals are required to instruct them for reasons of public policy. Furthermore, the Netherlands Government never requested the application of the special transitional provisions laid down in Article 28 of the Sixth Directive.

The exemption from VAT provided for in Article 4 (5) of the Sixth Directive is based on the fundamental function of taxes, which is to transfer private resources to the public purse. The activities of a public authority are not subject to VAT, just as they are not subject to income tax, for the simple reason that the resources already form part of the revenue of the State or the public body in question and if tax were imposed the tax authority and the taxable person would be identical. The revenues of the State or of public bodies are only subjected to income tax and, pursuant to the second and third subparagraphs of Article 4 (5), to VAT in order to avoid distortions of competition when the State engages in profit-making economic activities. The activities of notaries and bailiffs which entail the transfer of resources from one private estate to another are subject to both income tax and VAT.

2. According to the Kingdom of the Netherlands, the activities reserved in a modern State to the public authorities or bodies governed by public law must be divided into two categories: on the one hand, the economic activities answering the real needs of consumers which, although capable of being conducted by private undertakings, are in the hands of public authorities for political reasons, and, on the other hand, public services whose use is obligatory on grounds of public interest and for which a fixed statutory charge is set. The latter category, which includes the activities of notaries and bailiffs, may not be regarded as an economic activity within the meaning of the Sixth Directive. If, however, this is not the case, the derogation in Article 4 (5) applies.

Article 4 (5) should be interpreted by reference to the nature of the activities carried out and not by reference to the apparent character in which the activities are organized, which is at most an indication of the possible exercise of fundamental public powers. Only such an interpretation will ensure a uniform application of the Sixth Directive.

The term 'body governed by public law' covers all forms of public bodies existing in the various Member States. The independence of such a body and the absence of a hierarchical relationship do not preclude the application of Article 4 (5). Indeed, Annex D of the Sixth Directive, to which the third subparagraph of Article 4 (5) refers, expressly subjects to VAT a number of activities frequently carried out by bodies which are legally independent within the public administration. Furthermore, the last subparagraph of Article 4 (5) provides that certain activities set out in Article 13 may be regarded as the activities of public authorities even if they are carried out by legally independent bodies. The conditions of work and remuneration of notaries and bailiffs are laid down by statute. The absence of any hierarchical attachment to any other body governed by public law is explained by the nature of the functions they perform and is attributable to considerations similar to those which apply to the judiciary: in the case of notaries, it is a matter of ensuring complete impartiality in the registration of documents, whilst the activities of bailiffs are closely connected with the administration of justice. To argue that notaries and bailiffs perform their functions as private individuals is to overlook the fact that they occupy official positions and exercise fundamental powers and functions in the legal system.

The Commission's argument about the transfer of resources is untenable; the mechanism involved, which varies from one State to another, would suggest a different interpretation of Article 4 (5). The arguments based on the function of taxation and on the distinction between State finances and private resources miss the mark; the logical result of such reasoning would be that VAT should not be charged on the supply of goods or the provision of services to public authorities. Article 4 (5) is not concerned with the supply of goods or the provision of services to public authorities but with supplies by public authorities to final consumers; however, in the Commission's view, it is reasonable to tax those operations since this would increase public funds. Notaries and bailiffs are subject to income tax in the same way as all other public officials; the peculiar feature of their functions lies in the fact that in their case the public official and the public body are identical.

Bailiffs' charges are laid down by statute, whilst those of notaries are laid down in the scale of fees issued by the Broederschap van Notarissen [College of Notaries]. The fact that their remuneration does not pass through the State coffers but is paid directly to the officials by those concerned cannot alter the fact that their activities are public in character.

F. Schockweiler
Judge-Rapporteur