OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 3 June 2003 [1]

1. By judgments of 14 and 21 December 2001, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court of Justice, pursuant to Article 234 EC, a number of questions for a preliminary ruling concerning the interpretation of the Sixth VAT Directive [2] (hereinafter: the 'directive'). The national court is seeking, in particular, to establish whether the principles of the protection of legitimate expectations and legal certainty mean that, following a legislative amendment, a Member State may not require a taxable person, under Article 20 or, in the alternative, Article 5(7)(a) of the directive, to repay, in full or in part, the VAT it has deducted in accordance with the directive. The national court is also asking the Court of Justice to define the scope of the abovementioned legislative amendment in relation to leases in existence at the time the amendment entered into force. Finally, the national court is seeking to establish whether the answer to the first question would be different if account were taken solely of the period following the notification of the draft legislation containing the abovementioned legislative amendment.

I — Legal framework

A — *The relevant provisions of the directive*

2. Article 2 of the directive provides that:

'The following shall be subject to value added tax:

1. The supply of goods or services effected for a consideration within the territory of the country by a taxable person acting as such;'

3. Article 4(1) of the directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in

1 — Original language: Italian.

2 — 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).

paragraph 2, whatever the purpose or results of that activity.'

4. Under Article 5(7)(a) of the directive:

'The Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the value added tax on such goods, had they been acquired from another taxable person, would not be wholly deductible;.'

5. Under Article 10(2) of the directive:

the tax shall become chargeable when the goods are delivered or the services are performed ...'.

6. Article 11(A)(1)(b) of the directive provides:

'1. The taxable amount shall be:

...

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;'

7. Article 13(B) of the directive provides:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse;

...

(b) the leasing or letting of immovable property ?'

8. However, under Article 13(C) of the directive:

'Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

...

Member States may restrict the scope of this right of option and shall fix the details of its use.'

9. Article 17 of the directive provides that:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...

(c) value added tax due under Article[s] 5 (7)(a) ...'

10. Finally, under Article 20 of the directive:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property, acquired as capital goods, the adjustment period may be extended up to 10 years. [3]

3. In the case of supply during the period of adjustment, capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

...'

B — *The relevant provisions of Netherlands legislation*

11. The Netherlands transposed the directive into national law by a Law of 28 December 1978 [4] amending the 'Wet op de

3 — In accordance with Article 1(4) of Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18), that article has been replaced by the following: 'In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years'.

4 — *Staatsblad* 1978, p. 677.

omzetbelasting 1968' (Law of 1968 on Turnover Tax; hereinafter: 'the Law of 1968'). [5] The Law of 1968 was subsequently amended by the 'Wet van 18 december 1995 houdende wijziging van de Wet op de Omzetbelasting 1968 enz.' (Law of 18 December 1995 amending the Law on Turnover Tax 1968 etc.; (hereinafter: 'the Law of December 1995'). [6]

12. In implementation of Article 13(B) and (C) of the directive, Article 11(1)(b), point 5, of the Law of 1968 provided, before its amendment by the Law of December 1995, for VAT exemption for the leasing of immovable property, although it gave the lessor and lessee the possibility of opting for taxation of the leasing of immovable property not for habitation, by submitting a joint application to that effect to the tax authorities.

13. As a result of the amendments made to that provision by the Law of December 1995, however, the possibility of taking up that option became limited solely to those cases in which the lessee uses the leased immovable property for purposes in respect of which he has a full or virtually full right to deduct VAT.

14. In accordance with Article V(1) of the Law of December 1995, that Law entered into force on 29 December 1995 but applies retroactively, as of 18.00 hours on 31 March 1995, the date on which the Netherlands Secretary of State for Finance issued a press release indicating the intention of the Netherlands Council of Ministers to amend the 1968 Law with retroactive force as of the date of the press release itself. Article V (9), however, provides that the new rules do not apply, for a period comprising the first financial year in which the lessor began using the property and the beginning of the tenth financial year, to leases for property concluded in writing by 18.00 hours on 31 March 1995 and fulfilling certain conditions.

15. The procedures for adjusting the VAT deducted in relation to immovable property are governed by Article 13(2) of the regulation implementing the Law of December 1968 (hereinafter: the 1968 implementing regulation). In accordance with the provisions of Article 20 of the directive, that article provides that the deduction in relation to immovable property is to be adjusted over a period of nine financial years beginning with the financial year in which the economic operator first used the property and that the adjustment is to be made annually in respect of one tenth of the amount of VAT deducted.

II — Facts, main proceedings and questions referred

Case C-487/01

16. During the period 1990-1991, the Municipality of Leusden converted a nat-

5 — *Staatsblad* 1968, p. 329.
6 — *Staatsblad* 1995, p. 659.

ural grass pitch into an artificial grass pitch in a sports ground that it owned. On 1 January 1992, that sports ground was let to the Mixed Hockey Club (hereinafter: the 'Hockey Club').

17. Even though it was not entitled to deduct VAT, the Hockey Club together, with the Municipality of Leusden, opted for taxation of the letting in accordance with Article 11 of the Law of 1968. Under Article 17 of the directive, according to which VAT on goods or services is deductible only in so far as those goods or services are used for purposes which are also subject to VAT, that would have enabled the Municipality of Leusden to deduct the full amount of VAT relating to the work it had carried out on the sports ground.

18. However, as a result of the amendment to Article 11 of the Law of 1968 introduced by the Law of 1995, the Municipality of Leusden and the Hockey Club lost the option for taxation the letting of the sports ground. For that reason, and on the basis of Article 13 of the 1968 implementing regulation, the tax authority decided to ask the Municipality of Leusden to adjust the VAT deducted on the work that had been carried out. That adjustment, in particular, had been applied to only a portion of the VAT initially deducted, that is to say the portion covering the years remaining, after the entry into force of the Law of December 1995, of the ten-year adjustment period commencing with the first use of the sports ground.

19. The Municipality of Leusden brought an action against that decision before the Gerechtshof te Amsterdam (Amsterdam Court of Appeal) which, however, ruled against it. The Municipality of Leusden therefore appealed against that Court's ruling before the Hoge Raad, claiming, among other things, that the adjustment to the deduction of VAT consequent on the legislative amendment was incompatible with the principles of legitimate expectation and legal certainty cited in the Court's judgments of 3 December 1998 in Case C-381/97 *Belgocodex* [7] and 8 June 2000 in Case C-396/98 *Schloßstraße*. [8]

20. The Hoge Raad had doubts concerning the interpretation to be given to the relevant provisions of the directive since the facts of this case in some respects differed from those of the cases cited above, it therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'Do Articles 20(2) and 17 of the Sixth Directive or the principles, in European law, of the protection of legitimate expectations and legal certainty preclude adjustment — in a case involving no fraud or abuse or change of planned use as referred to in paragraphs 50 and 51 of the judgment of the Court of Justice in the Schloßstraße case — of the VAT deducted by a taxable person, which he has paid on an item of (immovable) property supplied to him with a view to the letting (subject to VAT) of that

7 — [1998] ECR I-8153.
8 — [2000] ECR I-4279.

property, for the years of the period of adjustment under Article 20(2) which have not yet elapsed at the time of the cessation of that right of option (in this case, in fact, 1 January 1996) for the sole reason that, as a result of a legislative amendment, the taxable person is no longer entitled to waive exemption for that letting?

2. If the answer to the first question is in the affirmative, is the legislative amendment inapplicable only in respect of the deducted tax mentioned in Question 1, or is it also inapplicable — until the period of adjustment has expired — in respect of the taxed status (subject to the provisions of Article 13(C) of the Directive) of the letting referred to in Question 1?'

Case C-7/02

21. In the course of 1994 and 1995, G&S Properties BV (hereinafter: 'G&S'), a member of the Holin Groep BV c.s. (hereinafter: the 'Holin Group') had built on land it owned a building complex made up of premises for use as offices, and it deducted the VAT charged in this respect.

22. Towards the middle of 1994, G&S entered into negotiations with ING Bank NV (hereinafter: the 'ING Bank') with regard to the leasing of part of the office building or sale of the building to the Bank. In these negotiations both G&S and the Bank agreed that, in the event of leasing, they would opt to make the lease subject to tax in accordance with Article 11 of the Law of 1968. The Bank intended to use the leased property for its own banking activities which are exempted from turnover tax by statute.

23. Although G&S claims to have entered into a commitment to lease the office building to the ING Bank before 31 March 1995, the lease was not drawn up in writing until December 1995 and took effect as of 1 January 1996.

24. Subsequently, ING Bank and the Holin Group applied to the Tax Inspector for the VAT exemption to be waived in accordance with Article 11 of the Law of 1968. But their application was rejected because, following the entry into force of the Law of December 1995, Article 11 of the Law of 1968 had been amended and, since the lease had not been drawn up in writing by 18.00 hours on 31 March 1995, it could not be covered by the transitional arrangements under Article V(9) of the Law of December 1995.

25. The Tax Inspector further established that the Holin Group had constructed the building in question as part of its own business, that it was using it to meet its own

business requirements; and that, had the immovable property been acquired by third parties, the Holin Group would not have been able to deduct VAT. Therefore, on the basis of Article 3(1)(h) of the Law of 1968, which is based on Article 5(7)(a) of the Sixth Directive, the Inspector demanded that the Holin Group pay the VAT previously deducted in respect of the construction work on the property in question.

26. The Holin Group brought an action against that decision before the Gerechtshof Amsterdam, which dismissed the action. On appeal to the Hoge Raad, the Holin Group claimed that, by charging VAT in accordance with the national provision based on Article 5(7)(a) of the directive as a result of the legislative amendment, the decision at issue was incompatible with the principles of the protection of legitimate expectations and legal certainty cited in the Court's *Belgocodex* and *Schloßstraße* judgments.

27. As the Hoge Raad had doubts concerning the interpretation to be given to the relevant provisions of the directive since the facts of this case in some respects differed from those of the cases cited above, it stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Do Articles 5(7)(a) and 17 of the Sixth Directive, or the European law principles of the protection of legitimate expectations and of legal certainty preclude — in a case not involving fraud or abuse or any question of a change in planned use, as mentioned in paragraphs 50 and 51 of the judgment of the Court of Justice in Schloßstraße — the charging of tax on the basis of the abovementioned Article 5(7)(a) when a taxable person has deducted VAT which he has paid for goods delivered, or services provided, to him with a view to the planned leasing, subject to VAT, of a particular immovable property, on the simple ground that, as a result of a legislative amendment, the taxable person no longer has the right to waive the exemption for that lease?

2. Would an affirmative response to the first question also apply to a right to deduct arising in the period between notification of the legislative amendment mentioned in Question 1 and its entry into force? In other words, in the event of an affirmative response to Question 1, can tax still be charged, on the basis of Article 5(7)(a), on the elements of the cost price referred to in Article 11(A)(1)(b) of the Sixth Directive which were incurred after that notification date?'

III — Procedure before the Court of Justice

28. During the written procedure, the following submitted observations to the

Court in relation to Case C-487/01: the Municipality of Leusden, the Netherlands and French Governments and the Commission. The French, Netherlands and United Kingdom Governments and the Commission submitted observations in relation to Case C-7/02. The two cases were joined by order of 6 November 2002, in accordance with Rule 43 of the Rules of Procedure of the Court of Justice. The Municipality of Leusden, the Holin Group, the Netherlands Government and the Commission took part in the hearing of 9 January 2003.

IV — Legal analysis

A — *The first questions referred in Cases C-487/01 and C-7/02*

29. By its first question in Case C-487/01, the national court is essentially asking the Court of Justice to clarify whether, following a legislative amendment, the principles of the protection of legitimate expectations and legal certainty prevent a Member State from requiring a taxable person to repay the tax that person has deducted, in accordance with Article 20 of the directive.

30. The first question in Case C-7/02 is fundamentally the same as that in Case C-487/01, the only difference being that it is raised in relation to Article 5(7)(a) rather than Article 20 of the directive.

31. Since the questions are very similar, I shall consider them jointly below.

Summary of the observations submitted to the Court of Justice

32. The Municipality of Leusden points out that it drew up its own investment plans and fixed the rent for letting the sports ground to the Hockey Club, relying, at the time the sports ground was converted, on the legislation then in force, under which it was entitled to deduct all of the VAT applicable to expenditure on that conversion work. The lease contained no clause allowing it, in the event of legislative amendments of the kind at issue, to adjust the rent so that the lessee had to bear the financial burden consequent on the amendment; therefore, to avoid having to meet that cost, the Municipality of Leusden would now have to bring an action before the courts — obviously with no guarantee as to the outcome — to secure adjustment of the rent under Article 258 of Book VI of the Netherlands Civil Code.

33. In support of its arguments, the Municipality of Leusden cites the *Schloßtraße* judgment and the Opinion of Advocate General Geelhoed in Case C-17/01, *Sudholz*.[9] It contends that it is apparent from

9 — Opinion of Advocate General Geelhoed in Case C-17/01 *Sudholz* [2004] ECR I-4245.

that case-law that the principles of legal certainty and legitimate expectation generally preclude the subsequent withdrawal by legislative amendment of the right to deduct VAT, once established. In the light of those principles, the Municipality of Leusden therefore concludes that it cannot be required to make any adjustment under Article 20 of the directive, and the first question must, consequently, be answered in the affirmative.

34. The Holin Group, too, claims to have relied, from the start of construction work on the building subsequently leased to the ING Bank, on the possibility of opting for taxation of that lease on the basis of the version of Article 11 of the Law of 1968 which was in force at the time. The building had been constructed specifically in order to be leased to the ING Bank, as is clear from the fact that it included safes. Moreover, as early as 31 March 1995, it had a pre-contractual undertaking with the ING Bank concerning the future leasing of the building and stipulating that the rent would be subject to VAT.

35. The Holin Group therefore considers that, in the light of the principles of the protection of legitimate expectations and legal certainty and, more particularly, the way in which the Court applied them in the abovementioned judgment in *Schloßtraße*, the Netherlands tax authorities could not, as a result of the amendment to Article 11 of the Law of 1968, claim repayment of the VAT it had deducted, by way of either an adjustment under Article 20 of the directive or the imposition of a tax within the meaning of Article 5(7)(a) of the directive. It therefore concludes that the first question referred in Case C-7/02 should be answered in the affirmative.

36. The Netherlands and French Governments and the Commission take a different view, as does the United Kingdom Government, but solely in relation to Case C-7/02, the only case in which it has submitted observations.

37. In relation, first of all, to Case C-487/01, the Netherlands Government points out that, according to Article 20 of the directive, the VAT deducted is to be adjusted whenever, in the context of activities subject to VAT, the use of the goods or services in relation to which the deduction was made, does not subsequently take place or takes place in a different way from that initially declared by the taxable person. That rule applies not only in cases in which the actual use of the goods or services differs from that initially intended by the taxable person but also in instances in which that use is no longer feasible because of a legislative amendment. In point of fact, again, according to the Netherlands Government, had the legislature wished to preclude factors outside the control of the taxable person, such as a legislative amendment, from resulting in adjustment, it ought to have made specific provision for this. However, Article 20(1)(b) of the directive provides that even in cases of theft, that is to say, in a situation over which the taxable person clearly has no control, the Member States may require adjustment of the deduction.

38. It is true, the Netherlands Government continues — and on this point it has the backing of the French Government and the Commission — that Article 20 of the directive does not aspire to list all cases in which adjustment is required, but only certain examples, as demonstrated by the use of the expression 'in particular' in the first sentence of Article 20(1). Therefore, the directive does not rule out the possibility of adjustment as a consequence of a legislative amendment.

39. Furthermore, the Netherlands Government and the Commission both point out that the circumstances of this case differ from those in *Schloßtraße*, on which the Court was asked to give a ruling. *Schloßtraße* concerned a legislative amendment which jeopardised, with retroactive effect, a deduction which had already been made, thus totally depriving the taxable person of his previously acquired right to deduct VAT, whereas this case involves the legal adjustment of a deduction, on the basis of Article 20 of the directive, not with retroactive effect but solely in relation to the years of the ten-year adjustment period that had yet to elapse at the time the legislative amendment entered into force.

40. The Netherlands Government also claims that the Municipality of Leusden could have avoided the financial loss resulting from the adjustment by agreeing with the Hockey Club to review the rent or referring the matter to the courts under Article 258 of Book VI of the Netherlands Civil Code.

41. Finally, the Netherlands Government adds that if the Court were to rule that the adjustment in accordance with Article 20 of the directive was not applicable, the Municipality of Leusden would have the right to deduct in relation to goods whose use is VAT-exempt. That would be contrary to the principle — which emerges from paragraph 44 of the judgment in *Becker*, [10] paragraphs 14 to 16 of the judgment in *Weissgerber* [11] and paragraph 23 of the judgment in *Monte dei Paschi di Siena* [12] — that a taxable person who intends pursuing a tax-exempt activity may not claim any right to deduct.

42. As regards Case C-7/02, the Netherlands Government points out that the charging of VAT to the Holin Group in accordance with Article 5(7)(a) of the directive is merely an indirect consequence of the legislative amendment in question. According to that article, in fact, VAT becomes chargeable once the taxable person has the goods for the purposes of his own business. In this case, that happened on 1 January 1996, on commencement of the lease, that is to say at a point in time after the legislative amendment had entered into force. This case is therefore significantly different from *Schloßtraße* in which the taxable person was deprived of a right to deduct which had already arisen, as a result of a legislative amendment with retroactive effect.

10 — Case 8/81 [1982] ECR 53, paragraph 44.
11 — Case 207/87 [1988] ECR 4433, paragraphs 14 to 16.
12 — Case C-136/99 [2000] ECR I-6109, paragraph 23.

43. According to the Netherlands Government, the liability to VAT of the Holin Group under Article 5(7)(a) of the directive is based on the consideration that, if on the same date that Group had purchased the immovable property in question from a third party to lease it to the ING Bank, it would not have been entitled to deduct VAT on the purchase price, since the property was intended for an activity — leasing to a bank — which was no longer subject to VAT by virtue of the legislation that had just entered into force. In this case, therefore, the charging of VAT in accordance with Article 5(7)(a) is not in breach of the principles of the protection of legitimate expectations and legal certainty.

44. The Commission also endorsed that view at the hearing, modifying the stance it had previously taken in its written observations. [13]

45. The United Kingdom Government, for its part, argues that the purpose of Article 5 (7)(a) of the directive is not to adjust the deduction of VAT but to ensure respect for the principle of fiscal neutrality. Moreover, it is the responsibility of taxable persons, when entering into contracts with third parties, to insert into those contracts clauses designed to avert the possible negative impact of future legislative amendments. But the Holin Group omitted to take that precaution when negotiating the contract of lease with the ING Bank. The United Kingdom Government finally points out that the circumstances of Schloßtraße are not comparable to those of the present case, since the latter does not relate to the obligation to repay the VAT which the taxable person had previously deducted because of a legislative amendment, but the possibility of requiring the payment of VAT in accordance with Article 5(7)(a) of the directive.

46. The Netherlands Government then cites the Court's case-law, in relation to both cases, and in particular the *Racke*, [14] *Decker* [15] and *Zuckerfabrik* [16] judgments, according to which the temporal effects of a Community act may exceptionally be permitted to run from a date subsequent to its publication, if the objective to be attained so requires, and without prejudice to the full protection of the legitimate expectations of those concerned. The Netherlands Government considers that those conditions are met in both cases at issue. First, the Law of December 1995 was designed to put a stop to certain abuses which had resulted from Article 11 of the Law of 1968 before it was amended. Secondly, that law had provided for transitional arrangements applicable to many leases that were up and running. Those transitional arrangements did not, however, extend to leases — such

13 — In its observations, in fact, the Commission started from the premiss that in order to determine whether the tax under Article 5(7)(a) of the directive was chargeable to the Holin Group, it was necessary to establish the date when the lease was concluded rather than the date when it took effect. Assuming, therefore, that the contract was concluded before 29 December 1995, it had maintained that, since the lease was not yet subject to VAT in accordance with the legislation in force on that date, by charging the tax in question to the Holin Group, the Netherlands tax authority had violated the principles of the protection of legitimate expectations and legal certainty.

14 — Case 98/78 [1979] ECR 69, paragraph 20.

15 — Case 99/78 [1979] ECR 101, paragraph 8.

16 — Joined Cases C-143/88 and C-92/89 [1991] ECR I-415, paragraph 49.

as that concluded between the Municipality of Leusden and the Hockey Club — which provided for an excessively low rent compared to the extent of the lessor's investment in the property or — like that concluded between the Holin Group and the ING Bank — were not drawn up in writing by 31 March 1995, the object being to prevent those leases that had presumably been drawn up specifically to commit the abuses which that Law was designed to curb from benefiting from the legislation that had been repealed. Finally, the principle of the protection of legitimate expectations had been respected since, as early as 21 December 1994, the Netherlands Secretary of State for Finance had announced the intention of amending the provisions in question and then confirmed that intention in both a reply to a parliamentary question of 21 March 1995 and a press release of 31 March 1995.

47. The French and Netherlands Governments finally claim that it would be incompatible with the principle of VAT neutrality if the Municipality of Leusden and the Holin Group were not subject to adjustment under Article 20 of the directive and to VAT in accordance with Article 5(7)(a) of the directive respectively. In the view of these Governments, the result would constitute unwarranted discrimination against all taxable persons wishing, after the Law of December 1995 had entered into force, to have work carried out on immovable property they intended to rent out. They would not in fact be entitled to deduct VAT in relation to such work, even though they were in the same circumstances as the Municipality of Leusden and the Holin group prior to the entry into force of that law.

Assessment

48. Before replying to the questions referred, I consider it appropriate to draw attention to a number of principles the Court has established in relation to the right to deduct VAT under Article 17 of the directive.

49. It is first of all clear from the case-law that this right arises at the time the VAT becomes chargeable in accordance with Article 10 of the directive and that 'consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct'. [17]

50. The Court then explained that any person acquiring goods or services with the intention, confirmed by objective evidence, to use those goods or services in the exercise of an economic activity, is acting in the capacity of a taxable person in accordance with Article 4 of the directive and therefore acquires the right to deduct the VAT payable on such expenditure. [18] In the absence of any provision empowering the

17 — Case 97/90 *Lennartz* [1991] ECR I-3795, paragraph 8.

18 — See Case 268/83 *Rompelman* [1985] ECR 655, paragraphs 22 to 24; Case C-110/94 *Inzo* [1996] ECR I-857, paragraphs 15 to 19; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 17; Joined Cases C-110/98 and C-147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 47; Case C-396/98, cited in footnote 8 above, paragraph 36; and Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 34).

Member States to limit the right to deduct, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs, without prejudice to any subsequent adjustments in accordance with Article 20 of the directive. [19]

51. But above all, it is apparent from the Court's many judgments that the principles of legal certainty and the protection of legitimate expectations generally prevent the right to deduct VAT, once established, from subsequently being limited as a result of facts, circumstances or events outside the control of the taxable person. [20]

52. More particularly, for the purposes of this case, the Court ruled in Schloßstraße that 'provided that the national court finds that the intention to commence economic activities giving rise to taxable transactions was declared in good faith and that that intention is supported by objective evidence, the taxable person is entitled immediately to deduct the VAT due or paid on the goods or services supplied with a view to the performance of the economic activities which it envisages carrying out, and the principles of the protection of legitimate expectations and of legal certainty preclude its being deprived retroactively of that right by a legislative amendment post-dating the supply of those goods or services'. [21]

53. That said, in order to answer the two questions referred, it will first be necessary to determine whether, in the light of the case-law set out above, the Municipality of Leusden and the Holin Group actually acquired the right to deduct VAT pursuant to Article 17 of the directive before 29 December 1995, that is to say before the entry into force of the amendment to Article 11 of the Law of 1968. It will then be necessary to consider, in the light of that same case-law, whether, in the circumstances of the cases at issue, the Netherlands tax authority was entitled to ask the Municipality of Leusden for VAT adjustment in accordance with Article 20 of the directive and/or to tax the Holin Group in accordance with Article 5(7)(a) of the directive.

The acquisition by the Municipality of Leusden and the Holin Group of the right to deduct VAT within the meaning of the directive

54. On the first point, I would observe to begin with that determining 'whether, in a particular case, a taxable person has acquired goods for the purposes of his

19 — See Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraphs 16 and 21, and Case C-97/90, cited in footnote 17 above, paragraph 27.

20 — See Case C-110/94, cited in footnote 18 above, paragraphs 21, 24 and 25; Case C-37/95, cited in footnote 18 above, paragraphs 20 and 22; Case C-381/97, cited in footnote 7 above, paragraph 26; Case C-396/98, cited in footnote 8 above, paragraph 42; and Case C-400/98, cited in footnote 18 above, paragraph 41. See, to the same effect, the Opinion of Advocate General Geelhoed in Case C-17/01, cited in footnote 9 above, point 48.

21 — Case C-396/98, cited in footnote 8 above, paragraph 47; see also Case C-62/00 *Marks and Spencer* [2002] ECR I-6325, paragraph 45.

economic activity' and therefore — in so far as such activities are subject to VAT — determining whether that person has acquired a right to deduct in accordance with Article 17 of the directive 'is a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's activity'. [22]

55. Applying those principles to Case 487/01, I would first point out that, according to the submissions of the Municipality of Leusden, at the time it undertook the conversion work on the sports ground, its intention was not only to let it out but also to exercise, together with the future lessee, the option for taxation of the lease, on the basis of the version of Article 11 of the Law of 1968 that was in force at the time. That this continued to be its intention, including at the time the VAT relating to that work became chargeable within the meaning of Article 10 of the directive, and that this point in time predated the entry into force of the Law of December 1995, is not only common ground, but seems to me to be fully borne out by the facts, given that the work was completed in 1991, the sports ground was leased to the Hockey Club as of 1 January 1992 and the right to opt for taxation of that lease was actually exercised.

22 — Case 97/90, cited in footnote 17 above, paragraph 21.

56. It must therefore be recognised, on the basis of the principles cited above, that the Municipality of Leusden acquired the right to deduct the VAT applicable to the said works, pursuant to Article 17 of the directive, and, consequently, lawfully exercised that right in full during the period 1990-1991.

57. The same applies as regards the Holin Group which, as is apparent from the order for reference, acquired the right to deduct VAT, pursuant to Article 17 of the directive, on the construction work on the immovable property leased to the ING Bank, [23] and also exercised that right in full. [24]

58. In that light, I shall therefore now move on to consider whether, in the two cases at issue, the Netherlands tax authority was entitled to seek adjustment of the VAT deducted by the Municipality of Leusden pursuant to Article 20 of the directive and/or to tax the Holin group pursuant to Article 5(7)(a) of the directive.

23 — See paragraph 3.4.5 of the order for reference, in which the Hoge Raad states that: 'the present case ? involve[s] the charging of a tax on the basis of Article 5(7)(a) of the Sixth Directive, which in practice has the result that the right to deduct which *arose pursuant to Article 17 of the Sixth Directive will be adjusted*' (emphasis added).

24 — See paragraph 3.1.1 of the order for reference in which the Hoge Raad states that: 'The party concerned deducted the turnover tax charged in this respect'.

Applicability to the Municipality of Leusden of Article 20 of the directive

59. There seems to me to be no doubt that the Municipality of Leusden was asked to make the VAT adjustment pursuant to Article 20 of the directive solely because, as a result of the entry into force of the Law of December 1995, the lease of the sports ground to the Hockey Club, for which purpose the Municipality had acquired and exercised the right to deduct in accordance with Article 17 of the directive, could no longer be subject to VAT.

60. In other words, it seems to me that it cannot be disputed that, in this case, there is causal link between the entry into force of that Law and the request to the Municipality of Leusden that, by means of an adjustment pursuant to Article 20 of the directive, it should refund the VAT it had previously deducted under the abovementioned Law.

61. In those circumstances, I consider the application of an adjustment, pursuant to Article 20 of the directive, to be tantamount to revoking the right to deduct a taxable person had acquired under the directive, solely because a legislative amendment has transformed an activity formerly subject to VAT into an activity which is no longer subject to VAT.

62. That, in my view, is patently incompatible with the Court's ruling in Schloßstraße, namely that a national legislative amendment cannot deprive the taxable person of a right to deduct VAT which he acquired in good faith within the meaning of the directive (see point 52 above).

63. That case-law notwithstanding, the Netherlands Government argues that Article 20 of the directive is applicable even in circumstances in which the actual use of the goods or services differs from the use originally intended for reasons beyond the control of the taxable person, as in the case of theft, and that there is, consequently, no reason not to apply the provision to instances of legislative amendment also.

64. But I fail to see how all of that can corroborate the argument of the Netherlands Government. Article 20(1)(b) of the directive actually provides, as a general rule, that adjustment may not be sought in cases of 'destruction, loss or theft of property duly proved or confirmed', that is to say in circumstances clearly beyond the control of the taxable person; and it allows the Member States to derogate from that rule only in cases of theft. It therefore seems to me that the provision tends rather to support the opposite view to that of the Netherlands Government, confirming, as it does, that, save for the exceptions specifically listed in that article, adjustment

cannot be made in instances in which, for reasons beyond the taxable person's control, goods cannot be used for the taxable activity originally intended.

65. But the Netherlands Government and the Commission further contend — and this seems to me central to their arguments — that Article 20 of the directive does not provide a comprehensive list of cases of adjustment. The first sentence of Article 20 (1), and especially the expression 'in particular', clearly indicate that the cases listed immediately thereafter do not constitute an exhaustive list. The directive does not therefore exclude the situation in which adjustment is the result of a legislative amendment.

66. I must, however, point out that, even though there is no doubt that Article 20 contains a non-exhaustive list of possible cases of adjustment, it seems to me difficult, to say the least, to maintain that the cases not specifically listed can include legislative amendments, since that would call in question fundamental principles of Community law. In fact, it seems to me clear that, given the implications of adjustment in a situation of that nature, the legislature ought to have made specific provision for it, had it intended to include it under Article 20. The fact that the legislature made no mention of that situation has therefore, of necessity, to be interpreted as meaning that it is excluded; that, moreover, is consistent with the general rule I mentioned a little earlier.

67. If that is so, then, in my view, the claim by the Netherlands Government and the Commission that the circumstances of this case are in any event different from those which gave rise to the judgment in Schloßstraße because the issue in that case was a legislative amendment which prejudiced, with retroactive effect, a deduction that had already been granted, whereas the present case concerns the lawful adjustment of a deduction, on the basis of Article 20 of the directive, solely in relation to the years of the ten-year adjustment period still to run at the time the legislative amendment entered into force, cannot be upheld.

68. That claim cannot be upheld because it is based on the extensive interpretation of Article 20 which I challenged a little earlier. But it also fails because, despite all the finely honed arguments to the contrary, it is hard to see how it can be denied that a legislative amendment has retroactive character simply because it does not go as far as to revoke legal situations that have now ceased to exist but 'is limited' to precluding the future enjoyment of a right legitimately acquired under the earlier legislation.

69. Finally, that claim cannot be upheld because, in my view, it is caught up in a vicious circle. According to the Commission, in fact, in Schloßstraße, the Court mentioned the possible application of Article 20 of the directive as one of the cases in which a right to deduct may be revoked. That leads the Commission to conclude that any revocation of this right founded on Article 20 is legitimate, including, therefore,

revocation as a result of the legislative amendment at issue here. But I must point out that, in this way, the Commission's argument begs the question since the issue in this case is not whether Article 20 permits the withdrawal of the right to deduct (something nobody disputes) but whether it permits withdrawal in all circumstances and especially in the case of a legislative amendment which, with retroactive effect, transforms an activity previously subject to VAT into an activity which is no longer subject to VAT. As I explained earlier, Article 20 does not permit this; nor can this be inferred from the fact that the judgment in Schloßstraße mentions Article 20, for other purposes and in a different sense.

70. Moreover, as we have seen, the Netherlands Government also seeks to justify in more general and convincing terms the legitimacy of the retroactive nature of the legislative amendment at issue. But I shall return to that later, since the argument is pertinent primarily in relation to Case C-7/02 (see points 85 - 101 below).

71. I shall now consider other arguments advanced by the Netherlands Government in support of its own case. In the first place, it contends that there has been no violation of the principle of protection of legitimate expectations because as early as December 1994, the Netherlands Secretary of State for Finance had stated his intention of amending Article 11 of the Law of 1968; that intention was later confirmed on 21 March 1995 in response to a parliamentary question and on 31 March 1995 in a press release.

72. That argument cannot, in my view, be upheld either. According to the court files in fact, the Municipality of Leusden acquired the right to deduct at issue well before those announcements were made. Consequently, none of those announcements can have affected the formation of a legitimate expectation on the part of the Municipality regarding the inviolability of that right.

73. In support of its own argument, the Netherlands Government then cites the judgments in *Becker*,[25] *Weissgerber*[26] and *Monte dei Paschi di Siena*,[27] which give rise to the principle that a taxable person who intends pursuing an activity exempt from tax may not claim any right to deduct.

74. I must, however, object that in this case, as I explained above, the Municipality of Leusden acquired that right before the letting of the sports ground became VAT-exempt.

75. Nor, finally, am I convinced by the argument of the French and Netherlands Governments that if the Municipality of Leusden were not subject to any obligation to adjust, the result would be unwarranted discrimination against all those taxable

25 — Case 8/81, cited in footnote 11 above.
26 — Case 207/87, cited in footnote 12 above.
27 — Case C-136/99, cited in footnote 13 above.

persons who, despite finding themselves, after the Law of December 1995 had entered into force, in the same position as the Municipality of Leusden prior to that Law, could not, unlike the Municipality, benefit from the right to deduct VAT.

76. It actually seems clear to me that such 'difference in treatment' is the natural consequence of any new provision which, by amending legislation already in force, provides for the future only, in accordance with the principle of non-retroactivity, and thus inevitably differentiates between the legal situations already obtaining under the amended legislation and the legal situations arising subsequently.

77. In the light of the above considerations, I therefore consider that the principles of the protection of legitimate expectations and legal certainty preclude, in the circumstances of this case, the application of an adjustment, in accordance with Article 20 of the directive, to the Municipality of Leusden.

Applicability of Article 5(7)(a) of the directive to the Holin Group

78. I now come to consider whether, in this case, Article 5(7)(a) of the directive is applicable to the Holin Group. I would point out that the Holin Group too acquired, prior to the entry into force of the Law of December 1995, a right to deduct VAT in relation to the construction work on the immovable property leased to the ING Bank (see point 57 above).

79. None the less, the Netherlands Government, the United Kingdom Government and the Commission maintain that the VAT relating to that work is chargeable to the Holin Group in accordance with the directive because the event giving rise to the tax — that is to say the Holin Group's 'use' of the building in question 'for the purposes of [its] business' in accordance with Article 5(7)(a) of the directive — in this case the commencement of the leasing of the immovable property by the ING Bank, occurred on 1 January 1996, that is to say at a date when the Law of December 1995 had already entered into force. Those governments and the Commission are, therefore, denying that the Law has retroactive effect.

80. But that argument does not seem to me to be well founded. Even if we accept the argument that, in the circumstances of this case, the event that gave rise to the tax in accordance with Article 5(7)(a) of the directive occurred after the entry into force of the Law of December 1995, that does not alter the fact that another event giving rise to taxation in accordance with the directive had occurred before that Law entered into force — namely the carrying out (and invoicing for) construction work on the abovementioned immovable property on behalf of the Holin Group. And it was as a result of that event, as I have explained, that the Group acquired a right to deduct VAT.

81. In those circumstances, and as correctly pointed out by the national court [28] and the Commission in its written observations, the practical effect of accepting that Article 5(7)(a) of the directive is applicable to the Holin Group as regards those same construction works would be to compel the Holin Group to repay the VAT previously deducted and thereby revoke the right to deduct VAT it had acquired prior to the entry into force of the Law of December 1995.

82. Nor, in my view, can there be any doubt that it was specifically as a result of the entry into force of that Law that the conditions for Article 5(7)(a) of the directive to apply to the Holin Group were met. That provision actually applies only in cases in which any acquisition from third parties of the goods used by a taxable person for the purposes of his business do not confer on him the right wholly to deduct VAT.

83. Consequently, it is only because the Law of December 1995 precluded the possibility of opting for taxation of the lease of the immovable property to the ING Bank that the Holin Group ceased to be able to claim any right to deduct VAT on acquiring that property from third parties.

84. I therefore consider that there is a specific causal link between the entry into force of the Law of December 1995 and the revocation of the right to deduct VAT previously acquired by the Holin Group as a result of the charging of VAT to that Group in accordance with Article 5(7)(a) of the directive. That, in my view, confirms that in this case the Law was applied retroactively.

85. However the Netherlands Government further claims that, in any event, the conditions which justify the adoption of a Community act with retroactive effect, in the light of the abovementioned case-law of the Court of Justice (see point 40 above), are present in this case. According to that case-law, that possibility may in fact exceptionally be permitted 'when the purpose to be achieved so demands and the legitimate expectations of those concerned are duly respected'. [29]

86. In the view of the Netherlands Government, both those conditions are met in this case. The new elements introduced by the Law of December 1995 are designed to bring to an end certain abuses resulting from the application of Article 11 of the Law of 1968; and, in addition, the taxable persons were alerted to the possible future amendment of that article by a number of announcements from the Netherlands Secretary of State for Finance and a press release he issued on 31 March 1995.

28 — See paragraph 3.4.5 of the order for reference, cited in footnote 23 above.

29 — See, inter alia, Case C-143/88, *Zuckerfabrik*, cited in footnote 16 above, which contains further references.

87. As far as the statements by the Secretary of State for Finance are concerned, I would immediately point out that, were it to be proven, as in the case of the Municipality of Leusden, that the Holin Group's acquisition of the right to deduct VAT predated those announcements, logic dictates that they could not have prevented the formation of a legitimate expectation on the part of that Group as regards the inviolability of the right in question.

88. However, the second question referred [30] appears to suggest that the Holin Group had acquired the right in question at a point subsequent to the announcements.

89. Even in those circumstances, I should, however, be inclined to rule out, as does the Commission in its written observations, that a press release concerning only a legislative proposal — of still uncertain outcome, therefore — can affect the formation of a legitimate expectation concerning the inviolability of a right acquired on the basis of the legislation in force.

90. But even assuming that, being now in a position to anticipate the future amendment to the Law, the Holin Group could not fully rely on the inviolability of the right to deduct VAT, it would also be necessary to ascertain whether, in this case, the other condition the Court requires to allow an act to be retroactive is fulfilled, namely that it must be essential for the act to be retroactive if it is to achieve its declared purpose. [31]

91. In that connection, the Netherlands Government simply claims, as we have seen, that the purpose of the Law of December 1995 was to combat abuses resulting from the inadequacy of the legislation previously in force.

92. Aside from the fact that, in the question referred, the national court expressly ruled out that the Holin Group had committed fraud or an abuse in this connection, it seems to me that the argument of the Netherlands Government fails to properly to take account of the actual scope of the case-law that has been cited.

93. It seems to me in fact that it would be a distortion of the case-law to infer that the mere need to pursue the declared purpose of an act could of itself be sufficient to justify that act violating rights already acquired, for the obvious reason that it is precisely the violation and not just the

30 — I am thinking in particular of the passage which refers to a '... right to deduct arising in the period between notification of the legislative amendment mentioned in Question 1 and its entry into force?'.

31 — See, among many, Case 108/81 *Amylum* [1982] ECR 3107, paragraphs 5-6 and Case C-143/88, cited in footnote 16 above, paragraphs 50 to54.

adoption of the act that has to be justified here. In other words, what needs to be demonstrated is that conferring retroactive effect on the act is a necessary consequence of pursuing its objective and, moreover, a consequence which cannot be otherwise avoided and is proportionate to the objective pursued.

94. In this case, as the Commission also has pointed out in its written observations, it does not seem to me that the Netherlands Government has demonstrated the existence of such conditions; nor do they emerge clearly from an objective assessment of the case. In fact, I consider the reverse to be true, in the light of my comments on the fact that the Holin Group conducted itself properly in relation to the matters at issue here.

95. However, the United Kingdom Government maintains that the retroactive effect of the Law of December 1995 as of 31 March 1995, that is to say the date on which the Netherlands Secretary of State for Finance issued the press release announcing the intention of adopting the Law, was necessary in order to prevent a form of abuse known in the United Kingdom as a 'prepayment scheme' — which some taxable persons might otherwise engage in during the period between the notification and the entry into force of the law.

96. That form of abuse takes place, in particular, where a company collaborates, with one or more associated companies, artificially to fix the point at which the tax becomes chargeable under the directive at a date prior to the entry into force of the law.

97. That argument also fails to convince me. In fact, even though it seems to me perfectly reasonable and appropriate to penalise an abuse of that nature, I do not believe that it was necessary to confer retroactive effect on the Law of December 1995 for that purpose.

98. As the Court has held on several occasions, we can infer from the directive the principle according to which 'in cases of fraud or abuse ? the tax authority may claim repayment of the sums retroactively ...'.[32]

99. In my view, if a company artificially fixes the date of the event giving rise to the tax, that is a clear example of the kind of fraud or abuse which justifies, under the directive, the full repayment of any VAT that company has deducted.

32 — Case C-110/94, cited in footnote 18 above, paragraph 24; Joined Cases C-110/98 and C-147/98, cited in footnote 18 above, paragraph 46; Case C-396/98, cited in footnote 8 above, paragraph 40.

100. However, in this case, as I mentioned above, the national court has ruled out any fraud or abuse on the part of the Holin Group. Therefore, were the Law of December 1995 applicable to that Group, it would be unjustifiably deprived, retroactively, of a right to deduct VAT which it had acquired in good faith.

101. In the light of the above considerations, I therefore consider that the retroactive application of the Law of December 1995 is not justified in this case.

102. Nor, finally, for the reasons I set out above (see points 75 and 76) does the argument of the French and Netherlands Governments seem to me to be acceptable, according to which if the Holin Group were not subject to the tax in question, the result would be unwarranted discrimination against all those taxable persons who, despite finding themselves, after the Law of December 1995 had entered into force, in the same position as the Municipality of Leusden prior to that Law, could not, unlike the Municipality, benefit from the right to deduct VAT.

103. For the abovementioned reasons, I therefore consider that even in this case the principles of legal certainty and the protection of legitimate expectations preclude the charging of the tax to the Holin Group under Article 5(7)(a) of the directive.

Conclusions on the two questions analysed

104. On the basis of the above considerations, I therefore consider that the answer to the first question referred in both cases should be that the principles of the protection of legitimate expectations and legal certainty preclude adjustment, within the meaning of Article 20 of the directive, or the tax, within the meaning of Article 5(7)(a) of the directive, being chargeable to a taxable person solely because, as a result of a legislative amendment, that person may no longer levy VAT on the activity in relation to which it had acquired a right to deduct VAT under the directive.

B — *The second question referred in Case C-487/01*

105. By its second question, the national court is basically asking the Court of Justice to clarify whether, if the first question in this case is answered in the affirmative, the Law of December 1995 is inapplicable, until the period of adjustment has expired, to lessees who opted for taxation of the

lease, on the basis of the legislation in force, with the effect that, during this period, the Hockey Club would still be required to pay VAT on the lease for the sports ground.

106. The Netherlands Government maintains that since the first question referred in this case ought to be answered in the negative, there is no need to answer the second.

107. The French Government shares that view. However, were the Court to answer the first question in the affirmative, the French Government submits that the second question should be answered in the affirmative also, in accordance with the principle of fiscal neutrality and in order to secure the proper operation of the VAT regime.

108. Neither the Municipality of Leusden nor the Commission has submitted observations on this question.

109. For my part, I would first point out that even though it is generally 'solely for the national court ? to determine in the light of the particular circumstances of the case both the need for the preliminary ruling ? and the relevance of the questions which it submits to the Court', [33] the latter has, on several occasions, held that 'it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical'. [34]

110. According to that case-law, 'if it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment'. [35] In that connection, it has also been made clear that 'in order that the Court of Justice may perform its task in accordance with the Treaty, it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment'. [36]

33 — Case C-318/00 *Bacardi-Martin* [2003] ECR I-905, paragraph 41. To the same effect, see, among others, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 59; Case C-421/97 *Tarantik* [1999] ECR I-3633, paragraph 33; and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20.

34 — Case C-318/00, cited in footnote 33 above, paragraph 43. See also Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 17 and 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; Case C-415/93, cited in footnote 33 above, paragraph 61; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52; and Case C-36/99, cited in footnote 33 above, paragraph 20.

35 — Case C-343/90, cited in footnote 34 above, paragraph 20.

36 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 17.

111. That said, I would point out that it is not clear from either the order for reference or the other documents in the file that an answer to the question at issue would assist the national court in deciding the case before it.

112. It is in fact apparent from the file that this dispute has arisen solely between the Municipality of Leusden and the Netherlands tax authority as a result of the latter's decision to ask the Municipality for an adjustment in accordance with Article 20 of the directive. But it is not clear that the national court is also concerned with the question whether, despite the entry into force of the Law of 1995, the Hockey Club is still required to pay VAT on the lease.

113. The fact that neither the Netherlands Government nor the Municipality of Leusden felt the need to submit to the Court any observations on this question and that, although it would patently be the party most affected by any answer to the question, the Hockey Club has not only been absent from the whole procedure before the Court, it has not even been involved, so far as I can determine, in the proceedings before the national court, seems to me to indicate that this question does not form part of the dispute pending before the Hoge Raad.

114. In the light of the above considerations, I therefore consider that the second question referred by the Hoge Raad in Case C-487/01 is hypothetical and has therefore to be declared inadmissible.

115. I will, however, make the following points, in the event that the Court does not share my view.

116. Were this question answered in the affirmative, the practical effect would merely be to suspend, during the remainder of the period of adjustment, the applicability of the Law of December 1995 to leases operational at the time it entered into force, thereby guaranteeing that the coffers of the Netherlands exchequer would be in receipt of revenue from a tax that could not otherwise have continued to be levied. In other words, a response of that nature would enable the Netherlands exchequer to compensate for the failure of the Law of December 1995 to provide for transitional rules requiring lessees, who, as a result of that Law, would no longer be required to pay VAT, to continue to pay the tax until the period of adjustment ended.

117. In the light of those considerations, it seems to me that this question raises an issue of the interpretation of national rather than Community law. If in fact it is the case — as I explained when answering the first question — that, when amending national legislation on charging VAT on the letting of immovable property, a Member State is required to respect, in accordance with the principles of legal certainty and the protec-

tion of legitimate expectations, the right to deduct VAT acquired by the lessors of immovable property under that legislation, no principle of Community law, in my view, prevents that State, when making the amendment, from depriving its own exchequer — albeit unintentionally — of the right to continue levying the tax on the lessee of such immovable property.

118. But the French Government claims that if the Netherlands exchequer were not allowed to continue to levy VAT on lessees of immovable property who opted to pay that tax under legislation that has now been repealed, VAT neutrality and the proper operation of the VAT regime would be jeopardised.

119. That seems to me to be a questionable argument. If I have properly understood, it is actually based on the alleged violation of two principles arising from the directive: the principle according to which 'all traders should be treated neutrally as regards their tax burden, regardless whether they are engaged in only preparatory acts or whether they are carrying out taxable transactions',[37] and the principle that a taxable person may deduct VAT charged on a transaction relating to inputs only in so far as the outcome serves the purposes of a taxable transaction relating to outputs.

120. Neither of those principles seems to me to have been violated in this case. At the time when the Municipality of Leusden deducted the VAT chargeable on the conversion work on the sports ground, it actually did so for the purpose of an activity — letting the sports ground to the Hockey Club — which was at that time taxable under the national legislation then in force. Therefore, the Municipality of Leusden acquired and exercised the right to deduct VAT in full compliance with the abovementioned principles.

121. Since, therefore, I find that the answer to this question does not depend on the interpretation of the provisions of the directive or the application of principles of Community law, I consider that, if this question is held to be admissible, the answer should be that it is for the national court to assess whether, on the basis of the principles of its own legal order, those lessees who opted for taxation of the lease on the basis of the legislation in force at the time the lease was drawn up should continue to be required to pay that tax even after the entry into force of a legislative amendment which removes the possibility of opting for taxation of that lease.

37 — See the Opinion of Advocate General Lenz in Case C-110/94, cited in footnote 18 above, point 27; see also Case 268/83, cited in footnote 18 above, paragraph 23.

C — *The second question referred in Case C-7/02*

122. If I have properly understood, by its second question in Case C-7/02, the national Court is actually asking the Court for elucidation on two points. Firstly, it is asking whether an affirmative answer to the first question, namely the inviolability of the right to deduct VAT acquired by the Holin Group prior to the entry into force of the Law of December 1995, also applies to the period subsequent to the press release of 31 March 1995 in which the Netherlands Secretary of Finance announced the proposed amendment to Article 11 of the Law of 1968. If the answer to that question is in the negative, the Hoge Raad is asking whether the Holin Group is required to pay a tax in accordance with Article 5(7)(a) of the directive, to be calculated, in accordance with Article 11(A)(1)(b)of the directive, [38] on the basis of the construction costs of the buildings leased to the ING Bank and incurred after the date of that press release.

123. The Holin Group maintains that the press release post-dated the commitments it had entered into with the ING Bank in relation to the future lease of the immovable property and the option for taxation of that lease and that, consequently, any taxation of the work commissioned on that immovable property after the press release was issued is incompatible with the principles of legitimate expectation and legal certainty.

124. The French Government for its part contends that if, in answer to the first question in this case, the Court holds that the tax under Article 5(7)(a) of the directive is not applicable to adjust a VAT deduction made for the purposes of a taxable activity which subsequently ceased to be taxable as a result of a legislative amendment, that tax is inapplicable to the Holin Group as regards the whole of the period prior to the legislative amendment. Furthermore, it would not be possible, in accordance with Article 11(A)(1)(b) of the directive, to calculate that tax exclusively on the basis of the expenditure on construction work on the immovable property incurred after the press release was issued.

125. But the Netherlands and United Kingdom Governments take a different view. They in fact consider that the Holin Group knew, at least after 31 March 1995, that it would be liable to tax in accordance with Article 5(7)(a) of the directive, if it decided to lease to the ING Bank the immovable property on which it was having work done. Consequently, the Holin Group could not rely on the principles of the protection

38 — Article 11(A)(1)(b) provides that, for the supplies referred to in Article 5(6) and (7) of the directive, the taxable base is to be the purchase price of the goods or of similar goods or, in the absence of the purchase price, the cost price, determined at the time of supply.

of legitimate expectations and legal certainty in relation to the period after 31 March 1995 and the Group can, therefore, be charged that tax, calculated on the basis of the expenditure incurred during that period.

126. The Commission, finally, points out in its written observations [39] that the press release could not have affected the formation on the part of the Holin Group of a legitimate expectation concerning the chargeability of VAT on the future lease of the immovable property in question. The Commission comments that the press release actually related only to proposed legislation by the Netherlands Government, and that it was not certain whether it would be passed, or passed unamended, by the Netherlands parliament. Consequently, even during the period between the press release and the final adoption of the new rules, the legislation in force was likely to foster a legitimate expectation on the part of taxable persons.

127. For myself, I consider that by this question, the national court is in fact merely reformulating the first question submitted in this case, highlighting the fact that the legislative amendment at issue was announced in advance in a press release.

128. I shall therefore confine myself to referring to my comments on the first question, namely that if, on the one hand, it is at least questionable, as the Commission rightly points out, whether, after the press release was issued, the Holin Group could have remained absolutely confident of the right to deduct VAT it had acquired (see point 89 above), on the other, there seems, in this case, to be no valid justification for that right to have been revoked by the Law of December 1995, (see points 90-101 above).

129. On those grounds, therefore, I consider that the reply here must be that the answer to the first question also applies to the period following the announcement, by the Netherlands Secretary of State for Finance in a press release, that the Netherlands Government intended to introduce amendments to the VAT legislation in force.

39 — Although, at the hearing, the Commission changed its stance, as compared with its written observations, in relation to the first question submitted in this case (see point 43 above), it made no further comment on the second question at the hearing.

V — Conclusions

130. In the light of the above considerations, I therefore propose that the Court give the following answers to the questions submitted:

(1) As regards the first question raised in Cases C-487/01 and C-7/02, the principles of the protection of legitimate expectations and legal certainty preclude the application to a taxable person of an adjustment, pursuant to Article 20 of the directive, or a charge to tax, pursuant to Article 5(7)(a) of the directive, on the sole ground that, as a result of a legislative amendment, that person may no longer charge VAT on the activity in relation to which it had acquired a right to deduct VAT under the directive.

(2) The second question submitted in Case C-487/01 is inadmissible. In any event, it is for the national court to assess whether, on the basis of the principles of its own legal order, those lessees who opted for taxation of the lease on the basis of the legislation in force at the time when the lease was drawn up should continue to be required to pay that tax even after the entry into force of a legislative amendment which removes the possibility of opting for taxation of that lease.

(3) As regards the second question raised in Case C-7/02, the answer to the first question also applies to the period following the announcement, in the press release issued by the Netherlands Secretary of State for Finance, that the Netherlands Government intended to introduce amendments to the VAT legislation in force.