OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 15 March 1989 *

Mr President,
Members of the Court,

1. The returns submitted by the local authority of Carpaneto for the purposes of the levying of direct taxes for 1980, 1981, 1982 and 1983 and those concerning value-added tax submitted by the local authority of Rivergaro for 1981, 1982, 1983 and 1985 were all the subject of rectified assessments made by the competent Italian authorities on the ground that they did not take account of sums of money or fees received for certain transactions regarded as commercial activities within the meaning of Article 4 of Presidential Decree No 633 of 26 October 1972.

2. The transactions at issue were the following: concessions of graves, cemetery vaults and chapels, leasing and selling of land in connection with subsidized house-building, the taking out of public ownership and sale of a piece of roadway, water supply, the concession for the operation of a public weighbridge, the sale of wood obtained from the lopping of trees and the sale of fittings for cemetery vaults.

3. Before the national courts, namely the Commissione tributaria di secondo grado (Tax Appeals Board) (Case 231/87) and the Commissione tributaria di primo grado (First Instance Tax Board) (Case 129/88), both of Piacenza, the local authorities concerned, as well as 23 other local authorities which intervened in support of the claims of the local authority of Rivergaro, claimed that under Article 4(5) of the Sixth Council Directive on VAT, [1] they were not 'taxable persons' in respect of the transactions at issue and, therefore, were entitled not to charge VAT on them.

4. Article 4(5) of the Sixth Directive is drafted in the following terms:

'5. States, regional and local government authorities and other bodies governed by public law shall not 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 these activities or transactions.

However, when they engage in such activities or transactions, 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.

In any case, these bodies shall be considered taxable persons in relation to the activities

* 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 taxes — Common system of value-added tax uniform basis of assessment (OJ L 145, 13 6 1977, p 1)

listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities'.

5. The series of questions referred to this Court by the national courts, to be found in Part III of the Report for the Hearing, deal exclusively with the interpretation of that provision and not with its concrete application to the local authorities and to the activities in question in the main proceedings. The questions concern, on the one hand, the problem of the 'direct effect' of Article 4(5) (first question in both cases), which is linked to that of the exact scope of the obligation to transpose that provision of the directive into national law (Questions 4 and 5 in Case 231/87 and Question 2 in Case 129/88), and, on the other hand, the concept of activities or transactions engaged in 'as public authorities' which are not subject to value-added tax (Question 2 in Case 231/87), including the question whether such activities or transactions are covered by the second subparagraph of the provision at issue (Question 3 in Case 231/87).

6. Before considering those questions in the order in which they were referred to the Court, let me go on to point out that the preliminary observation of the Italian Government to the effect that the dispute in the main proceedings in Case 231/87 is not concerned with value-added tax but with income tax and that, therefore, a decision is not 'necessary' to enable the national court to 'give judgment' (see the terms of Article 177 of the Treaty) cannot be accepted. According to established case-law of the Court, under the system laid down in Article 177 of the Treaty, it is for the national court to examine, in the light of the facts of the case, whether a preliminary ruling on the part of the Court of Justice is necessary or relevant.[2] Moreover, in its order for reference, the national court expressly pointed out that the Italian legislation on value-added tax and the legislation on direct taxation 'are connected to such an extent that if a given activity is not liable to VAT the income arising from it can also not be subject to direct taxation, and vice versa' (see the end of Part I of the Report for the Hearing).

I — The 'direct effect' of Article 4(5) of the Sixth Directive

7. Whereas the first question in Case 231/87 seeks to know whether 'the principle set out in the first subparagraph of Article 4(5) of the Sixth Directive, which excludes from the category of activities subject to VAT so-called "institutional" activities, [is] directly applicable even in the absence of a specific national provision', that referred to the Court in Case 129/88 deals with Article 4(5) in its entirety. That approach seems to me to be particularly appropriate in this case since the 'principle' set out in the first subparagraph is singularly modified and weakened in the following subparagraphs.

8. It should be noted that Article 4(5) is built in 'tiers', so to speak, proceeding by exceptions and counter-exceptions.

2 — See in particular, the judgments of 14 July 1988 in Case 298/87 *Smanor* [1988] ECR 4489, paragraph 9 and of 29 September 1987 in Case 126/86 *Gimenez Zaera* v *Instituto nacional de la seguridad social* [1987] ECR 3697, paragraph 7.

Moreover, in the second and third subparagraphs, it employs terms such as 'significant distortions of competition' or 'activities . . . not carried out on such a small scale as to be negligible', which leave a certain discretion to those called upon to apply them. It is in fact, in particular, with the problem of whether the Member States are required merely to insert those criteria into their national legislation or if they must lay down in detail the quantitative limits resulting from them that Questions 4 and 5 in Case 231/87 and Question 2(a) and (d) in Case 129/88 are concerned.

9. In Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt*, the Court was called upon to rule on the direct effect of a provision of the Sixth Directive, namely Article 13B(d)1.

10. In its judgment of 19 January 1982 [1982] ECR 53, the Court pointed out that

'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be *unconditional and sufficiently precise*, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State' (paragraph 25).

11. That is valid not merely when the provisions of a directive have not been given effect at the expiry of the period prescribed for its implementation but also where a Member State has not correctly implemented a directive. [3]

12. The rule contained in the first subparagraph of Article 4(5) is, considered in itself, sufficiently precise: the Member States must exclude from liability to value-added tax activities or transactions engaged in by bodies governed by public law as 'public authorities'.

13. The fact that the first subparagraph does not indicate precisely what those activities are makes no difference. That concept is part of a provision of Community law the interpretation of which cannot be left to the discretion of each Member State. [4]

14. However, the question is whether, notwithstanding the exceptions which follow, the rule is unconditional. The Commission draws attention to the fact that those exceptions are formulated in such a way as to leave the Member States a discretion as to the degree of significance of the distortions of competition and whether or not the activities listed in Annex D are carried out on such a small scale as to be negligible. Like the Commission, I consider that that discretion necessarily permits the Member States to place conditions on or to restrict the scope of the exceptions in the second and third subparagraphs and, thereby, the general rule laid down in the first subparagraph itself.

15. However, I also share the Commission's opinion, based in particular on the judgment in *Marshall*, [5] according to which the rule

3 — See, on that point, in addition to paragraph 20 of *Becker*, the judgments of 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, at p 748 and of 24 June 1987 in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraph 11.

4 — See, by way of precedent, in regard to the term 'consideration' contained in Article 8(a) of the Second Directive, the judgment of the Court of 5 February 1981 in Case 154/80 *Staatssecretaris van Financien* v *Cooperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 9. See also, in regard to the concept of 'tax avoidance' as contained in Article 27(1) of the Sixth Directive, the judgment of the Court of 12 July 1988 in Joined Cases 138 and 139/86 *Direct Cosmetics Ltd and Laughtons Photographs Ltd* v *Commissioners of Customs and Excise* [1988] ECR 3937, paragraph 20

5 — Judgment of 26 February 1986 in Case 152/84 [1986] ECR 723, at p 750

laid down in the first subparagraph is unconditional and precise in so far as a given activity can in no case come within the scope of the exceptions (criterion of 'exceptions not relevant to the case at hand', paragraph 54 of the judgment).

16. That is so in regard to an activity which, at the same time:

(i) can in no case give rise to distortions of competition because it is reserved by statute exclusively for bodies governed by public law;

(ii) is not included among the activities listed in Annex D to the directive.

17. In Italy, concessions for graves and cemetery vaults seem to fulfil both of those conditions. On the other hand, the supply of water, even if it is reserved exclusively for bodies governed by public law, does not fulfil the second condition because it is expressly listed in Annex D.

18. As we shall see in a moment, an activity reserved exclusively for bodies governed by public law must be regarded as an activity engaged in by them 'as public authorities' within the meaning of the first subparagraph of Article 4(5).

19. It may therefore in any event be concluded that Article 4(5) may be relied on by a body governed by public law in support of a plea that a specific activity engaged in by it can under no circumstances come within the scope of the exceptions provided for in the second and third subparagraphs of Article 4(5) and must therefore qualify for the application to it of the rule of treatment as a non-taxable person provided for in the first subparagraph.

20. Is it possible to go a step further and say, as the Commission does, that treatment as a non-taxable person may also be claimed in regard to an activity in respect of which 'competition from the private sector is undoubtedly insignificant'? Let us imagine for example that the law in a Member State requires local authorities to organize the removal of domestic refuse but does not prohibit private individuals from providing that service in parallel. May a local authority claim to be treated as non-taxable for VAT purposes in respect of that activity on the ground either that, in the country as a whole, very few private individuals have taken advantage of the opportunity available to them or that in its district no private individual is offering such a service and that the distortion of competition which could result from the treatment of that activity as non-taxable is not therefore 'significant' or indeed that it is non-existent in that district?

21. In that regard, it seems to me first that a Member State may, without infringing the directive, provide that, in principle, that activity is subject to VAT whilst permitting the competent administration to grant derogations in the light of local circumstances. However, what is the situation if the Member State has not made any provision for derogating from the rule?

22. I consider that in such a case, a local authority could not plead the absence of distortions of competition at local level as a basis for seeking a declaration in the courts that the rule adopted by the Member State is incompatible with the directive and must be set aside. A Member State cannot be obliged to provide for derogations from its

legislation in order to take account of special local situations. It has a discretion in that regard.

23. Could a local authority plead the absence of significant distortions of competition at the level of the country as a whole? Here again I am of opinion that the State has a discretion in deciding the point from which a distortion of competition fulfils that condition. It might consider that the distortion is sufficiently significant in certain places to justify making the activity in question subject to VAT in the entire country.

24. The criterion of 'significant distortions of competition' is thus not sufficiently precise to be relied on by a body governed by public law in opposition to a provision of national law.

25. It remains for me to consider whether, in respect of one of the activities listed in Annex D to the directive, a body governed by public law may argue before a national court that that activity is carried out on such a small scale as to be negligible and should therefore not be subject to tax.

26. There are several ways in which Member States may take account of that criterion. They may include it as such in their national legislation and make the competent administration responsible for applying it in each individual case. They may also designate the kinds of activities listed in Annex D which, generally and for the whole country, are deemed to be carried out on such a small scale as to be negligible (local fairs, for example). Lastly, they may also make a type of activity subject to VAT while providing a threshold below which the activity in question is not so subject (for example, the annual turnover of a local authority in respect of water supply). The criterion of the negligible scale of the activity could therefore lead to different situations in different local authority areas.

27. However, what is the situation if a Member State totally disregards that provision of the directive, that is to say, if it simultaneously fails to adopt the negligible-scale criterion, as such, in its legislation, to exclude from liability to taxation specifically designated activities which it regards as negligible or to lay down a threshold in respect of the activities listed in Annex D?

28. I consider that in that case, the Member State has not correctly transposed the directive into its national law because it is beyond dispute that the directive lays down the principle that the activities listed in Annex D which are carried out on such a small scale as to be negligible are not subject to taxation. Perhaps the Council opened the way to excessive complications by placing that criterion in Article 4(5) but the criterion in question does not constitute an option which the Member States are free to make use of or not. The third subparagraph of Article 4(5) clearly lays down two concurrent conditions: bodies governed by public law 'shall be considered taxable persons in relation to the activities listed in Annex D, *provided* they are not carried out on such a small scale as to be negligible'. The word 'provided' means here 'in so far as'.

29. The *principle* thus established is clear and unconditional. However, it cannot be determined from the provision itself what is to be understood by 'negligible'. In the last analysis, the obligation thus imposed on the Member States is not sufficiently precise for

it to be relied on by bodies governed by public law before the national courts even if the State has been at fault in totally disregarding that component of Article 4(5) when transposing the directive into its national law. If that indeed has been the case, it is for the Commission, if necessary, to bring an action against the Member State in question for failure to fulfil its obligations.

30. Consequently, I propose that the reply to the first question referred to the Court in both cases should be as follows:

'Article 4(5) of Directive 77/388 may be relied on by a body governed by public law before the national courts in opposition to the application of a national provision making it subject to VAT in regard to an activity which is not listed in Annex D to the directive and the pursuit of which is reserved exclusively for bodies governed by public law.'

II — The concept of activities or transactions engaged in 'as public authorities'

31. In the second question referred to the Court in Case 231/87, the national court asks whether the Community legislature intended 'to identify by means of the phrase "activities or transactions in which they engage as public authorities" in the first subparagraph of Article 4(5) those activities which public authorities carry out directly and exclusively pursuant to powers vested in them as public authorities, albeit delegated to them'.

32. I consider that that question must be interpreted as meaning that the national court wishes to know whether the activities in which bodies governed by public law engage directly and exclusively in the exercise of their powers under public law constitute:

(i) activities engaged in as public authorities,

(ii) which may in no circumstances give rise to liability to VAT.

33. I will therefore consider in turn what are the criteria which make it possible to determine the meaning of the expression 'activity engaged in as a public authority' (Section A) and in which cases such an activity necessarily comes within the scope of the rule of treatment as a non-taxable person for VAT purposes as laid down in the first subparagraph of Article 4(5) (Section B).

A — *Activities or transactions engaged in as public authorities*

34. In its judgment of 26 March 1987 in the 'notaries and bailiffs' case[6] the Court confirmed, referring to its judgment of 7 July 1985, in *Commission* v *Germany*,[7] that

'bodies governed by public law are not automatically exempted in respect of all the activities in which they engage but only in respect of those which form part of their specific duties as public authorities' (paragraph 21).

6 — Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471.
7 — Case 107/84 [1985] ECR 2655.

35. It follows, as a secondary consideration, from that statement of the Court that the fact that an activity is engaged in directly by the local authority itself does not of itself lead to the conclusion that it is part of the local authority's specific duties as a public authority. (In my view, activities engaged in through municipal undertakings must, so long as they are pursued in the name and on behalf of the local authority, also be included among the activities 'engaged in directly'.)

36. On the other hand, activities engaged in by a local authority pursuant to 'powers vested in it as a public authority' undoubtedly form part of its specific duty as a public authority. What does that mean?

37. Like the Commission, I would suggest that the Court adopt in that regard the definition proposed by Mr Advocate General Mancini in his Opinion in Case 307/84 *Commission* v *French Republic* [1986] ECR 1725, at p. 1732, namely that that concept refers to activities which involve 'acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply'.

38. Powers vested in a body as a public authority are exercised in concrete terms by authorizations, licences, permits, concessions, registrations, issue of certified copies, penalties for failure to comply with laws or regulations, etc.

39. Although 'activities engaged pursuant to powers vested [in a body] as a public authority' therefore constitute in all cases 'activities engaged in as public authorities', the latter concept also covers other types of activity. The concepts of 'activities or transactions engaged in as public authorities' and 'activities engaged in pursuant to powers vested [in a body] as a public authority' are not in fact synonymous.

40. That follows clearly from the *travaux préparatoires* for the Sixth Directive. In its commentary on Article 4 in the presentation which it made of its proposal for the Sixth Directive, [8] the Commission stated that

'persons governed by public law must be regarded as taxable persons in so far as they engage in economic activities which may be separated from the concept of public authority, that is to say, activities which could be engaged in by persons governed by private law without damaging the fundamental powers and authority in regard to general administration, justice, or national security and defence of States, provinces, local authorities and other bodies governed by public law'.

41. However, Article 4(5), as the Commission proposed it, was different from the version finally adopted. It was worded as follows:

'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities in which they engage as public authorities. However, when they engage in the transactions referred to in paragraph 1, they shall be

8 — *Bulletin of the European Communities — Supplement 11/73*, p. 9

considered taxable persons in respect of these transactions . . . '. [9]

42. The 'transactions referred to in paragraph 1' were 'transactions forming part of any economic activity specified in paragraph 2', which defined 'the economic activities referred to in paragraph 1' in the same terms as the version of Article 4(2) now in force, that is to say, as 'all activities of producers, traders and persons supplying services'. The Commission's proposal thus distinguished clearly between activities engaged in as public authorities and economic activities, and it defined the first concept as meaning activities constituting an exercise of powers conferred by public law.

43. It must therefore be concluded that by adopting the version of Article 4(5) now in force, the Council deliberately abandoned that clear distinction and gave the concept of 'activities or transactions engaged in as public authorities' a wider meaning, including activities other than merely those falling under the fundamental powers of the public authority in the areas of general administration, justice or national security and defence. The Council thus opted for an intermediate solution between, on the one hand, the extreme position of the Commission, which sought to make all the economic activities of bodies governed by public law liable to VAT and, on the other hand, the second VAT Directive, [10] under which the Member States were entitled to exempt bodies governed by public law from VAT in respect of such activities (see the last two paragraphs of Section 2 of Annex A to the directive, which, according to Article 20, forms an integral part thereof).

44. It is therefore clear that certain activities of producers, traders and persons supplying services (see Article 4(1) and (2)) engaged in by local authorities must be regarded as 'activities engaged in as public authorities'. However, how can such activities be recognized?

45. The various parties to the dispute, the Italian and Netherlands Governments and the Commission proposed several criteria for that purpose.

46. The local authority of Rivergaro put forward the criterion of the *purpose to be achieved.* However, at the hearing, the Commission rightly pointed out that in its judgment in the 'notaries and bailiffs' case, cited above, the Court decided that the term economic activities is 'objective in character, in the sense that the activity is considered *per se* and without regard to its purpose or results' (paragraph 8). That must also apply to an economic activity engaged in by a public body in its capacity as a public authority. Practically any activity engaged in by a local authority pursues an objective in the public interest, including the supply of water or the provision of a transport network. However, the third subparagraph of Article 4(5) and Annex D provide that in respect of such activities, local authorities are taxable persons. On the other hand, among the exemptions provided for in Article 13 is to be found a considerable

9 — *Bulletin of the European Communities — Supplement 11/73*, p. 36.

10 — 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 (OJ, English Special Edition 1967, p. 16).

number of activities which may be engaged in also by public bodies (see Section A(1)(b), (g) and (h)) in the public interest in order to satisfy essential individual [11] or public [12] needs (subparagraph (i)). The last subparagraph of Article 4(5) merely permits the Member States to regard such activities as being engaged in as public authorities but does not require them to do so.

47. I am also not convinced that the reference to the judgment of the Court of 8 March 1988 in Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, made by the Commission in its written observations in Case 129/88 in support of the criteria which it put forward in Case 231/87, is necessarily relevant to this case.

48. *Apple and Pear Development Council* was concerned with the interpretation of Article 2 of the Sixth Directive in order to determine whether the exercise by the Development Council of functions assigned to it by law and the fact that it imposed an annual charge on its members for the purpose of enabling it to meet administrative and other expenses incurred or to be incurred in the exercise of such functions constitute in 'the supply of . . . services effected for *consideration*', that is to say, transactions which are taxable within the meaning of the said article. In these cases, the Court is being asked to interpret Article 4(5) in order to determine whether a public body is or is not a taxable person in respect of certain activities in which it engages.

49. It is true that in his Opinion of 28 October 1987 in *Apple and Pear Development Council*, Advocate General Sir Gordon Slynn considered that there was a link between the concepts of taxable transaction and taxable person in the sense that 'for there to be liability to tax there must be both the taxable transaction and taxable persons'. [13] However, he pointed out that they are 'distinct concepts' (p. 7 of the roneoed text) and, further on, he emphasized their autonomous nature and stated that if, as he had concluded, the transactions in question did not constitute the supply of services for consideration, 'then there is no liability to VAT *even if* the person involved in what has been done is a taxable person' (p. 18 of the roneoed text).

50. Furthermore, contrary to what appears to be the Commission's view, I do not believe that it was the mandatory, that is to say, not contractual but statutory, nature of the charges in question nor even the fact that the amount thereof did not reflect the economic value of the services provided which was the decisive factor in determining the Court's decision. On the one hand, it can be seen from the second part of paragraph 15 of the judgment that it was not because the individual producer was obliged to pay the charge but because he had to pay it 'whether or not a given service of the Development Council confers a benefit upon him' that the Court concluded that there was no direct relationship between the service rendered and the consideration received. On the other hand, according to the Court's case-law, [14] which has once again been confirmed in the judgment of 23 November 1988, [15] that

11 — See at the top of p. 22 of the Report for the Hearing (roneoed text).

12 — See at the top of p. 19 of the Report for the Hearing (roneoed text).

13 — In regard to taxable transactions carried out within the country, that clearly follows from the very terms of Article 2. Moreover, imports of goods are taxable even if they are not carried out by a taxable person within the meaning of Article 4.

14 — See the judgment of 5 February 1981 in Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 13.

15 — Case 230/87 *Naturally Yours Cosmetics Ltd* v *Commissioners of Customs and Excise* [1988] ECR 6365.

consideration 'is a subjective value, since the basis of assessment is the consideration actually received and not a value estimated according to objective criteria' (paragraph 16). It was therefore more by virtue of the *absence of the necessary link between the advantages and the consideration* therefor than by virtue of the imbalance between the level of those two items that the Court decided that 'mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a *direct link with the benefits accruing to individual growers* as a result of the exercise of the Development Council's functions' (paragraph 16 of the judgment in *Apple and Pear Development Council*). That seems to me to be all the more true because the first argument on which the Court based its judgment was precisely the fact that those benefits were to the advantage of the entire industry concerned and not necessarily to that of each individual grower (see paragraph 14).

51. Finally, the Commission's argument does not seem to me to be free of all contradictions because, while seeing an indication that an activity is carried on as a public authority in the fact that the dues or contributions paid do not constitute consideration for the service provided 'but are that part of the expenditure inherent in the provision of services which the legislature has decided to impose unilaterally on the recipient of the services on the basis of fiscal, social or other considerations' (p. 29 of the roneoed text of the Report for the Hearing), it rightly contested at the hearing the criterion based on the method of calculating the consideration proposed by the local authority of Rivergaro, according to which an activity in respect of which a public body obtains consideration 'fixed in the exercise of public powers, whether it be a price which is imposed or a political price, fixed on the basis of political criteria having no direct relationship with the market value of the service' (p. 21 of the roneoed text of the Report for the Hearing) constitutes activity engaged in as a public authority.

52. I would add that if that criterion were to be accepted, a local authority could never be subject to VAT for the transport services, swimming pools, theatres and museums which it brings into being because the price charged to the user is almost always a 'political price', that is to say, a price which does not correspond to the cost of the service provided.

53. For the reasons I have just indicated and for those mentioned when considering the criterion of the objective to be achieved, [16] I therefore consider that the *method of fixing* (unilaterally and by an exercise of public authority) or the *calculation of the consideration* obtained by a public body cannot be regarded as decisive in defining the activities engaged in 'as public authorities'.

54. What is the situation in regard to the criterion based on the obligation on the body governed by public law to engage in the activities, put forward by the Commission? That institution proposes to regard as activities engaged in as a public authority by a body governed by public law those 'which form part of the powers which are absolutely necessary for the purpose of achieving the public objective for which the body was set up' (see paragraph 10(B)(a) of its written observations in Case 231/87, p. 35) or those which derive from 'binding obligations imposed by the legal order of the Member State' (proposed reply to the second question in Case 231/87).

55. I, too, consider that the activities thus defined or, to adopt the expression used by

16 — It should also be noted that Article 4(1) refers to 'any' economic activity, '*whatever the purpose or results of that activity*' and that Article 4(2) speaks of 'income' without making clear whether that income must correspond to the real economic value of the transaction entered into.

the Netherlands Government, those which are exercised under a 'mandate conferred by the legislature', constitute in any event activities engaged in 'as public authorities' even if they are not reserved exclusively for bodies governed by public law.

56. Once the legislature considers that a given activity is of such an importance from the point of view of the public good that it must in all cases be carried on by local authorities or other bodies governed by public law, it necessarily becomes an activity engaged in by those bodies as public authorities.

57. The Commission also referred to activities engaged in by means of *unilateral acts or conduct which are the expression of rights and powers derogating from the generally applicable rules of law* (concessions, for example). Here again I share the Commission's opinion that such activities are engaged in by bodies governed by public law 'as public authorities'.

58. Finally, it must be considered that any activity — even if it is not mandatory or not engaged in under public-law rights and powers — the exercise of which is reserved exclusively by the Constitution, by statute or by another provision of equivalent force for local authorities or other bodies governed by public law must be regarded as being engaged in by them 'as public authorities'. It may properly be considered that such activities have been reserved for bodies governed by public law by reason of the specific tasks for which they are responsible or by reason of the special assurances which they offer in regard to the proper performance of those activities.

59. I therefore propose that the Court should adopt four *alternative* criteria for 'recognizing' such an activity, namely:

(i) the exercise by a body of powers vested in it as a public authority;

(ii) the mandatory nature of the activity;

(iii) the use of rights or powers derogating from the generally applicable rules of law;

(iv) the fact that the activity in question is, by law, a monopoly.

60. However, what the national courts wish to know is whether there are also criteria making it possible to determine with certainty that an activity coming within one of those categories cannot give rise to treatment as a taxable person for the purposes of VAT.

B — *Activities engaged in as a public authority which cannot in any case give rise to its treatment as a taxable person*

61. Let me point out first that Article 4(5) of the Sixth Directive lays down a general principle and an exception.

62. The *general principle* is that in respect of activities or transactions engaged in as public authorities, bodies governed by public law are not subject to VAT.

63. The *exception* is that they are none the less so subject in cases in which their treatment as non-taxable persons would be liable to lead to significant distortions of competition.

64. It is therefore for the Member States to determine the activities in support of which significant distortions of competition are to be found if the public bodies which engage in them were not subject to VAT in respect of them. As a general rule, the problem may thus be resolved only by an assessment made by the Member State of each of those activities. Furthermore, that assessment may lead to different results in each Member State.

65. However, there is one case in which no distortion of competition can manifest itself, namely that in which the Constitution, a statute or a provision of equal force reserves the exercise of the activity in question exclusively to bodies governed by public law.

66. As we have just seen, such activities must in any event also be regarded as being engaged in by bodies governed by public law 'as public authorities'. We thus have a sound criterion for determining the activities in respect of which a body governed by public law can *never* be subject to VAT. In Italy, concessions for graves or cemetery vaults seem to constitute a typical example in that regard.

67. However, there is also an exception to the criterion of exclusivity. Annex D to the Sixth Directive lists the activities which must in all cases be subject to VAT (unless they are carried out on such a small scale as to be negligible). However, it may be that in a Member State one or other of those activities is reserved exclusively for local authorities. That seems to be the case in Italy in regard to the supply of water. In such a case, the criterion of exclusivity is thus not decisive in determining whether or not there is to be treatment as a taxable person. The third subparagraph of Article 4(5) thus constitutes a very special provision which sets out, on the one hand, the cases in which the existence of a distortion of competition is, so to speak, presumed, but, on the other, also the cases which give rise to treatment as a taxable person even if there is no likelihood of a distortion of competition. It is fairly clear that Article 4(5), by virtue of having been amended during the negotiations, has ceased to have any rigorously logical structure. That also can be seen from the use in the French, Dutch, Greek, and Portuguese versions of the third subparagraph of the word 'notamment' ('in particular'), which makes no sense in a sentence which refers to activities which must 'in any case' give rise to treatment as a taxable person. Since a word corresponding to 'notamment' is not to be found in the Danish, English, German, Italian and Spanish versions, I consider that there is no need to attach much importance to it.

68. It might still be asked whether the activities pursued under powers vested in a body as a public authority must not be regarded, *ipso facto*, as not subject to tax. It seems to me that that cannot be the case, even if those activities give rise only very rarely to treatment as a taxable person.

69. In the first place, most of those activities are not economic activities and, for that reason alone, cannot give rise to

treatment as a taxable person. They are also mainly reserved exclusively for bodies governed by public law and in that case the abovementioned criterion comes into operation. However, as is shown by Case 235/85, the 'notaries and bailiffs' case, it cannot be excluded that certain activities involving the exercise of powers conferred by public law would be carried out in parallel by private persons and bodies governed by public law. It could therefore become necessary to make those bodies subject to VAT in order to avoid a significant distortion of competition. The criterion of the exercise of powers conferred by public law cannot therefore be of itself sufficient.

70. With regard to mandatory activities, those which bodies organized under public law are required by law to carry out, it is also not possible to conclude that they must necessarily be excluded from VAT because private enterprise might enter into competition with the public body (for example, the law might require local authorities or other regional bodies to organize shipping services between the mainland and off-shore islands without prohibiting private individuals from setting up a competing service).

71. The assessment is more difficult in regard to activities engaged in by means of unilateral acts or conduct which are the expression of rights or powers derogating from the generally applicable rules of law. Cases in which the *same* activity may be engaged in by private individuals, using the means provided by private law, are probably fairly rare. However, it does not seem to me to be possible to exclude a priori the possibility that such cases could exist and that distortions of competition could therefore occur.

72. Ultimately, it is therefore necessary to conclude that the only criterion which makes it possible to say with certainty that an activity engaged in by a body governed by public law cannot be subject to VAT is the fact that that activity is reserved exclusively for such bodies. If I have correctly understood the Commission, it proposes to use that test concurrently with two others. However, if the criterion of exclusivity is fulfilled, other criteria are no longer necessary because in that case there cannot be any distortion of competition.

73. The same is true in regard to the wording of the national court's second question, with which we are concerned here. That question refers to activities which are engaged in by public bodies directly, exclusively and pursuant to powers vested in them as public authorities.

74. If the national court used the word 'exclusively' to refer to activities reserved by law for bodies governed by public law (*de jure* exclusivity and not *de facto* exclusivity) the reply to that question must certainly be in the affirmative. However, I think it is possible to give the national court a broader reply by indicating to it that it is sufficient that an activity should be reserved exclusively for bodies governed by public law, even if that activity is not carried out under powers vested in such bodies as public authorities, for it not to give rise to treatment as a taxable person.

75. However, as we have already seen, the activities listed in Annex D, which, on condition that they are not carried out on such a small scale as to be negligible, are always subject to VAT, even if one or other of them is reserved exclusively for bodies governed by public law, must be put into a separate category.

76. Consequently, I propose that the Court should reply as follows to the second question referred to it in Case 231/87:

'The first subparagraph of Article 4(5) must be interpreted as meaning that the Member States, regional and local authorities and other bodies governed by public law may in no circumstances be regarded as taxable persons in respect of activities or transactions in which they have the exclusive right to engage, except if such activities or transactions are among those listed in Annex D to the Sixth Directive.'

III — The third question referred to the Court in Case 231/87

77. That question seeks to ascertain

'whether, the assumption that the institutional activities are carried out exclusively by a public body, the Community legislature, by the use of the expression "such activities" in the second subparagraph of Article 4(5), intended to refer to residual activities relating to public services, governed by Royal Decree No 2578 of 15 October 1925'.

78. In the context of a reference for a preliminary ruling, the Court cannot rule on the conformity of provisions of national law with Community law. On the other hand, national courts may be provided with criteria enabling them to determine in which cases an activity comes within the scope of a given provision of Community law.

79. It follows from the analysis made in regard to the second question that the expression 'such activities' used in the *second subparagraph* refers to activities or transactions engaged in by bodies governed by public law in their capacity as public authorities, that is to say, those involving the exercise of powers vested in them as such, those which are carried out by virtue of a binding obligation imposed by the legal order of the State and from which they cannot be dispensed or those carried out by unilateral acts or conduct involving the rights or powers derogating from the generally applicable rules of law, in so far as such activities are not reserved exclusively for such bodies. That is how I propose that the Court should reply to that question.

80. In my view, it goes without saying that the second subparagraph of Article 4(5) refers only to activities or transactions in respect of which a public body receives consideration, of whatever kind, because only 'the supply of goods or services effected for consideration within the territory of the country' falls within the scope of VAT (Article 2 of the Sixth Directive).

IV — Obligations of Member States concerning the method of transposition of the directive

81. Questions 4 and 5 referred to the Court by the Tax Appeals Board (Case 231/87) and the second question referred to the Court by the First Instance Tax Board (Case 129/88) concern the way in which the Member States must transpose Article 4(5) into their national law. Essentially, those questions raise the following four problems.

82. (a) Were the Member States required to lay down the general principle set out in the first subparagraph of Article 4(5) by defining the specific criteria for determining the activities engaged in by local authorities 'as public authorities'?

83. Under the third paragraph of Article 189 of the Treaty, the Member States are required to adopt the measures necessary to ensure that the result aimed at by a directive can be achieved. On the other hand, they alone are competent to choose the form and methods by which that obligation is to be fulfilled.

84. One of the methods for achieving the result aimed at by Article 4(5) of the Sixth VAT Directive might consist in simply incorporating in the national legislation the principle laid down in the first subparagraph of that provision. The Member State is free to add, if it wishes, specific criteria making it possible to determine not merely which activities are engaged in by bodies governed by public law 'as public authorities' but above all those which must give rise to treatment as a taxable person for VAT purposes.

85. A more simple method could therefore be to draw up a list of the activities in question. That could be done concurrently with the incorporation of the general principle or as an alternative to this.

86. (b) Were the Member States required to exclude from taxation public activities which, although they might be regarded as commercial under national legislation, constitute an exercise of public authority?

87. We have seen that the concept of 'activities or transactions engaged in as public authorities' acquired, in the measure adopted by the Council, a wider scope than that which it had in the Commission's proposal and that it covers both activities engaged in by public bodies in the exercise of their public powers (*iure imperii*) and activities which could be regarded as economic, that is to say, activities as producers, traders and persons supplying services, according to the definition contained in Article 4(2).

88. It follows from Article 4(5) that the Member States are also required not to make activities regarded as commercial under national legislation subject to VAT if those activities fulfil the criteria worked out in reply to the second question referred to the Court in Case 231/87.

89. (c) Were the Member States obliged to incorporate into their tax legislation the criterion of 'significant distortions of competition' (fourth question in Case 231/87) or were they required *not* to tax activities engaged in as public authorities by bodies governed by public law when they do *not* lead to significant distortions of competition, by laying down the necessary quantitative limits [Question 2(c) in Case 129/88]?

90. As I have already pointed out above, the provision before the Court lays down a principle and provides for an exception. The principle requires the Member States to adopt all appropriate measures for ensuring that activities coming within the definition contained in the first subparagraph of

Article 4(5) are not subject to VAT, unless this is likely to lead to significant distortions of competition.

91. The Member States are obviously free to provide for that exception in their national legislation but this, of itself, would leave too many uncertainties both for the competent administrative authority and for the bodies governed by public law concerned.

92. On the other hand, it is hardly conceivable that the mere establishment of a quantitative limit, without more precision, would be of such a nature as to dispel those uncertainties. Distortion of competition is a concept which does not lend itself to an assessment in figures valid for all economic activities likely to be engaged in by bodies governed by public law. I do not see how the Member States could do otherwise than to draw up either a positive list of activities not subject to VAT or a negative list of activities which are so subject (the solution chosen by the Italian Ministry of Finance) or both. A negative list is composed obviously of activities deemed to create significant distortions of competition. If it should none the less appear that one of the activities included in that list can in no circumstances give rise to distortion (while none the less being an activity engaged in 'as a public authority') the Member State would have incorrectly fulfilled its obligations under the directive in that regard.

93. (d) Are the Member States required to incorporate into their tax legislation the criterion of the negligible scale of certain activities (fifth question in Case 231/87) or are they required to fix a threshold below which the activities listed in Annex D are not subject to taxation [Question 2(d) in Case 129/88]?

94. As I have already pointed out above in regard to the problem of 'direct effect', the activities listed in Annex D must be subject to VAT only in so far as they are not carried out on such a small scale as to be negligible. The Member States have several possibilities when it comes to implementing that principle. One of them consists in laying down a threshold below which the activity is not subject to taxation.

95. I therefore propose to give the two Italian courts the additional replies set out in paragraphs 4, 5 and 6 of the general conclusion.

Conclusion

For all the foregoing reasons, I propose that the Court should reply as follows to the questions referred to it:

'(1) Article 4(5) of Directive 77/388 may be relied on by a body governed by public law before the national courts in opposition to the application of a

national provision making it subject to VAT in respect of an activity not appearing in the list contained in Annex D to the directive, the exercise of which is reserved exclusively for bodies governed by public law.

(2) The first subparagraph of Article 4(5) is to be interpreted as meaning that the Member States, regions, local authorities and other bodies governed by public law cannot in any circumstances be regarded as taxable persons in respect of activities or transactions which may be engaged in only by them, save where such activities or transactions are listed in Annex D to the Sixth Directive.

(3) The expression "such activities" used in the second subparagraph refers to activities or transactions engaged in by bodies governed by public law in their capacity as public authorities, that is to say, those which involve the exercise of powers vested in them as such, those engaged in by virtue of an obligation imposed by the legal order of the Member State and from which they cannot be dispensed or those engaged in by means of unilateral acts or conduct under rights or powers derogating from the generally applicable rules of law, in so far as those activities are not reserved exclusively for such bodies.

(4) The first subparagraph of Article 4(5) must be interpreted as meaning that the Member States are required to adopt the measures which they consider the most appropriate for ensuring that the activities or transactions engaged in by public bodies in their capacity as public authorities are not subject to VAT in so far as they are not covered by the exceptions laid down in the second and third subparagraphs.

(5) The second subparagraph of Article 4(5) of the Sixth VAT Directive does not impose an obligation on the Member States to transpose literally into their national law the criterion of "significant distortions of competition". On the other hand, they are required to apply that criterion in practice and to make a concrete assessment of the competitive position in a form and in accordance with methods which they consider the most appropriate, making activities or transactions engaged in by bodies governed by public law in their capacity as public authorities subject to VAT whenever not to do so would be liable to lead to significant distortions of competition.

(6) The third subparagraph of Article 4(5) does not require the Member States to transpose literally into their national law the criterion concerning the "negligible" scale of the activities listed in Annex D to the directive; however, the abovementioned provision requires the Member States, using the form and in accordance with the methods which they regard as most appropriate, not to make subject to VAT those of the activities engaged in by bodies governed by public law and referred to in Annex D which are carried out on such a small scale as to be negligible.'