same legal conditions as those that apply to private traders. It is for the national court to classify the activities in question in the light of that criterion.

The second subparagraph must be interpreted as meaning that the Member States are required to ensure that bodies subject to 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.

The third subparagraph 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.

REPORT FOR THE HEARING
delivered in Case C-4/89 *

I — Legal Framework

1. *Community law*

Article 4 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal L 145, p. 1), hereinafter referred to as the 'Sixth Directive', defines the concept of taxable person in regard to value-added tax as any person who independently carries out in any place any economic activity. There is an exception to that rule in Article 4(5), which is the subject of these proceedings.

That provision 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

* Language of the case: Italian.

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 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'.

2. *National law*

Article 1 of Presidential Decree No 633 of 26 October 1972 (amended on several occasions subsequently) defines the transactions which are subject to VAT. The tax is charged on the supply of goods and services carried out within the country in connection with the operation of an undertaking or the practice of an art or profession and on imports by whomever carried out.

Article 4 of the same decree provides that the 'operation of an undertaking' means the carrying on as a regular activity, even if not an exclusive one, of the commercial and agricultural activities referred to in Articles 2135 and 2195 of the Civil Code, even if they are not organized in the form of an undertaking.

The conditions under which those provisions apply to the State, local authorities and, in general, public bodies whose exclusive or principal purpose is not to engage in commercial or agricultural activities, are laid down in the fourth subparagraph of Article 4 of the abovementioned decree, according to which 'the abovementioned public bodies must be regarded as liable to tax solely in respect of transfers of property and the provision of services carried out in the course of a commercial or agricultural activity'.

The fifth paragraph of Article 4 of the decree provides that commercial or agricultural activities engaged in by public bodies are subject to VAT even if carried on on a negligible scale.

With regard to local authorities, Circular 18/360068 of 22 May 1976 of the Ministry of Finance sets out a detailed, but not exhaustive, list of the activities fulfilling the conditions for liability to VAT 'so as to remove any lack of clarity and provide a precise definition of the transactions coming within the scope of the tax'.

The national rules described above contain no express reference to so-called 'institutional' activities engaged in by local authorities in their capacity as public authorities.

In that regard, the order for reference states that Presidential Decree No 616 of 24 July 1977, adopted under Delegating Law No 382 of 22 July 1975, pursuant to the principle laid down in Article 118 of the Constitution, defined the 'administrative functions' of local authorities in the various areas of their activities. According to the order for reference, those functions should constitute the decisive criterion for distin-

guishing 'institutional' activities from commercial ones.

II — Factual background and main proceedings

By a notice of 23 March 1988, the Ufficio provinciale imposta sul valore aggiunto di Piacenza rectified the VAT declaration made by the local authority of Carpaneto Piacentino for 1983 on the ground that the local authority had failed to invoice and note in the register of sales invoices for VAT purposes receipts for amounts received in respect of the following activities: concessions in respect of graves and cemetery vaults, sale of various fittings for vaults, sale of building land for subsidized housing and grants of rights over building land in connection with subsidized housing, contribution towards the payment of expenses incurred in installing water pipes, fees received for the concession to operate a public weighbridge, sale of salvaged plumbing material, sale of surplus road-making materials, sale of wood obtained from the lopping of trees lining the streets.

The tax authorities' claim is made on the basis that all of the above constitute commercial activities within the meaning of Article 4 of Decree No 633/72 and are included in the list of municipal activities subject to VAT referred to in Circular 18/360068 of the Ministry of Finance of 22 May 1976.

The local authority of Carpaneto Piacentino appealed against the notice of rectification to the commissione tributaria di primo grado di Piacenza, alleging an infringement of Article 4 of the abovementioned decree and Article 4(5) of the Sixth Directive.

Eleven other local authorities intervened in support of the Carpaneto Piacentino local authority's conclusions.

All the local authorities submitted conclusions asking for a reference for a preliminary ruling to be made to the Court of Justice concerning Article 4(5) of the Sixth Directive.

III — Questions referred to the Court

By order of 22 December 1988, the commissione tributaria di primo grado di Piacenza stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'In order to bring the Italian system of value-added tax into line with the Community provisions was the Italian legislature under an obligation by virtue of Article 1 of the Sixth Directive:

(a) to lay down the general principles set out in the first subparagraph of Article 4(5) of the Sixth Directive by stipulating specific criteria for defining the activities engaged in by local authorities in their capacity "as public authorities" with reference to the concept of "administrative functions" as defined with regard to the various branches of municipal activities by Presidential Decree No 616 of 24 July 1977 adopted pursuant to Delegating Law No 382/1985, implementing Article 118 of the Constitution;

(b) to exclude, therefore, from the range of commercial activities any activities which are deemed by law to involve the exercise of administrative functions

pursuant to Presidential Decree No 616 of 24 July 1977 and the other legislative provisions referred to therein;

(c) not to subject to value-added tax, in compliance with the second subparagraph of Article 4(5), activities engaged in optionally by local authorities (management of certain public services) where they do not lead to significant distortions of competition, in so far as the same services are also provided by private individuals, as is the case, for instance, with regard to the management of pharmacies in most local authority areas and, consequently, to specify the necessary quantitative limits;

(d) to fix, pursuant to the third subparagraph of Article 4(5) of the Sixth Directive, a threshold below which there is no liability to tax in respect of the public activities listed in Annex D to the Sixth Directive (excluding the management of water supply, which, being compulsory, involves the exercise of an administrative function)?'

IV — Procedure before the Court

The order for reference was received at the Court Registry on 5 January 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted

on 5 April 1989, by the local authority of Carpaneto Piacentino, the plaintiff in the main proceedings, and by 11 other local authorities which had intervened in support of its conclusions, represented by Francesco Tesauro and Michele Avantaggiati, avvocati;

on 20 April 1989, by the Government of the Italian Republic, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Franco Favara, avvocato dello Stato;

on 21 March 1989, by the Commission of the European Communities, by Enrico Traversa, a member of its Legal Department.

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.

By decision of 18 October 1989, the Court assigned the case to the First Chamber under Article 95(1) and (2) of the Rules of Procedure.

V — Summary of the written observations submitted to the Court

The plaintiff in the main proceedings, the Italian Government and the Commission point to the similarity of the questions referred to the Court by the commissione tributaria di primo grado di Piacenza to those referred by the same court and by the commissione tributaria di secondo grado di Piacenza in Joined Cases 129/88 and 231/87. Judgment was delivered in that case on 17 October 1989 ([1989] ECR 3233).

The local authority of Carpaneto Piacentino and the other local authorities which intervened in the main proceedings in support of its conclusions point out that Article 4(5) of the Sixth Directive contains provisions which are precise and binding, from which it is not possible to derogate. In their view, therefore, those rules are directly applicable, with the result that they give rise to rights in favour of persons subject to Community law which the Member States are required to respect.

They allege that the expression 'activities . . . in which they engage as public authorities' used in the first subparagraph of Article 4(5) includes both the activities of public bodies governed by the rules of public law and activities engaged in under the rules of private law which are intended to meet the essential needs of the public or are traditionally engaged in only by public bodies. The activities may be engaged in by other persons and, by virtue of the second subparagraph of Article 4(5), they are liable to VAT where treatment as non-taxable persons would lead to significant distortions of competition.

In their view, the Italian tax legislation is incompatible with the Community legal order, on the one hand, because, contrary to the first subparagraph of Article 4(5), it charges tax on acts of public authority which, in so far as they are engaged in exclusively by public bodies, are unlikely to distort free competition and, on the other, because, contrary to the second subparagraph of the same provision, they also charge value-added tax on activities in regard to which possible distortions of competition are of no importance.

With regard to the activities set out in Annex D to the Sixth Directive, they claim that, in accordance with the third subparagraph of Article 4(5), they are subject to tax only in so far as they are not engaged in on a negligible scale, which requires the Member States to fix a minimum threshold for tax liability.

Finally, the local authority of Carpaneto Piacentino and the other local authorities stress the importance of the legal concept of 'administrative functions' which is laid down in Article 118 of the Italian Constitution with specific reference to the municipal and provincial authorities, as defined by Presidential Decree No 616 of 24 July 1977. That concept, which covers all the activities which are the subject of the main proceedings, is to be contrasted with the concept of commercial activities and must therefore be used in interpreting Article 4(5) of the Sixth Directive, that is to say, in determining which activities are engaged in by public bodies as public authorities.

The Italian Government is opposed to too precise and rigid a link being made between the concept of activities engaged in as a public authority and the list of local authority administrative functions contained in Presidential Decree No 616 of 24 July 1977. Moreover, in its view, since that list concerns local authorities, it is of no value in regard to other bodies subject to public law.

The Italian Government therefore proposes that the Court should answer the first two questions by stating that the concept of activities engaged in as public authorities is an independent one and shares the purely indicative character of the directive in which it is contained, and that it is not possible to identify it with the lists of activities or

administrative functions laid down in the legislation of the Member States for other purposes, such as the internal division of powers.

The Italian Government considers that the second subparagraph of Article 4(5) does not contribute to the definition of the concept of activities engaged in as public authorities and that there may therefore be activities which are not engaged in under a legal monopoly by public bodies but which are subject to VAT even though they do not cause distortions of competition.

In regard to the third subparagraph of Article 4(5), the Italian Government considers that there is no obligation to insert the criterion of negligible scale into national legislation.

The Commission refers essentially to its observations in Joined Cases 129/88 and 231/87. It states however that the concept of 'administrative functions' in Italian law implies an exercise of sovereignty and it may therefore constitute an indication that the activity is engaged in as a public authority within the meaning of Article 4(5) of the Sixth Directive. However, it considers that too much importance should not be attached to such an indication, on the one hand because, in the Italian legislation on the division of powers between the central government and the local authorities, the expression 'administrative functions' lacks precision and is often applied to activities which are manifestly commercial in character, and on the other hand because the concept of 'taxable person' for the purposes of VAT is a concept of Community law alone which cannot be dependent on concepts of purely national law.

G. C. Rodríguez Iglesias
Judge-Rapporteur