OPINION OF ADVOCATE GENERAL MISCHO

delivered on 12 December 2002 [1]

1. The Gerechtshof (Regional Court of Appeal) te 's-Hertogenbosch (Netherlands) has referred to the Court for a preliminary ruling five questions regarding taxation of the estate of a person who was a non-resident when he died.

I — Legal background

A — *Community law*

2. The facts of this case took place before the entry into force of the Treaty of Maastricht. The relevant Community provisions are therefore those of the EEC Treaty. The following provisions are relied upon, in particular, with regard to freedom of movement for persons: Articles 48 and 52 of the EEC Treaty (subsequently Articles 48 and 52 of the EC Treaty, now, after amendment, Articles 39 EC and 43 EC) and Council Directive 90/364/EEC of 28 June 1990 on the right of residence. [2]

With regard to the free movement of capital; Article 67 of the EEC Treaty (subsequently Article 67 of the EC Treaty, repealed by the Treaty of Amsterdam), as implemented by Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, [3] is relevant.

3. Reference is also made to Articles 6 and 8a of the EC Treaty (now, after amendment, Articles 12 EC and 18 EC).

B — *National law*

4. The following information is given in the documents in the case.

5. Under Netherlands law, every estate is subject to tax. Article 1(1) of the Successiewet 1956 (1956 Law on Succession) [4]

1 — Original language: French.
2 — OJ 1990 L 180, p. 26.
3 — OJ 1988 L 178, p. 5.
4 — Stbl. 1956, p. 362, 'the 1956 SW'.

draws a distinction according to whether the deceased resided in the Netherlands or abroad.

1. If he resided in the Netherlands, the assets he leaves are liable to inheritance duty on the value of all the assets transferred.

2. If he did not reside in the Netherlands, transfer duty is levied on the value of the 'domestic possessions' (which, in so far as the present case is concerned, includes immovable property situated in the Netherlands) less, where appropriate, any debts.

6. However, under Article 13 of the Wet op de vermogensbelasting 1964 (1964 Law on inheritance tax[5]), as interpreted by the Netherlands courts, when assessing the estate of a non-resident deceased person, it is not possible to deduct, for the purposes of calculating the basis of assessment, any debts other than those secured by a mortgage on immovable property situated in the Netherlands. More particularly, that provision applies where the deceased, before his death, has transferred the financial ownership of the property to a separate legal person under an agreement of sale/purchase. Unlike the heir of a deceased person who was a resident, the heir of a deceased person who was not a resident must declare the full value of that property regardless of the fact that a third person has financial ownership of it.

5 — Stbl. 1964, p. 520, 'the 1964 WB'.

II — Facts and procedure

7. Mr Barbier, a Netherlands national who was born in 1941, died in Belgium, his last place of residence, on 24 August 1993. His heirs are his wife and his only son (together referred to as 'the heirs').

8. Mr Barbier had acquired during the period from 1970 to 1988, whilst he was resident in Belgium, a number of properties situated in the Netherlands, from which he received rent. Most of the properties were used for commercial purposes as shops, stores or cafés.

9. In 1988 Mr Barbier concluded a number of sales, by which he transferred most of his properties to private Netherlands companies which he controlled.

10. Registration duty of 6% was avoided on the transfer of the properties situated in the Netherlands by not entering the transfer of title in the appropriate register and merely assigning the 'financial' ownership of the properties. Mr Barbier had undertaken to transfer title to the properties sold (that is to say the right *in rem*) and pending such transfer relinquished all rights thereto. That obligation was not, however, subject to a mortgage.

11. Following Mr Barbier's death, his notary declared, for transfer duty purposes, the value of three other properties held in full ownership, less the mortgage debts incurred on their acquisition. The value of the properties whose financial ownership had been transferred to the private companies was not included in that declaration.

12. However, the head of the section 'Particulieren/Ondernemingen buitenland' of the national revenue service ('the Inspector') added to the declared estate the value of all the properties of which Mr Barbier was legal owner. In doing so he did not make any deduction in respect of the obligation to transfer legal title.

13. The heirs appealed against the Inspector's decision to the Gerechtshof te 's-Hertogenbosch, asking that the tax be reduced to zero on the ground that the Inspector had disallowed the deduction corresponding to the obligation to transfer legal title. The Gerechtshof te 's-Hertogenbosch referred the following five questions to the Court of Justice:

'1. Is cross-border economic activity still a precondition for being able to rely on Community law?

2. Does Community law preclude a Member State (the State in which the property is situated) from levying on the inheritance of immovable property situated in that Member State a tax on the value of that property which allows the value of the obligation to transfer title to that property to be deducted if, at the time of death, the deceased resided in the State where the property is situated but not if he resided in another Member State (the State of residence)?

3. Does it affect the reply to Question 2 if, at the time he acquired that property, the deceased no longer resided in the State in which the property is situated?

4. Is the distribution of the deceased's capital as between the State in which the property is situated, the State of residence and any other States relevant to the reply to Question 2?

5. If so, in which State must the capital be considered to be invested in the case of a current account claim against a private company of the type referred to in paragraph 2.4 [of the order for reference]?'

III — Analysis

A — *Question 1*

14. The national court observes that it is faced with a number of questions of Community law. If the existence or absence of cross-border economic activity is still relevant, in view of the adoption of the directive on the right of residence [6] and the provisions of the Treaty of Maastricht on European citizenship, it must be ascertained which of the fundamental freedoms is affected in the present case.

15. In that regard, according to the national court, it cannot be said that freedom of movement for persons is at issue, since neither the deceased nor his heirs were hindered in the personal choice of their place of residence or establishment. They were already living in Belgium when the deceased bought the first of the properties.

16. On the other hand, the Gerechtshof considers that there was cross-border movement of capital from 1970, the year the deceased moved from the Netherlands to Belgium. He then bought properties situated in the Netherlands while residing in Belgium.

17. The Netherlands Government states, however, that the first question is irrelevant. It points out in that regard that Article 18 EC does not apply *ratione temporis* and that Directive 90/364 is intended inter alia to harmonise national provisions relating to the right of nationals of Member States to reside in a Member State other than their own. In the present case the provisions of the 1956 SW at issue in the main proceedings have no connection with the conditions of access to and residence in the territory of another Member State and have not in any way restricted or hindered the right of the Barbier family to establish themselves elsewhere than in the Netherlands.

18. Nor do the provisions on the free movement of capital apply either. In the present case there is no cross-border economic activity that would be hindered by the Netherlands tax law. The purchase of immovable property in the Netherlands by the deceased, who was residing in Belgium, was not hindered in any way and the same was true of the transfer of financial ownership, in connection with which the deceased was treated in the same way as a resident of the Netherlands.

19. The acquisition of immovable property by way of inheritance does not, however, constitute an economic activity. The same

6 — It is to be assumed that the national court is referring to Directive 90/364.

applies with regard to the investment in purely legal ownership without financial ownership. In that regard the Netherlands Government contends that the deceased opted for the transactions described above for tax reasons. No protection under the Treaty is therefore necessary.

20. The claimants in the main proceedings maintain, on the contrary, that the free movement of both persons and capital are affected in the present case. In that regard they refer in particular to *Baars*[7] and *Verkooijen*.[8] In their view the Court of Justice considered, by implication, in *Baars*, cited above, that there is no requirement of cross-border economic activity, or that such activity exists where, as in the present case, cross-border investments are made in immovable property through a company, those investments generating income in the form of cross -border interest (comparable in essence to the cross-border dividends at issue in *Verkooijen*, cited above).

21. What is to be made of those arguments?

22. I share the view of the Netherlands Government that Article 8a of the Treaty does not apply *ratione temporis*. Indeed, as that Government points out, it is necessary to assess the situation in the light of the Community law in force at the material time in this case. The Treaty of Maastricht had not yet come into force on the date of Mr Barbier's death.

23. As for Directive 90/364, I consider it also irrelevant, although not for the same reasons as those put forward by the Netherlands Government. That directive, which is based on Article 235 of the EC Treaty (now Article 308 EC), requires Member States to grant, under certain conditions, the right of residence to nationals of other Member States who do not enjoy that right 'under other provisions of Community law'. That phrase means essentially the provisions on freedom of movement for workers and those on freedom of establishment.

24. It cannot be excluded that Mr Barbier's right of residence was, in reality, based on that directive and that the same applies as regards his heirs, but so far as I know, those rights of residence in Belgium have never been challenged.

25. The issue raised in the present case is different. It is whether Mr Barbier's heirs can infer from the Treaty provisions on freedom of establishment and on the free movement of capital the right not to be liable to pay transfer duty which is different from the inheritance tax which they would have been liable to pay if the deceased had

7 — Case C-251/98 [2000] ECR I-2787.
8 — Case C-35/98 [2000] ECR I-4071.

always lived in the Netherlands, and can rely on that right as against the Netherlands authorities.

26. There is no question that, in matters of inheritance duty and other similar taxes, the Netherlands tax authorities treat immovable property situated in the Netherlands differently according to whether the deceased was or was not resident in the Netherlands at the time of death.

27. Mr Barbier's estate is therefore affected by his residence in Belgium. It is clear from the order for reference that after moving from the Netherlands to Belgium Mr Barbier had continued to pursue his activities as a director of a company established in the Netherlands. The order does not state, however, that he subsequently stopped doing so.

28. The case-law of the Court of Justice according to which 'Article 52 nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty' [9] should therefore apply in this case.

29. It should also be pointed out that the Netherlands provisions at issue are likely to affect an economic operator's freedom to establish himself in another Member State even if, as the national court and the Netherlands Government make clear, they do not directly affect the right to enter or stay in another Member State. Where such an economic operator owns, or envisages acquiring, immovable property in the Netherlands, he is likely to be deterred from exercising his right to freedom of movement since he is liable to suffer unfavourable treatment as regards taxation of his estate.

30. Naturally, the effects on inheritance duty of exercising freedom of movement are no longer, by definition, of direct interest to the person concerned. The fact remains, however, as the Commission rightly states, that those effects are likely to constitute an obstacle to the exercise of the abovementioned freedoms. Those effects are among the considerations that must be taken into account by any interested person when deciding whether or not to exercise that freedom of movement.

9 — See to this effect, Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 15; Case C-419/92 *Scholz* [1994] ECR I-505, and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 32.

31. This point applies, moreover, as regards both freedom of movement for persons and free movement of capital, which I, like the Commission, consider is also at issue in this case.

32. The Commission is correct in citing Directive 88/361, which applied at the material time with regard to the facts at issue in the main proceedings, implementing Article 67 of the Treaty concerning the free movement of capital. It follows that that directive applies to investments in real estate on national territory by non-residents. The purchases of properties in the Netherlands made by Mr Barbier from his domicile in Belgium, as described in the order for reference, undoubtedly fall into that category.

33. It should be observed in that regard that that categorisation is purely objective and is wholly unconnected to the motives of the person who carried out the movements concerned. The possibility, as alleged by the Netherlands Government, that the transaction was carried out for tax reasons does not therefore mean that it thereby loses its character as a movement of capital within the meaning of Community law.

34. One may, however, question whether there is not a contradiction in the arguments of the Netherlands Government, which, on the one hand, states that the transactions involving legal ownership alone do not correspond to economic reality and, on the other hand, seeks in the present case to tax the person having legal ownership as if he were the financial owner.

35. For the above reasons, I suggest that the first question should be answered as follows:

— Article 1 of Directive 88/361 should be interpreted as meaning that the freedom established by that provision is at issue in circumstances such as those in the dispute in the main proceedings, concerning the estate of a resident of a Member State other than the Netherlands who had acquired immovable property situated in the Netherlands.

— Articles 48 and 52 of the Treaty must be interpreted as meaning that the freedom established by those provisions is at issue in circumstances such as those in the dispute in the main proceedings, concerning the estate of a Netherlands resident who had transferred his residence to another Member State whilst continuing his business activities in the Netherlands and who had subsequently acquired immovable property situated in the Netherlands.

B — *Question 2*

36. By this question the national court seeks to ascertain whether Community law precludes the estate of a deceased person who was a non-resident from being taxed differently from that of a deceased person who was a resident.

37. The Netherlands Government does not deny the existence of a difference in treatment based solely on the criterion of residence. It accepts that where the deceased was resident in the Netherlands it is possible to deduct the obligation to transfer legal title, although that is not possible in the case of a deceased person who was resident in another Member State.

38. It contends, however, that in this case comparable situations are not being treated differently. It considers that the situation of a deceased person who has been residing in the Netherlands is not comparable to that of a deceased person who has been residing in another Member State.

39. In that regard, it is necessary to apply the general principle of international tax law concerning the allocation of the power to tax between States, under which obligations *in rem* are a matter for the State in which the property is situated, and personal obligations, such as the obligation at issue to transfer legal title, are for the State of residence to take into account.

40. In the light of that principle, the situation where the deceased resided in the Netherlands is different from that where the deceased resided in another Member State. In the first case, the whole of the estate, including personal obligations, attaches to the Netherlands as the State in which the property is situated and the person concerned resided.

41. In the second case, however, only obligations *in rem* are to be taken into consideration by the Netherlands, the State in which the property is situated, whilst personal obligations fall under the fiscal competence of the State of residence.

42. It should be observed that the national court denies the existence of a principle as to allocation of fiscal competence.

43. It should also be pointed out that the categories of national law such as the separation between obligations *in rem* and personal obligations, or the supposed principles of international tax law, cannot justify infringement of Community law.

44. It is true that, in theory, an heir who is disadvantaged under Netherlands legislation could obtain a 'compensating advantage' under the law of his State of residence, assuming, of course, that the latter State applied the same criteria with regard to fiscal competence as the Netherlands.

45. The fact remains, however, that the Netherlands legislation takes no account of the treatment afforded by the Member State of residence. If the latter State does not take into consideration the full value of the personal obligations concerned and where there is therefore no 'compensating advantage' of that type, the heir of a deceased person who resided in that State is in the same situation as the heir of a deceased person who resided in the Netherlands, who cannot ensure that his personal obligations are taken into account by the authorities of another Member State. There is therefore no reason in such a case to treat that person differently from the heir of a deceased person who had been residing in the Netherlands.

46. Contrary to what the Netherlands Government contends, this may therefore be a case of comparable situations being treated differently. The Netherlands law assumes that it is possible for the person liable to pay the tax to obtain a deduction in another Member State without any certainty that that is so and without giving the person concerned the right to prove that such a possibility does not exist. This is all the more serious since, as we have seen above, there are doubts, such as those expressed by the national court, as to the universal nature of the principle of the allocation of fiscal competence applied by the Netherlands authorities.

47. The national legislation in question is therefore open, to say the least, to exactly the same criticism as that made by the Court against the German legislation in *Schumacker*, [10] namely that of excluding the possibility of a tax authority taking into account, for the purposes of the tax concerned, all the personal circumstances of the person liable to pay that tax, unlike the German legislation at issue in *Gschwind*, [11] also cited by the Netherlands Government.

48. A second argument appears to me to militate even more decisively against the view held by the Netherlands Government.

49. It should be stressed that the differentiation criterion adopted by the Netherlands has no connection with economic reality and amounts to treating similar economic situations in a radically different manner.

10 — Case C-279/93 [1995] ECR I-225.
11 — Case C-391/97 [1999] ECR I-5451.

50. In a case such as this, the Netherlands law allows the heirs of a person who was a resident to be taxed in a manner which accords with economic reality, namely that the property encumbered by the obligation to transfer legal title is excluded from the basis on which the estate is calculated. On the other hand, the heirs of a non-resident, who are in exactly the same economic situation with regard to the property concerned, are taxed as if that property had remained fully in the deceased's ownership.

51. When faced with these identical economic situations, it is not possible to make the question whether the obligations whose deduction is in issue are obligations *in rem* or personal obligations the deciding factor. What counts is that comparable economic situations, namely the existence of properties encumbered with an obligation to transfer title, should be treated in the same way and that their treatment should not depend solely on the place of residence of the deceased.

52. This is all the more so since, in the present case, the personal obligation in question, namely that of transferring economic title to the taxed property, is very closely linked to the property concerned and has a decisive impact on the value it has for the heirs. That connecting factor is as close as in the case of an obligation *in rem* affecting the property and it is hard to see any overriding reason to refuse to deduct personal obligations if deduction of obligations *in rem* is accepted.

53. At any event, it should be pointed out that, contrary to what the Netherlands Government states, little support for its view is to be found in case-law.

54. It insists in that regard that it is clear from *Gilly* [12] that a Member State is competent to determine the criteria governing the taxes it levies and that in so doing it may use the model drawn up by the OECD. It may also take into account the place where immovable property is situated.

55. The Court has always held, however, that in the exercise of that competence Member States cannot free themselves from their obligations under Community law. [13]

56. The Netherlands Government also relies on the case-law in which the Court held that the situations of resident and of non-resident taxpayers are not, as a rule, comparable. [14] The fact remains, however, that that consideration has not prevented the Court from finding in a large number of cases that residents and non-residents were

12 — Case C-336/96 [1998] ECR I-2793.

13 — See, for example, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 58.

14 — See *Schumacker*, cited above.

in a comparable situation with regard to the national rules at issue.

57. In particular, it is settled case-law that where a Member State treats residents and non-residents in the same way as regards a particular form of taxation it must do so also in respect of any deductions relating to such taxation. [15]

58. By treating them in the same way for taxation purposes, the legislature of that Member State accepts that there is no objective difference between residents and non-residents with regard to the terms and conditions of the tax which would justify a difference in treatment.

59. The Netherlands Government states in this regard that, according to the principle of territoriality, the estate of a person who was resident in the Netherlands is taxed on his global assets, whereas the liability of the heirs of a person who was residing in another Member State with regard to his estate is restricted to those parts of the estate which are situated in the Netherlands.

60. The fact remains that for the purposes of inheritance duty on immovable property situated in the Netherlands, the Netherlands authorities consider that residents and non-residents are equally liable to tax. The authorities cannot therefore, as regards that tax, refuse to allow non-residents the deductions which they allow residents.

61. On that point, the present situation has a striking parallel with *Saint-Gobain ZN*, cited above, in which the German Government relied on the fact that companies established in Germany were liable to tax on their global assets whereas the tax liability of companies established in another Member State was limited merely to their assets situated in Germany. That consideration did not prevent the Court from ruling that for the purposes of the contested tax liabilities both categories were in a comparable situation.

62. We are therefore looking at a case of treatment which differs according to the place of residence, a criterion which is likely to place nationals of other Member States at a disadvantage. The Netherlands Government fails to put forward any convincing justification for such discrimination.

63. It does however highlight the legislative reforms that took place in 2000, seven years after Mr Barbier's death, as a result of which a dispute such as that in the main proceedings could now no longer arise. Those provisions did not, however, apply

15 — See Case 270/83 *Commission* v *France* [1986] ECR 273, and *Saint-Gobain ZN*, cited above.

to the case in the main proceedings and since they have not been brought before the Court it cannot give a ruling in that regard.

64. The Netherlands Government also maintains that the link between the difference in treatment of an estate and the financial transactions conducted by the deceased is so remote that there cannot be said to be a restriction on the free movement of capital. It must be stated, however, that that does not detract from the fact that this is a case of unfavourable treatment based solely on the criterion of residence and that it has significant consequences.

65. It is also clear from the order for reference that the tax authority, the defendant in the main proceedings, has put forward other arguments in this context, arguments which the Commission assesses.

66. It has thus been stated that, if the value of the obligation to transfer legal title is deducted, no tax would be levied, either on the original transfer or on death. I share the Commission's view, however, that transfer duty and inheritance duty are taxes which have no common link.

67. Moreover, the same problem of non-payment of duties arises in the case of a deceased person who has resided in the Netherlands and who has made the same transfers of financial ownership without registering a mortgage as Mr Barbier.

68. Finally, there is even less reason to accept the argument because the heirs were able to maintain at the hearing, and were not contradicted on that point, that transfer duties are payable when legal ownership is finally transferred.

69. According to the national court, the tax authority, the defendant in the main proceedings, also maintained that, for supervision purposes, it is permissible to take into account only the transfer of legal ownership and not binding agreements providing that there is an obligation to transfer legal ownership.

70. I also share the Commission's view that it is not clear how the issue of supervision differs depending on the location of the residence of the deceased. If his residence was in the Netherlands the competent authorities would be satisfied with binding agreements.

71. It follows from the above that the national legislation at issue produces indirect discrimination akin to discrimination on grounds of nationality and that no overriding reason to justify such discrimination is discernible.

72. Reliance on Article 73d of the EC Treaty (now Article 58 EC) cannot provide any support for the view taken by the Netherlands Government. Not only was that provision not in force at the time material to the present case, as the Netherlands Government itself points out, moreover, but it states specifically that it cannot constitute a means of arbitrary discrimination. [16]

73. It is therefore appropriate to reply to the national court that the Treaty precludes application of the national legislation at issue.

C — *Question 3*

74. By this question the national court is asking the Court whether, in the context of the answer to the second question, it is important to know whether the deceased was no longer living in the State in which the immovable property concerned was situated at the time he acquired that property.

75. According to the Netherlands Government, which was the only party to submit observations specifically regarding that question, there is no need to distinguish between those two situations. The contested tax does not affect the actual acquisition of the property but the inheritance thereof. It is only if the deceased was living outside the Netherlands when he died and if, at that time, the financial and the legal ownership were separate that a difference in treatment could occur.

76. In my view, it is clear from the answer to the second question that it is not affected by the question of whether the deceased was resident in the State where the immovable property to be taxed is situated at the time when it was acquired. The difference in treatment does not depend on that consideration but, and I concur on this point with the observations of the Netherlands Government, solely on the deceased's place of residence at the time of his death. Nor, moreover and above all, is the lack of justification for the difference in treatment linked to the deceased's place of residence at the time the property was purchased.

77. The reasoning set out above in connection with the second question referred to the Court, from which it is clear that we

16 — See also to this effect *Verkooijen*, cited above.

have here a difference in treatment which is totally lacking in any objective justification, applies wherever the deceased's place of residence was at the time the property in question was acquired.

78. Although determination of the deceased's place of residence at the time the property was purchased is not likely to be of any relevance in the context of the second question referred by the national court, it should, however, be observed that the same is not exactly true as regards the first question.

79. I consider, in fact, that it is to be inferred from my observations concerning that question that if the tax at issue related to a property acquired by the deceased during the time when he was still residing in the Netherlands, a hypothesis which does not appear to apply in the present case since the order for reference mentions only the assets acquired after Mr Barbier moved away, we should not on the face of it have a measure affecting the free movement of capital within the meaning of Directive 88/361, since in that case acquisition of the property would not have involved any movement of capital. It is not contended either that there is the slightest obstacle to the receipt of revenue from that property.

80. It is clear, however, from my observations in relation to the first question that in such a case the provisions on freedom of movement for persons would continue to apply.

81. For the above reasons, I suggest that the answer to the third question should be that the issue of whether, at the time he acquired that property, the deceased was no longer living in the State in which the property was situated has no relevance as regards the answer to the second question.

D — *Question 4*

82. By this question the national court seeks to ascertain whether the distribution of the deceased's capital as between the State of residence, the State where the property is situated and any other Member States is relevant as regards the answer to the second question referred for a preliminary ruling.

83. According to the Netherlands Government, this question should be answered in the affirmative, the criterion being that where the deceased's assets were exclusively or almost exclusively in a State other than the State of residence, the State in which the property is situated must take

inter alia personal liabilities into account when levying tax. It is interesting to note that it is not clear from the documents in the case that such a criterion was provided for under the national legislation applicable to the dispute in the main proceedings.

84. At any event, I do not share the view of the Netherlands Government. The decisive factor in the present case is the parallel which must exist between liability to tax and the benefit of possible deductions. Since properties belonging to non-residents are taxed in the same way as those belonging to residents, the relevant deductions must also, as we have seen, be granted to non-residents in the same way as to residents.

85. There is therefore no reason to make any distinction according to how the assets of non-residents are distributed by refusing to allow some of them deductions when deductions are accessible to all residents.

86. The fact that some non-residents may possibly benefit from deductions in their State of residence makes no difference to this. It is clear from case-law that a Member State cannot justify less favourable treatment for residents of another Member State by the need to make up for an advantage they receive in that State. [17]

87. The answer to the fourth question should therefore be in the negative.

E — *Question 5*

88. In accordance with settled case-law, it is for the national court to determine both the need for a preliminary ruling and the relevance of the questions put to the Court. [18] It referred the fifth question only in case the answer to the fourth question was in the affirmative.

89. It is clear from what I have said above that that hypothesis does not obtain in the present case. There is therefore no need to answer this question.

17 — Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 44, and references cited therein.

18 — See, for example, Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 16.

IV — Conclusion

90. For the reasons set out above, I suggest that the following answers be given to the Gerechtshof te 's-Hertogenbosch:

Question 1

'— Article 1 of Council Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty should be interpreted as meaning that the freedom established by that provision is at issue in circumstances such as those in the dispute in the main proceedings, concerning the estate of a resident of a Member State other than the Netherlands who had acquired immovable property situated in the Netherlands.

— Articles 48 and 52 of the EEC Treaty (subsequently Articles 48 and 52 of the EC Treaty, now, after amendment, Articles 39 EC and 43 EC) must be interpreted as meaning that the freedom established by those provisions is at issue in circumstances such as those in the dispute in the main proceedings, concerning the estate of a Netherlands resident who had transferred his residence to another Member State whilst continuing his business activities in the Netherlands and who had subsequently acquired immovable property situated in the Netherlands.'

Question 2

'Community law precludes a Member State (the State in which the property is situated) from levying on the inheritance of immovable property situated in that

Member State a tax on the value of that property which allows the value of the obligation to transfer title to that property to be deducted if, at the time of death, the deceased resided in the State where the property is situated but not if he resided in another Member State (the State of residence).'

Question 3

'The issue of whether, at the time he acquired that property, the deceased was no longer living in the State in which the property was situated has no relevance as regards the answer to the second question.'

Question 4

'The issue of whether the deceased's capital was distributed between the State in which the property was situated, the State of residence and any other States has no relevance as regards the answer to the second question.'

Question 5

'There is no need to answer the fifth question.'