who habitually or occasionally organizes public performances or entertainments within the commune and requires those attending or participating to pay an entrance fee must pay a special tax on the gross amount of all receipts, does not possess the characteristics of a turnover tax within the meaning of that provision if it is established that the tax in question:

(i) applies only to a limited category of goods and services and thus is not a general tax;

(ii) is not charged at each stage of the production and distribution process, since it is imposed annually on the aggregate receipts of taxable undertakings; and

(iii) is not levied on the value added at each transaction but on the gross amount of all receipts, so that it is impossible to establish precisely what fraction of the tax charged on each sale or service may be regarded as having been passed on to the consumer.

REPORT FOR THE HEARING
in Case C-109/90 *

I — Facts and legal background

1. Article 33 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 VAT Directive') provides:

'Without prejudice to other Community provisions, the provisions of this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes'.

2. On 2 March 1983, the Commune of Overijse adopted a tax regulation under which (Article 2) any person who habitually or occasionally organizes public performances or entertainments within the commune and requires those attending or participating to pay an entrance fee must pay a special tax on the gross amount of all receipts. Under Article 3 of the regulation, that tax is payable on the total amount of

* Language of the case: Dutch.

entrance fees, rental and cloakroom charges, the sale of programmes or dance cards, the proceeds from all refreshments and any contributions or consideration which may replace or supplement such amounts, as well as any other charges.

In accordance with paragraph 1 B (c) of Article 4 of the tax regulation, the tax is levied at the rate of 25%. It is charged on a yearly basis. The tax regulation, which was in troduced for a six-year period, was applied until the end of 1988.

3. On 28 June 1989, *NV Giant*, the plaintiff in the main proceedings, lodged an appeal against the tax on performances and entertainments levied by the Commune of Overijse for 1988. It claimed that the charge was contrary to Article 33 of the Sixth VAT Directive.

NV Giant maintains that the levy can be characterized as a turnover tax and affects all the commercial transactions on which value added tax has already been charged, such as the sale of entrance tickets and refreshments, a second time, so that the amount collected is determined by turnover. It further states that the Commune exceeded its powers by taking action in a field in which the European Communities now have exclusive powers, namely the introduction, organization and harmonization of a turnover tax. It therefore seeks the annulment of the charge.

4. The *Commune of Overijse* contends, first, that the tax remains payable; secondly, that the tax regulation of 2 March 1983 was approved by the Bestendige Deputatie (executive branch of the Provincial Council) on 31 December 1983; and, lastly, that the tax was registered by the College of Aldermen on 13 March 1989 and that all legal and administrative requirements have therefore been satisfied.

5. The Bestendige Deputatie of the Provincial Council of Brabant, acting in its capacity as administrative court for disputes concerning communal taxes in the Province of Brabant, considered that the case called for an interpretation of Article 33 of the Sixth VAT Directive and decided, by order of 23 January 1990, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

'Is the tax regulation of the Commune of Overijse dated 2 March 1983, by which any person who habitually or occasionally organizes public performances or entertainments within the commune and requires those attending or participating to pay an entrance fee must pay a special tax on the gross amount of all receipts and by which in particular an annual tax of 25% is imposed on dance halls and restaurants attached to them on the total amount of entrance fees, rental and cloakroom charges, the sale of programmes or dance cards, the proceeds from all refreshments and any contributions or consideration which may replace or supplement such fees or prices, as well as any other charges, contrary to the prohibition on the imposition of any taxes on turnover other than value added tax laid down in Article 33 of Directive 77/388/EEC, or not?'

6. The order for reference was received at the Court Registry on 19 April 1990.

7. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by the Commission of the European Communities, represented by J. F. Buhl and B. J. Drijber, acting as Agents.

8. 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.

9. Pursuant to Article 95(1) and (2) of the Rules of Procedure the Court, by decision of 7 November 1990, assigned the case to the Fourth Chamber.

II — Written observations submitted to the Court

1. The *Commission*, basing its opinion on an analysis of the relevant case-law (see, in particular, Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, Case 73/85 *Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219, Case 252/86 *Bergandi* v *Directeur-général des impôts* [1988] ECR 1343, and Joined Cases 93/88 and 94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671), submits that the Court has held that a special tax can be characterized as a turnover tax within the meaning of Article 33 of the Sixth VAT Directive if the following three criteria are met: it must be a general tax; it must be exactly proportional to the price of the goods and services; and it must be reflected in the final price of each item or services, thus being borne in the final event by the consumer.

2. In the Commission's view, the communal tax in issue does not possess the abovementioned characteristics of a turnover tax. The Commission notes, first, that the tax in question is not a general tax. It is limited in two ways: geographically, since it is levied only within the Commune of Overijse, and substantively, since only goods and services provided by dance halls, etc., are subject to the tax.

3. Secondly, the Commission states that the tax in issue does not bear upon commercial transactions in a way comparable to value added tax. It is levied annually on the aggregate receipts of taxable undertakings, and not on individual transactions. Furthermore, the tax is applied only once annually, and not at each stage of marketing. It therefore cannot be said to be exactly proportional to the price of the goods and services provided.

4. Finally, the Commission points out, with regard to the tax being reflected in the prices paid by consumers, that it is impossible to establish for each transaction precisely what fraction of the tax the undertaking may be considered to have passed on to the final consumer. In the Commission's view, the tax is one which is paid to the commune once a year on gross receipts — it is thus non-specific — without there being any invoice specifying the amount of the communal tax for each transaction.

5. The Commission also points out, referring to the Court's judgment in *Wisselink*, cited above, that since the tax in question is levied in addition to, and neither totally nor partially in place of, value added tax, it does not appear to be capable of jeopardizing the operation of the common system of value added tax.

6. The Commission therefore concludes that the performance tax introduced by the Commune of Overijse does not constitute a turnover tax within the meaning of Article 33 of the Sixth VAT Directive. It proposes that the Court should answer the question referred to it by the Bestendige Deputatie in the negative.

M. Díez de Velasco
Judge-Rapporteur