OPINION OF ADVOCATE GENERAL

KOKOTT

Delivered on 8 December 2011 (1)

Case C?594/10

T.G. van Laarhoven

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Value-added tax — Sixth Directive — Deduction of input tax — Limitation — Previous legislation continuing to be transitionally applicable ? Amendment to an existing limitation which extends it as regards its amount ? Vehicles used both for business and private purposes ? Taxation of private use)

I – **Introduction**

1. The right to deduct input tax cannot, in principle, be limited. The Sixth Directive (2) and the subsequent Directive 2006/112 (3) nevertheless permit previous national legislation which limits the right to deduct input tax to continue to apply, provided that it already applied at the time of the entry into force of the Sixth Directive. However, what is the situation in relation to later amendments to such legislation, which further restrict the right to deduct solely as regards the amount? This is the question to which a reply is requested from the Court of Justice in the present case. In this context however it is also necessary to clarify whether the underlying Netherlands legislation in this case actually should be assessed against EU provisions on deductions, or, against those relating to taxation for private use. For it fully authorises an immediate and full deduction for the use of a vehicle for both business and private use and merely provides, as regards private use, for subsequent annual flat-rate additional taxation.

II – **Legislative framework**

A – *European Union (‘EU’) law*

2. Article 6 ‘Supply of Services’ of the Sixth Directive provides, in extract:

‘(2) The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible;

…

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

3. Title VIII of the Sixth Directive, headed 'Taxable amount', includes Article 11, which, as far as is relevant here, provides:

'A. Within the territory of the country

(1) The taxable amount shall be:

…

(c) in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services;

…'

4. Article 17 'Origin and scope of the right to deduct' of the Sixth Directive, as amended by Article 28f(1), is worded, in part, as follows:

'(2) 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 within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…

(6) 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.

… .'

5. Article 20 'Adjustments of deductions' of the Sixth Directive provides:

'(1) The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

(2) In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment is to be made only in respect of one fifth of the tax imposed on the goods. The adjustment is to be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

…'

B – *Netherlands law*

6. According to the referring court the Netherlands have maintained, in the context of implementing the Sixth Directive, legislation which limits the deduction of input tax as regards vehicles which are used by persons for business and private use. (4) According to that legislation, the value-added tax ('VAT') charged on ownership, including acquisition, of a vehicle is first deducted as if the vehicle were used exclusively for business purposes. At the end of each year however there is an additional tax liability. This is calculated by applying a fixed percentage to a flat-rate sum, which in the course of collecting income tax is considered as a reduction for private use. This flat-rate sum represents a certain percentage of the list price or the value of the vehicle.

7. Over time this legislation was the subject of various amendments which, according to the referring court, in most cases led to a reduction of the amount which could be definitively deducted.

8. First, the fixed percentage mentioned above was amended several times. Although it was 12% when the Sixth Directive entered into force, it was successively set at 12.5%, 13.5% and 13%; since 1 January 1992 it is 12% again. Second, the amount to which the fixed percentage is applied has meanwhile been increased. Although initially it was fixed as at least 20% of the published list price of the vehicle, later it was increased in certain cases to 24% and then to 25%, in particular if the private use exceeded a certain mileage. From 1 January 2004 until the period of taxation at issue, the amount was at least 22%, unless annual private use was less than 500 km. The categorisation of commuting to and from work as being business or private use, which changed over time, also could result in an increase of the amount during certain periods.

III – **Facts and the questions referred for a preliminary ruling**

9. Mr van Laarhoven is the sole proprietor of a tax consultancy in the Netherlands. In 2006 two vehicles successively comprised part of the assets of his business which he used for both business and private purposes. In his VAT return for the fourth quarter he declared, as regards private use of more than 500 km for the year 2006, EUR 538 as VAT owed, a declaration against which he however then brought a claim for reimbursement of that amount. As neither his claim nor his action at first instance was successful, he brought an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). He claimed inter alia that the Netherlands fiscal provisions at issue were contrary to the standstill clause of the second paragraph of Article 17(6) of the Sixth Directive.

10. Against that background, the Hoge Raad refers to the Court of Justice the following questions:

'(1) Does the second subparagraph of Article 17(6) of the Sixth Directive preclude amendments

to deduction-limiting legislation such as that in question, according to which a Member State has sought to take advantage of the possibility, for which that provision provides, of (retaining) the exclusion of deduction in respect of certain goods and services if, as a consequence of those amendments, the amount excluded from deduction has been increased in most cases, but the approach and scheme of the deduction-limiting legislation have remained unchanged?

(2) If the answer to the first question is in the affirmative, should the national courts refrain from applying the deduction-limiting legislation as a whole, or is it sufficient for them to refrain from applying the legislation to the extent that it has increased the scale of the exclusion or restriction existing at the time when the Sixth Directive entered into force?'

11. Mr van Laarhoven, the Netherlands Government, the United Kingdom Government and the European Commission participated in the proceedings before the Court, although the United Kingdom Government submitted only written observations.

IV – **Legal assessment**

A – *Preliminary remarks*

12. The right to deduct input VAT, which is clearly and unambiguously laid down in Article 17(2) of the Sixth Directive, (5) is, according to settled case?law, an integral part of the common system of VAT. (6) It serves to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, (7) may be exercised immediately, (8) and thus ensures that all economic activities are taxed in a wholly neutral way. (9) The right to deduct may therefore in principle not be limited. (10)

13. The right to deduct is none the less subject to the derogation in Article 17(6) of the Sixth Directive and, in particular, its second subparagraph. (11) According to that provision, the Member States are authorised to retain their existing legislation as at the date of the entry into force of the Sixth Directive with regard to the exclusion from the right to deduct until such time as the Council has adopted the provisions envisaged by that article. (12) As such provisions have not yet been adopted, (13) the Member States were able, during the relevant period, to maintain all existing rules on the exclusion of the right to deduct. (14)

14. The Hoge Raad requests the Court to interpret this second paragraph of Article 17(6) of the Sixth Directive in the context of the Netherlands legislation on the VAT scheme for passenger vehicles used for business and private purposes. The Hoge Raad considers that this rule, which already existed on the date on which the directive entered into force, results in a limitation to the right to deduct. Its doubts as to the compatibility of this rule with the Sixth Directive specifically arise from the fact that the legislation was repeatedly amended following the entry into force of the directive and that consequently the possibility for deductions was further limited as regards their amount.

15. However, the question arises whether the Netherlands legislation should actually be regarded as a limitation to the right to deduct which is to be assessed against Article 17(6) of the Sixth Directive.

16. As the Commission also pointed out, the Netherlands legislation authorises the tax payer to deduct immediately and in full the tax which in particular applies to the acquisition of a passenger vehicle used for both business and private use. This legislation therefore complies with settled case-law pursuant to which a tax payer may attribute an investment asset entirely to the assets of the company, even if it serves not only the business purposes of the tax payer but also private purposes (15) and, in this case, the VAT due on acquisition of the assets is in principle

immediately deductible in full, in accordance with Articles 17 and 18 of the directive. (16)

17. The referring court however considers that the right to deduct is limited in that the Netherlands legislation provides for subsequent additional liability as regards private use of a passenger vehicle. In this way at the end of each year an amount of VAT is imposed on the private use by applying a flat-rate percentage to a fixed amount of costs, which itself represents a percentage of the list price or the value of the vehicle.

18. According to the scheme of the Sixth Directive, such subsequent additional liability for private use is however not to be regarded as a limitation to the right to deduct within the meaning of Article 17(6) of the directive, which would only be lawful on an exceptional and temporary basis. Rather, such a subsequent levy of VAT on the private use of assets entirely attributed to the company, which justified an immediate and full deduction, conforms to the logic of the system established by the directive. (17)

19. In actual fact the directive itself provides that in such a case the right to a complete and immediate deduction is subject to the obligation to pay VAT on the private use of company assets. (18) To this end Article 6(2)(a) of the directive treats private use in the same way as the supply of services for consideration, so that the taxable persons must, in accordance with Article 11A(1)(c) of the directive, pay VAT on expenses linked to that use. (19)

20. This is also the objective of Article 20 of the Sixth Directive which includes rules on amendment to the initial deduction and which, although its scope does not completely overlap with that of Article 6(2)(a) of that directive, is applicable in cases where an asset is used both for business and private purposes. (20)

21. The aim of both of these provisions of the directive is, first, to prevent a taxable person who uses goods forming part of the assets of his business also for private use from being granted an unjustified economic advantage compared to a final consumer, which would result from an initial authorised full deduction. Second, both provisions aim to establish a link between the deduction of input tax and the imposition of VAT. (21)

22. The Hoge Raad indicates in the order for reference that the Netherlands provisions on private use of goods forming part of the assets of a business did not provide, prior to 1 January 2007, for any tax as regards private use within the meaning of Article 6(2)(a) of the Sixth Directive. Irrespective of that, however, it must be noted that the Netherlands legislation at issue governs the taxation of passenger vehicles which are used for both business and private purposes and which have given an entitlement to the right to an immediate and full deduction. In order to provide the referring court with useful pointers for assessing the compatibility of that legislation with the Sixth Directive, it is consequently necessary to interpret Article 6(2)(a) and Article 20 of the Sixth Directive and not Article 17(6) of that directive.

23. Later however, I will also deal with the interpretation of Article 17(6) of the directive, which the Hoge Raad requested, in the event that the Court does not share my view.

B – *Interpretation of Article 6(2)(a) and Article 20 of the Sixth Directive*

24. As mentioned above, the scope of Article 6(2)(a) and Article 20 of the Sixth Directive may overlap. This is particularly the case where the goods forming part of the assets of the business gave rise to the right to an immediate and full deduction and subsequently are used not solely for business purposes but also privately. (22) Case-law to date does not appear to indicate whether and under which circumstances one of these two provisions of the directive is to be examined as a priority.

25. Viewed systematically, Article 6(2)(a) of the directive appears to be the more specific provision, as it concerns only use for private or non-business purposes, but not, for example, use for exempt activities. (23) Furthermore, it follows from the application of this provision that private use constitutes a taxable transaction within the meaning of Article 17(2) of the directive. (24) This fiction has the effect that the taxable person is authorised to deduct the tax on goods forming part of the assets of his business (25) and remains authorised to do so, so that no adjustment is required under Article 20 of the directive and, moreover, the conditions for the application of that article do not appear to be met. Besides, Article 6(2)(a) of the Sixth Directive enables more flexible action than Article 20(2) of the directive, which only provides for annual adjustment.

26. There is a certain parallel between the Netherlands legislation on the taxation of the private use of vehicles for mixed use, in that it provides for annual additional liability, and Article 20(2) of the Sixth Directive, which also provides for an annual adjustment of the deduction. Indeed, following the judgment in *Wollny*, (26) the Member States have, also when taxing private use within the meaning of Article 6(2)(a) of the Sixth Directive and pursuant to the margin of discretion which they enjoy, the option, where determining the basis of taxation, of applying the rules in Article 20 on the adjustment of deductions.

27. It is not however necessary, for the purpose of the present analysis, to definitively deal with the question of the exact relationship between Article 6(2)(a) of the Sixth Directive and Article 20 of that directive. Having regard to their common purpose (27) and their same economic effect, (28) it is in fact sufficient to state that both provisions, like the right to deduct, ultimately seek to ensure the neutrality of the tax burden. (29) This, however, is guaranteed only if the offsetting which is carried out on the basis of one of those provisions is neither less nor more than that which corresponds to actual private use. VAT must be imposed subsequently to the extent that the taxable person would otherwise benefit from an unjust enrichment due to the private use of the goods for which he could completely deduct tax. (30)

28. As regards Article 6(2)(a) together with Article 11A(1)(c) of the Sixth Directive, the Court has however clarified that, even if the concept of the ‘full cost to the taxable person of providing the services’ in itself is an EU law concept, the Member States have a certain margin of discretion as regards the principles governing the determination of the amount of the full cost. Article 20(1) and (4) of the Sixth Directive also grant the Member States a certain discretion in that they provide that the initial deduction shall be ‘adjusted according to the procedures laid down in the Member States’ and in implementing paragraph 2 the Member States can determine the amount of the tax which is taken into account for the adjustment and can carry out administrative simplifications.

29. Although this margin of discretion clearly, to a certain extent, permits flat-rate methods of calculation, it must however be ensured that the use of flat-rate methods in principle satisfies the requirements of the Sixth Directive as regards the subsequent adjustment to be made. The flat-rate amendment must not therefore be disproportionate to the actual extent of private use.

30. That is at least doubtful as regards the Netherlands legislation in question here. In the 2006 tax year at issue, the additional liability was calculated as follows: if the use for private purposes was less than 500 km per year, an amount equal to at least 22% of the value of the vehicle was

applied. A tax rate of 12% was applied to this amount. The Commission is of the view that a flat-rate of that kind is not compatible with the directive, given that, in the absence of a further differentiation in the case of private use of over 500 km per year, it excludes neither unjust enrichment of the taxable person, nor over taxation of the taxable person due to the failure to take account of any depreciation of the vehicle.

31. In my opinion, it is for the referring court to rule on this. In actual fact, the order for reference does not make clear whether the amount for the year 2006 was calculated on the basis of the list price or the actual value of the vehicle. Furthermore, the order for reference refers, in relation to the calculation of the amount in 2006, to a percentage of *at least* 22%, which does not exclude that a subsequent differentiation is carried out according to the extent of private use.

32. Should the Hoge Raad conclude, in the context of the main proceedings, that the Netherlands provisions at issue have led to subsequent taxation which is too high (31) for the actual private use of the vehicle, it must, in the light of the primacy of EU law and its obligation to protect rights which are conferred on individuals, disapply the national legislation to the extent that it goes beyond an appropriate taxation of private use. (32)

33. Therefore the reply to the Hoge Raad should be that Article 6(2)(a) and Article 20 of the Sixth Directive preclude national legislation which authorises immediate and full deduction for vehicles used for business and private purposes, but provides, as regards private use, for a flat-rate supplement which bears no relationship to the actual private use. If the national courts are faced with such legislation and if it has led to subsequent taxation which is too high in relation to the actual private use of the vehicle, the courts must disapply that legislation to the extent that it goes beyond an appropriate taxation of private use.

C – *In the alternative: the first question referred*

34. In case, notwithstanding the fact that the Netherlands legislation at issue authorises the immediate and full deduction of tax and provides only for a subsequent taxation on private use, the Court were to consider, in accordance with the formulation of the order for reference, that it is necessary to interpret Article 17(6) of the Sixth Directive, I will deal with that situation in the alternative. In that context, like the referring court, I shall start from the premise — incorrectly in my view — that the Netherlands legislation limits the right to deduct.

35. As discussed above, the Member States may, under the second paragraph of Article 17(6) of the Sixth Directive, maintain their legislation excluding the right to deduct that existed on the date of the entry into force of that directive. (33)

36. The Court has stated in this respect that the mere fact that the specific national legal provision which limits the right to deduct was adopted following the entry into force of the Sixth Directive does not mean that it could not fall within the exception in Article 17(6) of the directive. On the contrary, it is to be assumed that a provision which is substantially identical to the earlier legislation or reduces its effects falls within the exception provided for under Article 17(6) of the Sixth Directive. (34)

37. On the other hand, national legislation does not constitute a limitation to the right to deduct permitted by the second paragraph of Article 17(6) of the Sixth Directive and infringes Article 17(2) of that directive if, subsequent to the entry into force of the Sixth Directive, it extends the scope of the existing exclusion and thereby diverges from the objective of that directive. (35)

38. In this context the Court held in *Puffer* (36) that legislation which is based on an approach which differs from that of the previous law and establishes new procedures cannot be treated in

the same way as legislation existing at the time of the entry into force of the Sixth Directive.

39. Contrary to what appears to be the view of the Netherlands Government, I do not see that the judgment in *Puffer* is to be understood to the effect that it is only when new legislation is based on a different approach and establishes new procedures that the amendment no longer falls within the exclusion under the second paragraph of Article 17(6) of the Sixth Directive. Rather, that is only one of the possible factual situations where a national provision extends the scope of the existing exclusions and thereby diverges from the objective of that directive.

40. This is supported in particular by the judgment in *Commission* v *France*, (37) which is at the origin of the case-law concerning inadmissible extensions, and the judgment in *X Holding*, (38) which was delivered after the judgment in *Puffer*. In both judgments, the criteria of the different approach played no part. Rather, they showed that a mere extension of the amount of an existing limitation to the right to deduct in principle has the effect that the legislation is no longer covered by the second paragraph of Article 17(6) of the Sixth Directive.

41. As regards the Netherlands legislation at issue here, it must be noted that it already provided, at the time of the entry into force of the Sixth Directive, that, in the case of vehicles used for both business and private purposes, a *definitive* deduction was excluded as regards private use. Such previous legislation can, in principle, fall within the exceptions of Article 17(6) of that directive if one regards it as a limitation to the right to deduct granted by Article 17(2) of the Sixth Directive. The only question which arises is whether the amendments made in the meantime require a different assessment. The very fact that amendments were adopted does not prevent Article 17(6) of the directive from applying. Rather, it is the extent of the amendments which is decisive.

42. Given that, according to the statements of the referring court, the underlying logic and the scheme of the Netherlands legislation has remained unchanged since the entry into force of the Sixth Directive, and that there is nothing to suggest a different assessment of this issue, the examination should concentrate on the fact that the amendments have, in most cases, further reduced the amount of the definitive deduction.

43. As discussed above, a supplementary reduction in the amount, which concerns not only exceptional cases, is in principle sufficient for it to be regarded as an extension to the existing exclusions. (39)

44. However, it would be premature to automatically conclude that the Netherlands legislation has accordingly diverged further from the objectives of the Sixth Directive.

45. Rather, the particularities of the mechanism of the limitation at issue are to be taken into account. As we have seen, these are based on the fact that, in the case of mixed-use passenger vehicles, an immediate and full deduction is first granted, but VAT is subsequently imposed as regards private use, so that, from this point of view, the deduction in this respect was not definitive.

46. As already discussed, such a mechanism is completely compatible with the objectives of the directive if the deduction initially granted is later adjusted to the extent that the vehicle was in actual fact used for private purposes. If the initial limiting rule did not fulfil the condition that VAT be applied appropriately to private use, but the later amendments are closer to fulfilling this condition, that legislation is closer to achieving the objectives of the Sixth Directive as a whole, even if, in comparison to the earlier situation, there is an additional limitation to the definitive authorised deduction.

47. It is only if the additional limitation does not serve to impose — subsequently and in so far

as is necessary — VAT on any private use of the vehicle that was, on the basis of the immediate deduction, initially free of VAT, that in order — in particular — to avoid unjust enrichment of the taxable person it must be found that the limitation has further diverged from the objective of the directive and that it is therefore no longer covered by the exception under the second paragraph of Article 17(6) of the Sixth Directive. It is for the national court to assess this in the case of the Netherlands legislation at issue.

48. In the alternative, I therefore suggest that the Court should give the following answer to the first question referred to it for a preliminary ruling: the second paragraph of Article 17(6) of the Sixth Directive precludes amendments made to legislation already existing at the time of the entry into force of the directive,

– which limit the deduction as regards certain company assets for mixed use by authorising, first, the immediate and full deduction, but only making it definitive in part, as VAT is imposed subsequently on private use,

– where the amount of the definitive deduction which is excluded was increased in most cases by the amendments, but the logic and scheme of the rules remained unchanged,

only if (and to the extent that) the supplementary limitation goes beyond that which is necessary for the purposes of an appropriate application of VAT to private use.

D – *Also in the alternative: the second question referred*

49. In case the Court answers the first question referred in the way it was phrased, I will also deal with the second question in the alternative below.

50. By its second question, the referring court seeks to ascertain, whether, in the event that — following amendments — the national legislation no longer falls within the scope of the second paragraph of Article 17(6) of the Sixth Directive and therefore infringes Article 17(2), the national courts should totally disapply that legislation or should disapply it only in so far as that legislation extended the scope of the exclusion or the limitation existing at the time of the entry into force of the Sixth Directive.

51. As the Netherlands Government rightly noted, the complete non-application of the Netherlands legislation, in so far as it excludes definitive deduction for private use of mixed-use passenger vehicles, would lead to a result which is incompatible with the Sixth Directive, since that would leave the private use not subject to VAT. A complete non-application cannot consequently be contemplated with regard to EU law.

52. In any event, as the amended national legislation ceases to be covered by the second paragraph of Article 17(6) of the Sixth Directive only in so far as it introduces a supplementary limitation which goes beyond that which is necessary for the appropriate application of VAT to private use EU law requires the national courts to apply the new legislation only to the extent that it is necessary for that taxation. In such cases, it is not necessary to refer to previous legislation.

53. Should the additional limitation to the definitive deduction which was introduced by the amendment generally go beyond that which is necessary for the purposes of taxation of private use, and if it consequently results in an inadmissible overall extension to the limitation, it is for the national courts to decide, according to the options available to them under national law, whether they may apply the amended version to the extent that it reformulates the earlier limiting legislation or whether they should disapply the legislation (40) and apply the earlier legislation as such.

54. Generally, it is to be noted that the scope of the limitation provided for under national law on the date of the entry into force of the Sixth Directive is not necessarily relevant in that regard. If the effects of that limitation were reduced after the entry into force of the directive, but before the amendment specifically to be examined, a Member State basically cannot return to the situation under national law that applied before the amendment. (41)

55. In the alternative, I therefore propose that the Court answer the second question referred as follows: if the supplementary limitation to the right to deduct which was introduced by the amendments to the national legislation goes beyond that which is necessary for the purposes of the appropriate application of VAT to private use, with the result that in that regard the amended legalisation no longer falls within the second paragraph of Article 17(6) of the Sixth Directive, the national courts must apply that legislation only to the extent necessary for the purposes of that taxation. A complete non-application of the new and/or previous legislation, with the result that the private use remains free from VAT, is not compatible with the Sixth Directive.

V – **Conclusion**

56. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the Hoge Raad:

Article 6(2)(a) and Article 20 of the Sixth Directive preclude national legislation which authorises the immediate and full deduction of input tax for vehicles used for both business and private purposes, but provides, as regards private use, for a flat-rate supplement which bears no relationship to the actual private use. If the national courts are faced with such legislation and if it has led to subsequent taxation which is too high in relation to the actual private use of the vehicle, the courts must disapply that legislation to the extent that it goes beyond an appropriate taxation of private use.

57. In the alternative, I propose that the Court of Justice should reply to both the questions referred by the Hoge Raad as follows:

(1) The second paragraph of Article 17(6) of the Sixth Directive precludes amendments made to legislation already existing at the time of the entry into force of the directive,

– which limit the deduction as regards certain company assets for mixed use by authorising, first, the immediate and full deduction, but only making it definitive in part, as VAT is imposed subsequently on private use,

– where the amount of the definitive deduction which is excluded was increased in most cases by the amendments, but the logic and scheme of the rules remained unchanged,

only if (and to the extent that) the supplementary limitation goes beyond that which is necessary for the purposes of an appropriate application of VAT to private use.

(2) If the supplementary limitation to the right to deduct which was introduced by the amendments to the national legislation goes beyond that which is necessary for the purposes of the appropriate application of VAT to private use, with the result that in that regard the amended legalisation no longer falls within the second paragraph of Article 17(6) of the Sixth Directive, the national courts must apply that legislation only to the extent necessary for the purposes of that taxation. A complete non-application of the new and/or previous legislation, with the result that the private use remains free from VAT, is not compatible with the Sixth Directive.

1 – Original language: German.

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).

3 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). Since the facts to the case in the main proceedings concerns the year 2006 and this directive only entered into force on 1 January 2007 pursuant to Article 413, the present case is to be examined with regard to the Sixth Directive.

4 – Article 15(6) of the Law on turnover tax of 1968 (Wet op de omzetbelasting 1968) and Article 15 of the Turnover Tax Implementation Order of 1968 (Uitvoeringsbeschikking omzetbelasting 1968).

5 – Judgments in Case C?345/99 *Commission* v *France* [2001] ECR I?4493, paragraph 18; Case C?460/07 *Puffer* [2009] ECR I?3251, paragraph 82; and Case C?74/08 *PARAT Automotive Cabrio* [2009] ECR I?3459, paragraph 17.

6 – Judgments in Case C?62/93 *BP Soupergaz* [1995] ECR I?1883, paragraph 18; Case C?414/07 *Magoora* [2008] ECR I?10921, paragraph 28; and Case C?274/10 *Commission* v *Hungary* [2011] ECR I?7291, paragraph 43.

7 – Judgments in Case C?37/95 *Ghent Coal Terminal* [1998] ECR I?1, paragraph 15; Case C?90/02 *Bockemühl* [2004] ECR I?3303, paragraph 39; and Case C?174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 27.

8 – Judgment in Joined Cases C?110/98 to C?147/98 *Gabalfrisa andOthers* [2000] ECR I?1577, paragraph 43; Case C?152/02 *Terra Baubedarf-Handel* [2004] ECR I?5583, paragraph 35; and Case C?368/09 *Pannon Gép Centrum* [2010] ECR 1?7467, paragraph 37.

9 – Judgments in Case C?409/99 *Metropol and Stadler* [2002] ECR I?81, paragraph 59; Case C?371/07 *Danfoss and AstraZeneca* [2008] ECR I?9549, paragraph 26; and *Magoora* (cited at footnote 6, paragraph 28).

10 – See *Magoora* (cited at footnote 6, paragraph 28); *Pannon Gép Centrum* (cited at footnote 8, paragraph 37); and *Commission* v *Hungary* (cited at footnote 6, paragraph 43).

11 – *Commission* v *France* (cited at footnote 5, paragraph 19), and *Magoora* (cited at footnote 6, paragraph 29).

12 – *Commission* v *France* (cited at footnote 5, paragraph 19); *Danfoss und AstraZeneca* (cited at footnote 9, paragraph 28); and Joined Cases C?538/08 and C?33/09 *X Holding* [2010] ECR I?3129, paragraph 38.

13 – *Puffer* (cited at footnote 5, paragraph 83); *X Holding* (cited at footnote 12, paragraph 39); and Case C?395/09 *Oasis East* [2010] ECR I?8811, paragraph 20. The VAT system Directive includes in Article 176 an exception which corresponds to Article 17(6) of the Sixth Directive.

14 – Provided that the excluded goods and services are sufficiently defined and that it does not concern general exclusisons, see *X Holding* (cited at footnote 12, paragraphs 40 to 45).

15 – Judgments in Case C?25/03 *HE* [2005] ECR I?3123, paragraph 46; Case C?72/05 *Wollny*

[2006] ECR I?8297, paragraph 21; and *Puffer* (cited at footnote 5, paragraph 39).

16 – Judgment in Case C?434/03 *Charles and Charles-Tijmens* [2005] ECR I?7037, paragraph 24; *Wollny* (cited at footnote 15, paragraph 22); and *Puffer* (cited at footnote 5, paragraph 40).

17 – *Wollny* (cited at footnote 15, paragraph 33).

18 – *Charles and Charles-Tijmens* (cited at footnote 16, paragraph 30) and *Wollny* (cited at footnote 15, paragraphs 24, 31 and 33).

19 – See judgments in Case C?269/00 *Seeling* [2003] ECR I?4101, paragraphs 42 and 43); *Charles and Charles-Tijmens* (cited at footnote 16, paragraph 25); and *Puffer* (cited at footnote 5, paragraphs 41 and 42).

20 – *Wollny* (cited at footnote 15, paragraph 34).

21 – *Wollny* (cited at footnote 15, paragraph 35 and 36).

22 – See paragraph 20 above.

23 – See Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 33.

24 – *Puffer* (cited at footnote 5, paragraph 41).

25 – See *Puffer* (cited at footnote 5, paragraph 42).

26 – Cited at footnote 15, paragraph 37.

27 – *Wollny* (cited at footnote 15, paragraph 37).

28 – *Uudenkaupungin kaupunki* (cited at footnote 23, paragraph 30).

29 – See *Uudenkaupungin kaupunki* (cited at footnote 23, paragraph 26) on Article 20 of the Directive.

30 – See *Wollny* (cited at footnote 15, paragraphs 32 to 36).

31 – A subsequent taxation which is possibly too low is in itself just as problematic, but this aspect may be irrelevant in the main proceedings, since those proceedings concern only the challenge to the decisions levying subsequent taxation with the objective of annulling or at least reducing the tax set.

32 – See paragraph 72 of my Opinion in Case C?309/06 *Marks & Spencer* [2008] ECR I?2283. In contrast, in *Magoora* (cited at footnote 6, paragraph 44) the Court chose an interpretation of the national provisions which complied with EU law.

33 – See paragraph 13 above.

34 – *Puffer* (cited at footnote 5, paragraphs 85 and 87). See the standstill clause of Article 57(1) EC, or of Article 64(1) TFEU regarding the free movement of capital with regard to third countries, Case C?157/05 *Holböck* [2007] ECR I?4051, paragraph 41, and Case C?541/08 *Fokus Invest* [2010] ECR I?1025, paragraph 42.

35 – Case C?40/00 *Commission* v *France* [2001] ECR I?4539, paragraph 17; *Metropol and Stadler* (cited at footnote 9, paragraph 46); Case C?155/01 *Cookies World* [2003] ECR I?8785, paragraph

66; *Magoora* (cited at footnote 6, paragraph 37); *Danfoss and AstraZeneca* (cited at footnote 9, paragraph 28); and *Puffer* (cited at footnote 5, paragraph 86).

36 – Cited at footnote 5, paragraph 87. See also *Cookies World* (cited at footnote 35, paragraph 63), as well as the standstill clause of Article 57(1) EC or the TFEU as regards the free movement of capital in relation to third countries, *Holböck* (cited at footnote 34, paragraph 41) and *Fokus Invest* (cited at footnote 34, paragraph 42).

37 – Cited at footnote 35, paragraph 17.

38 – Cited at footnote 12, paragraph 62 et seq.

39 – See paragraph 40 above.

40 – See *Magoora* (cited at footnote 6, paragraph 44). See also Kokott/Henze, ‘Das Zusammenwirken von EuGH und nationalem Richter bei der Herstellung eines europarechtskonformen Zustands’, in *Steuerrecht im Rechtsstaat: Festschrift für Wolfgang Spindler* , 2011, pp. 279, 290.

41 – *Commission* v *France* (cited at footnote 35, paragraphs 17 et seq. and 24).