Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 25 November 2015 [1]

Case C-332/14

Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR
v
Finanzamt Krefeld

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling — Taxation — Value added tax — Right to deduct input tax — Goods and services used for both taxable and exempt transactions — Letting of a building for commercial and residential purposes — Calculation of the deductible proportion on the basis of the turnover attributed to commercial tenants — National legislation prescribing that the proportion is to be calculated on the basis of the building's floor area attributed to those tenants — Retroactive effect — Legal certainty — Protection of legitimate expectations)

I – **Introduction**

1. The present request for a preliminary ruling concerns the interpretation of Articles 17, 19 and 20 of 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, [2] as amended by Council Directive 95/7/EC of 10 April 1995 [3] ('the Sixth Directive'), and of the principles of legal certainty and of the protection of legitimate expectations.

2. The request has been made in proceedings between Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR and Finanzamt Krefeld (Tax Office, Krefeld) relating to the calculation rule to be used to determine the deduction entitlement in respect of value added tax (VAT) for 2004 and to the adjustment of that deduction of tax, in the context of the construction and maintenance of a mixed-use building, that is to say, a building intended for a use involving both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible.

3. The present case should, in particular, lead the Court to offer a number of clarifications regarding the implications of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) and the possibility for a Member State, following a legislative amendment, to require an adjustment of the initial VAT deduction for years prior to the entry into force of that amendment, including for parts of the building whose use does not differ from the original intended use.

1 — Original language: French.
2 — OJ 1977 L 145, p. 1.
3 — OJ 1995 L 102, p. 18.

4. I would like to state at the outset that, on the basis of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689), the questions referred by the national court could, in my view, be answered relatively simply to the effect that the first subparagraph of Article 17(5) and Article 19(1) of the Sixth Directive preclude a Member State from giving precedence, systematically and indiscriminately for all mixed-use goods and services, to a method of calculating the extent of the right to deduct input VAT other the turnover-based allocation key provided for in the aforementioned provisions.

II – **Legal context**

A – *EU law*

5. Article 17 of the Sixth Directive, headed 'Origin and scope of the right to deduct', provides:

'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 within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

...

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.However, Member States may:

...

(c) authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services;

...'

6. Article 19 of the Sixth Directive, headed 'Calculation of the deductible proportion', provides in paragraph 1:

'The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

— as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

— as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. ...

…'

7. Article 20 of the Sixth Directive, headed ‘Adjustments of deductions’, provides in paragraphs 1 and 2:

‘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; ...

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 20 years.’

B – *German law*

8. The relevant provisions of German VAT legislation are contained in the Law on Turnover Tax of 1999 (Umsatzsteuergesetz 1999, BGBl. 1999 I, p. 1270; ‘the Law on Turnover Tax’).

9. Paragraph 4 of the Law on Turnover Tax, headed ‘Exemptions for supplies of goods and services’, provides:

‘The following transactions falling under Paragraph 1(1)(1) shall be exempt from tax:

...

12. (a) the leasing and letting of immovable property, ...’

10. Paragraph 15 of the Law on Turnover Tax provides:

‘(1) The trader may deduct the following amounts of input tax:

1. tax statutorily payable for supplies of goods and services which have been made for his business by another trader.

...

(2) There shall be no deduction of input tax in respect of the supply, import or intra-Community acquisition of goods, or in respect of supplies of services, which the trader uses to carry out the following transactions:

1. exempt transactions;

...

(4) If a trader uses any goods or services supplied, imported or acquired in the Community only in part to carry out transactions in respect of which there is no right to deduct, the part of the input tax which is economically attributable to those transactions shall not be deductible. The trader may make an appropriate estimate of the non-deductible amounts.'

11. The Tax Amendment Law of 2003 (Steueränderungsgesetz 2003, BGBl. 2003 I, p. 2645), which entered into force on 1 January 2004, added a third sentence to Paragraph 15(4) of the Law on Turnover Tax, which reads as follows:

'Determination of the non-deductible part of the input tax in accordance with the ratio between the turnover in respect of which there is no right to deduct and the turnover which confers a right to deduct shall be permissible only if no other economic apportionment is possible.'

12. The reasons for this addition by the legislature, according to the abovementioned law, are as follows:

'This provision seeks an appropriate allocation of input taxes in connection with supplies of goods and services. This new arrangement restricts the use of the turnover-based allocation key as the sole allocation criterion. That allocation key may be used only if no other economic allocation is possible. This amendment is necessary because the Bundesfinanzhof (Federal Finance Court) ruled, by judgment of 17 August 2001 ..., that the allocation of amounts of input tax in accordance with the ratio between the amounts of output turnover is to be recognised as an appropriate estimate within the meaning of Paragraph 15(4) of the Law on Turnover Tax. However, application of the turnover-based allocation key as a general allocation criterion would result in incorrect allocations, particularly in the case of the construction of mixed-use buildings; ... Application of this turnover-based allocation key as a general allocation criterion is not made mandatory by the Sixth Directive. Such a "proportional" arrangement ... is not obligatory for the Member States, as under the third subparagraph of Article 17(5) of the Sixth Directive they may lay down allocation criteria which depart from that arrangement. In respect of the acquisition of buildings, an allocation of input tax in accordance with the ratio between productive values and market values is also still possible ...'

13. Paragraph 15a of the Law on Turnover Tax, headed 'Adjustment of input tax', provides in subparagraphs 1 and 2:

'(1) Where some change occurs in the matters used to determine the amount of the original deductions within five years of the first use of goods, compensation shall be made, in respect of each calendar year corresponding to such change, by means of an adjustment of the deduction of the amounts of input tax apportionable to acquisition or production costs. In the case of immovable property, including the essential parts thereof, rights to which the provisions of civil law relating to immovable property apply and buildings on third-party land, a period of 10 years shall be substituted for the period of five years.

(2) Adjustment under subparagraph 1 is to be carried out, in respect of each calendar year corresponding to the change, on the basis of one fifth of the amounts of input tax apportionable to the capital goods in the cases covered by the first sentence of that subparagraph, and on the basis of one tenth thereof in the cases covered by the second sentence ...'

III – **The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

14. Between 1999 and 2004, Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR, a property partnership governed by civil law, demolished an old building on a plot of land owned by it and constructed a building for residential and commercial use there. The building was completed in 2004 and contains six residential and commercial units and 10 underground parking spaces. Some of those units and spaces were let as early as October 2002.

15. In the tax years for the period from 1999 to 2003, Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR calculated its entitlement to deduct VAT paid for the demolition and construction works by applying an allocation key based on the ratio between the turnover to be generated by the letting of the commercial units (which was subject to VAT) and the turnover arising from other letting transactions (which were exempt from VAT) ('the turnover-based allocation key'). Using that allocation key, the deductible portion of the VAT was 78.15%. In the course of two actions brought concerning the amount of VAT deductible for the 2001 and 2002 tax years, the Tax Office, Krefeld, accepted that allocation key.

16. In 2004, some parts of the building which had originally been envisaged for use subject to VAT were let exempt from VAT. In order to adjust the input tax deductions made, in its return for the 2004 tax year Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR calculated a compensatory amount which it determined by applying the turnover-based allocation key. The total amount of VAT to be refunded to Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR was around EUR 3 500.

17. The Tax Office, Krefeld, rejected that method of calculation on the ground that, following the entry into force of the third sentence of Paragraph 15(4) of the Law on Turnover Tax, the turnover-based allocation key could be used only if no other method of allocation of mixed-use goods and services was possible. Since it was possible and more precise to determine the attribution of the goods and services used for the demolition or construction of a building by reference to the ratio between the floor area (in square metres) of the commercial units and the floor area of the residential units ('the floor area-based allocation key'), the Tax Office, Krefeld, considered that Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR should have applied that allocation key. Accordingly, the Tax Office, Krefeld, allocated the amounts of input VAT paid for construction costs in respect of the period covering the years 1999 to 2004 between the various commercial units and residential units and determined a correction amount for each unit, including for units whose actual use was no different from the originally intended use, applying the floor area-based allocation key. The Tax Office, Krefeld, set the deduction percentage at 38.74%, corresponding to the total floor area of the building whose letting is taxable, and fixed the amount of VAT to be refunded to Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR for 2004 at EUR 950.

18. The Finanzgericht Düsseldorf (Finance Court, Düsseldorf) partially annulled that tax amendment notice on the ground that the floor area-based allocation key could be applied only in respect of VAT payable on maintenance costs for the building in question incurred from 2004. Consequently, it fixed the amount of VAT to be refunded to Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR for 2004 at just over EUR 1 700.

19. Both parties to the main proceedings appealed on a point of law against that judgment to the Bundesfinanzhof (Federal Finance Court).

20. According to the referring court, the dispute arises, in the first place, from questions connected with the Court's interpretation of Article 17(5) of the Sixth Directive in the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689).

21. The referring court notes, first of all, that in *Armbrecht* (C-291/92, EU:C:1995:304) the Court ruled, in paragraph 21 of its judgment, that 'apportionment [of the selling price] between the part allocated to the taxable person's business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division'.

22. On the basis of that finding, the Bundesfinanzhof (Federal Finance Court) ruled, in a judgment of 17 August 2001, that, 'if ... a building ... which is intended for "mixed" … use is acquired or constructed, … input tax is to be attributed neither according to an "investment-based key" nor on a spatial ("geographical") basis; instead, the "percentage" allocation of the use of the whole building to exempt and taxable turnover is determinant ...'

23. Following that judgment, the German tax authorities partially modified their previous practice and drew a distinction according to whether the VAT in question relates to the acquisition or construction costs for a building or to the costs of use, conservation and/or maintenance of the building. In the former case, the deduction is calculated on the basis of the proportion of the building used for the purposes of taxed transactions. In the latter case, the deduction is still calculated by reference to the part of the building for which VAT has been incurred, an allocation key being used only to determine the extent of the right to deduct VAT paid for supplies of goods or services which could not be assigned to a specific part of the building or which are attributable to the common parts.

24. Against this background, the referring court is uncertain whether the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) has, in turn, called into question existing tax practice.

25. The referring court observes that in that judgment the Court ruled that it is possible to have recourse to an allocation key, and thus a method of attribution for mixed-use goods and services, that is different from the turnover-based method provided for by the Sixth Directive only if that method does not apply to all cases of mixed use and if it results in a more precise determination of the deduction entitlement. According to the referring court, the Court held that the third sentence of Paragraph 15(4) of the Law on Turnover Tax is not compatible with the Sixth Directive in so far as it adopts a set of rules for calculating deductions for mixed-use goods which derogates generally from the turnover-based allocation key. However, with regard to the condition that the method adopted must guarantee a more precise allocation in respect of the deduction to be made, the referring court states that that condition is satisfied in this case as application of the floor area-based allocation key is generally more precise than the turnover-based allocation key. It follows that the method used by the German authorities and courts before judgment was delivered in *Armbrecht* (C-291/92, EU:C:1995:304), which was to determine the part of the building for which VAT has been incurred and to apply an allocation key only for the remaining amounts relating to the parts of the building actually used for mixed purposes, should take precedence as it produces more precise results than the turnover-based allocation key.

26. The referring court further notes that in the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 19) the Court held that it is possible for a Member State to use a method of allocation for mixed-use goods and services other than the method provided for in the Sixth Directive only for a 'given transaction, such as the construction of a mixed-use building'. Consequently, the referring court, which considers that the same method, namely the floor area-based method, should be applied for amounts of VAT connected with the construction or acquisition of a building and for amounts relating to costs for the use, conservation or maintenance of the building, is uncertain whether such alignment of the rules is consistent with that judgment.

27. In the second place, the referring court finds that, whilst the Court of Justice has already had occasion to acknowledge that a legislative amendment may give rise to the obligation to adjust certain VAT deductions, it has hitherto ruled only on legislative amendments affecting the very existence of the right to deduct. That being so, there is doubt whether Article 20 of the Sixth Directive permits a Member State to require a taxable person to make a VAT adjustment on account of the amendment

by that State of the method of attribution to be applied for mixed-use goods and services, including where that taxable person has continued to use the parts of the building to perform taxable transactions in accordance with his original intention and where he has not committed any inaccuracies in the calculation of the original deductions or derived an unjustified advantage from the initial deductions.

28. In the third place, the referring court is uncertain whether, in circumstances such as those in the main proceedings, the principles of the protection of legitimate expectations and of legal certainty preclude a VAT adjustment. That court notes, first, that the third sentence of Paragraph 15(4) of the Law on Turnover Tax could be insufficiently precise as it derogates in respect of all cases of mixed use from the general rule laid down in Article 17(5) of the Sixth Directive. Second, it states that the method of attribution for mixed-use goods and services used by Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR had been approved, for certain years, by the competent administrative and judicial authorities. Third, the referring court states that the national legislation does not include an express provision according to which the entry into force of the third sentence of Paragraph 15(4) of the Law on Turnover Tax is liable to give rise to VAT adjustments and that it has not laid down any transitional arrangements. Lastly, it states that the modification of the method of attribution for mixed-use goods and services is not mandatory, as the turnover-based allocation key is still recognised as amounting to an appropriate estimate within the meaning of Paragraph 15(4) of the Law on Turnover Tax even though, as from 1 January 2004, it has been made subsidiary.

29. In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) The Court of Justice of the European Union has ruled that the third subparagraph of Article 17(5) of [the Sixth Directive] allows Member States, for the purposes of calculating the proportion of input VAT deductible for a given operation, such as the construction of a mixed-use building, to give precedence, as the key to allocation, to an allocation key other than that based on turnover appearing in Article 19(1) of the Sixth Directive, on condition that the method used guarantees a more precise determination of that deductible proportion (judgment of 8 November 2012 in *BLC Baumarkt*, C-511/10, EU:C:2012:689).

(a) At the time of acquisition or construction of a mixed-use building, for the purposes of calculating more precisely the deductible amounts of input tax, must inputs the basis of assessment of which is part of the acquisition or construction costs be attributed initially to the (taxable or exempt) turnover of the building and only the remaining input tax be attributed by reference to a floor area-based or turnover-based allocation key?

(b) Do the principles established by the Court of Justice in its judgment of 8 November 2012 in *BLC Baumarkt* (C-511/10, EU:C:2012:689) and the answer to the foregoing question apply also to amounts of input tax on inputs for the use, conservation or maintenance of a mixed-use building?

(2) Is Article 20 of the Sixth Directive to be interpreted as meaning that the adjustment provided for in that provision as regards the initial input tax deduction applies also to circumstances in which a taxable person has attributed input tax arising from the construction of a mixed-use building in accordance with the turnover method provided for in Article 19(1) of the Sixth Directive and permitted by national law, and during the adjustment period a Member State subsequently provides that a different allocation key is to take precedence?

(3) If the answer to the previous question is in the affirmative: Do the principles of legal certainty and of the protection of legitimate expectations preclude the application of Article 20 of the Sixth Directive if, for cases of the type described above, the Member State has neither expressly

required input tax to be adjusted nor adopted any transitional arrangements, and if the input tax attribution applied by the taxable person in accordance with the turnover method had previously been recognised by the Bundesfinanzhof (Federal Finance Court) as being generally appropriate?'

30. Written observations on those questions were submitted by the German and United Kingdom Governments and the European Commission. Those parties also presented oral argument at the hearing on 9 July 2015.

IV – **Analysis**

A – *Preliminary remarks*

31. By its first question, the referring court seeks clarification, in essence, regarding the implications of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) concerning the method of calculating the VAT deduction in respect of, first, construction and production costs for a 'mixed-use' building, that is to say, a building intended for a use involving both transactions in respect of which VAT is deductible (such as commercial leases concluded for certain parts of the building) and transactions in respect of which VAT is not deductible (such as residential leases) (first question, part (a)) and, second, costs for the use and maintenance of that building (first question, part (b)). This question essentially concerns the interpretation of Article 17(5) of the Sixth Directive.

32. By its second and third questions, which I believe should be examined together, the referring court asks about the limits imposed by Article 20(2) of the Sixth Directive or by the principles of legal certainty and of the protection of legitimate expectations on a Member State's right to demand from a taxable person, following a legislative amendment of the method of calculating the VAT deduction, a VAT adjustment in respect of previous deductions made before the entry into force of that amendment.

33. Even though these questions focus primarily on the tax treatment of a mixed-use building, such as that at issue in the main proceedings, it should nevertheless be observed that, as is clear from the grounds of the request for a preliminary ruling and the observations of the interested parties, the present case raises a number of concerns from the perspective of the compatibility of a national rule such as the third sentence of Paragraph 15(4) of the Law on Turnover Tax, introduced with effect from 1 January 2004, both with Article 17(5) of the Sixth Directive and in the light of the principles of legal certainty and of the protection of legitimate expectations.

34. These concerns are, aside from a few minor variations, identical to those which emerged in *BLC Baumarkt* (C-511/10, EU:C:2012:689), a case also referred by the Bundesfinanzhof (Federal Finance Court) in similar circumstances. That case, which related specifically to the method of calculating the VAT deduction in respect of construction costs for a mixed-use building, in fact also stemmed from the legislative amendment made by the third sentence of Paragraph 15(4) of the Law on Turnover Tax to the method of calculating the VAT deduction applicable to all mixed-use goods and services — an amendment which relegates the turnover-based allocation key to a 'position which is distinctly subordinate',[4] whereas, in accordance with the provisions and the purpose of the Sixth Directive, as a general rule precedence must be given to that key, as I will show in more detail below.

4 — The expression used by Advocate General Cruz Villalón in point 44 of his Opinion in *BLC Baumarkt* (C-511/10, EU:C:2012:245).

35. In the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraphs 17 and 18), the Court did hold that 'to permit a Member State to adopt legislation, such as that described by the national court, which derogates generally from the rules established by the first and second subparagraphs of Article 17(5) and by Article 19(1) of the Sixth Directive would be contrary to the latter', explaining that such an 'interpretation is, moreover, in accordance with the purpose of the third subparagraph of Article 17(5) of the Sixth Directive, the provisions of which are suitable for application to given situations ...'.

36. However, neither the German Government nor, it would seem, the Bundesfinanzhof (Federal Finance Court) has drawn any conclusions from this finding, which related explicitly to the adoption by the German legislature of the third sentence of Paragraph 15(4) of the Law on Turnover Tax, the application of which is once again put in issue in the main proceedings.

37. Nonetheless, as I will explain below, the finding made by the Court in paragraphs 17 to 19 of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) means that the Federal Republic of Germany has failed to comply with the relevant provisions of the Sixth Directive, which, in turn, must mean that the third sentence of Paragraph 15(4) of the Law on Turnover Tax cannot be relied upon against individuals. Consequently, it is largely superfluous to answer each of the questions referred by the national court and I will therefore examine the questions in detail only in the alternative.

B – *The interpretation of Articles 17(5) and 19(1) of the Sixth Directive and the inability to rely on the third sentence of Paragraph 15(4) of the Law on Turnover Tax*

38. VAT, which is a tax borne entirely by the final consumer, is characterised by its neutrality at all stages of production and marketing. Up to the stage of the final consumer, the taxpayers who participate in the production and marketing process transfer to the tax authorities the amounts of VAT which they have charged their customers (output VAT collected) after deducting the amounts of VAT which they have paid to their suppliers (deductible input VAT).

39. Under Article 17(2) of the Sixth Directive, where a taxpayer purchases goods or services to carry out transactions subject to output tax, he is entitled to deduct the VAT paid on the purchase of those goods or services. As the Court has repeatedly stated, the right to deduct, which can be exercised immediately in respect of all the VAT charged on transactions relating to inputs, is an integral part of the VAT scheme and in principle may not be limited. [5]

40. Problems may nevertheless arise in the case of 'mixed-use' goods or services, where a taxpayer, having purchased goods or services in the course of his economic activity, uses them partly for the purposes of his taxed transactions and partly for other purposes.

41. As I have previously explained, the Sixth Directive envisages two categories of provisions relating to mixed use. [6]

42. However, just one category is at issue in the present case: the category which includes Article 17(5) of the Sixth Directive. [7]

5 — See, inter alia, judgments in *Securenta* (C-437/06, EU:C:2008:166, paragraph 24), and *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 22).

6 — See my Opinion in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C-515/07, EU:C:2008:769, points 23 to 30).

7 — The second category, to which the present case does not relate, concerns the use of goods and services both for economic transactions in respect of which VAT is deductible and for purposes other than those of the taxable person's business.

43. The scheme laid down by that provision relates to input VAT on expenditure connected exclusively with output economic transactions some of which give rise to the right to deduct and others, because they are exempt, do not give rise to such a right.[8] This is the case, as in the main proceedings, with costs connected with leasing transactions in respect of a building used for both commercial (taxed) and residential (exempt) purposes.

44. In such a case, the first subparagraph of Article 17(5) of the Sixth Directive provides that only such proportion of the VAT is deductible as is attributable to the former taxable transactions.[9]

45. Under the second subparagraph of Article 17(5) of the Sixth Directive, the deductible amount is calculated according to a proportion fixed in accordance with Article 19 of that directive,[10] that is to say, a turnover-based allocation key.

46. Nevertheless, as the Court has made clear, the third subparagraph of Article 17(5) of the Sixth Directive, which begins with the word 'however', allows derogation from the rule set out in the first and second subparagraphs of that provision.[11]

47. Article 17(5) permits Member States to opt for one of the other methods of determining the deduction entitlement which are set out in its third subparagraph, in particular the ability to 'authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services' (point (c) of the third subparagraph of Article 17(5)) and which, according to the Court, include the allocation key based on the floor area of parts of a mixed-use building.[12]

48. The third subparagraph of Article 17(5) of the Sixth Directive must, however, be regarded as constituting a provision derogating from the first and second subparagraphs of Article 17(5).[13]

49. In the exercise of the option available to them under that provision, Member States must respect the effectiveness of the first subparagraph of Article 17(5) of the Sixth Directive, the purpose and general system of that directive and the principles which underlie the common system of VAT, in particular those of fiscal neutrality and proportionality.[14]

50. The Member States' power to adopt a method of calculating the VAT deduction other than the turnover-based method is therefore restricted.

51. As is clear, in particular, from the judgments in *BLC Baumarkt* (C-511/10, EU:C:2012:689) and *Banco Mais* (C-183/13, EU:C:2014:2056), the exercise of the option available to the Member States seems to be subject to two conditions both being met.

8 — See to that effect, inter alia, judgments in *Securenta* (C-437/06, EU:C:2008:166, paragraph 33), and *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraphs 26 and 27).

9 — See, in particular, judgments in *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 53); *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 17); *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 13); and *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 28).

10 — Judgments in *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 18); *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 14); and *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 29).

11 — See judgments in *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 19), and *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 15).

12 — See judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 24).

13 — Judgments in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 16), and *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 18).

14 — See judgments in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraphs 16 and 22); *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 52); and *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 27).

52. First, the Member State must have opted for one of the methods of calculation other than the turnover-based method for 'a given transaction', [15] or at least for 'given situations', [16] or to take account of 'the specific characteristics of some activities'. [17] In other words and in any event, the alternative method of calculation must not be established as a method derogating generally from the turnover-based method. [18]

53. Second, the alternative method used must guarantee a 'more precise' [19] determination of the extent of the right to deduct input VAT than that which would arise from application of the turnover-based allocation key. [20]

54. In the Court's reasoning in the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689), those two conditions seem to give specific expression to respect for the purpose, objectives and principles of the Sixth Directive. They indeed make it possible to ensure that the principle of neutrality is observed and to achieve greater precision in the calculation of the extent of the right to deduct wherever that is justified, without distorting the basic structure of the rules for calculating the VAT deduction, which are based on the fundamental priority given to the turnover-based allocation key. [21]

55. In my view, it is only if a Member State observes those conditions that it is permitted to opt for a method of calculating the extent of the right to deduct for mixed-use goods or services other than the turnover-based method, such as that provided for in point (c) of the third subparagraph of Article 17(5) of the Sixth Directive.

56. Although the referring court makes some observations on the first of these conditions, it has not asked the Court directly about the consequences entailed by the Federal Republic of Germany's failure to satisfy that condition, a finding which is nevertheless apparent from paragraphs 17 to 19 of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689).

57. More specifically, first, it is only from the point of view of the calculation of the deduction entitlement in respect of maintenance and upkeep costs for a mixed-use building that the referring court is uncertain whether, assuming that it is possible to apply in relation to such costs a method of calculating the VAT deduction other than the turnover-based allocation key, like the method applicable to the construction costs for that building which was at issue in *BLC Baumarkt* (C-511/10, EU:C:2012:689), that extension still satisfies the condition of relating to 'a given transaction'.

58. Second, whilst is true that in the context of the third question which it has referred to the Court the national court does mention the excessively general character of the third sentence of Paragraph 15(4) of the Law on Turnover Tax, its queries in this regard are confined to observance of the principle of legal certainty in the event that that provision includes an implicit retroactive rule requiring adjustment of the VAT deduction initially made by the taxable person.

59. On the other hand, the referring court does not seek any clarification in relation to the fact that the Federal Republic of Germany has maintained the provisions of the third sentence of Paragraph 15(4) of the Law on Turnover Tax as they stand and to the highly subsidiary nature of the turnover-based allocation key under that provision, after delivery of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689).

15 — Judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraphs 19 and 24).

16 — Ibid. (paragraphs 18 and 20).

17 — *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 29).

18 — Judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 17).

19 — Judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraphs 18, 24 and 26 and operative part of the judgment).

20 — See, also, judgment in *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 32).

21 — See, to that effect, Opinion of Advocate General Cruz Villalón in *BLC Baumark*t (C-511/10, EU:C:2012:245, point 44).

60. In other words, the referring court seems to read the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) in disregard of the general wording of the third sentence of Paragraph 15(4) of the Law on Turnover Tax, 'as if' the Court had authorised the German legislature to give precedence to a method of calculation other than the turnover-based allocation key without any condition other than that the alternative method of calculation applied must be more precise.

61. It is true that the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) is tinged by a number of ambiguities.

62. As far as is relevant at this point, it should be noted that, whilst the operative part of that judgment states that the Member States are permitted to give precedence to an allocation key other than that based on turnover for a given transaction, such as the construction of a mixed-use building, 'on condition that the method used guarantees a more precise determination of the ... deductible proportion', paragraph 19 of the judgment adds that it may do so 'while complying with the principles underlying the common system of VAT'.

63. This clarification seems to entail, in the light of paragraphs 16 to 18 of the judgment, respect for the basic structure of the rules for calculating the VAT deduction — which are based on the fundamental priority given in all cases of mixed use to the turnover-based allocation key — or, in any event, the ruling out of the purely subsidiary character of that key, a character which is nevertheless clear from the third sentence of Paragraph 15(4) of the Law on Turnover Tax.

64. To treat the turnover criterion — as the German legislature does — as 'a final, subsidiary option' [22] when all the other methods of attribution have been exhausted without distinguishing the mixed-use operations concerned is tantamount to disregarding the general rule laid down in the first subparagraph of Article 17(5) of the Sixth Directive and 'the objective of the Sixth Directive, set out in the 12th recital thereof, according to which calculation of the deductible proportion must be carried out in a similar manner in all Member States'. [23]

65. It is true that point (c) of the third subparagraph of Article 17(5) of the Sixth Directive provides that a Member State may 'authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services'.

66. If the first subparagraph of Article 17(5) of the Sixth Directive is not to be rendered entirely ineffective, such authorisation cannot, however, mean that the calculation of the VAT deduction must be made on the basis of the actual use of *all* mixed-use goods and services. As the United Kingdom Government has asserted in essence in its written observations, point (c) of the third subparagraph of Article 17(5) of the Sixth Directive simply seeks to permit recourse to the method of actual use in respect of given goods or services as a whole or in part, according to the different use made of them in output transactions.

67. In my view, the authorisation granted by point (c) of the third subparagraph of Article 17(5) of the Sixth Directive therefore requires a clear and precise choice of the transactions concerned to be made first by the Member State. The third sentence of Paragraph 15(4) of the Law on Turnover Tax applies without distinction to all mixed-use goods or services and provides generically that the turnover-based allocation key is 'permissible only if no other economic apportionment is possible' without any further specification, thereby infringing the Sixth Directive, as the Commission rightly submits.

22 — The expression used by Advocate General Cruz Villalón in *BLC Baumarkt* (C-511/10, EU:C:2012:245, point 52).

23 — Judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:685, paragraph 17).

68. According to the German Government, since a judgment of 7 May 2014 the Bundesfinanzhof (Federal Finance Court) has been interpreting the third sentence of Paragraph 15(4) of the Law on Turnover Tax in conformity with the Sixth Directive, as meaning that the turnover-based allocation key is permissible if no other *more precise* economic allocation is possible.

69. It is true that such an interpretation in conformity with the directive restricts alternative methods of attribution to those which guarantee a more precise result than that arising from application of the turnover-based allocation key.

70. However, such an interpretation is simply intended to satisfy the second condition laid down in the ruling in *BLC Baumarkt* (C-511/10, EU:C:2012:689). On the other hand, it does not overcome the subsidiary character of the turnover-based allocation key which is evident from the third sentence of Paragraph 15(4) of the Law on Turnover Tax. Such subsidiary character is still contrary to the first condition identified in that judgment relating to the prevailing of that allocation key in the absence of a different, circumscribed choice of another method of deduction by a Member State in accordance with the third subparagraph of Article 17(5) of the Sixth Directive.

71. Since it seems to be particularly difficult to reconcile the first subparagraph of Article 17(5) of the Sixth Directive and the third sentence of Paragraph 15(4) of the Law on Turnover Tax by means of the method of interpretation in conformity with the directive, a matter which must nevertheless be established by the referring court,[24] it will be incumbent on that court to ensure that the former provision is given full effect by disapplying the latter on its own authority.[25]

72. The consequence is that, until the national legislature has clarified, without ambiguity, the cases of mixed-use goods or services for which the actual use method applies — in so far as that method guarantees a more precise result — the turnover-based allocation key, used by the applicant in the main proceedings on the basis of the clear and unconditional provisions of the first subparagraph of Article 17(5) and Article 19(1) of the Sixth Directive, should be binding on the German tax authorities.

73. In other words, I consider that, in view of the incompatibility of the third sentence of Paragraph 15(4) of the Law on Turnover Tax with the Sixth Directive, the Federal Republic of Germany must be regarded as having failed properly to exercise the option available under the third subparagraph of Article 17(5) of the Sixth Directive, which means that only the turnover-based allocation key is applicable in that Member State.

74. Accordingly, the referring court's questions concerning the application of an alternative method of calculating the extent of the right to deduct to the turnover-based allocation key no longer arise, as the turnover-based allocation key must be applied in all cases of mixed use irrespective of the expenditure incurred on inputs. In addition, it is clear that no adjustment of input VAT is necessary by reason of the entry into force of the third sentence of Paragraph 15(4) of the Law on Turnover Tax since that provision cannot be relied upon against the applicant in the main proceedings.

75. I therefore propose that the Court rule that the first subparagraph of Article 17(5) and Article 19(1) of the Sixth Directive must be interpreted as precluding a Member State from giving precedence, systematically and indiscriminately, for all mixed-use goods and services, to any method of calculating the extent of the right to deduct input VAT other than the turnover-based allocation key which applies, as a matter of priority, under those provisions. Having failed to identify clearly the

24 — I would point out that the obligation to interpret national law in conformity with EU law cannot, in particular, serve as the basis for an interpretation of national law *contra legem*: see, inter alia, judgments in *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 55), and *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 39).

25 — See, to that effect, judgment in *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 49 and the case-law cited).

transactions to which the alternative method or methods of calculation apply, which must, moreover, guarantee a more precise result than that which would arise from application of the turnover-based allocation key, the Member State concerned cannot enforce the application of those other methods vis-à-vis taxable persons.

76. Should the Court not concur with the above analysis and the answer I have just proposed, I will examine, in the alternative, the three questions referred for a preliminary ruling by the national court.

C – *In the alternative, the first question referred*

77. By its first question, the referring court is seeking to ascertain whether the input VAT for a mixed-use building must be attributed respectively to taxable and exempt turnover from the building, in which case only the VAT relating to non-attributed transactions (including in respect of the common parts of the building) must be attributed by reference to a general allocation key (based on floor area or turnover) or whether, on the contrary, the allocation key (based on floor area or turnover) applies to all transactions relating to the building.

78. The referring court subdivides this question according to whether the input expenditure relates to costs for the acquisition and construction of the mixed-use building (which has already been at issue in *BLC Baumarkt* (C-511/10, EU:C:2012:689)) or the maintenance costs for that building (which were not covered by the question referred by the Bundesfinanzhof (Federal Finance Court) in that case).

79. This distinction based on the nature of the input costs incurred seems to originate, according to the explanations given by the referring court, from the interpretation given by the German tax authorities and courts to paragraph 21 of the judgment in *Armbrecht* (C-291/92, EU:C:1995:304). According to that interpretation, the costs of acquisition or construction of a mixed-use building can be allocated only on the basis of the proportion of the building used for the purposes of taxable or exempt transactions, and not according to the floor area of that building, whereas, in the case of the building's maintenance costs, the supplies underlying those amounts generally have a closer link with the floor area of the building than with the turnover generated on that floor area.

80. This question also seems to have its origins in a new ambiguity, or at least drafting clumsiness, in the grounds of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689).

81. Whilst, in essence, paragraphs 24 and 26 and the operative part of that judgment indicate that the method of calculating the extent of the right to deduct chosen by the Member State pursuant to the third subparagraph of Article 17(5) of the Sixth Directive must guarantee a 'more precise' determination of the deductible proportion of the input VAT than that arising from application of the turnover-based allocation key, paragraph 23 of that judgment mentions that the calculation of that proportion must be 'as precise as possible'.

82. Although this is not entirely clear from the request for a preliminary ruling, it seems to follow from the referring court's analysis that the first part of the alternative suggested by it, namely the application of an allocation key based on the first or third subparagraph of Article 17(5) of the Sixth Directive only to parts of the building which are genuinely mixed-use, could offer an even more precise result than that arising from a calculation based on the application of such a key to the building concerned in its entirety.

83. It must therefore be clarified whether, where a Member State exercises the option available under the third subparagraph of Article 17(5) of the Sixth Directive, it must choose the method of calculation which is as precise as possible or simply a method which guarantees a determination of the extent of the right to deduct which is more precise than that arising from the turnover-based allocation

key. [26]

84. I would like to make three remarks in response to the referring court's analysis.

85. First, it seems to me that the distinction made by the referring court which is based on the interpretation of the judgment in *Armbrecht* (C-291/92, EU:C:1995:304) cannot be applied in the context of Article 17(5) of the Sixth Directive which, unlike the situation in that case, concerns only transactions performed by taxable persons for business purposes.

86. As is correctly highlighted by the United Kingdom Government in its written observations, the judgment in *Armbrecht* (C-291/92, EU:C:1995:304) concerned the question whether a person who sold a building used for both business and private purposes had to account for VAT on the part of the building put to private use. After noting that a person performing a transaction in a private capacity does not act as a taxable person for VAT purposes, the Court stated in paragraph 21 of that judgment that 'apportionment between the part allocated to the taxable person's business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division', in other words, according to the use of the respective floor areas of the building.

87. This assessment, as is apparent from the reference made in paragraph 21 of the judgment in *Armbrecht* (C-291/92, EU:C:1995:304) to point 50 of the Opinion of Advocate General Jacobs in that case (C-291/92, EU:C:1995:99), seems to be justified, in the light of the examples mentioned by the Advocate General, in order to rule out the risk of double taxation caused by 'allocation to private use on the basis of a fixed geographical division of the property', without therefore allowing the person concerned to have recourse to the adjustment mechanism laid down in Article 20(2) of the Sixth Directive in the event of a subsequent change in the use of the space.

88. In *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 54), the Court, moreover, ruled out any inability, as referred to in paragraph 21 of the judgment in *Armbrecht* (C-291/92, EU:C:1995:304), to opt for an apportionment according to the respective floor areas of the building, on the ground that the case concerned parts of a building and land on which it stood which 'were intended to be used for business purposes', that is to say, for transactions which are all subject to VAT and for which adjustment remains possible.

89. Contrary to the suggestion made by the referring court, paragraph 21 of the judgment in *Armbrecht* (C-291/92, EU:C:1995:304) does not preclude a Member State from authorising or requiring an apportionment of input VAT according to the use of different floor areas of the building in a situation such as that in the main proceedings.

90. Second, the ambiguity stemming from the drafting of paragraph 23 of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689) can easily be dispelled simply by reading the operative part of the judgment and the other concurring paragraphs of its grounds. The latter require only that the method of calculating the VAT deduction chosen by a Member State for a given transaction, on the basis of the option available under the third subparagraph of Article 17(5) of the Sixth Directive, guarantees a more precise result than the result which would arise from application of the turnover-based allocation key and not the most precise result possible.

26 — This is also how the United Kingdom Government has understood the reasoning behind the first question referred for a preliminary ruling by the national court.

91. In the exercise of the discretion retained by the Member States when they opt for one of the methods of calculation provided for in the third subparagraph of Article 17(5) of the Sixth Directive, they cannot be required to use the method which produces a result which is as precise as possible where the chosen method observes the principle of neutrality and, in addition, the Member State considers that it is advantageous in terms of administrative simplicity.

92. Since the turnover-based allocation key chosen by the EU legislature is already based on certain simplifications ensuring a fair and reasonably accurate calculation of the amount which is ultimately deductible,[27] the exercise by a Member State of the right to opt for a different key or method cannot, if that option is not to be rendered ineffective, be subject to the obligation to identify the method which guarantees the result which is as precise as possible, having regard also to the many different situations faced by the national tax authorities.

93. Accordingly, as both the Commission and the United Kingdom Government have argued, a Member State may certainly opt for an allocation key based on the (taxed or exempt) use of all the parts of a mixed-use building or, as appropriate, attribute expenditure incurred on inputs to certain parts of the building, in which case only expenditure which cannot be attributed is subject to the application of an allocation key.

94. Consequently, I consider it necessary to reject the German Government's argument that the choice of a direct allocation of costs to certain parts of a (mixed-use) building does not constitute a different 'allocation key' provided for in the third subparagraph of Article 17(5) of the Sixth Directive, as interpreted by the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689), and that, in that case, Article 17(2) of the Sixth Directive alone is applicable, Article 17(5) being relevant only to expenditure which cannot be allocated to individual parts of the building, such as expenses incurred for maintenance of common parts.

95. I am prepared to concede that direct allocation does not reflect the percentage of use, unlike methods based on a proportional allocation. However, it should be noted that point (c) of the third subparagraph of Article 17(5) of the Sixth Directive gives Member States the possibility of compelling or authorising the taxable person to make the deduction on the basis of the use of *all or part* of the goods and services concerned. Whatever the German Government may say, the situation of direct allocation of costs attributable to certain parts of a mixed-use building therefore certainly falls within the context of utilisation of the option provided for in the third subparagraph of Article 17(5) of the Sixth Directive.

96. My third and final remark concerns the scope of the notion of 'given operation' for the purposes of the judgment in *BLC Baumarkt* (C-511/10, EU:C:2012:689).

97. In paragraphs 19 and 26 of that judgment and in its operative part, the Court stated that 'the construction of a mixed-use building' constitutes such an operation. As the Commission in particular has contended, this does not mean, however, that the use, upkeep and maintenance of such a building are excluded from the exercise of the option available to Member States under the third subparagraph of Article 17(5) of the Sixth Directive. A distinction between the costs of acquisition of a mixed-use building and the costs attributable to its use or its maintenance is not apparent from Article 17(5) of the Sixth Directive or from the Court's case-law.

27 — See, to that effect, Opinion of Advocate General Cruz Villalón in *BLC Baumarkt* (C-511/10, EU:C:2012:245, point 33).

98. Nor can I see why a Member State which has already opted for the application of a method other than that provided by the turnover-based allocation key for the deduction of VAT paid on the costs of construction and acquisition of a mixed-use building would be prohibited from applying such a method in order to calculate the deductible VAT in connection with the costs attributable to the use or maintenance of such a building.

99. In my view, the crucial condition is that, in compliance with the principles underlying the common system of VAT established by the Sixth Directive, the method chosen guarantees a result of the calculation of the extent of the right to deduct which is more precise than that which would arise from application of the turnover-based allocation key.

100. Consequently, if a Member State considers that generally to be the case for transactions relating to the use, upkeep or maintenance of a mixed-use building because, for example, the costs attributable to those transactions have a closer link with the respective floor areas of the building than with the turnover generated by the various parts of the building, there is nothing, in my view, to prevent the Member State from exercising the option available under the third subparagraph of Article 17(5) of the Sixth Directive for this type of transaction.

101. Provided that the Member State has complied with the principles underlying the common system of VAT, it would then be for the referring court to determine whether, for the calculation of the deduction of VAT relating to the costs of use, conservation and maintenance of a mixed-use building, the method of calculation based on floor area guarantees a more precise result than is offered by the turnover-based allocation key.

D – *In the alternative, the second and third questions referred*

102. By its second question, the referring court asks, in essence, whether a Member State is authorised to require a taxable person to adjust, on the basis of Article 20 of the Sixth Directive, the initial input VAT deduction where that Member State gives precedence, during the adjustment period, to an allocation key in respect of the input VAT for the construction of a mixed-use building over the (turnover-based) allocation key which was applicable at the time of the initial deduction.

103. As is apparent from the grounds of the request for a preliminary ruling, the referring court's queries are raised in a context where the initial deduction by the applicant in the main proceedings relates to the five years (that is to say, 1999 to 2003) preceding the year from which the third sentence of Paragraph 15(4) of the Law on Turnover Tax entered into force (that is to say, 1 January 2004) and where, before and after the date of the entry into force of that provision, the respective proportions of taxable and exempt use of the building do not change.

104. If the answer to the second question is in the affirmative, the referring court wishes to ascertain, by its third question, whether the principles of legal certainty and of the protection of legitimate expectations nevertheless preclude the application of such an adjustment when this does not follow expressly from national law and no transitional arrangements are adopted.

105. Irrespective of the question of the retroactive application of the adjustment, the German and United Kingdom Governments consider that a Member State is entitled to require an adjustment following a legislative amendment concerning the method of calculating the extent of the right to deduct input VAT. The Commission argues the opposite, as no unjustified advantage is granted to the taxable person and the neutrality of VAT is preserved.

106. Whilst the right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs and as a general rule may not be limited,[28] the Sixth Directive also establishes rules on the adjustment of the VAT initially deducted which are themselves an integral part of the VAT deduction scheme established by that directive.[29]

107. Article 20(1) of the Sixth Directive thus provides that the initial deduction is to be adjusted according to the procedures laid down by the Member States, in particular where that deduction was higher or lower than that to which the taxable person was entitled or where after the return is made some change occurs in the factors used to determine the amount to be deducted.

108. Article 20(2) of that directive states that, in the case of capital goods, adjustment is to be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment is to be made only in respect of one-fifth of the tax imposed on the goods. *The adjustment is to 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.

109. That provision also authorises Member States, in the case of immovable property acquired as capital goods, to extend the adjustment period up to 20 years.[30]

110. According to the Court's case-law, the rules laid down by the Sixth Directive in respect of adjustment of deductions are intended to *enhance the precision of deductions* so as to *ensure the neutrality of VAT, with the result that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies themselves subject to VAT*. By those rules, that directive thus aims to *establish a close and direct relationship between the right to deduct* input VAT and the use of the goods and services concerned for taxable output transactions.[31]

111. The Court has also stated, with particular regard to immovable property which is often used over a number of years, during which the purposes to which it is put may alter, that the period for adjustment of deductions *makes it possible to avoid inaccuracies in the calculation of deductions* and unjustified advantages or disadvantages for a taxable person where, in particular, after the return is made some change occurs in the factors initially used to determine the amount to be deducted.[32]

112. Under Article 20(1)(a) of the Sixth Directive, the initial deduction is to be adjusted where it was higher or lower than that to which the taxable person was entitled or, in accordance with paragraph 2 applicable to immovable property, on the basis of the *variations* in the deduction entitlement in years subsequent to the year in which the goods were acquired or manufactured.

113. It is on the basis of Article 20(2) of the Sixth Directive in particular that the Court recognised in the judgment in *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263, paragraph 53) that the adjustment of the VAT initially deducted may stem from a legislative change in the right to deduct correlating to a change in the right to opt for taxation of an output transaction which is generally exempt.

28 — See, inter alia, judgment in *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 32 and the case-law cited).

29 — See, inter alia, judgments in *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 50), and *Pactor Vastgoed* (C-622/11, EU:C:2013:649, paragraph 33).

30 — As provided in Paragraph 15a of the Law on Turnover Tax, the Federal Republic of Germany opted for an adjustment period of 10 years.

31 — See, inter alia, judgments in *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 57), and *Pactor Vastgoed* (C-622/11, EU:C:2013:649, paragraph 34) (emphasis added).

32 — See, to that effect, judgment in *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 25), and order in *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750, paragraph 20) (emphasis added).

114. In its observations, the Commission argues, in essence, that such an adjustment must, however, be accepted only where the change alters whether or not the transaction in question is taxable, that is to say, where it affects the very existence of the right to deduct. It is only in such cases that there is a risk that an undue advantage or disadvantage could arise for the taxable person.

115. However, this approach, which seeks to give priority to one of the purposes of adjustment, seems to ignore the guidance provided by the Court to the effect that the adjustment of deductions is intended to enhance the precision of deductions or makes it possible to avoid inaccuracies in the calculation of deductions.

116. It is clear that an adjustment must be made where, in compliance with the provisions of the Sixth Directive, a Member State alters whether a given output transaction is taxable or exempt. There is no doubt that such adjustment is mandatory. [33]

117. However, Article 20 of the Sixth Directive does not preclude a Member State from also being able to require that such adjustment be made where it has chosen to amend the method of calculating the extent of the right to deduct by opting, in accordance with the third subparagraph of Article 17(5) of the Sixth Directive and the principles of the common system of VAT, for a method which guarantees a more precise result than that which would arise from application of the turnover-based allocation key.

118. Indeed, in such a case the adjustment enhances the precision of deductions which must be made in the years during which the costs of acquisition of immovable property are written off. [34]

119. Furthermore, as the United Kingdom Government also pointed out at the hearing, to permit a taxable person, as the Commission advocates, to continue to use the turnover-based allocation key for the entire adjustment period in respect of immovable property, even though the Member State has adopted a legislative amendment giving precedence to the application of an alternative method of calculation which provides a more precise result, would effectively confer an advantage on taxable persons who acquired immovable property before the entry into force of that legislative amendment. In such a case, despite that legislative amendment, the annual adjustment could still be calculated for the entire adjustment period (between 5 and 20 years depending on the Member State) on the basis of the method which was previously applicable to transactions relating to the acquisition or construction of such property and which gives a less precise result.

120. I therefore consider that Article 20 of the Sixth Directive does not preclude a Member State from requiring a taxable person to adjust the initial deduction of input VAT attributable to construction costs for a mixed-use building where that Member State gives precedence by means of legislation, during the adjustment period, to an allocation key which guarantees a more precise result for the VAT deduction than that which would arise from use of the allocation key applicable at the time of the initial deduction.

121. However, the exercise of such a power by a Member State under the Sixth Directive must comply with the principles of legal certainty and of the protection of legitimate expectations of taxable persons, which both form part of the EU legal order. [35]

33 — See, to that effect, judgment in *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 30), and order in *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750, paragraph 23).

34 — It should be noted that the special system of adjustment reserved for capital goods, in particular immovable property, is explained by the lasting use of those goods and the attendant writing-off of their acquisition costs; see in this regard, inter alia, judgment in *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 55 and the case-law cited).

35 — See, to that effect, judgments in *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263, paragraph 57); '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraph 32), and *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 30).

122. The first of these principles requires, first, that rules of law must be clear and precise and, second, that their application must be foreseeable by those subject to them. [36]

123. In addition, the principle of legal certainty applies all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the obligations which such rules impose on them. [37]

124. In addition, the Court has ruled that it is contrary to the principle of legal certainty, except in exceptional circumstances justified by an objective in the general interest, for the point in time from which a measure falling within the scope of EU law takes effect to be set by a national legislature as being before its publication. [38]

125. In the present case, the referring court points out a number of circumstances which lead it to have doubts as to whether that principle has been observed.

126. Aside from the considerations set out in my principal analysis, I fully concur with the referring court's argument that the third sentence of Paragraph 15(4) of the Law on Turnover Tax is insufficiently precise for it to give to understand that it entails adjustment of input VAT for deductions already granted in respect of years prior to the entry into force of that provision.

127. As the referring court states, that provision does not make any reference to Paragraph 15a of the Law on Turnover Tax, which transposes Article 20 of the Sixth Directive into national law. [39]

128. Since the adjustment required by the tax authorities pursuant to the third sentence of Paragraph 15(4) of the Law on Turnover Tax is not prescribed by Article 20 of the Sixth Directive, the taxable person cannot reasonably expect that an adjustment is required unless this is clearly and expressly provided by the legislative amendment in question.

129. Nor can the German Government seriously claim that the situation at issue in the main proceedings is similar to that in *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263).

130. While in that case the Court held that the Netherlands legislature had taken steps to prevent taxable persons from being taken unawares by implementation of the law in relation to adjustments of the right to deduct by allowing them the time to adjust to the new legislative situation, [40] that is certainly not the situation in the present case, as the referring court notes in this regard that no transitional arrangements were adopted.

131. Lastly, in so far as the tax authorities in the present case attempted to give retroactive effect to the third sentence of Paragraph 15(4) of the Law on Turnover Tax through the adjustment of input VAT, it should be pointed out that such an effect can be reconciled with the principle of legal certainty only in exceptional circumstances justified by objectives in the general interest, such as the need to prevent

36 — Judgment in *Traum* (C-492/13, EU:C:2014:2267, paragraph 28).

37 — Ibid. (paragraph 29 and the case-law cited).

38 — See, to that effect, judgment in '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraphs 33 and 34).

39 — Paragraph 15a of the Law on Turnover Tax provides, moreover, for adjustment only where some change occurs in the factors used for the initial deduction and accordingly transposes Article 20(1) of the Sixth Directive, and not Article 20(2), into national law.

40 — Judgment in *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263, paragraph 81).

actions to avoid tax [41] or to prevent the large-scale use of undesirable financial arrangements. [42] In the present case, neither the referring court nor the German Government has mentioned that the third sentence of Paragraph 15(4) of the Law on Turnover Tax was adopted by reason of one or more such objectives.

132. The principle of the protection of legitimate expectations extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him. [43]

133. In a context such as that of the main proceedings, this involves determining whether the conduct of an administrative authority has given rise to a reasonable expectation in the mind of a prudent and well-informed trader and, if it has, whether that expectation is legitimate. [44]

134. In that regard, it is clear from the explanations given in the order for reference that the allocation key used by the applicant in the main proceedings was accepted by the tax authorities for the 2001 and 2002 tax years in proceedings before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf).

135. This fact must necessarily be taken into consideration by the referring court. In particular, if, for those two years at least, it is established that the agreement of the tax authorities was definitive, this must, in my view, preclude any retroactive application of the third sentence of Paragraph 15(4) of the Law on Turnover Tax. Such retroactivity would deprive the taxable person of the right to deduct input VAT which he has definitively acquired under earlier legislation. [45] The referring court will also have to assess whether that agreement could also affect the extent of the right to deduct VAT in respect of the tax years relating to 1999 and 2000. In particular, it will have to examine whether the applicant in the main proceedings could also have been given assurances by the tax authorities or could have legitimately inferred from their conduct that such agreement was to apply a fortiori to those two tax years.

136. I would point out, however, that there will be no need for such an examination if the Court concurs with my principal analysis, according to which the third sentence of Paragraph 15(4) of the Law on Turnover Tax cannot be relied upon against the applicant in the main proceedings because it is incompatible with Articles 17(5) and 19(1) of the Sixth Directive.

V – **Conclusion**

137. In the light of the considerations set out in my principal analysis, I propose that the Court answers the request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court) as follows:

The first subparagraph of Article 17(5) and Article 19(1) of 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 95/7/EC of 10 April 1995, must be interpreted as precluding a Member State from giving precedence systematically and indiscriminately for all 'mixed-use' goods and services to any method of calculating the extent of the right to deduct input value added tax other than the allocation key based on the ratio between the turnover to be generated by the letting of the commercial units (which is subject to value added tax) and the turnover arising from other letting transactions (which are exempt

41 — Ibid. (paragraphs 71 and 77).

42 — Judgment in '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraphs 38 and 39).

43 — See in this regard, inter alia, judgment in *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 44 and the case-law cited).

44 — Ibid. (paragraph 45 and the case-law cited).

45 — See, to that effect, judgment in *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 39 and the case-law cited).

from value added tax). Having failed to identify clearly the transactions to which the alternative method or methods of calculation apply, which must, moreover, guarantee a more precise result than that which would arise from application of that allocation key, the Member State concerned cannot enforce the application of those other methods vis-à-vis taxable persons.