their national court and if the latter were prevented from taking it into consideration as an element of Community law. This is especially so when the individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits as to their discretion set out in the directive.

3. In the case of goods purchased in 1972 and intended to be used for the purposes of the undertaking which do not belong to the category of capital goods within the meaning of Article 17 of the directive, it is the duty of the national court before which the rule as to immediate deduction set out in Article 11 of the directive is invoked to take those facts into account in so far as a national implementing measure falls outside the limits of the margin of the discretion left to the Member States.

In Case 51/76

Reference to the Court under Article 177 of the EEC Treaty by the Hoge Raad (Supreme Court) of the Netherlands for a preliminary ruling in the action pending before that court between

VERBOND VAN NEDERLANDSE ONDERNEMINGEN (Federation of Undertakings of the Netherlands), The Hague,

and

INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN (Inspector of Customs and Excise, The Hague,

on the interpretation of Articles 11 and 17 of the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (OJ English Special Edition 1967, p. 16),

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Article 11 of the Second Council Directive on VAT provides:

1. Where goods and services are used for the purposes of his undertaking, the taxable person shall be authorized to deduct from the tax for which he is liable:
   (a) value-added tax invoiced to him in respect of goods supplied to him or in respect of services rendered to him;
   (b) the value-added tax paid in respect of imported goods;

...

An exception to the general authorization to make deduction is contained in the third indent of Article 17 of the Directive, which provides:

'With a view to the transition from the present system of turnover taxes to the common system of value-added tax, Member States may:

...

exclude, in whole or in part, during a certain transitional period, capital goods from the deduction system provided for in Article 11;

...'

The Second Directive became binding on the Member States, with the exception of Italy, with effect from 1 January 1972 (Third Council Directive, (69/463/EEC) of 9 December 1969 on VAT (OJ English Special Edition 1969 (II), p. 551).

2. The Netherlands adopted VAT by the 'Wet op de omzetbelasting' (Law on turnover tax) of 28 June 1968 (Staatsblad 329) with effect from 1 January 1969.

The wording of Articles 2 and 45 of that Law is as follows:

Article 2

Tax in respect of the delivery of goods and the supply of services to the trader and in respect of the importation of goods intended for him shall be deducted from the tax due in respect of the supply of goods and services.

Article 45

1. In derogation from Articles 2 and 15, in respect of goods intended to be used by the trader as business assets deduction may be made only for
   (a) ...
   (b) ...
   (c) 67 % of the tax, in the case where delivery or importation takes place in 1972.

...

3. The *Federation of Undertakings of the Netherlands,* the plaintiff in the main action, acquired during the early months of the year 1972 a Rotex printer and reply cards for members' meetings. In its tax return for February to April 1972 it deducted the full amount of the turnover tax which had been invoiced to it on that purchase.

However, acting on the basis of Article 45(1) of the Netherlands Law on turnover tax 1968, the *Inspector of Customs and Excise*, the defendant in the main action, taking the view that the goods in question had to be considered as business assets under Netherlands rules, limited the deduction of the tax to 67 % of the amount of the tax paid on this purchase by the plaintiff in the main action.

4. The *plaintiff* in the main action contested the corrective assessment made by the defendant in the main action before the Tariefcommissie. One of its arguments was that the right to make a deduction laid down by Article 45 (1) of the Law of 1968 is contrary to the principle of the right to make a deduction laid down by Article 11 (1) of the Second Directive mentioned above, in so far as the concept of 'business assets of an undertaking' is wider than that of 'capital goods' contained in the third indent of Article 17 of the Directive.

According to the explanatory note on the Netherlands transitional rules with respect to business assets, the expression 'business assets of the undertaking' should be interpreted as meaning that it includes all goods which are used in operating the undertaking, with the exception of articles for resale, ready-made goods for sale, raw materials and semi-finished products, ancillary materials, fertilizers, cattle fodder and seeds and non-returnable packing materials.

It follows from this definition of the expression 'business assets' that it should also include materials used for maintenance, office supplies, advertising material, and in a word costs which are generally described as general costs.

The printed material acquired by the plaintiff may be regarded as advertising costs and the printer may be classified as a small tool or office supplies.

According to the plaintiff in the main action, the concept of 'capital goods' contained in the Second Directive is to be interpreted as meaning goods, the cost of which, in accordance with the principles of business economy and accounting, is spread over several years.

But, says the plaintiff in the main action, the cost of the goods at issue is written off against profits in the year of acquisition as current expenditure.

One of the arguments put by the Inspector to the Tariefcommissie was that the definition of the concept of 'capital goods' given by the plaintiff is in conflict with the opinion of various authoritative writers.

According to the Inspector, it cannot be said that there is a virtually indissoluable link between 'capital goods' and 'investment', on the one hand, and the writing off of expenditure over several years, on the other hand.

At only one point in the Second Directive are the concepts of 'capital goods' and that of writing-off expressly juxtaposed, namely in the fourth indent of Article 17, which renders it possible to authorize the standard deduction in respect of 'capital goods' not yet written off at the time of introducing value-added tax. In addition, Article 11 (3) — the second and third subparagraphs of which cover goods and services which are used both in transactions giving entitlement to deduction and in transactions which do not give entitlement to deduction, deduction for the said goods and services being allowed only for that part of the value-added tax which is proportional to the amount relating to the transactions giving entitlement to deduction (pro rata rule) — provides in its third subparagraph that as regards 'capital goods' the adjustment shall be effected on the basis of the variations of the *pro rata* figure which have occurred during a period of five years including the year during which the goods were acquired and the second indent of Article 17 renders it possible to apply, during a certain transitional period, in respect of 'capital goods' the method of deduction by annual instalments (deduction *pro rata temporis*). These provisions do not imply any connexion with the spreading of costs over several years.

Even if the use of the term 'capital goods' in the aforesaid articles implies a certain link with the concept of writing off over more than one year, that link is however not present in the third indent of Article 17, which concerns the exclusion of deductions in respect of capital goods during a given transitional period.

The defendant argues, finally, that the transitional rules adopted in the Netherlands concerning business assets need not be regarded as being in conflict with the third indent of Article 17 of the Second Directive, because the wording of the first paragraph of that provision implies that a certain discretion was left to the Member States in the adoption of transitional rules.

The *Tariefcommissie* rejected the application of the Federation of Undertakings of the Netherlands on the ground that Article 17 of the Second Directive cannot be considered as self-executing. The fact that that provision does not define the concept of 'capital goods' used therein allows the national legislature an appreciable measure of discretion to follow its own national policy in the exercise of the powers thereby conferred on it.

5. The plaintiff in the main action appealed to the Hoge Raad on points of law against the decision of the Tariefcommissie.

By order of 9 June 1976 the Hoge Raad stayed its proceedings and referred the following questions to the Court of Justice pursuant to Article 177 of the EEC Treaty:

1. Is the term 'capital goods' contained in the third indent of Article 17 of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes to be understood as referring to goods the acquisition cost of which, according to the principles of accounting and business economy, is not treated as current expenditure but spread over more than one year?
2. If Question 1 is not answered in the affirmative, on the basis of what other criterion may a judgment be formed as to whether an object is to be considered to fall into the category of capital goods?
3. Does the provision contained in Article 11 of the said directive concerning the deduction of turnover tax invoiced to a taxable person in relation to goods supplied to him create a right in favour of an individual subject to Netherlands turnover tax, which may be invoked before a Netherlands court, to make an unrestricted deduction in respect of goods purchased in 1972 and intended to be used for the purpose of the undertaking which do not belong to the category of capital goods within the meaning of the said Article 17, whatever use the Netherlands legislature may have made of the powers mentioned in Articles 11 and 17 of the said directive?

6. The order of the Hoge Raad was entered in the Court Registry on 18 June 1976.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on behalf of the Federation of Undertakings of the Netherlands by its financial adviser, Professor A. E. de Moor, on behalf of the Belgian Government by the Director of Administration at the Ministry for Foreign Affairs, W. Collins, on behalf of the Government of the Netherlands by the Secretary-General of the Ministry for Foreign Affairs, E. L. C.

Schiff, and on behalf of the Commission by its Legal Adviser, Rolf Wägenbaur, assisted by Hendrik Bronhorst, a member of the Legal Service.

Upon hearing the report of the Judge-Rapporteur and the views of Advocate-General, the Court decided to open the oral procedure without a preparatory inquiry.

II — Written observations lodged with the Court

1. The *Federation of Undertakings of the Netherlands* points out that doubts have been expressed several times in the Parliament of the Netherlands as to the correctness of the opinion that the restriction of the right to make deductions for business assets, set out in Article 45 of the Netherlands Law of 1968 on VAT is compatible with the provisions of the Second Directive.

It argues, as to the *first question* referred by the Hoge Raad, that the answer to the question must be in the affirmative both on philological grounds and on grounds of history and exegetics.

The expression 'to invest' ist used in the Netherlands as meaning: to lay out capital for a long period; be it from the point of view of the management of the undertaking or from the fiscal point of view the investments are entered as assets when the profits are calculated and thus are not set against profits during the year of acquisition.

The opinion is supported when the history of the Second Directive is looked at. The report produced by a working party composed of experts from the Member States and the Commission, the 'ABC Report' defines capital goods as follows: goods (other than materials physically forming part of manufactured goods and other than goods intended for resale) which contribute directly or indirectly to manufacture or distribution, which are normally used for a period exceeding one year and which, by reason of this fact, are in principle treated as eligible for writing off for accountancy purposes. By general costs is meant costs (incurred through the purchase of goods or for the use of services) which contribute directly or indirectly to the manufacture or distribution of goods, but which do not concern raw or assimilated materials, or capital goods.

The structure of and the procedures for the application of the common system of value-added tax were examined in greater detail in the opinion of the Commission of 3 June 1964 concerning the structure of and procedures for application of the common system of value-added tax and in the explanatory notes on that opinion (OJ of 13. 7. 1964, p. 1800). On page 1805 a distinction is made between capital goods and goods attributable to general costs. Looked at as a whole, the text appearing on pages 1805 and 1806, which deals with the financial deduction made for capital goods, shows that the definition given in the ABC Report was followed, because mention is made therein of the two methods of deduction which can be used for capital goods; immediate deduction and deduction *pro rata temporis,* that is to say after writing off.

On 14 April 1965, the Commission submitted its proposal for a second directive to the Council (published with an explanatory note in the Bulletin of the European Economic Community No 5 of 1965, p. 17). These documents also show that the concept of capital goods was understood as meaning goods the cost of which is spread over more than one year.

As for the exegetic interpretation of the Second Directive, the plaintiff in the main action argues that the third subparagraph of Article 11 (3) thereof is only meaningful if it concerns goods the cost of which is spread over several years.

The second indent of Article 17 shows clearly that the expression 'capital goods' should, in the context, be understood as meaning goods which are entered as an asset and then written off over several years.

The fourth indent of Article 17 also shows very clearly that capital goods are written off, which means that the cost of acquiring or of producing them has first been entered as an asset.

Point 23 of Annex A to the Second Directive establishes a link between conjunctural policy and capital goods. The fact that a total or partial exclusion of the right to make a deduction from turnover tax on goods the cost of which is immediately written down as expenditure against profits must also be considered as an instrument of conjunctural policy seems very unconvincing from the point of view of economic theory.

2. Since the plaintiff in the main action answers the first question in the affirmative, it has no observations to submit on the *second question* referred by the Hoge Raad.

3. As for the third question referred by the Hoge Raad, the plaintiff in the main action is of the opinion that this question should receive an answer in the affirmative subject to the reservation that taking into account the provisions of Article 11 (2) and (4) of the Second Directive, there is no right to unrestricted deduction when the taxable person has been assessed to turnover tax on goods and services used in non-taxable or exempt transactions, or for the private needs of the taxable person or of his staff.

In this regard, it refers to the judgment of the Court of 6 October 1970 in Case 9/70, *Grad* v *Finanzamt Traunstein* ([1970] ECR 825) and to the judgment of 17 December 1970 in Case 33/70, *S.p.a. Sace* v *Ministry for Finance of the Italian Republic* ([1970] ECR 1213).

According to the plaintiff in the main action Article 11 (1) fulfils the conditions required of a provision of a directive or of a decision in those judgments in order to be directly applicable: the article is clear, it is not subject to any reservation, it does not require any additional measure on the part of the Community or of the Member States and it does not leave any discretion to the Member States. The measures which the Netherlands had to adopt were already determined. Although the national legislature may have had some kind of discretion as regards the derogation from Article 11 (1) for which the third indent of Article 17 makes provision, no discretion is given to the Member States whereby they may extend the power conferred on them by the third indent of Article 17 by also applying the measures mentioned in that provision to goods which are not capital goods.

4. The *Belgian Government* suggests that the Court should give a negative answer to the *first question* referred by the Hoge Raad, because an answer in the affirmative would require the Member States to define the expression 'capital goods' exclusively with reference to laws in force and accounting practices within the national system.

From the context in which the words 'capital goods' are used it would be possible to arrive at a Community definition. That definition, moreover, should be the same for all the provisions of the Second Directive.

5. As for the *second question* put by the Hoge Raad, the Belgian Government is of the opinion that for the purposes of the third indent of the first paragraph of Article 17 'capital goods' may be considered to be:

'Goods other than materials physically forming part of manufactured goods and other than goods intended for resale, which contribute directly or indirectly to the manufacture or to the distribution of goods or to the provision of services, for which the acquisition costs exceed a certain amount, which are normally used for a period exceeding one year, and which, by reason of that fact, are in principle treated as eligible for writing off for accountancy purposes'.

It adds that the acquisition cost of those goods is usually written off over several years. However a large undertaking could decide to write off a durable asset immediately whereas it would be written off over several years by another undertaking of a smaller size. The two kinds of undertaking should be put on an equal footing.

6. The Belgian Government suggests that the Court should answer the *third question* put by the Hoge Raad by saying that Article 11 of the Second Directive cannot have direct effect.

For that article requires that a series of measures be taken in order to achieve a given purpose, and it is only the Member States that can take such measures, given that it is for them to lay down the limits and the detailed rules.

Furthermore Article 11 taken together with points 20 to 24 of Annex A gives discretionary powers to the Member States.

In certain cases a Member State can even refuse any right to make deduction: Article 11 (4) of the Directive together with point 7 of the minutes of the Council of Ministers of 11 April 1967.

7. The *Government of the Netherlands* points out that according to a number of authoritative writers on business economics, the expression 'to invest' does not necessarily presuppose that costs are spread over several years.

The answer to the question whether capital goods are of are not involved in the present case depends on the nature of those goods and on how an undertaking uses them, without reference to the fact that a trader has or has not spread the acquisition costs of those goods over several years.

Any other approach would inevitably mean that an undertaking large enough to treat the acquisition costs of certain goods as current expenditure would be taxed far less heavily on those goods than a smaller undertaking.

The Inspector's interpretation of the expression 'business assets' does not involve the subjective factor of spreading the costs over several years. These considerations show, according to the Government of the Netherlands, that the expressions 'business assets' and 'capital goods' can be considered as meaning the same thing. There can thus be no question of a broad interpretation of the expression 'capital goods' on the part of the legislature of the Netherlands.

8. In the opinion of the *Commission*, the fact that the third subparagraph of Article 11 (3) of the Second Directive provides that as regards a certain category of goods the *pro rata* figure must be spread over a period of five years means that the expression 'capital goods' used in that article obviously concerns durable goods. The fourth indent of Article 17 makes it abundantly clear that the concept of capital goods is tied in with the concept of goods eligible for writing off, which is the same concept as is found in the third paragraph of Article 11 (3).

The fact that the expression 'capital goods' appears a number of times suggests that this concept has the same meaning in all the provisions of the Second Directive in which it is used. Were it to be otherwise, the directive would presumably have said so.

The Commission thinks that it may be concluded from an examination of the various provisions of the Second Directive in which the concept of capital goods is used that the said concept is used to define goods the cost of which is not treated as current expenditure, but spread over more than one year.

However, one cannot really get any further towards a definition of what 'capital goods' are on the basis of the Second Directive. In so far as more precise rules may be necessary at national level and for want of an exhaustive Community definition, it is for the national legislature to lay down such rules.

The history of the provisions relating to 'capital goods' confirms the conclusion set out above.

As for the definition of 'capital goods' found in the ABC Report, the Commission observes that the said definition is subject to important reservations: it is expressly stated in the said report that the report is binding neither on the national governments nor in the Commission.

On the other hand reference may be made without hesitation to the opinion of the Commission of 3 June 1964.

The distinction which is made in that opinion of the Commission between immediate deduction and deduction by way of writing off reappears in the proposal for a second directive submitted by the Commission to the Council on 14 April 1965.

It thus becomes clear, from an analysis of the Second Directive and of earlier documents, that the concept of capital goods as used in the Second Directive refers to durable goods the acquisition or production cost of which is not treated as current expenditure but spread over more than one year, according to the principles generally applicable.

9. In the light of this answer, the Commission is of the opinion that the *second question* put by the Hoge Raad ceases to be relevant.

10. As for the *third question* put by the Hoge Raad, the Commission argues that the wording of the question is such that it refers exclusively to Article 11 (1) (a) of the Second Directive given that *ex hypothesi* 'capital goods' are not involved and that the goods in question are to be used for the purposes of the undertaking.

The Commission thinks that, as thus limited, the question put by the Hoge Raad should be answered in the affirmative. In this regard, the Commission mentions, as does the plaintiff in the main action, the judgments of the Court in Cases 9 and 33/70, *Grad* and *S.p.a. Sace,* and the judgment of 4 December 1974 in Case 41/74, *van Duyn* v *Home Office* ([1974] ECR 1337).

According to the Commission, this is a provision giving taxable persons a right which is not subject to any reservation or condition. This right to which taxable persons are entitled means, of course, that the Member States are under an obligation to admit the deduction.

The provision under discussion is worded in such a way that it can be applicable even independently of national provisions adopted in implementation of the directive.

It should be emphasized that Article 11 (1) (a) does not leave the national authorities with any discretion as to bringing it into force.

The Federation of Undertakings of the Netherlands, represented by B. H. Ter Kuile, Advocate at the Bar of The Hague, the Belgian Government, represented by S. Habor, Fiscal Attaché to the Permanent Representatives of Belgium to the EEC, the German Government represented by Dr M. Seidel, Counsellor at the Ministry for Economic Affairs, the Commission, represented by its Legal Adviser, R. Wägenbaur, acting as Agent, assisted by H. Bronkhorst of its Legal Service, submitted their observations at the hearing on 17 November 1976.

Among the matters raised at that hearing were the following:

On the *first question* put by the Hoge Raad, the *Federation of Undertakings of the Netherlands* pointed out that the Netherlands legislation on VAT gave an explanation, based on their permanent nature, of the concept of 'capital goods' mentioned in Article 11 (3) of the Second Directive, by defining such goods as durable goods which are entered as assets and which are written off over a certain number of years. Furthermore it argued that in economic theory and in fiscal legislation concerning direct taxation, the expression 'capital goods' is used with the meaning that it had indicated, and that it is therefore admitted that the said expression is somewhat subjective.

As regards the *second question* the Federation noted that in the first question the Hoge Raad speaks of goods the acquisition cost of which, according to the principles of accounting and business economy, is not treated as current expenditure but spread over more than one year. It was, however, conceivable that the Court might be of the opinion that it would be better to write off the said acquisition costs over a certain number of years according to fiscal principles, and this would mean that the Court would not give an affirmative answer to the first question, but would answer the second question from a fiscal angle.

On the *third question,* the Federation argued that even if the Court were to come to the conclusion that Article 11 (4) of the Second Directive gives discretionary powers to the Member States, that would not mean that the other parts of Article 11 are not directly applicable.

As regards the *third question* put by the Hoge Raad, the *Belgian* Government said that the explanation contained in the minutes of the meeting of the Council of Ministers during which the Second Directive was approved show that the cases indicated in Article 11 (4) are only mentioned as examples, as appears, moreover, from the words 'in particular' included in the text of that paragraph. Thus the Member States have the right to refuse any deduction in respect of 'certain goods and services'. It should be noted, it said, that most of the Member States have availed themselves of that right. If, therefore, the Netherlands authorities decided to exclude the right to make deduction in respect of the printer or of the printed invitations, they were fully entitled to do so, and it is not possible to consider Article 11 as producing a direct effect.

The *German Government,* which did not submit written observations to the Court, declared at the hearing that on the *first question* put by the Hoge Raad, it supported the opinion of the Governments of the Netherlands and of Belgium according to which the concept of 'capital goods' in the Second Directive not only covers goods which, according to the principles of accounting and business management, constitute goods which are written off over more than one year. Goods can also be 'capital goods' when the acquisition cost is written off during the year in which they are acquired. In this regard, it does not matter whether the reason why they were written off during that year is because the capital asset in question only has a short life-span — as for example a diamond saw — or because the fiscal provisions of the Member State in question allow immediate writing-off. For in business management 'capital goods' are considered as including all goods which, in the widest possible sense, constitute the equipment for production.

The third paragraph of Article 11 (3) does not define the concept of 'capital goods' and simply constitutes a specific rules for such of those goods as have a useful life of less than five years.

As regards the *third question* put by the Hoge Raad, the German Government expressed doubts on the question whether in the present case there really is a situation in which it may be said that Article 11 has a direct effect. For the rule laid down in Article 11 cannot really be looked upon as a legislative provision because it needs to be set out in more specific and comprehensive terms, not only at Community level, but also by way of national rules to be made by the Member States empowered to do so. For example, it is not clear from Article 11 that the deduction of VAT is only possible when the taxable person has obtained the goods or services in question from another trader.

Finally, the German Government raises the question whether, in cases where the Commission and the Council undertake the gradual harmonization of a particular field, an examination of the direct effect or rules resulting from the first step towards harmonization should not always be undertaken in each individual case. By definition, the said rules only constitute partial harmonization, and are always rendered more specific by divergent national provisions. They only acquire a Community character when, at the next stage, the said national provisions are themselves harmonized.

The Advocate-General delivered his opinion at the hearing on 14 December 1976.

In a letter addressed to the President of the Court on 11 January 1977, the Minister for Foreign Affairs of Belgium pointed out that the Advocate-General in his opinion does not appear to have given weight, in the interpretation of Article 11 (4) of the Second Directive of 11 April 1967, to the words 'in particular' ('notamment') appearing in that provision and requested the Court to consider reopening the oral procedure with a view to asking the Council to give official notice of the minutes of the meeting of 11 April 1967 which show that the cases mentioned in paragraph (4) are given by way of example.

The Court, after deliberation in the Deliberation Room, established that every factor needing to be considered for the purpose of answering the questions put to it in the case had been taken into account and decided not to reopen the oral procedure.

Law

1 By order of 9 June 1976, which reached the Court on the 18th of that month, the Hoge Raad (Supreme Court) of the Netherlands has referred for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of certain provisions of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (OJ English Special Edition 1967, p. 16).

2 Those questions have been referred in respect of a dispute in which a Federation of undertakings, which is subject to Netherlands legislation on turnover tax, is contesting a decision adopted by the Inspector of Customs

and Excise which seeks to limit the right to deduct turnover tax on certain objects acquired by the Federation and used by it as office supplies.

3 Article 11 (1) of the directive provides that where goods and services are used for the purposes of his undertaking, the taxable person shall be authorized to deduct from the tax for which he is liable, *inter alia,* value-added tax invoiced to him in respect of goods supplied to him or in respect of services rendered to him.

4 That deduction system, however, is subject to exceptions laid down by other provisions of the directive which allow the Member States to make exceptions to it in specifically defined cases and within clearly stated limits.

5 Those exceptions include certain provisions concerning capital goods, particularly Article 17, which is in issue in this case.

6 The third indent of the first paragraph of that article provides that the Member States may exclude in whole or in part, during a certain transitional period, capital goods from the deduction system provided for in Article 11.

7 In application of that relieving provision, the Netherlands Law on turnover tax lays down transitional provisions whereby, for the year 1972, only 67 % of the tax on goods intended to be used by the trader as 'business assets' may be deducted.

8 The Federation claims that the latter expression, interpreted by the Netherlands tax authorities, has a wider meaning than the expression 'capital goods' used by the directive, and that the exception to the right to make deduction has thus been extended too widely, with the result that the Federation has had to bear tax not authorized by the directive.

The first two questions

9 By the first and second questions, the Hoge Raad asks, in effect, what is the correct interpretation of the expression 'capital goods' appearing in the third indent of the first paragraph of Article 17 of the directive.

10 It should be noted, in the first place, that the expression at issue forms part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope.

11 It follows that the interpretation, in general terms, of the expression cannot be left to the discretion of each Member State.

12 The ordinary meaning of the expression and its function in the context of the provisions of the Second Directive indicate that it covers goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs not normally treated as current expenditure but written off over several years.

13 In fact, the special system reserved for capital goods by the directive, which includes exceptions to the principle of immediate deduction, is explained and justified by the durable use of those goods and the attendant writing off of their acquisition costs.

14 However, the accounting methods and the procedures for writing off adopted by each particular undertaking in relation to its own financial interests cannot provide the decisive criterion for the definition of the concept at issue, given that the said concept has its place in a taxation system which, in principle, is based on the equality of undertakings before the revenue law.

15 Conversely, the decisive elements are the durability of use and the practices for writing off, as normally taken into consideration for the management of the undertaking in the sphere concerned.

16 In this respect, the Second Directive does not contain explicit guidance for defining uniformly and precisely the requirements which must be satisfied concerning durability and value, together with the rules applicable for writing off, in order that an object may be classified as capital goods for the purposes of the provisions at issue.

17 The Member States therefore have a certain margin of discretion as regards those requirements, provided that they pay due regard to the existence of an essential difference between capital goods and the other goods used in the management and day to day running of undertakings.

18 Therefore the appropriate answers to the first two question are

(a) that the words 'capital goods', appearing in the third indent of Article 17 of the Second Council Directive of 11 April 1967, on the harmonization of legislation of Member States concerning turnover taxes, mean goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but written off over several years;

(b) that the Member States have a certain margin of discretion as regards the requirements which must be satisfied concerning the durability and value of the goods, together with the rules applicable for writing off, provided that they pay due regard to the existence of an essential difference between capital goods and the other goods used in the management and day to day running of undertakings.

The third question

19 The third question referred by the Hoge Raad is worded as follows:

'Does the provision contained in Article 11 of the said directive concerning the deduction of turnover tax invoiced to a taxable person in relation to goods supplied to him create a right in favour of an individual subject to Netherlands turnover tax, which may be invoked before a Netherlands court, to make an unrestricted deduction in respect of goods purchased in 1972 and intended to be used for the purposes of the undertaking which do not belong to the category of capital goods within the meaning of the said Article 17, whatever use the Netherlands legislature may have made of the powers mentioned in Articles 11 and 17 of the said directive?'

20 This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

21 On this, the Court has already said, most recently in its judgment of 4 December 1974 in Case 41/74 ([1974] ECR 1337 at p. 1348) that if, by virtue of the provisions of Article 189, regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that article can never have similar effects.

22 It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.

23 In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

24 This is especially so when the individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits as to their discretion set out in the directive.

25 Paragraph (1) of Article 11 of the Second Directive on value-added tax states in explicit and precise terms the principle of the deduction of sums invoiced as value-added tax in respect of goods supplied to the taxable person, in so far as those goods are used for the purposes of his undertaking.

26 That basic principle, however, is subject to certain derogations and exceptions which the Member States may determine by virtue of other provisions of the directive.

27 When the nature of the provisions concerned is taken into account, the fact of having or of not having exercised the power to make a derogation or an exception is a matter for the discretion of the legislative or administrative authorities of the Member State in question and cannot, therefore be subject to legal review on the basis of the provisions of the directive.

28 The position is the same if the matter in dispute depends on one of the provisions which, either in express terms, or through the indefinite nature of the concepts used, leave the legislative or administrative authorities of the Member States a margin of discretion concerning the material contents of the exceptions or derogations authorized.

29 Conversely, it is the duty of the national court before which the directive is invoked to determine whether the disputed national measure falls outside the margin of the discretion of the Member States and cannot therefore be considered as a legitimate exception to or derogation from the principle of immediate deduction laid down by paragraph (1) of Article 11, and to take this into account in giving effect to the taxable person's claim.

30 Therefore the appropriate answer to the third question is that, in the case of goods purchased in 1972 and intended to be used for the purposes of the undertaking which do not belong to the category of capital goods within the meaning of Article 17 of the directive, it is the duty of the national court before which the rule as to immediate deduction set out in Article 11 of the directive is invoked to take those facts into account in so far as a national implementing measure falls outside the limits of the margin of the discretion left to the Member States.

Costs

31 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Kingdom of Belgium, the Government of the Kingdom of the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

32 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hoge Raad of the Netherlands by order of 9 June 1976, hereby rules:

1. **The words 'capital goods' appearing in the third indent of Article 17 of the Second Council Directive of 11 April 1967, on the harmonization of legislation of Member States concerning turnover taxes, mean goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure, but are written off over several years.**

2. **The Member States have a certain margin of discretion as regards the requirements which must be satisfied concerning the durability and value of the goods, together with the rules applicable for writing off, provided that they pay due regard to**

the existence of an essential difference between capital goods and the other goods used in the management and in the day to day running of undertakings.

3. In the case of goods purchased in 1972 and intended to be used for the purposes of the undertaking which do not belong to the category of capital goods within the meaning of Article 17 of the directive, it is the duty of the national court before which the rule as to immediate deduction set out in Article 11 of the directive is invoked to take those facts into account in so far as a national implementing measure falls outside the limits of the margin of the discretion left to the Member States.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 1 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 14 DECEMBER 1976 [1]

Mr President,
Members of the Court,

Article 99 of the Treaty establishing the European Economic Community empowers the Commission to submit proposals to the Council on the measures necessary with a view to harmonizing the legislation of the various Member States concerning turnover taxes in the interest of the common market.

By an opinion of 3 June 1964, the Commission stated the general lines along which it appeared expedient to establish a common system of value-added tax. On the basis of Articles 99 and 100 of the Treaty, the Council has adopted a series of directives for that purpose.

The first of them, dated 11 April 1967, fixed the final objective as the abolition

1 — Translated from the French.