OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 4 October 2001 [1]

I — Introduction

1. In the present case the Verwaltungsgerichtshof (Supreme Administrative Court) (Austria) has referred to the Court two questions concerning the interpretation of the second subparagraph of Article 17(6) and 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 — Common system of value added tax: uniform basis of assessment [2] (hereinafter 'the Directive'). More particularly, these questions relate to the permissibility of an Austrian tax measure introduced in the course of 1996, that is to say well over a year after Austria's accession to the European Union. That measure excluded the deduction of value added tax for specified categories of minibuses.

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

II — The legal framework

European law

2. The Directive is intended — within a harmonised system of turnover tax introducing value added tax (VAT) — *inter alia* to harmonise the rules governing deductions to the extent that they affect the actual amounts collected. [3]

Thus, Article 17(2) of the Directive reads as follows:

'In so far as the goods and services are used for the purposes of his taxable transactions,

3 — See the preamble to the Directive.

the taxable person shall be entitled to deduct from the tax which he is liable to pay:

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

(b) value added tax due or paid in respect of imported goods;

(c) value added tax due under Articles 5(7)(a) and 6(3).'

3. According to Article 17(6) of the Directive:

'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.'

4. Hitherto, no Community rules of the kind mentioned in Article 17(6) have been introduced, despite the fact that the period indicated in that paragraph has long since elapsed. In accordance with Article 1, the Directive was to enter into force in the Member States by no later than 1 January 1978.

In the case of Austria, the date of entry into force was 1 January 1995, the date on which Austria acceded to the European Union.

5. Under Article 17(7) of the 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 manu-

factured 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'.

6. The consultation to which, among other things, Article 17(7) refers is dealt with in Article 29 of the Directive as follows:

'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.

3. The Committee shall adopt its own rules of procedure.

4. In addition to points subject to the consultation provided for under this Directive, the Committee shall examine questions raised by its chairman, on his own initiative or at the request of the representative of a Member State, which concern the application of the Community provisions on value added tax.'

National law

7. In Austria, the Umsatzsteuergesetz (Law on Turnover Tax) 1994 [4] (hereinafter the 'UStG 1994') has been in force since 1 January 1995 — the date on which Austria acceded to the European Union. Paragraph 12 of this law specifies the amounts which a trader may deduct from VAT. More particularly, Paragraph 12(2)(2)(b) stipulates that supplies and other services are not deductible in so far as they are connected with the purchase, leasing or use of cars, dual-purpose vehicles or motorcycles. These exclusions from deductibility are, in their turn, subject to certain exceptions which are of no relevance to the present case.

8. Paragraph 12(2)(2) of the UStG 1994 was taken over unchanged from the Umsatzsteuergesetz 1972, as amended by the second Amendment Law 1977, which

4 — Published in BGBl. 663/1994.

entered into force on 1 January 1978. These provisions were implemented by a decision issued to the tax authorities by the Federal Minister for Financial Affairs (hereinafter 'the Minister'). That decision, dated 18 November 1987,[5] decreed as follows:

'According to the case-law of the Verwaltungsgerichtshof, minibuses do not fall within the tax exclusions applicable to cars and dual-purpose vehicles. Minibuses are therefore, in principle, eligible for deduction of input tax and for capital aid.

The view of the Federal Ministry for Financial Affairs is that a minibus is understood to mean a four-sided vehicle with the capacity to carry more than six persons (including the driver). For the purposes of assessing the number of persons capable of being carried, the relevant factor is not the actual number of seats but the maximum number of persons permitted to be carried. It is not material whether a vehicle classified as a minibus on these criteria is used for carrying persons or goods or both. In each case, in order for the vehicle to be eligible for deduction of tax, it must be shown to be used primarily for business or commercial purposes.'

9. Paragraph 44(4) of the Strukturanpassungsgesetz (Restructuring Law) 1996[6] inserted the following subparagraph into Paragraph 12(2)(2)(b) of the UStG 1994: 'The Minister may by regulation lay down more detailed definitions of the terms "car" and "dual-purpose vehicle". Such a regulation may be issued with effect from 15 February 1996.' On that basis the Minister issued a regulation on 20 June 1996[7] (hereinafter 'the regulation') pursuant to Paragraph 12(2)(2)(b) of the UStG 1994; under it neither a heavy goods vehicle nor a minibus falls within the definition of a car or dual-purpose vehicle.

10. Paragraph 10 of the regulation reads as follows:

'A minibus is not a car or dual-purpose vehicle for tax purposes, even if it is classified as a car or dual-purpose vehicle from the point of view of engine capacity and customs tariff purposes, where it is in the form of a bus and in addition satisfies the following conditions:

1. It is lawfully licensed to carry at least nine persons (including the driver), has luggage room inside the vehicle and as

5 — Decision Z 09 1202/4-IV/9/87, published in *Amtsblatt der Finanzverwaltung* (Official Gazette of the tax authorities), AÖF 1987/330.

6 — Law of 30 April 1996, BGBl. 201/1996.

7 — Published in BGBl. 273/1996. With retroactive effect from 15 February 1996.

part of its standard equipment has three fixed seats in the front row.

2. It is lawfully licensed to carry at least seven persons (including the driver). Behind the third row it has a load compartment at least 500 mm long at the back. This length must be reached, on average, between the floor of the load compartment and a height of 500 mm above the floor.'

11. According to the explanatory memorandum to the Government's bill, the Strukturanpassungsgesetz 1996 formed part of a Federal Government consolidation programme to reduce the budget deficit and repay State debt. [8]

12. In its order for reference, the Verwaltungsgerichtshof explains the national law as follows.

13. Since 1 January 1978, that is to say before Austria acceded to the European Union, VAT has in principle not been deductible on the purchase, leasing or use of cars, dual-purpose vehicles and motorbicycles. The Austrian legislation did not define those categories. Nor did it specify the characteristics which distinguish those vehicles from heavy-goods vehicles and minibuses, both of which were eligible for the deduction of VAT.

14. The distinguishing characteristics were set out in a (non-binding) ministerial decree of 18 November 1987. Where a vehicle displayed the characteristics described in the ministerial decree and was used principally for commercial purposes, it was the consistent practice of the tax authorities to allow deduction of VAT. The Pontiac TransSport and Fiat Ulysee vehicles at issue in these proceedings were in practice treated by the tax authorities as 'minibuses' eligible for deduction of VAT.

15. The 1996 regulation defined the characteristics of a 'minibus' considerably more narrowly than the administrative practice at that time, as established in the decree of 18 November 1987. In the present cases, it is common ground that vehicles of the Pontiac TransSport or the Fiat Ulysee types do not meet the new criteria.

8 — Explanatory memorandum on the Government's bill, GP XX RV 72, p. 196.

16. Moreover, the Verwaltungsgerichtshof has not had to decide, either before 1995 or since, whether a Pontiac TransSport or Fiat Ulysee is to be classified as a car or dual-purpose vehicle or as a minibus. They contained three rows of seats with a small luggage compartment behind.

III — Facts and procedure

18. In both cases deduction was refused, even after objections to the assessment, whereupon the complainants appealed to the Verwaltungsgerichtshof. Those appeals were based on the argument that the right to deduct VAT in respect of the abovementioned vehicles was derived from Community law, and in particular from Article 17(6) and (7) of the Directive.

Pre-litigation procedure

17. This case arises out of two appeals pending before the Verwaltungsgerichtshof, namely Metropol Treuhand Wirtschaftstreuhandgmb H (hereinafter 'Metropol') against Finanzlandesdirektion für Steiermark and Michael Stadler against Finanzlandesdirektion für Vorarlberg. In its VAT returns for 1996 and 1997, Metropol applied for deduction of VAT in respect of the commencement of use of a motor vehicle of the Pontiac TransSport type. In his VAT return for 1996 Mr Stadler applied for deduction of VAT in respect of the commencement of use of a motor vehicle of the Fiat Ulysee type. Both cases concerned vehicles designed to carry at most seven persons, including the driver.

19. In its objection, Metropol had contended that, under the second subparagraph of Article 17(6) of the Directive, Austria was entitled to maintain in force only those exclusions from deductibility for VAT purposes which were in force on accession to the European Union on 1 January 1995. As at 1 January 1995, minibuses were fully eligible for deduction of VAT. Certain categories of minibus were rendered ineligible for deduction from VAT under the regulation. That exclusion could not, in Metropol's view, be based on the second subparagraph, of Article 17(6) of the Directive, or on Article 17(7), inasmuch as it was based on purely fiscal, rather than cyclical economic reasons. Moreover, the exclusion was for an unlimited period and the Committee had not been consulted, as required by Article 29 of the Directive.

20. In its decision on the objection, the Finanzlandesdirektion für Steiermark acknowledged that before the entry into force of the regulation motor vehicles of the Pontiac TransSport make were classified as 'minibuses' and were thus eligible for deduction of VAT. It further stated that, on the facts, it was not disputed that the vehicle did not come within the category of 'minibuses' in the regulation and therefore, as a car, was not eligible for deduction of VAT. This consequence of the regulation was, in the opinion of the Finanzlandesdirektion, compatible with the second subparagraph of Article 17(6) of the Directive. The definition of 'minibus' in the regulation followed the pre-1995 case-law. The regulation simply tightened up a lax administrative practice. Moreover, the Finanzlandesdirektion pointed out that most EU Member States did not allow deduction of VAT in respect of the acquisition costs of a car. It could also be inferred therefrom that the fact that under the regulation minibuses are excluded from the right to deduct input tax was consistent with the Directive. According to the Finanzlandesdirection, as long as exclusion from deductibility has not been harmonised in a directive, Austria was entitled under the second subparagraph of Article 17(6) of the Directive to treat minibuses as 'cars' and to exclude them from the right to deduct VAT.

21. In the Stadler case, the Finanzlandesdirektion für Vorarlberg justified its decision as follows. The terms 'car' and 'dual-purpose vehicle' used in Paragraph 12(2)(2)(b) of the UStG 1994 had been defined anew in the regulation. The new definitions had been necessary in the light of the Verwaltungsgerichtshof's case-law. After entry into force of the regulation, the vehicle at issue was no longer eligible for deduction of VAT.

22. According to the Finanzlandesdirektion, that consequence of the regulation could not be regarded as a breach of Community law. The regulation merely gave effect to Paragraph 12(2)(2)(b) of the UStG 1994. It did not unlawfully add to the exclusions from the right to deduct VAT under the second subparagraph of Article 17(6) of the Directive.

The questions referred for a preliminary ruling

23. Subsequently, by order of 22 September 1999, received at the Court Registry on 26 October 1999, the Verwaltungsgerichtshof (Austria) requested a preliminary ruling on the following questions:

1. Is the second subparagraph of Article 17(6) of the Directive to be interpreted as precluding a Member State from excluding the right to deduct VAT in respect of certain vehicles after the entry into force of

the Directive, if before its entry into force VAT was deductible in respect of those vehicles as a result of practice followed by the administrative authorities?

2. If the answer to Question 1 is yes, is the first sentence of Article 17(7) of the Directive to be interpreted as meaning that a Member State may, without prior consultation under Article 29 of the Directive, add to the exclusions from the right to deduct VAT in the manner described in Question 1 and for an unlimited period in order to consolidate the budget?

Procedure before the Court of Justice

24. Written observations were submitted to the Court by the Austrian Government and by the Commission. Both further elucidated their views at the hearing on 5 July 2001. On that occasion, the Commission explored in detail the consequences of two recent judgments of the Court in *Commission* v *France*, both delivered on 14 June 2001, [9] in which the terms of Article 17(6) of the Directive were clarified. Those judgments are of importance in connection with the reply to the first question referred for a preliminary ruling.

IV — The first question

25. Before actually proceeding to answer the first question, I propose to deal with two preliminary issues. The reply which will follow will itself, to a considerable extent, be determined by the two judgments in *Commission* v *France* of 14 June 2001. [10] In those judgments the Court shed light on the nature of the second subparagraph of Article 17(6). In answering the question raised, the Court should therefore consider the extent to which the Austrian regulation of 1996 changed the existing legal situation.

Preliminary issue: the meaning of the second subparagraph of Article 17(6) for Austria

26. In its order for reference, the Verwaltungsgerichtshof considers whether, since it is a derogation, the transitional provision in the second subparagraph of Article 17(6)

9 — Case C-345/99 *Commission* v *France* [2001] ECR I-4493 and Case C-40/00 *Commission* v *France* [2001] ECR I-4539.

10 — See footnote 9.

can be applied to Member States such as Austria which acceded to the European Union only after the Directive came into force. The view amongst Austrian academics is that, since it is a derogation, the second subparagraph of Article 17(6) is to be interpreted narrowly so that only the original Member States were allowed to retain existing exclusions from entitlement to deduct VAT.

27. The Verwaltungsgerichtshof considers that interpretation to be incorrect because, in the absence of specific provisions, new Member States not only assume all the obligations resulting from the *acquis communautaire* but also acquire all the rights, including the right to retain existing exclusions from entitlement to deduct VAT. [11] In addition, the Verwaltungsgerichtshof noted that, just as the founding Member States or the Member States who acceded prior to Austria, the Member States who joined later had to make extensive adjustments to their legal systems and therefore had just as great a need for transitional provisions. The Austrian Government and the Commission share the view expressed by the Verwaltungsgerichtshof.

28. I too am of the opinion that under the second subparagraph of Article 17(6), Austria, as a Member State, has the right to retain the exclusions from entitlement to deduct VAT that existed at the time of its accession to the European Union, that is to say, on 1 January 1995. Like the Verwaltungsgerichtshof and the Commission, I consider the decisive factor to be that a new Member State takes over not only the obligations but also the rights stemming from the *acquis communautaire*. It is also important to note that the Council has not adopted any of the measures for which the first subparagraph of Article 17(6) of the Directive provides.

Preliminary issue: the competence of the Court

29. According to Austria, it is not for the Court of Justice but for the national court to decide whether on 1 January 1995 there was an exclusion from entitlement to deduct VAT in respect of the vehicles in question. The Austrian Government bases this conclusion on the judgment in *Konle*, [12] and more particularly on paragraph 27 of that judgment which reads as follows: 'Determination of the content of the existing legislation regarding secondary residences on 1 January 1995, the date of the accession of the Republic of Austria, is, in principle, a matter for the national court. It is, however, for the Court of Justice to

11 — See point 6 of the Opinion of Advocate General Tesauro in Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073.

12 — Judgment in Case C-302/97 [1999] ECR I-3099.

supply it with guidance on interpreting the Community concept of "existing legislation".' At the hearing, the Commission contested the Austrian Government's interpretation of the judgment in the *Konle* case. In the Commission's view, the Court is in fact competent to assess the content of the Austrian national legislation at accession.

30. I share the view that the conclusion which the Austrian Government draws from the judgment cited is incorrect. According to Article 234 EC, in preliminary- reference proceedings the Court interprets Community law and not national law. In the paragraph of the judgment in question the Court explains how it views its task. In that connection, the Court states that it is required to give an interpretation of the Community concept of 'existing legislation'. Naturally, in order to do so, it must also examine the content of the existing legislation itself.

31. That also is what the Court did in the *Konle* judgment. In that case, one of the issues was whether national legislation of 1996, that is to say, following Austria's accession, was covered by the concept of 'existing legislation' in the Act of Accession. [13] In order to enable it to answer that question, the Court had to assess the extent to which, in terms of content, the national legislation of 1996 was substantially the same as the legislation existing at the time of accession. It could not have made such an assessment without at the same time examining the content of the existing legislation. That aspect of the *Konle* case is identical to the situation in the present case. Since the Court considered itself to be competent in this respect in the *Konle* case, I fail to see why it should not be competent in the case now before it. Clearly, in the present instance the issue whether legislation such as the Austrian regulation is permitted by the second subparagraph of Article 17(6) of the Directive cannot be determined if the Court were not able to examine the existing legal situation.

The two judgments of 14 June 2001 in Commission *v* France

32. The present case must be assessed by reference to the two judgments of 14 June 2001. First of all, I would refer to my Opinion in those two cases in which I wrote the following: '... in view of the nature of the Directive, the opportunities to derogate from the deductibility of VAT are limited. In its judgment in *Lennartz*, the Court ruled that the right of deduction must be exercised immediately in respect of all the taxes charged on transactions ... Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases

13 — The Act concerning the conditions of accession for the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adaptation of the Treaties on which the European Union is based (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1).

expressly provided for in the Directive'. Moreover, provisions which contain possible exceptions must be interpreted strictly. [14]

33. In the judgment in case C-345/99, the Court construed the competence of Member States to make use of the derogating provisions of the second subpagraph of Article 17(6), in the following terms:

'21. In order to assess whether the amendment of the national legislation at issue is compatible with the provisions of the Sixth Directive, reference should be made to the judgment in Case C-136/97 *Norbury Developments* [1999] ECR I-2491, which concerned another transitional provision of the Sixth Directive, namely Article 28(3)(b) concerning VAT exemptions. In that judgment, the Court held that amendments made to the legislation of a Member State which did not increase the scope of VAT exemption but, rather, reduced it, did not breach the terms of that article. Whilst that article precludes the introduction of further exemptions or an increase in the scope of exemptions existing before the entry into force of the Sixth Directive, it does not prevent their reduction, since their abolition is the objective of Article 28(4) of the Sixth Directive (see *Norbury Developments*, cited above, paragraph 19).

22. The same reasoning can be applied in the interpretation of Article 17(6) of the Sixth Directive. Thus, where the legislation of a Member State, after the entry into force of the Sixth Directive, 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 provided for by the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2).'

34. It is plain that the provisions of the regulation do not have the effect of reducing the scope of the exemption. It is established that the minibuses in question are excluded from entitlement to deduct VAT. However, it does not immediately follow that the regulation is not permitted under the terms of the Directive. The case-law of the Court, and in particular the abovementioned judgments of 14 June 2001, show that the Directive does not preclude a national measure that has no effect on the existing legal situation. Thus, the second subparagraph of Article 17(6) only prohibits the 'introduction of further exemptions or an increase in the scope of [existing] exemptions'.

14 — Opinion of 22 February 2001, points 47 and 50. The *Lennartz* judgment was delivered on 11 July 1991 (Case C-97/90 [1991] ECR I-3795). In its written observations the Commission also refers to the judgments in Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13, and in Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 19.

35. Moreover, the Commission also refers to the judgment in *Royscot and Others*, [15] from which, *inter alia*, it follows that Member States may retain exclusions under the second subparagraph of Article 17(6) of the Directive as long as the Council has adopted no rules under that article notwithstanding the fact that the four-year period mentioned in the first subparagraph thereof expired a considerable period previously.

The reply

36. The nub of the matter is whether the regulation altered the existing legal situation.

37. My answer to this question is affirmative, being guided by the following two considerations:

— in assessing the existing legal situation current administrative practice must also be taken into account;

— it follows from the facts of the case that by its content the regulation alters the existing legal situation.

38. In regard to my first consideration, I would first refer to the Austrian Government's submission. The Government refers to the ministerial decision of 18 November 1987. That decision was consistent with existing Austrian case-law but was not binding. In the Austrian Government's view, that decision did not form part of existing national legislation for the purposes of the second subparagraph of Article 17(6) of the Directive. According to the Austrian Government, in answering the first question the Court may not have regard to an existing administrative practice. At the hearing the Government also pointed out that, according to the case-law of the Court, in transposing EC directives into national law, a Member State is obliged to lay down binding rules and administrative practices are not sufficient.

39. I cannot share the views expressed by the Austrian Government. I would point out that the Court does not adjudge whether national law is consistent with Community law by reference only to national legislation but also by reference to whether the administrative practice in a Member State goes hand in hand with national legislation. [16] The Court's broad test is necessary to ensure the practical

15 — Judgment of the Court in Case C-305/97 *Royscot and Others* [1999] ECR I-6671.

16 — See, for example, Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923.

effect of Community law in the Member States. A good illustration of this case-law in regard to the Directive is the recent judgment in *Commission* v *France*.[17] That case concerned a VAT exemption for service charges in the French hotel and catering industry. That exemption — which was not provided for by French tax legislation — was based on an administrative circular issued by the French tax authorities. Application of this exemption resulted in a finding by the Court against the French Republic.

40. The Austrian Government errs in drawing a comparison with the obligations imposed on the national legislature when transposing an EC directive. 'According to the settled case-law of the Court, mere administrative practices, which are alterable at the will of the administration and are not given adequate publicity, cannot be regarded as constituting adequate compliance with the obligation imposed on Member States to whom a directive is addressed by Article 189 of the EEC Treaty.'[18] The condition thus applied to the implementation of directives follows from the requirement of legal certainty for the beneficiaries of a directive. The latter must be able to know their rights under Community law and, where necessary, be able to assert those rights in the national courts. However, the present case does not concern an obligation to be fulfilled by a Member State when implementing Community law but merely establishment of an existing practice.

41. I now turn to my second consideration.

42. The Commission asserts that the regulation led to a narrower definition of the term minibus. This resulted in the vehicles at issue no longer being treated as minibuses. Thus, the regulation brought about a change in the legal situation.

43. The Austrian Government's argument is as follows. Throughout the European Union the rules applicable to these vehicles are those for cars and dual-purpose vehicles. That is not true of vehicles designed for more than nine persons. According to the Austrian Government, that test must also be applied in regard to tax law. It refers to a 1998 Commission proposal to amend the Directive which placed the dividing line at vehicles designed for more than nine persons, including the driver.

44. However, so the Austrian Government continues, in recent years minibuses with a

17 — Judgment in Case C-404/99 *Commission* v *France* [2001] ECR I-2667.

18 — See, for example, the judgment in Case C-131/88 *Commission* v *Germany* [1991] ECR I-825.

small capacity, such as the Pontiac TransSport and the Fiat Ulysee, have appeared on the market. These vehicles are replacing cars rather than buses. It would therefore be inconsistent with the purpose of Paragraph 12(2)(2) of the UStG 1994 and with the case-law of the Verwaltungsgerichtshof to treat those vehicles as buses. Thus, Article 10 of the 1996 regulation stipulates that those vehicles must be regarded as cars or dual-purpose vehicles. In that regulation mandatory criteria are laid down for the first time. The purpose of that provision is not to extend the category of vehicles excluded from entitlement to deductibility of VAT but to establish a clear dividing line.

45. I should begin by recalling that, according to the settled case-law of the Court, exceptions to the right to deduct must be interpreted restrictively. [19] A restrictive interpretation implies that even ancillary changes concerning the right to deduct — which are not in furtherance of the objective of the Directive — are not permissible.

46. The Austrian Government's justification for the regulation must be viewed in that light. The Austrian Government refers mainly to the function of the minibuses at issue. That function is comparable to that of a car rather than a bus. It is also said to be legally recognised elsewhere in the European Union. At first sight, the Austrian Government's description of the function of these minibuses appears to be correct. However, that function is not material to the answer to the first question posed by the national court. Nor is it material that minibuses with a small capacity such as the Pontiac TransSport and the Fiat Ulysee seem to have first appeared on the market after 1987.

47. In view of the requirement for a restrictive interpretation, a decisive factor in determining the Court's answer is the fact that until entry into force of the regulation, minibuses with a capacity of fewer than nine persons benefited from the right to deduct whereas after that date they did not.

48. I also note that the Strukturanpassungsgesetz 1996 and the regulation based on it served merely to abolish certain opportunities for deduction. However, the aim of the new rules, from the explanation given in the Government's bill, was, *inter alia*, to reduce the budget deficit and repay State debt.

49. I therefore suggest that the Court answer the first question as follows: On the basis of the second subparagraph of Article 17(6) of the Directive, a Member State is precluded from excluding the right to deduct VAT in respect of certain vehicles after the entry into force of the Directive, if

19 — See point 32 of this Opinion.

at the time of its entry into force VAT was deductible under an established national administrative practice.

V — The second question

50. The second question referred for a preliminary ruling can be divided into two parts. It is first necessary to examine the legal consequences of failure to follow the consultation procedure laid down in Article 29 of the Directive. Thereafter, the meaning of the expression 'cyclical economic reasons' has to be investigated.

The consultation procedure

51. The Austrian Government points out that the Article 29 procedure is purely consultative and unlike, for example, Article 27 of the Directive, does not call for a decision by the Council. The aim is to ensure the consistent application of the Directive. A citizen cannot invoke non-compliance with that provision.

52. In the Commission's view, a Member State may not rely on Article 17(7) without first having followed the consultation procedure. It recalls that in the *Direct Cosmetics* case — concerning Article 27(2) of the Directive, which also provides for notification by a Member State wishing to adopt a derogating measure — the Court ruled as follows: 'By virtue of the third paragraph of Article 189 of the Treaty, Member States are bound to observe all the provisions of the Sixth Directive in so far as a derogation has not been established in accordance with Article 27. The tax authorities of a Member State may not therefore rely, as against a taxable person, on a provision derogating from the scheme of the Directive.' [20] The Commission argues that this strict view also applies to Article 29. Consultation leads to the coordinated application of Article 17(7). Moreover, it provides a precautionary means of testing the extent to which the national measure has been adopted for cyclical economic reasons.

53. In forming a view of this matter, I consider it important first to distinguish between the Article 29 procedure and the procedure under Article 27 of the Directive, to which the *Direct Cosmetics* judgment relates. The Article 27 procedure is directed to obtaining the authorisation of the Council before a derogating measure is taken, whereas no such procedure is provided for under Article 29. Contrary to the Commission's assertion, the *Direct Cosmetics* case has no direct bearing on the Article 29 procedure.

20 — Judgments in Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 37 and in Case C-97/90 *Lennartz* [1991], already cited in footnote 14, paragraph 33.

54. For those reasons, I would recall the — extensive — case-law of the Court concerning the non-observance of procedural requirements. The case-law of the Court distinguishes between essential and non-essential procedural requirements. In the case of essential procedural requirements non-observance results in the annulment of the measure concerned. Moreover, the Court interprets the term 'essential procedural requirement' broadly. [21]

55. I am of the opinion that in this case the failure to follow the consultation procedure under Article 29 of the Directive may be regarded as a breach of an essential procedural requirement, which nullifies reliance on Article 17(7) of the Directive. I infer as much from the wording of Article 17(7) itself. An exclusion from the right to deduct is only allowed 'subject to the consultation provided for in Article 29'. In view of this wording, consultation of the Committee is a precondition for a national measure based on Article 17(7), even though in this case the consultation is no more than an exchange of information. Indeed, it is logical that the obligation to consult be accorded such importance. In this instance, the consultation procedure also affords the Commission an opportunity to monitor the use made of a possibility of derogation which — as I emphasised in my examination of the first question — must be interpreted narrowly.

56. I find support for my point of view in the judgment of 30 April 1996 in *CIA Security International*. [22] That case concerned the breach by a Member State of the obligation to notify under Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations. [23] In its judgment the Court compared this notification obligation with 'an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission's agreement or lack of opposition'. Unlike the latter, the notification obligation in question was not intended 'simply to inform the Commission ... [but] has a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive'. Because of this more general aim the Court regarded the obligation to notify as an essential formal requirement, in contrast to the general notification with which it was compared.

57. From the standpoint of the criteria of the judgment in *CIA Security International*,

21 — Thus, *inter alia*, the Court regards as an essential procedural requirement the obligation to state the reasons for measures (judgment in Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35), the obligation to consult the European Parliament when introducing a regulation (judgment in Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213, paragraph 14) and the failure to send documents to Member States in good time before adoption of an opinion by the Standing Committee on Construction (judgment in Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, paragraph 32).

22 — Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 48.

23 — OJ 1983 L 109, p. 8.

the duty to consult under Article 17(7) must likewise be regarded as an essential procedural requirement. This obligation too has a more general aim, namely to enable the Commission to oversee the way in which Member States avail themselves of the opportunity to derogate and thus counter any abuse.

The 'cyclical economic reasons' criterion

58. According to the Austrian Government, Member States may use Article 17(7) to correct macroeconomic imbalances, to reduce the budget deficit and to repay State debt. The national measures need not be limited in time. They may include measures already in existence when the Directive entered into force. The Commission, on the other hand, argues that Member States may not make indefinite use of derogating measures for purely budgetary reasons.

59. A Member State may base an exclusion from the system of deductions under Article 17(7) on cyclical economic reasons only. There is no doubt in my mind that a regulation applicable for an indefinite period and, moreover, intended to reduce the budget deficit and repay State debt does not have a cyclical economic origin.

60. The 'cyclical economic reasons' requirement means that the fiscal measure must be aimed at counteracting cyclical fluctuations. The measure forms part of the economic policy of a Member State. In this context, I understand economic policy to mean the influencing, through the government budget, of macroeconomic quantities such as production, consumption and import/export volumes over short periods of time, often no more than one or two years in length.

61. There is no need to examine in detail the question of the extent to which attainment of Economic and Monetary Union still leaves room for Member States to conduct their own economic policy. However, I am assuming that since attainment of Economic and Monetary Union, policy within the Union must be coordinated. In this connection, I refer to the procedure under Article 99 EC. Consequently, there cannot be much scope for entirely unilateral reliance on Article 17(7) of the Directive.

62. This brings me back to the national court's second question itself. In principle, a measure covered by Article 17(7) of the Directive must be of limited duration. A cyclical economic fluctuation is, by definition, a temporary effect. As I see it, the time limitation *per se* does not need to be explicitly expressed in the measure itself — a measure introduced for an indefinite period may in due course be

revoked — but in this case it must be obvious from the explanatory memorandum or other accompanying documents that the Member State genuinely intends to revoke the measure once the economic situation allows.

63. In any event, it is clear that a measure which excludes the right to deduct for cyclical economic reasons cannot be structural in nature.

VI — Conclusion

64. In light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Verwaltungsgerichtshof as follows:

First question: On the basis of 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, a Member State is precluded from excluding the right to deduct VAT in respect of certain vehicles after the entry into force of the Directive, if at the time of its entry into force VAT was deductible under an established national administrative practice.

Second question: Article 17(7) of the Directive does not allow an exclusion from the right to deduct VAT to be introduced for cyclical economic reasons without prior consultation of the committee provided for in Article 29 of the Directive. Moreover, the limitation in Article 17(7) to exclusions for cyclical economic reasons entails that, as a matter of principle, the exclusions must apply for a specific period of time and, in any case, may not be structural in nature.