tangible property as owner, even if there is no transfer of legal ownership of the property.
It is for the national court to determine in each individual case, on the basis of the facts of the case, whether or not there is such a transfer.

2. Under the division of functions provided for by Article 177 of the Treaty, it is for the national court to apply the rules of Community law, as interpreted by the Court, to an individual case. No such application is possible without a comprehensive appraisal of the facts of the case.

REPORT FOR THE HEARING
delivered in Case C-320/88 *

I — Facts of the case

A — *National and Community legislation*

1. The Wet op de Omzetbelasting 1968 (Netherlands VAT Law, hereinafter referred to as 'the VAT Law') provides that the concept of the supply of property (whether movable or immovable) covers *inter alia*

(i) the transfer of ownership of the property pursuant to a contract (Article 3(1)(a)), and

(ii) the transfer (overdracht en overgang) of property under which that property leaves the business assets of an undertaking (Article 3(1)(e)). According to Article 3(3) of the VAT Law,

'where agreements are entered into by more than one person entailing the obligation to supply the same item of property, and that item of property is then delivered directly by the first person to the final recipient, the item is considered to have been supplied by each of those persons'.

2. The basic rule for the taxing of transfers of immovable property is that the supply of pre-existing immovable property is exempted but that the supply of new immovable property is subject to the tax. Thus, by virtue of Article 11 of the VAT Law, the supply of a building previously used or of land which is not built on, and the registration and assignment of rights *in rem* over immovable property, are exempted from VAT whereas the supply of a site prepared for building, the supply of immovable property within two years of its original occupation, and the handing over of certain works of construction are subject to VAT.

The VAT Law was amended in 1979. The amendments were designed to bring the

* Language of the case: Dutch.

Netherlands legislation on turnover tax into line with the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1).

3. Under Article 5(1) of the Sixth Council Directive,

"'supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

B — *Background to the main proceedings*

4. By a notarial act of 19 June 1979, entitled 'Economic conveyance', a taxable entity known as Shipping and Forwarding Enterprise Safe BV (Safe Rekencentrum BV, hereinafter referred to as 'Safe'), whose registered office is at Hillegom (Netherlands) sold to Kats Bouwgroep NV (hereinafter referred to as 'Kats'), whose registered office is at Leeuwarden (Netherlands), immovable property consisting of a detached house with outbuildings for HFL 2 250 000. The contract of sale between Safe and Kats included the following conditions:

'1. The vendor undertakes to transfer to the purchaser a right of ownership which — subject to the creation of one or more mortgages in the property at the request of the purchaser or the registration of mortgages on its behalf:

(a) is unconditional and not subject to revocation, repurchase, rescission or annulment in any way;

(b) is not encumbered by mortgage, attachment or other rights *in rem*;

(c) is not encumbered by the registration of mortgages or attachment orders, etc.

...

5. The purchaser is entitled to all profits and liable for all outgoings in respect of the property with effect from today.

6. With effect from today the property is entirely at the risk of the purchaser.

7. The purchaser is liable for all notarial costs in respect of this agreement of purchase and sale and of the legal and actual transfer of the property; the purchaser is also liable for any transfer tax payable on the legal transfer of the property.

...

D — Inasmuch as the legal transfer of the property is to take place as soon as the purchaser so wishes, but in any event not later than 31 December 1982, the vendor and the purchaser further agree that:

(1) the vendor undertakes to transfer the property to the purchaser on the latter's demand,

(2) the legal transfer of the property shall take place under the conditions and at the time or times determined by the purchaser, having regard to what is agreed by the present act,

(3) with effect from today the purchaser shall have the use of the property for its own benefit and at its own risk;

with effect from today, and subject to observance of what is agreed in this act between the vendor and the purchaser the purchaser is entitled to engage in any and all (legal) dealings with regard to the property. With effect from today, the vendor shall refrain from any (legal) dealings with regard to the property, save on request of the purchaser.

E — The party of the first part (Safe) hereby grants the purchaser (Kats) an irrevocable power of attorney, with right of substitution, for or on behalf of the vendor:

(1) to transfer the property, as referred to above in Part D;

(2) to execute a mortgage over the property or such part thereof as the purchaser may wish, even for the benefit of the purchaser itself, in such amounts as the purchaser may wish and under such conditions as it may see fit;

(3) in general, to comply with the obligations undertaken by the vendor towards the purchaser.

The abovementioned power of attorney is granted exclusively in the interest of the purchaser and constitutes an integral part of this agreement of purchase and sale, which would not have been entered into without that power of attorney and if it were not irrevocable; the power of attorney shall have effect as against third parties, so that its revocation shall have no legal effect whatsoever.'

5. In 1980 Kats had the house and outbuildings demolished, and it prepared the site for development. On 11 August 1983 the trustees in bankruptcy of Kats entered into a notarial contract with Abreka BV of Amsterdam, under which they assigned to Abreka for the sum of HFL 425 000, plus the turnover tax of HFL 76 500 due on the transaction, all the rights which Kats had acquired under the 1979 agreement with Safe entitled 'Economic conveyance'. In accordance with its undertakings, Safe transferred legal ownership of the immovable property to Abreka direct, on 11 August 1983.

6. Safe incurred a retrospective assessment for value-added tax for the year 1979. According to the Inspector of Finances, the notice of retrospective assessment concerns the supply, within the meaning of Article 3(3) of the VAT Law from Safe to Kats on 11 August 1983, when the legal transfer of the property took place. The Inspector maintains that the payment of HFL 2 250 000 in 1979 was merely payment in advance.

Safe lodged an administrative appeal with the Inspector of Finances against the notice of retrospective assessment, but the Inspector rejected the appeal. Safe brought an action against the rejection before the Gerechtshof (Court of Appeal), The Hague, which annulled the Inspector's decision and the notice of retrospective assessment. The Staatssecretaris van Financiën lodged an appeal in cassation against that judgment.

C — *Questions submitted for a preliminary ruling*

7. The Hoge Raad der Nederlanden took the view that the dispute raised questions as to the interpretation of a provision of Community law and accordingly, by judgment of 19 October 1988, stayed the proceedings and requested the Court of Justice under Article 177 of the EEC Treaty

to give a preliminary ruling on the following questions:

'(1) Must Article 5(1) of the Sixth Directive be interpreted as meaning that a supply of goods takes place only where legal ownership of the property is transferred?

(2) If not, does a supply of goods also take place where their legal owner:

(i) has entered into an agreement with another party under which any changes in the value of the property and all profits or outgoings are for the benefit or at the expense of that other party;

(ii) has agreed to transfer legal ownership of the property to the other party at any future time;

(iii) has agreed to grant the other party an irrevocable power of attorney to carry out any transactions necessary to execute that transfer of legal ownership;

(iv) has, pursuant to that agreement, in fact placed the property at the disposal of the other party?'

8. The Hoge Raad is of the opinion that, if Article 5(1) of the Sixth Council Directive relates to certain forms of transfer of immovable property other than the transfer of legal ownership, it follows that, in view of the concordance in meaning between the term 'supply' used in the VAT Law and the same term as it appears in the Sixth Directive, Article 3(1) of the VAT Law also covers those other forms of transfer. The Hoge Raad adds that, pursuant to the first paragraph of Article 671 of the Netherlands Civil Code, the legal ownership of immovable property is transferred by entry of the act in question in the relevant official registers; until such entry has been made, the legal ownership of immovable property remains vested in the person who was the owner until then, even if he has transferred economic ownership to another person.

Consequently, the Hoge Raad takes the view that the question is whether only the transfer of the legal ownership of property may be described as a 'supply of goods' within the meaning of Article 5(1) of the Sixth Directive, or whether such a supply can be said to have taken place in all cases or in some cases where only the economic ownership of the property is transferred.

II — Procedure

9. The judgment making the reference was lodged at the Court Registry on 3 November 1988.

10. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by

the Government of the Kingdom of the Netherlands, represented by the Ministry of Foreign Affairs;

the Commission of the European Communities, represented by Johannes Føns Buhl, Legal Adviser and Berend Jan Drijber, a member of its Legal Department, acting as Agents.

11. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

12. By decision of 7 July 1989 the Court, pursuant to Article 95(1) and (2) of the Rules of Procedure, assigned the case to the Sixth Chamber.

III — Summary of the written observations submitted to the Court

A — *First question*

13. The Netherlands Government notes that the term 'supply of goods' under Article 5(1) of the Sixth Directive is not further defined therein. It is therefore natural that Member States should refer to their own civil law to determine the scope of the term. The conveyance of the legal ownership of tangible property, as defined under the civil law of the Member State concerned, must be described as the 'supply of goods'. By virtue of the first paragraph of Article 671 of the Netherlands Civil Code, legal ownership of immovable property is not transferred until the relevant deed has been entered in the official registers. Nevertheless, that civil-law approach does not in itself signify that the answer to the first question submitted by the Hoge Raad must be in the affirmative. The Netherlands Government maintains that account must be taken of the aim of the Sixth Directive, namely to ensure the neutrality of the Community system of turnover taxes. Accordingly, transactions which from an economic viewpoint are to be equated with the transfer of legal ownership should be classified under the heading 'supply of goods'. The principle applies to an act whereby the *de facto* power of disposal over property is transferred to a third party who thereby secures all the economic interests connected with the property. In such a case that third party holds the property as if he were the owner of it.

14. Such an interpretation of the term 'supply of goods' is borne out by the other provisions of Article 5 of the Sixth Directive, under which transactions whereby the third party is vested with a less extensive power of disposal than would be the case with the transfer of economic ownership are regarded as a 'supply of goods'. The Netherlands Government concludes that Article 5(1) of the Sixth Directive covers the transfer of the economic as well as the legal ownership of property.

15. Where the parties agree to transfer the legal and economic ownership at the same time, it is the legal ownership which constitutes the 'supply of goods'. The transfer of economic ownership has no significance in itself for the purposes of the levy of value-added tax. If the parties agree on the transfer of economic ownership alone, that transfer constitutes the 'supply of goods'. The subsequent transfer of legal ownership has no implications for the application of value-added tax.

16. Lastly, the Netherlands Government observes that the wording of Article 5(1) of the Sixth Directive, and in particular the phrase '... dispose of tangible property *as* owner', suggests that Article 5 also refers to transfers of economic ownership.

17. In conclusion, the Netherlands Government proposes that the Court should give a negative answer to the first question referred to it.

18. The Commission also proposes that the first question be answered in the negative.

19. The Commission puts forward the same textual argument as was submitted by the Netherlands Government.

20. According to the Commission, a Community definition should be given to terms used in directives, in order to ensure the uniform application of the harmonized system of turnover tax. For that reason, 'supply of goods' cannot be defined by reference to the manner in which the transfer of legal ownership is regulated by the national provisions of the Member States.

21. The Commission further submits that the framers of the VAT directives opted for an economic conception of the term 'supply of goods', so as to include any transaction which for commercial purposes may be treated as equivalent to a transfer of legal ownership. 'Supply of goods' is not confined to the acquisition of the power to dispose of property as the legal owner.

22. The Commission proposes that the Court should give the following answer to the Hoge Raad's first question:

'Article 5(1) of the Sixth Directive is not confined to the transfer of the legal ownership of goods.'

B — *Second question*

23. The Netherlands Government takes the view that a transfer of economic ownership as defined in the second question may constitute a supply for the purposes of Article 5(1) of the Sixth Directive. Nevertheless, the fact that the holder of the legal title has undertaken to transfer it at a future date supports the view that, in this case, the transfer of the legal ownership prevails.

24. The question which of the two transfers is to be regarded as the 'supply' for the purpose of Article 5(1) of the Sixth Directive must be resolved on a case-by-case basis, having regard to the situation when the economic ownership is transferred. If the interval between that transfer and the transfer of legal ownership is long or of indeterminate duration, it will be the transfer of economic ownership that constitutes the 'supply of goods'.

25. The Government of the Netherlands concludes that the second question must be answered in the negative because in the circumstances of the case before the national court it is the transfer of the legal, rather than the economic, ownership which is decisive.

26. The Commission takes the view that the transfer of economic ownership falls within the concept of the 'supply of goods'. Such a transfer covers the right to dispose of the property, which includes the power to manage, alter or mortgage the property and the assumption of the risk of any change in value.

27. The Commission contends that a broad interpretation of the term 'supply of goods' is corroborated by the fact that Article 5(3) and (4) of the Sixth Directive treat a number of legally distinct but economically similar transactions as a 'supply of goods'. Considerations of neutrality demand that transactions equivalent to the supply of goods be subject to VAT in the same way as the transfer of legal ownership.

28. The Commission maintains that this broad conception of the term 'supply of goods' is not affected if, on the transfer of economic ownership, the parties make arrangements for the transfer of the legal ownership of the property. For reasons of legal certainty it is justifiable that the liability to tax of a transfer of economic ownership should not be dependent on arbitrary factors such as the content of the agreement or the manner in which the relevant legal system regulates the transfer of legal ownership.

29. The Commission concludes that it is for the national courts to consider, in the light of the specific features of any given agreement, whether the right to dispose of property as owner has been transferred.

30. It proposes that the Court should give the following answer to the Hoge Raad's second question:

'It is for the national courts to determine in each case on the basis of the facts before them, whether the transferee has obtained the right to dispose of the property as the owner.'

G. F. Mancini
Judge-Rapporteur