OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 24 October 2002 (1)

Case C-17/01

Finanzamt Sulingen

v

Walter Sudholz

(Reference for a preliminary ruling from the Bundesfinanzhof)

(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 – 50% ceiling on the right to deduct VAT on vehicles not used solely for business purposes – Retroactive authorisation of a national tax measure)

I – **Introduction**

1. This reference for a preliminary ruling from the Bundesfinanzhof concerns the validity of Articles 2 and 3 of Council Decision 2000/186/EC of 28 February 2000 (2) (hereinafter: 'Decision 2000/186') 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 (3) (hereinafter: 'the Sixth Directive'). The national court wishes to ascertain whether Decision 2000/186 is compatible with the Sixth Directive and the general principles of Community law.

II – **Legal framework**

A – *Community law*

2. Article 17(2)(a) of Sixth Directive 77/388 provides as follows:

'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.'

3. Article 27 of Sixth Directive 77/388 provides as follows:

‘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. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.’

4. Article 2 of Decision 2000/186 provides that:

‘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.’

5. Article 3 of Decision 2000/186 provides that:

‘This Decision shall apply as from 1 April 1999.

It shall cease to be applicable on the date the Directive on expenditure not giving rise to the right to deduct VAT enters into force or shall expire on 31 December 2002 at the latest.’

B – *National law*

6. Paragraph 15(1) of the Umsatzsteuergesetz (hereinafter: ‘the UStG’) provides that:

‘A trader may deduct the following amounts of input tax:

1. the tax shown separately in invoices within the meaning of Paragraph 14 in respect of goods or services which have been supplied to his business by other traders.’

7. Paragraph 15(1)(b) of the UStG provides as follows:

‘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%.'

'Vehicles' within the meaning of Paragraph 1b(2) of the UStG include not only passenger cars, but also watercraft and aircraft.

8. Under Paragraph 27(3) of the UStG:

'Paragraph 15(1)(b) of the UStG and Paragraph 15a(3)(2) shall be applied for the first time to vehicles purchased or manufactured, imported, acquired within the Community or hired after 31 March 1999.'

III – **Facts and procedure**

A – *The main proceedings*

9. Mr Sudholz runs a painting business. In April 1999 he purchased a passenger car for DEM 55 086.21, plus turnover tax at 16% amounting to DEM 8 813.79. He assigned that vehicle to his business and used it 70% for business and 30% for non-business purposes.

10. In his provisional turnover tax return for April 1999 Mr Sudholz claimed the whole amount of the turnover tax on the purchase of the car as input tax. He takes the view that the revised rules laid down in Paragraph 15(1)(b) of the UStG, under which no more than 50% of the input tax is deductible, infringe Community law.

11. As regards the provisional turnover tax return for April 1999, the Finanzamt Sulingen (hereinafter: 'the Finanzamt') decided that under Paragraph 15(1)(b) of the UStG only 50% of the input tax could be deducted.

12. Mr Sudholz raised an objection against the decision of the Finanzamt. The Finanzamt rejected that objection and Mr Sudholz brought an action before the Finanzgericht which declared the action well-founded. The Finanzgericht held that Mr Sudholz was entitled to rely on the rules – more favourable to him – laid down in Article 17 of the Sixth Directive and considered that the limitations on the right to deduct input tax were contrary to Community law where – as in this case – limitations to that effect were not provided for before the Sixth Directive entered into force and appropriate authorisation to adopt them had not been issued pursuant to Article 27(1) of that directive at the time of the decision given by the Finanzgericht.

13. In its appeal on points of law to the Bundesfinanzhof, the Finanzamt points out that by Decision 2000/186 the Federal Republic of Germany is authorised, pursuant to Article 27 of the Sixth Directive, to limit to 50%, a taxable person's right to deduct VAT in respect of all expenditure on vehicles not used solely for business purposes, in so far as they do not represent the taxable person's current assets and are not used up to a maximum of 5% for private purposes.

14. Before the Bundesfinanzhof the Finanzamt claims that the contested judgment should be set aside and the action dismissed. Mr Sudholz contends that the action should be upheld.

B – *Observations of the Bundesfinanzhof*

15. In its order for reference the national court states that in the present case the requirements of Paragraph 15(1)(b) of the UStG, read in conjunction with Paragraph 27(3) thereof, are fulfilled. Firstly, it is established that Mr Sudholz used the vehicle 70% for business purposes. Since the vehicle was purchased after 31 March 1999, the deduction of the input tax charged on the purchase is limited to 50%. However, the national court is uncertain as to whether Paragraph

15(1)(b) of the UStG is applicable or whether Mr Sudholz is entitled to rely, in support of his claim to a full deduction of the input tax, on Article 17(2) of Sixth Directive because he assigned the vehicle as a whole to his business.

16. The national court considers that under the provisions of the directive which are in force, the German Government was entitled to limit the right to deduct only if it had been effectively authorised to do so by the Council. In its view, Article 27 of the Sixth Directive requires an authorisation which must predate the adoption of national rules limiting deduction. However, the Council did not authorise Germany to adopt the measure concerned until 28 February 2000, whilst the Steuerentlastungsgesetz 1999/2000/2002 (4) (by which Paragraph 15(1) of the UStG was introduced) dates from 24 March 1999.

17. There is also an objection to the procedure prior to the decision because the request for authorisation was not published by the German Government. Furthermore, it is claimed that the decision goes beyond that request since the Council additionally bases authorisation on the consideration that such a measure would make it possible to simplify the ‘system of taxation of the private use of vehicles’. Consequently, the national court is uncertain as to whether Decision 2000/186 is compatible with Community law.

18. Secondly, the national court is also unsure as to whether the retroactive effect of the decision (Article 3(1) of Decision 2000/186 declares that the decision is to apply as from 1 April 1999) is compatible with Community law. The national court recalls that in general the principle of the protection of legitimate expectations precludes a Community decision from being given retroactive effect. It considers that it is not possible to derogate from this principle in the present case because Decision 2000/186 does not explain the need for retroactive effect.

19. Finally, the national court raises the question whether decision 2000/186 fulfils the requirements of Article 27(1) in substantive terms. In other words, is the decision necessary and appropriate for the attainment of the specific objective which it pursues and does it have the least possible effect on the objectives and principles of the Sixth Directive?

20. In that connection it refers to the reasons stated for Article 2 of Decision 2000/186. It is stated that the 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 measure will allow a more simplified system of taxation of the private use of vehicles (fifth recital in the preamble). The sixth recital in the preamble states that the ceiling does not apply to expenditure on vehicles which represent a taxable person’s current assets and may not be applied where a vehicle is used up to a maximum of 5% for private purposes. In the seventh recital in the preamble it is therefore inferred that it can thus be ensured that this derogation from the principle of a taxable person’s right to deduct all the tax paid in connection with his taxable activities does not go beyond what is needed to prevent tax evasion or avoidance.

21. The national court states that the effect of the measure contained in Article 2 of Decision 2000/186 is that a taxable person may not deduct the VAT charged on expenditure on vehicles not used exclusively for business purposes even where he can actually prove that he will use or has used the expenditure in a proportion exceeding 50% for strictly business purposes. The national court considers that this outcome could be contrary to the principle of proportionality. It points out that in its proposal to the Council the Commission expressly allowed the taxable person an opportunity to prove that the vehicles concerned were used for business purposes more than 50% of the time.

C – *The questions submitted for a preliminary ruling*

22. In the light of the foregoing, the Bundesfinanzhof considered it necessary to refer the following questions for a preliminary ruling by an order of 30 November 2000, received at the registry of the Court of Justice on 15 January 2001:

‘(a) Is Article 2 of the 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 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?

(b) Is the first paragraph of Article 3 of Decision 2000/186, under which the decision is to have retroactive effect from 1 April 1999, valid?

(c) Does Article 2 of Decision 2000/186 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?’

D – *Procedure before the Court*

23. Pursuant to Article 20 of the Protocol on the EC Statute of the Court of Justice, written observations were submitted by the German and Netherlands Governments, the Council and the Commission. In its written observations the Netherlands Government examined only the first and second question. At the hearing before the Court on 10 July 2002 the German Government, the Council and the Commission presented oral argument in support of the forms of order respectively sought.

IV – **Arguments**

A – *The first question submitted for a preliminary ruling*

24. In the view of the intervening parties, the first question submitted for a preliminary ruling relates in particular to the interpretation of the word ‘authorise’ contained in Article 27(1) of the Sixth Directive. They take the view that this word does not mean that authorisation from the Council must precede the adoption of a national measure for derogation from the Sixth Directive. They contend that under Article 27(1) consent can be granted both in advance and retrospectively.

25. The German Government claims that according to the earlier version of Article 27, that is to say Article 13 of the Second VAT Directive, the Member State could not adopt any measures for derogation until the period for other Member States entering objections had expired or, where there had been objections, until the Council had adopted a favourable decision. No such prohibition on adopting a national measure for derogation in advance of authorisation therefor is provided for in Article 27. The German Government contends that under Article 27(2) the Member State is merely required to inform the Commission before adopting a particular national measure for derogation. In the present case the German Government informed the Commission of the measure concerned on 11 December 1998. By letter of 19 February 1999 it supplemented this information. By letter of 23 August 1999 it reaffirmed the content of the earlier letters. The German Government considers that it cannot be held responsible for the fact that the Commission postponed the procedure until far beyond 1 April 1999.

26. The Commission infers from Article 27(2) of the Sixth Directive that the authorisation

procedure must precede the introduction of the national measures for derogation from the directive. It considers that it is not the date on which the Council adopted its decision which presents a problem as regards compatibility with Community law but the date on which Germany introduced the legal rule contained in Paragraph 15 of the UStG. Therefore, it is the German measure and not Decision 2000/186 that might be contrary to the provisions of Article 27.

27. All the intervening parties take the view that Community law, and in particular Article 27, does not require that a Member State publish a request for authorisation. Under Article 27(3), the other Member States are to be informed of the measures which a Member State intends to adopt in derogation of the Sixth Directive. The German Government and the Commission refer to the opinion in *Skripalle*, (5) in which the Advocate General states that *BP Supergas* (6) implies that there is no Community-law obligation to publish under Article 27.

28. As regards the contention that the decision goes beyond the German request, the Council takes the view that the request from the German Government was also aimed at simplifying the system of taxation. The German Government explained that in the case of VAT deductions in respect of vehicles it is difficult to verify the breakdown between business and private expenditure. Moreover, the number of cases in which checks must be carried out is enormous. Furthermore, the Council points out that pursuant to Article 250 EC it may act on a proposal from the Commission which constitutes an amendment thereto, provided that the amendments remain within the scope of the original proposal.

B – *The second question submitted for a preliminary ruling*

29. The German Government takes the view that the national court's uncertainty as to the validity of the measures adopted on account of the retroactive effect of Decision 2000/186 is unfounded. In its view, a national rule can just as well be approved retrospectively. Moreover, it contends that a decision of the Council adopted pursuant to Article 27 cannot adversely affect the legitimate expectations of those concerned since such a decision concerns only the Member State and the Community institutions. Furthermore, the taxable persons had an opportunity to take note of the change in the system of tax deduction as a draft law thereon had been published.

30. The Netherlands Government considers that the possibility of giving retroactive effect to authorisation granted pursuant to Article 27 is not ruled out per se, provided that a number of conditions that the Court has developed in its case-law are satisfied. One of those conditions is the requirement of necessity, i.e. it is possible to derogate exceptionally from the rule that in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. (7) In the view of the Netherlands Government, the requirement of necessity is satisfied in this case because the general interest, that is to say counteracting tax evasion and avoidance, can justify the retroactive effect of a Community act. It adds that the prevention and counteracting of tax evasion and avoidance usually require swift action in the form of national measures in the Member States. In that regard the application of retroactive effect to such measures can be necessary to attain the specific objective of general interest. Consequently, it considers that the Council was able to give retroactive effect to the authorisation in the decision.

31. The Commission doubts whether it was necessary to give retroactive effect to the authorisation in order to attain the desired objective. The difficulty in verifying the breakdown between business and private use of vehicles has existed since the VAT system was introduced. Therefore, this problem of establishing the right to deduct VAT does not justify giving retroactive effect to the authorisation. As regards protecting the legitimate interests of those concerned, the Commission states that, under Article 17 of the Sixth Directive, the right to deduct arises at the

time when the deductible tax becomes chargeable. Since the right to deduct arises at the time when the goods or services are delivered, Mr Sudholz could, in the present case, legitimately expect that he was entitled to deduct in full the input tax payable on the purchase of the car. Although Article 27 of the directive opens up the possibility of restricting the right to deduct input tax, the rights of the persons so entitled cannot be made dependent on a future decision on a request for application of this article. Therefore, the Commission takes the view that Decision 2000/186 adversely affects the legitimate expectations of Mr Sudholz.

32. In the view of the Council, Article 3 of Decision 2000/186 is valid and thus the decision has retroactive effect as from the date referred to in Article 3. The Council points out that the German Government submitted the request for authorisation on 11 December 1998 and it was received at the Commission on 8 January 1999. The fact that the decision was not adopted until later is due to the delay in the procedure at the Commission. Like the German Government, the Council recalls that a decision adopted pursuant to Article 27 cannot per se impose an obligation on an individual as it is directed at the Member State. It is for the Member State to ensure that a measure such as that referred to in Article 27 does not adversely affect the legitimate expectations of those concerned.

C – *The third question submitted for a preliminary ruling*

33. The German Government contends that the 50% ceiling on the right to deduct does not apply in all cases and in particular does not do so where a vehicle is used up to a maximum of 5% for private purposes. It acknowledges the problem that where a vehicle is used 80% for business purposes the taxable person can deduct a maximum of 50% and is thereby placed at an economic disadvantage. On the other hand, the taxable person also benefits from the 50% rule where a vehicle is used 10-49% for business purposes. Such effects are typical of flat-rate measures and ceilings.

34. In the view of the Commission, Article 2 of Decision 2000/186 is contrary to the principle of proportionality. (8) In its proposal of 13 December 1999 for a Council Decision (9) it proposed, at the request of the German Government, that a flat-rate 50% ceiling on the right to deduct should not apply where a taxable person is able to demonstrate that he usually uses the vehicle for business purposes more than 50% of the time. The Commission emphasises that under Article 27(1) measures intended to simplify the procedure for charging the tax may not, except to a negligible extent, affect the amount of tax due at the final consumption stage.

35. The Council considers that Article 2 of the decision is not contrary to the principle of proportionality. In that connection it refers to the Commission proposal to amend the Sixth Directive to limit to 50% the right to deduct the VAT charged on expenditure on vehicles not used exclusively for professional purposes. The German Government’s measure is also intended to place a flat-rate 50% ceiling on the right to deduct VAT. It is clear from this proposal that the flat-rate ceiling aimed at combating tax evasion or avoidance is consistent with the principle of proportionality.

V – **Appraisal**

A – *The first question submitted for a preliminary ruling*

36. The first question concerns procedural requirements. By this question the national court seeks to ascertain whether or not Article 2 of Decision 2000/186 is invalid because the procedure followed prior to its adoption did not comply with Article 27 of the Sixth Directive. There are three aspects in this regard: the term ‘authorise’ in Article 27(1) of the directive; the fact that the request for authorisation was not published by the Federal Republic; and the question whether or not the

authorisation goes beyond the request.

37. Article 17(2)(a) of the Sixth Directive lays down the right to deduct VAT in full as the principal rule. Two exceptions thereto are possible. The first possible exception, the so-called ‘freezing’ (or ‘standstill’) clause contained in Article 17(6) of the directive, relates to existing laws. Under that provision, the Member States may retain existing exceptions to the principle of full VAT deduction until the measures referred to in that article have been introduced. This possible exception does not apply in the present case. The second exception relates to new laws. Under Article 27(1) of the directive, special measures for derogation from the provisions of the directive are possible where the new measure is intended to simplify taxation or where the measure is intended to prevent certain types of tax evasion or avoidance. The Member State must be authorised to do so by the Council. The procedure to be followed in that respect is laid down in Article 27(2) to (4). A Member State wishing to introduce a measure on the basis of one of the alternatives referred to in paragraph 1 must inform the Commission thereof and provide it with the relevant information (paragraph 2). The Commission in turn must inform the other Member States (paragraph 3). Authorisation can then be granted either by an express decision of the Council or, after a certain period of time, by implicit authorisation (paragraph 4).

38. The first aspect raised by the national court relates to whether or not the authorisation must precede the introduction of the relevant measure. The German text of the Sixth Directive uses the word ‘ermächtigen’ and not the word ‘genehmigen’. In Decision 2000/186 both words are used. The use of the word ‘ermächtigen’ in German indicates that approval must be granted in advance, whilst when ‘genehmigen’ is used it can also be effected retrospectively. In most language versions a word having the latter meaning is used. The French version of the directive, for example, speaks of ‘autoriser’ and not of ‘habiliter’. The English and Italian versions, for example, also speak of ‘to authorise’ and ‘autorizzare’ respectively.

39. As the Council also notes, the adoption of national taxation measures falls within the exclusive competence of the Member State concerned. However, it must ensure that its taxation measures are compatible with Community law. Article 27 of the Sixth Directive does not relate to the authorisation to adopt measures in the field of VAT but to authorisation to adopt measures for derogation from the directive. As is evident from the above paragraph, it is clear that it cannot be inferred from the terminology used in Article 27 in most language versions that such approval must by definition be granted in advance. Nevertheless, it is clear from Article 27(2) that a Member State *wishing to introduce* measures for derogation must inform the Commission of them and provide it with all relevant information. Consequently, it follows that the (beginning of the) authorisation procedure at any rate must precede the actual introduction of the national measure for derogation. However, this still does not answer the question whether or not authorisation may also be granted after the introduction of the national measure for derogation or, in other words, whether this measure may be introduced pending the outcome of the authorisation procedure. The directive does not expressly prohibit this. If it is assumed that authorisation may also be granted retrospectively, the answer must be in the affirmative. However, I should point out that a Member State which introduces the proposed measure during the authorisation procedure does so entirely at its own risk. At that point no authorisation has been granted and therefore at that point the measure introduced is contrary to Community law and it is by no means certain that this possible infringement will be redressed by authorisation with retroactive effect. Therefore, the premature introduction into the national legal system of a measure for derogation by a Member State can constitute an infringement of Community law. However, it does not per se have any effect on the validity of the authorisation decision itself.

40. The second procedural aspect concerns the fact that the Federal Republic of Germany did not publish the request for authorisation to introduce measures for derogation. As has been

correctly observed by various intervening parties, no such requirement to publish can be inferred from the wording of Article 27 of the Sixth Directive. They refer to the opinion of Advocate General Fennelly in *Skripalle*. (10) That case related *inter alia* to whether or not non-publication of a decision authorising measures can affect the validity or effectiveness thereof. The Court did not deal with this question. However, Advocate General Fennelly concluded that there is no requirement to publish such decisions under Article 191(3) of the Treaty (now Article 254 EC) and that Article 27 of the Sixth Directive likewise does not impose, in terms, any obligation to publish an authorisation thereunder. He went on to state that he did not think that non-publication of a Council decision authorising measures reduced either legal certainty or the efficacy of administrative or legal remedies available to the adversely affected taxable person.

41. The present case does not relate to the publication of a decision authorising measures which has been published in the Official Journal, in accordance with long-established practice, but to the publication of the request for such authorisation. Nevertheless, I consider that the reasoning followed by Advocate General Fennelly should also be followed by analogy in this case. If no requirement to publish can be inferred from Article 27 of the Sixth Directive as regards decisions to be issued pursuant thereto, the same also applies to requests from the Member States for the issue of such decisions. Under this provision, it is required only that the Commission be informed of the intention and that it in turn then inform the other Member States. In the present case that was done on 8 January 1999 and 11 October 1999 respectively. The other Member States must be informed because they have the right to request that the matter be raised by the Council. Moreover, a provision requiring publication of requests for authorisation would make sense only if a larger circle than that at present were granted some influence over the outcome of the procedure.

42. The final aspect of the first question relates to whether decision 2000/186 may go beyond the request. It is claimed that the Federal Republic based its request only on grounds relating to the prevention of tax evasion or avoidance and did not cite the desirability of simplifying taxation.

43. The objective of the notification referred to in Article 27(2) of the Sixth Directive and the provision of the relevant information is to enable the Commission and, if necessary, the Council to verify whether the derogating arrangements are within the scope of the objectives referred to in Article 27(1) thereof. (11) Under Article 27(1) of the directive, a clear distinction must be drawn between simplification measures, on the one hand, and measures relating to the prevention of tax evasion and avoidance, on the other. It is clear from the case-law that where a request for authorisation is based on the second alternative, the authorisation cannot extend beyond that purpose. (12) Therefore, the Member State may not rely on the first alternative subsequently, that is to say after the authorisation has been granted. However, this does not prevent the relevant Member State from extending its request during the authorisation procedure by basing it also on the other alternatives set out in Article 27(1). That appears to be so in the present case. Any other view would imply that the Member State concerned has first to withdraw its request in order to submit a fresh request thereafter. That would not be very effective. Furthermore, it consequently follows that where authorisation is requested and granted in respect of both alternatives, the preconditions relating to both alternatives must also be satisfied. Germany has put forward both alternatives (in the course of the authorisation procedure). Therefore, the measure must be justified in respect of both alternatives and satisfy the preconditions thereto. That means that the measure must be proportionate if it is adopted with the aim of combating tax evasion and that, if it is intended also to simplify national laws, it may not affect, except to a negligible extent, the amount of tax due at the final consumption stage.

44. The Commission further noted that Community institutions are entitled to examine the request in the light of the criterion of simplification, even if the government concerned has not

asked them to do so. It bases this view on the objective of Article 27 of the Sixth Directive which forms part of the chapter relating to simplification procedures. I do not concur with this view. It is for the Member State to decide which alternatives it wishes to put forward to obtain authorisation to adopt a measure for derogation. This is true in particular since the directive draws a clear distinction between the two alternatives for measures for derogation and the associated conditions. Neither the Council nor the Commission may interfere in this discretionary power of the Member State. Therefore, a request for authorisation from a Member State cannot simply be complemented by them. Nor have they done so in the present case because both alternatives were put forward by Germany in the course of the procedure.

45. In the light of the foregoing, I conclude that during the procedure prior to the authorisation no irregularities arose which affect the validity of Decision 2000/186.

B – *The second question submitted for a preliminary ruling*

46. This question relates to the retroactive effect of Article 3 of the decision. It is clear from the case-law of the Court that retroactive effect may be given to a Community decision only in exceptional cases, that is to say where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. (13) These requirements arise from the principles of legal certainty and the protection of legitimate interests.

47. Firstly, it should be noted that Article 17 of the Sixth Directive confers rights on taxable persons, (14) that the right to deduct forms a fundamental part of the VAT system, (15) and that this right arises at the time when the deductible tax becomes chargeable. (16) Derogations are permitted only in the cases expressly provided for in the directive and provided that they remain within the substantive and procedural preconditions laid down therein. (17) Although a taxable person may not therefore legitimately expect that the basis rule – the right to deduct VAT in full – will never be abridged or restricted, he may legitimately expect that, if a particular national measure derogating from this basic rule is introduced, it satisfies the requirements laid down in Article 27 of the directive and in particular that it is based on an authorisation. At the time when Mr Sudholz purchased the vehicle and assigned it to his business – April 1999 – Germany had introduced the national rule limiting the deduction but it was not based on the authorisation required under Article 27(1) of the directive. Since at that time Germany was not authorised to introduce and apply the particular national measure, Mr Sudholz was entitled to rely on the rules contained in Article 17 of the directive which were more favourable to him.

48. The question is now whether he may be deprived of this right retrospectively. It follows from the case-law of the Court that the principle of the protection of legitimate expectations precludes the abolition or limitation of a right to deduction conferred on taxpayers by the Sixth Directive.

49. In my opinion in *Marks & Spencer* (18) I summarised the principal features of the Court's case-law on the principle of the protection of legitimate expectations as follows:

'first of all, the Court has held in a series of judgments that that principle, which stems from the principle of legal certainty, forms part of the Community legal order. The principle requires legal rules to be precise and legal situations and relationships governed by Community law to be foreseeable;

secondly, individuals cannot legitimately expect that the legal rules applicable to them will not be amended. The Community legislature retains competence to adapt existing legislation to altered economic circumstances and, I would add, to altered political, policy and social views;

thirdly, individuals may legitimately expect that rights created under existing rules will not be

retroactively abridged. Only in very exceptional cases is it possible to derogate from this general principle, for example in the case of overriding economic necessity relating to the management of common organisation of agricultural markets or on grounds of overriding public interest.'

50. I should further note that as regards the requirement of necessity the Council stated no grounds at all in its decision for the need to give the decision retroactive effect. The mere consideration that the requested authorisation is designed to prevent evasion and abuse is not sufficient. That is one of the alternatives in respect of authorising a Member State to adopt measures for derogation from the directive. It does not in itself constitute an alternative in respect of giving a decision retroactive effect. As the Commission has correctly observed, the problem of establishing the right to deduct in respect of vehicles used partially for private purposes and partially for business purposes has existed since the directive was introduced. It cannot be inferred from this mere fact that there is thus no compelling need to authorise a Member State to adopt particular rules with retroactive effect.

51. Nor do I consider valid the German Government and Council's argument that retroactive effect must be given to the decision because the Commission delayed consideration of the request for authorisation. Even if the Commission has committed a procedural irregularity, such irregularity can never constitute a reason for abridging retroactively the rights which taxable persons may derive from Community law. They have no influence over the course of the authorisation procedure.

52. The German Government has also contended that Mr Sudholz is unable to derive rights from Article 27 of the Sixth Directive. It puts forward two arguments in that respect. Firstly, an authorisation decision issued pursuant to Article 27 is merely declaratory in nature. Secondly, this article relates only to relations between the Member States and the Community.

53. In the view of the German Government, the possibility of tacit approval by virtue of lapse of time, as provided for in Article 27, indicates that the authorisation decision is purely declaratory in nature. In such a situation the procedure is concluded without a Council decision on which a taxable person could possibly rely. However, I consider, as the Commission also stated at the hearing, that the nature of such approval is constitutive, regardless of whether or not it is tacit. In the absence of such authorisation the Member State may not introduce rules for derogation from the directive. It is thereby established that the authorisation has the effect of amending law because in the absence of such consent the Member State is obliged to comply with Article 17 of the directive.

54. The second argument likewise does not hold water. Although the authorisation procedure laid down in Article 27 takes place between the Community and the Member States, the outcome of this procedure can have a considerable effect on the rights which citizens may derive from Article 17 of the Sixth Directive. As stated at paragraph 47 above, the nature of the rights means that they can be amended or limited only by a Council decision taken pursuant to Article 27 of the directive. Therefore, Mr Sudholz has an interest in the decision being taken lawfully and in it conforming in substantive terms with Community law.

55. In the light of the foregoing I conclude that giving retroactive effect to Decision 2000/186 breaches the Community-law principles of legal certainty and of the protection of legitimate expectations and that therefore Article 3 of this decision is invalid in so far as it concerns retroactive effect as from 1 April 1999.

C – *The third question submitted for a preliminary ruling*

56. By this final question the national court seeks to ascertain whether Article 2 of the decision

satisfies, in substantive terms, the requirements laid down on a measure for derogation. Since the authorisation is based both on the first and the second alternative set out in Article 27(1) of the Sixth Directive, this must be examined separately in respect of each alternative.

57. The Court interprets possible applications of Article 27 of the Sixth Directive strictly on the basis of the principle of proportionality.

58. In *Commission* v *Belgium* (19) the Court pointed to the principle of proportionality by ruling that departures from the measure for charging laid down in the directive are possible only is so far as is strictly necessary for achieving the aim in view, namely the prevention of tax evasion or avoidance. This case-law was subsequently confirmed in *Skripalle* (20) and *Ampafrance and Sanofi*. (21) In the latter judgment, which was given after the authorisation at issue in this case had been granted, the Court makes it clear that there is no risk of tax evasion or avoidance where it is evident from objectively verifiable evidence that the expenditure was incurred for strictly business purposes. Although the Court considers that a measure for derogation involving standard amounts is justified under certain circumstances, such a measure is to be regarded as disproportionate if it excludes certain expenditure from the right to deduct VAT without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in the relevant case.

59. The case of *Ampafrance and Sanofi* related to a complete exclusion from the right to deduct VAT, whilst the present case concerns a flat-rate ceiling on that right. However, since in both cases the right to deduct is subject to a quantitative restriction – entirely or to a considerable extent – the principle of proportionality requires that in both situations the taxable person must have an opportunity to demonstrate that there is no tax evasion or avoidance in his case.

60. The case-law cited above relates to measures for derogation intended to prevent fraud or improper use. In my view, the examination in the light of the principle of proportionality carried out therein also applies to national measures for derogation intended to bring about simplification. The in principle legitimate aim of simplifying the procedure for charging VAT must be weighed up against the limitations on the taxable persons' rights following therefrom. That is also evident from the wording of the final sentence of Article 27(1) of the Sixth Directive. The neutrality rule laid down therein is to be construed as a specific case of the principle of proportionality.

61. If the authorisation granted in the present case is examined in the light of the foregoing, it is clear that – in so far as it is intended to combat fraud – it does not make provision for the taxable person to furnish proof to the contrary and thus breaches the principle of proportionality. The absence of such provision results in this measure affecting the amount of tax due at the final consumption stage to more than a negligible extent in all cases in which the taxable person uses a vehicle – considerably – more than 50% for business purposes. The authorisation in question – in so far as it is also intended to simplify the procedure for charging the tax – thus also fails to meet the criterion laid down in the final sentence of Article 27(1) of the Sixth Directive.

62. On these grounds, I consider that the authorisation granted in Article 2 of Decision 2000/186 is invalid because it contains a limitation on the rights which taxable persons derive from Article 17(2)(a) of the Sixth Directive which is disproportionate and contrary to Article 27(1).

63. For the sake of completeness, I should note that the proposal for a decision authorising a measure for derogation, made by the Commission to the Council, did indeed make provision for the taxable person to demonstrate that the purchased vehicles would be used more than 50% for business purposes. This proposal would thus have met the criteria laid down above. However, the Council amended the Commission proposal in a restrictive sense in precisely this regard by stipulating that the right to deduct VAT would continue to exist only in so far as the persons concerned used vehicles less than 5% for private purposes. (22)

64. The Council and the German Government have further observed that the basic rule – the right to deduct VAT in full – is more of an exception than a rule on account of the 'freezing' (or 'standstill') clause contained in Article 17(6) of the directive and the possibility to adopt national measures for derogation pursuant to Article 27. They appear thereby to argue that Germany should be placed in the same position as the other Member States by applying Article 27 in the present case. In addition, they refer to a Commission proposal to amend the Sixth Directive itself which makes provision for a flat-rate deduction in respect of cars which are used partly for business purposes and party for private purposes. By reference to that proposal, it is claimed that the United Kingdom is authorised to place a flat-rate 50% ceiling on the deduction of VAT in respect of such vehicles.

65. These arguments confuse the role and position of the Community legislature with that of the Community executive. Within the bounds established by Community law, the Community legislature may adapt secondary Community law at its discretion in accordance with its political and policy views. This is also true of VAT which forms the subject matter of the Sixth Directive. However, the Community executive, which is called upon to apply existing Community legislation, is required to comply with the rules laid down in that legislation. From the point of view of legal certainty the principle of legality must be strictly adhered to, certainly where the rights and obligations of taxable persons are involved. Consequently, a measure which disproportionately limits taxpayers' rights and, furthermore, is contrary to the letter of Article 27 of the Sixth Directive and thus with existing Community law, cannot be justified by reference to possible future legislation.

66. I consider irrelevant the reference to the authorisation granted to the United Kingdom, whatever the exact content thereof, since, in my view, it is established that Article 2 of Decision 2000/186 under examination by the Court in this case is contrary to applicable Community law.

67. It follows from the answer which I propose that the Court should give to the third question that the decision is invalid in its entirety. Therefore, strictly speaking no answer need be given to the second question. If the Court does not concur with my opinion as regards the third question, it follows from the proposed answer to the second question that Article 3 of the decision is at any rate invalid in so far as it was given retroactive effect as from 1 April 1999.

VI – **Conclusion**

68. Having regard to the foregoing, I propose that the Court should answer the questions referred by the Bundesfinanzhof as follows:

First question: 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 on the harmonisation of the laws of the Member States relating to turnover taxes – common system of value added tax: uniform basis of assessment meets the requirements laid down in Article 27 of Directive 77/388/EEC.

Third question: Article 2 of Decision 2000/186/EC is invalid.

Second question: Article 3 of Decision 2000/186/EC is invalid in so far as it gives retroactive effect to that decision as from 1 April 1999.

1 – Original language: Dutch.

2 – OJ 2000 L 59, p. 12.

3 – OJ 1977 L 145, p. 1, most recently amended by Directive 2001/4/EC (OJ 2001 L 22, p. 17).

4 – BGBl. I 1999, 402.

5 – Opinion of Advocate General Fennelly in Case C-63/96 *Skripalle* [1997] ECR I-2847.

6 – Case C-62/93 *BP Supergas* v *Greek State* [1995] ECR I-1883.

7 – The Netherlands Government refers *inter alia* to Case C-368/89 *Crispoltoni* [1991] ECR 3695.

8 – In this connection the Commission refers to Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 62.

9 – COM/99/690 final.

10 – Cited in footnote 5.

11 – *BP Supergas*, cited in footnote 6, paragraph 23.

12 – *Skripalle*, cited in footnote 5.

13 – See, for example, Case 98/78 *Racke* [1979] ECR 69; Case 99/78 *Weingut Gustav Decker* [1979] ECR 101; and Case C-337/88 *SAFA* [1990] ECR I-1.

14 – *BP Supergas*, cited in footnote 6.

15 – See, for example, *Ampafrance and Sanofi*, cited in footnote 8.

16 – See, for example, C-400/98 *Breitsohl* [2000] ECR I-4321.

17 – *BP Supergas*, cited in footnote 6, paragraph 22; and Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 24.

18 – Case C-62/00 [2002] ECR I-6325.

19 – Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 24.

20 – Case C-63/96 *Skripalle*, cited in footnote 5.

21 – Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi*, cited in footnote 8.

22 – See the seventh recital in the preamble to Decision 2000/186. In a footnote reference is made to *Skripalle*. The Council appears thereby to argue that the German measure is consistent with the principle of proportionality.