OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 22 June 2006 (1)

Case C-228/05

Stradasfalti Srl

v

Agenzia delle Entrate Ufficio di Trento

1. In the present request for a preliminary ruling, the Commissione Tributaria di Primo Grado (First Instance Tax Court), Trento, Italy, wishes in essence to know whether national rules precluding deduction of input VAT on motor vehicles which are not intrinsic to the taxable person's business activity as such, or on fuel for such vehicles, may be justified on the basis of Article 17(7) of the Sixth VAT Directive, (2) which allows total or partial exclusion of some goods from the deduction system for cyclical economic reasons and subject to consultation of the VAT Committee, in circumstances in which the rules have been maintained in force for 25 years and the VAT Committee has merely taken note of their adoption.

Relevant provisions of the Sixth Directive

2. Pursuant to Article 17(2) of the Sixth Directive, essentially, input VAT on supplies acquired by a taxable person is to be deductible from his output tax in so far as those input supplies are used for the purposes of his taxable output supplies.

3. Article 17(6) provides, however:

'Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

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

4. In fact, no such rules have yet been adopted. The Sixth Directive came into force in Italy on 1 January 1979. (3)

5. Article 17(7) of the Sixth Directive provides:

‘Subject to the consultation provided for in Article 29, each Member State may, for cyclical economic reasons, totally or partly exclude all or some capital goods or other goods from the system of deductions. ...’

6. Article 27 provides for a different, and more permanent, type of derogation. At the material time, (4) that provision read 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. ...

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.

…’

7. Article 29, referred to in Article 17(7), provides:

‘1. An Advisory Committee on value added tax, hereinafter called “the Committee”, is hereby set up.

2. The Committee shall consist of representatives of the Member States and of the Commission. The chairman of the Committee shall be a representative of the Commission. Secretarial services for the Committee shall be provided by the Commission.

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

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

The *Metropol* judgment

8. In *Metropol and Stadler* (5) the Court had to consider the provisions of Article 17(6) and, more particularly, 17(7) in the context of a request for a preliminary ruling from the Austrian Verwaltungsgerichtshof (Supreme Administrative Court), with regard to a national provision introduced after the Sixth Directive came into force in Austria. That national provision redefined a category of minibus much more narrowly than had been the case in previous administrative

practice and thereby excluded from deduction the input VAT on certain vehicles which had previously given rise to a right to deduct.

9. After establishing that the change of definition could not be justified under Article 17(6) of the Sixth Directive, because it represented a substantive change in binding rules as compared with the situation before the directive came into force in Austria, the Court went on to examine whether Article 17(7) authorised a Member State to exclude goods from the system of VAT deductions (a) without first consulting the VAT Committee, and (b) without limitation in time, in order to consolidate its budget.

10. First, the Court noted that the right of deduction is an integral part of the VAT scheme, ensuring the neutrality of that tax. In principle, therefore, it may not be limited. Derogations are permitted only in the cases expressly provided for in the Sixth Directive, which are to be interpreted strictly. Article 17(7) is one of those cases, giving Member States the right to exclude goods from the deduction system, subject to the consultation provided for in Article 29.

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

12. Article 17(7) thus lays down a procedural obligation which the Member States must observe in order to be able to make use of the derogation it sets out. Consultation of the VAT Committee is a condition precedent to the adoption of any measure on the basis of that provision. If an exclusion from the system of deductions has not been established in accordance with that condition, the national tax authorities may not rely on the exclusion to the detriment of taxable persons. (6)

13. Second, the first sentence of Article 17(7) of the Sixth Directive authorises Member States to exclude goods from the system of deductions for ‘cyclical economic reasons’, that is to say, to adopt measures of a temporary nature intended to cope with the temporary situation of its economy at a given moment. Application of such measures must therefore be limited in time and, by definition, they may not be of a structural nature. It follows that Article 17(7) does not authorise a Member State to adopt measures excluding goods from the system of deducting VAT which contain no indication as to their limitation in time and/or which form part of a package of structural adjustment measures whose aim is to reduce the budget deficit and allow State debt to be repaid. (7)

Relevant national provisions

14. The provisions in dispute in the present case appear in Article 19-bis-1 of Decreto del Presidente della Repubblica No 633 of 26 October 1972 (‘DPR 633/1972’).

15. Under paragraph 1(c) of that article, in derogation from the general rule of deductibility of input tax from output tax, VAT on the purchase or importation of certain types of motor vehicle which are not intended for public use and which are not intrinsic to the taxable person's business activity as such, (8) may in principle not be deducted other than by commercial agents or representatives, although it appears that 50% could be deducted until 1983. Since 1 January 2001, (9) 10% of the input tax on vehicles acquired under leasing arrangements, and 50% of that on vehicles not powered by internal combustion, (10) may again be deducted. The Italian Government stated at the hearing that the 10% deduction had been increased to 15% as from 1 January 2006.

16. Under paragraph 1(d), VAT on the purchase or importation of fuel and lubricants for any vehicle may be deducted only to the extent that VAT on the purchase or importation of the vehicles themselves is deductible.

17. What is now Article 19-bis-1 was introduced into the original text of DPR 633/1972 (as the new text of Article 19) in 1979, after the Sixth Directive came into force in Italy. (11) It has since been amended and its period of validity (originally until 31 December 1983) has been extended on a number of occasions – 24, according to the Commission – with the result that it is still in force today.

18. It appears from the submissions and documents presented to the Court that the measure in question has been the subject of a number of consultations of the VAT Committee. At the hearing it was further stated that the Commission had decided on 12 October 2005 – thus, after the lodging of all the written observations in this case – to send Italy a letter of formal notice pursuant to Article 226 EC concerning that measure, and that Italy had subsequently initiated the procedure for obtaining Council authorisation under Article 27 of the Sixth Directive.

The reference for a preliminary ruling

19. Stradasfalti Srl ('Stradasfalti') is a company which carries out road works. It has bought motor cars (of a 'private' rather than a 'commercial' kind) for its staff to use to travel between worksites and offices, to visit various administrations, and to enjoy as a 'fringe benefit'.

20. It objects to the limitation on the deductibility of input tax on those vehicles and the fuel for them. In 2004 it therefore decided to seek reimbursement of such VAT in respect of the years 2000, 2001, 2002, 2003 and 2004, totalling EUR 31 337.21.

21. On 15 July 2004, the local tax office rejected those claims. Stradasfalti has challenged the rejections before the referring court.

22. Having regard to the arguments before it – in which Stradasfalti submits that the contested provisions are contrary to the Sixth Directive and the tax office contends that Member States are entitled to exclude from deduction goods which are not inherent to the taxable person's business activity – and to the Court's judgment in *Metropol*, the national court has requested a preliminary ruling on the following questions:

'(1) Is the first sentence of Article 17(7) of Sixth Council Directive 77/388/EEC of 17 May 1977, in relation to paragraph 2 of that article, on the harmonisation of the laws of the Member States on turnover taxes, to be interpreted as:

(a) precluding from being treated as "consultation of the VAT Committee", for the purposes of

Article 29 of that directive, the mere notification by a Member State of the adoption of a rule of national law, like the present Article 19-bis-1[(1)](c) and (d) of Presidential Decree No 633/1972, as subsequently extended, which restricts the right of VAT deduction in respect of the use and maintenance of goods under Article 17(2), on the basis that the VAT Committee has merely taken note of it;

(b) also precluding from being treated as a measure falling within its scope any restriction whatsoever of the right to deduct VAT connected to the purchase, use and maintenance of the goods referred to in (a) introduced before the consultation of the VAT Committee and maintained in force by means of various legislative extensions adopted in unbroken succession for more than 25 years;

(c) if the answer to 1(b) is in the affirmative, the Court is asked to provide guidelines for determining the maximum period, if any, for such extensions on grounds of cyclical economic reasons referred to in article 17(7) of the *Sixth Directive*, or else to state whether the failure to observe the temporary nature of the derogations (repeated over time) confers on the tax payer the right to deduct.

(2) If the requirements and conditions for the procedure under Article 17(7) referred to above have not been complied with, the Court of Justice is asked to state whether Article 17(2) of that directive is to be interpreted as precluding a rule of national law or an administrative practice adopted by a Member State after the entry into force of the Sixth Directive (1 January 1979 for Italy) which, objectively and without limitation in time, restricts VAT deduction in respect of the purchase, use and maintenance of certain motor vehicles.'

23. Written observations have been submitted by Stradasfalti, the Italian Government and the Commission, all of whom also presented oral argument at the hearing on 6 April 2006.

Assessment

Admissibility

24. The Italian Government submits that questions 1(b) and 2 are not relevant to the dispute in the main proceedings in so far as they refer to legislation other than that in force during the years (2000 to 2004) in respect of which Stradasfalti seeks reimbursement of input tax, and that the first part of question 1(c) is hypothetical in so far as it presupposes an affirmative answer to question 1(b).

25. Those questions are thus in its view inadmissible in accordance with the Court's judgment in *Längst*, (12) to the effect that the Court may decline to rule on a question referred by a national court if the interpretation sought bears no relation to the facts of the main action or its purpose, or if the problem is hypothetical.

26. Underlying the objection to the admissibility of question 1(b) is Italy's assertion that, although in earlier years the legislation embodying the measure in issue may have been enacted or re-enacted *before* consultation of the VAT Committee, each amendment or extension since 1999 (and thus in respect of the period 2000 to 2004) has been adopted *after* consultation of the committee.

27. I note however that the question is phrased in entirely general terms. Nothing in the order for reference refers to any specific period or mentions any specific consultation of the VAT Committee, whether before or after adoption of a measure. By contrast, Stradasfalti, the Italian

Government and the Commission have all referred to various consultations and have all produced minutes of committee meetings, some preceding and some following the adoption of the measure in question.

28. It seems clear that the question of Italy's compliance with the requirements of consultation of the VAT Committee must be determined on the basis of the specific steps taken on each occasion. That, however, is a question of fact and can therefore be decided only by the national court. It is not for this Court to establish facts in the context of a reference for a preliminary ruling, even when those facts concern a Community procedure.

29. In that light, it seems to me perfectly admissible for the referring court to seek in general terms a preliminary ruling in the light of which it will assess such facts as it will ascertain or has already ascertained with regard to consultation of the VAT Committee. (13)

30. Likewise, since that court needs to know what does or does not constitute valid consultation, it is in my view legitimate for this Court to take account of the various situations revealed by the documents produced, whilst refraining from making any specific finding of fact such as to determine the outcome of the main proceedings on the basis of those documents.

31. Nor can question 1(b) be dismissed as irrelevant simply because it refers to 'various legislative extensions adopted in unbroken succession for more than 25 years', whereas in the main proceedings deduction is claimed in respect of a shorter period.

32. Regardless of whether the requirements of consultation were fulfilled or not, the 'unbroken succession' referred to may be relevant to assessing whether there has been compliance with the requirement in Article 17(7) of the Sixth Directive that any exclusion from the deduction system must be based on 'cyclical economic reasons'.

33. If question 1(b) is thus admissible – as in my view it is – the Italian Government's objection that question 1(c) is hypothetical has no basis.

34. With regard to the admissibility of question 2, Italy's objection is based on its argument that, for the period subsequent to 1999, the validity of the disputed measures was not 'without limitation in time' but was extended from year to year pending the adoption of a directive on rules governing the right to deduct. Italy therefore claims that the question is without relevance for the dispute in the main proceedings.

35. It is true that in 1998 the Commission submitted a proposal for a Council Directive amending Directive 77/388/EEC as regards the rules governing the right to deduct value added tax. (14) That proposal has very recently been withdrawn, (15) apparently following difficulty in reaching agreement within the Council. Article 1(2) of that proposal would have inserted an Article 17a into the Sixth Directive, dealing inter alia with deduction of VAT on 'expenditure relating to passenger cars which are not used solely for business purposes', on which Member States could have set a ceiling of not less than 50% of the tax in question. It is also true that mention is made of that proposal in the minutes of the VAT Committee produced by the Italian Government.

36. However, from the context of the reference for a preliminary ruling it seems to me that question 2 is not to be read narrowly as concerning only situations in which no actual limitation in time is set for the validity of a measure, but rather as concerning all situations in which validity is so extended as to be likely to conflict with the requirement that the derogation be for 'cyclical economic reasons'.

37. I therefore see no ground for finding any of the questions referred inadmissible.

38. In answering them, I shall adopt an approach similar to that proposed by the Commission. I therefore deal first with the procedural requirements for the validity of a derogation under Article 17(7) of the Sixth Directive (question 1(a) and part of question 1(b)), then with the substantive requirements for such validity (the remainder of question 1(b) and the first part of question 1(c)), and finally with the legal consequences of a failure to observe either type of requirement (the remainder of question 1(c), and question 2).

Procedural requirements – questions 1(a) and (b)

39. The national court wishes to know, essentially, whether 'mere notification of the adoption of a measure' can constitute 'consultation' of the VAT Committee when the committee simply 'takes note' of it; and what is the effect, if any, of consultation subsequent to adoption of the measure in question.

40. At one level, a very straightforward answer can be given to the first of those questions.

41. The VAT Committee is an advisory body. Whilst it may adopt 'guidelines', it is not obliged to do so unless the question is one of general interest and a particular view is shared by a clear majority of Member States. (16) An obligation to consult the committee is imposed by Article 17(7) of the Sixth Directive on a Member State which wishes to introduce an exclusion from deduction pursuant to that provision. By contrast, no condition is imposed as to the outcome of the consultation. If moreover there is no obligation on the VAT Committee, once consulted, to adopt any particular position (as there is not), the validity of the derogating measure cannot be called into question simply because the committee has 'merely taken note' of it.

42. Furthermore, Article 12(3) of the VAT Committee's Rules of Procedure specifically provides for the committee to 'take note' of a consultation which a Member State is obliged to make under the Sixth Directive. The fact that the committee does so – and it appears from the minutes produced before the Court that it has on several occasions taken note of Italy's consultation with regard to the disputed measure – cannot thus in itself impinge on the validity of that consultation.

43. However, question 1(a) refers to 'mere notification … of the adoption of a rule of national law'. It may perhaps thus be read as asking whether consultation can be said to have taken place when the committee merely takes note of the notification of a measure already adopted.

44. That in turn raises two further questions: what is needed in a 'notification' for it to constitute 'consultation'; and whether consultation *after* the adoption of a measure is a valid consultation or can have any effect (a matter also alluded to in question 1(b)).

45. On the first of those questions, it seems to me that the Commission is quite right in saying, essentially, that the Member State must communicate to the committee sufficient information for the other Member States and the Commission to be able to express a view as to whether the measure meets the substantive criteria laid down in Article 17(7). As the Court stated in *Metropol*, 'consultation enables the Commission and the other Member States to control the use by a Member State of the possibility of derogating from the general system of deducting VAT, by checking in particular whether the national measure in question satisfies the condition of adoption for cyclical economic reasons'. (17) Any lesser requirement as to the content or extent of the notification required would deprive the procedure of any usefulness whatever.

46. Whether sufficient information was provided in the consultations in issue is a question of fact, to be determined by the national court. It is none the less noteworthy that a number of the documents annexed by both the Italian Government and the Commission to their observations to the Court indicate that discussion on Italy's consultation did take place within the committee and that the Commission was able to express a view on the measures concerned.

47. As regards the second question, the judgment in *Metropol* clearly states that consultation of the VAT Committee is a 'condition precedent' for adoption of a derogating measure. (18)

48. The Italian Government nevertheless places reliance upon the Court's subsequent statement in *Sudholz* (19) 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.'

49. In that regard, I would point out that the consultation procedure set up by Article 17(7) differs from the authorisation procedure in Article 27. (20) It may therefore not be possible or appropriate to draw a full analogy between the two. The aim of consultation is generally most likely to be achieved when it precedes the adoption of a course of action, because it may thus influence the steps actually taken. In contrast, authorisation may still serve to validate the course of action as taken, even if it is accorded retroactively.

50. Moreover, even if an analogy is appropriate, it should be noted that in *Sudholz* the Court did not in fact accept that authorisation under Article 27 could be granted with retroactive effect. Rather, it decided that the authorisation there in issue, granted after the adoption of the measure concerned, was not invalid because of its timing but could legitimise the measure only as from the time it was granted.

51. In addition, the passage cited by the Italian Government concerned the timing of the Council's authorisation rather than of the application for that authorisation – which, it seems clear, must precede adoption of the derogating measure. The Court stated 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 (21) 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'. (22)

52. If an analogy is to be drawn, therefore, it would seem sensible to regard the initiation of a consultation pursuant to Article 17(7) as the equivalent of application for authorisation pursuant to Article 27; and thus as having to precede adoption of the measure in question. The position, if any, taken by the VAT Committee could however be subsequent to adoption without affecting the validity of the measure on procedural grounds.

53. The Commission makes the further point that the very nature of cyclical requirements usually means that action must be taken rapidly, and that meetings of the VAT Committee are relatively infrequent. A derogation might thus have to be introduced before the committee could discuss it.

54. However, it does not seem to me likely that the need to exclude certain goods from the deduction system can ever be so urgent as to preclude first at least initiating the consultation procedure by notifying the VAT Committee of the Member State's intention. In any event, the committee's Rules of Procedure state (23) that it is to meet in principle four times a year; and the Commission agreed at the hearing that it was possible (at least in theory) to call an extraordinary meeting of the committee in circumstances of urgency.

55. Nor, indeed, does it seem to be suggested in the present case that Italy on any occasion adopted any relevant legislative act between the moment when it initiated a consultation of the VAT Committee and the moment when that committee was able to discuss the matter, or that it was on any occasion obliged to act with urgency before a meeting of the committee could take place.

56. If the VAT Committee must in principle be consulted before adoption of the measure in issue, are there any circumstances in which a subsequent consultation can none the less produce any effect?

57. The national court refers in question 1(b) to a restriction introduced before consultation of the committee. Stradasfalti states that, although the disputed measure was first introduced in 1979, the first consultation of the committee was not until 1981. Italy points out that the measure has been re-enacted on several occasions since then.

58. It seems to me clear that, even if consultation is a condition precedent to the adoption of any measure on the basis of Article 17(7), failure to fulfil that condition in a particular instance cannot preclude for all time any subsequent adoption of an identical or similar provision following due consultation.

59. In my view, it is therefore necessary to look at each legislative act (be it enactment, re-enactment, extension of validity or amendment of a measure) and determine (a) whether the VAT Committee was consulted before its adoption and (b) whether on that occasion sufficient information of the specific content of the measure was given for the other Member States and the Commission to be able to form a view as to whether that measure met the substantive criteria laid down in Article 17(7).

60. On that basis, it will be possible for the national court to determine which of the various legislative acts embodying the disputed measure in its successive forms complied with the procedural requirements of Article 17(7), and which did not.

61. I am therefore of the view that consultation of the VAT Committee by a Member State is a condition precedent to adoption of each (successive) legislative act embodying an exclusion from the right to deduct pursuant to Article 17(7) of the Sixth Directive. The consultation must involve providing sufficient information as to the specific content of the exclusion for the other Member States and the Commission to be able to form a view as to whether it meets the substantive criteria laid down in Article 17(7).

Substantive requirements – questions 1(b) and 1(c)

62. The national court wishes to know, essentially, whether a measure kept in force for 25 years can be justified on the basis of Article 17(7) of the Sixth Directive; and, if not, for what length of time a derogating measure may validly be extended for cyclical economic reasons.

63. It is clear from *Metropol* (24) – and indeed from the wording of the provision – that Article 17(7) of the Sixth Directive can authorise only temporary measures responding to a temporary (cyclical) economic situation. (25)

64. Furthermore, it seems to me very difficult, if not frankly impossible, to describe a measure which applies for 25 years as 'temporary', or an economic situation which lasts for 25 years as temporary, short-term or cyclical. Twenty-five years amount to more than half of the lifetime of the European (Economic) Community, and practically the whole of the period during which the Sixth Directive has been in force in Italy.

65. The Italian Government however seeks to confine the Court's assessment to the five year period from 2000 to 2004.

66. I cannot agree that the validity of a measure purportedly justified for 'cyclical economic reasons' must be determined by reference only to the period material to its application to the facts in the national proceedings. The total length of time for which the measure remains in force is clearly also relevant when assessing whether the justification is made out. In my view, a period of 20 or 25 years is equally clearly too long to meet the criterion.

67. The situation would of course be different if a series of successive measures were to be implemented, each responding in a different way to a series of different cyclical economic circumstances. In view of the fact that the measure in issue in the present case has been renewed in various ways since it was first introduced in 1979, the national court must satisfy itself that such is not the case. That is a question of fact for that court to decide, but the Court of Justice may none the less provide a degree of guidance.

68. First, it appears that very few changes have been made to the disputed measure. The Court has been informed only of the existence of a partial right of deduction at certain periods – 50% between 1979 and 1983, 10% from 2001 to 2005 (50% in respect of a limited category of vehicles) and now 15% since the beginning of 2006. There appears to have been no right to deduction whatsoever for the 18 year period from 1983 to 2000 inclusive. Thus, the proportion of VAT which may or may not be deducted has occasionally varied, but the nature of the measure as an exclusion from deduction appears to have remained unchanged and uninterrupted since it was first introduced.

69. Second, although in theory it might be possible to imagine a series of successive short-term economic situations, each of which required limitation – by a different percentage – of the right to deduct input VAT on motor vehicles, no such series has been alleged to exist in the present case.

70. It therefore seems reasonable to conclude, unless convincing evidence to the contrary is presented to the national court by the tax authorities, that the disputed measure is neither temporary in nature nor based on temporary, short-term or cyclical economic reasons and consequently that it cannot fulfil the substantive requirements for justification under Article 17(7) of the Sixth Directive.

71. The referring court also requests guidance as to the maximum period for which an exclusion from deduction justified under that provision may be extended.

72. Although a period of 20 or 25 years appears manifestly too long, I do not think it is sensible (or possible) to propose any specific time-limit. The relevant criterion lies in the nature of the economic situation giving rise to a need for exclusion from the right to deduct, rather than in the specific duration of the situation. (The exclusion itself, of course, clearly cannot be justified for

longer than the duration of the circumstances which render it necessary.)

73. Stradasfalti refers to the Commission's submission in *Metropol* that only 'periods of substantial divergence from the normal economic cycle' are concerned, (26) and to Advocate General Geelhoed's view in the same case that: 'The "cyclical economic reasons" requirement means that the fiscal measure must be aimed at counteracting cyclical fluctuations. The measure forms part of the economic policy of a Member State. In this context, I understand economic policy to mean the influencing, through the government budget, of macroeconomic quantities such as production, consumption and import/export volumes over short periods of time, often no more than one or two years in length.' (27)

74. Both of those explanations appear to me to add an apposite and helpful gloss on the Court's statement in its judgment that Article 17(7) 'authorises a Member State to adopt measures of a temporary nature intended to cope with the temporary situation of its economy at a given moment. Application of the measures referred to in that provision must therefore be limited in time and, by definition, they may not be of a structural nature.' (28) The criteria indicated may be used by a national court when assessing whether a measure meets the substantive requirements for justification under Article 17(7), even if no precise time limit can be put on what is 'temporary' in that context.

75. I would add that some degree of fluctuation around an underlying trend is a normal feature of economic performance. It seems to me that the draftsman of Article 17(7) cannot have intended that normal phenomenon to give rise to a right for a Member State to derogate from the basic entitlement of a taxable person to deduct input tax in accordance with Article 17(2) of the Sixth Directive. Rather, it seems to me that Article 17(7) – which is, after all, to be construed strictly (29) – must refer to a rather more serious or significant divergence from the trend, such as would legitimately prompt the adoption of measures to prevent the aggravation of the economic cycle.

76. I am therefore of the view that Article 17(7) of the Sixth Directive must be interpreted as capable of authorising only temporary measures responding to short-term economic circumstances. A measure maintained in force for a period exceeding the duration of such circumstances, without substantial modification such as to respond to a changed economic situation, cannot be authorised under that provision.

Legal effects of failure to comply with requirements – questions 1(c) and 2

77. The national court asks whether failure to have regard to the temporary nature of an exclusion from deduction based on Article 17(7) of the Sixth Directive can confer on taxable persons a right to deduct, and whether application of the exclusion is precluded by Article 17(2).

78. It is evident that, if a national measure providing for the exclusion of certain goods from the right to deduct input VAT was not validly adopted in compliance with the requirements of the Sixth Directive, the rules contained in that measure cannot be applied. What rules, then, must be applied in their stead?

79. The Sixth Directive, like all harmonising directives, requires Member States to bring certain provisions into force but is not itself directly applicable. However, the Court has consistently held that individuals may rely on those of its provisions which are clear, precise and unconditional. In particular, the provisions of Article 17(1) and (2), establishing the right to deduction, have been held to confer rights on individuals on which they may rely before a national court. (30)

80. Moreover, a taxable person ‘who has completed his VAT return for a tax period using the method laid down by the national rules which transpose the Sixth Directive into domestic law may recalculate his VAT liability in accordance with the method held by the Court to comply with Community law, under the conditions laid down by national law, which have to observe the principles of equivalence and effectiveness’ (31) – ‘that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order’. (32)

81. Thus, if a national measure excluding certain goods from the deduction system has not been validly adopted, a taxable person affected by the exclusion may recalculate his VAT liability in accordance with Article 17(2), entailing an immediate right to deduction.

82. However, Article 17(2) contains the limitation ‘in so far as the goods and services are used for the purposes of his taxable transactions’. In view of the fact that in the present case Stradasfalti is specifically stated to have allowed the cars in question to be used by staff as a ‘fringe benefit’, account must also be taken of:

– Article 17(5), which provides: ‘As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions’ (this is to be read in conjunction with Article 19, which sets out detailed rules for the calculation of the deductible portion); and

– Article 5(6), which provides: ‘The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. …’

83. Consequently, in a case such as that of Stradasfalti, the right to deduct must in any event be limited to the extent to which the vehicles in question (and the fuel consumed by them) were used for the purposes of making taxable output supplies. Any necessary calculations must be established in accordance with the conditions laid down by national law, which have to observe the principles of equivalence and effectiveness.

Possible limitation of the temporal effects of the judgment

84. Finally, the Italian Government has requested the Court, should it deliver a ruling from which it follows that the disputed national measure is invalid, to limit the temporal effect of its judgment.

85. The Court has most recently stated its approach to such requests in *Skov*, (33) as follows:

‘According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 234 EC, gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the

application of that rule are satisfied …

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties …' (34)

86. If the Italian Government's request is to be granted, it is therefore first necessary for the criterion of 'good faith' to be met. This is stated more explicitly in *Bidar* (35) to imply the existence of a 'large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed'.

87. I admit to wondering whether 'objective, significant uncertainty' is the most appropriate phrase in this context. Should the existence of significant uncertainty not exhort a Member State to exercise caution, rather than to embrace a convenient assumption as to the correct interpretation of Community law?

88. It seems to me that it would be preferable to refer to 'objective, significant reasons for believing that the interpretation followed was correct', or even to apply criteria similar to those referred to by the Court in its case-law on State liability, such as whether the infringement was intentional or involuntary, whether any error of law was excusable or inexcusable, or whether the position taken by a Community institution may have contributed to the infringement. (36)

89. Both temporal limitation of the effect of a judgment and a finding of State liability are, after all, exceptions to the normal rules. They arise in response to an exceptional situation. The criteria used to determine whether they are appropriate in a given case should therefore reflect this. Moreover, since the two concepts address situations that lie, respectively, at the 'good' and the 'bad' end of the spectrum of behaviour by a Member State, it seems to me that a certain parallelism in the formulation of the criteria for assessing the Member State's conduct may be appropriate.

90. Be that as it may, the situation in the present case does not seem to me to support even the view that there was objective, significant uncertainty as to the correct approach for Italy to follow.

91. On the one hand, the need for 'cyclical economic reasons' and the need to consult the VAT Committee are clear from the wording of Article 17(7) of the Sixth Directive.

92. On the other hand, the Commission has produced VAT Committee documents which indicate that it has repeatedly expressed disapproval of the measure in issue and explained why. Its favourable reception of certain communications, remarked on by the Italian Government, concerned either the commitments to bring the derogation to an end, or the introduction of partial deductibility in 2001. There is no suggestion that the Commission has ever stated that the disputed measure seemed compatible with the Sixth Directive, or that other Member States have ever expressly approved Italy's course of action in enacting or re-enacting that measure.

93. It is true that the Commission did not initiate proceedings against Italy with regard to the disputed measure, pursuant to Article 226 EC, until after the reference for a preliminary ruling was made in the present case. However, I do not consider that merely refraining from initiating such

proceedings (which the Court has always held to be a matter in the Commission's discretion (37)) can be considered to negate its express disapproval in the VAT Committee. There appears to be no case in which the Court has accepted that the Commission's failure to bring infringement proceedings has, by itself, been sufficient to justify a temporal limitation on the effects of a judgment, by leading a Member State to hold in good faith a mistaken view of Community law. Such a situation can clearly be distinguished from that in *Legros*, for example, in which the Commission initiated infringement proceedings but then did not pursue them, proposing instead a Council decision approving the local tax in question, (38) or *EKW*, in which it appears that the Commission had assured Austria that the tax in issue was compatible with Community law. (39)

94. As regards the second criterion – the existence of a risk of serious economic difficulties for the Member State concerned – the Italian Government asserts that EUR 15 billion would be at stake, and that the need to reimburse such a sum would represent a considerable burden on the State.

95. I would tend to agree that, if correct, such a figure- – which I calculate to amount to some 1.5% of Italy's gross domestic product in 2004 – might well meet the criterion in question.

96. However, it appeared at the hearing that Italy had arrived at the figure merely by assuming that each of its 2 million registered taxable persons would be entitled to deduct EUR 1 500 of input VAT each year in respect of the purchase and use of a vehicle, and would be able to claim retroactive deduction over a period of five years.

97. The Commission cast doubt on the reliability of such a calculation. I share that doubt. The figure of 2 million taxable persons can presumably be verified easily enough, but Italy has not put forward the slightest evidence to justify its calculation of the average amount of input tax concerned. Many taxable persons will use no vehicle for business purposes. Many others will use several. The proportion of business use is likely to vary widely. The amount which can actually be claimed must take account of the provisions of Articles 5(6) and 17(5) of the Sixth Directive. (40) Moreover, it became clear at the hearing that the five-year period over which deductions could be claimed was a theoretical maximum, for taxable persons who had exercised the greatest possible diligence in lodging claims. The real period may be significantly shorter in many, if not most, cases.

98. I do not consider that the Court can decide that the criterion of serious economic difficulties is met on the basis of figures which are, at best, unsubstantiated and, at worst, arbitrary and hypothetical.

99. Consequently, I find no grounds for a limitation of the temporal effect of the judgment in the present case.

100. That being so, I shall not address the further questions of the date from which such a limitation should apply or the scope of any exceptions to it, which were also raised briefly at the hearing. However, if the Court were to consider that a limitation is appropriate, I suggest that it should not decide those two further issues until after judgment has been delivered in two cases currently before the Grand Chamber, Case C-475/03 *Banca Popolare di Cremona* and Case C-292/04 *Meilicke*, in which those issues have been extensively debated.

Conclusion

101. In the light of all the above considerations, I am of the opinion that the Court should give the following answers to the questions referred for a preliminary ruling by the Commissione Tributaria di Primo Grado di Trento:

(1) The first sentence of Article 17(7) of Sixth Council Directive 77/388/EEC does not authorise a Member State to exclude goods from the system of deducting value added tax without first consulting the committee provided for in Article 29 of the directive. The Member State consulting the committee must provide, for each proposed legislative act, sufficient information as to the specific content of the exclusion for the other Member States and the Commission to be able to form a view as to whether it meets the substantive criteria laid down in Article 17(7).

(2) Article 17(7) of the Sixth Directive authorises only temporary measures responding to short-term economic circumstances. A measure maintained in force for a period exceeding the duration of such circumstances, without substantial modification such as to respond to a changed economic situation, cannot be authorised under that provision.

(3) If a national measure excluding certain goods from the deduction system has not been validly adopted in accordance with Article 17(7), a taxable person affected by the exclusion may recalculate his VAT liability in accordance with Article 17(2) of the Sixth Directive, entailing an immediate right to deduction, limited however to the extent to which the goods in question were used by the taxable person for the purposes of making taxable output supplies. Any necessary calculations must be established in accordance with the conditions laid down by national law, which have to observe the principles of equivalence and effectiveness.

1 – Original language: English.

2 – 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, amended on numerous occasions; hereinafter ‘the Sixth Directive’).

3 – Article 1 of Ninth Council Directive 78/583/EEC of 26 June 1978 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1978 L 194, p. 16).

4 – Before it was modified with effect from 19 February 2004 by Council Directive 2004/7/EC of 20 January 2004 amending Directive 77/388/EEC concerning the common system of value added tax, as regards conferment of implementing powers and the procedure for adopting derogations (OJ 2004 L 27, p. 44).

5 – Case C-409/99 [2002] ECR I-81.

6 – See paragraphs 58 to 65 of the judgment.

7 – See paragraphs 66 to 68 of the judgment.

8 – ‘[C]*he non formano oggetto dell’attività propria dell’impresa*’. This appears to cover vehicles used in an ancillary capacity in the pursuit of any business activity, as opposed to those which form the very basis of that activity (such as car hire).

9 – Article 30(4) and (5) of Legge No 388 of 2000.

10 – This appears to concern principally electrically-propelled vehicles.

11 – By Article 1 of Decreto del Presidente della Repubblica No 24 of 31 March 1979 (‘DPR 24/1979’), with effect from 1 April 1979.

12 – Case C-165/03 [2005] ECR I-5637, paragraphs 30 to 33, in particular paragraph 32.

13 – The order for reference is not explicit as to what facts, if any, have already been ascertained, but the file forwarded to the Court contains a number of the minutes of VAT Committee meetings referred to above.

14 – COM (1998) 377 final (OJ 1998 C 219 p. 16).

15 – See OJ 2006 C 64, p. 3, at p. 9.

16 – Article 4(2) of the VAT Committee’s Rules of Procedure.

17 – Paragraph 61 of the judgment.

18 – Paragraph 63 of the judgment.

19 – Case C-17/01 [2004] ECR I-4243, paragraph 23.

20 – See point 6 above.

21 – The French version of the judgment makes it even clearer by its use of the word ‘préalable’, that the information must precede the introduction of the measure.

22 – Paragraph 22 of the judgment. See also point 39 of Advocate General Geelhoed’s first Opinion in the case.

23 – Article 5(1).

24 – In particular paragraph 67 of the judgment.

25 – It might be queried however whether ‘cyclical economic reasons’ exactly conveys in English the sense of ‘raisons conjoncturelles’, ‘Konjunkturgründen’, ‘konjunkturmaessige grunde’, ‘motivi congiunturali’, and ‘conjuncturele redenen’ in the other official languages in which the Sixth Directive was adopted in 1977. The term ‘cyclical’ might be thought to be linked to the normal economic cycle, whereas the other terms might suggest simply a temporary (and exceptional) combination of circumstances. See further point 75 below.

26 – See paragraph 57 of the judgment. This accords with the concept, reflected in the phrase ‘raisons conjoncturelles’ and the equivalent in other languages, of a significant *divergence* from the normal trend of economic performance. That may in turn imply that the bare use of the term ‘cyclical’ is misleading in the English version of the Sixth Directive.

27 – Paragraph 60 of the Opinion. ‘Economic policy’ in the second and third sentences is ‘conjunctuurpolitiek’ in the original, and ‘cyclical fluctuations’ is ‘schommelingen in de conjunctuur’.

28 – Paragraph 67 of the judgment.

29 – See *Metropol and Stadler*, cited in footnote 5, paragraph 59.

30 – See, for example, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 36; Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 32.

31 – Case C-291/03 *MyTravel* [2005] ECR I-0000, paragraph 18.

32 – Ibid., paragraph 17.

33 – Case C-402/03 [2006] ECR I-0000, paragraphs 50 and 51.

34 – That is to say, serious economic repercussions for the Member State concerned (See Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 69).

35 – Cited in footnote 34, paragraph 69.

36 – See, for example, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 56.

37 – See, for example, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11.

38 – Case C-163/90 [1992] ECR I-4625, paragraph 32.

39 – Case C-437/97 [2000] ECR I-1157, paragraphs 56 and 58.

40 – See point 82 above.