relating to services supplied by independent groups of persons exercising an activity which is exempt or for which they are not taxable, for the purpose of rendering services to their members, the transactions which are exempted pursuant to the aforesaid provision do not cover the activities of a foundation which consist exclusively in the organization and performance of services which are related to the activities of another foundation, against reimbursement of expenses actually incurred, where the other foundation acts as an umbrella organization for a number of bodies exercising an activity which is exempt or for which they are not taxable and, solely for those bodies, performs services as described in the aforesaid provision of the Sixth Directive.

REPORT FOR THE HEARING
delivered in Case 348/87 *

I — Facts and main proceedings

1. The appellant in the main proceedings (hereinafter referred to as 'SUFA') is a non-profit-making foundation set up in 1961 which organizes and holds lotteries the proceeds of which go to social and cultural institutions in the Netherlands. Since 1971, following the setting up of the Stichting Algemene Loterij Nederland (hereinafter referred to as 'ALN') to which those institutions are affiliated, the permission necessary to organize those lotteries on behalf of the affiliated institutions has been granted to ALN. ALN has, in turn, entrusted the organization and the holding of the lotteries to SUFA. Under the terms of the agreement concluded between the two foundations, all costs arising from the holding of the lottery are charged to and reimbursed by ALN.

2. Each of the two foundations is run by a managing board which is elected internally, independently of the other foundation's managing board. With the exception of one member who has a seat on both managing boards, there is no common management. However, one member of ALN's managing board attends all meetings of SUFA's managing board as an observer and vice versa. As a foundation, SUFA does not have its own funds or its own credit facility at a bank. It commenced its activities with initial capital put up by ALN as a permanent loan. The activities of SUFA consist exclusively in organizing and holding lotteries on behalf of ALN, while ALN merely distributes the revenue from the lotteries, after deduction of the costs of holding the lotteries,

* Language of the case: Dutch.

amongst the social and cultural institutions which are affiliated to it.

3. The dispute in the main proceedings arose following the payment, on the basis of its tax returns, of turnover tax in the amount of HFL 21 978 in respect of the costs of services supplied by SUFA to ALN during April 1983. SUFA lodged a complaint against the amount of tax paid but that complaint was dismissed by the inspector of taxes. In his decision, the inspector maintained that SUFA is not an independent group of persons providing services to its members, but that it performs its activities for a single principal and that principal, ALN, is not a member of SUFA.

4. SUFA appealed against that decision to the Gerechtshof (Regional Court of Appeal) in The Hague. In its appeal SUFA argued that it could not be considered to be an independent undertaking since it forms a fiscal unit with ALN. Thus, as a mere dependent extension of ALN, it must also enjoy the tax exemptions which apply to ALN. It is common ground that the activities of ALN and of its affiliated institutions are not subject to turnover tax under Article 11(1)(f) and (u) of the Netherlands' Wet op de omzetbelasting 1968 (Law on Turnover Tax 1968, hereinafter referred to as 'the Law') in its 1978 version.

5. Article 11(1)(f) of the Law empowers the Government to exempt:

'the supply of services and of goods of a social or cultural nature, provided that the enterprise is non-profit-making and that this exemption does not produce serious distortions of competition with regard to commercial enterprises.'

Article 11(1)(u) of the Law provides for the exemption of:

'services . . . supplied by independent groups of persons or bodies . . . providing exempted supplies . . . for the benefit of their members which are directly necessary for the aforesaid provision of supplies, provided that these groups merely claim from their members reimbursement of their share of the joint expenses and that there is no serious distortion of competition'.

Article 9(1)(f) and (2) of the Uitvoeringsbesluit omzetbelasting (Decree on the implementation of turnover tax) provides:

'(1) By services within the meaning of Article 11(1)(u) of the Law is meant services supplied for the benefit of their members by independent groups of: . . . institutions of a social nature whose supplies are exempt under Article 11(1)(f) of the Law in so far as the services supplied are directly necessary for the provision of those supplies, with the exception of services consisting in the assumption of responsibility for the

administration of remuneration, financial administration and the administration of a ledger.

(2) Paragraph 1 shall apply only if the independent groups referred to therein merely claim from their members reimbursement of the member's share of the joint expenses.'

Those provisions are intended to transpose Article 13(A)(1)(f) of the Sixth Directive under which the Member States are to be exempt:

'services supplied by independent groups of persons whose activities are exempt . . . for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition'.

6. On 7 May 1986 the Gerechtshof dismissed the appeal lodged by SUFA on the grounds that the two foundations were independent of one another, despite their close economic and structural relationship, and could thus not be regarded as constituting a fiscal unit. Moreover, the Gerechtshof emphasized that SUFA, unlike ALN, could not be described as an independent group of persons or bodies providing services to its members in return for reimbursement of their share of the joint expenses, since SUFA supplies those services exclusively to ALN and not to the institutions affiliated to that foundation. On those grounds, the Gerechtshof considered that Article 13(A)(1)(f) of the Sixth Directive is not applicable.

7. SUFA appealed against that judgment to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). By judgment of 4 November 1987, the Hoge Raad rejected three of SUFA's four grounds of appeal, and in particular the claim that the two foundations constitute a fiscal unit. With regard to the ground of appeal directed against the part of the Gerechtshof's judgment in which it was held that the exemption provided for under Article 11(1)(u) of the Law is not applicable to the activities of SUFA, the Hoge Raad considers that the definition of services which are exempt under that provision must be the same as the definition of the supplies of services which must be exempt under Article 13(A)(1)(f) of the Sixth Directive. Therefore, since an appreciation of that ground of appeal depends on the reply to the question whether the aforesaid provision of the Sixth Directive embraces services such as those provided by SUFA to ALN, the Hoge Raad has referred the following question to the Court of Justice for a preliminary ruling:

'Do the transactions which must be exempted from turnover tax pursuant to Article 13(A)(1)(f) of the Sixth Directive cover the activities of a foundation which consist exclusively in the organization and performance of work which is related to the activities of another foundation, against

reimbursement of expenses actually incurred, where the other foundation acts as an umbrella organization for a number of bodies exercising an activity which is exempt or for which they are not taxable and, solely for those bodies, performs services as defined in the aforesaid provision of the Sixth Directive?'

The judgment of the Hoge Raad was received at the Court Registry on 16 November 1987.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the appellant in the main proceedings, represented by J. W. Meijer, of the Hague Bar, by the Netherlands Government, represented by H. J. Heinemann, of the Ministry of Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by D. Calleja and B. J. Drijber, acting as Agents.

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.

II — Written observations submitted to the Court

1. The appellant in the main proceedings, SUFA, which points out its close statutory, contractual and material relationship with ALN, argues that if ALN had not been set up, SUFA could claim the exemption in question, since it organizes lotteries on behalf of the institutions affiliated to the ALN. The only function of the ALN is to hold the authorization to organize the lotteries and to distribute the proceeds of those lotteries amongst the institutions affiliated to it. Moreover, the activities of SUFA would be exempt if they were performed by the ALN since SUFA performs its activities only on behalf of the ALN and the institutions affiliated to the ALN, so there is no valid reason for refusing the exemption to SUFA.

SUFA considers that, in applying the criteria laid down in Article 13(A)(1)(f) of the Sixth Directive to the present case, the question is whether SUFA can be regarded as a group of independent institutions, in other words whether the institutions affiliated to the ALN can be considered to be members of SUFA. The abovementioned provision of the Sixth Directive was adopted in consideration of the multiplicity of forms in which and structures within which works and activities of a social and cultural nature can be carried out in order to facilitate those works and activities.

SUFA argues that it is untenable to maintain that the abovementioned provision is not applicable to the circumstances of the present case, in which: (i) a foundation carries out activities consisting solely of the organization and holding of lotteries in connection with another foundation; (ii) in return for reimbursement of expenses actually incurred; (iii) where the other foundation acts as an umbrella organization for a number of bodies exercising an activity which is exempt or for which they are not

taxable and, solely for those bodies, performs services within the meaning of the aforesaid provision of the Sixth Directive.

SUFA therefore proposes that the question referred for a preliminary ruling should be answered in the affirmative.

2. The Netherlands Government states that Article 13(A)(1)(f) of the Sixth Directive creates an exemption which applies, under certain specific conditions, to the supply of services for the benefit of their members by independent groups of taxable persons who are exempt from tax or of non-taxable persons, groups which in the Netherlands are usually described as associations. In that way the basic purpose of the provision is achieved, which is to prevent the levying of taxes on activities which are subcontracted by taxable persons who are exempted from tax and by non-taxable persons in so far as services are provided in the context of mutual cooperation, expressly mentioned in the provision relating to exemption. The application of exemptions or non-taxable treatment on a case-by-case basis to individual taxable or non-taxable persons does not achieve that purpose. It may therefore be considered that the effect of the exemption envisaged by the provision in question is, as it were, to extend the scope of the other exemptions and of treatment as a non-taxable person in such a way that the tax burden is not increased when, usually for reasons of efficiency, it is decided to act in association.

The Netherlands Government also points out that, in view of the restricted scope of Article 13(A)(1)(f) of the Sixth Directive and the precise nature of the terms employed, in particular the concepts of 'independent groups of persons' and 'members', that provision must be interpreted as meaning that the exemption applies only to the supply of services which are subcontracted to independent groups of persons. Therefore, the exemption does not extend to activities which are carried out on a subcontractual basis by another taxable person, regardless of whether or not those activities were subcontracted by an exempted association. A broad interpretation of the provision in question is not justified, in particular because the extension of such an exemption to taxable persons who do not have the status of association and therefore, in principle, to all taxable persons, would constitute an unacceptable derogation from the role of turnover tax as a general tax on consumption.

The Netherlands Government observes, moreover, that it is not possible to claim that a foundation has the status of an independent group of persons within the meaning of Article 13(A)(1)(f) of the Sixth Directive simply by virtue of the fact that its only activity is the provision of services for the benefit of a group of that kind and that it demands in return only reimbursement of expenses actually incurred. Consequently, turnover tax must be levied on the activities of the foundation, even if, in a case such as this, the circumstances are such that it may be said that the activities concerned do not form part of commercial dealings. According to the case-law of the Court of

Justice relating to Article 4 of the Sixth Directive, the concept of 'economic activity' is to be given a wide interpretation as meaning any activity which is carried out in return for remuneration.

The Netherlands Government therefore proposes that a negative reply be given to the question referred for a preliminary ruling.

3. The Commission of the European Communities points out first that the principal purpose of the Sixth Directive is the harmonization of the laws of the Member States relating to value-added tax (VAT). With regard to the exhaustive list of VAT exemptions in Article 13(A) of the Sixth Directive, the Commission is of the opinion that those exemptions must be regarded as independent concepts of Community law and, as the Court has consistently held, they must be interpreted restrictively since they constitute a derogation from the general principle according to which VAT is levied on all services and goods supplied for consideration to a consumer by a taxable person acting as such, and are not defined by reference to purely material or functional criteria.

The Commission observes that the exemption provided for under Article 13(A)(1)(f) of the Sixth Directive is one of the exemptions which expressly specifies who may carry out the exempted supply of services defined therein, namely 'independent groups of persons', provided, moreover, that they fulfil all the other conditions for the grant of the exemption; consequently its field of application must be extremely limited.

With regard to the special conditions provided for by Article 13(A)(1)(f) of the Sixth Directive, the Commission argues that the VAT exemption at issue applies only in a very small number of cases which do not already come under another exemption, and only if the cumulative conditions which are expressly set out in the provision are fulfilled. In that respect the Commission states that SUFA's submissions amount to a twofold legal claim; that it should be assimilated to a body whose activities are exempt under Article 13(A)(1)(f) of the Sixth Directive, that is to say ALN, and that SUFA itself should have the status of an independent group of persons, regardless of whether or not the activities of ALN are exempted.

With regard to the first claim, the Commission points out that according to the case-law of the Court the VAT exemption is reserved exclusively to the body which is performing the activity in the public interest which has been entrusted to it by the State, to the exclusion of any subcontractors. Since Article 13(A)(1)(f) of the Sixth Directive gives a precise definition of a taxable person whose activities must be exempted from VAT as 'an independent group of persons', it is not permissible to assimilate other bodies to those groups and in this way to create 'a chain exemption'. SUFA cannot, therefore, be assimilated to ALN and consequently it cannot be granted the exemption provided for by the abovementioned provision.

With regard to the second claim, the Commission considers that SUFA does not fulfil all six conditions of Article 13(A)(1)(f) of the Sixth Directive, since it cannot be described as an independent group of persons providing services to its members. By that term the Community legislature meant an association of two or more persons or bodies for the joint carrying out of certain activities. In the present case, one foundation is carrying out its activities exclusively on behalf of another foundation, so that SUFA must pay VAT on the services which it supplies to ALN.

The Commission therefore proposes the following reply to the question referred for a preliminary ruling:

The transactions which must be exempted from turnover tax pursuant to Article 13(A)(1)(f) of the Sixth Directive do not include the activities of a foundation which consist exclusively in the organization and performance of work which is related to the activities of another foundation, against reimbursement of expenses actually incurred, where the other foundation acts as an umbrella organization for a number of bodies exercising an activity which is exempt or for which they are not taxable and, solely for those bodies, performs services as defined in the aforesaid provision of the Sixth Directive.

M. Diez de Velasco
Judge-Rapporteur