JUDGMENT OF THE COURT (Fourth Chamber)
24 June 1986 *

In Case 157/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Genova [Genoa Magistrates' Court] for a preliminary ruling in the proceedings pending before that court between

Luigi Brugnoni and Roberto Ruffinengo,

and

Cassa di Risparmio di Genova e Imperia [Genoa and Imperia Savings Bank],

on the interpretation of Articles 67, 68, 73 and 108 (3) of the EEC Treaty, the First Council Directive, of 11 May 1960, for the implementation of Article 67 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 49) and the Second Council Directive of 18 December 1962 adding to and amending the First Directive (Official Journal, English Special Edition 1963-1964, p. 5), made in order to enable that court to give judgment on the compatibility with Community law of certain provisions of Italian legislation on exchange matters,

THE COURT (Fourth Chamber)

composed of: K. Bahlmann, President of the Chamber, T. Koopmans, G. Bosco, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

L. Brugnoni and R. Ruffinengo, the plaintiffs in the main proceedings, by G. Conte and G. M. Giacomini of the Genoa Bar,

* Language of the Case: Italian.

the Cassa di risparmio di Genova e Imperia, the defendant in the main proceedings, by P. Musante of the Genoa Bar,

the Government of the Italian Republic, by Marcello Conti, avvocato dello Stato, acting as Agent,

the Commission of the European Communities, by Guido Berardis, a member of its Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 May 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 16 May 1985, which was received at the Court on 23 May 1985, the Pretura di Genova referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 67, 68, 73 and 108 of the EEC Treaty and of the First and Second Council Directives, of 11 May 1960 and 18 December 1962, for the implementation of Article 67 of the Treaty in order to enable it to give judgment on the compatibility with Community law of certain Italian legislative provisions on exchange regulation.

2 Those questions were raised in proceedings relating to the purchase of foreign securities by Luigi Brugnoni, an Italian resident. In November 1984, Mr Brugnoni instructed the Cassa di risparmio di Genova e Imperia through his agent, Roberto Ruffinengo, to purchase DM 5 000 worth of bonds issued by the European Coal and Steel Community, which were quoted on the foreign stock exchange. In pursuance of those instructions the Cassa di risparmio deposited the bonds with

the Deutsche Bank in Frankfurt for the account of Messrs Brugnoni and Ruffinengo and debited them with safe custody charges. It also debited them with an amount in lire equivalent to 50%, subsequently reduced to 30%, of the value of the securities, for the purposes of the deposit provided for by Italian exchange rules. Mr Brugnoni and Mr Ruffinengo brought an action against the Cassa di risparmio before the Pretura di Genova for an order requiring it to deliver up the securities and repay the sums withheld for the deposit and safe custody charges.

3 The plaintiffs did not deny that the bank had acted in compliance with the Italian legislation. That legislation does in fact lay down special rules regarding the purchase and holding of foreign securities. Article 5 of Law No 786 of 25 July 1956 (Gazzetta Ufficiale della Repubblica Italiana No 192 of 2 August 1956) provides that Italian residents may not, except with ministerial authorization, hold shares in companies having their registered office outside Italian territory or hold shares or bonds issued or payable abroad. A Ministerial Decree of 12 March 1981 implementing that Law (Gazzetta Ufficiale, Supplement No 82 of 24 March 1981) authorizes, subject to certain conditions, the purchase by Italian residents of shares and bonds issued or payable abroad. Those conditions include the compulsory payment of a deposit and the lodging of the securities with an approved bank.

4 Article 15 of the aforesaid Decree provides that residents purchasing such securities must pay into a blocked, interest-free account with the bank through which the transaction is carried out a sum equal to 50% of the value of the investment. In 1984 that amount was reduced to 30% for purchases of bonds issued by the Community institutions and quoted on the foreign stock exchange. Article 20 of the Decree provides that bonds and shares issued or payable abroad must be entrusted to the custody of an approved bank. However, that condition is deemed to be fulfilled where the approved bank lodges the securities with a foreign bank in its own name and for the account of the owners of the securities.

5 The plaintiffs in the main proceedings submitted that that national legislation was contrary to Community law and in particular to Articles 67 and 68 of the Treaty which deal with the free movement of capital. They acknowledge that the liberalization of capital movements was to be carried out according to the timetable laid down by the Council in directives adopted under Article 69 of the Treaty but

pointed out that the two directives already adopted in 1960 and 1962 for the implementation of Article 67 contained an annex classifying all capital movements into four categories in List A, B, C and D, List B setting out transactions which were to be unconditionally liberalized. Those transactions included the acquisition by residents of foreign securities dealt in on a stock exchange.

6 The defendant, the Cassi di risparmio, contended before the Pretura di Genova that Commission Decision No 85/16/EEC of 19 December 1984 (Official Journal 1985, L 8, p. 34) had specifically authorized the Italian Republic to continue to apply certain protective measures. Those protective measures included the lodging of a 30% interest-free deposit on transactions in foreign securities issued by the Community institutions. They also required the securities in question to be held for at least one year; hence the necessity for them to be kept in safe custody for verification purposes.

7 The Pretura di Genova considered that it was necessary, for the purposes of reaching a correct decision in the case pending before it, to refer the three following questions to the Court for a preliminary ruling:

'(1) In the case of the acquisition by residents of foreign securities which are dealt in on a stock exchange and denominated in foreign currency or of foreign bonds denominated in foreign currency, do subjects of Community law enjoy rights which the Member States are bound to respect by virtue of directly applicable rules of Community law where such operations must be treated as one of the liberalized movements of capital because they appear in List B in the annexes to the Council Directives of 11 May 1960 and 18 December 1962 for the implementation of Article 67 of the EEC Treaty? If so, can restrictive measures imposed by national law which affect the performance of the contract and the right to dispose of the asset acquired, with particular reference to the requirement for securities to be deposited with banks authorized to act as depositories and administrators pursuant to Article 5 of Decree Law No 476 of 6 June 1956, which was converted into Law No 786 of 25 July 1956, and to Article 20 of the Ministerial Decree of 12 March 1981, be regarded as compatible with Community law?

Or, as the operation at issue is one of the capital movements mentioned in Commission Decision No 85/16/EEC and in view of the reference in that decision to Article 108 (3) of the Treaty, does the operation fall into the category of capital movements which the Member States may still subject to restrictions in accordance with Articles 67 and 68 of the Treaty, with the result that the restrictive measure introduced by the Member State is lawful in that context even though it imposes penal sanctions?

(2) Does the fact that the Italian Government did not observe the consultative procedure provided for in Article 73 of the Treaty when adopting or continuing measures restricting capital movements which the Member State concerned must liberalize constitute an infringement of the EEC Treaty in view of Commission Decisions Nos 74/287/EEC, 75/355/EEC and 85/16/EEC?

(3) Must the authorization contained in Commission Decision No 85/16/EEC of 19 December 1984 authorizing the Italian Republic to continue to apply certain protective measures be interpreted, in view of the express reference to Decisions Nos 74/287/EEC and 75/355/EEC, as a further extension of the preceding authorizations, that is to say the authorizations in force since 1974, or, in view of the wording of Article 1 thereof and having regard to the taking effect of the decision as provided for in the second paragraph of Article 191 of the Treaty, must it be interpreted as a new authorization which is not therefore applicable to operations carried out before 19 December 1984?'

8 Those questions are based on the finding that the operation in question must be classified as an acquisition by a resident of foreign securities dealt in on a stock exchange, that it is therefore covered by the full liberalization provided for by the directives on capital movements in the case of the transactions listed in List B annexed to the directives, but that Commission Decision No 85/16 authorized the Italian Republic to adopt protective measures entailing a restriction on capital movements.

9 The Annex to Commission Decision No 85/16 defines the nature of the restrictions authorized by way of derogation from the obligations imposed by Community law. In regard to operations in securities, it provides *inter alia* as follows:

'(a) The acquisition by residents of foreign securities dealt in on a stock exchange is subject to the lodging in an interest-free bank deposit of an amount equivalent to:

— 30% of the value of the securities if they are issued by a European Community institution or the EIB,

— . . .

on condition the securities purchased are held for at least a year.

Otherwise the deposit is equal to 50% of the value of the securities.

(b) . . .'.

10 Commission Decision No 85/16 was adopted pursuant to Article 108 (3) of the Treaty, which provides that where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments, the Commission may authorize that State to take protective measures, the conditions and details of which the Commission is to determine. Commission Decision No 74/287/EEC of 8 May 1974 (Official Journal 1974, L 152, p. 18), which was also adopted under Article 108 (3) and was amended by Commission Decision No 75/355/EEC of 26 May 1975 (Official Journal 1975, L 158, p. 25), had already authorized the Italian Republic to require residents carrying out *inter alia* operations in securities in other Member States to lodge an interest-free bank deposit not exceeding 50% of the value of the investment transaction.

11 Viewed in that light, the purpose of the questions referred to the Court by the Pretore di Genova is essentially to ascertain:

(a) whether Commission Decision No 85/16 authorizes an interest-free bank deposit to be required in respect of an operation carried out before its entry into force by virtue of the fact that it constitutes an extension of the authorizations previously granted by Commission Decisions Nos 74/287 and 75/355 (Question 3);

(b) whether Commission Decision No 85/16 permits the Italian Republic not only to require an interest-free bank deposit but also to require that the securities

acquired must be placed in the custody of an approved bank or a foreign bank chosen by the approved bank (Question 1);

(c) whether Article 73 of the Treaty was infringed because the consultation procedure for which it provides was not observed when the Italian Government adopted or confirmed restrictive measures affecting capital movements already liberalized (Question 2).

A — Application ratione temporis of Commission Decision No 85/16

12 The plaintiffs in the main proceedings argue that at the time of the operation in question, namely in November 1984, Commission Decision No 85/16 had not yet been adopted. At that time, the operation was governed by Commission Decision No 74/287, which temporarily authorized the Italian Republic to require its residents to lodge an interest-free bank deposit in respect of such a transaction. However, that decision was expressly repealed by Article 3 of Decision No 85/16. Consequently, interest-free bank deposits which had been lodged for previous transactions should have been released at the time of the entry into force of Decision No 85/16, which does not and could not have retroactive effect.

13 The Cassa di risparmio di Genova e Imperia, the Italian Government and the Commission take the view that the authorization contained in Commission Decision No 85/16 does not constitute a fresh authorization but an extension of the authorization previously granted. Since that authorization thus remains valid, the Italian legislation requiring an interest-free bank deposit therefore continued to be in conformity with Community law.

14 That last argument must be accepted. As its title states, Commission Decision No 85/16 authorizes the Italian Republic 'to continue' to apply certain protective measures for a period of three years. The effect of the decision is clarified in the fifth recital of its preamble, which states that 'the lifting of protective measures that Italy was authorized to take must be gradual' and that it is therefore appropriate 'to maintain certain exchange controls on the capital movements liberalized in principle'.

15 Decision No 85/16 must therefore be regarded as extending for a limited period the authorizations previously granted by Decisions Nos 74/287 and 75/355; it therefore authorizes the Italian Republic to continue to require an interest-free bank deposit for an operation effected before it entered into force.

B — The deposit of securities with an approved bank

16 The plaintiffs contend that the compulsory deposit of foreign securities with an approved bank constitutes an obstacle to capital movements which is made all the more awkward by the fact that an Italian resident does not even have the right to have the securities he has purchased physically tranferred to Italian territory because approved banks in Italy always make a collective deposit with one of their correspondent banks abroad. The Italian Government thus subjected capital movements which had already been liberalized to restrictions not authorized by the Commission decisions on protective measures.

17 The plaintiffs further contend that the obligation to deposit foreign securities with an approved bank creates discrimination based on the place where the capital is invested because no such obligation exists for Italian securities. However, Article 67 of the Treaty expressly provides that the free movement of capital entails the abolition of discrimination based 'on the place where such capital is invested'.

18 Finally, the plaintiffs argue that the Italian legislation at issue is incompatible with Article 2 of the First Directive for the implementation of Article 67 of the Treaty. In the case of capital movements falling, as in this case, within List B, Article 2 provides that the Member States are to grant general permission for the conclusion 'or performance' of transactions and for 'transfers between residents of Member States'. The transfer of possession of securities to the purchaser is an essential element in the performance of such transactions.

19 The Italian Government and the Commission take the view that Article 2 of the First Directive does not preclude Member States from requiring foreign securities to be deposited with a bank. In the Italian Government's view, the directive is not intended to restrict the power of the Member States to lay down provisions regulating the administration and disposal of foreign securities since such provisions in

no way interfere with a resident's right to acquire and arrange the transfer of such securities. In the Commission's view, the directive abolished restrictions on exchange transactions but it does not affect obstacles of an administrative nature such as those at issue in this case.

20 The Italian Government also supports the argument of the Cassa di risparmio to the effect that the compulsory deposit of foreign securities with approved banks constitutes a supervisory measure since the provisions authorized by the Commission require such securities to be held for at least one year. In fact, Article 5 of the First Directive expressly envisages the possibility for Member States to adopt supervisory measures.

21 It should be observed first of all that the dispute concerns a transaction falling within List B annexed to the First Directive, which lists the capital movements which are fully liberalized. The extent of that liberalization is explained in Article 67 of the Treaty, according to which the free movement of capital is to entail the abolition of restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or place of residence of the parties or on the place where such capital is invested.

22 It follows that, in so far as the two Council directives for the implementation of Article 67 of the Treaty were intended to ensure the complete liberalization of certain capital movements, their purpose includes the elimination of administrative obstacles which, although not taking the form of exchange authorizations or affecting the acquisition of foreign securities, none the less constitute a hindrance to 'the widest liberalization' of capital movements, which, according to the preamble to the First Directive, is necessary for the attainment of the objectives of the Community.

23 Nevertheless, according to Article 5 of the First Directive, the provisions of the directive do not restrict the right of Member States to verify the nature and genuineness of transactions or transfers, or to take all requisite measures to prevent infringements of their laws and regulations. As the Italian Government rightly points out, such measures may include controls to verify compliance with the conditions which purchasers of foreign securities must observe pursuant to the

protective measures authorized by the Commission under Article 108 of the Treaty. In particular, such controls may be designed to ensure that the purchaser complies with the obligation to hold the securities for at least a year.

24 It is therefore for the national court to ascertain whether the supervisory measures at issue are 'requisite', within the meaning of Article 5 of the First Directive, for the purposes of preventing infringements of the conditions which the Italian legislation has imposed, in accordance with the Commission's authorizing decisions, on the acquisition of securities issued or payable outside Italy.

25 The answer to the question must therefore be that the compulsory deposit of securities issued or payable abroad with an approved bank or a foreign bank chosen by an approved bank may not be required by a Member State, in the context of the liberalization of capital movement provided for in Article 2 and List B of the First Directive unless such a requirement is indispensable for monitoring compliance with the conditions laid down by the legislation of that Member State in conformity with Community law.

C — Applicability of Article 73 of the Treaty

26 Article 73 provides for consultations and, if necessary, protective measures in the event that movements of capital lead to disturbances in the functioning of the capital market in any Member State. However, Commission Decisions Nos 74/287, 75/355 and 85/16, the decisions at issue in this case, were adopted pursuant to Article 108. That article provides for consultation, mutual assistance between the Member States and, if necessary, protective measures where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments or as a result of the type of currency at its disposal.

27 A comparison of those two provisions shows that the substantive requirements of Article 73 differ from those of Article 108 and that the decisions which may be adopted or authorized are not the same in each case. It must therefore be concluded that the same applies as regards the procedures to be followed. Those procedures cannot therefore be regarded as cumulative.

28 Consequently, the answer to this question must be that the procedures provided for in Article 73 of the Treaty are not applicable to decisions and measures taken by a Member State and by the Commission pursuant to Article 108 of the Treaty.

Costs

29 The costs incurred by the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Pretura di Genova by order of 16 May 1985, hereby rules:

(1) Commission Decision No 85/16/EEC of 19 December 1984 must be regarded as extending for a limited period the authorizations previously granted by Decisions Nos 74/287/EEC and 75/355/EEC; it therefore authorizes the Italian Republic to continue to require an interest-free bank deposit for an operation effected before it entered into force.

(2) The compulsory deposit of securities issued or payable abroad with an approved bank or a foreign bank chosen by an approved bank may not be required by a Member State, in the context of the liberalization of capital movements provided for in Article 2 and List B of the First Council Directive, of 11 May 1960, for the implementation of Article 67 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 49), unless such a requirement is indispensable for monitoring compliance with the conditions laid down by the legislation of that Member State in conformity with Community law.

(3) The procedures provided for in Article 73 of the Treaty are not applicable to decisions and measures taken by a Member State and by the Commission pursuant to Article 108 of the Treaty.

Bahlmann Koopmans

Bosco O'Higgins Schockweiler

Delivered in open court in Luxembourg on 24 June 1986.

P. Heim
Registrar

K. Bahlmann
President of the Fourth Chamber