OPINION OF ADVOCATE GENERAL COSMAS

delivered on 23 March 2000 *

Table of contents

I — Introduction I-7016

II — Facts and procedure I-7016

A — Case C-177/99 ..... I-7016

B — Case C-181/99 ..... I-7017

III — The legal background of the two cases under consideration I-7017

A — Relevant provisions of the Sixth Directive I-7017

B — National tax law I-7020

C — Impugned Council Decision 89/487 ..... I-7021

IV — Case-law of the Court of Justice I-7022

A — Article 17 of the Sixth Directive I-7023

B — Article 27 of the Sixth Directive I-7026

V — Subject-matter of Decision 89/487 ..... I-7028

A — Arguments of the parties I-7028

B — My view of the problems raised above I-7031

(a) The provisions of the Sixth Directive in respect of which Decision 89/487 authorised derogation I-7031

(b) The scope of the exclusion from the right to deduct VAT authorised by Decision 89/487 ..... I-7032

VI — The legality of Council Decision 89/487 ..... I-7035

A — Arguments of the parties I-7035

(a) Ampafrance I-7035

(b) Sanofi I-7037

(c) French Government I-7038

(d) Commission I-7040

(e) Council I-7041

B — My view of the problems set out above I-7042

VII — Conclusion I-7049

* Original language: Greek.

I — Introduction

1. By these questions referred for a preliminary ruling under Article 234 EC (formerly Article 177 of the EC Treaty) by the Tribunaux Administratifs (Administrative Courts) of Nantes and Melun (France), the Court is invited to examine the problem of the legality of Council Decision 89/487/EEC of 28 July 1989 (hereinafter 'Decision 89/487') [1] authorising the French Republic to apply a measure derogating from the second subparagraph of Article 17(6) of the Sixth 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 (hereinafter 'the Sixth Directive'). [2]

II — Facts and procedure

A — *Case C-177/99*

2. In the course of its business activities Ampafrance SA (hereinafter 'Ampafrance') incurs sundry expenditure on accommodation, food, hospitality and entertainment both for its staff and for third parties. It therefore attempted to deduct the full amount of the value added tax (VAT) on expenditure of this kind for June 1993. The tax authorities did not approve this deduction and invoked Article 236 of Annex II to the French General Tax Code (Code Général des Impôts, hereinafter 'the CGI'), which transposes into national law Council Decision 89/487 at issue in this case. Ampafrance brought an action before the Tribunal Administratif de Nantes, seeking a refund of the sum it had been required to pay in respect of VAT to the tax authorities, because it had not been allowed to deduct the tax relating to the aforementioned expenditure incurred in respect of its staff and third parties.

3. In the order for reference the national court states as follows:

'The resolution of this dispute depends on whether the provisions of the Decision [89/487/EEC] of 28 July 1989 of the Council of the European Communities authorising the French Government to derogate from the standstill clause introduced by Sixth Directive 77/388/EEC of the Council of 17 May 1977 and to extend to third parties exclusions of expenditure on accommodation, food, hospitality and entertainment from the right to deduct tax are compatible, first, with the objectives of the Sixth Directive and in particular Article 27... and, second, with the principle of proportionality between the tax objective pursued and the means employed. Only the answer to that question, the solution of which is not obvious, will enable an assessment to be made of whether the pleas in this application are well-founded. It is

1 — OJ 1989 L 239, p. 21.
2 — OJ 1977 L 145, p. 1.

necessary to stay proceedings in the action brought by Ampafrance pending the preliminary ruling by the Court of Justice of the European Communities on the question set out above.'

4. In the light of the foregoing considerations, the national court decided to stay proceedings pending a preliminary ruling by the Court of Justice on the question set out in the grounds in the order for reference.

B — *Case C-181/99*

5. The company Sanofi Winthrop SA, which became, following mergers, first Sanofi on 12 May 1998 and then Sanofi-Synthelabo on 18 May 1999 (hereinafter 'Sanofi'), brought an action before the national court against the Director of Tax Services of Val-de-Marne on the following grounds: the competent tax authorities had not approved the deduction of VAT relating to expenditure incurred in November and December 1993 to provide hospitality for suppliers and clients by the Choay Clin Midy and Millot Solac laboratories, whose rights and obligations had been taken over by the applicant. The resolution of the dispute required an examination of the legality of Decision 89/487, on which the current provisions of Article 236 of Annex II to the CGI were based.

6. The national court (Tribunal Administratif de Melun), after holding that '... although this court can assess the validity of a measure adopted by an institution of the European Union, it cannot declare it to be invalid. It is therefore necessary, pursuant to Article 177 of the Treaty establishing the European Economic Community, to stay proceedings... pending a preliminary ruling by the Court of Justice of the European Communities on the validity, in the light of the principle of proportionality, of the abovementioned Decision of 28 July 1989 of the Council of the European Communities', stayed its consideration of the action for a refund of the additional taxes imposed and the respective penalties, until the Court of Justice of the European Communities had given a ruling on the abovementioned question.

III — The legal background of the two cases under consideration

A — *Relevant provisions of the Sixth Directive*

7. Article 17 of the Sixth Directive concerns the origin and scope of the right to deduct VAT. Under paragraph 2:

'In so far as the goods and services are used for the purpose of his taxed 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...'.

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

8. Article 17(6) of the Sixth Directive contains a standstill clause which provides for the retention of national exclusions of the right to deduct VAT which were applicable before the Sixth Directive came into force, that is to say, before 1 January 1979:

'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.

9. Those provisions are a consequence of the fact that the Council did not draw up an exhaustive list of the goods, services and, generally, the activities for which deduction of VAT must be excluded under the provisions of the Sixth Directive. It should be remembered that, in the statement of reasons accompanying its Proposal for the Sixth Council Directive, [3] the Commission points out that certain items of expenditure, even when incurred in connection with the normal operation of a business, are also intended to meet private needs. Therefore, apportionment between the 'private' part and the 'business' part of the expenditure in question cannot be accurately verified. For that reason the proposal concerning Article 17(6) of the Sixth Directive states that the right to deduct VAT is excluded in respect of expenditure on accommodation, meals, food, drink, passenger cars and cars used for the purpose of entertainment, as well as expenditure on entertainment and luxuries. That proposal was not accepted and, consequently, the provision of the Sixth Directive in question, in its present form, merely states that the Council will resolve the problem within four years and that, in the meantime, the national exclusions will be retained under a standstill clause.

3 — *Bulletin of the European Communities*, supplement 11/73.

10. Moreover, in its Proposal for a Twelfth Directive of 25 January 1983,[4] the Commission formulated specific and detailed rules prohibiting deduction of the tax in respect of expenditure on transport, accommodation, food and drink, and also on hospitality, entertainment and luxuries. That proposal was withdrawn following continual disagreements within the Council and, since then, it has not been possible to adopt common rules concerning the restrictions which must be imposed on the right to deduct VAT. Recently, in a proposal for a directive submitted to the Council on 17 June 1998,[5] the Commission suggested that the deduction of VAT on expenditure on accommodation, food and drink should be restricted to 50%, owing to the dual business and private nature of the expenditure in question. On the other hand, the Commission considered that deduction of VAT should be excluded in respect of expenditure on luxuries, amusements or entertainment, because such expenditure is not of a strictly business nature.

11. Under Article 27 of the Sixth Directive:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. 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.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging they conform with the requirement laid down in paragraph 1 above.'

4 — COM (82) 870 final (OJ 1983 C 37, p. 8).

5 — COM (98) 377 final (OJ 1998 C 219, p. 16).

B — *National tax law*

12. Articles 7 and 11 of Decree No 67-604 of 27 July 1967 [6] provided as follows:

Article 7: 'The tax on expenditure incurred in order to provide accommodation or lodging for the management and staff of undertakings shall not be deductible.

However, that exclusion shall not apply to the tax on expenditure incurred in order to provide free accommodation at the place of work for employees responsible for the security or supervision of an industrial or commercial complex or a works site.'

Article 11: 'The tax on expenditure incurred in order to satisfy the personal needs of the management and staff of undertakings, and in particular the tax on the cost of providing hospitality, food and entertainment, shall not be deductible.

However, that exclusion shall not apply to expenditure in respect of:

Goods which constitute fixed assets and are specially allocated at the actual places of work for the collective satisfaction of the needs of the staff;

Work clothes or protective clothing which an undertaking provides for its staff.'

13. After the Sixth Directive came into force, that is, after 1 January 1979, Decree No 79-1163 of 29 December 1979 [7] was adopted. Article 25 of that Decree replaced Article 236 of the CGI with the following provision:

'Tax on goods or services used by persons not employed by the undertakings or by the management or staff of the undertaking, such as accommodation or lodging, the cost of hospitality, food or entertainment or any expenditure directly or indirectly connected with travel or residence shall not be deductible.

6 — JORF of 28 July 1967, p. 7541.

7 — JORF of 31 December 1979, p. 3333.

However, that exclusion shall not apply to work clothes or protective clothing, premises and equipment provided to staff at the workplace, or to accommodation provided free of charge for security or supervisory staff at the workplace.'

14. The French Conseil d'État (Council of State), in its judgment of 3 February 1989 in the *Alitalia* case, held that Article 25 of the 1979 Decree did not comply with Community law in that it excluded the right to deduct the VAT on goods and services used by persons not employed by the undertaking; it considered that the exclusion in question was not covered by the standstill clause in Article 17(6) of the Sixth Directive and was, therefore, contrary to that directive.

15. The adoption of Council Decision 89/487 was followed by the promulgation of Decree No 89-885 of 14 December 1989 [8] which reformulated Article 236 of Annex II to the CGI giving it its present form:

'... As a temporary measure, the value added tax charged on expenditure in respect of accommodation, food, hospitality and entertainment shall be excluded from the right of deduction.

However, that exclusion shall not apply to:

1. Expenditure incurred by a taxable person in respect of the supply by him of accommodation, meals, food or drink for consideration;

2. Expenditure on accommodation provided free of charge for security, caretaking or supervisory staff on works, sites or business premises;

3. Expenditure incurred by a taxable person in carrying out his contractual or legal responsibility towards customers.'

C — *Impugned Council Decision 89/487*

16. Following the judgment annulling Article 25 of the 1979 Decree, the French authorities asked the Council to approve national derogations from the general sys-

8 — JORF of 15 December 1989, p. 15578.

tem of the Sixth Directive, on the basis of Article 27 thereof. In particular, they asked for permission to prohibit deduction of VAT on expenditure on accommodation, restaurants, hospitality and entertainment.

17. In the preamble to Decision 89/487, the Council had regard to the fact that 'this measure is aimed at excluding other expenditure in respect of accommodation, restaurants, hospitality and entertainment from the right to deduct VAT previously charged, in order to prevent tax evasion and avoidance'.

18. Article 1 of Decision 89/487 provides:

'1. By way of derogation from the second subparagraph of Article 17(6) of the Sixth Directive, the French Republic is hereby authorised, on a temporary basis and until such time as Community rules determining the treatment of expenditure referred to in the first subparagraph of that paragraph come into force, to exclude expenditure in respect of accommodation, food, hospitality and entertainment from the right to deduct value added tax previously charged.

2. The exclusion referred to in paragraph 1 shall not apply to:

— expenditure incurred by a taxable person in respect of the supply by him of accommodation, meals, food or drink for consideration,

— expenditure on accommodation provided free of charge for security, caretaking or supervisory staff on works, sites or business premises,

— expenditure incurred by a taxable person in carrying out his contractual or legal responsibility towards customers.'

IV — Case-law of the Court of Justice

19. Before analysing the various components of the reply to the questions referred for a preliminary ruling in this case, it is necessary to consider the focal points of the interpretation placed on Articles 17 and 27 of the Sixth Directive in the case-law of the Court of Justice.

A — *Article 17 of the Sixth Directive*

20. The Court has taken care, first of all, to make it clear that the right to deduct VAT payable on goods and services used for the purpose of carrying out other taxable transactions, within the limits defined by Article 17 of the Sixth Directive, is one of the foundations of the Community tax structure, because it is directly linked to the basic principles of tax neutrality [9] and equality of treatment in tax matters.

21. In particular, in its judgment in *Commission* v *France*, [10] the Court declared that 'from the features of VAT... it may be inferred... that the deduction system is meant to relieve the trader *entirely* of the burden of VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are then subject to VAT, are taxed in a *wholly* neutral way.' [11] Consequently, 'in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs.' [12] In other words, the Court attaches particular importance to the total and immediate nature of the deduction of VAT for which Article 17 of the Sixth Directive provides. [13]

22. In this connection, it is relevant to refer to the Court's judgment in *Intiem*, [14] which stated that the VAT deduction system established by the Sixth Directive must be applied 'in such a way that its scope corresponds as far as possible to the sphere of the taxable person's business activity.' [15] On the basis of that premiss, the Court held that the right of deduction of VAT paid on goods which, although sold to the taxable person in order to be used exclusively in his business, were physically delivered to his employees, could not be excluded. [16]

9 — As regards the principle of tax neutrality, see Case 268/83 *Rompelman* [1985] ECR 655; Case C-110/94 *Inzo* [1996] ECR I-857; and Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, which are cited by Ampafrance.

10 — Case 50/87 *Commission* v *France* [1988] ECR 4797.

11 — *Ibidem*, paragraph 15. Emphasis added.

12 — *Ibidem*, paragraph 16.

13 — *Ibidem*, paragraph 19. In that judgment the Court ultimately held that the French fiscal system, which, for undertakings that let immovable property which they had acquired or had built, limited the right to deduct value-added tax paid on inputs where the amount of the proceeds of the letting of such immovable property was less than one fifteenth of its value, was contrary to the applicable Community tax rules.

14 — Case 165/86 *Intiem* [1988] ECR 1471.

15 — *Ibidem*, paragraph 14.

16 — It must be pointed out, however, that Article 17 cannot be interpreted so widely as to extend the right to deduct VAT to circumstances or economic activities which do not fall clearly within the scope of that article. For example, in Case C-4/94 *BLP Group* [1995] ECR I-983, the Court held that, 'to give the right to deduct under paragraph 2, the goods or services in question must have a direct and immediate link with the taxable transactions, and... the ultimate aim pursued by the taxable person is irrelevant in this respect' (paragraph 19). Accordingly, except in the cases expressly provided for by the Community directives relating to VAT, 'where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid, even if the ultimate purpose of the transaction is the carrying out of a taxable transaction' (paragraph 28).

23. The Court had the opportunity to confirm that decision in its judgment in *BP Supergas*. [17] First of all, it reiterated that 'the fundamental principle which underlies the VAT system, and which follows from Article 2 of the First and Sixth Directives, is that VAT applies to each transaction by way of production or distribution after deduction has been made of the VAT which has been levied directly on transactions relating to inputs'. [18] Regarding the right of deduction provided for in Articles 17 et seq. of the Sixth Directive, the Court declared that this right 'is an integral part of the VAT scheme and in principle may not be limited. The Court has consistently held... that the right of deduction must be exercised immediately in respect of taxes charged on transactions relating to inputs. 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. Consequently, derogations are permitted only in the cases expressly provided for in the Directive.' [19]

24. The standstill clause in Article 17(6) of the Sixth Directive is considered to be such a derogation from the general deduction rule. Nevertheless, in two recent judgments, the Court has refused to interpret this exception strictly and has thereby accorded the Member States considerable latitude.

25. In particular, in the case of *Commission* v *France*, [20] the question was raised as to whether the national exclusion, referred to above, of the right of deduction was to be limited to expenditure which is not strictly business expenditure, that is to say, which is incurred by the taxable person for goods and services which are not absolutely essential for the operation of his business. The Court did not endorse the strict approach for which the Commission argued. It held that the relevant provision of the Sixth Directive 'authorises the Member States to retain national rules which deny taxable persons the right to deduct VAT on means of transport which constitute the very tool of their trade.' [21]

26. The Court followed the same line of argument in the case of *Royscot and Others*, [22] which concerned, as did Case C-43/96 *Commission* v *France*, the compatibility with Community law of national derogations which prohibited the deduction of VAT on the purchase of motor cars. The Court held that it followed from the wording of the disputed standstill clause 'which is clear and unambiguous, that Article 11(4) authorised Member States to exclude from the right of deduction even expenditure which is strictly business-related...'. [23] Consequently, the discretion

17 — Case C-62/93 *BP Supergas* [1995] ECR I-1883.

18 — *Ibidem*, paragraph 16.

19 — *Ibidem*, paragraph 18.

20 — Case C-43/96 *Commission* v *France* [1998] ECR I-3903.

21 — Paragraph 18 of Case C-43/96 *Commission* v *France*, cited in footnote 20.

22 — Case C-305/97 *Royscot and Others* [1999] ECR I-6671.

23 — *Ibidem*, paragraph 23.

conferred on the Member States is especially wide; the only restriction imposed on the national authorities is that they may not 'exclude all and any goods and services from the system of the right of deduction...'. [24]

27. Another aspect of that judgment is also significant. The Commission had maintained that a Member State might lose the right to retain exclusions of the right of deduction, based on the standstill clause contained in Article 17 of the Sixth Directive, if it had subsequently amended its national law so as to render the clause in question inapplicable. [25] The Court did not give an express reply to this assertion; from its attitude it may be deduced *a contrario* that it considered either that, in the case pending before it, the disputed amendments of national law had not undermined the standstill clause, or that amendments made to the national rules after the introduction of the clause do not justify the Member States losing their rights under the clause. In any event, however, the Court did not deal in depth with the matter of the effects, with regard to application of the standstill clause, of subsequent amendments to domestic law. [26]

28. To understand the approach taken by the Court regarding the interpretation of Article 17(6) of the Sixth Directive it is

24 — *Ibidem*, paragraph 24.

25 — See paragraph 19 of the Court's judgment in *Royscot*, cited in footnote 22: 'During the hearing, the Commission submitted that it follows from the judgment in Case C-43/96 *Commission* v *France* [1998] ECR I-3903 that the United Kingdom had in fact been initially authorised to retain the exclusions from the right of deduction in question. However, the Commission argues, the United Kingdom lost that right following an amendment of national law which was contrary to the standstill clause in Article 17(6) of the Sixth Directive.'

26 — However, I should mention two other judgments of the Court of Justice which relate to the matter of the interpretation of the standstill clauses in the Sixth Directive. In Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, the German Government had invoked the transitional provisions of Article 28(3) of the Sixth Directive, which authorise the Member States to continue to exempt certain activities from VAT by way of derogation from the common provisions contained in the Sixth Directive, and under which, the German Government contended, German legislation governing the taxation of travel agencies ought to be considered compatible with Community law. However, the Court held that, since Germany had not, and did not deny that it had not, maintained, for the various transactions performed by travel agencies, the general VAT scheme applicable before the Sixth Directive came into force, but had adopted a special tax scheme, it could no longer rely on the standstill clause. In other words, according to the judgment in question, it is possible, in certain circumstances, for a Member State to lose the benefit of the advantages to which it is entitled under a standstill clause in the Sixth Directive if it has amended its original legislation, that is, the legislation in whose favour the standstill clause could have operated.
Nevertheless, in its more recent judgment in Case C-136/97 *Norbury Developments* [1999] ECR I-2491, which also concerned the interpretation and application of the standstill clause in Article 28(3)(b) of the Sixth Directive, the Court took care to concede that it was possible for Member States to retain the advantages provided by the standstill clause if, by a subsequent measure, they only partly amended the national scheme which was in force prior to the adoption of the Sixth Directive. It observed that to construe a standstill clause narrowly, to the effect that a Member State may maintain the legal system existing at the time of the adoption of the Sixth Directive, but may not limit its scope or abolish it, even only partially, would have adverse effects for the uniform application of the Sixth Directive (see paragraph 20 of the judgment in *Norbury Developments*).
It is evident from the aforementioned judgments that, where a Member State has applied a standstill clause in the Sixth Directive to retain the national legislation adopted before the Sixth Directive came into force, it may introduce amendments or limitations to that legislation, on condition, however, that those amendments are not in breach of the fundamental principle of legal certainty. An example of such an extreme case would be where a Member State has obviously abandoned its legislation applicable before the Sixth Directive came into force, particularly by drawing up new legislation, and then invokes the standstill clause to revive the provisions originally applicable. Apart from that case, however, the powers conferred on the Member States by the standstill clause are not necessarily withdrawn from them merely because they have amended the national scheme which has been retained by virtue of the clause.

necessary to bear in mind that the Member States and the Community institutions are unable to agree which expenditure does not give a right to deduct VAT. [27] The difficulties which emerged when the disputed provisions of the Sixth Directive were drawn up and the continued failure of the Council, even after the four-year period fixed in the Directive had expired, [28] to take steps to resolve the matter, were invoked both by the Court and the Advocate General in the case of *Commission* v *France* [29] and by the Advocate General in *Royscot*. [30] Since the Community legislator in the matter has not managed to formulate the appropriate provisions which would have made it possible to remove the standstill clause in Article 17, it is not for the Court to assume the role of the legislator by proposing that the clause should be interpreted strictly.

B — *Article 27 of the Sixth Directive*

29. So far as concerns Article 27 of the Sixth Directive, which provides that the Council may authorise any Member State to introduce special national measures for derogation from the directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance, the case-law of the Court of Justice has, to date, been as follows:

30. First of all, the judgment in *Commission* v *Belgium* [31] clearly showed that the opportunity given to the national authorities to retain divergent or to introduce new legislation authorised only those derogations which were necessary to achieve the expressly stated aims of Article 27, that is, to simplify the tax and to prevent tax evasion and avoidance. In that judgment, the Court held that, since Belgium had not proved that the disputed national measures concerning car taxation were necessary to prevent tax evasion or avoidance, it had failed to fulfil its obligations under Community law.

31. Subsequently, in its judgment in *Direct Cosmetics I*, [32] the Court pointed out that the derogations provided for in Article 27 of the Directive were by way of exceptions. National legislation which diverges from the rules of the Sixth Directive, pursuant to Article 27(5), cannot be interpreted widely. Subsequent amendments to that legislation

27 — See points 9 and 10 of this Opinion.

28 — The first subparagraph of Article 17(6) of the Sixth Directive. I should say that, in my opinion, such inefficiency may justify an action against the Council under Article 232 EC.

29 — Paragraph 19 of the judgment in Case C-43/96 *Commission* v *France*, cited in footnote 20, and paragraphs 14 to 19 of the Opinion delivered in that case by Advocate General Jacobs.

30 — Points 74 to 77 of the Opinion delivered by Advocate General Léger in Case C-305/97 *Royscot and Others*, cited in footnote 22.

31 — Judgment in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861.

32 — Case 5/84 *Direct Cosmetics* v *Commissioners of Customs and Excise* [1985] ECR 617.

which extend the scope of application of the national rules derogating from the Sixth Directive are compatible with Community law only if they are approved by the Council in accordance with the provisions of Article 27(2) of the Sixth Directive.

32. In *Direct Cosmetics and Laughtons Photographs*, [33] the Court was invited to review the validity of a Council decision authorising the adoption of special national measures derogating from the Sixth Directive. The Court examined the legality of the Council decision approving the measures in the light of the criteria laid down in Article 27 of the Sixth Directive, the principle of proportionality and the basic principles of the Directive. After declaring that the notification made by the Member State concerned to the Commission, in accordance with Article 27(2) of the Sixth Directive, referred in 'sufficient' detail to the needs which the measure in question was intended to meet and that it contained all the essential elements to enable the aim pursued to be identified, [34] the Court finally held that the measures approved by the Council decision were not disproportionate to the aim pursued, [35] whilst acknowledging the 'freedom of action' that the measures would confer on the competent authorities 'to make use of that measure in cases in which its application is considered appropriate.' [36]

33 — Joined Cases 138/86 and 139/86 *Direct Cosmetics and Laughtons Photographs* v *Commissioners of Customs and Excise* [1988] ECR 3937 (hereinafter '*Direct Cosmetics II*').

34 — *Ibidem*, paragraph 36.

35 — *Ibidem*, paragraph 48.

36 — *Ibidem*, paragraph 44.

33. That case-law also served as a basis for the judgment in *BP Supergas*, [37] according to which national measures derogating from the Sixth Directive 'do not accord with Community law unless they remain within the limits of the objectives referred to in Article 27(1) and have also been notified to the Commission and impliedly or expressly authorised by the Council in the circumstances specified in paragraphs (1) to (4) of Article 27.' [38]

34. Lastly, in the *Skripalle* case, [39] the Court was invited to define the scope of application of the authorisation granted by the Council to Germany, under Article 27 of the Sixth Directive, to adopt a special measure derogating from the provisions of that directive so far as concerns supplies of services for consideration between associated persons. In its judgment, the Court states that 'national derogating measures designed to prevent the evasion or avoidance of tax must be strictly interpreted' and may not derogate from the general rules of the Sixth Directive 'except within the limits strictly necessary for achieving that aim.' [40] The Court considered to what extent those conditions were satisfied in the case and, although acknowledging that there may be a risk of evasion or avoidance between family members or associated persons, said that there is no such risk 'where the

37 — Cited in footnote 17.

38 — *Ibidem*, paragraph 22.

39 — Case C-63/96 *Skripalle* [1997] ECR I-2847.

40 — *Ibidem*, paragraph 24.

objective facts show that the taxable person has acted properly.' [41] On these grounds the Court limited the scope of application of the authorisation granted to Germany by the Council.

35. From the case-law analysed above, it appears that the Court has traced the following guidelines with regard to the question at issue. The deduction of VAT payable on goods and services at an intermediary stage, before other transactions subject to VAT are carried out, under Article 17 of the Sixth Directive, is an important element of the Community VAT scheme, which is directly linked to the fundamental principle of tax neutrality. Therefore, exceptions to the application of that general rule, which are the consequence in particular of the possibility afforded under Article 27 of the Sixth Directive of introducing further derogations from the general scheme of the Directive, must, in principle, be interpreted strictly. However, the latitude for derogation which the Member States are given by virtue of the possibility, under the standstill clause in Article 17(6) of the Sixth Directive, of retaining exclusions from VAT deduction introduced before that directive came into force, is, according to the Court's case-law hitherto, particularly extensive, inasmuch as it applies to any expenditure, irrespective of whether or not it is business expenditure; a limit is imposed on the above national power to exclude VAT deduction only in the extreme circumstances of a Member State ultimately excluding almost all goods and services from the right of deduction scheme.

V — Subject-matter of Decision 89/487

36. Before examining the legality of Decision 89/487, it is necessary to establish its specific subject-matter. According to Ampafrance, the derogation granted by the Council to the French Republic covers all accommodation, restaurant, hospitality and entertainment expenditure, regardless of the status of the person in respect of whom the taxable person has incurred the expenditure. On the other hand, the French Government maintains that, given the context of the national legal system, Decision 89/487 can only apply to the exclusion from the right to deduct VAT on expenditure incurred in respect of third parties outside the company concerned. The Commission seems to support this view. Sanofi and the Council do not deal with this point in their observations.

A — *Arguments of the parties*

37. Ampafrance first of all sets out its view of the applicable tax law in France. It

41 — *Ibidem*, paragraph 26.

considers that the original scheme, which was introduced by the aforementioned 1967 Decree, excluded from the right to deduct VAT only expenditure incurred to meet the private needs of the management and staff of undertakings. The 1979 Decree extended the exclusion from the right to deduct to all expenditure relating to accommodation, restaurants, hospitality and entertainment, without drawing any distinction between whether they benefited the management and staff of the undertakings or third parties as well. Nor does the 1979 Decree draw any distinction between items of expenditure depending on whether or not they are of a business nature. Ampafrance also points out that, in its judgment of 3 February 1989 in the *Alitalia* case, the French Conseil d'État held that the exclusion of the right to deduct VAT payable on the expenditure at issue, which the taxable person had incurred for the benefit of third parties, was incompatible with Community law. So far as concerns this kind of expenditure, Ampafrance deduces from the case-law of the Conseil d'État[42] prior to the *Alitalia* judgment that VAT could be deducted, under the 1967 Decree, when the expenditure was incurred for the benefit of the management and staff of the undertaking, if it was proved that it was of a business nature. From the case-law of the Conseil d'État, Ampafrance draws the conclusion that it has never been disputed that taxable persons may deduct VAT on expenditure directly linked to their business activity. It believes that this is why the French authorities initiated the procedure established in Article 27 of the Sixth Directive, in order that the Council would allow them to exclude from the right to deduct VAT any expenditure relating to accommodation, food, hospitality and entertainment, whether of a business nature or not.

38. Ampafrance relies on the above interpretation, which it suggests in connection with the tax scheme in force in France since 1967, to support its argument that Decision 89/487 at issue in this case covers all expenditure relating to accommodation, restaurants, hospitality and entertainment, not only that which taxpaying companies incur in respect of third parties. Ampafrance maintains that, since the French Republic had kept the 1967 Decree in force, the standstill clause in Article 17 of the Sixth Directive allowed it to exclude from the right to deduction of VAT only expenditure incurred to meet the private needs of the management and staff of an undertaking. The fact that, in the *Alitalia* judgment, the Conseil d'État questioned the compatibility with Community law only of those provisions of the 1979 Decree which apply to expenditure incurred for the benefit of third parties, cannot be construed — according to Ampafrance — as an indication that the general exclusion from the right to deduction of VAT on expenditure incurred for the benefit of the employees of the taxpaying company, as was provided for by the 1979 Decree and is still applicable, is covered by the standstill clause in Article 17 of the Sixth Directive and is therefore compatible with Community law. In any event, Ampafrance considers that the 1979 Decree repealed the 1967 Decree; the French Republic had therefore lost the opportunity to invoke the standstill clause at the time it initiated the procedure under Article 27 of the Sixth Directive. Ampafrance draws the conclusion that the logical consequence of this is

42 — It invokes, in particular, the judgments of 9 July 1977 in *Chaussures Myris* and 13 February 1980 in *SA Locafrance*.

that the authorisation conferred by the Council in Decision 89/487 could only apply to all expenditure relating to accommodation, food, hospitality and entertainment.

39. Sanofi took the same view during the hearing. It maintained that the subject-matter of the impugned decision included all expenditure relating to accommodation, restaurants, hospitality and entertainment, irrespective of the status of the person for whose benefit it was incurred.

40. On the other hand, the French Government claims that the subject-matter of Decision 89/487 is manifestly narrower than as described by the applicants in the main action. In this connection it cites the judgment given by the French Conseil d'État in the *Alitalia* case, from which it infers *a contrario* that the general exclusion from the right to deduction of VAT on expenditure relating to accommodation and so forth for the management and staff of taxpaying companies, an exclusion which had already been introduced by the 1967 Decree, was covered by the standstill clause in Article 17(6) of the Sixth Directive and was not, therefore, contrary to Community law. After the *Alitalia* judgment, and in order to tackle the specific problem of the tax treatment of expenditure incurred by companies for the benefit of third parties, the French Republic decided to take advantage of the opportunity offered to it by Article 27(1) of the Sixth Directive and submitted a request to the Commission. The French Government maintains that, as a consequence, given the context in which the request was submitted to the Community institutions, the subject-matter of Decision 89/487 is confined to excluding from the right to deduct VAT on expenditure relating to accommodation, food, hospitality and entertainment only cases in which the expenditure is incurred by the taxpaying companies for the benefit of third parties.

41. In this respect the Commission explains that the derogation from the general provisions of the Sixth Directive which was introduced by Decision 89/487 relates to Article 17(2) of the Sixth Directive, not Article 17(6) as inadvertently stated in Decision 89/487. According to the Commission, the request submitted by the French authorities referred to Article 17(2) of the Sixth Directive and consisted in the amendment of the current national legislation towards extending the exclusion from the right to deduction of VAT particularly in respect of expenditure incurred by taxpaying companies for the benefit of third parties. The Commission maintains that that narrow interpretation of Decision 89/487 is based only on the judgment of the Conseil d'État in the *Alitalia* case, in which it held that the extension of the national scheme of exclusions from the right to deduct VAT was contrary to Community law only in so far as it concerned the specific category of expenditure incurred for the benefit of third parties.

42. At the hearing the parties attached great importance to the problem of specifying from which provisions of the Sixth Directive the French Republic sought the authorisation to derogate granted to it by

Decision 89/487. The Commission again argued that Article 17(2) was involved, not Article 17(6) as inadvertently indicated in the text of the decision. The French Government and the Council considered that the derogation in question was perfectly correct and, in any event, concerned both Article 17(2) and Article 17(6) of the Sixth Directive. The applicants in the main proceedings pointed out that, since the text of Decision 89/487 referred to Article 17(6) of the Sixth Directive, the Commission could not maintain that that was merely an oversight. In so far as it authorised the introduction of derogations from Article 17(6), Decision 89/487 was invalid.

B — *My view of the problems raised above*

(a) The provisions of the Sixth Directive in respect of which Decision 89/487 authorised derogation

43. First of all, I shall examine whether Decision 89/487 related to the provisions of Article 17(6) of the Sixth Directive and/or those of Article 17(2). I am of the opinion that the first of thesepropositions cannot be upheld. The question might be raised, first of all, of what the introduction of derogations from the standstill clause in the second subparagraph of Article 17(6) consists in. A probable explanation is that Decision 89/487 authorised the French Republic to extend the scope of the standstill clause in question by introducing exclusions from the right to deduct VAT going beyond those provided by national law at the time the Sixth Directive came into force. In that case, however, it cannot be a question of extending the subject-matter of the standstill clause, since the problem which arises in France is not that pre-existing legislation is being *retained* but that new national provisions, which are contrary to the content of the Sixth Directive, are being *introduced.* Those national provisions do not run counter to the standstill clause in Article 17(6) of the Sixth Directive; they are merely not covered by the clause in question. They do, however, conflict with the provisions of Article 17(2), and that is why it was necessary to apply to the Council for the authorisation provided for in Article 27. It is therefore contrary to the rationale of the Sixth Directive to rely on Article 27 of that directive in order to introduce national derogations from the standstill clause. Article 27 gives the Member States the opportunity to derogate from the provisions of the Sixth Directive by *adopting* new measures, not by *retaining* provisions which were in force before that directive was adopted. Such provisions are, in any case, covered by the standstill clause in Article 17(6), although it is not necessary for them to be approved by the Council under the procedure established in Article 27 of the Sixth Directive. Accordingly, the reference to Article 17(6) in Decision 89/487 is obviously incorrect and the Commission is right in pointing out that

the exclusions from the right to deduct VAT proposed by the French Republic necessarily came under Article 17(2).

44. The question then arises whether the incorrect reference to Article 17(6), instead of to Article 17(2), renders Decision 89/487 defective and, consequently, invalid, as the applicants in the main proceedings claim, or whether it constitutes an imperfection in Decision 89/487 that can be remedied, which is the view taken by the Commission. The truth is that, throughout the procedure which culminated in Decision 89/487, the French Government, in the request it made under Article 27 of the Sixth Directive, the Commission, in the proposal it submitted to the Council (COM(89) 346 final, of 10 July 1989), and the Council, in its decision, seem to have erred in law concerning the provisions of the Sixth Directive in respect of which authorisation to derogate was being sought. The French Republic's request relates to Article 17(6); the Commission's proposal and Decision 89/487 also refer to that provision. It may therefore be claimed that Decision 89/487 is unlawful because its legal subject-matter is incorrect.

45. However, I consider that this would be too stringent a solution. I do not think that the fact that the parties who cooperated in the adoption of the Community act in question defined the relevant legal context incorrectly is sufficient to justify an automatic and irrevocable declaration that the act is unlawful. On the other hand, it is expedient to determine whether the applicable provisions of Community law have been observed in this case, irrespective of whether the reference made to them in the body of Decision 89/487 is correct or not. In particular, the fundamental question which arises is whether the French Republic could use the legal procedure prescribed by Article 27 of the Sixth Directive to introduce national provisions contrary to the provisions of the Sixth Directive, even if that Member State and the Community institutions which granted the relevant authorisation mistakenly believed that those national provisions were contrary to Article 17(6) of the Sixth Directive rather than Article 17(2). It need only be pointed out that the exclusions from the right to deduct VAT which the French Republic submitted for the Council's approval were certainly not contrary to Article 17(6) of the Sixth Directive, but to Article 17(2).

(b) The scope of the exclusion from the right to deduct VAT authorised by Decision 89/487

46. It remains to be determined whether the exclusion from the right to deduct VAT on expenditure relating to accommodation, food, hospitality and entertainment, authorised by Decision 89/487, covers all such expenditure, irrespective of the status of the persons for whose benefit it has been incurred, or whether it applies only to

expenditure incurred for the benefit of third parties. I shall take as a starting point for this analysis the letter in which the French Republic requested that Article 27 of the Sixth Directive be put into effect in order to introduce national provisions derogating from the general provisions of the Sixth Directive. Both the French Government and the Commission refer to this letter and consider that its indirect consequence was that the request for authorisation made by the French Republic to the Council concerned only expenditure relating to accommodation, food, hospitality and entertainment incurred for the benefit of third parties.

47. I consider that the reasoning of the French authorities, as expressed in their letter of 13 April 1989 to the Commission, contains a fundamental contradiction. Firstly, they imply that, under national law, the exclusion from the right to deduct VAT on the expenditure in question, relating to the staff and management of companies, is based on the aforementioned 1967 Decree which, in principle, is covered by the standstill clause in Article 17(6) of the Sixth Directive; on the other hand, the exclusion from the right to deduct VAT on expenditure of the same kind incurred by companies for the benefit of third parties, especially after the judgment given by the Conseil d'État in the *Alitalia* case, does not seem to have a legal basis in the national legislation prior to the Sixth Directive. Secondly, the French Republic's request for authorisation to derogate from the rules of the Sixth Directive under Article 27 is formulated in such a way as to include all expenditure relating to accommodation, food, hospitality and entertainment, whether incurred for the management and staff of undertakings or for third parties. To sum up, from the content of the aforementioned letter sent by the French Republic to the Commission, although it appears that the French Republic considers that the exclusion from the right to deduct VAT, at least for expenditure for the management and staff of undertakings, is covered by the standstill clause, it nevertheless requests that Article 27 be applied to all national legislation regarding exclusion from the right to deduct VAT on expenditure relating to accommodation, food, etc., without distinguishing between staff, management, and third parties.

48. As regards Decision 89/487 itself, it should be pointed out that its scope of application is clearly defined. It excludes from the right to deduct VAT all expenditure 'in respect of accommodation, food, hospitality and entertainment', irrespective of the status of the person for whose benefit the company incurs it. In other words, the Community legislature allows derogations from the generally accepted rules of Article 17 of the Sixth Directive in connection with the expenditure in question generally.

49. The question arises whether, as the French Republic and, indirectly, the Commission maintain, Decision 89/487, correctly interpreted, applies only to cases of

exclusion of the right to deduct VAT on expenditure incurred for the benefit of third parties and not for the benefit of the staff or management of the company, in view of the fact that the latter category of expenditure is already covered by national provisions which fall under the standstill clause in Article 17(6) of the Sixth Directive. I am unable to endorse the proposed solution which I have just described. It is tantamount to recognising the possibility of interpreting the content of an act of the Community institutions in the light of national law in a way that is contrary to its wording. Indeed, the wording of Decision 89/487 leaves no room for doubt with regard to its conceptual scope; it provides the French Republic with the opportunity to exclude from the right to deduct VAT all expenditure in respect of accommodation, food, hospitality and entertainment, irrespective of the status of the persons for whose benefit it is incurred and irrespective of whether the expenditure is closely or loosely connected with the business activity of the taxable person. To accept the position that Decision 89/487, despite its clarity, does not apply to all the cases described in its provisions, but only to some of them, having regard to the national legislation previously in force, first of all undermines the very foundations of the Community legal order, because it makes the interpretation of a Community rule subject to the circumstances and specific features of national law. It also infringes the fundamental principle of legal certainty, inasmuch as it allows a rule to be interpreted in a sense which conflicts with its wording, misleading those concerned as regards its scope of application. In any event, in accordance with the general legal principle *nemo auditur propriam turpitudinem allegans*, the French Republic cannot seek an interpretation *contra legem* of Decision 89/487.

50. Finally, it should be pointed out that the position in French law invoked by the French Republic is anything but clear. The judgment of the Conseil d'État in the *Alitalia* case merely gave indications — which may be rebutted — that exclusion from the right to deduct VAT on the expenditure at issue, incurred for the benefit of the management and staff of an undertaking, an exclusion for which the 1979 Decree made provision, was covered by the standstill clause, by means of the earlier 1967 Decree. Moreover, it is not clear whether the passage in Decision 89/487 which authorises exclusion from the right to deduct VAT on 'expenditure in respect of accommodation, food, hospitality and entertainment' is identical in sense to the content of Articles 7 and 11 of the 1967 Decree, under which, on the one hand, 'the tax on expenditure incurred in order to provide accommodation or lodging for the management and staff of undertakings shall not be deductible', and, on the other, 'the tax on expenditure incurred in order to satisfy the personal needs of the management and staff of undertakings, and in particular the tax on the cost of providing hospitality, food and entertainment, shall not be deductible'. Leaving aside the difference in wording, the question arises as to whether the provisions of the 1967 Decree in question

preclude the deduction of VAT in respect of the expenditure in question, even when it is of a strictly business nature. [43] If that is not accepted, [44] that is, if it is considered that VAT may be deducted in respect of business expenditure, even in the light of the 1967 Decree, the scope of application of the 1967 Decree becomes narrower than that of Decision 89/487, since it does not exclude the right in general to deduct VAT in respect of such expenditure. Of course, the question of the scope of the national legislation and, more particularly, of the 1967 Decree does not fall within the jurisdiction of the Court of Justice but of the national court. However — to return to the premiss on which I have based my argument — it would be contrary to the very essence of Community law to confer on a national court jurisdiction to determine the content of a Community act *by way of* an interpretation of its national law.

51. In the light of the foregoing, I believe that it would not be right to attempt to restore the meaning of Decision 89/487 *through* French law and to reformulate the content of the decision to the effect that it authorises the French Republic to exclude certain expenditure from the right to deduct VAT only in cases in which the expenditure is incurred for the benefit of persons outside the taxpaying company, and not when it relates to the management and staff. I therefore take the view that the impugned decision covers both of the aforementioned categories of expenditure, as its wording clearly indicates. The question of establishing which tax scheme is applicable in France, if Decision 89/487 is ultimately held to be contrary to Community law, is a different matter. I shall come back to this question — in so far as it concerns the implementation of the Sixth Directive — only if, after assessing the legality of Decision 89/487, I have doubts as to its validity.

VI — The legality of Council Decision 89/487

A — *Arguments of the parties*

(a) Ampafrance

52. Ampafrance maintains that Decision 89/487 is contrary to the objectives of Article 27(1) of the Sixth Directive and does not satisfy the requirements of the principle of proportionality.

53. As far as concerns the objectives of Article 27, these are only to simplify the

43 — See, above, the arguments developed on this point by Ampafrance and the case-law of the Conseil d'État to which that party refers (point 37 of this Opinion).

44 — That solution is also supported by a literal interpretation of the 1967 Decree, from which it seems clear that, although the accommodation expenses of the management and staff of undertakings are excluded altogether from the right to deduct VAT, the other, related expenditure (food, entertainment, etc.) is excluded only if it is incurred in connection with the 'private needs' of the workers.

procedure for charging the tax and to prevent certain types of tax evasion and avoidance. In its request, the French Government relied on the second of those objectives, that is to say, tackling tax evasion and avoidance. For its part, the Council, in accordance with the consistent case-law of the Court of Justice,[45] could not authorise the introduction of national derogations intended to achieve objectives other than those exhaustively listed in the provision of the Sixth Directive in question. However, according to Ampafrance, the exclusion from the right to deduct VAT at issue here is not based on the intention to penalise certain types of tax evasion or avoidance, but is founded on the 'presumption' of a risk of tax evasion or avoidance arising from the 'dual' nature (private and business) of the expenditure concerned. Consequently, the French authorities were not seeking to take action against the risks exhaustively listed by the Sixth Directive, but to establish a mechanism which would make it possible for them no longer to have to examine whether or not certain expenditure was business expenditure. Indeed, Ampafrance points out that expenditure on hospitality for business purposes may be deducted in France from the profits subject to corporation tax, under Article 39.1.1 of the CGI, if it is shown that it has been incurred in the interests of the company. According to Ampafrance, that observation is enough to establish that there is no actual risk of tax evasion or avoidance linked to deduction on expenditure in respect of hospitality. Furthermore, Ampafrance believes that Decision 89/487 was adopted in a way that constituted an abuse of the process prescribed by Article 27 of the Sixth Directive; firstly, it seeks to introduce an additional exclusion from the right to deduct VAT, which had been proposed and then rejected when the Sixth Directive was adopted; secondly, it constituted an indirect attempt to avoid the impact under national law of the judgment of the Conseil d'État in the *Alitalia* case,[46] which annulled certain provisions in the 1979 Decree.

54. So far as concerns the principle of proportionality, Ampafrance submits that the contested provisions of Decision 89/487 introduce a general and systematic exclusion from the right to deduct VAT, without the need to show that there really is a risk of tax evasion or avoidance. Accordingly, in so far as they create an irrebuttable presumption that an exclusion from the right to deduct VAT is possible even when it is shown that there is no risk at all for the levying of the tax, the Community provisions in question are disproportionate to the objective pursued. Furthermore, according to Ampafrance, there are other measures in French law which would enable the tax authorities to deal effectively with the problem of tax evasion and avoidance. For example, Article 230(1) of Annex II to the CGI provides that VAT charged on goods and services which taxable persons acquire or obtain for themselves is deductible only if those goods and services are 'necessary' to their business activity. The strict application of that rule would be enough to ensure fiscal legality and to make it possible to carry out effective tax inspections. Moreover, as Ampafrance points out, in French law there is an effective system for inspecting the expenditure concerned; it imposes the obligation to submit a detailed statement of

45 — See the judgment in *Skripalle*, cited in footnote 39, paragraph 30.

46 — See point 14 above.

general expenses with the fiscal year's results. Lastly, Ampafrance infers from the judgment in Case 324/82 *Commission* v *Belgium*[47] that the national measures to prevent tax evasion or avoidance may derogate from the general scheme of the Sixth Directive only within the limits which are strictly necessary to achieve that objective. Since there are measures which are less onerous for taxable persons than a general and systematic exclusion from the right to deduct VAT on the expenditure at issue, this exclusion is incompatible with Community law.

55. To sum up, Ampafrance considers that Decision 89/487 does not fulfil the requirements of the principle of proportionality because it introduces, in a general and absolute way, an irrebuttable presumption of the existence of a risk of tax evasion and avoidance without the tax authorities having to show proof of the risk and without the taxable person being able to adduce evidence in rebuttal, although under French law there are less restrictive measures for dealing with this kind of situation.

(b) Sanofi

56. Sanofi's observations have a similar basis: after having explained why the question referred for a preliminary ruling, which disputes the validity of an act of the Community institutions, is admissible, it concentrates its analysis on the issue of proportionality. It maintains that Decision 89/487 does not satisfy the requirements of the principle of proportionality because the objective pursued by the decision could be achieved by other means less prejudicial to the objectives of the Sixth Directive. It also believes that the case pending has similarities with Case 324/82 *Commission* v *Belgium*,[48] in which the Court held that national provisions derogating wholly and systematically from the rules of the Sixth Directive were disproportionate to the objective pursued. Furthermore, according to Sanofi's observations, the statement of reasons for Decision 89/487 is very brief and consequently does not explain why the derogation proposed by the French Republic had to be authorised. Those omissions in its statement of reasons mean that the proportionality of the decision adopted cannot be reviewed, and Decision 89/487 is therefore unlawful.

57. Furthermore, Sanofi also refers to the corporation tax provisions in French law and points out that expenditure relating to accommodation, food, hospitality and entertainment is deductible from the taxable amount; in other words, so far as concerns corporation tax specifically, the possibility of deducting the expenditure in

47 — Cited in footnote 31.

48 — Cited in footnote 31.

question is not considered by the French legislature as automatically constituting tax evasion or avoidance. Consequently, the introduction of an irrebuttable presumption of tax evasion or avoidance constitutes a disproportionate measure for protecting fiscal legality, inasmuch as this could have been ensured by an effective, specific inspection of the expenditure concerned. Sanofi believes that such a form of effective inspection is provided by Article 230 of Annex II to the CGI, under which any expenditure which is not incurred in the 'interest' of the company may not be subject to a deduction in respect of VAT.

58. Lastly, Sanofi puts forward two further arguments: first, it refers to the national law of a large number of Member States, under which the expenditure in question is deductible; it does not, therefore, understand the difficulties in controlling tax evasion and avoidance to which the French Government has referred and which the Council has conceded do exist. Secondly, it points out that the derogation at issue, which Decision 89/487 authorised the French Republic to introduce, is provisional in nature; nevertheless, the Council's inability to adopt the measures envisaged in the first subparagraph of Article 17(6) of the Sixth Directive is perpetuating that temporary situation and inevitably makes the derogation disproportionate to the objective pursued. In the light of the above considerations, Sanofi proposes that the Court should declare Decision 89/487 invalid.

(c) French Government

59. The French Government points out, first, that the fundamental objective of the VAT system is to tax final consumption, not intermediate consumption which takes place in the course of another taxable activity.[49] However, in the case of certain categories of expenditure, it is not always easy to establish whether it is incurred to meet business or private needs, which is the criterion for establishing whether the consumption is final or intermediate. This difficulty suffices to pave the way for tax evasion or avoidance on the part of taxable persons, as the Commission has already pointed out in its proposals for the Sixth and Twelfth Directives.[50] This is also the reason why Article 27(1) of the Sixth Directive provided for the possibility of adopting special derogating measures to deal with the risk of tax evasion or avoidance. That being the case, in view of the risks of tax-free final consumption, particularly in respect of expenditure on accommodation, food, hospitality and entertainment, and of the difficulty in distinguishing between business and private expenditure, the French Government considers that Decision 89/487, at issue in this case, is wholly compatible with the objective defined in Article 27 of the Sixth Directive.

49 — The French Government refers Case C-165/88 *ORO Amsterdam Beheer* [1989] ECR 4081, paragraph 20.

50 — See points 9 and 10 of this Opinion.

60. The French Government also draws attention to the fact that, for the same reasons, most of the Member States implement similar measures. With regard specifically to its own case (France), it maintains that the judgment of the Conseil d'État in the *Alitalia* case [51] created a significant risk of tax evasion and avoidance on the part of undertakings and made it more difficult to monitor the purpose of the expenditure at issue, in so far as it encouraged undertakings to incur ever higher expenditure for the benefit of third parties.

61. As regards the principle of proportionality, the French Government considers that Decision 89/487 meets the requirements of the principle, as set out in the case-law of the Court. It recalls in particular the view taken by the Court in its judgment in *Molenheide and Others*, [52] in which it held that 'in accordance with the principle of proportionality, the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation.' The French Government maintains that exclusion from the right to deduct VAT in respect of expenditure in relation to accommodation, food, hospitality and entertainment, for which Decision 89/487 provides, is limited to cases in which there is an actual risk of tax evasion or avoidance and which relate to circumstances in which it is impossible to determine whether the expenditure in question is of a business or private nature; on the other hand, Article 1(2) of Decision 89/487 lists the cases in which, because the expenditure in question is of a business nature, VAT may be deducted.

62. According to the French Government, the exclusion from the right to deduct VAT, which is at issue in this case, is necessary since there are no other satisfactory means of monitoring the nature of the expenditure in question. For example, it is not possible to establish, from the receipts issued in the name of a company, the persons for whose benefit the expenditure has been incurred. Furthermore, to allow the relevant sums to be deducted on the basis of information supplied by the company itself would have the undesirable result of multiplying the legal and extralegal disputes relating to the real nature of the expenditure in question.

63. The French Government also takes the view that a comparison of the situation before the Court in this case and the system in force in France, as regards corporation tax, is irrelevant, owing to the fundamental differences between that tax and VAT. VAT is a tax on final consumption and is based on a mechanism which ensures the neutrality of the tax; VAT deductions apply exclusively to expenditure incurred for the purpose of taxed operations. On the other hand, corporation tax and income tax are calculated on income or net profits, that is to say, gross sums from which the expenditure necessary to acquire the income or profits is deducted. Moreover, the French Government would consider arbitrary a

51 — See point 14 above.

52 — Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 [1997] ECR I-7281, paragraph 46.

solution which authorised the deduction of VAT on company expenditure on accommodation, food, hospitality, and so forth up to a certain amount. In any event, the French Government points out that the proportionate nature of Decision 89/487 has been the subject of an extensive review by the Commission and the Council, which fully satisfies the requirements of case-law.

64. At the hearing, the French Government requested that the Court, if it ultimately held that Decision 89/487 was unlawful, should limit the effects of its judgment by declaring the decision invalid *ex nunc*; it based this request on the need to protect the legitimate expectations of the French authorities with respect to the lawfulness of the decision.

(d) Commission

65. The Commission recalls the case-law of the Court of Justice relating to the application of the principle of proportionality in connection, specifically, with Article 27 of the Sixth Directive. It deduces from this that it would be contrary to Community law to impose restrictions on the right to deduct VAT in circumstances in which, first, it has been objectively proved that no tax evasion or avoidance can be attributed to the taxable person and, secondly, the restrictions introduced do not comprise derogations that are absolutely necessary in order to prevent the risk of tax evasion or avoidance. As regards the specific nature of the expenditure referred to in Decision 89/487, the Commission points out that the Sixth Directive excludes, in any event, the right to deduct VAT in respect of expenditure 'which is not strictly business expenditure, such as that on luxuries, amusements or entertainment'. [53] It also refers to its proposal for the Sixth Directive, in which it pointed out that it was difficult, if not impossible, to distinguish between the business part and the private part of the expenditure in question.

66. The Commission concludes, in the light of the foregoing considerations, that it was fully entitled to accept the reasons given by the French authorities that there was, in this case, a significant risk of breach of the VAT rules: companies are likely to incur expenditure, in the form of gifts or other benefits in kind, from which VAT should not be deducted because it is not connected to their activities, without its being established to what extent such expenditure relates to the company's management and staff or to third parties. Furthermore, the French authorities themselves have specified the circumstances in which there is no risk of tax evasion or avoidance and have omitted them from the exclusions from the right to deduct VAT; these are the circumstances listed in Article 1(2) of Decision 89/487.

67. The Commission also points out that the temporary derogation authorised by

53 — The first subparagraph of Article 17(6) of the Sixth Directive.

Decision 89/487 applies, in actual fact, to circumstances in which there is a serious risk of tax evasion or avoidance. It considers that the risk is sufficiently proven, even though the statement of reasons for the decision is succinct. It refers, in particular, to certain specific cultural features of France, where some transactions are concluded 'between the fruit and the cheese', which explains why other Member States, in which such matters are conducted very differently, have not provided for similar exclusions. The Commission adds that the disputed prohibition authorised by the Council has the advantage of clarity, simplicity and legal certainty, for both businesses and tax authorities. Consequently, the Commission maintains that the measures covered by Decision 89/487 are warranted and satisfy all the requirements of the principle of proportionality, that is to say, they are necessary, appropriate and proportionate, in the strict sense of the word.

68. However, the Commission believes that the national authorities, when called upon to implement the general and vague measure approved by Decision 89/487, must carry out a specific review of tax situations, so as to distinguish the cases in which there is a genuine risk of tax evasion or avoidance from those in which it is possible to establish objectively that certain expenditure relating to accommodation, food, hospitality and entertainment is strictly business expenditure and is eligible for a deduction of VAT.

(e) Council

69. In its observations, the Council argues that Decision 89/487 is lawful. It considers that the decision is justified because it is difficult, if not impossible, to ascertain effectively the nature (business or otherwise) of the expenditure in question. Moreover, according to the Council, the Community legislature's compliance with the principle of proportionality is apparent in the fact that Article 1(2) of Decision 89/487 stipulates the circumstances in which VAT on the expenditure in question may be deducted in so far as it is objectively proved that it is connected with the business activity of the company. The Council also points out that, under the provisions of the Sixth Directive, VAT is deductible only in respect of expenditure which is strictly business expenditure, which excludes VAT relating to expenditure on what might be described as 'luxuries'. It also considers that Decision 89/487 is justified irrespective of whether it is established that there is an intention on the part of the taxable person to evade or avoid tax or whether there is tax evasion or avoidance. The mere fact that the nature of the expenditure concerned enables it to be used as a potential means of evading or avoiding tax, which is difficult for the tax authorities to monitor, is enough to justify the provisions in question. It is not certain that the use of another method of dealing with the problem, such as imposing a fixed limit on the amount of the deductions, would be more consistent with the objective of the Directive, that is, deduction of VAT on intermediate business expenditure; such a

method might create discrimination between economic operators, which might result in a distortion of competition.

B — *My view of the problems set out above*

70. First of all, I do not dispute that the combating of tax evasion and avoidance is a legitimate and important aim of any tax authority seeking to implement the objectives of the Sixth Directive and the proper working of the VAT mechanism. If that were not the case, the risk that taxation on final consumption might be evaded would be contrary to the very philosophy of the tax system in question.

71. In that connection, the Community legislature provided for a fundamental distinction between expenditure of a strictly business character and that which is unconnected with the taxpayer's business activity, and has expressly excluded expenditure on luxuries, amusements or entertainment from the right to deduct VAT. Only strictly business expenditure may be considered to relate to goods or services 'used [by the taxpayer] for the purposes of his taxable transactions', within the meaning of Article 17(2) of the Sixth Directive, and is therefore eligible for a deduction of VAT.

72. That is where the problem lies in this case. There is, of course, expenditure which it is very difficult to categorise as business or other expenditure. Expenditure relating to accommodation, food, hospitality and entertainment, on which this analysis is concentrated, presents the greatest degree of difficulty in this respect, since its connection with a company's business activity is not clear, which may well facilitate tax evasion or avoidance. Indeed, this is why it has not been possible to adopt an overall legislative solution to the problem at Community level, as is evidenced by the difficulties encountered during the preparation of the Sixth and Twelfth Directives. [54] Even more so, for some of this expenditure it may well be impossible in practice to separate business expenditure entitled to deduction of VAT from private benefits which are subject to tax, when only a total exclusion from the right to deduct VAT makes it possible to safeguard the public interest, namely penalising certain kinds of unlawful conduct on the part of taxable persons. It should be pointed out, once again, that the proper working of the VAT mechanism developed by Community tax legislation obviously requires action to counteract any kind of tax evasion or avoidance; the Community legislature recognises this necessity when it allows the Member States to request and obtain from the Council authorisation to adopt, under Article 27 of the Sixth Directive,

54 — See points 9 and 10 of this Opinion.

special measures for derogation from the general provisions of that directive in order to 'prevent certain types of tax evasion or avoidance.'

73. From the foregoing observations, it seems clear that the contested provisions of Decision 89/487 prima facie follow the logic of Article 27 of the Sixth Directive, inasmuch as they serve the objectives described in that article. However, it cannot necessarily be concluded from those observations that the provisions in question are in keeping with the overall objectives of the Sixth Directive and may be incorporated into the regulatory system which that directive creates. The problem is a consequence of the fact that, if the right to deduct VAT is excluded in respect of all expenditure on accommodation, food, hospitality and entertainment, with the sole exception of the three situations listed in Article 1(2) of Decision 89/487, it is excluded in respect of expenditure which may be shown to have a genuine connection with the production process of undertakings, that is to say, strictly business expenditure. Ampafrance cites the example of the expenditure incurred by a company in respect of hospitality for commercial representatives or customers when presenting its products for sale; it is indisputable that, *up to a certain point*, that expenditure is directly connected to the company's activities and cannot be regarded as final consumption.

74. As a result, it is not impossible for the unqualified application of the system to exclude the right to deduct VAT introduced by Decision 89/487 to lead to the exclusion of the right to deduct VAT relating to company business expenditure; nor is that possibility disputed by those parties which maintain that the Community act under examination is lawful. In that way, however, the attempt to rectify a problem created by a possible malfunctioning of the procedure for charging VAT (risk of tax evasion or avoidance), has, at the same time, an adverse and equally serious effect on that tax system, since it subjects to the tax certain forms of intermediate consumption, contrary to the fundamental principle of tax neutrality. I think that, if the Sixth Directive is correctly interpreted and implemented, a tax mechanism problem cannot be resolved by resorting to a solution which is just as problematical from the point of view of compatibility with the fundamental rules governing the operation of the mechanism in question. In any event, an exclusion from the right to deduct VAT as wide and unqualified as the one at issue here is contrary to the objectives of that directive and upsets the balance of the provisions it contains. By that I mean that Article 27 of the Sixth Directive cannot be used as a weapon with which to undermine one of the bases of that directive, namely tax neutrality.

75. In that connection, it is not irrelevant from a legal point of view that the contested Community provisions amount to the adoption of an irrebuttable presumption in respect of a given category of tax charges. In my view, the introduction of a presumption of that kind raises questions

as to its compatibility with the fundamental rules of the Community legal order. The principle of the rule of law, the maintenance of equal treatment in tax matters and the guarantee of full and effective judicial protection — notions which are receiving greater and greater emphasis nowadays in the legal system constructed by the Community — are hardly compatible with the idea of introducing irrebuttable presumptions designed to provide a legal solution to specific problems such as the legal classification, from a tax point of view, of a category of expenditure. It is no accident that there is a tendency, in the national legal systems of the Member States, to consider 'legal axioms' of this kind anti-constitutional. [55] Indeed, it is not certain that they are compatible with the principles of the European Convention on Human Rights, observance of which is expressly imposed by the EC Treaty. [56] Furthermore, there are indications in its case-law that the Court of Justice does not view the phenomenon of irrebuttable presumptions very favourably. [57]

76. To these considerations may be added others concerning the principle of proportionality. It must be pointed out that the possibility of considering that the abovementioned irrebuttable presumptions are consistent with the general objectives of the Sixth Directive and do not by their nature raise any other issue of legality from a Community point of view has no bearing on the appraisals made with regard to the principle of proportionality. Irrespective of the manner chosen to resolve the problems

55 — In this case, I shall merely cite the example of Greece, where the Τνχοφμιο υιτ Επιλσαυιατ (Council of State), although it had initially considered irrebuttable tax presumptions to be constitutional in certain circumstances (StE 434/1983, *EDD* 1984, 75), has finally held that a tax presumption of the existence of an income is compatible with constitutional rules if 'that presumption is rebuttable as a matter of law... and the party concerned still has the opportunity to show that he received an income lower than that resulting from the presumption' (StE 1694/1900, *NoV* 39, p. 153, *ToS* 1990, p. 493, *DD* 1990, p. 1189). Legal theory always adopted a negative attitude towards irrebuttable presumptions: see, by way of illustration, Bei, 'Τα αμάχητα τεκμήρια είναι αντισυνταγματικά' (Irrebuttable presumptions are unconstitutional), *D.* 9, p. 761; Kypraios, 'Τα αντισυνταγματικά αμάχητα τεκμηρια του Ν. 820/9978' (The unconstitutional irrebuttable presumptions of Law No 820/9978), *DFN* 1980, p. 679; Paulopoulos, 'Η αναδρομικότητα των φορολογικών νόμων' (The retroactive nature of tax laws), *DFN* 1991, p. 1733, 1740, and Dellis, 'Η συνταγματικότητα του αντικειμενικού προσδιορισμού του φορολογητέου εισοδήματος' (The constitutionality of objective determination of taxable income), *DFN* 1996, p. 841.

56 — Even though the Strasbourg Court did not deal specifically with the matter of irrebuttable tax presumptions, it appears that the adoption of this kind of presumption is contrary to the right to bring an action before an independent and impartial legal authority, in order to obtain a 'fair hearing', a right guaranteed by Article 6(1) of the ECHR, which has been interpreted in the well-known judgments of 29 April 1988 in *Belilos*, Series A No 132; 17 January 1970 in *Delcourt*, Series A No 11; and 25 March 1983 in *Minelli*, Series A No 62. Moreover, it is no accident that the same court has equated certain fiscal penalties imposed by the administrative authorities to the 'criminal charges' of Article 6 of the Convention.

57 — Case C-208/88 *Commission* v *Denmark* [1990] ECR I-4445 and Case C-367/88 *Commission* v *Ireland* [1990] ECR I-4465. In those judgments the Court held to be contrary to existing Community law a national measure introducing an allowance for beer imported in the personal luggage of travellers, but limited to a certain amount; the Court considered that the contested measure raised an irrebuttable presumption that the importation had a commercial character and was thereby contrary to the provisions of Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (1), p. 232). As Advocate General Darmon pointed out in his Opinion in the abovementioned cases, 'Compliance with Directive 69/169... therefore involves on-the-spot verification of a practical nature on the part of the national authorities, which may make it possible for the non-commercial nature of an importation of a seemingly large number of litres of beer to be taken into consideration.... In fact, it seems that the customs authorities of the Member States are quite capable of organising some degree of appropriate verification. As the Commission acknowledged at the hearing, it seems reasonable, and in conformity with the Directive, for customs officers to be able to presume that over and above a certain quantity an importation has a commercial character, without barring a traveller altogether from furnishing proof to the contrary. The issue here is the difference which exists between laying down a mandatory rule, which precludes consideration of specific situations, and laying down... a quantitative criterion which permits a presumption to be raised without, however, preventing it from being rebutted.... Accordingly, there would seem to be some scope for an orderly application of the Directive which does not go too far and seek to achieve the impossible, namely verification of each individual case, and which does not undermine the very core of the Community system...' (points 18 and 19).

at issue, it is necessary, if the legality of Decision 89/487 is to be upheld, for its provisions to be deemed necessary and appropriate to the achievement of the specific objective pursued and for them to affect the objectives and principles of the Sixth Directive as little as possible. [58]

77. The method consisting of a general and unqualified exclusion of the right to deduct VAT in respect of a category of expenditure already seems problematical in the light of the principle of proportionality. The three exceptions to the general exclusion from the right to deduct VAT listed in Article 1(2) of Decision 89/487 do not prove — although there have been submissions to the contrary — that the French Republic, the Commission and the Council examined all the circumstances in which expenditure on accommodation, food, hospitality and entertainment constitutes strictly business expenditure, thus restricting the prohibition in paragraph 1 to what is absolutely essential to prevent tax evasion and avoidance. Furthermore, the statement of reasons for Decision 89/487, even when analysed in the light of the letter which the French Republic sent to the Council asking for the contested derogation, does not make it possible to understand the reasoning of the Community legislature when it excluded from the right to deduct VAT all the circumstances described in Article 1(1) of Decision 89/487, since they involved a risk of tax evasion or avoidance, and when it allowed VAT to be deducted in the circumstances listed in paragraph 2 of the same article. Moreover, it does not adequately explain why the prohibition in paragraph 1 is the only effective means of achieving the aim pursued, namely, to remedy situations of tax evasion or avoidance. More generally, the flaws in the statement of reasons for Decision 89/487 could alone constitute valid grounds for annulment.

78. However, irrespective of the formal defect in the statement of reasons which I have just mentioned, I think that there are, in any event, strong grounds for believing that the national and Community authorities could effectively protect the public interest, which is to combat tax evasion and avoidance, by adopting measures with a less detrimental effect on the general system of the Sixth Directive. I do not have in mind the introduction of a provision under which the deduction of VAT in respect of expenditure on accommodation, food, hospitality and entertainment would be allowed only up to a given percentage of that expenditure; it is not absolutely certain that this would be the most effective solution. However, it might be possible to introduce a rebuttable presumption concerning the non-business nature of the expenditure concerned, a presumption which the taxable persons could negate by furnishing sufficient proof.

79. Furthermore — and this is particularly important — French tax law provides for the opportunity to prove that expenditure of the same kind is business expenditure, in the context of corporation tax. I believe that some of the parties were wrong to maintain that the example taken from the

58 — See point 34 of this Opinion.

corporation tax regime in force in France is not relevant to the case. The risk of tax evasion or avoidance resulting from the classification of certain expenditure on accommodation, food, hospitality and entertainment as expenditure linked to business activity, followed by its deduction from taxable income, profits, goods or services, is generally the same in the case of income tax or corporation tax as in the case of VAT. Consequently, it is not a logical consequence for the tax authorities, in the first case, to allow the expenditure concerned to be deducted from the taxable profits or income and, in the second case, to prohibit the deduction of VAT in respect of goods or services, on the ground that this distinction is dictated by the need to combat certain kinds of tax infringements.

80. I do not, therefore, understand why it was necessary to formulate such an unqualified prohibition particularly for that specific category of expenditure, a prohibition which leaves taxable persons no latitude to furnish proof to the contrary, since the risk of tax evasion or avoidance which might be inherent in the deduction of the amounts concerned could be counteracted by milder means: for example, by a strict application of Article 230 of Annex II to the CGI, under which VAT may not be deducted in respect of any expenditure which is not incurred in the 'interest' of the company, or even by adopting stricter provisions of a similar content, particularly for the category of expenditure at issue.

81. In the light of all the foregoing conclusions, I consider that Council Decision 89/487 at issue here was not adopted in a manner consistent with the requirements of the fundamental principle of proportionality.

82. Before concluding this part of my analysis, I think it is necessary to examine one of the Commission's submissions to the effect that the disputed provisions of Decision 89/487 are, in principle, consistent with Community law; however, when the national authorities implement them, they must specifically consider the extent to which each item of expenditure on accommodation, food, hospitality and entertainment is in fact unconnected with the taxable activities of the company and therefore comes under the heading of tax evasion or avoidance. The fact of the matter is that the Commission is trying to salvage the legality of the provisions in question by giving them an interpretation *contra legem*, which is not, however, possible. The provisions of Decision 89/487 expressly and absolutely exclude the deduction of VAT in respect of a certain category of expenditure without at the same time providing for any verification as to whether or not it is business expenditure and whether it represents a real danger to the proper working of the VAT system. That is the only possible interpretation of the provisions in question, taken directly from their wording, which is clear. Consequently, since, in accordance with the foregoing analysis, those provisions are contrary to the general system introduced by the Sixth

Directive and to the principle of proportionality, they become inapplicable in the national and Community legal system.

83. In that regard, I am called upon to examine the request made orally by the French Government concerning the limitation of the effects of the Court's judgment on the illegality of the Council decision at issue here. I think that this request should be denied for two reasons. Firstly, it is not possible, in my view, for a Member State to invoke the principle of protection of legitimate expectations in order to avoid the consequences of a judicial decision establishing the invalidity of a Community act. Such a solution does not flow from the principle of legal certainty, as happens in certain cases in which individuals entertain legitimate expectations created by the public authorities; rather it undermines the fundamental principles of legal certainty and the rule of law, since that solution deprives citizens of the possibility of effective protection against actions which, although taken by the administrative authorities in good faith, are based on illegal rules of law. Secondly, the principle *nemo auditur propriam turpitudinem allegans* means that the French Government may not escape the consequences of a judgment establishing the invalidity of Decision 89/487, since it contributed itself, by its request to the Council and in its general attitude, to the adoption of the decision the unlawful content of which is at issue.

84. However, in order to reply to the question referred for a preliminary ruling, it is not enough to express a negative conclusion with regard to the legality of Decision 89/487. As I have observed in previous points in my analysis, [59] establishing that Decision 89/487 has irreparable flaws and is invalid raises the question as to the tax law applicable to the disputes in question. Owing to the fact that the current national legislation, as set out in the French Decree of 14 December 1989, [60] now has no legal basis once it is established that Decision 89/487 is invalid, it is necessary to apply — in so far as they are not incompatible with Community law — the provisions designated by the national law in accordance with its own rules. [61]

85. From the point of view of Community law, it remains to reply to the question concerning the way in which the standstill clause in Article 17(6) of the Sixth Directive will be applied again, if indeed it may be applied again. As has already been pointed out, [62] the clause concerned related, in France, to Decree No 67-604 of 1967. However, could the fact that the cases previously covered by the 1967 Decree [63] also came within the field of application of Decision 89/487 be inter-

59 — See point 47 of this Opinion.

60 — See point 15 of this Opinion.

61 — It should be noted, however, that if the 1989 Decree is set aside, it will be necessary to revive the immediately previous legislation, the 1979 Decree, which applies only in so far as it is not incompatible with the rules of the Sixth Directive; this means that the solution adopted by the Conseil d'État in the *Alitalia* judgment (cited in point 14 above) again acquires significance.

62 — See point 12 of this Opinion.

63 — I refer to my analysis in points 45 et seq. of this Opinion.

preted as meaning that the Decree had already ceased to be applicable when the French Republic requested the adoption of Decision 89/487, and that, if Decision 89/487 is removed from the body of applicable Community tax law provisions, the French Republic will then be prevented from reinvoking the 1967 Decree and, by extension, the standstill clause in Article 17 of the Sixth Directive?

86. I think that this question should be answered in the negative. The French Republic introduced a special tax system excluding a given category of expenditure from the right to deduct VAT; this system was set out in the 1967 Decree. The provisions concerned were not affected either by the adoption of Decree No 79-1163 of 1979, amending the previous legislation, or by Decree No 89-885 of 1989, which followed Decision 89/487. The French Republic merely tried to extend the system of exclusions in question in a way which — as emerges from the foregoing analysis — is contrary to the requirements of the Sixth Directive. This shows that it was the firm intention of the French authorities to retain the initial exclusions from the right to deduct VAT and not to abandon the idea of using the standstill clause in Article 17 of the Sixth Directive. For that reason, I believe that, if Decision 89/487 is declared invalid, the effect will not be to deprive the French Republic of the advantages it has already gained from application of the standstill clause in question. Furthermore, it should be pointed out that the actions taken by that State hitherto cannot be regarded as prejudicing legal certainty.

87. Finally, in order to help the national court, I think it is appropriate to offer the following clarification. To give an appropriate ruling in the pending cases, it is necessary to determine the precise field of application of the exclusions from the right to deduct VAT which the 1967 Decree had introduced. Did the exclusions relate only to expenditure on accommodation, food, hospitality and entertainment which was not business expenditure, as Ampafrance maintains, or did they comprehensively cover certain expenditure, whether or not it was business expenditure, as appears to be inferred from a literal interpretation of the provisions in question? Of course, this problem falls exclusively within the jurisdiction of the national court.

88. For my part, I would merely recall the aforementioned case-law of the Court of Justice, [64] according to which the discretion enjoyed by a Member State which wishes to retain, by virtue of the standstill clause in Article 17 of the Sixth Directive, the exclusions from the right to deduct VAT which were applicable before the Directive came into force, is particularly wide; the exclusions may also relate to expenditure which is strictly business expenditure. However, that weakens the principle of tax neutrality and the logic underlying the tax system of

64 — See points 24 et seq. of this Opinion.

the Sixth Directive. This gives rise to the following inconsistency: although Community law provides, in principle, for the deduction of VAT on the business expenditure incurred by companies, that deduction may be excluded by national provisions which predate the Sixth Directive. However, that inconsistency, which clearly is not conducive to improving the Community and national tax system, can be eliminated only if the Council adopts legislative measures in respect of the problem at issue.

VII — Conclusion

89. In the light of the above, I propose that the Court reply as follows to the questions referred for a preliminary ruling:

Council Decision 89/487/EEC of 28 July 1989 authorising the French Republic to apply a measure derogating from the second subparagraph of Article 17(6) of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes, is unlawful.