Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 23 October 2025[1]

Case C-515/24

Randstad España SLU
v
Administracíon General del Estado

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Request for a preliminary ruling – Common system of value added tax – Directive 2006/112/EC – Article 176 – National restrictions on the right to deduct input VAT in respect of business-related gifts to clients – 'Standstill' clause under the second paragraph of Article 176 – First-time introduction of a restriction on the right to deduct input VAT at the same time as accession to the European Union and transposition of the VAT Directive)

I. Introduction

1. In this request for a preliminary ruling, the Court of Justice is called upon to address the scope of a 'standstill' clause. That clause provides that Member States may retain their existing legislative provisions that exclude a deduction of input VAT, pending the entry into force of the VAT Directive[2] (which, at that time, was still the Sixth Directive[3]). In the case of Member States that acceded subsequently, that rule applies to the exclusion rules in force until the date of accession.

2. However, in view of the fact that Spain did not have a VAT system with a right to deduct input VAT until the date of accession, it also had no exclusion rules in that respect. As deduction of input VAT in respect of 'entertainment expenditure' which is not strictly business expenditure does not appear to be mandatory, Spain has nevertheless introduced such an exclusion. That was done with a law promulgated shortly before accession, whereby that law entered into force, as a VAT law transposing the VAT Directive, at the same time as the accession to the European Union.

3. In the absence of a VAT system with a right to deduct input VAT, an exclusion of the right of deduction makes no sense. It therefore follows that, unlike other Member States, Spain was in fact able to bring that exclusion into effect only upon the entry into force of the new VAT system. The question now arises as to whether that action is still covered by the standstill clause, or whether

[1] Original language: German.

[2] Council Directive 2006/112/EC of 28 November 2006 (OJ 2006 L 347, p. 1).

[3] 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).

Member States that did not have a VAT system with a right to deduct input VAT prior to their accession could make use of the possibility of restricting the right to deduct input VAT only before the introduction of the new VAT system rather than at the same time.

4. That question concerns not only the interpretation of the standstill clause, but also the equality of the Member States within the European Union.[4] Many Member States with an input VAT deduction model restricted the deduction of input VAT for 'entertainment expenditure' (which then continued to apply), whereas all Member States without an input VAT deduction model were (naturally) unable to have such rules and therefore had to accept a loss of their tax revenue if they still did not introduce comparable rules upon their accession to the European Union.

II. Legal framework

A. European Union law

Treaty concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community[5] *(the 'Accession Treaty')*

5. Article 395 of the Accession Treaty is worded as follows:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of Directives and Decisions within the meaning of Article 189 of the EEC Treaty and of Article 161 of the Euratom Treaty, and with recommendations and decisions within the meaning of Article 14 of the ECSC Treaty, unless a time limit is provided for in the list of Annex XXXVI or in any other provisions of this Act.'

Directive 2006/112/EC on the common system of value added tax[6] *('the VAT Directive')*

6. In the VAT Directive, the conditions for deduction of input VAT are set out in Article 168(a):

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person'.

[4] The equality of the Member States is sometimes accorded such great weight that even the primacy of EU law is said to follow from it (see, for example, Lenaerts, K., *L'égalité des États membres devant les traités: la dimension transnationale du principe de primauté*, Revue du Droit de l'Union Européenne 4 (2020). See also, to similar effect, von Danwitz, T., *Der Vorrang des Rechts der Europäischen Union vor dem Recht der Mitgliedstaaten*, Festschrift Streinz, 2023, p. 41 (47). Although that is rather doubtful (see Kokott, J. / Hummel, D., *Der Vorrang des Unionsrechts als Ausdruck des Gleichheitsprinzips*?, Europäische Grundrechte Zeitschrift, 2024, p. 1 et seq.), it is not material to the present case.

[5] OJ 1985 L 302, p. 9 et seq.

[6] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable to the years at issue, 2009 to 2011. In that respect, it was last amended by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1).

7. Article 16 and Article 26(1) of the VAT Directive govern the treatment of supplies of goods and services carried out free of charge and, as such, deem them to be taxable transactions carried out for consideration. Article 16 of the VAT Directive, relating to the supply of goods free of charge, is worded as follows:

'The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.'

8. Article 26(1) of the VAT Directive concerns supplies of services free of charge and provides:

'Each of the following transactions shall be treated as a supply of services for consideration:

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

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

9. Article 176 of the VAT Directive provides, in the first paragraph thereof, for a restriction to be placed, by the Council, on the right to deduct input VAT and, in the second paragraph thereof, sets down a standstill clause:

'The Council, acting unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession.'

B. Spanish law

10. Ley 30/1985, de 2 de agosto, del Impuesto sobre el Valor Añadido (Law 30/1985 of 2 August 1985 on value added tax; 'the VAT Law') transposed the VAT Directive into Spanish law for the first time. Article 96 of that law, which is now in force, governs exclusions and restrictions relating to the right of deduction and provides:

'One. No proportion of the input VAT amounts resulting from the acquisition, including by self-supply, import, hire, transformation, repair, maintenance or use of the goods and services set out below, or goods and services that are incidental or supplementary to them, shall be deductible: …

4. Shows and recreational services.

5. Goods and services used to show appreciation for clients, salaried employees or third parties.

Such goods and services shall not include:

(a) Free samples and the promotional items of small value defined in Article 7(2) and (4) of this law.

(b) Goods solely intended to be supplied or hired out, directly or by means of their transformation, for consideration, which, at a time subsequent to their acquisition, are used to show appreciation for clients, salaried employees or third parties.

6. Transport, travel, hotel and restaurant services, except where the relevant amounts are tax-deductible expenses for the purposes of personal income tax or corporation tax.

Two. The input VAT amounts resulting from the transactions mentioned in the preceding paragraph and relating to the following goods and services shall be excluded from the provisions of that paragraph:

1. Goods which may objectively be considered to be solely for industrial, commercial, agricultural, clinical or scientific use.

2. Goods solely intended to be supplied or hired out, for consideration, directly or by means of their transformation, by business owners or professionals who regularly carry out such operations.

3. Services received in order to be provided as such, for consideration, by business owners or professionals who regularly carry out such operations.

Three. The deductions established in this article and in the preceding article shall also comply with the conditions and requirements laid down in Chapter I of Title VIII of this law and, in particular, those relating to the pro rata rule.'

III. The facts

11. According to the information communicated by the referring court, which is not disputed by the parties, the exclusion of a right of input VAT deduction in respect of 'entertainment expenditure' provided for in Article 96(One)(4) and (5) of the VAT Law was first introduced (promulgated) (in the previous version) by Law 30/1985 on 9 August 1985 and entered into force on the date of accession of the Kingdom of Spain to the European Union, that is on 1 January 1986.

12. Before 1 January 1986, there was no consumption tax in Spain similar in structure to VAT, but there was, until that date, a collection of taxes levied on consumption. However, none of those taxes was subject to specific rules governing the exercise of the right to deduct input VAT. In the case of those taxes, then, which applied in Spain until 31 December 1985, the right of deduction could never be exercised in respect of the tax paid. It therefore follows that, until the date on which the Accession Treaty entered into force, the 1985 Spanish law did not provide for any restriction of that right of deduction either.

13. Randstad España, S.L.U. ('Randstad') is a commercial company and a taxable person under VAT law. During the financial years 2009, 2010 and 2011, it purchased (subject to VAT) tickets for admission to sporting and other leisure events (for example, for football matches of Real Madrid, C.F. and F.C. Barcelona, invitations to the Paddock Club of the Formula 1 Grand Prix in Spain, and invitations to excursions on board the ship Clipper Stad Amsterdam). Those admission tickets were intended to show appreciation for clients. While it is true that such expenditure is deductible as operating expenditure for the purposes of corporation tax, it is not possible to deduct input tax in relation to VAT in accordance with Article 96(One)(4) and (5) of the VAT Law.

14. Corresponding assessment decisions were issued on 14 July 2014. On 31 July 2014, Randstad challenged those assessment decisions before the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain), which rejected that challenge in a decision of 22 November 2017.

15. Randstad brought proceedings contesting that decision before the Sala de lo Contencioso Administrativo de la Audiencia Nacional (Administrative Division, National High Court, Spain). By judgment of 17 January 2022, the tax assessment was confirmed in that respect.

16. Randstad brought an appeal against that judgment before the Sala de lo Contencioso-Administrativo del Tribunal Supremo (Administrative Division, Supreme Court, Spain). That court has doubts as to whether the restriction on the right of deduction established in Article 96(One)(4) and (5) of the VAT Law could be covered by the standstill clause set out in the second paragraph of Article 176 of the VAT Directive. Since the provision which preceded that provision also first entered into force on the date of accession of the Kingdom of Spain to the European Union, that is on 1 January 1986, it considers that there was, strictly speaking, no provision providing for a restriction until the date of accession.

IV. Request for a preliminary ruling

17. The Tribunal Supremo (Supreme Court) therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a rule such as that contained in Article 96(One)(4) and (5) of Law 37/1992 of 28 December 1992 on value added tax consistent with Article 168(a) and Article 176, first paragraph, of [the VAT Directive], where, in accordance with that rule, no proportion of the input VAT amounts resulting from the acquisition of goods and services such as [tickets for] sporting events, or those used to show appreciation for clients, salaried employees or third parties, is deductible, even if the taxpayer proves that such expenditure is directly related to his or her business or professional activity, that it had a strictly business or professional purpose and that the goods and services were used by the taxable person to carry out taxable transactions, and even though the amount of such expenditure is tax deductible for the purposes of income taxes (personal income tax and corporation tax)?

(2) Is a rule such as that contained in Article 96(One)(4) and (5) of Law 37/1992 of 28 December 1992 on value added tax, which introduces a condition limiting the exercise of the right of deduction, consistent with Article 176, second paragraph, of [the VAT Directive], where that rule entered into force the same day that the Kingdom of Spain joined the European Union, on 1 January 1986, and where no legislation in force until the date of accession provided for such a restriction?'

18. Randstad España, the Kingdom of Spain and the European Commission have submitted written observations in the proceedings before the Court. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

V. Legal assessment

A. The link between the right to deduct input VAT and the subsequent taxation of benefits in kind (gifts to customers)

19. Both questions concern the lawfulness of the exclusion of the right to deduct input VAT under Spanish law. However, that issue presupposes that a right to deduct input VAT does in fact exist under the general rules of the VAT Directive. Under Article 168(a) of the VAT Directive, that requires that the admission tickets be used for the purposes of Randstad's taxed transactions.

20. According to the facts provided by the referring court, the admission tickets were intended, at the time of their acquisition, for the purposes of showing appreciation for clients. Assuming that the transfer of the admission tickets to the clients was made for business reasons, for example in order to maintain and cultivate relations with clients and thus generate additional revenues, there is a certain link between the costs of the admission tickets and Randstad's economic activity. To that extent, a right to deduct input VAT under Article 168(a) of the VAT Directive would exist in principle.

21. However, upon considering the deemed transactions set out in Article 16 and Article 26(1)(a) of the VAT Directive, it becomes clear that that deduction of input VAT is merely temporary. For example, the first paragraph of Article 16 of that directive treats the free-of-charge disposal of goods giving rise to the right of input VAT deduction as a supply made for consideration, thereby triggering a corresponding VAT liability.

22. Gifts made to third parties in respect of which a right of input VAT deduction has been exercised must therefore, in principle, be taxed retrospectively at the time of making the gift, unless they are gifts of small value (*de minimis* limit). That reflects the requirement for subsequent taxation if the free-of-charge onward transfer would otherwise lead to untaxed final consumption by the donee. By taxing the free-of-charge onward transfer, the donor's original deduction of input VAT is ultimately corrected and an untaxed final consumption by the third party is thus avoided.

23. According to the Court's case-law, which is in the end correct, such subsequent taxation is unnecessary only if the gift made 'free of charge' is closely linked to a main supply rendered for consideration, as the Court has affirmed in the case of a 'free' gift of a tablet when a subscription to a periodical is taken out for consideration.[7] However, there does not appear to be such a link with another transaction made for consideration in the present case.

[7] Judgment of 5 October 2023, *Deco Proteste – Editores* (C-505/22, EU:C:2023:731, paragraphs 25 and 26).

24. In that regard, it is true that there is a right to deduct input VAT in respect of business-related gifts. However, that right is only temporary. The free-of-charge onward transfer would, in accordance with Articles 16 and 26, have to be taxed later on at the time of making the gift in order for the input VAT deduction to be corrected again without undermining the principle of neutrality.

25. In that respect, however, the VAT Directive contains a legislative lacuna as regards supplies of services gifted to third parties for business reasons. Article 26(1)(b) of the VAT Directive covers the free-of-charge onward transfer of a service to the taxable person's own staff, but not – unlike Article 16 of the VAT Directive in relation to supplies of goods carried out free of charge – to other third parties (for example, to clients).

26. Since admission tickets can be transferred like goods (and therefore gifted) but are not tangible goods, they constitute services within the meaning of Article 24(1) of the VAT Directive. Hence, according to the wording of the VAT Directive, there is no requirement for subsequent taxation in the present case. This results in an untaxed final consumption on the part of the clients receiving the gift if they also, or primarily, enjoy (consume) the gift for their own private amusement, which can surely be assumed in cases involving attendance at a concert or football match.

27. I do not share Spain's view that the deduction of input VAT is precluded on that account simply because the direct link to those non-taxable operations displaces the indirect link to Randstad's taxable transactions.[8] I do, however, share Spain's concern that a deduction of input VAT in those situations ultimately results in an untaxed final consumption.

28. The fact that that is not the actual intention is made clear by the second sentence of the first paragraph of Article 176 of the VAT Directive, which assumes that the Council will 'in no circumstances' determine that VAT is to be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

29. The latter must be understood as meaning expenditure that, while linked to the professional activity, is at the same time of an entertainment nature and suitable for promoting the taxable person's social standing. Typical examples include expenditure for theatre visits, social gatherings and gifts to clients. The second sentence of the first paragraph of Article 176 thus assumes that such expenditure, which is not strictly business expenditure and is therefore mainly for private consumption, is to be excluded from the right to deduct input VAT.

30. The foregoing and the proximity between the private use of the admission tickets, on the one hand, and the business-motivated gifting of such admission tickets, on the other, explains why – as the Commission also rightly emphasises – the deduction of input tax for such 'expenditure on amusements' or 'entertainment expenditure' was, and still is, permitted only to a limited extent under many national laws governing turnover tax or VAT. For example, Paragraph 15(1a) of the German Umsatzsteuergesetz (German Law on Turnover Tax; 'the UStG') excludes the deduction of input tax in respect of gifts above a certain amount. Austrian law (in that case, Paragraph 12(2)(2) of the Austrian Umsatzsteuergesetz (Austrian Law on Turnover Tax; 'the öUStG')) also places restrictions on deductions for entertainment expenditure and entertainment outlays.

[8] The Court is quite tolerant in that respect – see only the judgments of 16 September 2020, *Mitteldeutsche Hartstein-Industrie* (C-528/19, EU:C:2020:712, paragraph 29 et seq.), and of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C-132/16, EU:C:2017:683, paragraph 33 et seq.).

31. In the light of the foregoing VAT law assessments, the two questions referred for a preliminary ruling by the referring court can now be answered.

B. Question 1: The interpretation of the first paragraph of Article 176 of the VAT Directive

32. By its first question, the referring court is seeking an interpretation of the first paragraph of Article 176 of the VAT Directive. However, as the Commission rightly emphasises in its written observations, that question is neither explained nor substantiated in further detail. Moreover, in view of the fact that the first paragraph of Article 176 of the VAT Directive is addressed to the Council, the question is difficult to comprehend. As the Council has evidently not made a corresponding determination, the first paragraph of Article 176 of the VAT Directive does not appear to be relevant here.

33. Nevertheless, the clear wording of the first paragraph of Article 176 of the VAT Directive confers on the Council not only a power, but also an obligation. The wording does not state 'may', but rather that 'the Council, acting unanimously on a proposal from the Commission, shall determine', the expenditure in respect of which VAT shall not be deductible. The second sentence states that *in no circumstances* is VAT to be deductible for expenditure on luxuries, amusements or entertainment.

34. In that respect, the second sentence indicates, in particular, that the legislature assumes that expenditure which is not strictly business expenditure, because it relates to expenditure on (private) amusements, is, in principle, to be excluded from the right to deduct input VAT. It is also clear from that provision that such exclusions are, in any event, not contrary to the intention of the legislature, even if the Council – for whatever reason – has not yet fulfilled its mandate under the first sentence of Article 176 of the VAT Directive.

35. That conclusion is not called into question by the differences highlighted by the referring court in relation to the treatment of such costs for income tax law purposes under Spanish taxation law. The question as to whether the costs are deductible or non-deductible as business expenditure or advertising expenditure under Spanish income tax law is irrelevant for the purposes of EU VAT law. Income tax law is not a harmonised law under EU law, which means that the Member States are free to structure their prohibitions on deduction differently in that respect. For that reason alone, no conclusions can be drawn from national income tax law for the purpose of interpreting EU law. That is all the more true in view of the fact that income tax law normally pursues other objectives as well. As a general rule, it aims to tax the inflow of income, whereas VAT law taxes the expenditure for a consumer good.

C. Question 2: The interpretation of the second paragraph of Article 176 (standstill clause) of the VAT Directive

36. By its second question, the referring court is asking how the second paragraph of Article 176 of the VAT Directive is to be interpreted in order for it to be able to determine whether the exclusion of the right to deduct input VAT provided for under Spanish law is covered by the standstill clause set down in EU law. According to that clause, the Member States may – pending the adoption of the Council's determination pursuant to the provisions set down in the first paragraph of Article 176 of the VAT Directive (which is still pending to date) – retain all exclusions on deduction of input VAT provided for under their national laws on the date of their accession.

37. According to the question referred for a preliminary ruling, both the exclusion of input VAT deduction provided for under Article 96(One)(4) and that provided for under Article 96(One)(5) of the VAT Law (in the version applicable at the time) entered into force on the date of accession and thus at the same time as the new VAT system. Hence, Article 96(One)(4) and (5) of the VAT Law could be covered by the second paragraph of Article 176 of the VAT Directive.

38. The determinative factor in the present case is the correct perspective. From the point of view of Randstad, the exclusion of the right to deduct input VAT was provided for only upon the introduction of the VAT Law at the time of accession. To that extent, there are no corresponding old rules that could continue to apply.

39. However, there was no VAT system with input VAT deduction in Spain prior to accession, such that – as appears to be the Commission's perspective – input VAT deduction was generally excluded. Consequently, no exclusion of input VAT deduction was introduced but, on the contrary, the existing total exclusion was reduced in that respect by the introduction of the right to deduct input VAT and the provisions set down in Article 96(One)(4) and (5) of the VAT Law.

40. By contrast, Spain considers that, although the exclusion was in fact newly introduced, it had already been promulgated prior to accession and was therefore already provided for in Spanish law prior to accession, even though it entered into force only at the time of accession.

41. At a first glance, Randstad's view appears convincing. The second paragraph of Article 176 of the VAT Directive permits old law that conflicts with the VAT Directive to continue to apply until the Council and the Commission fulfil their respective mandates. The exclusion of the right to deduct input VAT as introduced by the entry into force of the transposition law is not an old law that continues to apply. However, upon somewhat closer examination, the Commission's perspective appears to be the correct one, particularly in the present case.

42. First, the exclusion of the right to deduct input VAT for expenditure on amusements and entertainment is consistent with the intention of the legislature and, in view of the private consumer satisfaction that is closely linked to such expenditure, it also makes sense for the purposes of VAT law.

43. Second, in the absence of an old VAT system with an exclusion of the right to deduct input VAT, Member States would have absolutely no possibility of introducing such an exclusion because, in the absence of a system featuring a right to deduct input VAT, a partial exclusion of a right of deduction would be impossible and would not make sense. In that respect, when considered in the clear light of day, a right to deduct input VAT is not restricted for the first time on the date of accession, but is instead made possible for the first time, albeit within certain limits only. However, if those limits reflect the intention of the legislature and are compatible with the objectives of the VAT Directive (taxation of private consumption), then entry into force at the same time as the newly transposed VAT system would – as both the Commission and Spain argue – be consistent with the purpose of the second paragraph of Article 176 of the VAT Directive.

44. Ultimately, in my opinion, the second paragraph of Article 176 of the VAT Directive merely clarifies that, after accession and the associated obligation to transpose the VAT Directive, the Member States may no longer individually (that is to say, without the Council) introduce a new exclusion, or an extension of an existing exclusion, of the right to deduct input VAT that is not

provided for in the VAT Directive. In that regard, the exclusions already provided for as at the time of accession demarcate the decisive limit. The entry into force of such exclusions at the same time as accession is therefore innocuous.

45. That view is supported, first, by the wording of the second paragraph of Article 176, since that paragraph does not state that the exclusion of the right to deduct input VAT must have already been in force, but only that it must have been 'provided for'.[9] However, a national law that was already promulgated prior to accession and contains a corresponding provision already provides for such an exclusion at the time of accession.

46. Second, in the light of equality between Member States, it would seem very strange to me if Germany, for example, is permitted to retain its exclusion of the right to deduct input VAT for business-related gifts because it already had a VAT system with a right to deduct input VAT at the end of the transposition period for the VAT Directive, but a Member State acceding to the European Union later cannot introduce such a system one 'logical second' beforehand, or at the same time.

47. If Spain had, for the first time, introduced its own VAT system with a right of input VAT deduction and corresponding exclusion in relation to the right of input VAT deduction one day prior to accession and brought it into effect (for one day), and then transposed the VAT Directive one day later upon accession, nobody would doubt the applicability of the standstill clause set down in the second paragraph of Article 176 of the VAT Directive. However, the question whether that legislation entered into force one day earlier, a logical second earlier or simultaneously can have no bearing on a Member State's tax revenue (nor, allegedly, on the European Union's[10] own resources). The only decisive factor is whether, after accession, the situation is subsequently changed contrary to the requirements of the VAT Directive. However, that has not happened in Spain.

48. In that regard, the Court's current case-law also militates in favour of that approach, which treats all Member States equally. That is because the Court has already stated that the second paragraph of Article 176 of the VAT Directive contains a standstill clause, which provides, in particular, for the retention by States acceding to the European Union of national exclusions from the right to deduct VAT which were applicable prior to the date of their accession, until such time as the Council has adopted the provisions envisaged by the first paragraph of Article 176, which it has not yet done.[11]

49. However, that power is not absolute since the Court has held that the standstill clause is not intended to allow a new Member State to amend its domestic legislation upon its accession to the European Union, the effect of which would be to extend the scope of existing exclusions in a way

[9] The other language versions also focus only on the fact that the restriction must have been provided for. See the versions in French ('*prévu par leur législation nationale*') or English ('provided for under their national law').

[10] For example, in connection with the second paragraph of Article 176 of the VAT Directive, see, expressly, judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 32). However, that is incorrect, as the own resource based on gross national income (GNI) compensates for any expenditure not covered by traditional own resources and the VAT own resource. See only the European Commission's proposal for a Council Directive of 24 April 2019 amending Directive 2006/112 and Directive 2008/118 concerning the general arrangements for excise duty as regards defence effort within the Union framework, COM(2019) 192 final, page 10 – German version.

[11] See, in lieu of multiple citations: judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 30). Similarly, judgment of 15 April 2010, *X Holding and Oracle Nederland* (C-538/08 and C-33/09, EU:C:2010:192, paragraph 38).

that diverts that legislation from the objectives of the VAT directive, which would be contrary to the very purpose of that clause.[12] According to the Court, the decisive factor is whether the legislation at issue extended, *after that accession*, the scope of existing exclusions.[13]

50. To that end, a comparison of input VAT deductions before and after accession can be carried out.[14] In the present case, it was not possible, prior to accession, for input VAT to be deducted in respect of goods or services intended to show appreciation for clients. After accession, it is also not possible for input VAT to be deducted in respect of such gratuities. It therefore follows that the exclusion of the right to deduct input VAT has not been extended. Moreover, by introducing that exclusion of the right to deduct input VAT, Spain has not departed from the objectives of the VAT Directive, which would be contrary to the purpose of the standstill clause. As explained earlier in this Opinion (see points 28 et seq.), it would in fact be an untaxed final consumption of such consumer goods that would run counter to the objectives of the VAT Directive.[15]

51. Even the more extensive condition developed by the Court, according to which the national legislation at issue must adequately define the nature or the purpose of the goods and services in respect of which the right to deduct VAT is excluded in order to ensure that that option granted to the Member States is not used to authorise general exclusions from that system,[16] is also fulfilled in the present case. The exclusion of the right to deduct input VAT for acquisitions of goods or services intended to show appreciation for clients, salaried employees or third parties is sufficiently specific and not of a general nature.

52. The judgment in *AES-3C Maritza East 1*,[17] cited by Randstad, does not undermine that position. In that case, the pre-existing exclusions of the right to deduct input VAT were extended at the time of accession.[18] In Spain, however, there was no right to deduct input VAT at all. It therefore follows that the previously non-existent exclusion was not extended either; on the contrary, the input VAT deduction right was granted for the first time, albeit subject to restrictions in that respect.

53. In so far as a supposedly required strict interpretation[19] of the standstill clause is pleaded, that is not helpful here. Thus, the Court has already held in the past that the second paragraph of Article 176 of the VAT Directive seeks to maintain 'all the exclusions' provided for on the date of accession. In that regard, the Court has expressly stated that the expression 'all the exclusions' set out in the second subparagraph of Article 17(6) of the Sixth Directive – and now in the second

12 Judgments of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 31); and of 22 December 2008, *Magoora* (C-414/07, EU:C:2008:766, paragraphs 37 and 39).

13 Judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraphs 32 and 33). See, to that effect, judgments of 18 July 2013, *AES-3C Maritza East 1* (C-124/12, EU:C:2013:488, paragraph 41 and the case-law cited therein); of 8 January 2002, *Metropol and Stadler* (C-409/99, EU:C:2002:2, paragraph 46); and of 22 December 2008, *Magoora* (C-414/07, EU:C:2008:766, paragraph 41 et seq.). See also recent orders of 26 February 2020, *PAGE International* (C-630/19, not published, EU:C:2020:111, paragraph 30); and of 17 September 2020, *Super Bock Bebidas* (C-837/19, not published, EU:C:2020:721, paragraph 30).

14 See also judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraphs 39 and 51).

15 With particular emphasis on the issue of whether the legislation of a Member State brings itself into line with the objectives of the VAT Directive, see judgments of 14 June 2001, *Commission* v *France* (C-345/99, EU:C:2001:334, paragraph 22), and of 8 January 2002, *Metropol and Stadler* (C-409/99, EU:C:2002:2, paragraph 45).

16 Judgments of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 40); of 15 April 2010, *X Holding and Oracle Nederland* (C-538/08 and C-33/09, EU:C:2010:192, paragraph 44); and of 23 April 2009, *PARAT Automotive Cabrio* (C-74/08, EU:C:2009:261, paragraphs 28 and 29). More recently, see also, again, orders of 26 February 2020, *PAGE International* (C-630/19, not published, EU:C:2020:111, paragraph 34), and of 17 September 2020, *Super Bock Bebidas* (C-837/19, not published, EU:C:2020:721, paragraph 39).

17 Judgment of 18 July 2013, *AES-3C Maritza East 1* (C-124/12, EU:C:2013:488).

18 Judgment of 18 July 2013, *AES-3C Maritza East 1* (C-124/12, EU:C:2013:488, paragraph 48).

19 See also judgments of 23 April 2009, *PARAT Automotive Cabrio* (C-74/08, EU:C:2009:261, paragraph 23), and of 22 December 2008, *Magoora* (C-414/07, EU:C:2008:766, paragraph 28).

paragraph of Article 176 of the VAT Directive – comprises, in the light of the wording and legislative history of that article, also expenditure which is strictly business expenditure.[20] It therefore follows that the standstill clause set down in the second paragraph of Article 176 of the VAT Directive authorises the Member States also to exclude from the right to deduct input VAT categories of expenditure that are strictly business expenditure, provided that they are defined with sufficient precision (see, in that regard, point 51 above).

54. That case-law does not constitute a strict interpretation of the standstill clause. Furthermore, a strict interpretation of Article 176 of the VAT Directive has been sought only in order to avoid the maintenance of a *general (blanket)* exclusion of the right to deduct input VAT by a Member State.[21] According to the case-law, the second paragraph of Article 176 permits only the continued maintenance in force of those exclusions that relate to *specifically defined expenditure*.[22] However, that is the situation in the present case (see, in that regard, point 51 above).

55. In so far as the exclusion actually reflects – as in the present case – the intention of the legislature, according to which expenditure on luxuries, amusements (football matches, concerts, etc.) and entertainment are to be excluded from the right to deduct input VAT in all cases, the doubtful 'dogma' of a strict interpretation of a standstill clause cannot, in my opinion, apply in any event if the legal interpretation is intended to achieve the intention of the legislature.

VI. Conclusion

56. I therefore propose that the questions referred for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) be answered as follows:

(1) In the absence of a unanimous determination by the Council, the first paragraph of Article 176 of the VAT Directive does not preclude any provision of the Spanish legislation on VAT. However, the second sentence of the first paragraph of Article 176 of that directive demonstrates that the exclusion of the right to deduct input VAT in respect of expenditure on amusements and entertainment does not contravene the intention of the legislature, even if the Council and the Commission, collectively, have not yet fulfilled their mandate under the first paragraph of Article 176 of the VAT Directive. The question of whether or not Spanish income tax legislation permits the deduction of such expenditure is not decisive for the purposes of EU law.

(2) The second paragraph of Article 176 of the VAT Directive must be interpreted as meaning that it precludes all Member States equally from providing for new or stricter exclusions of the right to deduct input VAT after expiry of the transposition deadline, so long as the Council and the Commission, collectively, have not yet fulfilled their mandate under the first paragraph of Article 176. Consequently, the second paragraph of Article 176 does not preclude national legislation which, for the first time, provided for an exclusion of the right

[20] Judgments of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 47), and of 5 October 1999, *Royscot and Others* (C-305/97, EU:C:1999:481, paragraph 20).

[21] Judgment of 23 April 2009, *PARAT Automotive Cabrio* (C-74/08, EU:C:2009:261, paragraph 28).

[22] Judgment of 2 May 2019, *Grupa Lotos* (C-225/18, EU:C:2019:349, paragraph 40). See, to that effect, judgment of 15 April 2010, *X Holding and Oracle Nederland* (C-538/08 and C-33/09, EU:C:2010:192, paragraph 44).

to deduct input VAT in respect of expenditure on amusements and entertainment, and which entered into force at the same time as the accession and the transposition of the VAT Directive.