OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 22 February 2001 [1]

1. In both these cases, the Commission of the European Communities has asked the Court to declare that the French Republic has failed to fulfil its obligations under Article 17(2) and (6) of the 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 [2] (hereinafter 'the Directive'). The French Republic is supported by the United Kingdom in Case C-345/99.

2. Although the Court has not joined the two actions, I have decided to address them both in the same Opinion. I have done so because addressing the two cases in the same Opinion makes it possible to reach a better understanding of the central problem at issue, namely the interpretation of the second subparagraph of Article 17(6) of the Directive. I am well aware that, although the two cases are without doubt connected as regards substance, they are not identical.

3. The Commission's application in Case C-345/99 is based on the following facts. France introduced the right to deduct value added tax on means of transport intended for driving instruction (road transport, air transport, etc.), which is, in itself, in conformity with the objective and provisions of the Directive. But France makes that right subject to a condition that such means of transport are not used for any other business purpose. The proceedings concern whether such a condition may be imposed when the right of deduction is introduced.

4. The Commission's application in Case C-40/00 concerns these facts. France reintroduced, with effect from 1 January 1998, a system in which the deduction of value added tax is excluded for diesel used as fuel in vehicles not eligible for deduction. An exclusion of this type existed previously in France, when the Directive came into force in 1979. It remained in force until 30 June 1982. However, on 1 July 1982, France introduced partial deductibility. That was

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

abolished again on 1 January 1998. The issue is whether France was entitled to reintroduce an exclusion from the directive which had no longer been fully in force.

Community law

5. The purpose of the Directive — within the framework of a harmonised system of turnover taxes introducing a value added tax — is, *inter alia*, to harmonise the deduction regimes in so far as they affect the effective level of taxation. [3]

6. Article 17(2) of the Directive thus provides that:

'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;

(b) value added tax due or paid in respect of imported goods;

(c) value added tax due under Articles 5(7)(a) and 6(3).'

7. Article 17(6) is also relevant in the present case; it reads as follows:

'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 exclu-

3 — See the recitals in the preamble to the Directive.

sions provided for under their national laws when this Directive comes into force.'

8. No Community provision for the purposes of Article 17(6) has to this day been adopted, even though the period laid down in this paragraph expired long ago. [4]

9. I note further Article 27 of the Directive, which introduces the possibility of derogating from the Directive. Paragraph (1) reads as follows:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

4 — By virtue of Article 12 of the Directive, it entered into force in the Member States on 1 January 1979 at the latest.

The actions

Case C-345/99

10. When the Directive came into force on 1 January 1979, the French legislation provided that private vehicles did not benefit from deduction of VAT unless they were used for public passenger transport. From 1 January 1993, French tax legislation (Article 273fA of the Code général des impôts (General Taxation Code)) introduced a right of deduction for means of transport designated for driving instruction (road transport, air transport, etc.) provided such means of transport are not used for any other business purpose.

11. By letter of 18 June 1998, the Commission formally notified France that it considered that the introduction of the 'exclusive use' condition was incompatible with Article 17 of the Directive. In its reply of 13 October 1998 to the formal notification, the French Government contended that a Member State which limits the scope of an exclusion is acting in accordance with Article 17(6) of the Directive. The Member State in effect determines the cases in which the exclusion is no longer applicable. Following that, the Commission addressed a reasoned opinion to France on 10 March

1999, to which the French Government replied by a letter of 1 June 1999 confirming its view.

Case C-40/00

12. French tax legislation has provided (Article 298, 4-1° of the Code général des impôts) since 1 January 1998 that VAT on purchases, imports, intra-Community acquisitions and supplies of, and services relating to, diesel used as fuel (etc.) is not deductible. Before 1 January 1998, the following regime applied in France. At the time of the entry into force of the Directive (1 January 1979), the deductibility of diesel used as fuel was excluded completely. However, on 1 July 1982 the legislature introduced partial deductibility. That partial deductibility went from 10% in 1982 to 80% in 1991 and, since then, the rate of VAT deduction has remained at 50%. Partial deduction was abolished again on 1 January 1998.

13. By a letter of 24 July 1998, the Commission formally notified France that it considered the reintroduction of the total exclusion incompatible with Article 17 of the Directive. In its reply of 30 October 1998 to the formal notification, the French Government contended that it was free to modify the deduction regime provided that it remained within the parameters of the national legislation in existence when the Directive came into force. Following that, the Commission addressed a reasoned opinion to France on 19 July 1999, and the French Government reiterated its view in a letter of 10 December 1999.

The Commission's complaints

The interpretation of the second subparagraph of Article 17(6)

14. The Commission points out, first, that the second subparagraph of Article 17(6) is a derogation from the general rule and must be strictly interpreted. This provision allows Member States to maintain only the exclusions from the deductibility of VAT which already existed in their national legislation when the Directive came into force. The Commission submits that, according to the settled case-law of the Court, deductibility is a fundamental feature of the VAT system and that limitations on the right of deduction are only possible in cases expressly provided for by the Directive. [5] The second subparagraph of

5 — The Commission cites in particular the judgments in Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, and Case C-97/90 *Lennartz* [1991] ECR I-3795.

Article 17(6) does not give Member States complete discretion to introduce and modify a derogating national system on the basis of their own criteria.

15. In the two cases, the Commission maintains that, in introducing a partial or conditional right of deduction, France has gone beyond the ambit of Article 17(6) and has, on that account, exhausted its right to apply the derogation to its fullest extent. Article 17(6) is no longer in point and the French system must be assessed in the light of Article 17(2). In Case C-40/00, Article 17(6) ceased to be applicable since 1982, when the right to partial deduction was first introduced.

16. The Commission considers that the second subparagraph of Article 17(6) imposes a 'standstill' [6] obligation pending the adoption of Community legislation. The Commission asserts, in Case C-345/99, that there is a 'standstill' obligation and not one requiring the progressive 'disarmament' of the Member States. [7] This obligation serves to prevent unilateral measures by Member States, capable of leading to comparable measures by other Member States, which would have the effect of increasing distortion of competition and impeding the acceptance of Community measures of harmonisation. Moreover, such a step would prejudice the harmonisation already achieved.

17. The Commission makes reference to the case-law on Article 28(3)(b), which enables Member States to maintain an exemption during a transitional period. The Commission argues that the judgment in *Norbury Developments* [8] is not applicable in the case of the second subparagraph of Article 17(6). In that judgment, the Court accepts that a Member State which has power to maintain an exemption from VAT entirely may also limit it. In the Commission's opinion, the second subparagraph of Article 17(6) is substantially different from Article 28, given that, unlike the latter, it shows no clear intention that the Council should later regulate the exclusion of the right of deduction.

Further complaints in relation to Case C-345/99

18. On the premiss that the second subparagraph of Article 17(6) does not apply in the case at issue, the Commission examines in the light of the provisions of Article 17(2) the limited right of deduction introduced by France.

6 — The Commission refers in this regard to the judgment in Case C-43/96 *Commission* v *France* [1998] ECR I-3903.

7 — The Commission uses this metaphor to describe the alternative view — which it does not support — that the freedom of action of the Member States is progressively limited.

8 — Case C-136/97 [1999] ECR I-2491.

19. The Commission objects to making the right to deduct conditional. It considers that making that right conditional on purely national criteria negates it. Only the Community legislature is empowered to modify the right of deduction. Moreover, the condition applied in this case, namely the exclusive use of the vehicle for instruction, is not found in or provided for by the Directive.

20. The Commission's opinion is that Article 17(2) neither envisages nor permits a distinction between different types of use. It cites the judgment in *Lennartz*, [9] in which the Court recognised the existence of the right of deduction, even if the goods or services are used for business purposes only marginally.

21. The Commission points out that France could have achieved the same result without breaching the Directive if it had requested a derogation under Article 27. Other provisions of the Directive, such as the *pro rata* rule in Article 19, also provide protection against abuse of the possibility to deduct. Such protection was an important reason for the French Government's decision to make the right of deduction subject to a condition.

Further complaints in relation to Case C-40/00

22. The justification given for the French provision excluding the deductibility of VAT is the protection of the environment (the reduction of atmospheric pollution). In the Commission's view, protection of the environment cannot, on its own, justify a breach of the Directive, as Member States are able to adopt other measures which accord with Community law. The Commission also doubts whether — in view of its limited scope — this measure really can contribute to the protection of the environment.

23. The Commission's final argument relates to the earlier amendments to the right to deduct VAT in French legislation. Contrary to what the French Government asserts, the Commission has never formally been notified of the amendments to French law. In this context, the Commission cites the settled case-law of the Court, which allows it freedom to choose when to address a formal notification to a Member State. In those circumstances, the Commission's alleged failure to act can never give rise to a legitimate expectation on the part of the French Government that its conduct complies with Community law. [10]

9 — Cited above in footnote 5.

10 — The Commission cites in particular the judgment in Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039.

France's defence

The interpretation of the second subparagraph of Article 17(6)

24. The French Government considers that what it views as the excessively restrictive interpretation of the second subparagraph of Article 17(6) by the Commission is misconceived and relies, by contrast, on a wide interpretation. In support of that position, it cites the Court's judgment in *Royscot and Others*. [11] The French Government submits, in short, that the sole purpose of the second subparagraph of Article 17(6) is to prohibit Member States from introducing exclusions which did not exist in their national legislation when the Directive came into force. Member States may therefore modify their national legislation on the exclusion of the right of deduction as long as the amendments in question do not go beyond the scope of that purpose.

25. In Case C-40/00, the French Government questions the consistency of the Commission's analysis in view of the fact that the Commission authorised the introduction — in 1982 — of a partial right of deduction. It considers that, on the basis of the Commission's reasoning, only a full right to deduct is possible, as only then can there be no question of introducing provisions on exclusion which already existed when the Directive came into force.

26. The French Government does not share the concern of the Commission that the introduction of national measures such as those at issue here may lead to the adoption of unilateral measures by other Member States or even jeopardise the existing degree of harmonisation. In *Lennartz*, [12] the Court held that derogations from the system are not permitted in national legislation, except in the cases provided for in the Directive.

27. Disagreeing with the Commission, France argues (in its defence in Case C-345/99) that the case-law on Article 28(3)(b), namely the judgment in *Norbury*, [13] should be applied to the second subparagraph of Article 17(6). There must exist for Member States an option other than just the maintenance of an exception or its complete abolition. The reasoning of the Commission, on the basis of which no such further option exists, would have the undesirable consequence that Member States would maintain an exception entirely, which would have a negative

11 — Case C-305/97 [1999] ECR I-6671.

12 — Cited above in footnote 5.

13 — Cited above in footnote 8.

influence on the neutrality and harmonisation of the VAT system.

Further issues in Case C-345/99

28. In this case, one of the principal arguments of the French Government is that the 1993 measure establishes no new system excluding the right to deduct VAT, but involves only the amendment of an existing exclusion, within the framework of the second subparagraph of Article 17(6). The aim is to modify and render more flexible the exclusion of the right of deduction; it is not to lay down any new basis for deductibility.

29. The French Government examines in detail the scope and terms of the exclusion of the right of deduction in its national legislation. This exclusion is based upon two criteria, the intrinsic nature of the means of transport and its designated use. The use of means of transport for the purpose of instruction can only lead to allowing a derogation from the exclusion of the right of deduction. The criteria for benefiting from this derogation were modified in 1993, without any need to alter the scope of the exclusion from the right to deduct VAT.

30. The French Government's view concerning the applicability of the second subparagraph of Article 17(6) means that it need not go into the possibility suggested by the Commission of seeking a derogation under Article 27 of the Directive. The French Government also does not consider the methods referred to by the Commission for recognising the types of business use, such as designation for the purpose of instruction.

31. France points out that the Commission previously commenced a pre-litigation procedure in 1990 which it terminated in 1994. The Commission then recommenced the procedure in 1998, relying on the same grounds.

32. France is supported in the present case by the United Kingdom, which also points out that in *Norbury*[14] the Commission adopted a stance on a significant issue different from the one it is adopting now. The position of the Commission — regarding the applicability of Article 28 of the Directive! — amounts to saying that the widest power (complete exemption by a Member State of specified transaction) includes a lesser power (partial exemption of the transaction).

14 — Cited in footnote 8. The argument put by the Commission at the hearing is reproduced in paragraph 18 of the Opinion of Advocate General Fennelly.

Further issues in Case C-40/00

33. The French Government points out that excluding the right to deduct VAT serves an environmental objective. It contributes to the achievement of an objective to which the Community legal order attaches great importance. The French Government is surprised that the Commission doubts the effectiveness of the measure. A measure of this kind can, naturally, never resolve the environmental problems connected with air quality, but it is part of a series of fiscal measures designed to encourage the purchase and use of less polluting vehicles.

34. Finally, the French Government denies that it failed to notify the Commission of the earlier amendments to the legislation. It produces correspondence from 1990, 1991 and 1992, and shows that the 1991 measure, of which the Commission was notified by letter of 6 November 1992, gave rise to no comment by the latter. That measure reduced the deduction authorised from 80% to 50%.

The case-law on Article 17 of the Directive

35. In the proceedings with which we are concerned, the interpretation of the second subparagraph of Article 17(6) occupies a central place. That interpretation is, in large measure, determined by the Court's case-law on Article 17, and by a judgment concerning Article 28 of the Directive.

36. Article 17 of the Directive, which regulates the right to deduct VAT, has given rise to extensive case-law. In the recent judgment in Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi*, [15] the Court has again described the nature of the right of deduction in the Community VAT system. Thus, the Court has stated that it is a 'fundamental principle' of the VAT system that the tax applies after deduction has been made of the VAT which has been levied directly on transactions relating to inputs. [16] The Court points out that it is settled case-law that the right of deduction is an integral part of the VAT scheme and may only be limited in the cases expressly provided for by the Directive. Indeed, any limitation on the right of deduction affects the level of the tax burden and must be applied in a similar manner in all the Member States.

37. In his Opinion in *Ampafrance and Sanofi*, Advocate General Cosmas examines the nature of Article 17 of the Direc-

15 — [2000] ECR I-7013.

16 — See paragraph 34 of the judgment. The Court refers on this issue to paragraphs 16 and 18 of its judgment in Case C-62/93 *BP Supergas* [1995] ECR I-1883.

tive more generally.[17] He notes that the right to deduct constitutes one of the foundations of the Community tax system and is directly related to the fundamental principles of fiscal neutrality[18] and equality of treatment in taxation. In its judgment in *Commission* v *France*,[19] the Court refers in this regard to the need for all economic activities to be 'taxed in a wholly neutral way'. Advocate General Cosmas also points out once again in the Opinion I have cited that derogations from this right to deduct are permitted only in the cases expressly provided for by the Directive.

38. The provision in the second subparagraph of Article 17(6) must be viewed as a possibility of this sort with a view to Member States derogating from the right to deduct VAT. It is necessary in consequence to enquire how this possibility of derogation should be interpreted. The Court has considered this question in two cases, which I will now summarise briefly.

39. In its judgment in *Commission* v *France*,[20] the Court upheld the position of France in a case in which it had maintained in force national legislation excluding the deductibility of VAT on means of transport constituting the tools of the taxable person's business. In so doing, the Court gave a wide interpretation to the derogation provided for by Article 17(6), ruling that the power provided for in the second subparagraph is not limited to expenditure which does not have a strictly business character. The Court's decision was made, in particular, on the basis of the origins of the Directive. Moreover, that case was to a large extent concerned with the same issues as Case C-345/99, namely the deduction for vehicles designated for driving instruction.

40. In its judgment in *Royscot*,[21] the Court adopted a similar interpretation. The Court ruled that Article 17(6) authorises Member States to maintain general exclusions from the right to deduct VAT on the purchase of motor cars used by a taxable person for the purpose of his taxable transactions. The power thus accorded to Member States is not, however, unlimited. Member States do not have an absolute discretion to exclude all, or almost all, goods and services from the deduction system and thus to negate the system established by the Directive.[22]

41. On the basis of the two cases I have summarised, Advocate General Cosmas

17 — See point 20 et seq. of the Opinion.

18 — Advocate General Cosmas refers in this connection to the judgments in Case 286/83 *Rompelman* [1985] ECR 665, Case C-110/94 *Inzo* [1996] ECR I-857, and Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1.

19 — Case 50/87 [1988] ECR 4797.

20 — Cited above in footnote 6.

21 — Cited above in footnote 11.

22 — Paragraphs 26 and 24 of the judgment.

concludes in the Opinion I have referred to that the Court recognises that Member States have a wide discretion [23] limited only by the circumstance that Member States may not negate the system established by the Directive.

42. The judgment in *Royscot* [24] is of importance for another reason. In it, the Court considers the transitional character of the second subparagraph of Article 17(6). This provision must be interpreted as meaning that Member States can maintain exclusions of the right to deduct VAT even if by the expiry of the time-limit in the first subparagraph the Council has failed to determine what expenditure is ineligible for a deduction of VAT. [25]

43. In summary, I deduce from the case-law relating to Article 17 of the Directive that the right of deduction is a fundamental feature of the VAT system, from which there may be no exclusions unless the Directive provides for them explicitly. The system also implies, however, that where the Member States are explicitly permitted freedom of action that cannot be intended to be excessively limited. It is for the Council to set limits to such freedom of action by adopting the Community measures required by the Directive.

44. Apart from the case-law on Article 17 of the Directive, there is another judgment concerning the directive which is of particular significance in these proceedings. In its judgment in *Norbury*, [26] the Court adopted the following assessment of the transitional rule in Article 28(3)(b) of the Directive, according to which Member States may continue to exempt certain activities from VAT: 'Whilst that provision precludes the introduction of new exemptions or the extension of the scope of existing exemptions following the entry into force of the Sixth Directive, it does not prevent a reduction of those exemptions ...'. [27] A different assessment would have the following undesirable consequence: 'A Member State might find itself compelled to maintain all the exemptions existing at the date of adoption of the Sixth Directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system laid down in the directive in the sphere under consideration'. [28]

23 — Point 26 of the Opinion.

24 — Cited above in footnote 11.

25 — This observation is consistent with the previous case-law of the Court, namely the judgment in Case C-165/88 *ORO Amsterdam Beheer and Concerto* [1989] ECR 4081, concerning the previous Article 32 of Directive 77/388, which contained a transitional provision relating to used goods which corresponded to Article 17(6).

26 — Cited above in footnote 8.

27 — Paragraph 20 of the judgment.

28 — Paragraph 21 of the judgment.

Analysis

The interpretation of the second subparagraph of Article 17(6)

45. Before I come to the analysis itself of these cases, I would like to draw attention to certain points on which the parties are agreed and which in my view are not at issue here, in order to assist a full understanding of the matter.

46. First is the fact that the scope of the national power to make use of the second subparagraph of Article 17(6) is limited to the adoption of national rules restricting the right to deduct VAT at most to the extent that such rules already existed in the relevant Member State when the Directive entered into force.

47. In addition, in view of the nature of the Directive, the opportunities to derogate from the deductibility of VAT are of a limited nature. In its judgment in *Lennartz*,[29] the Court ruled that the right to deduct 'must be exercised immediately in respect of all the taxes charged on transactions... Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases expressly provided for in the Directive'.[30]

48. Lastly, I point out that the proceedings concern only the existing situation, in which the Council has failed to adopt the Community provisions referred to in the first subparagraph of Article 17(6). I add, for the sake of completeness in this connection, that according to the settled case-law of the Court[31] the power given to Member States to maintain their existing legislation excluding the right of deduction remains until the Council adopts the measures referred to in that article, even though the time-limit laid down in Article 17(6) for adopting such measures has long since expired.

49. I come now to the assessment of the actual cases, which in my view relate essentially to the leeway given to Member States in the second subparagraph of Article 17(6).

50. I share the Commission's view that the second subparagraph of Article 17(6) of

29 — Cited above in footnote 5.

30 — Paragraph 27 of the judgment.

31 — Recently confirmed in *Royscot* (cited above, in particular in point 24 of this Opinion).

the Directive is a provision that must be interpreted strictly. It constitutes a derogation from the aim of the Directive, which is to establish a harmonised turnover tax system by the introduction of a value added tax. The Directive seeks likewise to harmonise the rules on deduction as a part of that system. I also deduce from *Lennartz* [32] a strict interpretation of the right to deduct. Indeed, this right to deduct must be available in respect of all transactions which have borne value added tax, subject only to a few restrictions expressly provided for.

51. These factors do not in any way affect the fact that a Member State which has recourse to an exclusion expressly provided for by the Directive has a wide discretion. That discretion is only limited to the extent defined by the Court in *Royscot*: [33] the use of this power must not negate the system of the Directive. [34]

52. The primary question in the present cases is whether the French measures remain within the ambit of the second subparagraph of Article 17(6). Only if it is established that a measure is within that ambit can it be considered whether the discretion has been exceeded.

53. The ambit of the provision is in my view limited in two ways. First, the power of Member States to maintain exclusions by virtue of the second subparagraph of Article 17(6) is limited to the situation, understood to be a temporary one, which exists for so long as the Council has not adopted Community provisions. The Directive envisages that these provisions should be adopted during the four years following its entry into force. Secondly, the Directive speaks of the retention of the national rules which already existed in the Member States when it entered into force.

54. Taken together, these factors lead to the following assessment of the second subparagraph of Article 17(6) of the Directive. This provision is to be understood as transitional and temporary, necessary because, when the Directive entered into force, it was not yet possible to achieve fully the aim of the Directive. That may be attributed to the fact that, at that time, the Member States were not yet willing — for which there may in fact be good reasons — to replace existing provisions completely by a harmonised system. The temporary character of this transitional regime is emphasised by the time-limit of four years referred to in the first subparagraph of Arti-

32 — Cited above in footnote 5.

33 — Cited above in footnote 11.

34 — See also point 40 of this Opinion.

cle 17(6). This does not in any way affect the fact that the time-limit proved not to have been complied with — far from it — and that it is still plainly not possible to this day to achieve the aim of the Directive fully.

55. The proceedings before us are concerned essentially with the meaning to be attributed to the temporary or transitional character of the derogation referred to in the second subparagraph of Article 17(6). Is it above all a 'standstill' clause, or is it rather another ordinary derogation, which has different effects in different Member States, depending on the national legislation in existence on 1 January 1979?

56. I understand the arguments advanced on this issue by the parties as follows. The Commission sees the 'standstill' character of the provision as central. The provision allows the maintenance for a certain period of time of derogating national rules existing at the time of the entry into force of the Directive. On the other hand, the French Government relies on the nature of the derogating provision. That provision freezes the situation existing on 1 January 1979. It is the situation in existence at that moment which determines the margin of discretion of Member States. Only a decision of the Council, adopted in accordance with the first subparagraph of Article 17(6), can reduce the extent of that discretion.

57. Overall, I share the view of the Commission that the 'standstill' nature of the clause predominates. As I have already noted above, this provision was needed because, when the Directive was adopted, it was not yet possible to achieve its aim fully. The Court commented on the purpose of Article 17 of the Directive in *Ampafrance and Sanofi*.[35] Briefly, it was of the view that the right to deduct is a fundamental principle of the VAT system, which must be implemented in the same way in all Member States.

58. As soon as a Member State abrogates a derogating national provision — one which excludes the right to deduct under the second subparagraph of Article 17(6) — that purpose is achieved. The tax burden is then the same in the sector in question in the Member States. A Member State may not then reintroduce the derogating provision subsequently. To do so would be to create a disparity between the legislation of Member States on the basis of a justification which did exist previously but which has now disappeared.

59. I would like to add the following further argument. In a situation in which the legislation of the Member States has (meanwhile) become parallel, no good reason can be put forward to justify one Member State making use of an exclusion referred to in the Directive, and the others

35 — Cited above in footnote 15.

not. The fact that there was a previous disparity between Member States is not, in my opinion, relevant in such a case.

60. At this stage, I reach the following interim conclusion: as soon as a Member State has abolished a derogating national provision, it may no longer, in the sector in question, have recourse to the transitional provisions of the second subparagraph of Article 17(6), or it will fall outside their ambit. However that may be, the situation is not as simple in either of these cases, because in neither was there a complete abolition of a national derogating provision.

61. It is now necessary to determine whether the temporary transitional regime also ceases to apply if a Member State amends the national derogating provision, or abolishes it in whole or in part. The two cases at issue concern this type of situation. Case C-345/99 concerns the introduction of the right to deduct subject to a condition. Case C-40/00 concerns the introduction first of a partial right to deduct, followed by an alteration of the percentage of VAT deductible and, lastly, a return to a total exclusion of the right to deduct (the real subject of the dispute).

62. As we know, the Commission considers that a Member State falls outside the ambit of Article 17(6) if it introduces a partial or conditional right to deduct.

63. That view is, in my opinion, not at all supported by the wording of the provision itself or by the case-law relating to it. It does not, in my opinion, follow from the nature of a 'standstill' clause that it is by definition impossible for Member States, where they have the choice of maintaining or abolishing an exclusion, to be entitled to decide to abolish it in part or progressively. The greater power will usually include the lesser.

64. I refer in this connection to *Norbury* [36] in particular, where the Court emphasised the importance — from the point of view of the objective to be achieved by the Directive — that a Member State should be free to implement the Directive progressively in the relevant area. The Commission's argument that this reasoning — applied in the context of Article 28 of the Directive — does not apply to Article 17 of the Directive is unconvincing. Both articles provide for a transitional regime, necessary because complete harmonisation was not yet possible.

65. I consider that the situation is different, however, if a Member State applies afresh

36 — Cited above in footnote 8.

in a wider manner an exclusion whose use was limited at a given moment by a legal provision. I have in mind the French provision which is the subject of Case C-40/00, in which the partial right to deduct has been replaced by a total exclusion. In my view, the character of the 'standstill' clause in the second subparagraph of Article 17(6) implies that the possibility of derogation has disappeared in respect of the part for which the exclusion of the right of deduction has been abolished. For that part, it is no longer possible to speak of the maintenance of an exclusion. France has thus also gone beyond the ambit of the second subparagraph of Article 17(6).

66. I also consider it significant that in Case C-40/00 the amendment to the French legislation takes us further from, rather than nearer to, the object sought by the Directive, namely the implementation of a harmonised system of turnover tax by the introduction of a value added tax. A measure of this kind, which precisely reduces the degree of harmonisation, is on that account contrary to the aim and content of the Directive. I would point out that, by reason of the principle that the greater power includes the lesser, there was a serious argument for permitting the progressive or partial withdrawal of an exclusion. That argument does not run in the present case.

67. The situation is otherwise is Case C-345/99. In my view, it follows from the factors considered above that the abolition of a condition of a national exclusion falls within the ambit of the second subparagraph of Article 17(6). I will now address the question whether France has acted within the discretion allowed by Community law.

68. I base my opinion at this point on the judgments in *Commission* v *France* and *Royscot*.[37] In these judgments, the Court recognised that Member States operating an exclusion from the right to deduct VAT enjoyed a reasonable discretion. In the exercise of that discretion Member States may also decide, at a particular time, to apply a part of the exclusion no longer. As the last judgment I have mentioned makes clear, this discretion is not, however, absolute and its exercise may not negate the system of the Directive. It is only if a measure moves further from the objective sought by the Directive, rather than nearer to it, that it may be said that it negates the system of the Directive.

69. The Commission further points out that the French measures could trigger comparable measures on the part of other Member States, which would increase distortion of competition and impede the implementation of Community measures of harmonisation, or jeopardise the existing degree of harmonisation. Having regard to the limited ambit of the discretion allowed

37 — Cited above in footnotes 6 and 11 respectively.

by the second subparagraph of Article 17(6), I no more share the Commission's concerns than does the French Government.

70. To summarise, I reach the following assessment:

— if a Member State abolishes an exclusion measure, it moves outside the ambit of Article 17(6);

— a Member State may partly abolish an exclusion measure (Case C-345/99) on condition that, in doing so, it does not negate the system of the Directive;

— in this case, it falls outside the ambit of Article 17(6) in respect of the part of the exclusion abolished;

— in that event, it is not permitted later to reintroduce an exclusion (Case C-40/00) by reference to Article 17(6).

71. In brief, my analysis of the second subparagraph of Article 17(6) leads me to the conclusion that the measure at issue in Case C-345/99 is permitted by the Directive, whilst that is not so with regard to the measure which is the subject of the proceedings in Case C-40/00.

Further issues in Case C-345/99

72. The Commission's other complaints presuppose that the French measure should be assessed in the light of Article 17(2) of the Directive. I believe that the supposition is mistaken, as the factors considered above demonstrate. The measure must in fact be analysed by reference to the criterion laid down in *Royscot*,[38] on the basis of which the measure may not negate the Directive.

73. In my view, it is plain that it cannot be maintained that the measure has this effect. I consider that the interpretation given by the French Government of the system in force is relevant. The requirement of exclusive designation for driving instruction is nothing other than a limitation on the category of means of transport for which the deduction may be used. In applying this

38 — Cited above in footnote 11.

provision, France does no more than abolish the exclusion for a specified category of vehicles, while maintaining it for other vehicles.

74. Even after considering these further complaints, my provisional conclusion is unchanged.

Further issues in Case C-40/00

75. For the sake of completeness, I point out that the French legislature previously adopted — during the period before 1991 [39] — measures which led progressively to a diminution in the percentage excluded from deduction of VAT. Since those measures are not the subject of these proceedings, I will confine myself to noting that such measures have as their aim, or at least as their effect, a movement towards the objective of the Directive. From that point of view, such measures differ in essence from that which is the subject of the present proceedings.

76. The French Government emphasises the purpose of the measure at issue, namely the protection of the environment. It rightly claims that this is a factor given great importance in Community law. That does not alter the fact that national measures aimed at protecting the environment may not be contrary to acts of Community law such as, in this case, Article 17(6) of the Directive. I do not consider, in the circumstances of this case, that the question whether the national measure is also likely to be effective for the protection of the environment is decisive.

77. None the less, I will point out what follows for the sake of completeness. The Commission doubts that the measure — having regard to its limited scope — *could* contribute effectively to the protection of the environment. The French Government replies that the measure is not the only one in question but is part of a group of measures aimed at combating the problem of atmospheric pollution. What is decisive, in my view, is that an approach such as that adopted by France, which has chosen to address the problem of the environment by means of a selection of measures, does not seem on the face of it to be a dubious one. I do not therefore agree with the Commission's reasoning on this. But I am also not convinced by the factors which France relies on. Although, in general terms, I accept the French argument that a group of measures may constitute an appropriate way of resolving the problems of the environment, the French Government has failed to show that the system at issue relating to the deduction of value added tax is a necessary element of this group of measures.

39 — As already indicated, the deductible percentage of VAT was again reduced in that year, from 80% to 50%.

78. The final point at issue concerns the Commission's silence at an earlier stage, namely on the amendment to French taxation law in 1991, when the percentage of the permitted deduction was reduced from 80 to 50%. As the Commission rightly asserts, the Court deals with this issue in its case-law, declaring that the Commission is free to determine the time at which it conveys a formal notification to a Member State. In the circumstances of this case, the alleged silence of the Commission could never have the effect of giving rise to a legitimate expectation on the part of the French Government as to the compliance with Community law of its actions. That does not alter the fact that it appears from the file that it seems likely that the French Government did inform the Commission of the previous measures.

79. Even after considering these further complaints, my provisional conclusion is unchanged.

Conclusion

80. Having regard to the facts and circumstances I have described above, I propose that the Court should rule as follows.

In Case C-345/99:

(a) Dismiss the application.

(b) Order the Commission to pay the costs pursuant to Article 69(2) of the Rules of Procedure.

In Case C-40/00:

(a) Declare that the French Republic has failed to fulfil its obligations under Article 17(2) and (6) of the Sixth Council Directive (77/388/EEC) by reintroducing, with effect from 1 January 1998, a system excluding the right to deduct the VAT borne by diesel used as fuel in vehicles.

(b) Order the French Republic to pay the costs pursuant to Article 69(2) of the Rules of Procedure.