JUDGMENT OF THE COURT (Fourth Chamber)

11 October 2007 *

In Joined Cases C-283/06 and C-312/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Zala Megyei Bíróság (Hungary) (C-283/06) and from the Legfelsőbb Bíróság (Hungary) (C-312/06), made by decisions of 16 January and 10 July 2006, received at the Court on 29 June and 18 July 2006 respectively, in the proceedings

KÖGÁZ rt,

E-ON IS Hungary kft,

E-ON DÉDÁSZ rt,

Schneider Electric Hungária rt,

TESCO Áruházak rt,

OTP Garancia Biztosító rt,

OTP Bank rt,

ERSTE Bank Hungary rt,

Vodafone Magyarország Mobil Távközlési rt (C-283/06)

* Language of the case: Hungarian.

v

Zala Megyei Közigazgatási Hivatal Vezetője,

and

OTP Garancia Biztosító rt (C-312/06)

v

Vas Megyei Közigazgatási Hivatal,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2007,

after considering the observations submitted on behalf of:

— KÖGÁZ rt, E-ON IS Hungary kft, E-ON DÉDÁSZ rt, Schneider Electric Hungária rt, TESCO Áruházak rt, OTP Garancia Biztosító rt, OTP Bank rt and ERSTE Bank Hungary rt, by P. Oszkó, ügyvéd,

— Vodafone Magyarország Mobil Távközlési rt, by D. Deák, ügyvéd,

— the Hungarian Government, by J. Fazekas and R. Somssich, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and V. Bottka, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 In Case C-283/06, the reference for a preliminary ruling concerns the interpretation of point 3(a) of part 4 of Annex X to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the

adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the Act of Accession') and Article 33 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1; 'the Sixth Directive').

2 That reference was submitted in the context of proceedings between nine companies governed by Hungarian law, KÖGÁZ rt, E-ON IS Hungary kft, E-ON DÉDÁSZ rt, Schneider Electric Hungária rt, TESCO Áruházak rt, OTP Garancia Biztosító rt, OTP Bank rt, ERSTE Bank Hungary rt and Vodafone Magyarország Mobil Távközlési rt (together, 'the applicants in the main proceedings in Case C-283/06'), and the Zala Megyei Közigazgatási Hivatal Vezetője (Director of Administrative Services of the County of Zala, 'the defendant in the main proceedings in Case C-283/06'), concerning payments on account by way of local business tax which those companies were ordered to pay in respect of the 2005 fiscal year.

3 In Case C-312/06, the reference for a preliminary ruling concerns the interpretation of point 3(a) of part 4 of Annex X to the Act of Accession and Article 33(1) of the Sixth Directive.

4 That reference was made in the context of proceedings between OTP Garancia Biztosító rt, a company governed by Hungarian law ('the applicant in the main proceedings in Case C-312/06'), and the Vas Megyei Közigazgatási Hivatal (the Administrative Services of the County of Vas; 'the defendant in the main proceedings in Case C-312/06') concerning payments on account by way of local business tax which that company was ordered to pay in respect of the fiscal periods ending on 15 September 2005 and 15 March 2006 respectively.

Legal context

The Community legislation

The Act of Accession

5 Annex X to the Act of Accession, entitled 'List referred to in Article 24 of the Act of Accession: Hungary', includes a part 4, itself entitled 'Competition policy', which concerns Chapter 1 of Title VI of the EC Treaty, relating to the rules on competition.

6 Under that part 4 is found point 3, entitled 'Local authority fiscal aid', point (a) of which provides:

'Notwithstanding Articles 87 and 88 of the EC Treaty, Hungary may apply, up to and including 31 December 2007, local business tax reductions of up to 2% of the net receipts of undertakings, granted by local government for a limited period of time on the basis of Articles 6 and 7 of Act C of 1990 on Local Taxes, as amended by Article 79(1) and (2) of Act L of 2001 on the Amendment to Financial Laws, as amended by Article 158 of Act XLII of 2002 on Amendment of Acts on Taxes, Contributions, and Other Budgetary Payments.'

The Sixth Directive

7 Article 33(1) of the Sixth Directive provides:

'Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, 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 characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

National legislation

8 It is apparent from the information contained in the orders for reference that Act C of 1990 on Local Taxes (a helyi adókról szóló 1990. évi C. törvényt, 'the Act of 1990') authorises municipalities in Hungary to introduce a local business tax (helyi iparűzési adó, 'the HIPA') within their territories.

9 That information also shows that:

— the HIPA is not a general tax, levied throughout the national territory, but a local tax, the introduction, repeal and amendment of which is subject to the discretion of the local authorities;

— in the municipalities where it has been introduced, it is applied to every economic activity carried out on a permanent or temporary basis in the territory of the municipality concerned, the taxable person being the undertaking;

— the basis of assessment, in the case of an economic activity of a permanent nature, is the net turnover corresponding to the goods sold or the services provided during a given period, less the purchase price of the goods sold, the value of the intermediary services and the costs of the materials;

— in the case of sole traders and small agricultural producers, the basis of assessment is the standard-rate taxable amount determined in accordance with the Act on tax on the income of private individuals, plus 20%;

— in the case of undertakings subject to simplified business tax (*egyszerűsített vállalkozói adó*), the basis of assessment of the HIPA may correspond to 50% of the simplified business tax;

— the local authority which has introduced the HIPA may grant reductions or other fiscal advantages, entitlement to which, however, is restricted to undertakings whose basis of assessment does not exceed HUF 2.5 million, or a lower amount fixed by that authority;

— a special fiscal advantage is envisaged in the event of an increase in the number of employees during the fiscal year (a reduction of the taxable amount by HUF 1 million per person employed);

— in the case of an economic activity carried out on a permanent basis, the maximum annual rate of the HIPA is fixed at 2%;

— taxable persons are not required to state the amount of the HIPA expressly on invoices or accounting documents; the Act of 1990 does not include any provision setting out the possibility of deducting the HIPA which may be included in the price of goods or services acquired by the taxable person;

— the Act of 1990 does not expressly provide that the HIPA can be passed on to the consumer, but that tax may be included in the price paid by the consumer;

— in addition to the HIPA, in Hungary there is also a value added tax (általános forgalmi adó), governed by Act LXXIV of 1992.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-283/06

10 By a series of decisions adopted in 2005, the defendant in the main proceedings in Case C-283/06 upheld the decisions ordering that HIPA payments on account be made in respect of 2005, which had been taken by various local authorities against the applicants in the main proceedings in that case.

11 That defendant based its decisions on Article 41(1) and (2) of the Act of 1990 and on various local decrees introducing the HIPA. It takes the view that the applicants in the main proceedings in Case C-283/06 acknowledged their fiscal obligations in respect of that tax by lodging a HIPA tax return and are therefore bound to make a tax payment on account. In some of its decisions it rebutted the objection that, on the basis of Article 33 of the Sixth Directive, the HIPA has no legal basis since it is a tax which can be characterised as a turnover tax.

12 The applicants in the main proceedings in Case C-283/06 brought actions against those decisions before the Zala Megyei Bíróság (Zala District Court). In essence, they argue that those decisions are unlawful on the ground that, since May 2004, they have no longer been subject to the HIPA because of the direct applicability of Article 33 of the Sixth Directive.

13 The referring court is of the opinion that point 3(a) of part 4 of Annex X to the Act of Accession can be interpreted as meaning that it establishes a temporary derogation allowing the HIPA to be maintained or, at least, that, by authorising reductions in that tax until 31 December 2007, the contracting parties have temporarily accepted that that tax is compatible with Community law.

14 The referring court is of the opinion that, should the Court agree with that interpretation, any other question is superfluous. Should the Court disagree with that interpretation, the referring court takes the view that it is necessary to obtain an interpretation of 'a tax which cannot be characterised as a turnover tax', for the purposes of Article 33 of the Sixth Directive.

15 In those circumstances, the Zala Megyei Bíróság decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Must point 3(a) of part 4 of Annex X to the [Act of Accession] ... be interpreted as meaning that:

— the Republic of Hungary has been granted a temporary derogation which allows it to maintain [the HIPA], or that

— by granting the possibility to maintain reductions [in the HIPA], the Act of Accession also recognises that the Republic of Hungary has the (provisional) right to maintain a tax on economic activities?

(2) Should Question 1 be answered in the negative, ... on a correct interpretation of the Sixth ... Directive ... , what are the criteria on which a tax may be considered not to be characterised as a turnover tax for the purposes of Article 33 of [that] ... directive?'

Case C-312/06

16 By a decision adopted in 2005, the defendant in the main proceedings in Case C-312/06 upheld the decision taken by a local authority against the applicant in the main proceedings in that case, ordering that HIPA payments on account be made in respect of the fiscal periods ending on 15 September 2005 and 15 March 2006.

17 The grounds of that decision, which was based on Articles 39(1) and 41(2) of the Act of 1990 and on Article 8(1) of Local Decree No 13/2003 (III.27), stated that, at the end of an examination of the HIPA during accession negotiations, the Republic of Hungary obtained, in the Act of Accession, a derogation on reductions of that tax until 31 December 2007. According to the defendant in the main proceedings in Case C-312/06, the information in the Act of Accession on the conception of that tax supports the conclusion that it was approved by the European Union.

18 The applicant in the main proceedings in Case C-312/06 brought an action against that decision before the Vas Megyei Bíróság (Vas District Court). It submits that that decision is unlawful, on the ground that the HIPA is a turnover tax, the maintenance of which by the Republic of Hungary after its accession to the Union is contrary to Article 33(1) of the Sixth Directive and which cannot, furthermore, be regarded as provisionally authorised by the Act of Accession.

19 That action was dismissed by the Vas Megyei Bíróság, on the ground, in substance, that the grant under the Act of Accession of a provisional derogation to the Republic of Hungary in respect of reductions in the HIPA necessarily means that the Union allowed that tax to be maintained temporarily.

20 The applicant in the main proceedings in Case C-312/06 lodged an appeal before the Legfelsőbb Bíróság (Supreme Court) against the decision given by the Vas Megyei Bíróság.

21 The referring court is of the opinion that, if point 3(a) of part 4 of Annex X to the Act of Accession can be interpreted as meaning that the contracting parties have, by granting a temporary derogation concerning reductions in the HIPA, also granted a

derogation on that tax itself, the tax is therefore compatible with Community law until 31 December 2007. On the other hand, if the opposite interpretation is accepted, it will be necessary to determine, in the light of Article 33(1) of the Sixth Directive, whether, on the basis of the essential substantive criteria contained in that provision, a tax such as the HIPA is a tax which can be characterised as a turnover tax.

22 In those circumstances, the Legfelsőbb Bíróság decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) May ... point 3(a) of part 4 of Annex X to the [Act of Accession] ... be interpreted as meaning that the Republic of Hungary has been granted a provisional derogation which allows it to maintain the [HIPA], that is to say, as meaning that the Act of Accession, in contemplating the possibility of maintaining the tax reductions [in the HIPA], recognised that the Republic of Hungary has the provisional right to maintain a tax of the same type as the [HIPA]?

(2) Must Article 33(1) of [the Sixth Directive] ... be interpreted as meaning that it prohibits the maintenance of a tax (the [HIPA]) on profit-making business activities which is fundamentally characterised by the fact that it is imposed in respect of net receipts, after deduction of the purchase price of the goods sold and the price of services supplied by third parties and the cost of raw materials? That is to say, must a tax with those characteristics be classified as a turnover tax prohibited by that provision?'

On the questions referred for a preliminary ruling

23 As suggested by KÖGÁZ rt, E-ON IS Hungary kft, E-ON DÉDÁSZ rt, Schneider Electric Hungária rt, TESCO Áruházak rt, OTP Garancia Biztosító rt, OTP Bank rt and ERSTE Bank Hungary rt (together, 'KÖGÁZ and Others'), the Hungarian Government and the Commission of the European Communities, it is appropriate to examine first of all the second question referred by each of the referring courts, relating to the interpretation of Article 33 of the Sixth Directive.

24 In Case C-283/06, that question concerns the criteria which distinguish a tax which cannot be characterised as a turnover tax for the purposes of Article 33 of the Sixth Directive.

25 Read in context, that question concerns, like the second question referred in Case C-312/06, the issue of whether Article 33 must be interpreted as precluding the maintenance of a tax with the same characteristics as the HIPA.

26 In order to interpret Article 33 of the Sixth Directive, it must be set against its legislative background. To that end it is useful to recall at the outset the objectives pursued by the introduction of a common system of value added tax ('VAT') (Case C-475/03 *Banca Popolare di Cremona* [2006] ECR I-9373, paragraph 18).

27 According to the preamble to First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ,

English Special Edition 1967 (I), p. 14), harmonisation of legislation concerning turnover taxes should make it possible to establish a common market within which there is healthy competition and whose characteristics are similar to those of a domestic market, by eliminating tax differences liable to distort competition and hinder trade (Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319, paragraph 14, and *Banca Popolare di Cremona*, paragraph 19).

28 A common system of VAT was introduced by Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation 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 (I), p. 16); and by the Sixth Directive (*Pelzl and Others*, paragraph 15, and *Banca Popolare di Cremona*, paragraph 20).

29 The principle of the common system of VAT, under Article 2 of the First Directive 67/227, involves the application to goods and services, up to and including the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged (see, inter alia, Case 295/84 *Rousseau Wilmot* [1985] ECR 3759, paragraph 15; Case 252/86 *Bergandi* [1988] ECR 1343, paragraph 15; Joined Cases 93/88 and 94/88 *Wisselink and Others* [1989] ECR 2671, paragraph 18; *Pelzl and Others*, paragraph 16; and *Banca Popolare di Cremona*, paragraph 21).

30 However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components of the goods and services. The procedure for deduction is so arranged in Article 17(2) of the Sixth

Directive that taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods or services have already borne and that that tax is charged, at each stage, only on the added value and is finally borne by the ultimate consumer (*Pelzl and Others*, paragraph 17, and *Banca Popolare di Cremona*, paragraph 22).

31 In order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT was intended, according to the preamble to the Second Directive 67/228, to replace the turnover taxes in force in the various Member States (see, inter alia, *Pelzl and Others*, paragraph 18, and *Banca Popolare di Cremona*, paragraph 23).

32 Article 33 of the Sixth Directive accordingly permits a Member State to maintain or introduce taxes, duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes (see, inter alia, *Pelzl and Others*, paragraph 19, and *Banca Popolare di Cremona*, paragraph 24).

33 However, Community law, as it now stands, does not contain any specific provision excluding or limiting the power of Member States to introduce taxes, duties or charges other than turnover taxes (*Wisselink and Others*, paragraph 13, and Case

C-318/96 *SPAR* [1998] ECR I-785, paragraph 21). It is clear even from the terms of Article 33 of the Sixth Directive that Community law permits systems of taxation to exist concurrently with VAT (*Wisselink and Others*, paragraph 14; Case C-109/90 *Giant* [1991] ECR I-1385, paragraph 9; and *SPAR*, paragraph 21; see also, to that effect, Case 73/85 *Kerrutt* [1986] ECR 2219, paragraph 22).

34 In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33 of the Sixth Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT (*Pelzl and Others*, paragraph 20, and *Banca Popolare di Cremona*, paragraph 25; see also, to that effect, Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 20 and the case-law cited).

35 The Court has stated in this regard that taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way (Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, paragraphs 11 and 14; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 32; and *Banca Popolare di Cremona*, paragraph 26).

36 Article 33 of the Sixth Directive does not, on the other hand, preclude the maintenance or introduction of a tax which does not display one of the essential

characteristics of VAT (Case C-130/96 *Solisnor-Estaleiros Navais* [1997] ECR I-5053, paragraphs 19 and 20; *GIL Insurance and Others*, paragraph 34; and *Banca Popolare di Cremona*, paragraph 27).

37 The Court has established the essential characteristics of VAT. Notwithstanding certain differences of wording, it appears from the case-law that there are four such characteristics: VAT applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; that tax is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately on the consumer (*Banca Popolare di Cremona*, paragraph 28).

38 In order to prevent outcomes which are inconsistent with the objective pursued by the common system of VAT as set out in paragraphs 27 to 34 of the present judgment, any comparison of the characteristics of a tax such as the HIPA with those of VAT must be made in the light of that objective. In that connection, particular attention must be paid to the need to safeguard the neutrality of the common system of VAT at all times (*Banco Popolare di Cremona*, paragraph 29).

39 In this case, as regards first the second essential characteristic of VAT, it must be observed that, whereas VAT is levied on individual transactions at the marketing stage and its amount is proportional to the price of the goods or services supplied

(*Banca Popolare di Cremona*, paragraph 30), a tax such as the HIPA is, by contrast, based on the difference, calculated under accounting legislation, between the turnover linked to the goods sold or the services supplied during a fiscal period, on the one hand, and the purchase price of the goods sold, the value of the intermediary services and the costs of the materials, on the other.

40 Since a tax such as the HIPA is therefore calculated on the basis of periodic turnover, it is not possible to determine the precise amount of that charge which may be being passed on to the client when each sale is effected or each service supplied, such that the condition that this amount should be proportional to the price charged by the taxable person is not satisfied (see, to that effect, *Pelzl and Others*, paragraph 25).

41 In addition, as the Commission has pointed out, the legislation on the HIPA includes, with regard to a number of situations, simplified rules, broadly based on a standard rate, for establishing the basis of assessment by reference either to the basis of another tax plus a fixed percentage (for sole traders and small agricultural producers), or to a fixed percentage of another tax (for undertakings subject to simplified business tax).

42 In such cases, the basis of assessment for the HIPA is, ostensibly, determined by criteria other than the price paid by clients for the goods or services (see, by analogy, Case C-347/90 *Bozzi* [1992] ECR I-2947, paragraph 15).

43 Those special rules accentuate the overall lack of proportionality between the amount paid by the taxable person in respect of a tax such as the HIPA and the price of the goods or services supplied by that taxable person.

44 Accordingly, such a tax cannot be regarded as proportional to the price of the goods or services supplied.

45 Next, concerning the fourth essential characteristic of VAT, in the first place it must be observed that, whereas under Article 17(2) of the Sixth Directive the taxable person is entitled to deduct from the VAT which he is liable to pay the VAT due or paid in respect of any goods or services used for the purposes of his taxed transactions, in the case of the general HIPA scheme, the deduction, which is made at the stage when the basis of assessment of the tax is established, is limited to the purchase price of the goods sold, the value of the intermediary services and the costs of the materials.

46 It thus became clear at the hearing that, as regards the services supplied to the taxable person, only those costs which meet the criteria set by the applicable legislation, such as the cost of the services supplied by sub-contractors or intermediaries, and of the services used by the taxable person and which he provides to his clients in an unchanged form ('unchanged' services), can be deducted by the taxable person from the basis of assessment for the HIPA. On the other hand, costs such as those of experts' services or those linked to services provided to the taxable person for the needs of his business and which he does not reintroduce into the economic circuit in the same form ('purchased' services) cannot be deducted.

47 The basis of assessment for the HIPA is therefore not limited to the value added at a particular stage in the production and distribution process, but concerns the overall turnover of the taxable person, minus only those elements identified in paragraph 45 of this judgment (see, by analogy, *Pelzl and Others*, paragraph 23).

48 In the second place, it is admittedly correct to state that the existence of differences in the method for calculating the deduction of tax already paid cannot exclude a tax from the prohibition laid down in Article 33 of the Sixth Directive if such differences are in fact technical in nature and do not prevent that tax from operating in essentially the same way as VAT (*Banca Popolare di Cremona*, paragraph 31).

49 It is also true, as KÖGÁZ and Others and Vodafone have pointed out, that in order for a tax to be characterised as a turnover tax, it is not necessary for the relevant national legislation expressly to provide that that tax may be passed on to the consumer (Joined Cases C-370/95 to C-372/95 *Careda and Others* [1997] ECR I-3721, paragraph 18) nor that that tax is indicated separately on the invoice issued to the client (see, to that effect, *Dansk Denkavit and Poulsen Trading*, paragraphs 13 and 14, and *Careda and Others*, paragraphs 23 and 26).

50 On the other hand, a tax levied on production in such a way that it is not certain that it will ultimately be borne, like a tax on consumption such as VAT, by the final consumer, is likely to fall outside the scope of Article 33 of the Sixth Directive (*Banca Popolare di Cremona*, paragraph 31).

51 In fact, whereas, through the mechanism of the deduction of tax laid down by Articles 17 to 20 of the Sixth Directive, VAT taxes only the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved (see, to that effect, Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraphs 19, 22 and 23; Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraph 29; and *Banca Popolare di Cremona*, paragraph 32), that is not the case with a tax such as the HIPA.

52 As the Commission has observed, the information contained in the orders for reference shows that there is no certainty that the burden of the HIPA is ultimately passed on to the final consumer in a way characteristic of a tax on consumption such as VAT.

53 The referring courts also point out that, on account of its very nature, the HIPA is not necessarily passed on. If it is, they add, the purchaser may not be aware of that fact, in which case the tax passed on in the price of the goods or services he has acquired as a taxable person will not be passed on in the price of the goods or services which he himself supplies to his clients.

54 Moreover, as the Hungarian Government pointed out, since the HIPA is calculated on the basis of periodic turnover, a taxable person cannot ascertain exactly either the amount of the HIPA already included in the purchase price of goods or services (see, by analogy, *Banca Popolare di Cremona*, paragraph 33) or what percentage of the HIPA may be being passed on to the client when each sale of goods is effected or each service supplied (see, to that effect, *Giant*, paragraph 14, and *Pelzl and Others*, paragraph 25).

55 In addition, as the Hungarian Government also observes, if, in order to pass on the burden of the tax payable in connection with his own business to the following stage in the distribution or consumption process, a taxable person included that burden in his sale price, the basis of assessment for the HIPA would then include the tax itself, with the result that the HIPA would be calculated on an amount based on a sale price incorporating, in anticipation, the tax to be paid (see, by analogy, *Banca Popolare di Cremona*, paragraph 33).

56 In any event, even on the assumption that a taxable person liable to the HIPA selling to final consumers will take account, in fixing his price, of the amount of the charge included in his general expenses, not all taxable persons have the possibility of thus passing on, or passing on in full, the burden of the tax (see, by analogy, *Pelzl and Others*, paragraph 24, and *Banca Popolare di Cremona*, paragraph 34).

57 It follows from the foregoing considerations that, having regard to those characteristics, a tax such as the HIPA is not intended to be passed on to the final consumer in a way which is characteristic of VAT.

58 On that point, a tax such as the HIPA differs from a levy such as that which gave rise to the judgment in *Dansk Denkavit and Poulsen Trading*, which was declared to be incompatible with the common system of VAT in paragraph 14 of that judgment, inasmuch as that levy was intended to be passed on to the final consumer, as is apparent from paragraph 3 of that judgment. That levy was in addition charged on the same basis of assessment as that used for VAT and was charged alongside VAT, as is apparent from paragraph 8 of that judgment.

59 Consequently, even on the assumption that, as KÖGÁZ and Others and Vodafone have claimed, the HIPA is generally applied in the municipalities which have introduced it, that would not suffice to classify a tax such as the HIPA as a turnover tax within the meaning of Article 33 of the Sixth Directive, inasmuch as it is not levied on transactions in a manner comparable to VAT (see, to that effect, *Pelzl and Others*, paragraph 27).

60 In the light of all the foregoing considerations, it is apparent that a tax with the same characteristics as the HIPA differs from VAT such that it cannot be deemed to be a tax which can be characterised as a turnover tax for the purposes of Article 33(1) of the Sixth Directive.

61 The answer to the second question referred by the national courts for a preliminary ruling must therefore be that Article 33(1) of the Sixth Directive must be interpreted as not precluding the maintenance of a charge to tax with characteristics such as those of the tax at issue in the main proceedings.

62 In those circumstances, it is not necessary to rule on the first question referred by the national courts in relation to point 3(a) of part 4 of Annex X to the Act of Accession.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 33(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers, must be interpreted as not precluding the maintenance of a charge to tax with characteristics such as those of the tax at issue in the main proceedings.

[Signatures]