OPINION OF ADVOCATE GENERAL COSMAS
delivered on 23 March 2000 *

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I — Introduction

1. By this reference for a preliminary ruling made under Article 177 of the EC Treaty (now Article 234 EC) by the Corte di Appello di Napoli (Court of Appeal, Naples), the Court is asked to interpret certain provisions of primary Community law with a view to establishing whether national legislation under which the acquisition of rights *in rem* over immovable property situated in areas of Italian national territory designated as being of military importance is subject, in the particular case of foreign nationals, to prior authorisation is compatible with those provisions.

* Original language: Greek.

II — Facts and procedure

2. On 14 January 1998 two German nationals purchased two properties situated in the area of Barano on the island of Ischia off Italy's Neapolitan coast. However, the Naples Registrar of Property refused to register the instruments of purchase on the ground that the purchasers had not, before they were entered into, obtained the Prefect's authorisation required, in the particular case of foreign nationals, by Article 18 of Italian Law No 898 of 24 December 1976, as amended by Article 9 of Law No 104 of 2 May 1990, which now operates pursuant to the Ministerial Decree of 15 May 1990 adopted jointly by the Ministers for Defence and for the Interior. [1] As will be explained below, such authorisation is necessary where the properties to be purchased are situated, as in the case in point, in areas which have been declared to be of 'military importance'.

3. An action against that refusal was brought before the Tribunale di Napoli (Naples District Court) by Alfredo Albore, a notary in Forio and appellant in the main proceedings ('Mr Albore'), who submitted that the requirement for prior authorisation could not be applied to foreign nationals who were citizens of other Member States of the European Union since it was contrary to fundamental provisions of the Community legal order. The court of first instance rejected that plea.

1 — GURI (Gazzetta Ufficiale della Repubblica Italiana) No 117 of 22 May 1990.

4. On 22 June 1998 Mr Albore lodged an appeal, again pleading the incompatibility of the contested national legislation with the rules of Community law.

5. The referring court observed that the relevant provisions of Italian law appear, at first sight, to conflict with Article 6 of the EC Treaty (now, after amendment, Article 12 EC) in conjunction with Articles 52 and 56 of the EC Treaty (now, after amendment, Articles 43 and 46 EC) and Article 67 thereof (repealed by the Treaty of Amsterdam). The court nevertheless considered it 'necessary to make an order for reference to the Court of Justice of the European Communities under Article 177 of the Treaty for a preliminary ruling on whether Article 18 of Law No 898/1976, as amended by Article 9 of Law No 104/1990, is compatible with the abovementioned provisions of the said Treaty'.

III — Relevant national legislation

6. Article 1 of Italian Law No 1095 of 3 June 1935 concerning the transfer of immovable property situated in the provinces adjoining land frontiers provided as follows:

'All instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to

land frontiers shall be subject to approval by the Prefect of the province.'

Under Article 2 of the same Law, instruments effecting alienation or acquisition of ownership cannot be recorded in the public registers 'unless evidence is produced that the Prefect has given his approval'.

7. Article 18 of Law No 898 of 24 December 1976 laying down new rules on military easements, as amended by Law No 104 of 2 May 1990, provides as follows:

'The provisions laid down in Articles 1 and 2 of Law No 1095 of 3 June 1935, as amended by Law No 2207 of 22 December 1939, shall also apply in the areas of national territory designated as being of military importance by decree of the Minister for Defence, jointly with the Minister for the Interior, and published in the Gazzetta Ufficiale.

Neither the Prefect's authorisation nor the opinion of the military authorities provided for by Law No 1095 of 3 June 1935, as amended by Law No 2207 of 22 December 1939, in respect of the disposal in whole or in part of immovable property shall be required where such disposal in whole or in part is to Italian nationals or to the authorities of the State, including autonomous agencies, to municipalities, provinces or other public economic bodies, or to any other legal person, whether governed by public or private law, of Italian nationality.'

8. The joint decree of the Ministers for Defence and for the Interior provided for by Law No 104 of 2 May 1990 was adopted on 15 May 1990 and published in the Official Gazette on 22 May 1990 (GURI No 117). The areas of national territory designated therein as being of military importance were the same as those referred to in Article 18 of Law No 898/1976. They cover almost all of the small Italian islands, including Ischia, the island concerned in the main proceedings.

IV — Admissibility of the question referred for a preliminary ruling

9. The Italian Government is of the opinion that the Court should not give an answer on the substance of the question referred for a preliminary ruling, inasmuch as the action pending before the referring court is of a purely national character. More specifically, it contends that the issue of the acquisition of rights *in rem* over immovable property could be the proper subject of scrutiny in terms of Community law only if it had implications with respect to exercise of one of the freedoms guaranteed by the Treaty, that is to say freedom of establishment, freedom of movement or freedom to provide services. The fact that the purcha-

sers of the properties in question are German nationals is not sufficient, on its own, to justify the view that the restrictions which Italian legislation imposes on the acquisition of rights *in rem* have any implications with respect to exercise of one of the abovementioned freedoms enshrined in the Community legal order.

10. I cannot endorse that argument. It is sufficient to point out in this connection that the acquisition, for consideration, of rights *in rem* by persons resident in other Member States constitutes an investment and hence a transfrontier movement of capital, which as such is covered by the Community principle of free movement of capital. Reference can usefully be made here to the judgment in *Konle*. [2] In paragraph 22 of that judgment the Court stated: 'As for capital movements, they include investments in real estate on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5)'.

11. In the present case, real estate situated on Italian territory was purchased by a German national. Consequently, provided that he is not resident in Italy, the acquisition of a right *in rem*, for whatever purpose, falls within the scope of Community law, if only because it presupposes a transfrontier movement of capital. Where he is already resident in Italy, of course, the issue under consideration involves the Community legal order from the point of view of freedom of movement of persons.

V — Choice of legal basis

A — *The parties' arguments*

12. Mr Albore seeks to establish a link between the contested national prohibition and the Treaty provisions relating to freedom of establishment, freedom of movement for workers, freedom to provide services and free movement of capital, as well as the prohibition of discrimination set out in Article 6 of the EC Treaty. To that end, he relies on the Court's judgment in *Commission* v *Greece*, [3] in which it held that the right to acquire rights *in rem* over immovable property is an important constituent of the free movement of capital as well as of freedom of movement for workers and freedom to provide services. He also maintains that the prohibition of discrimination in conjunction with the right to protection of personal privacy means that domestic legislation which requires nationals of other Member States to declare the purposes for which immovable property is acquired, while exempting nationals of the legislating Member State from that requirement, is contrary to Community

2 — Case C-302/97 [1999] ECR I-3099.

3 — Case 305/87 [1989] ECR 1461.

law. On the other hand, Mr Albore takes the view that the question referred for a preliminary ruling is not to be examined in the light of Articles 223 (now, after amendment, Article 296 EC) and 224 of the EC Treaty (now Article 297 EC) because the exceptional conditions of applicability of those provisions are not satisfied in the present case.

13. In the observations which it has submitted to the Court, the Greek Government seeks to establish that the contested national prohibitions are compatible with Community law in that they relate to national defence, protection of public security and foreign policy, spheres in which, it maintains, the Member States have the widest possible discretion. Without relying on any one Treaty provision as a specific legal basis for the purposes of the present case, it mentions Article J.1 et seq. of the Treaty on European Union (Articles J to J.11 of the Treaty on European Union have been replaced by Articles 11 EU to 28 EU), Articles 223 and 224 of the EC Treaty and Articles 36 and 48 (now, after amendment, Articles 30 EC and 39 EC) and 73d of the EC Treaty (now Article 58 EC), from which it infers the existence of, if not absolute, at least particularly extensive freedom for the Member States to take measures on the grounds of national defence and public security, even if those measures restrict one of the freedoms guaranteed by the Community legal order.

14. The Commission considers that the matter in issue should more properly be examined from the point of view of Articles 56 and 73d of the EC Treaty. More specifically, the Italian legislation concerned appears to constitute both a 'new restriction' on the right of establishment and an obstacle to the free movement of capital.

15. The Italian Government contends that, if the question is examined as to its substance, the relevant legislation is wholly consistent with Community law.

B — *My views on the matter*

(a) The special nature of national measures relating to the armed forces and national defence

16. I shall begin my analysis by pointing out that the present case touches on a sensitive issue, namely how Community law deals with State measures which relate to the protection of national interests of a military nature. This particular aspect of the national public interest, directly linked to the notion of State sovereignty and forming part of the core of the State, exhibits certain special features which distinguish it from the other dimensions of public security, if it is accepted that 'public security' is a general concept taking in, among other things, State measures, decisions or policies relating to a Member

State's interests and requirements of a military nature. In other words, this is an issue which the framers of Community law and those applying it must approach with great caution and possibly accord special regulatory and interpretative treatment diverging to a greater or lesser extent from the treatment customary in other cases where the question of the protection of national public security is raised.

17. Nor is it without significance that in a number of instances primary Community law makes express mention of national defence or exceptional circumstances in which a Member State may make use of its military resources. I refer, of course, to the provisions of the Treaty on European Union concerning the adoption of a common foreign and security policy and to Articles 223 and 224 of the EC Treaty, provisions to which I shall return later in my analysis. Furthermore, the Court has consistently held that the definition of national policy on public security (both internal and external) and the adoption of the related measures fall within the exclusive jurisdiction of the Member States; [4] *a fortiori*, not only does the management of a State's 'military affairs' fall within its own sovereignty but in addition it must not encounter obstacles deriving from the Community legal order which negate national freedom to make the associated decisions.

18. However, the foregoing remarks do not lead to the conclusion, as the Greek Government seems to imply in its observations, that that national competence is not checked by Community law, which would be equivalent to accepting that 'there is inherent in the Treaty a general exception covering all measures taken for reasons of public security'. [5] State measures taken for national military purposes are subject to review of their compatibility with Community law in so far as their application obstructs or affects observance of the rules of the Community legal order.

19. Application of Community law in this particular connection does, nevertheless, face an additional difficulty. Although, as I pointed out earlier, it would make sense to recognise, in certain circumstances, that, because of its special nature, the particular category of national measures 'of military interest' needs to be distinguished from other national rules concerned with public security and to receive special treatment from the Court when it assesses the compatibility of those measures with Community rules, that possibility is not conferred directly by the provisions of primary Community law. In the first place, the provisions of the Treaty on European Union concerning a common foreign and security policy, which recognise the freedom of the Member States to define the specific features of

4 — Judgments in Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621 and in Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 35.

5 — See the judgment in Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 16.

their defence policy,[6] cannot affect the application of provisions of the EC Treaty in any way.[7] Consequently, Member States may not rely on the provisions of the Treaty on European Union in order not to comply with their obligations under the EC Treaty. In respect of the latter Treaty, it appears that, with the exception of situations falling within the scope of the special safeguard clause of Article 223 et seq. of the EC Treaty, national rules which relate to military matters and national defence and restrict or obstruct the application of Community rules are justified only in the cases and under the conditions expressly provided for by the Community legislature.

20. Such safety valves are to be found, for example, in Articles 36, 56 and 73d of the Treaty, Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC), which permit derogation from the rules on free movement and harmonisation of national laws. However, the relevant provisions — and, as I stated earlier, this is important — do not refer specifically to military matters or national defence, but in general terms to national measures required 'on grounds of public policy or public security', and they make national derogating measures dependent on observance of the principle of proportionality and subject to extensive review by the Court as to their substance. Thus, it appears to follow from the wording of provisions of primary Community law that, in those cases where the question of application of Article 223 et seq. of the Treaty does not arise, national rules such as those before the Court must be examined in the same way as any other State measure concerning public policy or public security.

21. However, is that correct, or should the Court none the less search for an appropriate method of adapting Community review to the special features of the situations in question? As I shall explain in due course, the latter approach is the only one which is acceptable, and it is in keeping with the direction followed by the case-law up till now.

(b) The legal basis offered by Article 224 of the EC Treaty

22. It seems to me to be helpful to start by considering Article 224 of the EC Treaty and examining its applicability to the case in point.

6 — See, for example, Article J.4(4) of the Treaty on European Union: 'The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States ...'.

7 — See Article M of the Treaty on European Union (now Article 47 EU): '... nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'.

23. Article 224 introduces into the Treaty a safety valve for the protection of certain crucial interests of the Member States. This provision affording release from the obligations normally incumbent upon Member States under Community law is exceptional on two levels. First, like other safeguard clauses accompanying Community rules it must be construed strictly since it constitutes a derogation from the generally applicable regime created by those rules. Second, in contrast to other safeguard clauses it seems not to be amenable to implementation in 'normal circumstances'; it is intended only for the extreme situations which are listed exhaustively in the article itself.

24. This latter consideration has led the Court, particularly following the Opinion of Advocate General Darmon in *Johnston*, [8] to regard Article 224 as ancillary vis-à-vis other Treaty provisions, constituting 'the *ultima ratio* to which recourse may be had only in the absence of any Community provision enabling the demands of public order in question to be met'. [9] That, indeed, is the main reason why this provision of primary Community law has never so far been applied. [10]

25. In my view, the reasoning according to which the fact that a provision of primary Community law is exceptional automatically means that it is ancillary is not immune to legal criticism.

26. Of course I understand the Court's reservations with respect to Article 224. Routine reliance on this provision by Member States would entail a risk of upsetting the balance of the provisions of the Treaty and impairing the proper functioning of the mechanism for reviewing the compatibility of national measures derogating from the generally applicable Community rules. It is very much in the interest of Member States, precisely in order to evade the rigorous review of proportionality which generally accompanies the application of the other safeguard clauses con-

8 — Case 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651.

9 — Advocate General Darmon's Opinion in *Johnston*, cited in footnote 8 above, point 5.

10 — Up till now there have been at least two occasions on which application of Article 224 of the Treaty was, in my view, theoretically possible. The first was in the case of *Johnston*, cited in footnote 8 above, relating to a national measure which allowed only male police officers to carry fire-arms, to be trained in the handling and use of fire-arms and to be employed as armed members of the reserve police force operating in Northern Ireland; and the second was in *Sirdar*, cited in footnote 5 above, which concerned a review of the compatibility with Community law of a national rule excluding women from service in the select military corps of the Royal Marines. On both occasions, the Court refrained from examining the matter in its Article 224 dimension and merely reviewed the national provisions in question from the standpoint of other Community rules.
I should also mention the *Macedonia* case concerning the compatibility with Community law of the trade embargo which the Hellenic Republic had imposed on the former Yugoslav Republic of Macedonia. Although, following the Commission's decision to discontinue the proceedings, the Court never ruled on the substance of the case (see the order in Case C-120/94 *Commission* v *Greece* [1996] ECR I-1513), Advocate General Jacobs had the opportunity in his Opinion to set out a number of interesting ideas regarding the scope of Article 224 and the manner of its application.

tained in the Treaty (such as in Articles 36, 56 and 66), to seek to have the national measures in issue reviewed from the standpoint of Article 224; in that event the Court is confined, under Article 225 of the EC Treaty (now Article 298 EC), to assessing whether the Member State concerned has made 'improper use' of the powers conferred on it by Article 224.

27. Nevertheless, I am of the opinion that Article 224 is intended to fulfil an additional role in the system of the Treaty provisions beyond merely enabling Member States to take specific measures derogating from a Community rule, measures which could perhaps be justified by recourse to other provisions of primary Community law. Article 224 seems to constitute the demarcation line between the normal circumstances in which national and Community institutions function and difficult situations of national danger which affect the more general relationship between the Community and Member States. Since it brings about significant changes to the nature, strength and extent of the ties binding a national legal order to the Community legal order, it is imperative to establish, in each particular case, whether the preconditions for its application are met. That explains why the Community legislature did not make exercise of the powers conferred by Article 224 expressly conditional on the inadequacy of the other legal remedies which the Treaty affords Member States for the purposes of safeguarding their interests.

28. What, however, is the normative scope of Article 224? In the view of both Mr Albore and the Commission, it is almost self-evident that the case in point does not constitute a proper subject for its application. I myself am not convinced that this negative answer is so obvious.

29. First, the interpretation of this Treaty provision presents a major difficulty. The cases which it enumerates ('serious internal disturbances affecting the maintenance of law and order', 'war', 'serious international tension constituting a threat of war' and 'to carry out obligations it has accepted for the purpose of maintaining peace and international security') are directly linked to political, strategic and geopolitical assessments which fall in principle within the competence of the Member States. As Advocate General Jacobs observed in his Opinion in Case C-120/94, [11] this raises the 'fundamental issue of the scope of the Court's power to exercise judicial review in such situations', [12] particularly those involving the concept of 'war' or 'threat of war'. In those cases 'the intensity of the review may be severely curtailed by the absence of any appropriate legal criteria capable of judicial application'. [13] Furthermore, the Advocate General pointed out that the scope of the judicial review (carried out under Article 225) as to a possible improper use of powers 'is extremely limited — not just because of the terminology of that and the preceding article but

11 — Cited in footnote 10 above.

12 — Opinion of Advocate General Jacobs, point 50.

13 — Ibid., point 51.

also because of the nature of the subject-matter'. [14] Consequently, while the national perception of whether the circumstances meet the conditions of Article 224 is not uncontrolled from the point of view of Community law, it is not amenable to full judicial review as to the substance, such as the review of proportionality carried out in the context of Articles 36, 56, 66 and so forth of the EC Treaty.

30. A further question of interpretation arises. Does recourse to Article 224 presuppose the actual materialisation of the events and circumstances it describes, that is to say actual situations of internal anarchy, war or threat of war or an obligation (usually military) actually accepted by a Member State for the purpose of maintaining peace and international security? Both Mr Albore and the Commission seem to answer this question in the affirmative. In his Opinion in *Sirdar*, [15] Advocate General La Pergola supported the view that Article 224 cannot be applied in order to justify national measures relating to the organisation of special military forces of the Member State concerned is not confronted at that very moment with serious disturbance, war, threat of war and so forth. That restrictive approach seems, at first sight, to be in keeping both with the wording of the provision itself and with the principle whereby derogations from observance of Community law must be interpreted and applied narrowly.

31. In my view, however, a different approach could be adopted, based on the particular nature if the situations to which the framers of the Treaty referred in drafting Article 224. More specifically, I consider that the main and ultimate objective of the drafters of this article was to confer on the Member States the greatest possible capability to deal with certain exceptional and truly dangerous eventualities. The adoption of measures to that end does not necessarily presuppose the actual occurrence of the situations in question; it is sufficient if the measures taken are directly and exclusively linked to those situations. It could therefore be maintained that the power of the Member States to act as necessity dictates when they are confronted with a crisis also entitles them to take the preventive measures necessary to enable them to respond in the event of war, international disturbances or breakdown of the State. An entirely narrow interpretative approach to Article 224, automatically removing from its scope national decisions which are directly and exclusively linked to the exceptional situations it describes (usually decisions regarding the organisation of national defence and of the armed forces), may render the provision in question entirely redundant. Narrow interpretation of a derogating provision — an approach with which I entirely concur — is not the same as attributing it a meaning so restrictive as to rob it of all practical usefulness.

32. It is possible to counter that line of reasoning with the argument that, precisely because the situations envisaged by Arti-

14 — Ibid., point 63.

15 — Cited in footnote 5 above.

cle 224 are exceptional, the national measures taken must, in any case, be temporary. That is to say, it is not conceivable for that provision to cover State decisions which regulate a matter permanently, even one relevant to coping with circumstances of war or other similar crises. In other words, even if it is accepted that the national measures in issue need not necessarily coincide in time with the periods when the particular situations described in Article 224 actually occur (I have already explained the difficulties of defining clearly the situations in which there is a manifest 'threat of war'), it is not possible to prolong the measures for ever: their permanence would indicate that they have not been taken exclusively for the purpose of resolving problems falling within the scope of Article 224. I would not oppose the introduction of an interpretative presumption of this kind; although certainly challengeable, it would be difficult to refute in practice.

33. To move on from the purely theoretical level, I shall now attempt to transpose the foregoing considerations into the context of the present case. I ask myself whether the disputed provisions prohibiting the acquisition of rights *in rem* in areas designated as being of military importance could fall within the scope of Article 224. If the prohibitions concerned were of a temporary and special nature it would not be impossible, in my view, to answer this question in the affirmative. I need only mention the state of anarchy which prevailed for a time in Albania, a country neighbouring on Italy, or, *a fortiori*, Italy's involvement in NATO operations in Bosnia and, more recently, Kosovo. Could anyone deny the Italian authorities the right to regard those occurrences as threats of war or as special circumstances arising from an international obligation accepted 'for the purpose of maintaining peace and international security'? Having regard to the instability reigning in the Balkans for the past five years, could Italy be denied the possibility of also maintaining pre-emptive prohibitions such as that at issue here during periods when, although international order and security have been re-established, it is not clear that the problems are over once and for all? Could the Community judicature, in that case, subject the measures concerned, enacted to protect national military interests, to a full review of their proportionality and hold, for example, that the island of Ischia is not situated in an area which is 'at risk' to a greater or lesser degree? Or could it maintain, as Mr Albore suggests, that military imperatives of that kind no longer exist?

34. It is clear, in my view, that at least for some Member States fulfilment of the conditions of Article 224 is not as remote as is customarily imagined. The difficulties inherent in defining the limits of, and carrying out, judicial review under Article 225 of any improper use of powers are noteworthy in every respect, this, of course, being on the basis that application of Article 224 cannot be avoided by rely-

ing — wrongly, to my mind — on the fact that it is solely an ancillary provision.

35. The issue does not arise in the case in point. The Italian legislation concerned is not temporary but permanent, and in accordance with the foregoing analysis thus falls outside the scope of Article 224. Furthermore, the Italian Government has not made use of the possibility of derogation offered by Article 224. It has not even sought to set out the reasons why situations covered by that article exist or why the disputed provisions, being of a military nature, are indissolubly and exclusively connected with coping with situations of that kind, when, in accordance with the interpretative approach set out above, they could be brought within the scope of Article 224, at least for a limited period. In so far as the manner in which Member States themselves perceive the geopolitical, strategic and other circumstances relating to Article 224 is, as I stated earlier, crucial for the purposes of applying that article, there is no need to consider this particular matter any further.

36. Nevertheless, the foregoing analysis is not without value. It is necessary in order to demonstrate the meaning of the disputed national legislation and the particular manner in which it should be treated. Inasmuch as that legislation concerns a matter which is declared by Italy to be 'of military importance' and, on that basis, is connected with circumstances to which Article 224 might possibly apply, the Court is called on to take account of these parameters in conducting its assessment of the legislation, even when doing so in relation to the other legal bases offered by the Treaty. If it also adopts this approach to assessment outside the scope of Article 224, Member States will no longer have a motive for relying on that article on an extensive basis, possibly jeopardising Community legality.

(c) Other legal bases

37. Moving beyond Article 224 of the Treaty, it remains to be considered, first, whether the disputed national prohibition touches upon certain Community rules and secondly, whether, that notwithstanding, it is in any event compatible with Community law. The provisions of primary Community law proposed by the referring court and the parties as suitable legal bases for the purposes of examining this case are those establishing the prohibition of any discrimination on grounds of nationality, the inviolability of private life, the free movement of persons and capital and the freedom to provide services.

38. Before considering each of these legal bases in detail, it is relevant to note that the Treaty provisions concerned share a common feature: on their proper construction they explicitly or implicitly permit, under certain conditions, the establishment of

national derogations from the principle of freedom of movement, in the name of 'public security'. The Court's treatment of the concept of public security is identical, irrespective of the particular legal context in which it is relied on. Having regard to that observation, the choice of the specific Treaty provision or provisions for the purposes of assessment of the case in issue does not have a particularly great practical significance.

39. So far as concerns, first, the free movement of capital, I need only mention the following: [16] capital movements also include those whereby non-residents of a Member State make investments in real estate situated on the territory of that State; and the disputed national legislation makes the acquisition of rights *in rem* over immovable property situated in certain parts of Italy subject, in the special case of persons who are not Italian nationals, to certain additional conditions. The national legislation in question thus clearly concerns the free movement of capital; its compatibility with Community law must be examined from the viewpoint of the Community rules organising that fundamental Community freedom, in so far as it is presumed that the purchasers in the main proceedings, who are German nationals, are not residents of Italy.

16 — See points 10 and 11 of this Opinion.

40. By contrast, since the intentions of the purchasers of the properties concerned are not known to the Court, it is not possible to establish with certainty whether the relevant acquisition of rights *in rem* is associated with the exercise of free movement of persons and of the freedom to provide services. Although the acquisition of immovable property may be an important constituent of those freedoms, as stated in the Court's judgment in *Commission* v *Greece*, [17] in the case pending before the referring court any association between the acquisition of the properties in issue, situated on the island of Ischia, and the intention to exercise the Community freedoms concerned remains hypothetical. In my view, therefore, the referring court's questions are not to be examined in the light of these legal bases, in so far, of course, as the purchasers of the aforementioned properties, as appears probable, were not already resident in Italy and do not intend to reside there.

41. It could, certainly, be argued that the acquisition of a property in a tourist area like the island of Ischia in Italy is sufficient in itself to make it likely that the purchaser intends to visit that island as a tourist, or recipient of services, in which case the provisions relating to freedom to provide services also apply to the case in point. [18] Similarly, the broad construction adopted by the Court and the Community legislature with respect to the scope of the

17 — Cited in footnote 3 above.

18 — See the judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, in Case 186/87 *Cowan* [1989] ECR 195 and in Case C-348/96 *Calfa* [1999] ECR I-11.

freedom of movement of persons and the right of establishment, including within their scope categories of persons not directly involved in the practice of an occupation, job-seeking or other economic activities, [19] could lead us to conclude that the very attempt to acquire immovable property in any part of Community territory is tantamount to an express intention to exercise freedom of movement or the right of establishment, in which case the relevant Treaty provisions would apply. Although I am not, in principle, opposed to a presumption to that effect — which in any case does nothing to alter the fact that any association between the acquisition of the immovable property in question and the relevant freedoms guaranteed by the Treaty is hypothetical — I do not consider it necessary to proceed any further in this direction, since, as I have explained, the present case seems to fall within the sphere of the free movement of capital. Furthermore, in accordance with my earlier analysis [20] the answer to be given to the question whether or not the national legislation concerned is compatible with Community law does not depend, in the present case, on the particular aspect of free movement under which it is to be examined.

42. Lastly, it is necessary to consider the assertion that the national restrictions in question conflict with Article 6 of the Treaty, which lays down a general prohibition of 'any discrimination on grounds of nationality', and with the right to the protection of private life as recognised in Community law.

43. The right to respect for private life is, indeed, protected by the Community legal order. [21] However, I do not consider that the obligation imposed by the Italian authorities to inform them of the purpose for which a person wishes to acquire immovable property constitutes an infringement of the right to private life. Furthermore, fundamental rights in any event 'do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed ...'. [22] Consequently, even if the national prohibitions at issue were to be regarded as restricting the right to respect for private life, they do not infringe Community law inasmuch as they are justified by reasons relating to the public

19 — See the analysis presented in my Opinion in Case C-378/97 *Wijsenbeek* [1999] ECR 1-6207, points 30 and 31.

20 — See point 38 of this Opinion.

21 — See, for example, the judgments in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575 and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737.

22 — *Commission* v *Germany*, cited in footnote 21 above, paragraph 23.

interest as represented here by national defence.

44. A more important issue is, in my opinion, potentially raised by the assertion that the Italian legislation concerned conflicts with Article 6 of the Treaty by introducing a form of discrimination on grounds of nationality. The Italian and Greek Governments contend that Article 6 cannot apply independently, but only where other, more specific, Treaty provisions apply which constitute particular applications of the principle of non-discrimination. To accept this restrictive approach would mean that Article 6 could not constitute a legal basis for examination of the present case unless the latter fell within the normative scope of another Treaty rule, for example the free movement of persons or capital or the freedom to provide services. I do not agree with that narrow interpretation, which ultimately deprives this provision of primary Community law of all practical usefulness. The Court has established clearly that a person can derive rights from Article 6 of the Treaty in the context of legal relationships falling within the scope of Community law in so far as it is not possible to apply one of the more specific provisions of primary or secondary Community law implementing the fundamental obligation on Member States to avoid any discrimination on grounds of nationality. [23] The right to equal treatment irrespective of nationality which derives from that provision is of course likewise not an absolute right. It is conceivable for national law to maintain or introduce restrictions for legitimate reasons relating to the public interest corresponding to those provided for under Articles 36, 59 (now, after amendment, Article 49 EC), 69 and so forth of the EC Treaty.

45. In any event, however, Article 6 is not the appropriate legal basis for examining the present case, not because it cannot apply independently but because there is another provision of Community law which concerns a more particular embodiment of the principle of non-discrimination. Since it has already been established that the national legislation at issue concerns Community law from the point of view of free movement of capital (and hence falls within the scope of Article 67 et seq. of the Treaty) or, in the alternative, from the point of view of freedom of movement for persons, Article 6 of the Treaty cannot be relied upon directly.

46. To conclude, I consider that the present case must be examined from the point of view of free movement of capital, although, in the alternative, it could also be examined from that of the principle of freedom of movement for persons.

23 — See the analysis of the case-law set out in point 62 et seq. of my Opinion in Case C-411/98 *Ferlini*, pending before the Court, ECR I-8081, I-8084.

VI — Compatibility of the contested national legislation with Community law

A — *The criteria governing judicial review*

47. Contrary to the view expressed by the referring court, the national rules must be examined not from the point of view of Article 67 of the Treaty but of Article 73b of the EC Treaty (now Article 56 EC) and Article 73d thereof, as expressly provided by Article 73a (repealed by the Treaty of Amsterdam). It is indisputable that the requirement of prior administrative authorisation as a condition for the acquisition of ownership of immovable property specifically where the purchaser is not an Italian national constitutes discrimination on grounds of nationality and a hindrance to the free movement of capital. Consequently, it is in principle prohibited under Article 73b, unless it is justified in accordance with Article 73d. The latter states as follows: 'The provisions of Article 73b shall be without prejudice to the right of Member States ... to take measures which are justified on grounds of public policy or public security'. I stated above that the term 'public security' is used by the framers of the Treaties to designate the same dimension of the public interest both in the context of Article 73d of the Treaty and in that of Articles 36, 56 and 66 thereof. It remains to be examined whether the Italian legislation in question constitutes a lawful restriction on the free movement of capital by virtue of the protection of public security.

48. Before analysing this particular point, I consider it essential to emphasise the differences distinguishing the present case from the case which the Court dealt with in *Commission* v *Greece*.[24] The subject-matter of that judgment was similar to that of the present case, because it concerned the conformity with Community law of national legislation prescribing special rules for foreign natural or legal persons on the drawing up of legal instruments relating to immovable property situated in border regions. However, in Case 305/87[25] the Court did not address some of the questions that have been raised in the context of the present case. More specifically, the Greek Government did not contest the complaints made against it by the Commission alleging that the Greek legislation infringed Articles 48, 52 and 59 of the Treaty, but merely made reference during the written procedure to the existence of a draft law which was intended to amend the legislation complained of.[26] Furthermore, when, at the hearing, the Greek Government argued for the first time that the measures at issue were justified under Article 224 of the Treaty, it did so without further elucidation, and the Court did not

24 — Cited in footnote 3 above.

25 — *Commission* v *Greece*, cited in footnote 3 above.

26 — *Commission* v *Greece*, cited in footnote 3 above, paragraph 10.

consider the substance of that submission.[27] Lastly, the Court, given the subject-matter of the dispute before it, merely declared that the Greek legislation was contrary to Articles 48, 52 and 59 of the Treaty, without considering whether that legislation might be justified by imperatives relating to the defence of Greece's military interests; in other words, the question of the relationship between the national prohibitions in question and the protection of public security did not constitute a substantive element of the Court's review.

49. The Court has consistently held that Treaty provisions which permit the adoption of national measures derogating from generally applicable Community rules must, because they constitute exceptions, be interpreted narrowly. National measures which introduce or maintain obstacles to or restrictions on freedom of movement are subject to full review of their proportionality in order to determine whether or not they are compatible with the Member States' obligations under the provisions of primary Community law. No national derogating measure may be disproportionate to the intended objective and every such measure must be interpreted in such a way 'that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard'.[28]

50. The Court's judgment in *Konle*[29] is of particular relevance here. That judgment concerned the compatibility with Community law of Austrian legislation under which transactions relating to the acquisition by foreign nationals of ownership of building land in certain regions of Austria was subject to authorisation from the authority responsible for land transactions. The purpose of that legislation was to prevent a change of land-use to use as a secondary residence in certain parts of Austria. The Court, after finding that the measures in question created a discriminatory restriction on capital movements,[30] stated that 'to the extent that a Member State can justify its requirement of prior authorisation by relying on 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, the restrictive measure inherent in such a requirement can be accepted only if it is not applied in a discriminatory manner and if the same result cannot be achieved by other less restrictive procedures'.[31] It came to the conclusion that, 'given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land as in this case and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines, the authorisation procedure at issue constitutes a restriction on capital movements which is not essential if infringements of the

27 — *Commission* v *Greece*, cited in footnote 3 above, paragraph 11.

28 — Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, paragraph 36.

29 — Case C-302/97, cited in footnote 2 above.

30 — Ibid., paragraph 23.

31 — Ibid., paragraph 40.

national legislation on secondary residences are to be prevented'. [32]

51. That case-law is relevant here not only on account of its connection with the subject-matter of the present case but also because it reveals the depth of the review of proportionality conducted by the Court in connection with application of Article 73d of the Treaty. In order to assess the necessity and the strict proportionality of national rules, the Court adopts a line of legal reasoning similar to that of the drafter of the rules at issue, seeking a solution under which the objective pursued by the public authorities will be achieved in a manner involving the least possible effect on the Community freedoms guaranteed by the Treaty. In other words, at a certain stage in its judicial reasoning the Court places itself in the position of the national legislature concerned in order to ascertain whether the national measures undergoing review meet the conditions of necessity and strict proportionality.

52. At the hearing the Commission relied on *Konle*, emphasising the similarities between the Austrian legislation which formed the subject-matter of that case and the provisions of Italian law at issue here. It maintained that the approach adopted in the judgment in *Konle* could be transposed, unaltered, to the present case. In other words, the Commission asked the Court to rule that the disputed Italian legislation and its system of prior authorisation of the purchase of immovable property infringe the principle of free movement of capital because they are not essential for protection of the public interest invoked by the national authorities, inasmuch as it is possible to safeguard that interest with provisions which affect the freedom under Community law less seriously.

53. I do not agree with the Commission's approach. I find it difficult to accept that it is possible to follow the aforementioned case-law step by step, firstly, examining in detail the specific military imperatives relied on by Italy and, secondly, proposing alternative ways of meeting those imperatives. For reasons which I have already explained, [33] the full substantive review normally accompanying application of the principle of proportionality is not appropriate in the case in point.

54. Furthermore, the Court has, in my view, recognised the need to limit the extent of the review of proportionality in cases such as the present one. That seems to be the import of its case-law stating that Member States have a degree of discretion when they adopt measures on matters associated with national public security. [34] It follows from those statements that judicial review carried out by the Court by applying the fundamental principle of proportionality is converted *from a full review as to the substance into an examination of*

32 — Ibid., paragraph 49.

33 — Point 16 et seq. of this Opinion.

34 — *Sirdar*, cited in footnote 5 above, paragraph 27, and *Leifer*, cited in footnote 4 above, paragraph 35.

the limits of the Member States' discretion with regard to public security. So far as concerns more particularly the specific aspect of public security at issue here, namely safeguarding military interests and national defence, the Member States' freedom of assessment and action is especially wide, as I have mentioned above. As the national authorities' degree of discretion widens, the scope of the review of such national measures in terms of Community law correspondingly narrows. [35]

55. What, however, are the criteria for determining the extent of judicial intervention in cases such as that under consideration here? As the Commission rightly observes, the Community legal order does not permit, as the basis for derogation from Community rules, the invocation of a national public interest, even one of a military nature, in general, abstract and hypothetical terms. The opposite approach would entail recognition of the existence of a category (of indeterminate extent) of national 'acts of State' immune from Community control of their legality. Consequently, a Member State wishing to diverge from the Community path must provide such explanations as are necessary to establish that the exceptions introduced are not of a general nature or designed to deal in an unsanctioned manner with hypothetical and speculative situations. This 'minimum statement of reasons' obligation constitutes a precondition for recognising that national decisions on matters of military importance are compatible with Community law.

56. That does not mean, in the case in point, that the body applying Community law must assess Italy's defence policy in terms of its substance or carry out an exhaustive assessment of the regulatory choices made by the national legislature. It is for the latter alone, first, to designate a particular matter as being one of military importance and, secondly, to find the means of meeting that specific public-interest objective. Reliance on national defence cannot, however, be uncontrolled: the national measures concerned must, up to a certain point, be supported by a statement of reasons which makes clear the objective pursued and the logical connection between the national measures adopted and attainment of that objective. The Court cannot tolerate reference to the concept of national defence without further logical explanation in such a way that is it used as a pretext for circumventing a Member State's obligations under the Treaty. When national authorities refer to the military dimension of public security, they must in any case abide by the rules of logic and the lessons of common experience. Nor is it permissible for military interest to be used as a pretext concealing some other State objective contrary to the

35 — Adopting the same approach, it is to be inferred that the review of proportionality associated with the application of Articles 36, 59, 69 and 73d of the EC Treaty exhibits, following the limitation deriving from the special nature of the national measures under scrutiny, similarities with the review of 'improper use' which is provided for under Article 225 of the EC Treaty. In that way, balance is restored in the application of provisions of primary Community law, and the boundaries between Community and national action are traced more clearly without risk of encroaching on national sovereignty through the exercise of excessive Community control.

Treaty provisions, such as, for example, the indirect introduction of discrimination on grounds of nationality. That undeniably constitutes improper conduct on the part of the Member State concerned and is contrary to the rules on freedom of movement.

57. The Court's judgment in Case C-62/96 *Commission* v *Greece* [36] is a characteristic example of the review conducted by the Court with respect to national rules which a Member State links to its military defence. Greece had maintained in force legislative provisions which restricted the right to be registered in the Greek shipping registers and to fly the Greek flag to vessels more than half the shares in which were owned by Greek nationals or owned by Greek legal persons more than half of whose capital was held by Greek nationals. To justify that legislation, it relied, *inter alia*, on the particular nature of its national defence organisation and the need to be able to requisition ships in order to cope with exceptional situations. The Court simply responded to that line of argument as follows: '... as regards organisation of the military defence of the Hellenic Republic, suffice it to note that the Greek authorities could decide to requisition for military purposes any ship flying the Greek flag, whatever the nationality of its owner'. [37] In other words, the Court based its reasoning on deductions of logic and the lessons of common experience, in accordance with which a State's power to requisition certain goods for national defence purposes is so extensive that it cannot be in the least affected by the nationality of the owner of those goods. There was, therefore, no logical connection between the national rules at issue and attainment of the military objective pursued by the Member State concerned.

B — *Application of those criteria to the present case*

58. It remains to transpose to the present case the conclusions of the above analysis relating to the limits of the Community judicial review and the criteria governing that review. I should mention, once again, that although Member States may have a very wide degree of discretion with regard to the protection of their military interests, that discretion is not uncontrolled. Thus, when national authorities introduce derogations from the fundamental Community principle of freedom of movement, they are under an obligation to state the reasons on which those derogations are based, in that they are to state the objective pursued by the national rules concerned and demonstrate the logical connection between the attainment of that objective and the rules enacted. Observance of that obligation, the specific features of which vary, of course, according to the particular nature of each individual case, is an essential precondition of the judicial review under Community law, so as to ensure, in each instance, that Member States are not exceeding the limits of the discretion which they have with regard to protection of the national military interest or that they are not improperly relying on that aspect of the public interest in order to pursue, in reality, different

36 — [1997] ECR I-6725.

37 — *Commission* v *Greece*, cited in footnote 36 above, paragraph 26.

objectives which are contrary to the requirements of Community law.

59. In the case of the Italian legislation at issue here, under which the acquisition by non-Italian nationals of rights *in rem* over immovable property situated in areas of military importance is dependent on prior administrative authorisation, effective judicial review under Community law presupposes explanation by the Italian authorities of the following matters.

60. As regards, first, the drawing up of the legislation at issue, it is essential to make clear the logic of the system whereby certain parts of Italian national territory are designated to be areas 'of military importance', the general criteria which might be applied in identifying those areas and the reason why it is necessary specifically for foreign purchasers of immovable property to be subject to the prior authorisation procedure.

61. As regards, secondly, the implementation of those rules in practice, it would be useful if the body applying Community law — as far as possible, of course, given the particular nature of situations in which the protection of national military interests is involved — were aware of the matters scrutinised, by the national administrative authorities and the specific criteria taken into account for granting or refusing authorisation.

(a) The logic of the contested national rules

62. I shall start with the first aspect of the obligation to provide a statement of reasons. In reality, the Italian authorities are called on to answer two questions. First, why is it essential for foreign nationals wishing to acquire rights *in rem* over immovable property in certain regions of Italy to be treated in a special, manifestly less favourable, manner? Secondly, how, at the legislative level, are the parts of Italian territory which are covered by that regime for foreign nationals designated?

(i) Why does the special regime apply only to non-Italian nationals?

63. It is apparent from the answers given by the Italian Government to the questions posed by the Court in the course of the written procedure that the application of a system of prior authorisation to the acquisition by non-Italian nationals of rights *in rem* over immovable property in areas designated as being of military importance is based on the following reasoning. Persons having the nationality of a particular Member State belong, by reason of that attribute, to a 'national community' and share the fundamental interests of that community. First, the interests of those persons are assumed to be identical with the interests of the corresponding 'national community'. Secondly, those persons, by the mere fact of their nationality, are subject to a special obligation to conform to the interests of the national community which stems from the duty of solidarity

binding a citizen to the State of which he is a national. That duty finds practical expression in a series of separate obligations incumbent on nationals, such as that laid down in Article 246 of the Italian Penal Code which makes it an offence for any citizen to accept monetary reward or other advantage from a foreign source for behaving in a manner contrary to national interests. It is clear that persons not having Italian nationality are not in the same position, in law or in fact, as Italian nationals, in the sense that they cannot be regarded as 'sharing' Italy's national interests and are not subject to the special obligations imposed by Italian law to conform to those interests.

64. Thus, whereas — in the sovereign opinion of the Italian authorities — the Italian nationality of a purchaser of immovable property situated in areas of military importance and the special duties inherent in that nationality are sufficient to ensure that national military interests are not jeopardised by the purchase, corresponding guarantees do not exist where the purchaser is a foreign national. It is therefore essential, in the opinion of the Italian Government, to provide for an additional system for safeguarding national military interests. That is precisely the objective pursued by the Italian legislation concerned, which introduces a system of prior authorisation specifically for cases where the purchaser of immovable property in areas of military importance is a foreign national.

65. That reasoning could be countered with the following criticism. Although the position in law and in fact of foreign nationals cannot be equated with that of Italian nationals, the question arises as to whether it is acceptable under Community law to impose a system of preventive control specifically on the former when it is apparent that the latter are not subject to a corresponding regime: [38] under Article 246 of the Italian Penal Code, any Italian citizen who prejudices national (in the case in point, military) interests incurs penal sanctions; it is, however, inconsistent with the very logic of the system for safeguarding national military interests for the Italian legal order to allow prejudice to those interests when the person causing it is an Italian national and to intervene only afterwards with penal measures, but to consider preventive intervention necessary, for the purposes of safeguarding the very same interests, with regard to the activities of foreign nationals in Italy. Does the contested Italian legislation perhaps ultimately mask a more general negative position on the part of the national legislature towards non-Italian nationals to the effect that foreign nationals are treated in law as more likely to engage in anti-national conduct and hence as more dangerous in practice, especially where the national military interest is at stake?

66. That approach, if it truly reflects the intentions of the Italian legislature, undoubtedly troubles the body applying Community law, inasmuch as it can be regarded as rejecting the idea of continuous convergence of the peoples of the Member States and of advancement of European integration, an idea which is projected by the Community legal order. That criticism, however, is political, not legal. At the

38 — Until the entry into force of Law No 898/1976, Italian nationals were subject to a system of preventive control under Law No 1095/1935.

present stage of European integration and despite the progress made at both institutional and constitutional level, particularly in relation to European citizenship, a Member State still retains the right, in my view, to make a distinction between its own nationals and those of other Member States and to consider that, in certain situations and under certain conditions, the conduct of the former presents less of a potential risk to national military security than that of the latter. Consequently, I am of the opinion that Italian legislation applying in areas of national territory of military importance is not contrary to Community law solely because it imposes on non-Italian nationals wishing to acquire immovable property in those areas the obligation to apply for and obtain a special prior administrative authorisation which is not required when the purchaser of such property is an Italian national. It is possible for that discriminatory treatment to be held to be justified under Community law.

(ii) The designation of areas 'of military importance'

67. Although the logic of the distinction made between Italian nationals and foreign nationals with regard to the matter at issue, namely, the acquisition of rights *in rem* on Italian territory, may, at least theoretically, be acceptable in terms of Community law, that does not mean that the contested Italian legislation is automatically compatible with the rules of the Community legal order in every respect. If the need for that distinction on the grounds of safeguarding Italy's military interests is to be conceded, it is essential to have clarification of the logic of the system whereby certain parts of Italian territory are designated as areas of military importance and made the subject of special rules applying only to foreign nationals. I am not, of course, calling for — nor could I call for — an exhaustive analysis of Italian defence policy and hence a detailed definition of the notion of 'military importance'. Nevertheless, I consider it essential for the Italian authorities to be able to explain the philosophy of the system which divides Italian territory into areas with and without military importance and the functioning of the associated preventive control mechanism.

68. However, even following the written and oral observations of the Italian Government, the rationale of the contested legislation has not been made sufficiently clear. The Ministerial Decree of 15 May 1990, implementing the provisions of Law No 104/90 and designating the areas of military importance in which special rules on the transfer of immovable property apply, merely lists without further explanation the island areas envisaged by Law No 898/1976, which, in turn, refers to the earlier Laws No 1095/1935 and No 2207/1939. It appears, therefore, that the competent ministers did not carry out any substantive assessment of the appropriateness or otherwise of keeping the island areas concerned subject to the aforementioned special rules or, assuming that they considered the matter, did not set out

the reasons on which they based their decision. Furthermore, neither the Law of 1976 nor the original Law of 1935 provide specific information on the philosophy underlying the system of dividing Italy into areas with and without military importance, nor do they even state the general criteria on the basis of which the competent national authorities make that division. Also, no care appears to have been taken to review the matter at regular intervals in order to ascertain whether it is appropriate for territory originally classified as being of military importance to continue to be designated as such.

69. It is particularly notable that, whereas Law No 898/1976 regulates exhaustively the question of military easements burdening land in the vicinity of military installations (Articles 1 to 15) and issues concerning the restrictions imposed on the construction of certain works in 'municipalities of military importance', [39] it is especially vague so far as concerns the 'areas of military importance' mentioned in Article 18. In particular, the legislation defines in detail the cases in which restrictions are imposed on the use of land by reason of its proximity to military installations, the scope of those restrictions and the preconditions for their imposition. The validity of the restrictions is limited in time, the need for them is subject to regular review and the Law provides for the possibility of lifting them or awarding compensation to persons who have suffered damage because of them. By contrast, the system of a general division of Italian territory into areas respectively with and without military importance has remained essentially unchanged, in the form it was given shortly before the Second World War when the geopolitical and strategic circumstances were clearly different. The modern-day Italian legislature does not appear to have considered the necessity of maintaining that system and has not even taken care to provide information as to the criteria for defining the concept of areas of military importance.

70. In short, Italian law provides no information explaining why and according to what criteria certain parts of national territory, as opposed to others, are of such military interest as to justify the application of special rules affecting foreign nationals with respect to the transfer of immovable property. That is to say there is no indication of the logical connection which specifically links the areas in question to the national military interest, or of the connection between the safeguarding of that interest and the application of a system of preventive authorisation to immovable property transactions where the purchaser is a non-Italian national.

71. It should be pointed out that the lack of a statement of the reasons on which the contested legislation is based cannot be justified, as the Italian Government attempted to do at the hearing, by relying on a general and undefined concept of 'military secrecy'. The latter might justify a refusal to disclose specific information regarding the particular military interest of a certain area. It is not, however, capable

39 — Those municipalities are listed exhaustively in Schedules A, B and C to Law No 898/1976.

of remedying the designation, without any reasons, of extensive areas of Italian territory as areas of military importance. A distinction has to be made between the general system of designating certain areas as being 'of military importance', the logic of which the Italian authorities must be able to explain, and specific applications of that system, which may be covered by military secrecy.

72. While the Member States may have a wide degree of discretion in adopting the criteria whereby certain regions are subject to special rules for reasons of a military nature, they cannot refrain entirely from defining any such criteria, possibly effecting an arbitrary classification of the various parts of national territory. Otherwise, there would be nothing to prevent States from making the whole of their particular territory subject to special rules and thereby introducing a very extensive restriction on the free movement of capital, by relying, without any explanation, on the military importance of that territory. Such a practice is manifestly wrongful from the point of view of Community law.

73. I consider it appropriate at this point to make two further observations which aggravate the position of the contested Italian legislation from the point of view of its compatibility with Community law.

74. First, it is not without significance that the system of prior authorisation for transfers of immovable property in areas of military importance, as introduced by Law No 1095/1935, originally concerned all transactions without exception, irrespective of the purchaser's nationality. Law No 898/1976, which retained and enlarged the geographical scope of those provisions, stated that they were no longer to apply when the purchaser was an Italian national. That is to say, the discriminatory treatment of non-Italian nationals was introduced afterwards, at a time when Italy was already a member of the European Communities and under an obligation to observe the principles of the free movement of capital. That fact, in conjunction with the abovementioned lack of adequate explanation regarding the logic underlying this preventive control mechanism and its connection with the actual requirements of the protection of national military interests, means that it cannot be ruled out that the Italian legislation at issue constitutes a means of arbitrary discrimination against nationals of other Member States who wish to exercise the rights arising from the principle of the free movement of capital.

75. Secondly, as specifically regards island regions such as that to which the national court's question refers, it should be noted that the Italian legislature placed every small Italian island in the category of areas of military importance.[40] It would appear, therefore, that the particular geopolitical and strategic characteristics of Ischia, the island in question in this case, were not considered when it was included among the areas designated as being of military impor-

40 — I refer on this point to the text of the joint ministerial decree of 15 May 1990 mentioned in point 8 above.

tance. The problem from the point of view of Community law created by the lack of satisfactory explanation as to the logic of the system of classifying Italian territory and the way in which the national military interest is connected with any specific region becomes more acute when it is remembered that many of the islands listed in the Ministerial Decree of 15 May 1990, one being Ischia, are nowadays of major importance as tourist areas; this of course attracts both Italian and foreign property purchasers and makes the acquisition of property situated on those islands a highly attractive investment. Thus, when the Italian legislature gives no explanation whatever as to why those islands are of military importance, it is not possible to verify whether the real purpose of the prohibition imposed on foreign purchasers is the protection of certain specific military interests or, in direct conflict with Community law, discrimination against foreign investors as compared with national investors.

76. Consequently, at least on the basis of the information available to the Court, the contested Italian legislation, in so far as it constitutes a derogation from the principle of free movement of capital without sufficient justification being provided of the necessity of introducing that derogation for the purpose of safeguarding the national military interest, does not appear to be compatible with Community law. I would, however, make some slight reservation for the eventuality that, in the course of the main proceedings, the Italian authorities provide the referring court with the explanations needed in order to deduce, first, the philosophy underlying the system of designating areas of military importance on Italian territory and, secondly, the logical connection between serving Italy's military interests in regions of military importance and applying special rules to the transfer of immovable property situated in those regions. [41]

(b) Application of the relevant Italian legislation

77. The analysis given below operates on the assumption that the contested provisions relating to the division of Italian territory into areas respectively with and without military importance are considered to be truly aimed at safeguarding an existing national military interest and that the exercise of a system of preventive control applying to the transfer of immovable property in regions of military importance in cases where the purchaser is a non-Italian national has a logical connection with the protection of that interest, in which case the legislation concerned is not — theoretically, at least — contrary to the Community rules relating to the free movement of capital. If that is so, it is

41 — I consider it necessary, at this point, to draw attention to the fundamental distinction to be drawn, in procedural terms, between the preliminary reference procedure under Article 177 of the Treaty and the procedure under Article 169 of the EC Treaty (now Article 226 EC). If the contested legislation constituted the subject-matter of an action brought by the Commission against the Republic of Italy, I would not hesitate to take the view that, in the light of the information available to me, Italy has failed to fulfil its obligations under the provisions of Community law relating to the free movement of capital. However, in the context of the Article 234 procedure, the Court's sole function is to provide the national court with appropriate guidance on the interpretation of Community law which will enable that court, thereafter, to assess whether the national provisions it is called upon to apply are consistent with Community law. The final decision therefore falls to the national court.

essential to consider whether the manner in which the relevant legislation is implemented in particular cases constitutes an obstacle to exercise of the aforementioned freedom which is unjustified and therefore contrary to Community law. Consequently, it is vital to assess the elements of the preventive administrative control on the transfer of immovable property as exercised in practice.

78. It is apparent from the answers given by the Italian Government to the Court's questions on the matter that the real authority to grant to a foreign national authorisation to acquire rights *in rem* over immovable property situated in an area of military importance lies with the competent military authorities whose opinion is sought on the matter. Ultimately, it is those authorities who decide whether the military importance of a particular region precludes the acquisition of immovable property by a particular foreign national. There are, however, no clear criteria governing the exercise of this preventive control, nor do we know whether the military authorities' investigation is centred on the foreign national or the characteristics of the immovable property.

79. In this connection, I should point out that the need for the body applying Community law to know how the national authorities assess applications lodged by non-Italian nationals seeking to acquire immovable property in areas of military importance might conflict with the need to preserve military secrecy. The reasons for which the military administration issues an opinion in favour of, or against, granting authorisation to a foreign national may be based on confidential assessments whose disclosure is considered likely to be prejudicial to public security. Although this thorny problem of the compatibility of the judicial function with the preservation of military secrecy clearly concerns the Community legal order since it affects the review, in individual cases, of the observance of Community law, it nevertheless remains within the domain of national law, that is to say it is covered by the principle of the Member States' procedural autonomy. It is for the national court, acting in its capacity as ordinary court of Community law, to seek the most appropriate solution, taking into account, first, its obligation to examine whether or not the manner to which the Italian legislation at issue is implemented in practice constitutes unlawful discrimination against non-Italian nationals and, secondly, the possibilities for, and restrictions on, its access to the relevant information under national law.

80. In any event, irrespective of the extent of the judicial review as to application of the legislation in individual cases, it is relevant, in my opinion, to refer to some numerical data regarding the administrative practice adopted to date. According to the information supplied by the Italian Government in its written observations, which has not been challenged, of all the authorisation applications lodged in Italy by foreign nationals during 1997 and 1998 only two were refused, one of which concerned a border region. It therefore follows that the legislation in question does

not appear to be utilised, today, as a means of systematically preventing foreign nationals from acquiring properties in certain regions of Italy. In my view, this is an indication that the national system of controlling the transfer of immovable property which is at issue does not appear to function in a manner such as to render it, as a whole, a means of arbitrary discrimination against non-Italian nationals contrary to the requirements of the principle of freedom of movement. In terms of Community law, the problem posed by the legislation concerned is, as I have explained, a different one: it relates to the lack of satisfactory explanation regarding the criteria defining the concept of 'areas of military importance' and regarding the logical connection linking the national military interest to those areas and to the special rules applying to the transfer of immovable property.

VII — Conclusion

81. In view of the foregoing consideration, I propose that the Court should answer the question referred to it for a preliminary ruling as follows:

National legislation which imposes conditions on the acquisition by foreign nationals of rights *in rem* over immovable property situated in areas designated as being of military importance is contrary to Community law, and in particular to the principle of free movement of capital, where there is a lack of satisfactory explanation regarding the criteria under which an area is designated as being of military importance and regarding the necessity of exercising that preventive control for the purpose of safeguarding national military interests.