OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 28 January 2010[1]

I — Introduction

1. By the questions raised in the present joined cases, the Court of Justice is asked about the interpretation of Article 11(4) of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax,[2] and of Article 17(6) of the Sixth Directive.

2. These questions have been raised in proceedings which relate, in essence, to certain categories of expenditure incurred by persons liable to VAT in respect of members of their staff, for which the Netherlands legislation, adopted before the entry into force of the Sixth Directive, partially excludes the right to deduct input VAT.

II — Legal framework

A – *Community legislation*

3. Article 11(1) of the Second Directive provided:

'Where goods and services are used for the purposes of his undertaking, the taxable person shall be authorised to deduct from the tax for which he is liable:

(a) the value added tax invoiced to him in respect of goods supplied to him or in respect of services rendered to him;

1 — Original language: French.

2 — OJ, English Special Edition 1967, p. 16. That directive was repealed with effect from 1 January 1978 by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover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, 'the Sixth Directive').

...'

4. Article 11(4) of the Second Directive provided:

'Certain goods and services may be excluded from the deduction system, in particular those capable of being exclusively or partially used for the private needs of the taxable person or of his staff.'

5. Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

6. Article 6(2) of the Sixth Directive is worded as follows:

'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 value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

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

7. Article 17(2) and (6) of the Sixth Directive states:

'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 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.'

B – *National legislation*

8. Article 2 of the Wet op de omzetbelasting (Law on turnover tax) 1968 ('the VAT Law') states:

'A trader may deduct from the tax to be paid on supplies of goods and services the tax charged on supplies of goods and services to him, acquisitions of goods effected by him within the Community and imports of goods intended for him.'

9. Article 15 of the VAT Law states:

'1. The tax referred to in Article 2 which is deductible by the trader shall be:

(a) the tax which, in the period covered by the return, other traders have charged him by means of an invoice issued in accordance with the applicable rules, in respect of supplies of goods and services which they have made to him;

…'

10. Article 16(1) of the VAT Law provides:

'The deduction referred to in the first subparagraph of Article 15(1) may, in certain cases, be totally or partially excluded by royal decree in order to prevent a situation in which goods and services relating to luxury expenditure, for the purposes of persons who are not traders ... are totally or partially exempted from VAT.'

11. Under Article 1 of the Besluit uitsluiting aftrek omzetbelasting 1968) (Royal Decree on the exclusion of deductions from turnover tax, 'the BUA'), in the version in force from 1 January 1969 to 31 December 1979, the deduction referred to in Article 15(1) of the VAT Law was not allowed in cases where, and to the extent to which, the goods or services were used for:

'1. …

(a) giving business gifts or other gifts to persons in relation to whom, if they had been charged or were to be charged the relevant turnover tax, this would be entirely or mainly non-deductible;

(b) providing the staff of the trader with food and drink, accommodation, payment in kind, opportunities for sports and leisure activities, or private transport, or

for other personal purposes of the staff concerned;

2. "Business gifts" or "other gifts" shall be understood to mean any supplies provided by the trader in furtherance of business relationships or out of generosity towards others without his receiving consideration or for which he receives consideration which is lower than the acquisition or production costs or, in the case of services, the cost price of such services excluding turnover tax.'

12. Article 2 of the BUA provides:

'Where the trader has charged a fee in respect of a supply referred to in Article 1(1)(b) or (c), and therefore owes turnover tax, a deduction up to the amount of tax owed by the trader in respect of the supply concerned shall not be excluded.'

13. Article 3 of the BUA, in the version in force up to 31 December 1979, stated:

'If the total of the acquisition or production costs or the cost price, excluding turnover tax, of all the supplies within the meaning of Article 1(1)(b) and (c) provided by the trader in one financial year in respect of a given person, does not exceed NLG 250, those supplies shall fall outside the scope of this decree.'

14. With effect from 1 January 1980, the BUA was amended to introduce a special scheme for the provision of food and drink; the other provisions of the decree remained unaltered.

15. Accordingly, from 1 January 1980, the provision of food and drink was excluded from Article 1(1)(c) of the BUA. Article 3 of the BUA was renumbered as Article 4 and a new Article 3 was inserted, providing for the exclusion of the deduction of VAT payable on

food and drink. The amount mentioned in the former Article 3 (now Article 4) was changed from NLG 250 to NLG 500.

16. The new provisions of the decree are therefore worded as follows:

Article 3

'1. If goods and services are used by the trader for the purpose of providing food and drink to his staff and he has charged less for this purpose than the amount described in Article 3(2), the deduction shall be excluded up to a maximum of 6% of the difference between that amount and the amount which has been charged.

2. The amount referred to in Article 3(1) shall consist in the acquisition costs of the food and drink, excluding turnover tax, plus 25%. If the trader has manufactured the food and drink himself, the acquisition costs of the raw materials shall be taken into account instead of the acquisition costs of the food and drink.'

Article 4

'1. If the total of the acquisition or production costs or the cost price, excluding turnover tax, of all the supplies within the meaning of Article 1(1)(b) and (c) provided by the trader in one financial year in respect of a given person, and the portion of the difference referred to in Article 3(1) and applicable to that person does not exceed NLG 500, those services and that portion of the difference shall not be taken into account for the purposes of the application of this decree.

2. In calculating the total referred to in paragraph 1, the difference referred to in Article 3(1) shall not be taken into account if, with regard to the supply of food and drink to the staff of the trader, the deduction was excluded pursuant to Article 3.'

III — The main proceedings and the questions referred for a preliminary ruling

A – *Case C-538/08, X Holding*

17. During the period between 1 January 1997 and 31 December 1999, X Holding purchased 34 passenger cars from car dealers. It retained the cars for a limited period, after which it sold them.

18. X Holding deducted in full the VAT which it had been charged when it purchased the cars. It paid on declaration the VAT charged on the sale of each car.

19. On 10 July 2001, an investigation was opened into the accuracy of the VAT returns submitted by X Holding during the years in question. In a report dated 13 November 2002, the finance inspectorate concluded that most of the cars purchased had not been used for the needs of the company and that X Holding had therefore wrongly claimed deduction of the input VAT paid. Consequently, an additional VAT assessment of NLG 887 852 (EUR 402 889) was imposed.

20. X Holding lodged an objection against that decision. In the review of the matter, the finance inspectorate concluded that four of the 34 cars had been purchased and used in the context of the business exclusively for commercial purposes. In those circumstances, the deduction of the input VAT paid on the acquisition of those four cars was allowed. The additional VAT assessment was therefore reduced, the amount of VAT payable being NLG 856 605 (EUR 388 710).

21. X Holding appealed against that decision before the Gerechtshof (Regional Court of Appeal) Amsterdam (Netherlands). That court ruled that the 30 cars which were the subject of an additional VAT assessment were used for both business and private purposes. The Gerechtshof therefore upheld the additional VAT assessment.

22. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), hearing

the appeal against the judgment of the Gerechtshof, pointed out that Article 11(4) of the Second Directive allowed Member States to exclude certain goods and services from the deduction system, in particular those capable of being exclusively or partially used for the private needs of the taxable person or those of his staff. That provision therefore allowed Member States to exclude from the system certain categories of motor vehicles, but did not allow them to exclude from it all goods in so far as they are used for the private purposes of the taxable person. Indeed, the option given applies only to maintaining exclusions from deduction with regard to categories of expenditure defined by reference to the nature of the goods or services rather than by reference to the use to which they are put or the way in which they are used.

23. The Hoge Raad also noted that the restriction of the deduction provided for in Article 1(1)(c) of the BUA also applies to goods and services used for other personal purposes of the staff and to payments of wages in kind. As the system concerns all goods for private use, the Hoge Raad considered that restriction to be, on the whole, inadequately defined and too broad. However, it noted that the provision describes some categories of goods and services more specifically. This is true, for example, of goods and services used to provide opportunities for private transport. For the Hoge Raad, it was clear from an analysis of the background to that provision that, in referring to goods and services used to provide opportunities for private transport, the national legislature intended to include situations in which a taxable person makes a passenger car available to a member of his staff for private (and other) purposes.

24. The Hoge Raad therefore stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive be interpreted as meaning that a Member State wishing to take advantage of the possibility for which those provisions provide of (retaining) the exclusion of deduction with respect to categories of expenditure which are described as "providing the opportunity for private transport" has satisfied the condition requiring the designation of a category of adequately defined goods and services?

2. If the answer to the first question is in the affirmative, do Article 6(2) and Article 17(2) and (6) of the Sixth Directive leave room for national legislation such as that at issue, which was adopted before that directive entered into force and under which a taxable person may not deduct in full the VAT paid on the

acquisition of certain goods and services which are used partly for business purposes and partly for private purposes of the staff, but may do so only to the extent that the VAT is attributable to use for business purposes?'

B – *Case C-33/09, Oracle Nederland*

25. Oracle is a worldwide supplier of database products for companies.

26. In May 2005, Oracle provided, in return for payment, food and drink to its staff, for which the company entered in its tax return an amount of EUR 3 977 in respect of input VAT. During the same period, Oracle acquired the services of a disc-jockey for a staff function and arranged for accommodation to be found for one of its employees; the VAT paid in respect of those items of expenditure was EUR 850 and EUR 380 respectively. Finally, by way of a business gift, Oracle also invited third parties to a golfing event, for which VAT of EUR 256 was entered by the company in its tax return for May 2005.

27. The dispute between Oracle and the Inspecteur van de Belastingdienst (Inspector of the Revenue Service) Utrecht-Gooi (Netherlands) concerns the input VAT payable on the items of expenditure listed in the previous point; the Inspector considered that, under the provisions of the VAT Law and the BUA, deduction of the input VAT was to be excluded for the categories of expenditure referred to therein.

28. That assessment was disputed by Oracle before the Rechtbank (District Court) Haarlem (Netherlands), which upheld the appeal in part so far as the expenditure connected with the golfing event was concerned, since 'business gifts' constitute a category which is inadequately defined for the purpose of restricting the right to deduction. The Rechtbank dismissed the remainder of the appeal.

29. Both Oracle and the Netherlands tax authority lodged an appeal against the judgment of the Rechtbank.

30. In that regard, Oracle maintained inter alia that the relevant provisions of the Netherlands legislation, in excluding or restricting the right to deduction of VAT on the goods and services in question, are contrary to Article 11(4) of the Second Directive and Article 6(2) and (6) of the Sixth Directive. For its part, the Netherlands tax authority claimed that the exclusion of the right to deduct input VAT is based on a national provision introduced before the entry into force of the Sixth Directive but still applicable, in accordance with the option given to Member States by Article 17(6) of the Sixth Directive.

31. In those circumstances, the Gerechtshof te Amsterdam stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Are Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive to be interpreted as meaning that a Member State wishing to make use of the possibility offered by those articles of (retaining) the exclusion of deduction in respect of categories of expenditure described as:

— "the provision of food and drink to the staff of the trader";

— "giving business gifts or other gifts to persons in relation to whom, if they had been charged or were to be charged the relevant turnover tax, such tax would be entirely or mainly non-deductible";

— "providing the staff of the trader with accommodation";

— "providing the staff of the trader with opportunities for recreation",

has satisfied the condition requiring the designation of a category of adequately defined goods and services?

2. If the answer to the first question is in the affirmative for one of the categories listed, do Article 6(2) and Article 17(2) and (6) of the Sixth Directive leave room for a national statutory provision, such as that at issue, which was enacted before the Sixth Directive entered into force and on the basis of which a taxable person

may not deduct in full the turnover tax paid on the acquisition of certain goods or services because a fee was charged in respect thereof which incurred turnover tax, but only an amount up to the amount of tax owed in respect of that supply?

3. If, in respect of "the provision of food and drink", the condition is satisfied which requires the designation of a category of adequately defined goods and services, does Article 17(6) of the Sixth Directive preclude an amendment to an existing exclusion of the deduction, from which amendment it seems likely that in principle the scope of the exclusion will be restricted but where it cannot be ruled out that in an individual case in a particular year the scope of the restriction of the deduction might be extended, in particular through the flat-rate nature of the amended scheme?'

IV — Procedure before the Court

32. In accordance with Article 23 of the Statute of the Court of Justice of the European Union, written observations have been submitted in Cases C-538/08 and C-33/09 by the Greek and Netherlands Governments, and by the Commission of the European Communities. The applicant in the main proceedings in Case C-33/09 has also submitted written observations in that case.

33. By order of the President of the Court of 17 June 2009, Cases C-538/08 and C-33/09 were joined for the purposes of the oral procedure and the judgment.

34. The applicant in the main proceedings in Case C-33/09, the Greek and Netherlands Governments and the Commission presented oral argument at the hearing held on 3 December 2009.

V — Legal analysis

35. Since the wording of the first two questions posed in C-33/09 differs from that of the first two questions in Case C-538/08 only in respect of the difference between the goods and services at issue in the main proceedings, I consider that they should be examined together. Only the third question

posed in Case C-33/09 requires separate consideration.

A – *The first questions posed in the two cases*

36. By the first questions, the national courts wish to know whether Article 11(4) of the Second Directive and the second subparagraph of Article 17(6) of the Six Directive are to be interpreted as authorising Member States to exclude from the right to deduct input VAT various categories of goods or services listed in its national legislation, which was applicable before the entry into force of the Sixth Directive, regard being had to the wording of those categories.

37. It is important, first of all, to point out that the principle of the right to deduct VAT, as expressly and precisely stated in Article 17(2) of the Sixth Directive, is nevertheless qualified by the derogation in the second subparagraph of Article 17(6) of the Sixth Directive. Under that provision, the Member States are authorised to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article. [3]

38. However, since none of the proposals put to the Council by the Commission under the first subparagraph of Article 17(6) of the Sixth Directive has been adopted by the Council, the Member States may retain their existing legislation in regard to exclusion from the right to deduct VAT until such time as the Community legislature has established a Community system of exclusions and thus brought about the progressive harmonisation of national VAT legislation. Community law therefore does not yet contain any provision listing the expenditure excluded from the right to deduct VAT. [4]

39. In other words, the second subparagraph of Article 17(6) of the Sixth Directive contains a standstill clause which provides for the retention of national exclusions from the right

3 — See to that effect in Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraphs 43 and 44; Case C-371/07 *Danfoss and AstraZeneca* [2008] ECR I-9549, paragraphs 27 and 28; Case C-74/08 *PARAT Automotive Cabrio* [2009] ECR I-3459, paragraphs 17 and 21; and Case C-460/07 *Puffer* [2009] ECR I-3251, paragraph 83.

4 — See inter alia Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 20, and *Danfoss and AstraZeneca*, paragraph 29.

to deduct VAT which were applicable before the Sixth Directive entered into force. [5]

40. Nevertheless, as the Court has also pointed out, Article 17(6) of the Sixth Directive presupposes that the exclusions which Member States may retain pursuant to that provision were lawful under the Second Directive, which predated the Sixth Directive. [6]

41. However, while Article 11(1) of the Second Directive provided for the right of deduction, Article 11(4) authorised Member States to exclude certain goods and services from the deduction system, particularly those which are capable of being used exclusively or partially for the private needs of the taxable person or his staff. [7]

42. It is against that background that the national courts question whether the Netherlands legislation applicable before the entry into force of the Sixth Directive (that is, before 1 January 1978) defines with adequate precision certain goods or certain services which it excludes from the right to deduct VAT.

43. Although, as a rule, it is not for the Court of Justice, in preliminary ruling proceedings, to interpret the national legislation in order to determine whether, at the date of entry into force of the Sixth Directive, its content was compatible with that Directive and with the Second Directive, the Court may, in a spirit of cooperation with national courts, provide the national court with all the guidance that it deems necessary in order to give the national court a useful answer. [8]

44. In the present case, it is necessary to determine what is meant by *certain* goods or services, within the meaning of Article 11(4) of the Second Directive and of the case-law.

45. In that regard, in the judgment in *Royscot,* the Court acknowledged that the United

5 — See, inter alia, to that effect *Danfoss and AstraZeneca*, paragraph 30, and Case C-414/07 *Magoora* [2008] ECR I-10921, paragraph 35.

6 — See the judgment in Case C-305/97 *Royscot and Others* [1999] ECR I-6671, paragraph 21.

7 — See to that effect *Royscot*, paragraph 22, and *PARAT Automotive Cabrio*, paragraph 29.

8 — See, to that effect, *Magoora*, paragraphs 32 and 33.

Kingdom was entitled to make use of the authorisation deriving from Article 11(4) of the Second Directive in excluding from the right of deduction certain goods such as motor cars, even though the expenditure in question was strictly business related. [9]

46. The Court thus emphasised the nature of the goods (or services) for the purpose of identifying expenditure covered by the exclusion from the right to deduct provided for in Article 11(4) of the Second Directive, by omitting from that verification the criterion of the use to which the goods (or services) are put, that is to say, whether they are likely to be used for business or private purposes.

47. Furthermore, it is this interpretation of the judgment in *Royscot* that the Court accepted, in essence, in the judgment in *Uudenkaupungin kaupunki*. [10] In the latter judgment, the Court expressly inferred from paragraphs 21 to 25 of the judgment in *Royscot* – which related, I recall, to the interpretation of Article 11(4) of the Second Directive – that analysis of the origin of Article 17(6) of the Sixth Directive showed that the option given to Member States by the second subparagraph of that provision applies only to 'maintaining exclusions from deduction with regard to categories of expenditure defined by reference *to the nature of the goods or services acquired* rather than by reference to the use to which they are put or the way in which they are used'. [11]

48. The question whether that criterion for defining the goods and services at issue by reference to their nature is exclusive of other criteria was raised in the Commission's written observations and also, at the hearing, by the Netherlands and Greek Governments. Those parties pointed out that, in paragraph 28 of the judgment in *PARAT Automotive Cabrio,* the Court acknowledged that the exclusion from the right to deduct VAT could also be justified by reference to the purpose or objective of the goods or services concerned, a finding which constitutes a development in relation to the judgment in *Uudenkaupunki kaupunki*. According to those parties, the consequence, for the main proceedings in Case C-33/09, of the contribution made by the judgment in *PARAT Automotive Cabrio* is that the exclusion from the right to deduct VAT in respect of the category of business gifts, imposed by the Netherlands legislation, may be justified.

49. I, for my part, consider that the Commission and the Netherlands and Greek

9 — *Royscot*, paragraphs 23 and 25. See also Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, paragraph 34.

10 — Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039.

11 — Idem, paragraph 49. Emphasis added.

Governments attempt to draw conclusions from paragraph 28 of the judgment in *PARAT Automotive Cabrio* which go beyond what is actually stated in that judgment. Indeed, for the reasons set out below, that judgment cannot, to my mind, be interpreted in the way advocated by the Commission and the Netherlands and Greek Governments in the present cases.

50. I would point out that, in paragraph 28 of the judgment in *PARAT Automotive Cabio*, the Court, hearing a matter concerning the interpretation of the second subparagraph of Article 17(6) of the Sixth Directive, stated that that provision 'cannot be regarded as permitting a Member State to maintain a restriction of the right to deduct VAT which may also apply in a general manner to any expenditure related to the acquisition of goods, irrespective of its nature *or purpose*.' [12]

51. As regards its wording, I would point out that, contrary to what the Commission stated in its written observations but as it acknowledged at the hearing following a specific question in that respect posed by the Court, the term 'its purpose' does not refer 'to the goods' but to the expenditure connected with the acquisition of goods. That is apparent from a reading of the version of the judgment in the language of the procedure and, for example, of the French and Italian language versions. [13] This interpretation is also logical in the light of paragraph 27 of the judgment in *PARAT Automotive Cabrio*, which refers to the list of expenditure given in the first subparagraph of Article 17(6) of the Sixth Directive, expenditure which, according to that provision, must in any event be excluded from the right to deduct input VAT, namely, expenditure on luxuries, amusements or entertainment. Indeed, the last two of those kinds of expenditure are clearly defined by their purpose. Therefore, that explains the reference to the purpose of the expenditure in paragraph 28 of that judgment.

52. Irrespective of that point and more fundamentally, it is the context of paragraph 28 of the judgment in *PARAT Automotive Cabrio* and the relationship between Article 17(6) of the Sixth Directive and Article 11(4) of the Second Directive which make me inclined to think that the addition of the term 'its purpose' cannot be interpreted as the expression of the Court's intention to add to the criterion for defining certain goods or services, covered by Article 11(4) of the Second Directive, by reference to their nature, a criterion based on the purpose (in the sense of objective) of the goods or services, or even expenditure connected with the acquisition of the goods and services.

12 — Emphasis added.

13 — The Italian version is particularly clear in that regard: '... a qualunque spesa legata all'acquisto di beni, indipendentemente dalla sua natura o dal suo oggetto'.

53. It should be pointed out, first of all, that, in the judgment in *PARAT Automotive Cabrio*, the Court examined inter alia whether a national measure of a general nature, adopted before the accession of the Republic of Hungary to the European Union, excluding the right to full deduction of input VAT relating to the acquisition of goods financed by a subsidy from public funds, was compatible with Article 17 of the Sixth Directive. However, in the light of the general nature of the national measure, which covered all types of goods, quite logically the question never arose – as it has in the main proceedings in the present cases – as to whether the category of goods or services covered by the national legislation was adequately defined.

54. It is also important to state that paragraph 28 of the judgment in *PARAT Automotive Cabrio* interprets only the second subparagraph of Article 17(6) of the Sixth Directive and leaves aside the question of the interpretation of the term 'certain goods or services', within the meaning of Article 11(4) of the Second Directive.

55. In my view, this assessment is confirmed by paragraph 29 of the judgment, which points out that, historically, 'the Community legislature [has] authorise[d] only the exclusion of certain goods or services from the deduction system, and not ... general exclusions from that system'.

56. Indeed, as I have already pointed out in points 40 and 41 of this Opinion, national legislation such as that at issue in the main proceedings, providing for the exclusion from the right to deduct VAT and enacted prior to the Sixth Directive, must, in order to be authorised, not only fall within the scope of the second subparagraph of Article 17(6) of that directive but must also be compatible with the Second Directive, in particular with Article 11(4), which was applicable at the time that legislation was adopted.

57. It follows, in my view, that paragraphs 28 and 29 of the judgment in *PARAT Automotive Cabrio* mean simply that, although the second subparagraph of Article 17(6) of the Sixth Directive allows Member States to exclude from the right to deduct input VAT expenditure defined according to its nature or purpose, it cannot exempt them from the obligation, arising, directly or indirectly, from Article 11(4) of the Second Directive, to define

adequately the nature of the goods or services concerned by that expenditure, if it is not to extend unduly the scope of a derogation from the system of the right to deduct. [14]

58. Therefore, and in accordance with the decision in *Uudenkaupunki kaupunki*, it is necessary to ascertain, in the main proceedings, whether the categories of expenditure excluded from deduction of input VAT by the legislation at issue have been defined with sufficient precision, that is to say whether they have been defined by reference to the nature of the goods or services acquired.

59. In general, I would point out that the BUA applies, as well as to the specific categories which it excludes from the right to deduct, to goods and services used for any other private purposes of the undertaking's staff. Put in those terms, such an exclusion is based on the private use to which the goods or services are put rather than on their nature and on that account do not satisfy the requirements of Article 11(4) of the Second Directive, as interpreted by the Court.

60. However, as the Greek Government pointed out in its written observations, the main proceedings do not relate to goods and services falling within that general category, but to goods or services used by the taxable person for more defined needs of his staff, specified in the other categories listed in the BUA.

61. It is therefore necessary to examine whether those categories are sufficiently precise in the light of the requirements of Article 11(4) of the Second Directive.

62. As regards Case C-538/08, the category in question is that referred to in Article 1(1)(c) of the BUA, which concerns goods or services used by the employer to provide his staff with an 'opportunity for private transport'.

14 — For the founder Member States of the European Community and for those States which acceded before 1 January 1978, which adopted their legislation concerning exclusion from the right to deduct VAT when the Second Directive was still in force, Article 11(4) of the Second Directive is still directly relevant. On the other hand, for Member States which acceded after the Second Directive was repealed by the Sixth Directive, application of the criterion 'certain goods or services' is only indirect or, in other words, incorporated into the conditions for application of Article 17(6) of the Sixth Directive.

63. According to the national court, an analysis of the background to that provision clearly shows that, in referring to goods and services used to provide opportunities for private transport, the national legislature intended to include situations in which a taxable person makes a passenger car available to a member of his staff for private (and other) purposes.

64. I would point out that that category is, in two respects, broader than that considered by the Court in *Royscot*, in which the exclusion from the right to deduct VAT payable on the purchase of motor cars was held to be compatible with Article 17(6) of the Sixth Directive. On the one hand, the category in Article 1(1)(c) of the BUA includes goods or services used to provide an opportunity for private transport. On the other hand, that category is not limited to so-called passenger cars but may also include, as the national court has pointed out, provision of a vehicle for transporting staff members of a taxable person from their place of residence to their place of employment.

65. Nevertheless, that does not mean that the category in question is too generally defined.

66. First, there is little doubt that that category may lead to the exclusion of all or almost all goods or services from the right to deduct and negate the general system established by Article 17(2) of the Sixth Directive. [15]

67. Secondly, as it includes the actual provision of the opportunity for private transport to members of the taxable person's staff, the category concerned is undoubtedly a sufficiently precise designation of the goods concerned by the expenditure at issue in the main proceedings, which, it should be recalled, concern the exclusion from the right to deduct VAT paid on the purchase of cars by the taxable person and used, in part, for the private use of members of his staff.

68. As for the categories at issue in Case C-33/09, I also consider that the category relating to 'the provision of food and drink to the staff of the taxable person' and also the category relating to 'providing the staff of the taxable person with accommodation' adequately meet the requirements of Article 11(4) of the Second Directive.

15 — See in that regard, inter alia, the judgments in *Royscot*, paragraph 24, and *Charles and Charles-Tijmens*, paragraph 33.

69. On the one hand, and contrary to what has been suggested by the applicant in the main proceedings in that case in respect of the category relating to the provision of food and drink, I do not think that the goods or services concerned by that category need to be individualised and/or listed exhaustively. In the light of the information provided by the national court, it is clear that that category included foodstuffs as well as the goods and services involved in the making and preparation of food and drink. That category of goods or services therefore seems to me adequately identifiable and defined, implicitly, according to their nature.

70. I also note that, in its judgment in *Danfoss and AstraZeneca*, the Court did not state that there was an obstacle, in principle, to the exclusion from the right to deduct VAT on purchases and similar operations relating to 'food for the company's owners and staff' falling within the scope of the derogation in Article 17(6) of the Sixth Directive.

71. Also, I agree with the national court's assessment in respect of the category relating to 'providing the staff of the trader with accommodation', which includes, as the national court pointed out, making a dwelling available to members of the employer's staff, as such, but also the costs incurred by using agency or brokerage services making it possible to provide the accommodation. To my mind, that category also is adequately defined, implicitly, by reference to the nature of the goods and services concerned.

72. On the other hand, I have serious doubts as to whether the other two categories at issue are sufficiently definite, namely that relating to 'providing the staff of the [taxable person] with opportunities for recreation', referred to in Article 1(1)(c) of the BUA, and that relating to 'giving business gifts or other gifts to persons in relation to whom, if they had been charged or were to be charged the relevant turnover tax, such tax would be entirely or mainly non-deductible', referred to in Article 1(1)(b) of the BUA.

73. Those categories are defined according to their purpose, that is, their objective, and, what is more, the nature of the goods or services concerned are not or may not be objectively delimited, even in a general way. In particular, contrary to what the Netherlands Government argued in its written observations, there is no evidence to support the view that the category of business

gifts is limited to luxury articles. On the contrary, that claim is disproved by Article 1(2) of the BUA, which states that 'business gifts' or 'other gifts' shall be understood to mean 'any supplies provided by the trader in furtherance of business relationships or out of generosity towards others'.

74. In the light of the foregoing conclusions, I consider that Article 11(4) of the Second Directive and Article 17(6) of the Sixth Directive are to be interpreted as meaning that a Member State which has made use of the possibility offered by those articles of excluding deduction in respect of categories of expenditure described as:

— 'providing the staff of the employer with the opportunity for private transport',

— 'the provision of food and drink to the staff of the employer',

— 'the provision of accommodation for the staff of the employer',

has satisfied the condition requiring the designation of a category of adequately defined goods and/or services, by reference, even implicitly, to the nature of those goods and/or services.

On the other hand, the exclusion, by a Member State, of the right to deduct input VAT in respect of categories of expenditure described as:

— 'providing the staff of the employer with opportunities for recreation',

— '[giving] business gifts or other gifts … to persons in relation to whom, if they had been charged or were to be charged the relevant turnover tax, such tax would be entirely or mainly non-deductible', does not satisfy that condition.

B – *The second questions posed in the two cases*

75. By their second questions, worded in almost identical terms, the national courts ask,

in essence, whether, if a total exclusion of the right to deduct VAT is authorised for one or more of the categories of expenditure examined in the reply to the first questions referred for a preliminary ruling, the provisions of the Sixth Directive are to be interpreted as meaning that they preclude a partial exclusion from the right to deduct VAT, such as that in national legislation enacted before the directive entered into force.

76. Having regard, on the one hand, to the general nature of the option given to Member States by Article 17(6) of the Sixth Directive, which allows them to retain any exclusions from the right to deduct established by their national legislation and applied before the entry into force of the Sixth Directive, and, on the other hand, to the saying that 'He who can do more, can do less', I see nothing to prevent a Member State limiting the scope of an exclusion from the right to deduct VAT, as soon as such an exclusion is adopted.

77. That possibility seems to me to accord with the spirit of the Sixth Directive. Although the Court has acknowledged that Article 17 of the Sixth Directive does not preclude a Member State reducing the scope of exclusions existing *after the entry into force of the Sixth Directive*, since their abolition is the objective of Article 28(4) of the Sixth Directive, [16] it is reasonable to infer from that that the provisions of the Sixth Directive, inter alia Article 17(2), also do not preclude the adoption, *even before the entry into force of that directive*, of national legislation providing for the partial exclusion from the right to deduct input VAT.

78. I therefore consider that Article 17(6) of the Sixth Directive is to be interpreted as meaning that it allows a Member State to retain a partial exclusion from the right to deduct input VAT in respect of expenditure relating to certain goods or services, introduced by national legislation enacted before the entry into force of the Sixth Directive.

C – *The third question posed in Case C-33/09*

79. The third question posed by the national court in Case C-33/09 concerns only the

16 — See *Commission* v *France*, paragraphs 21 and 22; Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 45; *Danfoss and AstraZeneca*, paragraph 32; and *Magoora*, paragraph 36.

particular situation of the partial exclusion from the right to deduct VAT of the category of expenditure relating to the 'provision of food and drink' to the members of staff of the taxable person, referred to in Article 1(1)(c) of the BUA.

80. I consider that, by this question, the national court is asking whether Article 17(6) of the Sixth Directive is to be interpreted as meaning that it precludes an amendment by a Member State to a partial exclusion from the right to deduct VAT in respect of the category of expenditure relating to 'the provision of food and drink', which is intended, in principle, to restrict its scope, but where it cannot be ruled out that, in an individual case in a particular year, the scope of the exclusion might be extended having regard to the flat-rate nature of the amended scheme.

81. It is not disputed that, as regards that category – which I consider to be adequately defined, as I stated in the above examination of the first questions referred for a preliminary ruling –, the BUA was amended after the Sixth Directive entered into force.

82. It is also not disputed, as is apparent from the judgment making the reference and as was also acknowledged by the applicant in the main proceedings at the hearing before the Court of Justice, that the amendments which were made in relation to the exclusion from the right to deduct VAT on expenditure relating to the provision of food and drink, in general, reduced the scope of that exclusion.

83. However, according to the case-law, such a reduction in the scope of an exclusion from the right to deduct falls within the scope of the derogation provided for by Article 17(6) of the Sixth Directive, even if it was adopted after the entry into force of the Sixth Directive. [17] Indeed, as has already been stated, the reduction in the scope of such a derogation from the principle of the right to deduct VAT, provided in Article 17(2) of the Sixth Directive, is in accordance with the objective of the directive.

84. I do not consider this general assessment to be undermined by the possibility, which is referred to by the national court but which the parties agree is irrelevant to the main proceedings, that, in exceptional cases, the new flat-rate partial exclusion scheme, introduced

17 — *Commission* v *France*, paragraph 22; *Danfoss and Astra-Zeneca*, paragraph 32; *Magoora*, paragraph 36; and *Puffer*, paragraph 85.

after the Sixth Directive entered into force, may lead to a less favourable financial result than under the previous scheme, owing to the rules for applying the new scheme.

85. In that regard, I note that, according to the national court and the written observations of the Netherlands Government, such a situation is likely to arise only where the taxable person offers food and drink to his staff, without contributing either to their preparation or to enabling their consumption, while exceeding the threshold of NLG 500 (approximately EUR 227) per member of staff during the same accounting year.

86. However, the mere possibility that such a case may arise cannot, in my view, preclude the application of the derogation in Article 17(6) of the Sixth Directive since, as the national court has pointed out, the amendment made after the entry into force of that directive is, in general, more favourable to taxable persons than the scheme in existence up to that date. The existence, even if established, of such an isolated or exceptional situation would not affect the principle that the amendment to the national legislation, which was adopted after the entry into force of the Sixth Directive, has reduced the scope of the previously existing exclusions.

87. On the other hand, I consider that, as the Commission rightly pointed out, a court hearing the exceptional and currently hypothetical case envisaged by the national court ought, in accordance with its obligation under Community law, to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Sixth Directive with a view to achieving the results sought by the latter. [18]

88. I therefore consider that Article 17(6) of the Sixth Directive is to be interpreted as meaning that it allows Member States to introduce, after the entry into force of the directive, an amendment to the exclusion from the right to deduct VAT on a category of expenditure, such as that relating, in the main proceedings, to the provision of food and drink by the taxable person to members of his staff, which is intended, in principle, to restrict the scope of the exclusion but where it cannot be ruled out that, in an individual case in a particular year which is not relevant to the main proceedings, it might extend the scope of the exclusion through the flat-rate nature of the amended provision.

18 — See inter alia, regarding that obligation, *Magoora*, paragraph 44 and the case-law cited.

VI — Conclusion

89. In the light of the foregoing considerations, I propose that the following reply be given to the questions referred by the Hoge Raad der Nederlanden and the Gerechtshof Amsterdam for a preliminary ruling:

(1) Article 11(4) of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, and Article 17(6) of 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, are to be interpreted as meaning that a Member State which has made use of the possibility offered by those articles of excluding deduction in respect of categories of expenditure described as:

— 'providing the staff of the employer with the opportunity for private transport',

— 'the provision of food and drink to the staff of the employer',

— 'the provision of accommodation for the staff of the employer',

has satisfied the condition requiring the designation of a category of adequately defined goods and/or services, by reference, even implicitly, to the nature of those goods and/or services.

On the other hand, the exclusion, by the Member State, of the right to deduct input VAT in respect of categories of expenditure described as:

— 'providing the staff of the employer with opportunities for recreation',

— '[giving] business gifts or other gifts … to persons in relation to whom, if they had been charged or were to be charged the relevant turnover tax, such tax would be entirely or mainly non-deductible', does not satisfy that condition.

(2) Article 17(6) of the Sixth Directive is to be interpreted as meaning that it allows a Member State to retain a partial exclusion from the right to deduct input VAT in respect of expenditure relating to certain goods or services, introduced by national legislation enacted before the entry into force of the Sixth Directive.

(3) Article 17(6) of the Sixth Directive is to be interpreted as meaning that it allows Member States to introduce, after the entry into force of the directive, an

amendment to the exclusion from the right to deduct VAT on a category of expenditure, such as that relating, in the main proceedings in Case C-33/09, to the provision of food and drink by the taxable person to members of his staff, which is intended, in principle, to restrict the scope of the exclusion but where it cannot be ruled out that, in an individual case in a particular year which is not relevant to the main proceedings, it might extend the scope of the exclusion through the flat-rate nature of the amended provision.