JUDGMENT OF THE COURT (Fifth Chamber)

8 January 2002 *

In Case C-409/99,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Metropol Treuhand Wirtschaftstreuhandgmb H

and

Finanzlandesdirektion für Steiermark

and between

Michael Stadler

and

Finanzlandesdirektion für Vorarlberg,

on the interpretation of Article 17(6) and (7) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member

* Language of the case: German.

States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola, L. Sevón (Rapporteur), M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— the Austrian Government, by A. Längle, acting as Agent,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government, represented by H. Dossi, acting as Agent, and A. Längle, and the Commission, represented by K. Gross, at the hearing on 5 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2001,

gives the following

Judgment

1 By order of 22 September 1999, received at the Court on 26 October 1999, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 17(6) and (7) 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 (OJ 1977 L 145, p. 1, 'the Sixth Directive').

2 The questions were raised in proceedings between Metropol Treuhand Wirtschaftstreuhandgmbh ('Metropol') and the Finanzlandesdirektion für Steiermark, and in proceedings between Michael Stadler and the Finanzlandesdirektion für Vorarlberg, concerning the right to deduct input value added tax (VAT) paid for the use of a Pontiac TransSport vehicle and a Fiat Ulysse vehicle respectively.

Community legislation

3 The second paragraph of Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14, 'the First Directive') prescribes that '[o]n each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components'.

4 Article 2(1) of the Sixth Directive prescribes that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to VAT.

5 Article 17 of the Sixth Directive, headed 'Origin and scope of the right to deduct', provides, in paragraph 2(a), that '[i]n 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 ... value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

6 Article 17(6) of the Sixth Directive provides:

'Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction

of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.'

7 Under Article 17(7) of the Sixth Directive:

'Subject to the consultation provided for in Article 29, each Member State may, for cyclical economic reasons, totally or partly exclude all or some capital goods or other goods from the system of deductions. To maintain identical conditions of competition, Member States may, instead of refusing deduction, tax the goods manufactured by the taxable person himself or which he has purchased in the country or imported, in such a way that the tax does not exceed the value added tax which would have been charged on the acquisition of similar goods.'

8 Article 29(1) and (2) of the Sixth Directive provides:

'1. An Advisory Committee on value added tax, hereinafter called "the Committee", is hereby set up.

2. The Committee shall consist of representatives of the Member States and of the Commission.

The chairman of the Committee shall be a representative of the Commission.

Secretarial services for the Committee shall be provided by the Commission.'

The national legal background

9 Under Paragraph 12(1)(1) of the Umsatzsteuergesetz 1994 (Law on Turnover Taxes 1994, BGBl. 663/1994, 'the UStG 1994'), which entered into force on 1 January 1995, a trader may deduct from VAT 'the tax indicated separately in an invoice... addressed to him by other traders for supplies of goods or other services which have been effected for his undertaking within the country'.

10 Under Paragraph 12(2)(2)(b) of the UStG 1994, however, supplies and other services 'in connection with the acquisition (manufacture), leasing or operation of cars, mixed vehicles or motor cycles, except for driving school vehicles, demonstration vehicles and vehicles which are intended exclusively for commercial resale and vehicles which are used to the extent of at least 80% for commercial passenger transport, are not regarded as effected for the undertaking'.

11 As the order for reference shows, Paragraph 12(2)(2)(b) of the UStG 1994 re-enacts unchanged the provisions of Paragraph 12(2)(2)(c) of the Umsatzsteuergesetz 1972, as last amended in 1989 (BGBl. 419/1989, 'the UStG 1972').

12 According to Circular Z 09 1202/4-IV/9/87 of the Federal Minister for Finance of 18 November 1987 (AÖF 1987/330, 'the 1987 circular'):

'Minibuses, according to the case-law of the Verwaltungsgerichtshof, do not fall within the restrictive tax provisions applicable to cars and mixed vehicles. For minibuses it is therefore possible in principle to deduct input [VAT] and claim investment benefits.

In the view of the Federal Ministry of Finance, a minibus is to be understood as a vehicle with a box-van-shaped exterior and the capacity to carry more than six persons (including the driver). For the purposes of assessing the passenger-carrying capacity, the relevant factor is not the number of seats actually present but the maximum number of persons permitted to be carried. It is also irrelevant whether a vehicle classified as a minibus on these criteria is used for transporting persons or goods or both. However, in order for the vehicle to be recognised for tax purposes, it must be shown to be used predominantly for business or commercial purposes.'

13 Paragraph 44(4) of the Strukturanpassungsgesetz (Structural Adjustment Law) of 30 April 1996 (BGBl. 201/1996) inserted into Paragraph 12(2)(2)(b) of the UStG 1994 a provision authorising the Federal Minister for Finance to define the terms 'car' and 'mixed vehicle' by regulations which could be adopted with effect from 15 February 1996.

14 The Verordnung des Bundesministers für Finanzen über die steuerliche Einstufung von Fahrzeugen als Personenkraftwagen und Kombinationskraftwagen (Regulations of the Federal Minister for Finance on the classification for tax

purposes of vehicles as cars and mixed vehicles) of 20 June 1996 (BGBl. 273/1996, 'the 1996 regulations'), adopted on the basis of the new provision, entered into force with retroactive effect from 15 February 1996.

15 Paragraph 1 of the 1996 regulations states that 'heavy goods vehicles and small buses do not fall within the terms car or mixed vehicle'.

16 Under Paragraph 10 of the 1996 regulations:

'Small buses are not cars or mixed vehicles for tax purposes, even if they are classified as cars or mixed vehicles for transport law and customs tariff purposes, if they have a form corresponding to a bus and in addition satisfy one of the following conditions:

1. The vehicle is licensed under transport law to carry at least nine persons (including the driver) and also has luggage space inside the vehicle. The front row of seats is provided by the manufacturer with three fixed seats.

2. The vehicle is licensed under transport law to carry at least seven persons (including the driver) and is provided by the manufacturer with a loading space at the rear at least 500 mm long behind the third row of seats. That

length must be attained by the loading space on average up to a height of 500 mm above the floor of the space.'

The main proceedings and the questions referred for a preliminary ruling

17 In its tax declarations for 1996 and 1997 Metropol applied to deduct the input VAT paid for the use of a Pontiac TransSport vehicle.

18 By assessment of 27 April 1998 the Finanzamt (Tax Office) assessed the VAT due for 1996 without deducting the input VAT paid for use of the vehicle. On the other hand, by assessment of 6 November 1998, for calculating the VAT due for 1997, it deducted the input VAT paid for the use of the vehicle.

19 By decision of 9 July 1998, the Finanzlandesdirektion für Steiermark dismissed as unfounded Metropol's appeal against to the 1996 assessment. It observed that, while Pontiac TransSport vehicles had indeed been classified as 'minibuses' and had consequently been eligible for deduction of VAT until the entry into force of the 1996 regulations, it was common ground that those vehicles did not fall within the definition of 'small buses' laid down by that order. Consequently, being regarded since 15 February 1996 as cars, they were now excluded from the right to deduct. According to the Finanzlandesdirektion für Steiermark, this new state of the law was consistent with the second subparagraph of Article 17(6) of the Sixth Directive, since the definition in the 1996 regulations was based on case-law of the Verwaltungsgerichtshof from before 1995. The regulations merely corrected an overly liberal administrative practice.

20 By decision of 21 December 1998, the Finanzlandesdirektion für Steiermark, in the exercise of its supervisory power, of its own motion annulled the 1997 assessment on the ground that the deduction in question had been allowed contrary to the applicable legislation.

21 Metropol brought proceedings in the Verwaltungsgerichtshof against the decisions of the Finanzlandesdirektion für Steiermark of 9 July and 21 December 1998.

22 Mr Stadler applied, in his tax declarations for 1996, to deduct the input VAT paid for the use of a Fiat Ulysse vehicle. He claimed that the restrictions of the right to deduct input VAT paid for the use of minibuses introduced by the 1996 budgetary economy measures were contrary to the Sixth Directive.

23 By assessment of 1 December 1997, the Finanzamt refused to allow deduction of the input VAT paid for the use of Mr Stadler's Fiat Ulysse vehicle.

24 By decision of 8 March 1999, the Finanzlandesdirektion für Vorarlberg dismissed Mr Stadler's appeal against the assessment. In its decision it observed that the terms car and mixed vehicle used in Paragraph 12(2)(2)(b) of the UStG 1994 had been redefined by the 1996 regulations to reflect the case-law of the Verwaltungsgerichtshof. There had been no extension of the scope of the

exclusions of the right to deduct VAT contrary to Article 17(6) of the Sixth Directive, because the 1996 regulations merely implemented that provision of the UStG 1994.

25 Mr Stadler brought proceedings in the Verwaltungsgerichtshof against that decision.

26 The Verwaltungsgerichtshof notes that since 1 January 1978 the VAT paid on the acquisition, hire or use of cars, mixed vehicles or motor cycles has in principle been excluded from the right to deduct in Austria.

27 However, neither the definition of cars and mixed vehicles nor the distinction between that category and that of lorries and minibuses, for which VAT may be deducted, follows from Paragraph 12(2)(2)(c) of the UStG 1972, which was applicable until 31 December 1994, or from Paragraph 12(2)(2)(b) of the UStG 1994, which replaced it from 1 January 1995.

28 In the 1987 circular addressed to the tax authorities, the Federal Minister for Finance set out the criteria by which a minibus could be distinguished from a car. That circular, which as a ministerial instruction was binding on the public authorities, formed the legal basis of a consistent administrative practice. If a motor vehicle satisfied the definition of a minibus in the 1987 circular and was used predominantly for business purposes, the tax authorities in practice systematically allowed the input VAT paid on that vehicle to be deducted.

29 According to the Verwaltungsgerichtshof, on the basis of that administrative practice, deduction of the input VAT paid on Pontiac TransSport and Fiat Ulysse vehicles, which were regarded as minibuses, was allowed until 15 February 1996. From that date it was excluded by the 1996 regulations, which define the characteristics of minibuses more strictly than the previous administrative practice did. It is not disputed in the main proceedings that those vehicles do not satisfy the new conditions.

30 The Verwaltungsgerichtshof states that the regulations classifying the vehicles for tax purposes are binding on the tax authorities and also on itself in the context of interpreting Paragraph 12(2)(2)(b) of the UStG 1994.

31 It states that the explanations in the Government proposal which led to the Strukturanpassungsgesetz 1996 show that that law was thought of as part of a 'consolidation programme' intended to reduce the budget deficit and enable State debt to be repaid.

32 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the second subparagraph of Article 17(6) 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 to be interpreted as precluding a Member State from excluding the right to deduct input tax in respect of

certain vehicles after the entry into force of the directive, if before its entry into force input tax was deductible in respect of those vehicles by virtue of the administrative authorities' actual practice?

2. If the answer to Question 1 is yes, is the first sentence of Article 17(7) 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 to be interpreted as authorising a Member State, without prior consultation as provided for in Article 29 of the directive, to extend the exclusions from the right to deduct input tax in the manner described in Question 1 for an indefinite period in order to consolidate its budget?'

Question 1

33 By its first question the national court asks essentially whether the second subparagraph of Article 17(6) of the Sixth Directive precludes a Member State from excluding, after the entry into force of the Sixth Directive, expenditure relating to certain motor vehicles from the right to deduct VAT where, at the date of entry into force of that directive, that expenditure gave rise to the right to deduct VAT in accordance with a consistent practice of the public authorities of that State on the basis of a ministerial circular.

Observations submitted to the Court

34 The Austrian Government notes that in a judgment of 20 June 1958 the Verwaltungsgerichtshof held that cars are used predominantly for private or

business use by a limited number of persons, generally up to six, whereas a bus is used for the transport of a larger number of persons on the basis of business use. In that judgment the Verwaltungsgerichtshof found that a Volkswagen van resembled a bus rather than a car and that in everyday language a car did not mean a Volkswagen van.

35 According to the Austrian Government, it was to follow that line of case-law that the 1987 circular recognised as buses, or minibuses, vehicles with a carrying capacity of more than six persons. However, according to the consistent case-law of the Verfassungsgerichtshof (Austrian Constitutional Court) and the Verwaltungsgerichtshof, circulars such as that of 1987 in which the Federal Minister for Finance states his position on a question of law have no legislative force. Consequently, unlike laws and regulations, such circulars do not form part of the 'national laws' within the meaning of the second subparagraph of Article 17(6) of the Sixth Directive.

36 With the adoption of the 1996 regulations, criteria were fixed for the first time which were binding both on the courts and on the tax authorities, in order to distinguish minibuses from cars and mixed vehicles. Those regulations were adopted because of the appearance subsequent to the 1987 circular of new types of vehicles, such as minivans and MPVs or family carriers, not contemplated by that circular, not to extend the category of vehicles excluded from the deduction scheme, but to avoid the national legislation in force being interpreted in such a way that those new vehicles, such as the Pontiac TransSport and the Fiat Ulysse, which as a rule take the place of cars, are regarded as minibuses.

37 Moreover, it is for the national court to determine whether, as the law stood in Austria on 1 January 1995, the two vehicles at issue in the main proceedings were

classified as cars or mixed vehicles or, on the other hand, as minibuses. Similarly, as the Court held in Case C-302/97 *Konle* [1999] ECR I-3099, it is for the national courts to determine the content of the laws in force in Austria on 1 January 1995, so that it is not within the jurisdiction of the Court to hold that the administrative practice referred to in the main proceedings may be taken into account in answering the first question.

38 The Commission submits that the provision in the second subparagraph of Article 17(6) of the Sixth Directive is a 'standstill' clause, in that it requires that an exclusion of the right to deduct must be based on provisions of national law which were already in existence at the date of entry into force of that directive. It follows from that provision, *a contrario*, that Member States are prohibited from introducing into national law new exclusions of the right to deduct.

39 In the main proceedings, the relevant provision of national law, Paragraph 12(2)(2)(b) of the UStG 1994, has not been substantially amended in content since 1 January 1995. On the other hand, the 1996 regulations contained a much narrower definition of minibuses than the 1987 circular. It appears from the order for reference that the effect of that change to the criteria for classification was that the vehicles at issue in the main proceedings are no longer regarded as minibuses, as they were previously.

40 As the new definition of minibuses differs clearly from the view previously taken, it entails a substantial change in the legal position. It is irrelevant in this respect that the former law was based only on a ministerial circular, that is, an administrative rule, since the new criteria which determine the scope of the exclusion of the right to deduct are, in any event, contained in a binding rule of law.

Findings of the Court

41 It should be noted, first, that the Sixth Directive entered into force for the Republic of Austria on the date of its accession to the European Union, 1 January 1995. That is therefore the material date for the purposes of the application of the second subparagraph of Article 17(6) of the Sixth Directive as regards that Member State.

42 Second, according to the fundamental principle which underlies the VAT system and which follows from Article 2 of the First and Sixth Directives, VAT applies to each transaction by way of production or distribution after deduction has been made of the VAT which has been levied directly on transactions relating to inputs. It is settled case-law that the right of deduction provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. That right must be exercised immediately in respect of all the taxes charged on input transactions. Any limitation on the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the Sixth Directive (see, *inter alia*, Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 34 and the case-law cited therein).

43 Article 17(2) of the Sixth Directive sets out in express and specific terms the principle of the taxable person's right to deduct the amounts invoiced as VAT for goods supplied or services rendered to him, in so far as such goods or services are used for the purposes of his taxable transactions.

44 The principle of the right to deduct VAT is none the less subject to the derogation in Article 17(6) of the Sixth Directive, and in particular the second subparagraph.

The Member States are thereby authorised to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article (see Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 19). It is for the Community legislature to establish the Community system of exclusions from the right to deduct VAT and thereby to bring about the progressive harmonisation of national VAT legislation (see Case C-305/97 *Royscot and Others* [1999] ECR I-6671, paragraph 31).

45 Therefore, as the Court has already held in Case C-345/99 *Commission* v *France*, paragraph 22, where, after the entry into force of the Sixth Directive, the legislation of a Member State is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of the Sixth Directive, that legislation must be considered to be covered by the derogation in the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2).

46 On the other hand, national legislation does not constitute a derogation permitted by the second subparagraph of Article 17(6) of the Sixth Directive, and infringes Article 17(2), if its effect is to increase, after the entry into force of the Sixth Directive, the extent of existing exclusions, thus diverging from the objective of that directive (Case C-40/00 *Commission* v *France* [2001] ECR I-4539, paragraph 17).

47 Finally, interpretation of the national legislation in order to determine its content at the date of entry into force of the Sixth Directive and to establish whether the effect of the 1996 regulations was to extend, after the entry into force of the Sixth Directive, the scope of existing exclusions is in principle, as the Austrian Government rightly submitted, within the jurisdiction of the national court. It is, however, for the Court of Justice to supply the national court with guidance on

interpreting the Community concept of 'national laws' within the meaning of the second subparagraph of Article 17(6) of the Sixth Directive, in order to enable it to carry out that determination.

48 In this respect, first, the second subparagraph of Article 17(6) of the Sixth Directive contains a freezing (or 'standstill') clause which provides for the retention of national exclusions from the right to deduct VAT which were applicable before the Sixth Directive entered into force (*Ampafrance and Sanofi*, paragraph 5). The objective of that provision is to allow the Member States, pending the establishment by the Council of the Community system of exclusions from the right to deduct VAT, to maintain any rules of national law excluding the right to deduct which were actually applied by their public authorities at the date of entry into force of the Sixth Directive.

49 In view of that objective, it follows that the term 'national laws' within the meaning of the second subparagraph of Article 17(6) of the Sixth Directive does not refer only to legislative acts in the strict sense, but also to administrative measures and practices of the public authorities of the Member State concerned.

50 Second, where in a Member State deduction of the input VAT paid in respect of certain vehicles was allowed at the date of entry into force of the Sixth Directive, the subsequent adoption of national legislation excluding those vehicles from the right to deduct VAT has the effect of extending, after the entry into force of the Sixth Directive, the scope of existing exclusions.

51 The answer to Question 1 must therefore be that the second subparagraph of Article 17(6) of the Sixth Directive precludes a Member State from excluding,

after the entry into force of the Sixth Directive, expenditure relating to certain motor vehicles from the right to deduct VAT where, at the date of entry into force of that directive, that expenditure gave rise to the right to deduct VAT in accordance with a consistent practice of the public authorities of that State on the basis of a ministerial circular.

Question 2

52 By its second question, which falls into two parts, the national court asks essentially whether the first sentence of Article 17(7) of the Sixth Directive must be interpreted as authorising a Member State to exclude goods from the system of VAT deductions

— without first consulting the Advisory Committee on value added tax ('the VAT Committee') provided for in Article 29 of the Sixth Directive, and

— without limitation in time, in order to consolidate its budget.

Observations submitted to the Court

53 With respect to the first part of the second question, the Austrian Government submits that the procedure referred to in Article 29 of the Sixth Directive, to which the first sentence of Article 17(7) refers, has a purely consultative purpose

and, unlike Article 27 of the Sixth Directive, does not provide for a decision of the Council. Failure to apply that procedure does not constitute a breach of essential procedural requirements which could make national legislation in the field of VAT inapplicable.

54 The Commission, citing in particular Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 37, which concerned Article 27(2) of the Sixth Directive, submits that, by analogy, without prior consultation of the VAT Committee Article 17(7) of the Sixth Directive may not be relied on.

55 In view of the Sixth Directive's aim of harmonisation, it is essential for the VAT Committee to be involved whenever national law is amended to introduce a new exclusion of the right to deduct. Only such involvement can ensure the uniform application of the provisions of the Sixth Directive, within the meaning of the 16th recital of the preamble. Consulting the VAT Committee is also the only way of ascertaining, on a preventive basis, whether the national measure was indeed adopted for the cyclical economic reasons referred to in the first sentence of Article 17(7) of the Sixth Directive.

56 With respect to the second part of the second question, concerning the absence of a temporal limitation of a measure adopted on the basis of the first sentence of Article 17(7) of the Sixth Directive, the Austrian Government submits that that provision, which gives Member States the right to exclude goods from the system of deductions for cyclical economic reasons, must allow them to correct macro-economic imbalances, and in particular reduce the budget deficit and repay State debt. Since such measures, according to the Government, produce results only in the long term and Article 17(7) of the Sixth Directive does not impose time-limits, that provision must also authorise measures which are not limited in time.

57 The Commission points out that derogations such as Article 17(7) of the Sixth Directive are to be interpreted strictly. It is therefore only during periods of substantial divergence from the normal economic cycle that the first sentence of Article 17(7) of the Sixth Directive authorises a Member State to depart for a determined period from the Community system of deduction of VAT. That provision does not, therefore, allow derogations for unlimited periods based on budgetary reasons, such as that described in the order for reference.

Findings of the Court

58 As noted in paragraph 42 above, the right of deduction provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. Derogations are permitted only in the cases expressly provided for in the Sixth Directive.

59 Provisions laying down derogations from the principle of the right to deduct VAT, which ensures the neutrality of that tax, are to be interpreted strictly.

60 As regards the first part of the second question, Article 17(7) of the Sixth Directive lays down one of the procedures in the directive for authorising derogations, giving Member States the right to exclude goods from the system of deductions '[s]ubject to the consultation provided for in Article 29'.

61 That consultation enables the Commission and the other Member States to control the use by a Member State of the possibility of derogating from the general system of deducting VAT, by checking in particular whether the national measure in question satisfies the condition of adoption for cyclical economic reasons.

62 Article 17(7) of the Sixth Directive thus lays down a procedural obligation which the Member States must observe in order to be able to make use of the derogation it sets out (see, by analogy, with respect to Article 27(5) of the Sixth Directive, which also provides for derogations from the scheme of the directive, Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 28).

63 Consultation of the VAT Committee is thus clearly a condition precedent to the adoption of any measure on the basis of that provision.

64 By virtue of the general duty stated in the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), Member States are bound to observe all the provisions of the Sixth Directive (see Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 33). In so far as an exclusion from the system of deductions has not been established in accordance with Article 17(7), which imposes a duty of consultation on the Member States, the national tax authorities may not rely as against a taxable person on a provision derogating from the principle of the right to deduct VAT set out in Article 17(1) of the Sixth Directive (see, by analogy, concerning Article 27(1) and (5) of the Sixth Directive, *Lennartz*, paragraph 33).

65 In the main proceedings, it is common ground that the Austrian authorities did not consult the VAT Committee before adopting the 1996 regulations, contrary to the requirement in the first sentence of Article 17(7) of the directive. The Austrian Government may not therefore rely on those regulations to the

detriment of taxable persons (see, by analogy, concerning Article 27(1) and (5) of the Sixth Directive, *Lennartz*, paragraph 34).

66 As regards the second part of the second question, the first sentence of Article 17(7) of the Sixth Directive authorises Member States to exclude goods from the system of deductions 'for cyclical economic reasons'.

67 That provision thus authorises a Member State to adopt measures of a temporary nature intended to cope with the temporary situation of its economy at a given moment. Application of the measures referred to in that provision must therefore be limited in time and, by definition, they may not be of a structural nature.

68 It follows that the first sentence of Article 17(7) of the Sixth Directive does not authorise a Member State to adopt measures excluding goods from the system of deducting VAT which contain no indication as to their limitation in time and/or which form part of a package of structural adjustment measures whose aim is to reduce the budget deficit and allow State debt to be repaid.

69 The answer to Question 2 must therefore be that the first sentence of Article 17(7) of the Sixth Directive must be interpreted as not authorising a Member State to exclude goods from the system of deducting VAT without first consulting the VAT Committee. That provision also does not authorise a Member State to adopt measures excluding goods from the system of deducting VAT which contain no indication as to their limitation in time and/or which form part of a package of structural adjustment measures whose aim is to reduce the budget deficit and allow State debt to be repaid.

Costs

70 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main actions, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 22 September 1999, hereby rules:

1. The second subparagraph of Article 17(6) 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 — precludes a Member State from excluding, after the entry into force of the Sixth Directive, expenditure relating to certain motor vehicles from the right to deduct value added tax where, at the date of entry into force of that directive, that expenditure gave rise to the right to deduct value added tax in accordance with a consistent practice of the public authorities of that State on the basis of a ministerial circular.

2. The first sentence of Article 17(7) of the Sixth Directive must be interpreted as not authorising a Member State to exclude goods from the system of deducting value added tax without first consulting the committee provided for in Article 29 of the directive. That provision also does not authorise a Member State to adopt measures excluding goods from the system of deducting value added tax which contain no indication as to their limitation in time and/or which form part of a package of structural adjustment measures whose aim is to reduce the budget deficit and allow State debt to be repaid.

Jann La Pergola Sevón

Wathelet Timmermans

Delivered in open court in Luxembourg on 8 January 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber