Arrêt de la Cour
Case C-17/01

Finanzamt Sulingen

v

Walter Sudholz

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Articles 2 and 3 of Decision 2000/186/EC – Flat-rate limit on the right to deduct VAT on vehicles not used solely for business purposes – Retroactive authorisation of a national tax measure)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Special derogating measures – Decision 2000/186 authorising a flat-rate limit on the right to deduct – Breach of the adoption procedure or of substantive requirements – Absence – Retroactive effect – Breach of the principle of the protection of legitimate expectations

(Council Directive 77/388, Art. 27; Council Decision 2000/186, Arts 2 and 3)

Decision 2000/186 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, adopted on the basis of Article 27 of that directive, is intended, inter alia, to limit to 50% the right to deduct the value added tax charged on expenditure on vehicles not used exclusively for business purposes.

The fact that that decision was adopted after derogating measures had been taken by the German authorities, that the Federal Republic of Germany did not publish its request for authorisation to introduce those measures and that the Council inferred from the terms in which the request for authorisation was couched that its intended objective was to simplify the procedure for charging the tax without that objective having been expressly referred to in that request, does not render the procedure leading to the adoption of the decision irregular.

Moreover, Article 2 of that decision, which authorises a flat-rate limit on permitted deductions, set at 50% of the amount paid by way of input value added tax, meets the substantive requirements of Article 27(1) of the Sixth Directive. In particular, the Council was entitled to consider that that limitation constituted a necessary and appropriate means of preventing tax evasion and avoidance and of simplifying the procedures for charging value added tax.

By contrast, insofar as it provides for the authorisation granted by the Council to the Federal Republic of Germany to have retroactive effect, Article 3 of Decision 2000/186 infringes the principle of the protection of legitimate expectations and is therefore invalid. That provision authorised the introduction of a national derogating measure imposing a limit on the deduction of the tax before that measure had been authorised by the Council and at a time when those concerned were entitled to continue to believe that the rule that whole of the tax could be deducted was applicable.

(see paras 23, 25, 30-31, 39-41, 43, 60, 70, operative part 1-3)

JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004(1)

(Sixth VAT Directive – Articles 2 and 3 of Decision 2000/186/EC – Flat-rate limit on the right to deduct VAT on vehicles not used solely for business purposes – Retroactive authorisation of a national tax measure)

In Case C-17/01,
REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending in that court between
Finanzamt Sulingen

and

Walter Sudholz,
on the validity of Articles 2 and 3 of Council Decision 2000/186/EC of 28 February 2000 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive (77/388/EEC) 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 2000 L 59, p. 12),

THE COURT (Fifth Chamber),,

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans and S. von Bahr (Rapporteur), Judges,
Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Principal Administrator,
after considering the written observations submitted on behalf of:

– the German Government, by W.-D. Plessing, assisted by J. Sedemund, Rechtsanwalt,
– the Netherlands Government, by H.G. Sevenster, acting as Agent,
– the Council of the European Union, by K. Borchers and A.-M. Colaert, acting as Agents,
– the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,
after hearing the oral observations of the German Government, represented by W.-D. Plessing, assisted by T. Lübbig, Rechtsanwalt, of the Council, represented by K. Borchers and A.-M. Colaert, and of the Commission, represented by K. Gross, at the hearing on 10 July 2002,

having regard to the order of 12 December 2002 reopening the oral procedure,
after hearing the oral observations of the German Government, represented by W.-D. Plessing, assisted by T. Lübbig, of the United Kingdom Government, represented by K.P.E. Lasok QC, of the Council, represented by K. Borchers and A.-M. Colaert, and of the Commission, represented by K. Gross, at the hearing on 30 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1 By order of 30 November 2000, received at the Court Registry on 15 January 2001, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC three questions on the validity of Articles 2 and 3 of Council Decision 2000/186/EC of 28 February 2000 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive (77/388/EEC) 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 2000 L 59, p. 12).A
2 Those questions were raised in proceedings between Finanzamt Sulingen (Sulingen Tax Office) (hereinafter 'the Finanzamt') and Mr Sudholz relating to the amount of value added tax (hereinafter 'VAT') chargeable on the purchase of a passenger car used by Mr Sudholz partly for business and partly for private purposes.

Legal background
Community legislation
3 Article 17(2) of the 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (hereinafter 'the Sixth Directive') states:
'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:
(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;'.
4 Article 27(1) to (4) of the Sixth Directive provides:
'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.
2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.
3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.'

5 On 28 February 2000, the Council adopted Decision 2000/186 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive.

6 The fifth and ninth recitals in the preamble to Decision 2000/186 state:

'(5) The second [derogating] measure … is intended to limit to 50% a taxable person's right under Article 17(2) [of the Sixth Directive] to deduct VAT in respect of all expenditure on vehicles not used solely for business purposes, and also not to charge the VAT due on passenger cars used for private purposes; this ceiling on a taxable person's right to deduct VAT is justified by the proven difficulty of actually verifying the breakdown between business and private expenditure on this type of good and by the consequent likelihood of tax evasion or abuse; in addition such [a] measure will allow a more simplified system of taxation of the private use of vehicles.

…

(9) The authorisation to apply these derogating measures should therefore limit their period of validity so that this ends with the entry into force of the above proposed Directive, but not later than 31 December 2002 if that Directive is not yet in force by then; … .'

7 Article 2 of Decision 2000/186 provides:

'By way of derogation from Article 17(2) of Directive 77/388/EEC, as amended by Article 28f of that Directive, and from Article 6(2)(a) of that Directive, the Federal Republic of Germany is hereby authorised to limit to 50% the right to deduct the VAT charged on expenditure on vehicles not used exclusively for business purposes and not to treat as supplies of services for consideration the use for private purposes of vehicles belonging to a taxable person's business.

The provisions of the first paragraph shall not apply where a vehicle represents a taxable person's current assets or where such a vehicle is used up to a maximum of 5% for private purposes.'

8 The first paragraph of Article 3 of Decision 2000/186 states:

'This Decision shall apply as from 1 April 1999.'

National legislation

9 Paragraph 15(1b) of the Umsatzsteuergesetz 1999 (German Law of 1999 on turnover taxes) (hereinafter 'the UStG') states:

'Amounts of input tax charged on the purchase or manufacture, importation, acquisition within the Community, hire or operation of vehicles within the meaning of Paragraph 1b(2) which are also used for the private purposes of the trader or for other non-business purposes shall be deductible only at the rate of 50%'.

10 The Bundesfinanzhof states that the word 'vehicles' within the meaning of Paragraph 1b(2) of the UStG includes passenger cars.

11 Paragraph 27(3) of the UStG states:

'Paragraph 15(1b) of the UStG and … shall be applied for the first time to vehicles purchased or manufactured, imported, acquired within the Community or hired after 31 March 1999'.

The main proceedings and the questions referred

12 Mr Sudholz runs a painting business. In April 1999, he purchased a passenger car for DEM 55 086.21, plus a sum equivalent to 16% of that price by way of VAT, amounting to DEM 8 813.79. He allocated the car to his business and used it as to 70% for business purposes and as to 30% for non-business purposes.

13 In his VAT return for April 1999, Mr Sudholz claimed the whole amount of the VAT charged on the purchase of the vehicle, and not part only of it. In that regard, he took the view that Paragraph 15(1b) of the UStG, under which he could only deduct 50% of the input

tax paid, infringed Community law. That provision came into force on 1 April 1999, and applies to vehicles purchased after 31 March 1999.

14 In its turnover-tax prepayment decision for April 1999, the Finanzamt allowed a deduction in respect of only 50% of the input VAT paid.

15 The Finanzgericht granted the application brought before it by Mr Sudholz on the ground that he was entitled to rely on the more favourable rules contained in Article 17 of the Sixth Directive. That article permits the taxable person to deduct from the tax which he is liable to pay the whole of the input tax charged on expenditure incurred for the purposes of his taxable transactions.

16 The Finanzamt appealed on a point of law before the Bundesfinanzhof, relying on Article 2 of Decision 2000/186.

17 The Bundesfinanzhof notes that 70% of the use made by Mr Sudholz of the vehicle in question was for business purposes. Because the vehicle was purchased after 31 March 1999, it was subject to Paragraph 15(1b) of the UStG, adopted in accordance with Decision 2000/186, and accordingly could only give rise to a deduction of 50% of the tax charged on its purchase.

18 As the Bundesfinanzhof nevertheless had doubts as to whether Decision 2000/168 was compatible with Community law, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 2 of Council Decision 2000/168/EC of 28 February 2000 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive (77/388/EEC) on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment invalid because the procedure prior to the adoption of the decision did not meet the criteria laid down in Article 27 of Directive 77/388/EEC?

2. Is the first paragraph of Article 3 of Decision 2000/168/EC, under which the decision is to have retroactive effect from 1 April 1999, valid?

3. Does Article 2 of Decision 2000/168/EC meet the substantive requirements to be applied to such an authorisation, and do any objections to the validity of that provision arise as a consequence?'

The first question

19 By its first question, the national court is essentially asking whether Decision 2000/186 is invalid because the procedure prior to the adoption of that decision was irregular.

20 According to the national court, the first potential ground of irregularity arises from the fact that Decision 2000/186 followed the adoption of the derogating measures by the German authorities. The decision adopted by the Council under Article 27 of the Sixth Directive was an enabling decision, which must necessarily precede any national measures taken under it.

21 It must be noted in that regard that although the German version of Article 27 of the Sixth Directive uses the verb 'ermächtigen', which means 'habiliter' [*enable*] in French, most of the other linguistic versions use a term such as 'authorise', which does not necessarily require that the authorisation from the Council precede the measures adopted by the Member State concerned.

22 It must also be pointed out that Article 27 specifies various stages in the procedure leading to the adoption of a decision by the Council, and requires in particular that the Member State concerned inform the Commission of its desire to introduce a derogating measure, but that no time-limit is laid down as regards the timing of the adoption by the Council of its decision.

23 It must accordingly be held that the wording of Article 27 of the Sixth Directive does not preclude the Council's decision being adopted *a posteriori*. The decision is not invalid solely by reason of the fact that it was adopted after the derogating measure.

24 The national court mentions a second potential ground of irregularity in relation to Decision 2000/186, namely the fact that the Federal Republic of Germany did not publish its request for authorisation.

25 It is sufficient to note in that regard that there is no basis for inferring such a requirement for publication of the request for authorisation from the wording of Article 27 of the Sixth Directive. Under that article, a Member State is required only to inform the Commission and provide it with all relevant information relating to the measures envisaged, and it is the Commission which is to inform the other Member States.

26 The national court suggests a third potential ground of irregularity in relation to Decision 2000/186, that the statement of reasons on which it is based is defective. It notes in that regard that the reasons stated by the Council for that decision include, in the fifth recital in the preamble, a statement that one of the objectives of Article 15(1b) of the UStG is to simplify the system of taxation of the private use of vehicles, although the Federal Republic of Germany did not expressly refer to such an objective in its request.

27 It must be pointed out that the objectives underlying a request for authorisation to introduce a measure which derogates from the Sixth Directive are important. Only two objectives are specified in Article 27(1) of that directive, namely simplification of the procedure for charging VAT and the prevention of tax evasion or avoidance. The measures relating to simplification are subject to the condition laid down in the second sentence of Article 27(1) of the Sixth Directive.

28 In order to establish whether, in the statement of reasons in Decision 2000/186, the Council went beyond the objectives specified by the Federal Republic of Germany in its request, it is necessary to consider the wording of that request.

29 It is apparent from the information provided to the Court by the German Government and by the Council that the German authorities based their request of 11 November 1998 on the fact that it is not always easy to ascertain the proportion of the taxable person's expenditure which relates to professional use of the vehicle and that which relates to private use. Furthermore, in their letter of 19 February 1999, those authorities supplemented their request by stating that tax inspectors are faced with an extremely high verification workload and that they cannot rely purely on returns submitted by taxable persons to the revenue authorities.

30 In those circumstances, it must be held that the Council was entitled to treat the terms of the request for authorisation made by the German authorities as meaning that it was directed specifically at simplifying the procedures relating to returns and verification of VAT and not only at preventing tax evasion and avoidance. It follows that the Council did not go beyond the wording of that request in the statement of the reasons on which Decision 2000/186 was based.

31 In the light of the foregoing considerations, the answer to the first question must be that consideration of the procedure prior to the adoption of Decision 2000/186 has disclosed no irregularity such as to affect the validity of that decision.

The second question

32 By its second question, the national court asks whether Article 3 of Decision 2000/186, under which the authorisation is to have retroactive effect, is valid.

33 In that regard, it should be pointed out that in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20, and Case C?110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 151).

34 Moreover, as the Court has repeatedly held, Community legislation must be certain and its application foreseeable by those subject to it (Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 43). That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that

those concerned may know precisely the extent of the obligations which they impose on them (see Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24).

35 It is therefore necessary to ascertain whether Decision 2000/186, which came into force with effect from 1 April 1999, that is to say on a date prior to that of its publication on 4 March 2000, is none the less justified by the purpose which it seeks to achieve and whether the legitimate expectations of those concerned have been respected.

36 As regards the purpose of Decision 2000/186, none of the recitals in the preamble to it suggests that it would have been necessary for it to incorporate a provision giving it retroactive effect.

37 With respect to the legitimate expectations of those concerned, such as Mr Sudholz, it must be pointed out that if the taxable person chooses to treat goods used both for business and private purposes as business goods, the VAT due as input tax on the acquisition of those goods is in principle wholly and immediately deductible (see, inter alia, Case C?97/90 *Lennartz* [1991] ECR I-3795, paragraph 26, and Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 41). In the absence of any provision empowering the Member States to limit the right to deduct, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, *Lennartz*, paragraph 27, and Case C?37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 16).

38 Therefore, so long as a national derogating measure authorised by the Council under Article 27 of the Sixth Directive had not been adopted, those concerned, such as Mr Sudholz, were entitled to believe that they could deduct the whole of the tax charged on the purchase of their passenger car.

39 The measure enacted by the German authorities is dated 24 March 1999 and imposes a limit on the deduction of input VAT paid on passenger cars purchased after 1 April 1999. Nevertheless, it is not disputed that that measure had not yet been authorised by the Council on the date on which it was adopted. It follows that the limit on permitted deductions under that measure did not comply with Article 27(1) of the Sixth Directive on the latter date and that those concerned were entitled to continue to believe that the rule that the whole of the VAT could be deducted was applicable.

40 Inasmuch as Article 3 of Decision 2000/186 provides for the retroactive application of Paragraph 15(1b) of the UStG, it is clear that it authorises the introduction of a national law which may infringe the legitimate expectations of those concerned. The Court has already held that a national legislative amendment retroactively depriving a taxable person of a right to deduct which he has derived from the Sixth Directive is incompatible with the principle of the protection of legitimate expectations (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 45).

41 By permitting the retroactive application of Paragraph 15(1b) of the UStG, Article 3 of Decision 2000/186 accordingly infringes the principle of the protection of legitimate expectations and must therefore be declared to be invalid.

42 The argument of the German authorities that the Council's authorisation was not given timeously because of delays on the Commission's part in processing the request submitted by the Federal Republic of Germany does not justify the retroactive nature of Decision 2000/186.

43 The answer to the second question must therefore be that Article 3 of Decision 2000/186 is invalid in that it provides for the authorisation granted by the Council to the Federal Republic of Germany to have retroactive effect from 1 April 1999.

The third question

44 By its third question, the national court asks whether Decision 2000/186, and in particular Article 2 thereof, infringes the substantive requirements under Article 27(1) of the Sixth Directive and whether the decision is invalid for that reason.

45 Since Decision 2000/186 authorises a measure which derogates from the general principle that VAT is deductible, a strict approach is required to the question of its compatibility with the conditions laid down under Article 27(1) of the Sixth Directive (see,

inter alia, Case C?63/96 *Skripalle* [1997] ECR I-2847, paragraph 24).

46 In order to do so, it is necessary to determine whether the flat-rate limit on permitted deductions, set at 50% of the amount paid by way of input VAT, could be considered necessary and appropriate for the attainment of the objectives which Decision 2000/186 pursues and as least likely to affect the objectives and principles of the Sixth Directive (see Joined Cases C-177/99 and C?181/99 *Ampafrance and Sanofi* [2000] ECR I?7013, paragraph 43).

47 At paragraph 30 of this judgment, it was stated that the objectives pursued by Decision 2000/186 comprised, pursuant to the request submitted by the German authorities, not only the need to combat tax evasion and avoidance, but also the simplification of the procedures for charging VAT.

48 According to the Commission, that decision is not necessary and appropriate for the attainment of the first objective referred to, that is to say the prevention of tax evasion and avoidance, and infringes the principle of proportionality in that a taxable person, such as Mr Sudholz, who uses his passenger car as to 70% for business purposes, and can prove that he does so, is nevertheless permitted to deduct only 50% of the amount of the input VAT paid on the purchase of the vehicle.

49 The Commission submits, relying on paragraph 56 of the judgment in *Ampafrance and Sanofi*, that where there is no risk of tax evasion or avoidance in such a case, the need to prevent those risks cannot serve to justify restricting the taxable person's right to deduct to 50%. The limit imposed is therefore disproportionate.

50 The facts underlying the *Ampafrance and Sanofi* case related to the right to deduct VAT on expenditure in respect of accommodation, food, hospitality and entertainment.

51 It must nevertheless be noted that, unlike the facts underlying the main proceedings, the decision at issue in *Ampafrance and Sanofi* involved a complete exclusion of the right to deduct and not a flat-rate limit on that right. Moreover, the purpose of that decision was solely the prevention of tax evasion or avoidance, and not the simplification of the procedure for charging VAT. Lastly, the expenditure in question was subject to effective verification by checks on the documents or on the premises for income tax or corporation tax purposes. By contrast, the German authorities have not referred to any method for ensuring effective verification in the main proceedings.

52 It must also be noted that in paragraph 62 of the judgment in *Ampafrance and Sanofi* the Court reserves its position on the question whether other possible methods of preventing tax evasion and avoidance may exist, including imposing a flat?rate limit on authorised deductions, without commenting on their validity.

53 With respect to Decision 2000/186, it thus remains to be determined, first, whether the flat-rate limit on the right to deduct VAT is valid.

54 In that respect, it is necessary to consider the factors mentioned by the German authorities, which are not contested by either the Commission or the Council, that is to say the difficulty for the taxable person of establishing in advance the proportions of private and business use to which his vehicle will be put, the difficulty, for verification purposes, of proving precisely what use is made of the vehicle, and the discovery of irregularities in almost all cases where verification is carried out.

55 These factors disclose a serious risk of tax evasion or avoidance. In those circumstances, the imposition of a flat-rate limit on the right to deduct would appear to be a measure to prevent that risk, while at the same time making verification more straightforward and simplifying the system for charging VAT.

56 The second point which arises is whether the limit of 50% is proportionate to the objective pursued.

57 In that regard, the German authorities have stated that that percentage corresponds to the average use for private purposes of the vehicles concerned. It also corresponds to the figure applied in other Member States and to the figure put forward by the Commission in its proposal for a Council directive of 17 June 1998 amending Directive 77/388 as regards the rules governing the right to deduct value added tax (OJ 1998 C 219, p. 16).

58 The Court notes that the accuracy of the figure stipulated by the German authorities for the average use of vehicles for private purposes has not been challenged. Furthermore, the fact that the same flat-rate limit has been adopted by other Member States and by the Commission in the proposal for a directive referred to above suggests that such a limit is reasonable.

59 Moreover, as the 50% limit on deductions of the input VAT paid is an average, the Council took the view that it was necessary to avoid the figure applying to cases involving use below a certain level, that is to say where the use of the vehicle for private purposes does not exceed 5% of its total use. Decision 2000/186 accordingly excludes the application of that limit in those particular cases.

60 In the light of those findings, it must be held that the Council was entitled to consider that a measure of the kind at issue in the main proceedings, which limits the right to deduct VAT to 50%, except in the particular cases referred to in the preceding paragraph, constituted a necessary and appropriate means of preventing tax evasion and avoidance, and of simplifying the procedures for charging the tax.

61 The fact that, as a result, those persons who intend to use their vehicle as to more than 50% for business purposes cannot deduct a corresponding proportion of the VAT charged on the purchase of their vehicle must accordingly be held to be inherent in the measure for simplification of the procedures for charging VAT.

62 Indeed, it must be accepted that a simplification measure implies, by definition, a more general approach than that of the rule which it replaces and thus will not necessarily reflect the exact situation of each taxable person.

63 To allow, as the Commission suggests, each taxable person who can show that more than 50% of the use of his vehicle is for business purposes to deduct a corresponding proportion of the VAT charged on the purchase of his vehicle would nullify the desired result of simplification. Such an approach would have the effect of recreating, for all persons claiming to use their vehicle in that way, the difficulties referred to above, that is to say the complexity of correctly assessing the proportion of the private or business use of vehicles, the difficulty of verifying the accuracy of returns and, accordingly, the risk of tax evasion and avoidance.

64 It must therefore be held that the measure authorised by Decision 2000/186 does not conflict with the objectives or the principles of the Sixth Directive and observes the principle of proportionality.

65 As regards the specific requirement, laid down by the second sentence of Article 27(1) of the Sixth Directive, that a simplifying measure is not to affect, except to a negligible extent, the amount of the tax due at the final consumption stage, additional observations were submitted by the German and United Kingdom Governments and by the Council and the Commission at the hearing which took place on the reopening of the oral procedure.

66 The German and United Kingdom Governments and the Council submitted that this requirement fell to be considered generally and not on a case-by-case basis, having regard to the whole VAT payable on passenger cars having mixed uses.

67 According to the Commission, the determining factor is whether a significant number of individual cases lead to a material modification of VAT due at the final consumption stage, leading to double taxation of the final consumer.

68 It must be held in that regard that, as a simplifying measure is involved, the approach to be taken must be general, as in the case of determining whether the first condition has been fulfilled. Given that the measure in question reflects an average, the number of cases in which more tax is paid by a supplier such as Mr Sudholz than would be payable under the common system of deduction provided for under the Sixth Directive is likely to correspond generally to the number of cases where less tax is paid. The same reasoning applies in so far as the flat?rate deduction scheme may influence the level of prices – and accordingly the basis of assessment for VAT – charged to the final consumers of goods and services supplied by a taxable person, such as Mr Sudholz. The overall effect on VAT payable to the Community in respect of its own resources would thus appear to be

negligible.
69 Moreover, even in individual cases, the effects on VAT due at the final consumption stage will be limited, given that it is possible for the supplier to apportion the VAT to all the goods sold over the years for which he keeps his vehicle.
70 The answer to the third question must accordingly be that Article 2 of Decision 2000/186 meets the substantive requirements of Article 27(1) of the Sixth Directive and is not invalid.

Costs
71 The costs incurred by the German, Netherlands and United Kingdom Governments and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 Bundesfinanzhof by order of 30 November 2000, hereby rules:
1.Consideration of the procedure prior to the adoption of Council Decision 2000/186/EC of 28 February 2000 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth 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 has disclosed no irregularity such as to affect the validity of that decision.
2.Article 3 of Decision 2000/186/EC is invalid in that it provides for the authorisation granted by the Council of the European Union to the Federal Republic of Germany to have retroactive effect from 1 April 1999.
3.Article 2 of Decision 2000/186 meets the substantive requirements of Article 27(1) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995 and is not invalid.
Jann

Timmermans

von Bahr

Delivered in open court in Luxembourg on 29 April 2004.
R. Grass

V. Skouris

Registrar

President

1 – Language of the case: German.