OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 20 November 2001 [1]

I — Introduction

1. As a result of the judgment in *Konle*, [2] the Unabhängiger Verwaltungssenat Salzburg (Independent Administrative Chamber, Salzburg) has submitted to the Court a number of cases relating to Austrian procedures for authorising the acquisition of immovable property. [3] The Verwaltungssenat has, in particular, submitted for a preliminary ruling questions on the interpretation of the provisions of the EC Treaty concerning the free movement of capital. The referring court seeks to ascertain whether it is compatible with Community law to require a prior constitutive authorisation of transfer for the acquisition of building land. In my Opinion I shall also assess the domestic legislation at issue in the light of the provisions on the freedom to provide services.

II — Legal framework

2. Under Austrian Law ownership of immovable property is acquired by means of a court-approved entry (acquisition of title) in the land register. In connection with the approval of an entry of property the Grundbuchsgericht (Land Registry Court) is required to consider whether an authorisation of transfer is necessary and, if so, whether this authorisation has been issued or whether ownership may be acquired without an authorisation of transfer. The applicable legislation is to be found both in federal law and in rules laid down by the *Länder*.

3. The present case concerns the compatibility with Community law of the 1997 Grundverkehrsgesetz (Land Transfer Law) of the *Land* of Salzburg. [4]

4. Paragraph 12 of this Law states that legal transactions concerning building plots are permissible only where the acquirer of title submits a declaration. Paragraph 12(3) requires him first to declare that he is an Austrian national or a foreigner taking advantage of one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area. He must

1 — Original language: Dutch.

2 — Judgment in Case C-302/97 *Konle* [1999] ECR I-3099.

3 — For this aspect see also the judgment in Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977.

4 — Gesetz des Landes Salzburg über den Grundstücksverkehr, LGBl. No 11/1999.

further declare his intention to use the land as his principal residence or for professional purposes. He may declare that he intends to use the land for a secondary residence only if the land was used for a secondary residence prior to 1 March 1993 or is located in an area designated for secondary residences.

5. On the basis of the user's declaration the Grundverkehrsbeauftragter (Land Transfer Agent) [5] issues a confirmation. He may refuse to issue the confirmation only if he has good reason to fear that the acquirer will not use the land in accordance with the declaration or that the acquisition is inconsistent with the purpose of the law. In this event he refers the acquirer to the Grundverkehrslandeskommission (Land Transfer Commission of the *Land*), which may approve the transfer, but it too is bound by the substantive criteria governing transfers to which I have referred above (in principle, use of the land for a principal residence or for professional purposes) and which seek to limit the number of secondary residences.

6. Without the confirmation of the Grundverkehrsbeauftragter or the approval of the Grundverkehrslandeskommission no building land may be acquired in the *Land* of Salzburg since, if neither of these documents has been issued, the authorisation required by Austrian law for the transfer of ownership does not exist.

5 — The official responsible for receiving the declaration made by the acquirer of land.

7. Paragraph 19 of the Grundverkehrsgesetz requires the acquirer to use the land in accordance with the declaration which he has submitted pursuant to Paragraph 12 of that Law.

8. Under Paragraph 19 conditions and requirements may also be attached to the approval granted by the Grundverkehrslandeskommission with a view to ensuring that the acquirer uses the land in accordance with his declaration. The acquirer may further be required to lodge a security. The competent authority can set the security at a reasonable sum, which may not exceed the purchase price or value of the land.

9. Under Paragraph 42 of the Grundverkehrsgesetz the Grundverkehrsbeauftragter may take legal action to have a land transaction declared void. The court may declare a land transaction void if it is fictitious or is intended to circumvent the law.

10. Paragraph 43 of the Grundverkehrsgesetz provides for fines of up to ATS 500 000 and imprisonment of not more than six weeks if, for example, the acquirer of land has not applied for authorisation or if he uses acquired land in a way that is not permitted.

11. The relevant Community legislation is to be found in the provisions of the EC Treaty concerning the freedom to provide services and the free movement of capital (Article 49 et seq. EC and Article 56 et seq. EC, respectively).

III — Facts and main proceedings

12. In the first series of joined cases, *Reisch and Others* (C-515/99 and C-527/99 to C-540/99), the applicants in the main proceedings omitted to apply for authorisation to acquire building plots. They were for that reason fined. They are contesting the fines before the Unabhängiger Verwaltungssenat Salzburg.

13. In the second series of joined cases, *Lassacher and Others* (C-519/99 to C-524/99 and C-526/99), some of the applicants did not receive authorisation for the land transaction. The other applicants received authorisation solely on condition that they deposited a security. The applicants are contesting these decisions of the Grundverkehrslandeskommission before the Unabhängiger Verwaltungssenat Salzburg.

14. The Unabhängiger Verwaltungssenat decided, by orders of 22 December 1999, to refer the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

(a) in Case C-515/99 and in Cases C-527/99 to C-540/99:

'Are the provisions of Article 56 et seq. EC to be interpreted as precluding the application of Paragraphs 12, 36 and 43 of the Salzburger Grundverkehrsgesetz 1997 in the version published in LGBl. No 11/99, whereby any person who wishes to acquire a building plot in the federal *Land* of Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedom of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?'

(b) in Cases C-519/99 to C-524/99 and C-526/99:

'Are the provisions of Article 56 et seq. EC to be interpreted as precluding the application of Paragraphs 12 to 14 of the Salzburger Grundverkehrsgesetz 1997 in the version published in LGBl. No 11/99, whereby any person who wishes to acquire a building plot in the federal *Land* of

Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedoms of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?'

15. Two of the applicants, Mr Schäfer (C-519/99) and GWP Gewerbeparkentwicklung GmbH (C-524/99), and the Austrian Government have submitted written observations to the Court. At the Court's sitting on 12 September 2001 the Commission and the Netherlands Government explained their positions orally, focusing on the question whether this is a 'purely internal situation' not governed by Community law.

IV — Structure of this Opinion

16. During the proceedings before the Court considerable attention was paid to an important preliminary question: to what extent do the main proceedings concern a 'purely internal situation', which would mean that the Court was not entitled to answer the questions? All the cases appear, after all, to concern persons resident in Austria wishing to acquire a plot of land in that country. Only in the *Fidelsberger* case (C-523/99) has the applicant given an address in another Member State, namely Germany. In a number of other instances the applicant in the main proceedings is a legal person.

17. In substance the issues in the cases referred to the Court by the Unabhängiger Verwaltungssenat Salzburg are very similar to that raised in the *Konle* case.[6] If the Court is entitled to answer the questions submitted to it, it might therefore confine itself to assessing the aspects distinguishing these questions from those which the Court has in fact already answered in its judgment in *Konle*.

18. This would seem to suggest that the Advocate General too should confine himself to a brief and simple discussion of the questions submitted. The Court's jurisdiction will first be considered. This will be followed — possibly as an alternative argument — by a comparison with the criteria of the judgment in *Konle*.[7]

19. I am of the opinion, however, that these cases warrant a wider discussion. Their substance and context lead me to take this view.

20. It should first be noted that the questions submitted concern domestic legis-

6 — Cited in footnote 2.
7 — Cited in footnote 2.

lation which attaches certain conditions to the acquisition of immovable property in areas attractive to tourists so that — for regional planning and other reasons — the number of secondary residences may be limited. In principle, immovable property may be acquired only if the acquirer plans to use it for his principal residence or for commercial activities. Section V of this Opinion will consider the legislation itself in greater depth.

21. The *Konle* case concerned similar legislation. The Court there ruled that domestic provisions governing the acquisition of the ownership of land should be consistent with the Treaty provisions on the freedom of establishment of nationals of the Member States and on the free movement of capital. [8] It then examined the Austrian legislation at issue solely in terms of the free movement of capital, as referred to in Article 56 EC. I do not consider the Court's decision to examine the compatibility of legislation that has a regional planning objective with the provisions on the free movement of capital to be an obvious choice. Such legislation, after all, touches equally — and even to a greater degree — on other freedoms emanating from the EC Treaty, such as the freedom to provide services, since it seeks primarily to regulate the use of immovable property, not the capital transaction needed to acquire the immovable property. I shall consider below (in section VI) the importance of the free movement of capital — and of other freedoms — in transactions involving immovable property. This is the first, more general, issue which I shall consider in this Opinion.

22. My view that the Austrian legislation cannot be appraised solely on the basis of Article 56 EC is relevant to the second issue, which warrants a wider discussion: the theory of the 'purely internal situation'. In its judgment in *Guimont* [9] the Court recently considered its obligation to reply to a question submitted for a preliminary ruling where all the aspects of the main proceedings were confined to one Member State. From this judgment — which does not, moreover, stand alone — it can be deduced that the Court is reluctant to turn down requests for preliminary rulings simply because the main proceedings lack cross-border elements. I shall consider (in section VII) the extent to which the reasoning in *Guimont*, which concerned the free movement of goods and, more specifically, of cheese, also applies in the case of transactions involving immovable property. In anticipation of this discussion I will state at this juncture that I see no reason for a more restricted view of the Court's tasks.

23. The third and final issue is the proportionality of a domestic measure if it transpires that it may actually or potentially obstruct free movement (and there is therefore no 'purely internal situation'). The

8 — Cited in footnote 2, paragraph 22 of the judgment.

9 — Judgment in Case C-448/98 [2000] ECR I-10663, paragraph 21 et seq. Advocate General Saggio concluded in this case that the question submitted did not require an answer as the case was purely internal.

question then is in particular what kind of obstruction can be deemed acceptable in the case of transactions relating to immovable property. Immovable property is usually acquired with the aim of retaining possession for some considerable time. Formalities preceding the acquisition of immovable property, unlike that of movable property — I refer to the example of the judgment in *Guimont* [10] concerning cheese —, do not necessarily form a more serious obstruction than subsequent checks (for further comments see section VIII).

24. On the basis of the discussion of these three general issues I shall arrive at the answers to the questions referred to the Court.

V — Content and purpose of the Salzburger Grundverkehrsgesetz of 1997

25. The Salzburger Grundverkehrsgesetz of 1997 seeks, within the framework of regional planning policy, to prevent tourist activities from becoming dominant in certain regions. In its judgment in *Konle* the Court refers in this context to 'a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions.' [11] I would add that the protection of nature or of fragile landscapes may also be an obvious goal for regional planning.

26. To this end, the Grundverkehrsgesetz provides for rules requiring the number of secondary residences in the *Land* of Salzburg to be limited. It introduces both a notification and authorisation procedure before immovable property is acquired and a system of subsequent supervision and sanctions. In other words, it governs the use of immovable property for secondary residences. The point of departure for the legislature is the acquisition of immovable property.

27. The legislation is aimed at a certain market, namely the potential acquirers of secondary residences. These may be private individuals or undertakings such as commercial operators of holiday homes or property developers. By way of example, the applicants in the main proceedings include legal persons as well as private individuals.

28. This market is certainly not a local market. Secondary residences are not as a rule located at the acquirers' normal places of residence. The acquisition of a secondary residence is specifically attractive outside one's own region and often outside one's

10 — Cited in footnote 9.

11 — Cited in footnote 2, paragraph 40.

own Member State. This is undoubtedly true of areas attractive to tourists, of which there are many in the *Land* of Salzburg. The Grundverkehrsgesetz takes express account of the possibility of foreigners wishing to acquire a secondary residence. Paragraph 12 refers explicitly to the nationality of the acquirer: he must be an Austrian or a national of another Member State or of another country belonging to the European Economic Area. I attach no importance in this context to the fact that the applicants in the main proceedings are (almost) all resident in Austria. In my view, this is a coincidence. Moreover, the legislation of the *Land* of Salzburg here under discussion may well deter foreigners from acquiring building plots in this *Land*.

29. I have thus briefly indicated the purpose and content of the legislation and the market to which it relates.

30. Such legislation has an effect on the exercise of various economic activities of relevance to Community law, depending on the way in which immovable property is used for purposes of non-permanent residence.

31. A private individual acquiring a secondary residence may do so, firstly, with the aim of occupying it himself for part of the year. Activities relating to the free movement of persons will then be in issue: (the right of) residence in another Member State. Although secondary residences are usually occupied for only a limited period of the year, such occupancy none the less has something permanent about it. Furthermore, the occupancy of a secondary residence is relevant to the freedom to provide services. I refer in this context to the judgment in *Luisi and Carbone*,[12] in which the freedom to provide services was also deemed applicable to those for whom a service is provided. The use of a secondary residence is bound to be accompanied by services provided for its private owner, for example, services connected with the residence itself, such as repairs, and services relating to tourist activities.[13] Secondly, the private individual may not himself use the secondary residence he has acquired, but let it to others. He can then be regarded as a provider of services within the meaning of Article 50 EC. In a third, very common variant the secondary residence is intended for the owner's use for part of the year and is otherwise let to others. Fourthly, the immovable property may be acquired primarily as an investment or for speculative reasons. In such cases the emphasis is not on its use as a secondary residence but on the expected increase in the value of the land. The free movement of capital is then at issue.

32. Land may also be acquired for professional purposes. Its use by the acquirer

12 — Judgment in Joined Cases 286/82 and 26/83 [1984] ECR 377, paragraph 10 et seq.

13 — The judgment in *Luisi and Carbone* refers explicitly to tourism as an activity relevant to the freedom to provide services.

himself does not then, in principle, play any role. He will normally use the land to let secondary residences, in holiday parks, for example. The lessor, who will frequently offer a number of other (tourist) services besides residences to rent, can then be regarded as a provider of services. The main aim in acquisition for professional purposes may again be investment or speculation. The land is then acquired less with a view to its use for a secondary residence.

33. Finally, I would point out that the Salzburger Grundverkehrsgesetz of 1997 concerns the acquisition both of land on which buildings have already been constructed and of land where this is not yet the case. If no buildings are standing on the land at the time of acquisition, an acquirer wanting to be able to use it for a secondary residence will, of course, have to build on it. An acquirer who has a residence built on his land can be regarded as the person for whom a service is provided.

34. So much for the outline of the most common economic activities affected by the Salzburger Grundverkehrsgesetz of 1997. At this juncture I shall revert to the essential purpose of the legislation, namely the regulation of the use of immovable property for secondary residences. The main point is the way in which the land is used, whether by the acquirer himself or by a third party. This Opinion also focuses on the economic activities directly associated with that use of the land. Investment, or speculation in land, may be the acquirer's purpose, but these are not activities that the Salzburger Grundverkehrsgesetz seeks to address.

35. Finally, regardless of how land is used, the legislation in all cases affects the free movement of payments and capital. It concerns payment and capital transactions connected with the financing of the acquisition. In this context it affects both the actual investment in immovable property and the financing of that investment. I would point out that these effects are not intended by the legislation, but they none the less occur.

VI — The free movement of capital and the other freedoms emanating from the EC Treaty

36. This section of my Opinion deals with the first, general issue which is important for the assessment of the cases in question (see point 21 of this Opinion). I require this — detailed — discussion as the basis for the positions I adopt in section VII of this Opinion on what may be the purely internal nature of the proceedings here at issue.

37. The court requesting the preliminary ruling asks in these cases that the domestic

Austrian legislation be considered in the context of the free movement of capital, not the other freedoms emanating from the EC Treaty. I assume that that court bases this choice on the judgment in *Konle*. [14]

38. Having regard to this question, I shall discuss at some length the substance and evolution of the free movement of capital to the extent to which that it is relevant to the present cases. I shall then consider other freedoms under the EC Treaty, paying particular attention, given the nature of the Salzburger Grundverkehrsgesetz of 1997, to the freedom to provide services. This will lead to an assessment of how the acceptability of transactions in immovable property, which are at issue here, can best be gauged.

The substance of the free movement of capital

39. The substance of the free movement of capital has been defined in the judgment in *Luisi and Carbone*. [15] According to the Court, 'movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service.'

40. Neither Article 56 EC nor any other provision of the EC Treaty gives a more precise indication of what is meant by movements of capital. For these reasons the Court often reverts to Annex I to Directive 88/361/EEC, [16] which includes a nomenclature of capital movements. However, this directive dates from the time before the insertion — under the Maastricht Treaty — of the present Article 56 EC into the Treaty and is therefore, strictly speaking, no longer valid.

41. In its judgment in *Trummer and Mayer*, [17] the Court states on this subject: 'However, inasmuch as Article 73b of the EC Treaty [18] substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.'

42. The nomenclature in the annex to that directive is thus indicative in nature, but it is not exhaustive. For the cases here at issue Part II of the nomenclature concerning

14 — Cited in footnote 2.

15 — Cited in footnote 12, paragraph 21.

16 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

17 — Judgment in Case C-222/97 [1999] ECR I-1661, paragraph 21.

18 — Now Article 56 EC.

investments in real estate is particularly important. According to Directive 88/361, the free movement of capital concerns investments in real estate on national territory by non-residents and investments in real estate abroad by residents. I would also refer in this context to the seventh recital in the preamble to that directive, which reads as follows: '... the full liberalisation of capital movements could in some Member States, and especially in border areas, contribute to difficulties in the market for secondary residences;... existing national legislation regulating these purchases should not be affected by the entry into effect of this Directive'.

43. It does not follow from the annex that every acquisition of immovable property is governed by the free movement of capital, but it does follow that an investment in, or speculation with, immovable property may come under the free movement of capital. What is decisive is the activity to which domestic legislation relates. Is it the acquisition of immovable property with the aim of using it in a given way, or is it the investment? In point 26 of this Opinion I stated that the Salzburger Grundverkehrsgesetz of 1997 focuses on the use made of immovable property.

44. Article 56 EC essentially prohibits two types of national measure that restrict the movement of capital. These are, firstly, measures that may obstruct residents of the Member State concerned wishing to make investments or effect other financial transactions in another Member State and, secondly, measures that may obstruct residents of other Member States wanting to make investments or effect other financial transactions in the Member State concerned. To quote from the judgment in *Commission* v *Belgium*: [19] 'Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision..., [20] as do measures which make a direct foreign investment subject to prior authorisation....' [21]

45. At issue in the cases here under discussion is a national measure that places a prior obstacle in the way of a direct (foreign) investment in the territory of the Member State.

The evolution of the free movement of capital

46. The free movement of capital has grown significantly in importance since

19 — Judgment in Case C-478/98 [2000] ECR I-7587, paragraph 18.

20 — The Court refers here to the judgments in Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10, *Trummer and Mayer* (cited in footnote 17, paragraph 26), and Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19.

21 — The Court refers here to the judgments in Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 24 and 25, and Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 14.

the establishment of the European Economic Community. In the first phase, which lasted in general terms until the adoption of Directive 88/361 — a directive that was to have been implemented in the Member States by 1 July 1990 — the Treaty contained a provision on the free movement of capital, although it lacked any direct impact. The original signatories of the Treaty did not think the time was ripe for the complete liberalisation of capital movements. The Member States were to retain the power to control capital transactions. The secondary legislation in this field was also limited. Thus, Council Directive 72/156/EEC of 21 March 1972 on regulating international capital flows and neutralising their undesirable effects on domestic liquidity [22] provided for coordinating measures in relation to exceptionally large capital movements.

47. The Member States' powers with respect to cross-border capital transactions were necessary in regard to monetary policy, which was similarly pursued at Member State level until the Treaty of Maastricht came into effect. Influencing the exchange value and quantity of national currency is scarcely conceivable unless control can be exercised over incoming and outgoing capital flows. Article 105 of the old EEC Treaty therefore provided for no more than the coordination of Member States' monetary policies.

48. A major step towards the liberalisation of capital movements was taken with the adoption of Directive 88/361. In this second phase the Member States were required to lift the restrictions on the intra-Community movement of capital. The Directive must be seen in the context of the completion of the internal market at the end of 1992. The internal market, according to the then Article 7a of the EEC Treaty, [23] comprises an area without internal frontiers in which, among other things, the free movement of capital is ensured.

49. The entry into force of the Maastricht Treaty marked the beginning of the third phase. The directly applicable Article 56 was included in the EC Treaty. The free movement of capital became — compared with the other freedoms defined in the EC Treaty — a full freedom. This completely free movement of capital was a precondition for the establishment of Economic and Monetary Union.

50. I regard the completion of Economic and Monetary Union as the fourth phase. There is freedom to effect capital transactions. National legislation that attaches conditions to the movement of capital between Member States is no longer permitted.

51. Within the completed Economic and Monetary Union, or at least within the

22 — OJ, English Special Edition 1972 (I), p. 296.

23 — As introduced by the Single European Act.

Euro Zone, public-law restrictions on capital transactions are no longer conceivable. A single money and capital market has emerged. Under Article 105 EC monetary policy has been removed from the Member States' responsibility and is now pursued at the level of the Union. Within this framework legislation on capital flows — in part as a result of the establishment of the European Central Bank — is necessarily adopted and supervised at Community level.

52. By this I do not mean that the movement of capital is completely free in practice. As an example I refer to the obstruction of free movement that was at issue in the *Svensson and Gustavsson* case.[24] The Court ruled that a requirement in Luxembourg law that a loan for the financing of the construction, purchase or improvement of housing be obtained from a credit institution approved in that Member State was incompatible with Community law. However, there is still much private-law legislation that requires financing by a credit institution in the same Member State. While legislation of this kind may infringe competition law, it is of no relevance to the cases here under discussion.

53. Furthermore, while public-law obstacles to the movement of capital may have been removed, the activities of operators on the capital market are still subject to national legislation.

54. The activities of individual financial institutions, for example, are supervised at national level. In addition, national legislation governing financial markets results from the interest in maintaining public order in the areas of, say, insider dealing in shares and money-laundering. The Member States are also permitted to maintain domestic tax legislation. Article 58 EC leaves the Member States scope for this. Paragraph 3 of this article emphasises that such measures 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments'.

55. The Salzburger Grundverkehrsgesetz of 1997 must also be considered in this light. It must not constitute a direct obstruction to the cross-border movement of capital in the Economic and Monetary Union. It may, on the other hand, impose conditions on anyone wanting to invest capital in immovable property in Austria. Such conditions have, by their nature, cross-border effects, now that there is no longer a national capital market.

24 — Cited in footnote 20.

The other freedoms

56. I now turn to the free movement of persons, of which I will consider the freedom to provide services to be part in this context. In its judgment in *Commission* v *Greece*[25] the Court ruled that the right to acquire, use and dispose of immovable property on the territory of another Member State is the corollary of the freedom of movement. In other words, this right makes an essential contribution to the actual achievement of the free movement of persons within the European Union.

57. In its judgment in *Konle*[26] the Court refers to the freedom of establishment of nationals of the Member States. The description of the Salzburger Grundverkehrsgesetz of 1997 in section V of this Opinion leads me to believe that in this instance the freedom to provide services is of primary importance. I recall that the use of a secondary residence by the owner himself is often accompanied by the provision of services for him and that since the judgment in *Luisi and Carbone*[27] it has been clear that the freedom to provide services includes the freedom of the person for whom services are provided. In addition, the owner of the residence, who may or may not let it within the framework of professional activities, is himself a provider of services.

58. I would also refer to the following. As I explained in my Opinion in the *Baumbast* case,[28] the rules in the EC Treaty governing the free movement of persons primarily concern travel to and residence in another Member State for the purpose of undertaking an economic activity. With regard to the provisions of the Salzburger Grundverkehrsgesetz of 1997 this means, among other things, that, although they are not directed primarily at persons wishing to undertake an economic activity related to work in Austria, a Member State, they do concern the exercise of economic activities. In my Opinion in *Baumbast* I also indicated that the importance and scope of the free movement of persons have grown appreciably over the years. This is certainly true of the period since the adoption of the Maastricht Treaty, when a generally worded right of movement and residence for the citizens of the Union was included in the EC Treaty (Article 18 EC). The possible direct effect of Article 18 EC will not be discussed further, but the increasingly broad interpretation of the right to move and reside within the European Union means that this right may also embrace the occupancy of a secondary residence.

Concurrence of the free movement of capital and the freedom to provide services

59. Since the judgment in *Svensson and Gustavsson*[29] it has been clear that the free

25 — Judgment in Case 305/87 [1989] ECR 1461, paragraph 18 et seq.

26 — Cited in footnote 2.

27 — See point 31 of this Opinion.

28 — Opinion in Case C-413/99 [2002] ECR I-7091, paragraph 28 et seq.

29 — Cited in footnote 20.

movement of capital and one of the other freedoms, in this instance the freedom of establishment, may be applicable at the same time. In that judgment the Court ruled that national (Luxembourg) legislation was inconsistent with both freedoms. In subsequent judgments, however, the Court has dismissed national legislation for infringing either the free movement of capital or one of the other freedoms and remained silent on the question of whether a 'double infringement' has been committed.

60. This was the Court's approach, for example, in its judgment in *Safir*.[30] This case concerned Swedish legislation on the taxation of capital life assurance premiums. The court requesting the preliminary ruling had asked whether this legislation was compatible with both the provisions on the freedom to provide services and the provisions on the movement of capital. The Court focused on the freedom to provide services, since 'insurance is deemed to be a service within the meaning of Article 50 EC', and did not consider the free movement of capital.[31]

61. In its judgment in *Konle*[32] the Court also assumed that two of the freedoms emanating from the Treaty were applicable, that is to say, the freedom of establishment as well as the free movement of capital. Then — without further explanation — it compared the legislation only with the rules on the free movement of capital. In his Opinion in this case Advocate General La Pergola stated that, as inconsistency with the freedom of establishment was at issue, he would not discuss the free movement of capital.

62. In his Opinion in *Baars*,[33] Advocate General Alber formulated the following rules for cases where the free movement of capital and freedom of establishment are both in issue:

'1. Where the free movement of capital is directly restricted such that only an indirect obstacle to establishment is created, only the rules on capital movements apply.

2. Where the right of establishment is directly restricted such that the ensuing obstacle to establishment leads indirectly to a reduction of capital flows between Member States, only the rules on the right of establishment apply.

...

30 — Judgment in Case C-118/96 [1998] ECR I-1897.

31 — See also the similar judgment in this respect in Case C-410/96 *Ambry* [1998] ECR I-7875.

32 — Cited in footnote 2.

33 — Opinion in Case C-251/98 [2000] ECR I-2787.

3. Where there is direct intervention affecting both the free movement of capital and the right of establishment, both fundamental freedoms apply, and the national measure must satisfy the requirements of both.'

63. These rules apply equally, in my view, where there is concurrence of the free movement of capital and the freedom to provide services. The decisive question is therefore: is there a 'direct intervention?' This criterion must be applied on the basis of the nature and substance of the national legislation at issue.

64. In his Opinion in *Safir*[34] Advocate General Tesauro indicates what the application of this criterion might lead to: 'if the measure at issue directly restricts the transfer of capital, rendering it impossible or more difficult, for example by subjecting it to mandatory authorisation or in any event by imposing currency restrictions, Article 73b et seq. of the Treaty [now Article 56 et seq.] will apply; if, conversely, it only indirectly restricts movement of capital and primarily constitutes a non-monetary restriction on the freedom to provide services, then Article 59 et seq. of the Treaty [now Article 49 et seq.] will apply.'

65. The judgment in *Safir*, which followed this Opinion, makes no reference to this method of application. None the less, I believe that Advocate General Tesauro gives an appropriate explanation of the criterion of 'direct intervention'. The line he proposes forms a good point of departure for the assessment of the cases here at issue.

66. I would add that the authors of the Treaty also allowed for the possibility of both the freedom to provide services and the free movement of capital being applicable. Article 50 EC stipulates that the provisions concerning the freedom to provide services apply only 'in so far as the services are not governed by the provisions relating to freedom of movement for goods, capital and persons'. By including this sentence, the authors of the Treaty classified the freedom to provide services as a residual category.[35] In practice, however, this sentence has not been very significant. It should be remembered that it was included in the original EEC Treaty in 1957, at a time when the cross-border provision of services was still limited in scale. Over the years, however, the freedom to provide services has become increasingly important and has played, and continues to play, an essential role in European integration. There is therefore no question of its being possible to deduce a 'hierarchy' of

34 — Opinion in *Safir* (cited in footnote 30), point 17.

35 — Advocate General Tesauro refers in his Opinion in *Safir* to the residual value of the provisions on the freedom to provide services, to which the Court wrongly, in his view, paid no attention (point 15 of the Opinion).

freedoms from the sentence quoted above.[36] This is also evident from the solutions chosen by the Court in cases of concurrence in the judgments in *Svensson and Gustavsson* and *Safir,*[37] for example.

Concurrence in the case of transactions involving immovable property

67. Advocate General Alber applied the criterion of a 'direct intervention' — on the basis of the *Konle* case[38] — to the acquisition of immovable property. He stated that in the case at issue there had been a direct restriction of the right of establishment. He then concluded that 'the purchase of land always represents an investment of capital, and is accordingly, whatever its purpose, protected by the rules on capital movements.'

68. At this juncture I would like to shift the emphasis.

69. It should be remembered that the Austrian legislation at issue in the present cases seeks to regulate, in the context of regional planning, the use of immovable property as secondary residences. To this end, it chooses the acquisition of immovable property as its point of departure. It does not, however, address the investment of capital in immovable property. Nor does it address the transfer of capital from one Member State to another. Anyone, whether an Austrian national or a national of another Member State or another country belonging to the European Economic Area, may, according to the legislation, invest capital in immovable property in the *Land* of Salzburg. The only restriction is that the immovable property may not be used for a secondary residence.

70. The acquisition of immovable property involves, by definition, a capital transaction. This capital transaction is used to pay for the immovable property or is linked — as in the case of a mortgage — to the financing of the transaction. Moreover, the acquisition of immovable property, and of other capital goods, differs from the acquisition of consumer goods. The acquisition of immovable property and of other capital goods always has an element of investment. After its acquisition, the property forms part of the acquirer's assets.

71. The capital transaction is not, however, the main element: it is, as it were, secondary. In the words of Advocate General Tesauro:[39] the restriction of the movement of capital is only indirect, and the measure

36 — The equality of the various freedoms is also apparent from the Court's case-law on 'double infringement'. See the judgments in *Safir* (cited in footnote 30) and *Ambry* (cited in footnote 31).

37 — Cited in footnotes 20 and 30, respectively.

38 — Cited in footnote 2.

39 — See point 64 of this Opinion.

primarily constitutes a non-monetary restriction on the freedom to provide services.

72. The capital transaction can be assessed in much the same way as any other payment made in consideration for a service provided. I refer to the judgment in *Luisi and Carbone*,[40] in which the Court drew a distinction between current payments and the movement of capital: '... current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service.... Consequently, payments in connection with tourism or travel for the purposes of business, education or medical treatment cannot be classified as movements of capital....' This judgment was, moreover, delivered under the old rules governing the movement of capital and payments, which were amended by the Maastricht Treaty, but this does not detract from its scope.

73. I assume that here too the capital transaction is to be regarded primarily as remuneration for a service. Admittedly, the capital transaction underlying the acquisition of immovable property is more complex than that involved in the acquisition of movable goods. Firstly, the acquisition of immovable property is often financed externally, and a mortgage is raised for the purpose. Secondly, and more importantly in this context, the acquisition of immovable property therefore always includes an element of investment. However, this does not in itself mean that the emphasis is placed on the free movement of capital. After all, as I have already stated, the provisions of the Salzburger Grundverkehrsgesetz of 1997 do not seek to regulate capital transactions — investment in immovable property — but are aimed at economic activities to which the freedom to provide services applies. There is no more than an indirect relationship with the free movement of capital.

74. In these circumstances it would be wrong for the Court's decision in the *Konle* case[41] to focus solely on the free movement of capital to be followed in the present cases also: the freedom to provide services is primarily at issue here.

VII — The purely internal situation

Observations submitted

75. Both the Netherlands Government and the Commission have submitted observa-

40 — Cited in footnote 12, paragraphs 21 to 23.

41 — Cited in footnote 2.

tions on the question of whether the proceedings are purely internal in nature. The Netherlands Government refers to the Court's case-law concerning the free movement of goods and persons, from which it follows that it is for the national courts to decide whether or not to submit questions for a preliminary ruling. The Court will reject a request from a national court only if the national proceedings have no connection whatsoever with Community law. There is no reason to apply other criteria in the case of the free movement of capital — the subject in which the requesting court in the present cases is interested. This does not alter the fact that Article 56 EC applies only to situations which have a cross-border element. The Commission asks the basic question whether this case-law, which restricts the applicability of Community law, is compatible with the internal market. It concludes that the cases here under discussion are unsuitable for an answer to this question. In its view, the obligation to consider questions submitted for a preliminary ruling is very wide-ranging. According to the Commission's interpretation of the Court's case-law, an answer is to be provided if a connection with Community law cannot be excluded. [42] In the context of the cases here under discussion the Commission refers to a judgment of the Austrian Constitutional Court of 26 February 1999 which prohibits discrimination against Austrian nationals.

76. The applicant in the main proceedings in the *GWP Gewerbeparkentwicklung GmbH* case (C-524/99) goes one step further: it claims that the action has no connection with European law and that the relevant provisions of the EC Treaty have already been clarified in the judgment in *Konle*. [43] The conditions governing the submission of questions for a preliminary ruling have therefore not been satisfied.

General framework

77. The Court has frequently considered the possibility of questions submitted for a preliminary ruling being purely internal. Before taking a closer look at the Court's decisions on various aspects of Community law, I shall briefly outline the framework within which this issue should be placed.

78. According to settled case-law, it is for the national court to decide whether it considers it appropriate for a request for a preliminary ruling to be submitted to the Court of Justice. [44] The latter is obliged to reply unless it is quite obvious that the interpretation of Community law sought by the national court bears no relation to the actual facts of the action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or

42 — The Commission refers primarily to the judgment in *Guimont* (cited in footnote 9), which is also discussed in depth in the following.

43 — Cited in footnote 2.

44 — With due regard, of course, for Article 234 EC.

legal material necessary to give a useful answer to the questions submitted to it.[45]

79. Again according to settled case-law, the Treaty provisions concerning free movement (of persons and goods) do not apply to activities all of the relevant aspects of which are confined to one Member State. The Court regards these as being purely internal affairs of a Member State because of the absence of any connection with situations governed by Community law.[46]

80. The two — in principle, separate — sets of decisions of the Court define the framework within which the following comments should be read. The main question is this: is it the facts in the main proceedings that determine whether the Court must answer the questions referred to it for a preliminary ruling, or is it the nature and substance of the national measure?

81. If it is the facts in the main proceedings that are decisive, the Court clearly will not answer the question where the main proceedings have no cross-border elements. This appears to be true of the cases at issue, in which Austrian nationals wish to acquire a plot of land in Austria and are impeded in this by internal Austrian legislation.

82. If it is the substance of the national measure that is decisive, the Court should consider how far the national legislation may have an external effect. Only if there is no — potential — external effect should the Court refrain from answering the question referred to it. The next step — if the Court is entitled to give an answer — is to assess the substance of the disputed national legislation. A question that may arise at this stage is whether an individual may also assert claims against his own Member State under Community law. It is ultimately for the — national — court involved in the main proceedings to rule on an applicant's claims in the case concerned. It does so — as far as possible — with due regard for the answer it receives from the Court to the question submitted for a preliminary ruling.

The Court's case-law on the free movement of goods

83. In its judgment in *Guimont*[47] the Court recently considered its obligation to

45 — *Inter alia*, the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61.

46 — See, for example, the judgment in Case C-60/91 *Batista Morais* [1992] ECR I-2085, paragraphs 7 and 9.

47 — Cited in footnote 9, paragraph 21 et seq. Advocate General Saggio concluded in this case that the question submitted did not need to be answered in view of the purely internal nature of the issue concerned.

answer a question submitted for a preliminary ruling where all the elements of the main proceedings are confined to one Member State. In this judgment the Court gives the following — broad — interpretation with regard to Article 28 EC, which concerns the free movement of goods.

'21 As for a rule such as that at issue in the main proceedings, which, according to its wording, applies without distinction to national and imported products and is designed to impose certain production conditions on producers in order to permit them to market their products under a certain designation, it is clear from the Court's case-law that such a rule falls under Article 30 of the Treaty only in so far as it applies to situations that are linked to the importation of goods in intra-Community trade...

22 However, that finding does not mean that there is no need to reply to the question referred to the Court for a preliminary ruling in this case....

23 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the national court. Such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.'

This reasoning led the Court to answer the question referred to it in that case.

84. The judgment in *Guimont* is based on earlier case-law, including the judgment in *Pistre and Others*,[48] in which the Court argued as follows:

'... whilst the application of a national measure having no actual link to the... importation of goods does not fall within the ambit of Article 30 of the Treaty... , Article 30 cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State.

48 — Judgment in Joined Cases C-321/94 to C-324/94 [1997] ECR I-2343, particularly paragraphs 44 and 45. Advocate General Jacobs had, moreover, proposed in this case that the question concerning Article 30 should not be answered, given the purely internal nature of the facts.

... In such a situation, the application of the national measure may also have effects on the free movement of goods between Member States, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods.'

85. In its judgment in *Smanor* [49] the Court had already given a broad interpretation. That case concerned the application of French law to a French company manufacturing and marketing deep-frozen yoghurt in France. The Court felt, however, that the possibility of such products being imported into France and of the French legislation being applicable to them could not be ruled out. The Court stated: 'As to whether Smanor may validly plead before the national court a barrier to imports of deep-frozen yoghurt created by the French regulations, it should be pointed out that the Court has consistently held that it is for the national courts, within the system established by Article 177 of the Treaty, to weigh the relevance of the questions which they refer to the Court, in the light of the facts of the cases before them.' The Court therefore addressed the question concerning Article 30 of the EC Treaty (now Article 28 EC).

49 — Judgment in Case 298/87 [1988] ECR 4489, paragraphs 8 and 9.

86. In his Opinion in the *Pistre* case, Advocate General Jacobs does not agree with this broad interpretation by the Court. He outlines a clear alternative: 'It seems that the Court has tended to decline to address questions relating to Article 30 on the grounds that a situation is purely internal only where the domestic provision concerns domestic products exclusively and would have no application in any circumstances to imported products.... In my view, however, the Court should decline to rule on the application of Article 30 to imports when it is clear from the facts that a situation is wholly confined to national territory.' [50] The same line was taken by Advocate General Saggio in the *Guimont* case. [51] In his view there was no need for the Court to answer the question in that case since it was clear that the facts in the main proceedings were of a purely internal nature.

87. From these three judgments I deduce that, in the area of the free movement of goods, the Court did not agree with the Advocate General and was not prepared to refuse to answer a question submitted for a preliminary ruling simply on the ground that the main proceedings lacked a cross-border element. In fact, in its judgment in *Guimont* [52] the Court defined a criterion which may result in an interpretation of Community law being given even in purely internal disputes. The possible presence in the national legal system of a prohibition of reverse discrimination — a Member State's discrimination against its own

50 — Opinion in *Pistre* (cited in footnote 48), paragraphs 37 and 38.

51 — In his Opinion of 9 March 2000 in the *Guimont* Case (cited in footnote 9) he also advocates that a substantive answer should not be given to the question submitted for a preliminary ruling.

52 — Cited in footnote 9.

nationals as compared to nationals of other countries — may in itself be sufficient for a reply to be given to a question submitted for a preliminary ruling. Where national law prohibits reverse discrimination, a national court will, after all, need an interpretation of the claims that nationals of other Member States are entitled to assert under Community law if it is to be able to determine whether the case before it involves reverse discrimination.

88. In other words, it is the nature and substance of the national measure that determine whether the Court answers questions referred to it for a preliminary ruling, not the facts in the main proceedings.

The free movement of workers, the freedom of establishment and the freedom to provide services

89. The Court has also considered the purely internal nature of questions submitted for a preliminary ruling in the context of the free movement of workers, the freedom of establishment and the freedom to provide services. It appears to adopt a different position in this context.

90. In a number of cases the Court has ruled that Community law does not apply to disputes in which all of the facts occur within a single Member State. In these cases it did not provide substantive answers to the questions referred to it by the respective national courts. To quote from the judgment in *USSL n° 47 di Biella*: [53] 'According to settled case-law, Articles 48, 52 and 59 of the Treaty cannot be applied to activities which are confined in all respects within a single Member State.' This case concerned a service organisation which had its registered office in Italy and provided services for a government body similarly established in Italy.

91. A good illustration of the Court's approach can be found in its judgment in *Batista Morais*. [54] The main action concerned a Portuguese national employed in Portugal as a driving-school instructor. It would thus seem that the Court does share the view of Advocates General Jacobs and Saggio in cases that concern the free movement of workers, the freedom of establishment and the freedom to provide services.

92. It is noticeable that the Court considered the question referred to it, but did not then give a substantive answer since all the facts in the main proceedings were confined to the territory of one Member State.

93. A further inference to be drawn from the Court's case-law in the context of these

53 — Judgment in Case C-134/95 [1997] ECR I-195, paragraph 19. See also, *inter alia*, the judgments in Joined Cases C-29/94 to C-35/94 *Aubertin and Others* [1995] ECR I-301, paragraph 9, on the freedom to provide services, and in Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537, on the freedom of establishment.

54 — Cited in footnote 46.

freedoms is that it is quick to recognise a cross-border element bringing a case within the ambit of Community law. I refer in this regard to a number of cases in which a national claimed before a court of his own Member State that Community law was applicable because national legislation did not recognise the diplomas or professional experience which he had acquired in another Member State. [55]

94. I would also refer to the judgment in *Angonese*, [56] a case in which an Italian national had objected to Italian rules on admission to a certain recruitment competition. The Court ruled: 'Whether or not the reasoning of the order for a reference... is well founded, it is far from clear that the interpretation of Community law it seeks has no relation to the actual facts of the case or to the subject-matter of the main action.' The Court did not find it necessary in that case to base its obligation to reply on the — unmistakable — existence of a cross-border element in the main proceedings: the complaint concerned the non-recognition of linguistic proficiency acquired abroad.

Synthesis

95. The following line of argument might be derived from the above discussion of the case-law. Where the free movement of goods is at issue, it is the nature and substance of the national measure that determine whether the Court must answer questions referred to it for a preliminary ruling, whereas it is the facts in the main proceedings that are decisive in the case of the freedom (*inter alia*) to provide services. As the Salzburger Grundverkehrsgesetz of 1997 concerns the freedom to provide services, the facts in the main proceedings must be considered. Assuming that there are no cross-border elements, [57] the Court might decide not to answer the questions referred to it or to give a general answer as in its judgment in *USSL n° 47 di Biella*. [58]

96. It is my view that the Court should not pursue this line of argument, but should seek to follow on from its judgment in *Guimont* concerning the free movement of goods. [59] I base this view on the following considerations.

97. First, the judgment in *Guimont* is the only very recent judgment in which the Court has had to dwell at length on the question of a purely internal situation.

98. Second, I refer to the clear grounds of the judgment in *Guimont*, in which a close

55 — See, for example, the judgments in Case 115/78 *Knoors* [1979] ECR 399 and Case 246/80 *Broekmeulen* [1981] ECR 2311.

56 — Judgment in Case C-281/98 [2000] ECR I-4139.

57 — In this context I overlook the fact that one of the applicants in the main proceedings has given an address in Germany.

58 — Cited in footnote 53.

59 — Cited in footnote 9.

link is also forged with the Court's settled case-law [60] stating that it is principally for national courts alone to decide whether Community law needs to be interpreted in a national dispute.

99. Third, there is no reason for a difference of approach as between the free movement of goods and the freedom to provide services. Just like the movement of goods, the provision of services has become extensively cross-border in nature.

100. It is my view, in the fourth place, that the internal nature of cases such as the present is not very significant. It is mere coincidence that all of the parties in the cases referred to the Court are resident in the Member State of Austria. What is at issue here, after all, is investment in land in tourist areas. In such areas individuals or organisations from other Member States will often be similarly interested in acquiring immovable property in general. These cases also concern secondary residences, which are not, as a general rule, located at the acquirer's normal place of residence. This is the precise reason for the Austrian legislation here under discussion, which seeks to prevent the construction and use of secondary residences.

60 — See also, for example, the judgment in Case C-130/95 *Giloy* [1997] ECR I-4295, paragraph 20 et seq.

101. These factors lead me to conclude that the Court must answer the questions referred to it in the cases at issue. I attach no importance in this regard to the possibility that all the parties in the main proceedings are resident in Austria. The determining factor is that the nature and substance of the Salzburger Grundverkehrsgesetz of 1997 are such that it may have an external effect and may therefore, actually or potentially, obstruct free movement. It is, after all, common ground that the legislation imposes restrictions on the acquisition of immovable property.

Alternative submission: the free movement of capital

102. Even if the Court should examine the Salzburger Grundverkehrsgesetz in the light of the provisions concerning the free movement of capital, it is my view that it should answer the questions referred to it.

103. The Court has not hitherto needed to consider the purely internal situation in the context of the movement of capital. As I see it, what is most important in this context is the following.

104. The unity of the capital market that has emerged within the completed Economic and Monetary Union means that a purely internal situation can no longer be said to exist in respect of the free movement of capital. There are always cross-border effects, even though national legislation may in fact concern only operators acting within one Member State, which is not, moreover, true in the present case.

105. I consider this unity to be similar to that which has existed for a longer time in the Community customs area. In this connection the Court stated in its judgment in *Lancry and Others* that 'since the very principle of a customs union covers all trade in goods, as provided for by Article 9 of the Treaty [now Article 23 EC], it requires the free movement of goods generally, as opposed to inter-State trade alone, to be ensured within the Union.' [61]

106. I would also refer to the following. The presence of cross-border elements inevitably results from the factual and the legal context of these cases, which concern transactions in immovable property. In this regard I draw a distinction between two elements in the movement of capital, both of which may play a part in the cases here under discussion. The first is the actual investment that is made in immovable property. The second element of which the movement of capital consists is the financing of that investment.

107. The actual investment may well be made by an Austrian resident in relation to land located in Austria. There may then be said to be an internal situation, which may, furthermore, not fall within the scope of Article 56 EC, at least if the nomenclature in Annex I to Directive 88/361, which is meant to be indicative, is taken literally. However, the legislation at issue, which seeks to counter the use of secondary residences in tourist areas, is not aimed at internal situations. What I have said about this in the context of the freedom to provide services (see point 100 of this Opinion) applies here without qualification.

108. The second element of which the movement of capital consists is, as I have said, the financing of the investment. An investment in immovable property is often financed externally, by means of a mortgage, for example. I refer in this connection to the judgment in *Trummer and Mayer*, [62] in which the Court stated that the financing of an investment, such as a mortgage, comes within the scope of Article 56 EC

61 — Judgment in Joined Cases C-363/94 and C-407/94 to C-411/94 [1994] ECR I-3957, paragraph 29.

62 — Cited in footnote 17, paragraphs 24 to 26.

if it is inseparably linked to a movement of capital.

109. Where financing is concerned, the internal nature of a transaction cannot be of conclusive relevance to the Court's treatment of a question submitted for a preliminary ruling. Even if all the mortgages in the cases here under discussion were taken out by Austrian residents at Austrian banks, it would still not be certain that the transactions might not have some impact on the intra-Community movement of capital. After all, even an Austrian bank will not be operating solely in the Austrian capital market.

110. I do not, moreover, consider it to be the Court's task to determine where the acquirers of building land take out, or have taken out, mortgages. Nor is it the Court's task to examine the capital market in Austria with a view to forming an opinion on whether institutions of that Member State that lend mortgages operate primarily in the Austrian market.

111. In those circumstances I take the view that it is at the discretion of the national court to submit questions for a preliminary ruling if it feels that the free movement of capital is at issue.

VIII — Proportionality

Preliminary observation

112. In this part of the Opinion I come to the substantive answers to the questions submitted by the national court for a preliminary ruling, it being understood that, in my view, these questions should be considered in the context of the provisions concerning the freedom to provide services.

113. Another aspect that may be considered in this context is whether an individual may assert claims against his own Member State under Community law. According to the Court's case-law, an activity falls within the scope of Article 49 EC if at least one of the providers of services is established in a Member State other than that in which the service is offered. [63]

114. In my view, the question whether Austrian nationals may assert claims under Community law should be left — with due

63 — See, for example, the judgment in Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 27.

regard for the Court's case-law — to the national court in this instance. The Commission's comments on the cases here under discussion reveal that Austrian national law prohibits discrimination against Austrian nationals vis-à-vis foreigners ('reverse discrimination'). For this reason Austrian nationals may, under national law, have an interest in invoking Community law.

115. If it should examine the Salzburger Grundverkehrsgesetz of 1997 in the light of the free movement of capital, the Court may adopt the following premiss: the unity of the capital market within the Economic and Monetary Union means that Austrian nationals too may invoke Community law.

The judgment in Konle [64]

116. The court requesting a preliminary ruling is essentially asking for a more detailed interpretation of the judgment in *Konle*. The Grundverkehrsgesetz of the *Land* of Salzburg, which is in dispute in the present cases, is very similar to the legislation in the *Land* of Tyrol, which was the subject of the action in the *Konle* case. Both cases concern legislation that imposes conditions on the acquisition of immovable property to enable the number of secondary residences to be limited, a goal pursued under the regional planning policy.

117. In *Konle* the Court ruled that this objective may in itself justify a restriction of the free movement of capital. It came to the conclusion, however, that the instrument chosen, namely prior authorisation, imposed too severe a restriction on free movement. According to the Court, the need for such a procedure had not been demonstrated in the case. [65]

118. The Court based this view on the following considerations. It recognised that 'a procedure simply involving a declaration does not... in itself enable the aim pursued to be achieved in the context of a procedure for prior authorisation. In order to ensure that the land is used in accordance with its intended purpose,... Member States must also be able to take measures....' The Court referred in this context to 'a fine,... a decision requiring the acquirer to terminate the unlawful use of the land forthwith under penalty of its compulsory sale,' and 'a declaration that the sale is void resulting in the reinstatement in the land register of the entries prior to the acquisition of the property.... Furthermore,... prior declaration... constituted an effective means of supervision capable of preventing the prop-

64 — Cited in footnote 2.

65 — The detailed assessment of this procedure can be found in paragraphs 39 to 49 of the judgment. The considerations set out below are to be found in paragraph 46 et seq.

erty concerned from being acquired as a secondary residence.'

119. In view of these 'other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines' and 'given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land', the requirement of prior authorisation goes too far, according to the judgment in *Konle*.

120. The cases here under discussion concern national legislation which, at first sight, entails a less severe restriction of free movement. In the case of this notification and authorisation procedure, the court requesting a preliminary ruling claims, it is normally enough for the acquirer of building land to make a declaration to the appropriate authority as to the future use of the land. The authority is obliged to accept the declaration unless it has good reason to doubt it. Only then is a procedure similar to the prior authorisation referred to in the *Konle* judgment set in motion. Such authorisation may, moreover, have conditions and requirements attached and may be subject to the lodging of security.

121. The Austrian Government points out in its written observations that this procedure is the least onerous option for achieving the intended objective. For acquirers of immovable property about whom there are doubts the authorisation procedure also has the advantage of letting them know in good time where they stand, even as regards possible subsequent sanctions for illegal use of the property. In the Austrian Government's view, the procedure is consistent with European law. Mr Schäfer, the applicant in Case C-519/99, does not share this view. Referring to the judgment in *Konle*, he claims that subsequent checks, for which the Law also provides, are sufficient.

122. If it is entitled to answer the questions referred to it, the Court must assess the acceptability of this notification and authorisation procedure, which appears to lie, in terms of severity, between the prior declaration that the Court appears to have accepted in the judgment in *Konle* and the prior authorisation that could not pass the test of Community law.

The Salzburger Grundverkehrsgesetz of 1997

123. The provisions of the Salzburger Grundverkehrsgesetz of 1997 should be assessed on the basis of the Court's settled case-law, as set out, for example, in its judgment in *Gebhard*:[66] 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guar-

66 — Judgment in Case C-55/94 [1995] ECR I-4165, paragraph 37.

anteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'

124. The following conclusions can be drawn from an appraisal of the Salzburger Grundverkehrsgesetz of 1997 in the light of those four conditions.

125. The first condition is easily satisfied. The legislation applies equally to Austrian nationals and to nationals of other Member States and of other countries forming part of the European Economic Area.

126. Of crucial importance for an assessment of the second condition is the fact that in its judgment in *Konle* the Court recognised as imperative reasons in the general interest 'a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions'. [67] I would add that nature protection in certain regions may also be a justified objective in the area of regional planning.

67 — Cited in footnote 2, paragraph 40.

127. The third condition does not, in my view, require any special discussion. It goes without saying that a system in which rules for supervision of the acquisition and use of immovable property have been introduced is likely to limit the number of secondary residences in the *Land* of Salzburg.

128. In the case of the fourth condition I believe the following to be of primary importance: formalities prior to the acquisition of immovable property do not necessarily form a more serious restriction than subsequent checks. Immovable property is generally acquired with the aim of retaining possession for some considerable time. Its acquisition is subject to formal requirements in all national private-law systems, such as a notarial act and entry in a public register. These formal requirements are intended to establish the necessary legal certainty both for the acquirer and for any interested third parties. Of particular interest to the acquirer is that he should have the certainty of obtaining and retaining possession and of having unhindered enjoyment of the immovable property.

129. The procedure defined in the Salzburger Grundverkehrsgesetz provides the acquirer of immovable property with legal certainty. Once the notification and authorisation procedure has been completed, he can assume that he may continue to use the immovable property unhindered.

130. I now come to the assessment of proportionality itself. In my view, the preventive examination of the intended use of building land is not a disproportionate restriction of the freedom to provide services. Such an examination is necessary if the aim of the legislation — to restrict the number of secondary residences — is to be achieved. National legislation such as this must, after all, effectively prevent irreparable harm from being caused to the interests which it seeks to protect. Irreparable harm may be done, for example, as soon as the construction of secondary residences begins. In addition, the Salzburg Law, unlike the judgment in *Konle*,[68] confines itself, in principle, to requiring that notification be given. Only if there is justified doubt may the appropriate authorities decide to subject the acquisition of land to an authorisation procedure. The requirement of 'justified doubt' provides adequate guarantees for those concerned that the authorisation procedure will not be applied arbitrarily.

131. The situation is different when it comes to the details of the actual authorisation procedure. Pursuant to Paragraph 19 of the Salzburger Grundverkehrsgesetz of 1997, authorisation may be made subject to conditions and requirements to ensure that the acquirer uses the land in accordance with his declaration. The acquirer may also be required to lodge a security, which must not exceed the purchase price or the value of the land.

132. The Grundverkehrsgesetz thus grants a broad discretionary power to the competent authorities and thereby entails the risk that 'the exercise of a freedom guaranteed by the Treaty [may] be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory.'[69] The power to impose conditions and requirements is not, after all, bound by substantive criteria in the Grundverkehrsgesetz. This means that the competent authorities may impose conditions and requirements which are so onerous that a party refrains from acquiring land. This is, of course, *a fortiori* the case with regard to the possibility of requiring an — appreciable — security.

133. In brief, if the power to impose conditions and requirements or to require the deposit of a security is necessary — which, in my view, is by no means certain — it should at least be subject to strict constraints.

68 — Cited in footnote 2.

69 — Judgment in *Konle* (cited in footnote 2, paragraph 44).

IX — Conclusion

134. In view of the above considerations I propose that the Court should answer the questions submitted by the Unabhängiger Verwaltungssenat in Salzburg as follows:

Community law, in particular the rules on the freedom to provide services and, in conjunction therewith, the rules on the free movement of capital, does not preclude a notification and authorisation procedure relating to the acquisition of immovable property which is necessary for regional planning reasons and which does not result in a disproportionate restriction. Unrestricted power to impose conditions and requirements must be regarded as constituting such a disproportionate restriction.